Respected Pradhan Mantri ji,

I seek to bring to your august attention a grave transgression of Constitutional safeguards affecting Scheduled Tribes, which requires your personal intervention for its rectification.

2. As you are aware, the Constitution of India enjoins upon the National Commission for Scheduled Tribes to monitor and evaluate all matters relating to the safeguards provided for the Scheduled Tribes under the Constitution, any law for the time being in force and under any order of the Government, and to participate and advise on the planning process of socio-economic development of the Scheduled Tribes. Clause (9) of Article 338A of the Constitution further provides that “The Union and every State Government shall consult the Commission on all major policy matters affecting Scheduled Tribes”. Under Clause 5(d) of the Article the Commission is required to present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards.

3. For sometime the Commission has been rather perturbed by the cavalier disregard exhibited by some Ministries in respect of meaningful consultation with the Commission, while drafting legislation affecting the land rights of tribals, etc. which are specifically protected under the Constitution; and the issue was commented upon at length in the Annual Reports of the Commission for the years 2008-09 and 2009-10, which unfortunately have still to be placed in Parliament. The matter was also specifically brought to your kind attention after submitting these reports to the President (D.O. letters No 4/5/2010-Coord dated 9th September, 2010 and No 4/2/11/11-Coord dated 20th July, 2011 refer). However, we are not aware whether any action has subsequently been taken by the Cabinet Secretariat, or the Ministry of Law, in respect of the Commission’s recommendations to ensure consultation with the Commission’s during processing of legislative proposals before they are considered by the Council of Ministers.

4. Recently, the Land Acquisition, Rehabilitation & Resettlement Bill, 2011 has been introduced in the Lok Sabha on 7th September, 2011 while the Mines and Minerals (Development and Regulation ) Bill, 2011 has been approved by the Cabinet on 30th September, 2011 for introduction in the ensuing session of the Parliament. Though both these Bills are important legislative proposals vitally affecting the Scheduled tribes and their land rights, the concerned Ministries viz. Ministry of Rural Development (MoRD) and Ministry of Mines, have processed these Bills wilfully ignoring this Commission and the Constitutional
obligation under Article 338A. Not only this, these Ministries repeatedly disregarded the Commission’s exhortations that, for meaningful consultation as envisaged under Article 338 A(9) of the Constitution, the draft Bills finalized by the Ministry should be referred to the Commission for advice before submission to the Cabinet - impudently suggesting that the Commission may proffer its views on the draft hosted for public comment on their websites; which demonstrates the scant regard in which they hold Constitutional bodies, as well as also the spirit underlying the important constitutional safeguards for Scheduled Tribes. I enclose 2 notices issued by the Commission to the Secretaries of these Ministries (Annexure-I/III) which are self explanatory. I may add that the Ministry of Law have also opined that Ministries are obligated by the Constitution to consult the Commission on the provision of the draft bill affecting Scheduled Tribes (Annexure-III). The Law Secretary has also written to the Cabinet Secretary requesting him to advise all Ministries/Departments to follow strictly the provision contained in the said Article (Annexure-IV).

5. In view of the position explained above, the Commission is of the view that the concerned Ministries viz. Ministry of Rural Development (MoRD) and Ministry of Mines and their senior officials should be counselled suitably to adopt a more sensitive approach towards the problems of Scheduled Tribes/Scheduled Areas and respect for relevant Constitutional safeguards. The Commission also recommends that the Cabinet Secretariat and the Ministry of Law and Legal Affairs should be tasked with the responsibility of ensuring consultation with the National Commission for Scheduled Tribes before such proposals affecting Scheduled Tribes are placed for consideration before the Council of Ministers; and the Cabinet Secretariat may issue appropriate instructions in this regard under the Rules of Business of the Government.

6. Notwithstanding this, the Commission has finalized detailed comments/views of the Commission on the Land Acquisition, Rehabilitation & Resettlement Bill, which has became available to the Commission only after its introduction in Lok Sabha (Annexure-V). I would request you to have the views of the Commission considered by the Government even while the matter is engaging the attention of the Standing Committee of the Parliament.

With esteemed regards,

Yours Sincerely,

Dr. Rameshwar Oraon

Dr. Manmohan Singh,
Hon'ble Prime Minister of India,
South Block,
New Delhi- 110001.

Encl:
Annexure-III
     Notices issued by the Commission to the Secretary, Ministry of Rural Development and Ministry of Mines
Annexure-III
     Ministry of Law and Justice, Deptt. of Legal Affairs letter No. FTS/LS/11 dated 22/09/2011
Annexure-IV
Annexure-V
     Comments/views of National Commission for Scheduled Tribes on the draft Land Acquisition, Rehabilitation & Resettlement Bill, 2011
GOVERNMENT OF INDIA
NATIONAL COMMISSION FOR SCHEDULED TRIBES
(A Constitutional Commission set up under Art. 338A of the Constitution to investigate and monitor all matters relating to violation of rights and safeguards provided for STs.)

No NCST/2008/REHAB/01 Date: 14th October, 2011

To

Ms. Anita Chaudhary,
Secretary,
Department of Land Resources
Ministry of Rural Development,
‘G-Wing’, NBO Building, Nirman Bhavan,
New Delhi- 110001.


Madam,

The Constitution of India enjoins upon the National Commission for Scheduled Tribes to monitor and evaluate all matters relating to the safeguards provided for the Scheduled Tribes under the Constitution, and any law for the time being in force and under any order of the Government, and to participate and advise on the planning process of socio-economic development of the Scheduled Tribes. Clause (9) of Article 338A of the Constitution further provides that “The Union and every State Government shall consult the Commission on all major policy matters affecting Scheduled Tribes”. Under Clause 5(d) of the Article the Commission is required to present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards.
2. It was understood from news reports that the Government had formulated/introduced the new Land Acquisition (Amendment) Bill, 2007 and Rehabilitation and Resettlement Bill, 2007 in Parliament in December, 2007. Subsequently, Ministry of Rural Development processed an integrated Bill, Land Acquisition and Rehabilitation & Resettlement Bill, 2011. As land acquisition as well as rehabilitation & resettlement affect tribals in a large measure, particularly their livelihood, settlements, environment and culture, the Commission was anxious that certain important concerns need to be adequately addressed in the Bill, and has requested the Deptt. of Land Resources, MoRD, on several occasions, to submit initially the Land Acquisition (Amendment) Bill, 2007 and the Rehabilitation and Resettlement Bill, 2007 and subsequently, the integrated Bill - Land Acquisition and Rehabilitation & Resettlement Bill, 2011, as finalized, for obtaining the views/comments of the Commission under Article 338A(9) of the Constitution, as detailed below:

Reference No./Date

NCST
/2008/REHAB/01 dt. 06/08/2010

Contents in brief

MoRD had not sought the comments of the Commission on the draft Rehabilitation and Resettlement Bill, 2007 and Land Acquisition (Amendment) Bill, 2007. Notwithstanding this, the Commission had, suo-moto, communicated its views/suggestions to the Minister of Rural Development on the both the Draft Bills vide D.O. letter dated 6th August, 2010. Minister, MoRD apprised of the mandatory consultation on all major policy matters affecting Scheduled Tribes under Clause 9 of Article 338A and requested to forward the draft legislation as soon it is finalized.
NCST  /2008/REHAB/01  dt  20/05/2011

The (successor) Minister MoRD was again apprised of mandatory consideration with the Commission on all major policy matters affecting the STs, absence of consultation by the Ministry of Rural Development on the draft Rehabilitation and Resettlement Bill, 2007 and Land Acquisition (Amendment) Bill, 2007 and urgent consideration of the views of the Commission forwarded on these Bills vide letter dated 06/08/2010.

NCST  Letter  2008/REHAB/01  As above.
dt:13/07/2011

MoRD  D.O. NO.  Minister, MoRD assured the Commission that the views 2/VIP/OG/M(RD)/11 of the Commission would be fully considered before MoRD finalise any new legislation on land acquisition.

Minutes of the Meeting held on 29/07/2011, circulated Secretary, Depts. of Land Resources, MoRD informed vide Letter NCST that an integrated Bill covering both land acquisition /2008/REHAB/01 and rehabilitation and resettlement- Land Acquisition dt:10/08/2011 and Rehabilitation & Resettlement Bill, 2011, was being processed.

The Commission emphasized that the rights of Scheduled Tribes needed special consideration through a separate Chapter in the Bill keeping in view the provisions of the Constitution applicable to the Scheduled Tribes and the Scheduled Areas. Further, for the consultation with the NCST, as envisaged under Art. 338A(9) of the Constitution to be meaningful, the draft Bill finalized in the Ministry after inter-Ministerial consultations, may be referred to the Commission; and the observations of the Commission and views of the
Ministry on those observations may also be placed along with the draft Bill for consideration by the Cabinet.

The Secretary, Deptt. of Land Resources, MoRD mentioned that the MoRD would consider the observations of the NCST and, if considered necessary, the matter will be decided in consultation with the Ministry of Law.

Deptt. of Land Resources, MoRD Letter
11015/10/2010-LRD dt. 19/08/2011

Additional Secretary, Deptt. of Land Resources, MoRD, vide letter dated 18th August, 2011 (received on 29th August, 2011) sought comments of the Secretary, NCST on the Draft Land Acquisition and Rehabilitation and Resettlement Bill, 2011 as available in the public domain. (It was noted from the website that Ministry of Rural Development had given the public time till August 31 to send their comments).

NCST /2008/ REHAB/01 dt. 30/08/2011

Deptt. of Land Resources, MoRD requested to forward the draft Land Acquisition and Rehabilitation and Resettlement Bill, 2011, after its finalization by the MoRD, for views/suggestions of the Commission under Article 338 A(9) of the Constitution.

NCST /2008/REHAB/01 dt.09/09/2011

Secretary, Deptt. of Land Resources, MoRD, requested to forward a copy of their reference to the Ministry of Law and their views, if received, to the Commission urgently.
MoRD informed that the Land Acquisition and Rehabilitation and Resettlement Bill, 2011 after approval by the Cabinet on 05/09/2011 had been introduced in the Lok Sabha on 07/09/2011.

3. It is mentioned that the Deptt. of Legal Affairs, in response to a reference by the Ministry of Mines have opined vide letter No.FTS/2878/LS/11 dated 22/09/2011 (copy enclosed) that the Ministry of Mines were under constitutional obligation to consult the Commission. Further, there may no legal or constitutional objection in sharing the draft Bill with the Commission before its submission to the Cabinet.

4. It is evident from the above that the Deptt. of Land Resources, MoRD have faulted in respect of lack of proper understanding of the Constitutional provisions - in particular, the obligation to consult the Commission in a meaningful manner, as mandated under the Constitution, maintaining transparency of actions regarding implementation of Constitutional safeguards with respect to STs and failed to exhibit expected sensitivity of approach/attitude towards weaker sections.

5. In view of the obdurate avoidance manifest by the Deptt. of Land Resources, MoRD in respect of the Constitutional obligation to consult the Commission on the (i) Land Acquisition (Amendment) Bill, 2007, (ii) Rehabilitation and Resettlement Bill, 2007 and, (iii) Land Acquisition and Rehabilitation & Resettlement Bill, 2011, as mandated under the Constitution, the Chairperson, NCST has called the Secretary, Deptt. of Land Resources, MoRD on 3rd November, 2011 at 1200 hours at the Conference Room of the Commission to:


(b) Explain the reasons for avoiding meaningful consultation with the Commission.
4. In view of the obdurate avoidance manifest by the Ministry of Mines in respect of the obligation to consult the Commission on the draft MMDR Bill, 2010, as mandated under the Constitution, the Chairperson, NCST has called the Secretary, Ministry of Mines on 3rd November, 2011 at 12:00 hours at the Conference Room of the Commission to:

(a) Produce a chronological record of the action taken on the requests made by the Commission regarding the MMDR Bill, 2010.

(b) Explain the reasons for avoiding meaningful consultation with the Commission on this important legislation concerning the STs; and

(c) Explain why legal action should not be instituted against the Secretary, Ministry of Mines, for repeated disregard of the Commission’s requests to provide a copy of the draft legislation to the Commission to ensure meaningful consultation before submission of these Bills to the Cabinet.

5. Secretary, Ministry of Mines, is requested to attend in person.

Yours faithfully,

[Signature]

(Aditya Mishra)
Joint Secretary
GOVERNMENT OF INDIA
NATIONAL COMMISSION FOR SCHEDULED TRIBES
(A Constitutional Commission set up under Art. 338A of the Constitution to investigate and
monitor all matters relating to violation of rights and safeguards provided for STs.)

No. 12/2/2009-Coord Date: 13th October, 2011
To
Shri S. Vijay Kumar,
Secretary,
Ministry of Mines, Room No. 320, 'A' Wing,
Shastri Bhavan,
New Delhi

Sub: Mandatory consultation with the National Commission for Scheduled Tribes under Clause (9) of Article 338A by Ministry of Mines with reference to Mines and Mineral (Development & Regulation) Bill 2010

Sir,

The Constitution of India enjoins upon the National Commission for Scheduled Tribes to monitor and evaluate all matters relating to the safeguards provided for the Scheduled Tribes under the Constitution, and any law for the time being in force and under any order of the Government, and to participate and advise on the planning process of socio-economic development of the Scheduled Tribes. Clause (9) of Article 338A of the Constitution further provides that "The Union and every State Government shall consult the Commission on all major policy matters affecting Scheduled Tribes". Under Clause 5(d) of the Article the Commission is required to present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards.

2. It was understood from news reports that the Government was contemplating the new Mines and Minerals (Development & Regulation) Bill, 2010. As mining affects tribals in a large measure, particularly their livelihood, settlements, environment and culture, the Commission was anxious that certain important concerns need to be adequately addressed in the Bill, and requested the Ministry of Mines, on several occasions, to submit the Draft MMDR Bill, as finalized, for obtaining the views/comments of the Commission under Article 338A(9) of the Constitution, as detailed below:

Reference No./Date                      Contents in brief
NCST Letter 12/2/2009-Coord dt. 21/05/2010 Secretary, Mines apprised of the mandatory consultation on all major policy matters affecting Scheduled Tribes under Clause 9 of Article 338A and requested to forward the draft regulation as soon it is finalized.
As a follow up to National Commission for Scheduled Tribes letter dated 21/05/2011, Ministry of Tribal Affairs requested the Ministry of Mines to send the draft legislation, as and when finalized, to the Commission.

Ministry of Mines communicated that new Draft MMDR Act has not been finalized, also informing that the latest version of the draft MMDR Act had been uploaded on 3rd June, 2010 on website of the Ministry of Mines.

Secretary, Ministry of Mines again requested (with reference to their letter dated 08/06/2010) to forward the new Draft MMDR Act, as soon as it is finalized for comments/views of the Commission.

Minister of Mines apprised of mandatory consultation with the Commission under Clause 9 of Article 338A of the Constitution and the Commission’s concern in critical areas which require urgent attention.

Minister of Mines requested to forward the final version of the Draft MMDR Act for the views of the Commission as required under Article 338A of the Constitution at an early date.

Minister of Mines apprised of Commission’s concern on certain important issues affecting Scheduled Tribes.

Minister of Mines was informed that no response from the Ministry of Mines had been received in response to D.O. letter dated 11/10/2010 with the request to have views of the Commission considered by the Council of Ministers.

Meeting taken by the Hon’ble Chairperson with the Secretary, Ministry of Mines. From the position submitted by the Ministry of Mines in the meeting, the Commission observed that its recommendations being important, required consideration of the Government; and in case it was not found to be feasible to incorporate Commission’s recommendations for general adoption, these may be incorporated as special provisions, applicable to the Vth Scheduled Areas.

The Commission also observed that since the draft MMDR Bill, as finalized and being processed had not been referred for comments by the Ministry of Mines, the Commission was not in a position to date, to discharge its mandated function. Representative of the Ministry of Mines stated that the draft MMDR Bill was formulated in terms of the National Mineral Policy, 2008, which had been approved by the Government in March, 2008. Further, since the present proposal pertained to legislation and not policy matter, the draft MMDR Bill was not referred to National Commission for Scheduled Tribes.
Secretary, Ministry of Mines requested to forward the Draft MMDR Bill 2010, as finalized by the Group of Ministers for Commission's views/suggestions to enable the Commission discharge its mandate in the spirit of the Constitution.

Secretary Ministry of Mines was informed that the Commission was not agreeable to the contention of the Secretary, Ministry of Mines that legislation was not a policy matter within the ambit of Article 338A (9) of the Constitution. Ministry of Mines was also apprised of the concern of the Commission regarding non-furnishing of the Draft MMDR Bill, 2010 in spite of the letter dated 27.07.2011 for Commission's views/suggestions in the matter. Secretary, Ministry of Mines also requested to produce copy of the draft MMDR Bill, 2010 in the meeting scheduled to be held on 17/8/2011.

Ministry of Mines informed that views of the Deptt. of Legal Affairs, Ministry of Law have been sought inter-alia, on the need to consult the Commission on the MMDR Bill, 2010 legislation

Ministry of Mines informed vide letter dated 17/08/2011 that recommendations of the GOM on the draft MMDR Bill 2010 were awaiting Cabinet approval. Since GOM and Cabinet procedures are by their nature secret, it is not possible to share the contents of the discussions of the GOM with the Commission at this stage.

Secretary, Ministry of Mines apprised of the need to forward the draft Bill finalized in the Ministry to the Commission and also expedite views of the Ministry of Law in the matter.

In the meeting taken by the Chairperson, National Commission for Scheduled Tribes representative of Deptt. of Legal Affairs stated that the opinion of the Ministry of Law would be communicated shortly.

Ministry of Law and Justice have opined that the Ministry of Mines were under constitutional obligation to consult the Commission. Further, there may be no legal or constitutional objection in sharing the draft Bill with the Commission before its submission to the Cabinet.

3. It is evident from the above that the Ministry of Mines have faulted in lack of proper understanding of the Constitutional provisions - in particular, the obligation to consult the Commission in a meaningful manner as mandated under the Constitution, maintaining transparency of actions regarding implementation of Constitutional safeguards with respect to STs and failed to exhibit expected sensitivity of approach/attitude towards weaker sections.
4. In view of the obdurate avoidance manifest by the Ministry of Mines in respect of the obligation to consult the Commission on the draft MMDR Bill, 2010, as mandated under the Constitution, the Chairperson, NCST has called the Secretary, Ministry of Mines on 3rd November, 2011 at 12 00 hours at the Conference Room of the Commission to:

(a) Produce a chronological record of the action taken on the requests made by the Commission regarding the MMDR Bill, 2010.

(b) Explain the reasons for avoiding meaningful consultation with the Commission on this important legislation concerning the STs; and

(c) Explain why legal action should not be instituted against the Secretary, Ministry of Mines, for repeated disregard of the Commission’s requests to provide a copy of the draft legislation to the Commission to ensure meaningful consultation before submission of these Bills to the Cabinet.

5. Secretary, Ministry of Mines, is requested to attend in person.

Yours faithfully,

[Signature]

[Printed Name: Aditya Mishra]

Joint Secretary
To

The Secretary
National Commission for Scheduled Tribes
6th Floor, B Wing, Lok Nayak Bhawan
Khan Market, New Delhi

(Kind attention : Shri Aditya Mishra, Joint Secretary)

S:V,


***

I am directed to refer to your letter no. 12/12/2009-Coord dated 14th September, 2011 on the aforesaid subject and to say that opinion of this Department on the issue of making available to the Commission a copy of the draft Bill on the aforesaid subject has been sent to the Ministry of Mines vide FTS no. 3120/11/Adv.A, a copy of which is sent herewith for record/necessary action as desired.

Its receipt alongwith annexures may please be acknowledged.

Yours faithfully,

(M.K. Sharma)
Joint Secretary & Legal Adviser
Tel. no. 23383051
The Ministry of Mines has referred the following issues for advice:

(i) Whether the draft Mines and Minerals (Development and Regulation) Bill, 2011, as a legislation based on National Mineral Policy, 2008, qualifies as a policy matter in terms of the provisions of clause (9) of Article 338A of the Constitution of India, and

(ii) Whether the draft Mines and Minerals (Development and Regulation) Bill, 2011, can be shared at this stage with National Commission for Scheduled Tribes, once the GOM has recommended the draft Bill to be placed before the Cabinet (since it is a part of the Cabinet process).

2. It has been stated that National Commission for Schedule Tribe (NCST) is seeking a copy of the draft Mines and Minerals (Development and Regulation) Bill, 2011 to give its comments/views on the draft Bill which has been recommend by the GOM to be placed before the Cabinet. The NCST has stated that the Constitution of India confers power upon it to monitor all matters relating to safeguards provided for the Scheduled Tribes and to participate and advice on the planning process of socio-economic development of the Scheduled Tribes. NCST has further stated that clause (9) of Article 338A of the Constitution provides that “the Union and every State Government shall consult the Commission on all major policy matters affecting Scheduled Tribes, and clause 5(d) of the same Article also provides that the Commission shall present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards. The NCST has sought a copy of the draft MMDR Bill, 2011, in terms of these provisions of the Constitution.

3. According to the administrative Ministry it had undertaken an exercise to prepare a draft Bill to replace the existing Mines and Minerals (Development and Regulation) Act, 1957 in terms of the Report of the High Level Committee in Planning Commission and the new National Mineral Policy, 2008. In preparation of the draft Bill the Administrative Ministry has undertaken extensive consultations with all stakeholders including State Governments, Concerned Ministries/Departments of Central Government Industry Associations and Representatives of Civil Society concerned with environmental/social impact. Successive versions of draft was circulated/uploaded on the web site for comments of the stakeholders. Subsequently the Government set up a GOM to consider the draft Bill which has recommend the Bill to be presented to the Cabinet.

4. It has been stated that the NCST addressed the Hon’ble Minister of Mines vide its letter dated 06.08.2010 (p.22-23/C) regarding concern on issues pertaining to Scheduled Tribes arising out of mining operations and recommended that in a development project specially when land is required from tribal land owners, the land should be returned to the owners after reclamation of mined areas or future earning should be shared if non-Agricultural use is continued and a sum equal to royalty due should be paid to tribal for duration of mineral extraction to compensate them for deprivation of livelihood. Since, the draft Bill was referred to GOM which had already held two meetings by then, the NCST vide the letter dated 27.09.2010 (p.27/C) of the Hon’ble Minister of Mines was informed inter alia that the draft Bill has been prepared after consultations with the stake holders in terms of National Mineral Policy, 2008 which enunciates that appropriate compensation will form an important aspect of sustainable mining and adequately provide for stakeholders’ interest for indigenous population in the mining operations. It was further informed that the Government has constituted a GOM.
to consider various viewpoints on the draft Bill to give its recommendations to the Government. Since the Bill is under consideration, specific measures and details are not yet finalized. Subsequent to this, the NCST issued another letter dated 11.10.2010 (p.95-97/C) making additional recommendations on the draft Bill. It has been stated that the administrative Ministry had incorporated these recommendations on the draft Bill but the NCST was not informed for the reason that the matter was with the GOM and the provisions of the Bill were not finalized. As the NCST was not informed, the NCST convened a meeting for discussion and requested the Secretary, Ministry of Mines to attend the same on 25.07.2011 (p.114-115/C). In the said meeting the Ministry of Mines is stated to have clarified that all concerns raised by NCST have been suitably addressed in the draft Bill and that once the draft Bill was approved by the Cabinet, a copy of the same would be sent to NCST before introducing the same in the Parliament.

5. From the above, it may be seen that the draft Mines and Minerals (Development and Regulation) Bill, 2011 is yet to be submitted to the Cabinet as recommended by the GOM. The administrative Ministry has neither disclosed nor placed on file any instructions/guidelines prohibiting to share the draft Bill with the NCST which is under the constitutional obligation to participate and advise on the planning process of Socio-economic development of the Scheduled Tribes and to evaluate the progress of their development in terms of Article 338A(5) (c). The Commission also possess powers of Civil Court under Article 338A(8). Further, in terms of Clause (9) of Article 338A, the Union and every State Government are under an obligation to consult the Commission on all major policy matters affecting Scheduled Tribes.

6. In view of above, we are of the opinion that the concerns expressed by the National Commission for Scheduled Tribes in their letters dated 05.08.2010 (p.23/C) and 11.10.2010 (p.96-97/C) relate to the safeguards of the Scheduled Tribes and the provisions of the draft Bill may likely to affect the Scheduled Tribes and as such, may be a major policy matter affecting Scheduled Tribes. Hence in our opinion, the Ministry of Mines is under constitutional obligation to consult the commission. Thus, there may be no legal or constitutional objection in sharing the draft Bill with the Commission before its submission to the Cabinet.

May kindly see.

(R.S. Shukla)
Addl. Legal Adviser
14.09.2011

May also kindly note.

J.S.R.
15-8-11

Secretory
07-9-11

MLA(C)
D.O. No. 11051/07/Advice-A

My Dear Sir,

The National Commission for Scheduled Castes called me on 7th August 2007 to discuss the issue relating to non-consultation of the Commission while making various substantive legislations and rules affecting the interests of the Scheduled Castes in the country.

2. During the discussion Dr. Buta Singh, the Chairman of the Commission, expressed his serious concern by observing in no uncertain terms that the Commission is not being consulted by the Government while taking various decisions/measures affecting the rights of the Scheduled Castes in the country, and that such non-consultation violates the provisions of article 338(9) of the Constitution of India. The said article provides that the Union and every State Government shall consult the Commission on all major policy matters affecting the Scheduled Castes. The role of our Department and the Legislative Department in such matters was explained to the Commission. After the discussion, the Hon’ble Chairman directed me to take appropriate steps in the matter and inform the Commission.

3. I shall be grateful if you could kindly advise all Ministries/Departments to strictly follow the provisions contained in the said article as per observations of the Commission.

Yours sincerely,

(T.K. Viswanathan)

Shri K.M. Chandrasekhar, Cabinet Secretary, Cabinet Secretariat, New Delhi.
Annexure-IV

Comments/views of National Commission for Scheduled Tribes on the draft Land Acquisition, Rehabilitation & Resettlement Bill, 2011

1. A general law doesn't make suitable discrimination between the nature of land rights of tribals vis-à-vis other categories of landholders. Land is generally owned by the State, and held on the basis heritable tenures in most parts of the country – the concept of freehold being limited to certain urban pockets. Tribals, however, have traditionally enjoyed full ownership of land, which practice is still prevalent in the North – East. Tribal lands are also not transferable to non-tribals – whether by sale, lease or mortgage, etc. Any law which seeks to expropriate tribal rights over land must recognize these differences; and provide appropriate and equitable circumstances as well as compensation of rights. Therefore, in order to insulate tribals from the adverse effects of development, provide equitable treatment and also to meet their needs and aspirations, there was an imperative need to include a clearly defined perspective of tribal rights in the Bill through a special chapter in respect of Scheduled Areas considering the following major factors:

(i) In SLP (civil) 4601-02 of 1997, Samatha Vs. Govt. Of Andhra Pradesh and Ors. the Supreme Court had observed that in the light of the provisions contained in Clause a of sub-para 2 of Para 5 of Scheduled V of the Constitution, there is implied prohibition on the State’s power on allotment of its land to non-tribals, in the Scheduled areas, which also limits the State’s power to acquire tribal land for subsequent allotment to non-tribals whether for incidental public purposes or otherwise. Keeping in view the provisions of Schedule V and the directions in the aforesaid judgment, it would be appropriate to simultaneously legislate special provisions for acquisition of land in Scheduled Areas instead of leaving adaptation of the same entirely to the wisdom and zeal
of the Tribal Advisory Councils/ Governors of the Concerned States

(ii) Land being the primary means of production in the tribal society, acquisition of tribal land, leading to their landlessness, is both socially and economically depriving the tribals, who have limited capacity to earn their livelihood outside their habitat and pursue economic activity not involving agricultural land. Sensitivity to these tribal needs must be incorporated into legislative treatment; and only leasehold rights may be demanded from them for developmental needs rather than expropriation of ownership.

(iii) Diligent effort is essential to comprehensively identify all the environmental / displacement risks which tribals would be exposed, consequent to displacement; and to establish the overriding public interest which demands such sacrifice from them. In Scheduled Areas, therefore, ‘Public purpose’ should be determined through a participatory and transparent process incorporating additional safeguards for tribals including judicial review.

(iv) The prevailing governance deficit requires that the availability of safeguards for Scheduled Tribes is not dependent on the mercy or alertness of Govt. functionaries, or become fodder for interpretation by legal luminaries.

2. The provisions of rehabilitation and resettlement have been integrated with the land acquisition process in the Bill. However, the Bill doesn’t explicitly include acquisition and displacement from lands acquired/purchased from tribal owners by public sector organizations (companies, corporations, boards, authorities, etc.). The Requiring body may possibly obtain some portion of its total land requirement through allotment of Govt. lands. Therefore, besides land acquired by the appropriate Govt., all other land transfers, or change in land use of agricultural / forest land for a different purpose, which will result in displacement of tribal owners / occupiers, should also be brought within the scope of the legislation.

3. However, combining provisions of rehabilitation and resettlement with land acquisition procedures in the Bill does not deny the necessity of a separate R&R
legislation as, it does not include cases of involuntary displacement of permanent nature due to disasters/natural calamity, external/internal, conflicts and diversion of forest land, etc.

4. The Bill doesn’t explicitly provide land compensation for persons having “title deeds” conferred under the ST other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, whose rights have to be foregone on account of resettlement. Besides clarifying relevant definitions, (Cl 3(r) (ii)), the Bill should specify that all land acquisition process in Scheduled Areas must be preceded by settlement of tribal rights (including community rights) under the Scheduled Tribes and other Traditional Forest dwellers (Recognition of Forest Rights) Act, 2006 (which should be kept recorded/updated) and land regularized under this Act must not be dispossessed/acquired except in the case of emergency, wherein same category of land rights must be provided. The Bill should also recognize resettlement/rehabilitation rights of share croppers etc. and other persons who derive their livelihood by providing services to land owners (especially if displacement is involved).

5. The definition of “infrastructure project” under Cl. 3(o) is too wide and ambiguous, and should be more specific in respect of Scheduled Areas, to ensure that tribals are not displaced to provide for the commercial/residential/entertainment needs of other sections of society. Therefore, purposes like mining activities, sports, tourism, projects for preservation and storage of processed agro-products and perishable agricultural commodities, housing, should be included under Clause 3 za(vii), irrespective of ideological bias. Further, Cl 3 (o)(v), which provides flexibility to include “any other project or public facility as may be notified in this regard by the Central Government” has the effect of enlarging the scope of the Act, and should not be extended to Scheduled Areas to avoid temptation to tinker with constitutional safeguards for Scheduled Tribes.
6. In Scheduled Areas, concern with tribals being primary, all other needs should be considered of secondary importance. Therefore, the need for land acquisition and displacement, even for the Govt. under strategic considerations, should be well proven/amply justified through the benefits of the project option outweighing the costs of loss of land, livelihood, shelter, habitat/culture, environment, capital and operating costs incurred and any public interest value accruing from the existing use of the land and everything attached to it.

To limit deprivation of tribal land for all other non-strategic purposes, while determining “Public purpose”, the general interest of the community as opposed to the particular/commercial interest of individuals should be clearly demonstrated, and the livelihood of the tribals should also be adequately protected by providing land in lieu of land (even by purchase of private land/diversion of forest areas) in all cases. Keeping in view the limits on allotment of Govt. land to non-tribals flowing from the Samatha judgment, in Scheduled Areas, instead of general usefulness, public purpose may be restricted to developmental activities or redevelopment in the interests of area planning wherein the Govt. owns at least 51 %. Even for such purposes considering current life cycles of investments, tribal land should be mortgaged/given on lease rather than transfer of ownership, with provision for continued sharing of cost appreciation/windfall gains. Since profit is their overriding consideration, PPP/private projects necessarily embed tribal hazard, in that they cannot eschew temptation to substitute cheaply obtained land for more expensive capital requirements. In order to discourage circumventing of constitutional safeguards, the declaration of public purpose should also be justiciable in respect of Scheduled Areas.

7. SIAls / EIAs are necessary to provide a good substrate for resettlement planning to address/mitigate ensuing problems and also to identify all the environmental / displacement risks which tribals would be exposed to consequential to displacement; and establish the overriding public interest in Scheduled Areas (with record of specific findings on different issues to facilitate testing during
judicial review), which demands such sacrifice from them. It is possible that the quantum of land proposed to be secured will be understated (or arranged in creeping increments) to escape R&R obligations. Therefore, in Scheduled Areas, SIA (including emotional and psychological impacts) should be mandatory for all projects / land transfers / change in land use of agricultural / forest land for a different purpose which will result in the displacement of tribal owners / occupiers, irrespective of the quantum of land involved and the number of families it displaces or the voluntary / involuntary nature of the displacement. SIA should also identify affected areas (including contiguous forest lands wherein tribals have rights) and enumerate all affected (interested) persons to facilitate enquiry into objections and subsequent determination of 'public purpose'.

Projects involving land proposed to be acquired under urgency provisions are also accompanied by the same irreversible adverse effects of environmental degradation / displacement, and should not be exempted from the requirements of EIA / SIA or the need to comprehensively weigh public purpose. This is especially important for Scheduled Areas, because the regularity with which “exceptions” become a “routine” appendage of bureaucratic processes and decision-makers' apathy obscures citizens' miseries by fanciful interpretations of national imperatives have been amply commented upon by the Supreme Court in recent decisions on the subject. Other legislations providing for acquisition of land and/or occupation of the land under emergency in times of conflict, calamity, etc. without prior payment of compensation should also be reviewed/amended to provide rehabilitation and resettlement.

SIAs should be undertaken by the Requiring body to avoid fragmentation/dereliction of responsibility, through properly qualified multi-disciplinary teams and should also incorporate views of the affected persons and concerned elected local bodies in the Scheduled Areas. The expert group to consider SIA report should also include a representative of the displaced
families (if only as observers). Individual notices may be issued in Scheduled Areas to all persons known to have an interest in the land besides public notice, so that they may also be enabled to seek judicial determination regarding the public purpose of acquisition.

8. It is important to ensure that tribals are not dispossessed from their lands and livelihood without ensuring resettlement in advance. Therefore, implementation of the R&R plan should generally be entrusted to the Requiring body so that R&R facilities are integrally conceived with the planning of the project, and come into existence simultaneously with the process of award and payment of compensation; and certain critical elements, like infrastructure, are not staggered thereafter. Closure interaction/flexible understanding between the Requiring; Body and the affected person would mitigate the adverse effects of the project, besides reducing acquisition time/schedule of implementation of projects.

9. There is no provision in the Bill to regulate compensation in cases farmland is purchased directly by companies. Proxy purchase of tribal land by companies through subterfuge agents have been reported. Since land transfer Regulations in Scheduled Areas generally provide for transfer of tribal land only with the permission of designated authorities, the Collector (Land Acquisition) should also be tasked with certifying reasonability of sale prices (comparable with his award) before private transfers are permitted/registered.

10. In Scheduled Areas, since data regarding land transfers may be scanty, the Net Present Value (NPV) of the expected accruals from the current/future use of the land for 30 years should also be compared while arriving at the market value.

The Bill should also provide compensation in the award for forest rights which may become unavailable because of displacement and also sub-surface rights (water/minerals etc.) as Scheduled Tribes have been (and also continue to be
so in Schedule VI areas) traditional owners of land (rather than tenure holders with heritable rights to cultivate land).

Multiple uses of the land acquired must also be accounted for in the compensation. For example, if agricultural land is to be used for mining, then besides compensation for use of land surface, the future earnings from mining activity should also be shared with land owners. The current provision of 20% of land value appreciation in Schedule II of the Bill doesn’t take into account all possible situations.

Further, where land is acquired by the Govt. for projects meant for production of goods and services, compensation for land acquired has to be supplemented with (and not adjusted against) allotment of shares and debentures, as part of the long-term profit sharing of the project derivable from land as a factor of production. The quantum of such “sweat” equity must be reasonably relatable to the nature of economic activity of the project and the equity base. 50% developed land/sweat equity/share in the future profits should be provided for land owners in case of land development projects, (instead of 20% developed land as proposed in Schedule II) because land is the principal ingredient of the activity and its value continues to rise exponentially while other appurtenances depreciate.

Development costs should not be charged as part of the profit-sharing mechanism in respect of the land acquired for urbanization purposes, since such costs are open to manipulation and the quantum of 20% reserved for affected families is actually quite arbitrary.

11. In the event of the acquired land remaining unutilized, it should be returned back to the original tribal owner wherever possible, without insisting on the repayment of the compensation amount since the livelihood loss caused to the landowners may have eroded the compensation received (as is done on expiry
of a lease). In case the land is subsequently utilized by the Govt. for a different purpose (e.g. for real estate development after mining, etc.), the earnings from such activity should also be shared with the original land owners in similar fashion for appreciation in land values.

12. There is a need to specify to fix timelines for the entire process, involving land acquisition and R &R. The (maximum) period entailed in the process (from SIA upto award) is 5 years, which needs to be shortened to 3 years through larger involvement and devolution of responsibility to the Requiring body for rehabilitation planning and implementation in the interest of project implementation as well as speedy resettlement of affected persons.