



**NATIONAL COMMISSION
FOR
SCHEDULED TRIBES**

**SPECIAL REPORT
GOOD GOVERNANCE
FOR
TRIBAL DEVELOPMENT AND ADMINISTRATION
MAY 2012**



सत्यमेव जयते

डा. रामेश्वर उराँव

अध्यक्ष

(भूतपूर्व सांसद—लोकसभा)

(पूर्व जनजातीय कार्य राज्यमन्त्री)

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Dated: 18 June, 2012

Respected Rashtrapati jee,

The National Commission for Scheduled Tribes was set up w.e.f. 19 February, 2004 by amending Article 338 of the Constitution and inserting a new Article 338A vide the Constitution (89th Amendment) Act, 2003. Article 338A, inter-alia, provides that it shall be the duty of the Commission to present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of the safeguards available to the members of Scheduled Tribes and to make in such reports recommendations as to the measures that should be taken by the Union or any State for effective implementation of those safeguards and other measures for protection, welfare and socio-economic development of the Scheduled Tribes.

2. Tribal peoples' culture and identities form an integral part of their lives. Their ways of life, customs and traditions, institutions, customary laws, land use and forms of social organization, etc are usually different from those of the dominant population. Special measures are therefore, required to be taken to ensure that they are protected and appropriate participatory mechanisms are evolved and implemented in the governance of Scheduled Tribes and Scheduled Areas. Effective implementation of existing constitutional provisions specifically provided for the Scheduled Areas and strengthening of supporting mechanism is equally necessary to achieve the desired objectives.

3. As a part of its constitutional role of an advisor to the Government, the National Commission for Scheduled Tribes has been attempting to bring about greater sensitivity and responsiveness towards tribal concerns while examining policy and legislations affecting Scheduled Tribes. Some recent Bills which were of major concern for the tribals are (i) Land Acquisition and Resettlement & Rehabilitation Bill, 2010, (ii) Mines and Minerals (Development and Regulation) Bill, 2011 and (iii) the National Food Security Bill 2011.

4. In your address at the Conference of the Governors of the States held in September 2008, the Governors were urged to ponder on the role of Governors for the peace and good Government of the States having Scheduled Areas in consultation with their respective State Governments

5. In 2009, the Standing Committee on Inter-sectoral issues in its 3rd Report on "Standards of Administration and Governance in Scheduled Areas" had

lamented that, while special provisions in Schedule V to the Constitution envisage that all Central and State Legislations would be fine-tuned by the Governor in accordance with the requirements of the tribals in the Scheduled Areas, these provisions had largely remained a dead letter during the last sixty years of the Republic.

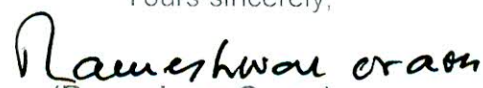
6. The Commission, therefore, resolved to prepare a Special Report on Good Governance in Scheduled and Tribal Areas, which would aim to shed light on the actual working of some of the Constitutional safeguards enshrined in Schedule V and Schedule VI respectively, based on the documentation of experience across the country, an analysis of which forms the basis for expedient recommendations by the Commission in this Special Report.

7. While, in pursuance to the provision contained in Art. 338A(5)(d) of the Constitution, National Commission for Scheduled Tribes has already submitted 5 Annual Reports and preparation of the Sixth Annual Report is in progress, I am submitting this Special Report focusing on Good Governance in Scheduled Areas/Tribal Areas. The experiences of the Commission have been encapsulated in this Report, which has three main Chapters covering (i) **GOOD GOVERNANCE IN SCHEDULED AND TRIBAL AREAS** (ii) **REGULATIONS REGARDING PEACE AND GOOD GOVERNANCE** and (iii) **NEED FOR MEANINGFUL CONSULTATIONS WITH COMMISSION**. A summary of the recommendations made in each Chapter of the Report has been given in the Fourth Chapter titled **SUMMARY OF RECOMMENDATIONS**.

7. I would like to add that National Commission for Scheduled Tribes has presented Five Annual Reports to the President of India. 1st report relating to the period 2004-05 & 2006-07 was submitted on 08 August 2006, the 2nd Report has been submitted on 3rd September, 2008 while 3rd Report has been submitted on 29th March, 2010 and Fourth Report has been submitted to the President on 27th August 2010 and Fifth Report for 2009-10 has been submitted on 13th July, 2011. Not even First Report has been laid in Parliament, as provided under sub-Clause (e) of Article 338A(5) of the Constitution. Copies of the reports cannot be made public because reports have not been laid in both Houses of Parliament. This situation has led to dilution of the recommendations of this Constitutional Commission relating to the development of Scheduled Tribes Since this is a Special Report I request your honour to issue instructions that priority is accorded for laying this Special Report in both Houses of Parliament at the earliest.

With kind regards

Yours sincerely,


(Rameshwar Oraon)

Smt. Pratibha Devi Singh Patil,
Hon'ble President of India,
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CHAPTER 1

GOOD GOVERNANCE IN SCHEDULED AND TRIBAL AREAS

INTRODUCTION

Tribal peoples' culture and identities form an integral part of their lives. Their ways of life, customs and traditions, institutions, customary laws, land use and forms of social organization, etc are usually different from those of the dominant population. Special measures are therefore, required to be taken to ensure that they are protected and appropriate participatory mechanisms are evolved and implemented in the governance of Scheduled Tribes and Scheduled Areas. Effective implementation of existing constitutional provisions specifically provided for the Scheduled Areas and strengthening of supporting mechanism is equally necessary to achieve the desired objectives.

1.2 As a part of its constitutional role of an advisor to the Govt., the NCST has been attempting to bring about greater sensitivity and responsiveness towards tribal concerns while examining policy and legislations viz., Land Acquisition and Resettlement & Rehabilitation Bill, 2010, MMDR Bill 2011 and the National Food Security Bill 2011, but with limited results. These Bills were of major concern for the tribals.

1.3 The President in her address at the Conference of the Governors of the States held in September 2008 had urged the Governors to ponder on the role of Governors for the peace and good Government of the States having Scheduled Areas in consultation with their respective State Governments

1.4 Coincidentally, in 2009, the Standing Committee on Inter-sectoral issues in its 3rd Report on "Standards of Administration and Governance in Scheduled Areas" had lamented that, while special provisions in Schedule V to the Constitution envisage that all Central and State Legislations would be fine-tuned by the Governor in accordance with the requirements of the tribals in the Scheduled Areas, these provisions had largely remained a dead letter during the last sixty years of the Republic. The Commission, therefore, resolved to prepare a Special Report on good governance in Scheduled Areas/Tribal Areas, which would aim to shed light on the actual working of some of the Constitutional safeguards enshrined in Schedule V and Schedule VI respectively, based on the documentation of experience across the country, an analysis of which forms the basis for expedient recommendations by the Commission in this Special Report.

GOVERNANCE OF SCHEDULED AREAS: HISTORICAL BACKGROUND

A. The Scheduled Districts Act 1874

1.5 Before proceeding to analyse the present situation regarding governance in Scheduled Areas, it is necessary to have an evolutionary insight into the historical background. It may be recalled that the control of the Government of India from the East India Company to the British Crown was affected through the Government of India Act 1858, passed on August 2, 1858.

This paved the way for taking the first step in the direction of notifying certain (tribal) areas (mentioned in the Schedule annexed to the Act) as "Scheduled Districts" and declaring what enactments are in force (or not in force), in any Scheduled District through the enactment of the Scheduled Districts Act 1874 (Act 14 of 1874). A copy of the Act is at **ANNEXURE 1.I**

1.6 This Act further provides that

"In declaring an enactment in force in a Scheduled District or part there of under Section 3 of this Act, or in extending an enactment to a Scheduled District, or part thereof under Section 5 of this Act, the Local Government may declare the operation of the enactment to be subject to such restrictions as that Government thinks fit".

"The Local Government may from time to time:-

Appoint officers to administer Civil and Criminal Justice and to superintend the settlement and collection of the public revenue, and all matters relating to rent, and otherwise to conduct the administration, within the Scheduled Districts.

Regulate the procedure of the officers so appointed: but not so as to restrict the operation of any enactment for the time being in force in any of said districts.

Direct by what authority any jurisdiction, powers or duties incidental to the operation of any enactment for the time being in force in such district shall be exercised or performed".

B. The Government of India Act, 1919

1.7 The Government of India Act, 1919 followed suit and Section 15 of the Act (Relevant extracts at **ANNEXURE 1.II**) provided that :

"(2) The Governor-General in Council may declare any territory in British India to be a "backward tract," and may, by notification, with such sanction as aforesaid, direct that the principal Act and this Act shall apply to that territory subject to such exceptions and modifications as may be prescribed in the notification. Where the Governor-General in Council has, by notification, directed as aforesaid, he may, by the same or subsequent notification, direct that any Act of the Indian Legislature shall not apply to the territory in question or any part thereof subject to such exceptions or modifications as the Governor-General thinks fit, or may authorize the governor in council to give similar directions as respects any Act of the local legislature.

C. The Government of India Act, 1935

1.8 The genesis of the Fifth and Sixth Schedules of the Constitution can be traced to certain provisions of the Government of India Act 1935, under

which certain backward areas had to be administered by the Governor in the exercise of his personal discretion. Section 92 in Chapter V- PART III. EXCLUDED AREAS AND PARTIALLY EXCLUDED AREAS, of the Government of India Act, 1935 (Relevant extracts at **ANNEXURE 1.III**) provided that:

"92.-(1) The executive authority of a Province extends to excluded and partially excluded areas therein, but, notwithstanding anything in this Act, no Act of the Federal Legislature or of the Provincial Legislature, shall apply to an excluded area or a partially excluded area, unless the Governor by public notification so directs, and the Governor in giving such a direction with respect to Government of India Act, 1935. any Act may direct that the Act shall in its application to the area, or to any specified part thereof, have effect subject to such exceptions or modifications as he thinks fit.

(2) The Governor may make regulations for the peace and good government of any area in a Province which is for the time being an excluded area, or a partially excluded area, and any regulations so made may repeal or amend any Act of the Federal Legislature, or of the Provincial Legislature, or any existing Indian law, which is for the time being applicable to the area in question.

(3) The Governor shall, as respects any area in a Province which is for the time being an excluded area, exercise his functions in his discretion.

D. Draft Constitution discussed in the Constituent Assembly

1.9 The Draft Constitution prepared by the Drafting Committee and discussed in the Constituent Assembly adapted these provisions with regard to the administration of the scheduled and tribal areas. Articles 189 and 190 of the Draft Constitution dealt with the same and read as follows:

Article 189

"In this Constitution –

(a) the expression "schedule areas" means the areas specified in Parts I to VII of the table appended to paragraph 18 of the Fifth Schedule in relation to the State to which those Parts respectively relate:

(b) the expression "tribal areas" means the areas specified in Part I and II of the table appended to paragraph 19 of the Sixth Schedule."

Article 190

"Administration of scheduled and tribal areas –

1. The provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State for the time being specified in Part I of the Fifth Schedule.

2. The provisions of the Sixth Schedule shall apply to the administration of the tribal areas in the State of Assam.”

1.10 At the revision stage after the debates, Article 244 was brought in to encapsulate Articles 189 and 190 after incorporating the amendments passed by the Constituent Assembly.

E. SPECIAL SAFEGUARDS FOR SCHEDULED TRIBES AND SCHEDULED AREAS

1.11 The provisions of the Fifth and Sixth Schedules are placed at **ANNEXURE 1.IV** and **ANNEXURE 1.V** respectively. The specific safeguards provided for the Scheduled Tribes in relation to Governance are as mentioned below:

- (i) **Article 244:** According to Clause (1) of Article 244, the provisions of the Fifth Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than the States of Assam, Meghalaya, Mizoram and [Tripura]¹.

According to Clause (2), the provisions of the **Sixth Schedule** shall apply to the administration of the tribal areas in the States of Assam, Meghalaya, Mizoram and Tripura¹.

- (ii) The First Proviso to Article 275(1) of the Constitution of India enables grants from the Consolidated Fund of India each year for promoting the welfare of Scheduled Tribes and in pursuance of this Constitutional obligation, the Ministry of Tribal Affairs provides funds through the Central Sector Scheme “Grants under Article 275(1) of the Constitution”. The objective of the scheme is to meet the cost of such projects for tribal development as may be undertaken by the State Governments for raising the level of administration of Scheduled Areas therein to that of the rest of the State.
- (iii) **The Fifth Schedule** contains provisions regarding the administration and control of the Scheduled Areas in nine States having Scheduled Areas, viz., Andhra Pradesh, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, Madhya Pradesh, Maharashtra, Orissa and Rajasthan. The Governors of these States, comprising Scheduled Areas, have special responsibilities and powers. These States have Tribe Advisory Councils (TACs). (In addition, Tamil Nadu and West Bengal, which have Scheduled Tribes but do not have any Scheduled Area, also have TACs). Beside the power to exclude or modify application of any Act of Parliament or the State legislature in its application to Scheduled areas, the Governors of

¹ Ins. by the Constitution (Forty-ninth Amendment) Act, 1984, s. 4 (w.e.f. 1-4-1985).

these States have the power to make regulations for the peace and good governance of any Scheduled Area particularly for the following purposes:-

- (a) to prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such areas,
- (b) to regulate the allotment of land to members of the Scheduled Tribes in such area,
- (c) to regulate the carrying on of business as money lender by persons who lend money to members of the Scheduled Tribes in such area.

- (iv) **The Sixth Schedule** contains provisions relating to the administration of the Tribal Areas in the States of Assam (North Cachar Hills District and Karbi Anglong District), Meghalaya, Mizoram and Tripura (Autonomous Hill District). There are Autonomous District Councils and Autonomous Regional Councils in these areas which have a long tradition of self-management systems. These Autonomous Councils not only administer the various Departments and developmental programmes but they also have powers to make laws on a variety of subjects, e.g., land, forest, shifting cultivation, village or town administration including village or town police and public health and sanitation, inheritance of property, marriage and divorce and social customs. The Sixth Schedule vests the Governors of the concerned State and the President of India with certain duties and powers in relation to legal enactments in the State States and the Vith Schedule Areas in those States. According to an important provision, in respect of role of Governors, which is common to the Sixth Schedule States of Assam, Meghalaya and Tripura:

"the Governor may, by public notification, direct that any Act of Parliament or of the Legislature of the State of to which the provisions of clause (a) of this sub-paragraph do not apply shall not apply to an autonomous district or an autonomous region in that State, or shall apply to such district or region or any part thereof subject to such exceptions or modifications as he may specify in the notification".

- (v) Another specific provision in respect of the role of the President of India in relation to the States of Meghalaya, Mizoram and Tripura provides that

"the President may, with respect to any Act of Parliament, by notification, direct that it shall not apply to an autonomous district or an autonomous region in the State of, or shall apply to such district or region or any part thereof subject to such exceptions or modifications as he may specify in the notification and any such direction may be given so as to have retrospective effect".

PRESENT DEFINITION OF SCHEDULED AREAS

1.12 The term `Scheduled Areas' has been defined in the Indian Constitution as "such areas as the President may by order declare to be Scheduled Areas". **Paragraph 6 of the Fifth Schedule** of the Constitution

prescribes the following procedure for scheduling, rescheduling and alteration of Scheduled Areas.

SCHEDULED AREA² AND PROCEDURE FOR SCHEDULING, RESCHEDULING AND ALTERATION OF SCHEDULED AREAS

- (1) In this Constitution, expression 'Scheduled Areas' means such areas as the President may by order declare to be Scheduled Areas.
- (2) The President may at any time by order.
 - (a) Direct that the whole or any specified part of a Scheduled Area shall cease to be a Scheduled Area or a part of such an area
 - (b) Increase the area of any Scheduled Area in a State after consultation with the Governor of that State.
 - (c) Alter, but only by way of rectification of boundaries, any Scheduled Area.
 - (d) On any alteration of the boundaries of a State on the admission into the Union or the establishment of a new State, declare any territory not previously included in any State to be, or to form part of, a Scheduled Area.
 - (e) Rescind, in relation to any State or States, any order or orders made under this paragraph, and in consultation with the Governor of the State concerned, make fresh orders redefining the areas which are to be Scheduled Areas.

and any such order may contain such incidental and consequential provisions as appear to the President to be necessary and proper, but save as aforesaid, the order made under sub-paragraph (1) of this paragraph shall not be varied by any subsequent order".

Thus the specification of Scheduled Areas in relation to a particular State/Union Territory is by a notified Order of the President, after consultation with the State Governments concerned. The same procedure will apply while altering, increasing or rescinding any order(s) relating to Scheduled Areas.

1.13 The criteria followed for declaring an area as Scheduled Area are preponderance of tribal population; compactness and reasonable size of the area; under-developed nature of the area; and marked disparity in economic standard of the people. These criteria are not spelt out in the Constitution of India but have become well established. They embody principles followed in declaring 'Excluded' and 'Partially-Excluded Areas' under the Government of India Act 1935, Schedule 'B' of recommendations of the Excluded and Partially Excluded Areas Sub Committee of Constituent Assembly and the Scheduled

² Source: Website of the Ministry of Tribal Affairs- www.tribal.gov.in

Areas and Scheduled Tribes Commission 1961. The Scheduled Tribes live in contiguous areas unlike other communities. It is, therefore, much simpler to have an area approach for development activities as well as regulatory provisions to protect their interests.

1.14. In exercise of the powers conferred by paragraph 6 of the Fifth Schedule to the Constitution, the President after consultation with the State governments concerned had by Orders called 'the Scheduled Areas (Part A States) Order, 1950' and the Scheduled Areas (Part B States) Order 1950' set out the Scheduled Areas in the States. Further by Orders namely the Madras Scheduled Areas (Cesser) Order, 1951' and 'the Andhra Scheduled Areas (Cesser) Order, 1955' certain areas of the then east Godavari and Visakhapatnam districts were rescheduled. At the time of devising and adopting the strategy of Tribal sub Plan (TSP) for socioeconomic development of Scheduled Tribes during Fifth Five Year Plan (1974-79), certain areas besides Scheduled Areas, were also found having preponderance of tribal population. A review of protective measures available to the tribal of these newly identified areas vis-à-vis Scheduled Areas was made and it was observed that a systematic use of protective measures and other powers available to the executive under Fifth Schedule will help in effective implementation of the development programmes in sub-Plan Areas.

1.15 Therefore, in August 1976 it was decided to make the boundaries of the Scheduled Areas co-terminus with the Tribal Sub-Plan areas. Accordingly, Clause (2) of the paragraph 6 of the Fifth Schedule was amended vide the Constitution (Amendment) Act, 1976 to empower the President to increase the area of any Scheduled Areas in any State. Pursuant thereto the President has issued from time to time Orders specifying Scheduled Areas afresh in relation to the States of Bihar (now part of Jharkhand State), Gujarat, Madhya Pradesh (including present Chhattisgarh State), Maharashtra, Orissa and Rajasthan. The tribal areas. in Himachal Pradesh were scheduled on 27.11.1975. While scheduling the areas in Himachal Pradesh the principle of making the sub plan and the Fifth Schedule areas coterminous was kept in view. Thus, presently the Tribal Sub-Plan areas (Integrated Tribal Development Projects/Integrated Tribal Development Agency areas only) are coterminous with Scheduled Areas in the States of Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, Madhya Pradesh, Maharashtra, Orissa and Rajasthan. The State of Andhra Pradesh, where the Tribal Sub-Plan areas are not coterminous with Scheduled Areas, has also furnished a proposal to this effect which is under examination.

1.16 The following Orders are in operation at present in their original or amended form in respect of the Scheduled Areas:-

S.No.	Name of Order	Date of Notification	Name of State(s) for which applicable
1.	The Scheduled Areas (Part A States) Order, 1950 (C.O.9)	26.1.1950	Andhra Pradesh
2.	The Scheduled Areas (Part B States) Order, 1950 (C.O.26)	7.12.1950	Andhra Pradesh
3.	The Scheduled Areas (Himachal Pradesh) Order, 1975 (C.O.102)	21.11.1975	Himachal Pradesh

4.	The Scheduled Areas (States of Bihar, Gujarat, Madhya Pradesh and Orissa) 1977 (C.O. 109)	31.12.1977	Gujarat, and Orissa and then existing composite States of Bihar, and Madhya Pradesh
5.	The Scheduled Areas (State of Rajasthan) Order, 1981 (C.O.114)	12.2.1981	Rajasthan
6.	The Scheduled Areas (Maharashtra) Order, 1985 (C.O.123)	2.12.1985	Maharashtra
7.	The Scheduled Areas (States of Chhattisgarh, Jharkhand and Madhya Pradesh) Order, 2003 (C.O.192)	20.2.2003	Re-organised States of Chhattisgarh, Jharkhand and Madhya Pradesh
8.	The Scheduled Areas (State of Jharkhand) Order, 2007 (C.O. 229).	11.04.2007	Jharkhand

1.17 A list of Scheduled Areas³ in each State under Fifth Schedule to the Constitution is placed at **ANNEXURE 1.VI**

TRIBAL AREAS UNDER SIXTH SCHEDULE

1.18 The term "Tribal Areas" has not been defined in the Constitution but Article 244(2) of the Constitution prescribes that the provisions of the Sixth Schedule to the Constitution shall apply to the administration of the tribal areas in the States of Assam, Meghalaya, Tripura and Mizoram. Accordingly, certain areas in these States have been declared as "Tribal Areas" under the Sixth Schedule to the Constitution which provides for setting up District or Regional Autonomous Councils for such areas.

CURRENT PERSPECTIVE

ILO Conventions concerning Tribal people

1.19 There are various international treaties and conventions which also aim at uplifting the tribal communities and raising the level of administration in Tribal Areas bringing them to the level of the rest of the population/ areas. ILO conventions are some measures which aim at the development of tribal population and the tribal areas in the Member-countries.

1.20 It is noted from the website of the Ministry of Labour that India has ratified ILO Convention 107 on 29th September, 1958. However, ILO Convention C 169 (related to tribal population and tribal areas in the country) has not been ratified by the Govt. of India. A comparative Statement of the provisions contained in the two Conventions is at **ANNEXURE 1.VII**

1.21 The Convention No. 169 applies to tribal people in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated, wholly or partially, by their own customs or traditions or by special laws or regulations. It also applies to people in independent countries who are regarded as indigenous on account of their descent. The main Provisions of ILO Convention

³ Source: Annual Report of Ministry of Tribal Affairs 2010-11

No. 169 concerning Indigenous and Tribal People in Independent Countries are given below:

- The Convention stipulates that indigenous and tribal people should enjoy full measures of human rights and fundamental freedoms without hindrance or discrimination and no form of force or coercion shall be used in violation of the human rights and fundamental freedoms.
- It also stipulates that indigenous and tribal people should have the right to decide their own priorities for the process of development and in addition they should participate in the formulation, implementation and evaluation of plans and programmes for national and regional development, which may affect them directly.
- It prescribed that while imposing penalties on indigenous and tribal people, account should be taken of their economic, social and cultural characteristics and preference should be given to methods of punishment other than confinement in prison.
- It envisages consultation, fair compensation, etc for any damages, which the indigenous and tribal people may sustain when the State retains the ownership of mineral or sub-surface resources.
- The Convention also envisages that the Government should, in cooperation with the people concerned, adopt special measures to ensure the effective protection with regard to recruitment and conditions of employment of workers to the extent they are not effectively protected by laws.

1.22 The Commission requested the Ministry of External Affairs, Ministry of Tribal Affairs, Ministry of Labour & Employment to apprise the Commission about the approach of the Govt. with regard to the various provisions in the ILO C169: concerning Indigenous and Tribal People in Independent Countries, The Ministry of Tribal Affairs did not furnish any reply while MEA informed that Ministry of Labour and Employment is the nodal Ministry for dealing with issues relating to ILO. The reply of the Ministry of Labour and Employment does not indicate the views of the Government of India communicated, if any, to the ILO. On the other hand Ministry of Labour and Employment furnished information about the stand of the Government of India (MEA, MHA and MTA) about ratification of ILO Convention 169.

(a) Comments of Ministry of External Affairs

(i) The concept of indigenous people provided in Article 1 para (b) of Convention 107 and Article 1, para (b) of Convention 169, does not apply in the India context as all Indians are considered indigenous. The definition is understood in the context of situations where the original inhabitants are markedly different from the colonial settlers such as in Australia, New Zealand and the American continent.

(ii) We need to, however, look at the Convention from the political angle. It is well known that in spite of the fact that government has taken a stand that the concept of indigenous people is not relevant to India, the international organizations and foreign governments, including the ILO have formulated projects to reach out to our tribal group in India, conferring on them a status identical to indigenous people in other parts of the world. Convention 169 calls on governments to take measures including by means of international agreements, to facilitate contacts and cooperation between indigenous peoples across borders including activities in the social-culture, economic, spiritual and environmental fields. The ratification of Convention 169 would, therefore, immediately open the gates to such offers of cooperation from other State parties to the Convention, in spite of any declaration/reservation Government of India might make on interpretation of who constitute "indigenous people".

(iii) Another aspect of the problem is that on ratification of an ILO Convention, Government of India would be subjected to the supervisory mechanism of the ILO on the implementation of the various provisions of the Convention in question. IT is felt that this process was likely to have strong political overtones, given the tripartite nature of the ILO and the various interest groups within the secretariat and from civil society who now are equal participants in the process. Therefore, in spite of legal protection provided nationally in our Constitution and under laws for the tribals, subjecting our laws to any such scrutiny is bound to bring to the fore a litany of motivated complaints. Such reports put government unnecessarily on the defensive and embarrass us in international fora.

(b) Comments of Ministry of Home Affairs

(i) The Government of India has all along taken the position that all Indians including the tribals are indigenous people and that our tribals alone cannot be equated as indigenous people. This is against the first article of the Convention.

(ii) Article 7 of C-169 stipulates that indigenous and tribal people should have the right to decide their own priorities for the purpose of development and in addition they should participate in the formulation, implementation and evaluation of plans and programmes for national and regional development, which may affect them directly. It is also felt that this Article would create administrative problems in the formulation of development plans and may distort the planning process in the country.

(iii) Article 10 suggests that while imposing penalties on indigenous and tribal people, preference should be given to methods of punishment other than confinement in prison. It is felt that this provision may also create problems for the criminal law administration.

(iv) Article 15 envisages fair compensation for the indigenous and tribal peoples when the State retains the ownership of mineral of sub-surface resources. The existing laws in the country safeguard the surface

resources rights and the owner of the land for the tribals as well as non-tribals. However, the existing laws do not recognize the right of the landholders, whether tribal or non-tribal, over sub-surface resources.

(v) Article 32 of the Convention envisages that the Government should take appropriate measures for promoting and facilitating contacts and cooperation between the indigenous and tribal peoples across the border in economic, social, cultural, spiritual and environmental fields. It has been felt that such measures will give rise to demand by different groups of tribals and indigenous people for special rights and dispensation which may lead to enhanced level of social and demographic problems. In view of the existing security environment and continuous flow of illegal migrants from across the border, the implementation of this Article would lead to greater social tension.

(c) Comments of Ministry of Tribal Affairs

(i) The ILO uses the word “indigenous people” whereas India, on behest of the Ministry of External Affairs, does not accept this term with reference to the tribes scheduled under our Constitution.

(ii) The Ministry of Tribal Affairs and the Planning Commission are very clear that we already have excellent safeguards of the rights of the Scheduled Tribes and what we need is good governance and the desire to carry out and supervise the laid down policies and programmes.

(iii) Therefore, if we accept the role suggested by the ILO, Government will be deluged with schedules for reporting, including by other international bodies. The Ministry of Tribal Affairs is already furnishing responses through Ministry of External Affairs to UN Committee on Economic, Social and Cultural Rights as well as ILO through the Ministry of Women and Child Development.

(iv) There is also no need for another UN body to evaluate our tribal development programmes. Enough material is available in the reports of the Planning Commission, National and State Institutions like the NIRD, and organizations like IFAD, who are actually taking up, and have taken up, tribal development projects in tribal dominated States of the country. Reports are also available in the Ministry of Panchayati Raj on the functioning of the Sixth Scheduled areas.

1.23 The Commission noted from the reply received from the Ministry of Labour & Employment that there has evidently been no concern/effort to harmonize our domestic safeguards with international best practices embedded in the Convention(s). While some of the best practices have been embedded through existing safeguards in our Constitution, in respect of remaining, a view needs to be taken for Constitutional/ legislative changes which may be appropriate for modern times/context. While we may accept the non-applicability of the concept of indigenous people (defined in C-169) in the Indian context, as highlighted by MEA, MHA and MTA, and also heed to political

overtone (MEA), indigenous citizen concerns (MHA) and the reporting load (MTA) arising out of ratification of C-169, and not subscribing to the Convention too on such considerations, it is certainly desirable to consider the best practices emerged from the Convention(s), for their adaptation in relation to the tribals. In the context of prevailing unrest in Tribal Areas there may also be no serious objection to inclusion of a re-furbished TSP strategy predicated on Gol responsibility, in the Vth Schedule, which also aims at focussed development of Scheduled Areas. While the existing laws don't recognise the rights of the landholders, whether tribal or non-tribal, over sub-surface resources, it is mentioned that the Vth and VIth Schedule provide for separate regulations in respect of land rights of tribal not excluding sub-surface rights. The Administrative Reforms Commission and the Standing Committee on Inter-sectoral Issues has also argued for issue of directions by Gol/ discretionary powers to Governors to implement the spirit of Vth Schedule.

1.24 In view of the above, the Commission decided to discuss the matter in detail with the Secretaries of the MEA, Ministry of Home Affairs, Ministry of Tribal Affairs and Ministry of Home Affairs for which a Sitting was held on 16/02/2012. The sitting was chaired by the Chairperson, National Commission for Scheduled Tribes. During the Sitting, the Commission desired to know the views of the MTA on the need to incorporate international best practices into our constitutional safeguards for STs and also spell out these aspirations in a charter for Tribal Areas/ people. The Commission pointed out that after making monetary compensation to the tribals after acquiring their lands, the tribals become jobless as well as landless and the compensation received is not sufficient to secure peaceful livelihood to the tribals and this was a major cause for uprising and naxalism in various tribal/ scheduled areas in the country. The Commission mentioned that it has already recommended on the MMDR Bill, 2011 that besides compensation for entrustment of land surface rights, future earnings from mining activity should also be shared with land owners in perpetuity. Therefore, while redesigning the quantum and nature of (sweat) equity participation to allay the apprehensions of promoters in respect of enterprise management, a sum equal to royalty be paid to the land rights holders for the duration of mineral extraction; and sweat equity holdings may be redeemed by the lessee to purchase lifelong annuity payments after mining operations have ceased in a particular location.

1.25 Secretary, MTA stated that the best practices could be incorporated in the related safeguards concerning Scheduled Tribes. The Secretary also informed that the Task Force under the Chairmanship of Dr. Narendra Jadhav, Member, Planning Commission has already examined the working of Tribal Sub-Plan in various States and by the Central Ministries/Departments; and given its recommendations for revised guidelines for preparing TSP by the Central Ministries. Recommendations of the Task Force relating to revised guidelines for TSP of States was in the process. He further informed regarding sub-surface rights over land that the proposed provisions by the Ministry of Mines in the MMDR Bill, 2011 may also be examined.

1.26 Secretary, Ministry of Labour and Employment stated that a draft Cabinet Note regarding ratification of ILO Convention (C 169) was mooted in

2003 which was not finalized taking into consideration the views expressed by the MEA, MHA and MTA. He further mentioned that, so far, only 22 countries have ratified ILO C 169. He also emphasized the need to adopt best practices out of ILO Conventions to improve our systems.

1.27 A copy of the Summary Record of the Sitting, placed at **ANNEXURE 1.VIII**, is also available on the Website of the Commission. It emerged from the Sitting that while some of the best practices have been embedded through existing safeguards in our Constitution, in respect of remaining, a view should be taken for Constitutional/ legislative changes which may be appropriate for modern times/context. **Based on the position emerged from the discussion, Commission recommends to the Govt. for considering the need for amendments of Schedule V and VI to provide a comprehensive Charter for tribal communities incorporating the best practices enumerated in the ILO Convention (s).**

VIEWS EXPRESSED BY THE PRESIDENT REGARDING ROLE OF THE GOVERNORS IN THE CONFERENCE OF GOVERNORS OF THE STATES HELD IN SEPTEMBER, 2008

1.28 In her address to the Conference of Governors the President remarked that:-

“The Fifth Schedule of the Constitution dealing with the administration of Scheduled Areas and Scheduled tribes envisages a specific role for the Governors. It empowers the Governor to direct whether a particular enactment shall apply with or without modifications or be not applied to any scheduled area. It also empowers the Governor to make regulations for peace and good governance.

In view of these special provisions, there is a feeling in certain quarters that the Governor should play a pro-active role. On the other hand, it is understood that court judgments and debates in the Constituent Assembly provide that the Governor is bound by the advice of the Council of Ministers in the exercise of his powers under the Fifth Schedule. This causes considerable uncertainty. The Government could seek authoritative legal opinion to set at rest this ambiguity. Annual Reports required to be submitted by the Governors under the Fifth Schedule requires streamlining. Further, the Tribes advisory Councils set up under this Schedule have not functioned with the vigour expected of them, thus warranting remedial action at your end. We would be keen to hear from you about your views and perception of making your role in this regard more meaningful.

I understand that “The Provisions of the Panchayats (Extension to Scheduled Areas) Act, 1996”, (PESA) has extended Panchayati Raj to the nine States, namely, Andhra Pradesh, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, Madhya Pradesh, Maharashtra, Orissa and Rajasthan under Fifth Schedule. However, they are yet to frame requisite local enactments to comply with the PESA Act. Since the quality of government-citizen interface at the grassroots level determines the quality

of governance, you may urge the State Governments to have informed discussions on this matter and chart out the most optimal path for the good of the people.

1.29 Summing up the deliberations, the President observed that:

"Taking into cognizance the special requirements of the North-East, the framers of our Constitution under Article 371 and the Sixth Schedule had cast a special responsibility on the Governors for providing peace, good Government and promotion of the welfare and advancement of the people. I would, therefore, urge upon all the Governors of the North-East to individually introspect how far the governance mechanism in each State has fulfilled the aims and aspirations of the locals and what more needs to be done and submit their recommendations. I hope the Prime Minister will agree with me on that.

A prime prerequisite of good Government is to have in place an administrative structure and ethos which is within the comprehension of the people and is responsive to their needs. We are aware that the North-Eastern States have effective customary institutions of governance right down to the village level. Your study could reflect on how far the indigenous good governance practices and traditional institutional mechanisms have been harmoniously intertwined with modern system of administration. Your recommendations may also envisage how best the two administrative systems can supplement and complement each other to make the delivery mechanism more responsive, efficient, prompt and people-friendly.

Our Constitution devolves power upon the elected autonomous District Councils in Assam, Meghalaya, Tripura and Mizoram under paras three and four of the Sixth Schedule to make laws and administer justice.

The Governors are empowered to decide whether legislative enactments, Central or State, are to be applied or not or applied with modifications in the Autonomous Regions. Para 14 also envisages setting up of Commissions by the Governor to review the functioning of the Autonomous Councils. Para 2 makes room for further decentralization by creation of units at sub-district level through Subordinate Local Councils. It needs serious consideration as to how the institutions under the Sixth Schedule can be strengthened to effectively fulfil their expected role as vehicles of self-governance. Equally important are the provisions contained in para 2 of the Fifth Schedule which envisages a specific role for Governors for the peace and good government of the States having Scheduled Areas. I would urge upon the Governors to ponder on these issues in consultation with their respective State Governments⁴."

⁴ Source: Record of deliberations page 155

1.30 In the same Governor's Conference, the Prime Minister made the following observations:

"It is not a coincidence that the areas affected by naxalite activity are also areas with a large representation of tribal communities. It was in recognition of this fact that many such States and areas were included in the Fifth Schedule of the Constitution. This provides for a special role for Governors. Our Government has enacted the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act 2006, which, I believe, is a path breaking initiative, which if implemented efficiently and honestly will empower tribal communities in a massive way. The efficient and effective implementation of the provisions made in this law needs close attention and monitoring. I urge Governors to take particular interest in the implementation of this law"⁵.

PRESENTATION BY GOVERNORS OF THE STATES IN THE CONFERENCE

1.31 The Governors of the States made presentation on various aspects relating to administration in the concerned States, beside making written submissions for the Conference. The written submissions and presentations relating to the Role of the Governor under Fifth/ Sixth Schedule are recapitulated below:

(i) Chhattisgarh

"In such a scenario, the role of the Governor in the administration of the scheduled areas becomes significant. A certain ambiguity exists on the actual role of the Governor in this field. Under Article 163 of the Constituion of the India the Governor is to exercise his functions on the Advice of the Council of Ministers except in so far as he is under of the Constitution read with Article 244 vests certain functions/powers on the Governors. There is a certain grey area herein which needs to be redefined keeping in view the interests of the tribals and their development"⁶.

(ii) Jharkhand

"[In respect of the special responsibility cast on Governors in administration of the Scheduled areas under the fifth Scheduled of the constitution I may inform that Jharkhand has 24 districts out of which 13 districts are totally under the scheduled areas whereas two districts are partially under the scheduled areas.

I have been periodically reviewing issues central to the identity and well being of the scheduled tribes and it has been my experience that the Tribal Advisory Councils have been largely ineffective in performing the role assigned to them. Further, I would like to reiterate the point I had made during the last conference of Governors in 2005 that in areas where special

⁵ Source: Record of deliberations- page 150

⁶ Source: Record of deliberations- page 53

responsibility vests with the Governor under Schedule V there is need to provide such institutional arrangements in place that will enable the Governor to play a proactive role without coming into conflict with the elected government"]⁷.

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"Over the years the working of the Tribal Advisory Council especially in the context of Jharkhand has been rather disappointing. It is worth considering that the chairmanship of TAC be given to Governor to make it more responsive to its mandate. During the last conference of Governors I had suggested the need to institutionalize the arrangements in spheres where special responsibility vests with the Governor under Schedule V in such a manner that the Governor is able to perform his obligations without coming into conflict with the elected government. I think this suggestion even now merits serious consideration"⁸.

(iii) Orissa

"The State has unfortunately witnessed communal violence in recent past, first during the Christmas last year and again, only a few days ago, during Janmastmi celebrations this year. But it should not be viewed only as a communal problem. This is an issue involving ethnicity, religious conversion, socio-economic status and the right over land a reservation in jobs. The Panas who belong to the Scheduled castes claim Scheduled Tribe status on the basis that they also speak Kui language. Those Panas (Scheduled Caste), who have managed to obtain ST certificates, get the benefits of land records and reservation even after conversion, at the cost of tribals. This hurts the Kandhas, who belong to the Scheduled Tribe. The Panas are economically a little better off"⁹.

"Governor has powers of making regulation for peace and good governance of Scheduled Areas, to prohibit or restrict the transfer of land by or among the members of the Scheduled Tribes in such areas, to regulate the allotment of land to members of the Scheduled Tribes in such areas and to regulate the business of lending money by money-lenders to members of Scheduled Tribes in such area. Accordingly, laws and regulations have been enacted in the State"¹⁰.

(iv) Meghalaya

"The District Councils are there in Meghalaya, as also in Nagaland and Mizoram. But, with the present Government, which is really a tribal Government in the three states, the need for the district Council itself is disputable because I have lot of input from the political leaders which make me think that this is the time that we should dispense with the District

⁷ Source: Record of deliberations- page 33

⁸ Source: Record of deliberations- page 115

⁹ Source: Record of deliberations- page 54

¹⁰ Source: Record of deliberations- page 206

Council and introduce the Panchayati Raj system instead. That will lead to the better development of the area"¹¹.

(v) Arunachal Pradesh

"In my opinion, good governance will help to solve most of the problems being faced by the people. In fact, I am of the opinion that the time has come for a complete "government process re-engineering", to ensure a more responsive and people friendly, developmental oriented administration. If this resource of government employees is motivated and systematically trained to increase their capabilities, they will be great assets".

"However, as of date, the postings in such areas are considered as a punishment posting, and the officers posted there either work half heartedly or remain away on one pretext or the other. At places, there is complete lack of feeling of oneness with the people amongst the administrators posted there".

"It is strongly recommended that we must change the personnel management policy for such areas. Willing, committed and competent officers should only be posted in these areas with more powers and flexibility, so that they can deliver the results. The presence of the government should be felt very obviously. As an incentive such 'achievers' should be rewarded with better emoluments, recognition, good accommodation and education for their children in some good centres, preferential treatment in promotion and empanelment, foreign training etc".

"Further, in such areas, the administration should not be kept as an exclusive domain of the administrative service officers only. We may call for voluntary deputation of outstanding highly committed officers from all other services including the armed forces for the coveted posts of District Collectors or Sub-divisional Magistrates. We need Verrier Elvin or Lawrence of Arabia type of individuals, who merge with the people and in turn the people begin to like them. This will provide a cadre of good, dedicated and willing officers to serve in such areas. During the formative years of Arunachal Pradesh, the then NEFA, the Indian Frontier Service Officers (IFAS) drawn from various services had made a tremendous contribution"¹².

(vi) Assam

"The Sixth Schedule functioning in the State needs to be revamped in a major administrative manner since the financial rules are arcane and also monitoring of the projects is not up to the mark. This issue should be emphasized to the State Government by the Ministry of Home Affairs in the Government of India with a view to facilitate a sound mechanism at the district level and the State Government level for the twin hill districts of Karbi

¹¹ Source: Record of deliberations- page 68

¹² Source: Record of deliberation- page 18-19

Anglong and the North Cachar Hills and separately for the Bodoland Territorial Council".

"Apart from the three Autonomous Councils under the Sixth Schedule in the State, The State Government has set up six other Councils under State legislation for the areas predominantly inhabited by tribal people. The infrastructure in these Council areas is poor and needs substantial investment for development. To expeditiously develop these areas, a Special Package of Rs. 150 crores has been proposed on the pattern of the Economic Package provided to the Bodoland Territorial Council".

"State Government has proposed for a Special Development Package with an outlay of Rs. 500 crore for the development of the areas inhabited by the six communities viz. Tai-Ahom, Chutia, Moran, Motok, Tea tribes and Koch Rajbongshis who are agitating for tribal status. The purpose of this package would be to provide them the benefits, which are critical for their social and economic upliftment"¹³.

(vii) Manipur

"In item of Clause (2) under Article 371C of the Constitution, the Governor furnishes to the President a report annually regarding the administration of the Hill areas of Manipur"¹⁴.

(viii) Mizoram

["Although the Constitution-makers intended and finally provided uniform pattern of administration for all the tribal Areas in the North-east, still gradually with the reorganizations of the State of Assam and with subsequent amendments to be Sixth Schedule, the very nature of uniformity has got diluted. Now, the provisions of the Sixth Schedule are different for the tribal areas of Assam than those in Meghalaya, Mizoram & Tripura and even the scopes of discretionary powers of the Governors of Mizoram and Tripura are phenomenally different from that of the Governor of Assam. The Governor of Meghalaya has no discretionary power in the administration of the tribal Areas in Meghalaya except in paragraph 9 of the Sixth Schedule. Paragraph 20 BA of the Sixth Schedule defines the discretionary powers of the Governor of Assam, while Paragraph 20BB of the Sixth Schedule defines the discretionary powers of the Governors of Mizoram and Tripura. These two Paragraphs again confer different types of discretionary powers on the respective Governors. For example, while the Governor of Assam well as removal of a nominated member of an Autonomous Council in do not have any discretionary powers in the removal of a nominated member of a District Council in their states. In these two states, they are normally bounded by the advice of their respective Council of Ministers is removing a nominated member. Such anomalies need immediate examination and rectification".

¹³ Source: Record of deliberations- page 36

¹⁴ Source: Record of deliberations- page 159

"Duplicities of functions in the Tribal Areas pose practical problems and it is the high time to arrest such overlapping functions and programmes. Paragraph 6(1) of the Sixth Schedule empowers an Autonomous District Council to establish, construct or manage primary schools, dispensaries, markets, cattle pounds, ferries, fisheries, roads, road transport and waterways. Under Paragraph 6(2), administrative as well as developmental functions relating to agriculture, animal husbandry, community projects, cooperatives societies, social welfare, and village planning, etc. can be entrusted to the autonomous District Councils and have in fact been entrusted to them. While the District Councils have been undertaking these projects and managing the same, the concerned Departments in the state Government are also found to undertake the same developmental schemes in such autonomous districts. Like this, there are many occasions where the same developmental or administrative functions are being undertaken by the District Councils as well as by the state Government Departments. This needs to be rectified so that wasteful expenditures, manipulations in utilization of funds etc. can also checked to a large extent"¹⁵.

(ix) Nagaland

"Nagaland is a fully tribal State with approximately 90% of the population being composed of Naga tribes. However, the people of Nagaland have chosen to remain outside the purview of Fifth & Sixth Schedule of the Constitution. Therefore there is no Autonomous District or Regional Council in Nagaland. We have Village Councils constituted as per the customary practices and usages of people which have been recognized by the State Government under the Nagaland Village Councils Act. We also have Village Development Boards (VDBs) in every village constituted by the respective Village Council and they function under the overall supervision and control of Deputy Commissioners and are responsible for the development of the villages. The State Government has been raising the issue of the State being deprived of funds from the Tribal Sub Plan inspite of the State being predominantly tribal"¹⁶.

VIEWS OF THE ATTORNEY GENERAL FOR INDIA ON THE ROLE AND POWERS OF GOVERNOR

1.32 In view of the observations made by the President, in the Conference of the Governors, that the Government could seek authoritative legal opinion to set at rests this ambiguity, Ministry of Home Affairs sought this opinion of Attorney General for India on the nature of powers of the Governor under the fifth Schedule read with Article 244 of the Constitution of India in respect of administration of Scheduled Areas and Tribal Areas. A copy of the detailed opinion of the Attorney General for India on the subject is placed at **ANNEXURE 1.IX** The Attorney General for India made the following observations on the issues before him:

¹⁵ Source: Record of deliberations- page 184

¹⁶ Source: Record of deliberations- page 191

General observations

- (i) 13. The Framers of our constitution were sensitive to the administration of scheduled areas and special provisions were carved for administration of the said areas.
- (ii) 14. Under clause 2 of the Fifth schedule, the extent of executive power of the state in the scheduled areas has been made subject to the provisions of the Fifth Schedule. In other words, the exercise of the executive power of the state in scheduled areas in scheduled areas is subservient to the provisions of the Fifth schedule which grants important and crucial powers to the Governor in respect of scheduled areas.
- (iii) 15. Under clause 3, the Governor is mandated to make a report to the president regarding the administration of scheduled areas and the Executive power of the Union extends to the giving of directions to the state as to the administration of the said areas. This provision categorically shows the overarching control of the union which the constitution Framers envisaged in respect of scheduled areas.
- (iv) 16. Clause 5 deals with the legislative powers of the Governor . Clause 5 opens with a non-obstante clause stating that the Power exercisable under clause 5 overrides any other provisions in the constitution. Under clause 5, the Governor may, by a public notification, direct that any particular Act of parliament or of the Legislature of the state will not apply to a scheduled area or would apply subject to such exceptions and modifications as he may specify in the notification . The Governor is also empowered to make regulations for peace and good governance of any area in a state which is for the time being a scheduled area. The regulations made under clause 5 have to be submitted to the President and have no effect until assented to by the President

Executive and discretionary powers of the Governor

- (i) 17. Under Article 163(1) of the constitution, the council of Ministers along with the Chief Minister, aid and advice the Governor in the exercise of his functions except in so far as he is by or under the constitution required to exercise his functions or any of them in his discretion.

Concluding Opinion of Attorney General of India

1.33 The Attorney General of India has opined that the nature of powers of the Governor under the 5th Schedule is discretionary, as has been held by the Hon'ble Supreme Court of India. The Attorney General of India has further mentioned that Clause 2 of 5th Schedule states that the executive power of the State is subject to the provisions of the 5th Schedule. Under Article 154, the executive power of the State is vested in the Governor. In so far exercise of

executive powers of the State are concerned, the Governor has to exercise the same on the aid and advice of the Council of Ministers along with the Chief Minister. However, the exercise of powers by the Governor under the 5th Schedule is not co-terminus with exercise of the executive power of the State but it is within the discretion of the Governor.

3RD REPORT TITLED "STANDARDS OF ADMINISTRATION AND GOVERNANCE IN THE SCHEDULED AREAS" BY THE STANDING COMMITTEE ON INTER-SECTORAL ISSUES RELATING TO TRIBAL DEVELOPMENT.

1.34 **The Standing Committee on Inter-Sectoral Issues relating to Tribal Development** headed by Dr. Bhalchandra Mungekar, Member, Planning Commission, with Secretaries of some key Ministries concerned with tribal development as Members, submitted its 3rd Report titled "Standards of Administration and Governance in the Scheduled Areas" by the Standing Committee on Inter-Sectoral Issues relating to Tribal Development. The Committee has recommended that in the Fifth Schedule areas, the office of the Governor must play a pro-active role for ensuing protection of tribal right and tribal welfare/development. The Mungekar committee of the Planning Commission,, vide page 8-28 of its Report, recommends that in the fifth schedule Areas, the office of the Governor must play a more pro-active role for ensuring the protection of tribal rights and for tribal welfare/development. It suggests that besides a critical review of the Governor's report, the Governor should also decide on the application central laws as well as notification of new laws in schedules areas as provided in schedule V of the constitution."

COMMENTS OF THE NATIONAL COMMISSION FOR SCHEDULED TRIBES ON THE OBSERVATION OF THE STANDING COMMITTEE

1.35 The Report of the Standing Committee was received in the National Commission for Scheduled Tribes from Ministry of Tribal Affairs for comments. The comments of the Commission on specific point relating to Governor's role in Scheduled Areas are recapitulated below:

- a) It is desirable that all Acts and laws should be reviewed for their adaption to the Scheduled Areas, but this is not practically feasible by the concerned departments. The Law Commission (under the Ministry of Law) should be entrusted this responsibility of review of existing Laws and Acts for adaption to Scheduled Areas in consultation with Ministry of Tribal affairs, State Govts., NCST, etc.
- b) Continuing demands for inclusion of new areas / communities would indicate that the political process in the country tends to increase the errors of inclusion. These are required to be reviewed objectively to at least eliminate such errors. Therefore, the task of review of Scheduled Areas/Tribes should be entrusted to the Scheduled Areas & Scheduled tribes Commission.
- c) Further to an observation by the President of India in a conference of Governors was held on 16th and 17th September,2008, that the Government could seek authoritative legal opinion to set ambiguity in the

exercise of power by Governors under the Fifth Schedule, the Ministry of Home Affairs had sought the opinion of the Attorney General of India on the issue whether the powers conferred upon the Governor under Art. 244 read with the Fifth Schedule are to be exercised on the aid and advice of the Council of Ministers of the State or are discretionary powers of the Governor. While forwarding a copy of the advice, the Ministry of Home Affairs has informed that all the Governors of the States concerned have been apprised of the opinion of the Ld. Attorney General of India and that the Ministry of Home Affairs has no proposal under consideration for review of the role and powers of the Governors in respect of Scheduled Areas. Nevertheless, by forwarding the opinion of the Attorney General to the Governors of the State, the Ministry of Home Affairs may have unwittingly stoked ambitions of executive power, which may have unpleasant repercussions on the relationship between Centre and States in a fractious polity which is increasingly apt to take positions based on political expediency rather than long-term public interest.

- a) While rendering his opinion, the Attorney General of India has referred to the historical background, various court judgments, including judgments delivered by Hon'ble Supreme Court of India, the proceedings of the Constituent Assembly and quotes from various books on the subject, particularly genesis of Scheduled Areas and the provisions relating to administration in those areas in the Government of India Act, 1935, and developments thereafter. The Attorney General of India has opined that the nature of powers of the Governor under the 5th Schedule is discretionary, as has been held by the Hon'ble Supreme Court of India. The Attorney General of India has further mentioned that Clause 2 of 5th Scheduled States that the executive power of the State is subject to the provisions of the 5th Schedule. Under Article 154, the executive power of the State is vested in the Governor. In so far exercise of executive powers of the State are concerned, the Governor has to exercise the same on the aid and advice of the Council of Ministers along with the Chief Minister. However, the exercise of powers by the Governor under the 5th Schedule is not co-terminus with exercise of the executive power of the State but it is within the discretion of the Governor.
- b) It may be noted that Clause 3 of the 5th Schedule is one such provision which seeks to make the Governor a vital link and an agency of the Centre at the State level. The Governor is expected to make an assessment of the administration of scheduled areas and report to the President so that the appropriate directions can be passed by the Centre in relation to the same, since under Clause 3 the executive power of the Union extends to the giving of directions to the State for administration of Scheduled areas. This is a clear indication that the framers of the Constitution had intended that overarching power to administer the Scheduled area would vest with the Centre. It is thus appropriate for the Ministry of Tribal Affairs which is the nodal Ministry in the Central Government, for matters relating to the Scheduled Tribes may, keeping in view the provisions under Clauses 3 and 5 of the 5th Schedule, issue

appropriate directions, w.r.t. administration of Scheduled Areas, in exercise of the Executive Power of the Union.

- c) However, it is difficult to endorse the contention of the Attorney General that the Constitution also envisages an executive power of the Governor acting in his own discretions in the Scheduled Areas (apart from the executive power of the Union by virtue of clause 3 of the Fifth Schedule) since SAs are not any excluded areas outside the territory of the States, and such an arrangement similar to that in clause 5 of the Fifth Schedule does not exist even for the Union Territories under the Constitution. It is certainly not good governance to create multiple power centres, since their mechanics will ultimately lead to paralysis of decision making through contradictory interpretations. Since the Scheduled Areas comprise significantly large extent of the country, the hypothesis is portent enough to cause administrative apprehension and turbulence in many States; and should logically be referred to the current Centre – State Commission so that experts and jurists can debate it extensively and design appropriate safeguards regarding the use of such discretionary authority (which has not been evidenced in the history of the working of the Indian Constitution in the last sixty years).

SECOND ADMINISTRATIVE REFORMS COMMISSION

1.36 The Second Administrative Reforms Commission set up by Department of Administrative Reforms & Public Grievances in August 2005 submitted 15 Reports during its tenure. The Fifteenth report on **STATE AND DISTRICT ADMINISTRATION** was submitted in April 2009. A List of Reports submitted by the Administrative Reforms Commission and information about decision taken by the Government on the consideration of the Reports, as available on the website of the Department of Administrative Reforms & Public Grievances is given at **ANNEXURE 1.X**. It was noted that 7th Report (Capacity Building for Conflict Resolution - Friction to Fusion), 8th Report (Combating Terrorism - The report is being handled by Ministry of Home Affairs), 10th Report (Refurbishing Personnel Administration - Scaling New Heights) and 15th Report (State and District Administration) Reports contain recommendations relating to Scheduled Tribes and Administration in Scheduled Areas in the country.

1.37 Since many of the recommendations made in various Reports of the ARC relating to Scheduled Tribes and Scheduled Areas had been accepted, the National Commission for Scheduled Tribes decided to know the manner in which decisions taken by the Government on the recommendations made in the above mentioned Reports have been implemented by the Governments of the Union and the concerned States. The Department of Administrative Reforms & Public Grievances which had set up the Administrative Reforms Commission and the Ministry of Home Affairs which was concerned with the recommendations relating to Scheduled Areas under 6th Schedule to the Constitution were requested to inform the method/ status of implementation of the recommendations which had been accepted by the Government. Copies of letters sent to Department of Administrative Reforms & Public Grievances and

Ministry of Home Affairs for providing information in respect of specific recommendations of the Reports are placed at **ANNEXURE 1.XI** The Chairperson, National Commission for Scheduled Tribes also discussed the matter with Department of Administrative Reforms & Public Grievances and the Ministry of Home Affairs in a Sitting on 21/02/2012.

1.38 The Secretary, Department of Administrative Reforms & Public Grievances attended the Sitting and informed that the role of Department of Administrative Reforms and Public Grievances is to monitor / expedite the implementation of the accepted recommendations of 2nd ARC by concerned Ministries / Departments. He further informed that the Second Administrative Reforms Commission (ARC) was constituted to suggest measures to achieve a proactive, responsive, accountable, sustainable and efficient administration for the country at all levels of the Government. The Secretary, further informed that the 15th Report of 2nd Administrative Reforms Commission (2nd ARC) titled 'State and District Administration' deals with issues of modernization, increased devolution of functions and powers, effective grievance handling system, people's participation, enhancing responsiveness, process simplification and delegation of power. The Commission was further informed that the Report contains 158 recommendations under 57 sub-headings. The meeting of the Core Group on Administrative Reforms (CGAR) headed by Cabinet Secretary on this Report took place on 08.12.2009 and submitted their views. The meeting of the Group of Ministers (GoM) on this report took place on 17.06.2010 to give final decision. Out of 158 recommendations, 134 recommendations were accepted and 24 recommendations were not found to be feasible. The Government's decisions on the said Report have been circulated to concerned Ministries / Departments and all States / UTs for necessary action and implementation. The following Central Ministries / Departments are involved in this Report alongwith all the State Governments -

- (a) Ministry of Home Affairs (MHA),
- (b) Inter- State Council Secretariat,
- (c) Ministry of Panchayati Raj,
- (d) Department of Personnel and Training,
- (e) Ministry of Urban Development,
- (f) Ministry of Rural Development,
- (g) Ministry of Finance,
- (h) Planning Commission and
- (i) Ministry of Development of North Eastern Region.

1.39 The Chapter 5 of the 15th Report is on 'Governance Issues in the North Eastern States. A Statement containing the Action Taken Reports (ATRs) received by the Department of AR & PG from Ministry of Home Affairs as well as from North Eastern States for Paras 5.3.6, 5.4.8, 5.5.5, 5.7.3, 5.8.6, 5.11.5, 5.12.6, 5.15. 5.15.2.5.5 and 5.15.3.9.3 of the 15th Report furnished by the Secretary, Department of Administrative Reforms & Public Grievances are given at **ANNEXURE 1.XII** These recommendations were stated to be still under implementation.

1.40 In addition, the 7th Report of 2nd ARC titled “Capacity Building For Conflict Resolution – Friction To Fusion” which has touched upon ‘ Issues Related to Scheduled Tribes’ Paragraph 7.10 of the Report tries to examine the background and the emerging facets of many conflicts that plague India. The Report contains 126 recommendations under 27 sections. CGAR considered the views of the concerned ministries/ departments in its meetings on 19th & 26th May, 2009. A meeting of the GoM to consider the recommendations was held on 8.12.2009. Out of the 126 recommendations GoM accepted 111 recommendations while 15 recommendations were not found feasible to be accepted, principal among them being the issue of directions by the Union Government to the States regarding the administration of Tribal Areas under Fifth Schedule to the Constitution. The Ministries concerned with this Report along with State Governments are:

- (i) Ministry of Panchayati Raj,
- (ii) Ministry of Tribal Affairs,
- (iii) Department of Land Resources,
- (iv) Ministry of Home Affairs,
- (v) Ministry of Environment & Forests and
- (vi) State Governments.

1.41 Four recommendations (numbers– 38, 39, 42 and 45) under Para 7.10 have been treated as ‘Implemented’. Most are still under implementation. The status of implementation on the said Para is given at **ANNEXURE 1.XIII**

1.42 The 10th Report titled ‘Refurbishing of Personnel Administration – The Scaling New Heights’ is relating to issues pertaining to the Civil Services. It makes recommendations regarding recruitment, training, enhancing performance and ensuring accountability, placement of civil servants. The 10th Report contains 97 recommendations under 22 sub-headings. This Report was considered by CGAR in its meeting held on 27th July, 2009 and 27th October, 2009. It was stated that the meeting of GoM was yet to be held and therefore, the government decisions on this Report were stated to be still pending.

1.43 The Deputy Secretary (NE Division), Ministry of Home Affairs, who attended the Sitting since the Secretary, Ministry of Home Affairs could not attend due to his engagement in the Meeting with the Parliamentary Committee. He further informed that Chapter-5 of the 15th Report relates to GOVERNANCE ISSUES IN NORTH-EASTERN STATES and the Commission made several recommendations relating to the subject matter. He submitted a Statement giving Action Taken Report on the Accepted Recommendations of the 15th Report of 2nd Administrative Reforms Commission – "State And District Administration", which is placed at **ANNEXURE 1.XIV**. In respect of some of the recommendations it was mentioned that the recommendations were referred to the concerned Ministry/ State Government and action was being taken by them. Since the Report was submitted in April 2009, this type of information did not

provide the actual status about implementation of the recommendations. The Commission advised that statement regarding upto date status about implementation and manner of implementation of the recommendations may be furnished to the Commission urgently. The Deputy Secretary, Ministry of Home Affairs assured that the revised Statement will be furnished to the Commission shortly.

1.44 It would be evident that mere communication of the recommendation to the concerned State Governments will not ensure implementation of even those suggestions which are considered desirable. The special requirement of governance of Scheduled Areas cannot be mortgaged to administrative lethargy or political sensibilities, because the special Constitutional safeguards have been provided only to overcome such tendency of the governance system. Elsewhere (para 1.49) the NCST have recommended the issue of guideline for implementing a Tribal Charter of Rights; and the Commission recommend that administrative reference also be viewed in similar light.

1.45 The Commission has noted that the Government has not taken any decision on the 10th Report of Administrative Reforms Commission- "Refurbishing of Personnel Administration, Scaling New Heights" (November, 2008)- which has important recommendations relating to the Scheduled Tribes. The NCST has noted that general reluctance on the part of the officers and staff for posting in Scheduled Areas/ Tribal Areas on account of lack of housing, medical and education facilities has been exponentially compounded by the general climate of permissiveness fostered by rampant political interference and collusive abandonment of responsibilities in search of greener pastures. **In order to address these problems, the Commission is of the view that Government should formulate specific regulations in respect of Scheduled Areas for personnel management with the formation of a State level Civil Services Authority for Scheduled Areas, which would deal with matters of assignment of functional domains to officers, preparing a panel for posting of officers, fixing tenures for senior posts etc., in line with the Central Civil Services Authority proposed by the ARC. In order to improve personnel management in respect of all category of employees, it is necessary to fix a minimum tenure for various cadre posts, which be filled on the basis of merit, suitability and experience, prescribe norms and guidelines for transfers and posting to maintain continuity and predictability in career advancement and acquisition of necessary skills and experiences as well as promotion of good governance. The normal tenure of all public servants may not be less than two years and Transfers before the specified tenure should only be for valid reasons to be recorded in writing. These recommendations are in accordance with the observations contained in para 8.5.11, 8.5.12 and 8.5.14 of the 10th Report. Department of Personnel and Training may consider the above views of the Commission and issue detailed guidelines for improvement of personnel policies and systems in Tribal Areas in the interest of peace and good governance under intimation to the Commission.**

REVIEW OF THE WORKING OF CONSTITUTIONAL POWERS OF THE GOVERNORS SINCE THE INCEPTION OF THE CONSTITUTION

1.46 It has been mentioned earlier that separate laws /systems for Tribal Areas had a long history, in India beginning with the provision in the Scheduled Areas Act, 1874, to extend general laws with modification to Scheduled Districts. The Government of India Act, 1919 divided Scheduled Districts into “Excluded Areas” and “Partially Excluded Areas”. Subsequently, the Government of India Act, 1935 empowered Governors to make regulations with the approval of the Governor General. This arrangement has been incorporated in and as Schedule V and Schedule VI to the Constitution for specific adaption of general laws to Scheduled Area/Tribes; but its effectiveness appears to have paled, since, judging from the infrequent resort to the relevant provisions despite a plethora of Central/State Legislation impacting Scheduled Areas/Tribes. To this end, the Commission, vide NCST letter dated 23-11-2011 and 30-12-2011, had sought information from Schedule V and Schedule VI States on three issues viz:

- a. The instances in which Central/State legislation(s) had been adapted in its application to Scheduled Areas/Tribal Areas,
- b. Regulations promulgated for peace and good governance in different States, which have the force of law; and
- c. Experience of the functioning of advisory mechanisms (Tribes Advisory Council)

1.47 Since the responses received from the State Governments in the matter had revealed that the State Governments were experiencing some difficulties in appreciating the requirements conveyed by the Commission, a meeting was convened by the Secretary, NCST on 11/01/2012 with the MHA, MTA and the Secretaries in charge of Tribal Development/Welfare in the States having Scheduled Areas to facilitate clearer understanding of the requirements of the Commission, ascertain the status of implementation of the provisions under Fifth and Sixth Schedule to the Constitution for adaption of laws applicable to Scheduled Areas/Tribes and seek ideas for the way forward.

1.48 It was noted in the meeting that possibly because of infrequent resort to the Constitutional scheme, the State Governments had not submitted / presented the requisite information/ details, as requested vide NCST letter dated 23-11-2011 and 30-12-2011. The factual position in the matter was also not pre-confirmed from the Governor’s Secretariat and the Law Deptt. by most of the States, which was necessary for the purpose of ensuring reliability of the information being furnished in the Commission’s Report to the President. Besides, the MHA and the MTA were requested to furnish the requisite information in respect of Schedule VI and Schedule V States respectively, while Schedule V and Schedule VI States were requested vide letter dated 17/01/2012 to submit the requisite information after re-confirming facts in the matter from the Governor’s Secretariat/ Law Department of the respective States. The State Governments were also requested to communicate the Rules prescribed for the conduct of meetings of the Tribes Advisory Council , the type of issues included in the agenda and the nature of the recommendations of the TAC and its

effectiveness in addressing concerns pertaining to the welfare and advancement of Scheduled Tribes.

1.49 The position submitted by the MTA, MHA, Schedule V and Schedule VI States is placed at **ANNEXURE 1.XV, ANNEXURE 1.XVI ANNEXURE 1.XVII** and **ANNEXURE 1.XVIII** respectively. It is revealed that no instance regarding use of any of the discretionary powers of the Governor regarding applicability or adaptation of an Act of Parliament or State legislation as provided under para v of the Fifth Schedule and para 12,12A, 12AA and 12B of the Sixth Schedule has been reported. Further, the Regulations, promulgated by Governors of the States, had been mainly restricted to land transfer alienation, restrictions on money landing and reservation of local STs in recruitment at local level etc. Specific regulations necessary for peace and good governance in important areas like social rights, educational, environmental, mineral and cultural rights, compensatory relocation/ exemption from acquisition of tribal lands for public purposes, protection of customary laws and inheritance development strategy, (which are international best practices emerging from ILO Conventions) etc. had not been promulgated.

1.50 Regarding the functioning of the Tribes Advisory Council, it emerged that, in general its meetings were an annual/ bi-annual features; the nature of issues largely pertain to local development related matters, reservation of local STs in recruitment at local level and general issues. The Rules prescribed for the conduct of meeting did not specify the type of issues included in the agenda and the nature of the recommendations of the TAC and its effectiveness in addressing concerns pertaining to the welfare and advancement of Scheduled Tribes. Detailed proceedings of the meeting held on 11/01/2012 is placed at **ANNEXURE 1.XIX**

1.51 It would be apparent from the replies submitted by the States that wherever specific attention has been paid in the State legislative process to the needs of tribal areas/ Communities, it has taken the form of incorporation of a specific exclusion provision in the "extent" clause of the legislation, or special provisions relating to them. This may be because the Constitutional prescription in Schedules V & VI of adaptation of laws, subsequent to their enactment, has been considered too cumbersome or tedious; or, it may well be because the framework established for the Advisory Councils could not cultivate the regular and purposive introspection necessary for triggering of the Constitutional safeguards. Quite evidently **robust "pre-facto" mechanism have to be grafted to Constitutional provisions which would ensure requisite attention to tribal concerns- foremost of which would be the mandatory inclusion of a separate chapter on Special Provisions for Scheduled Areas/ Scheduled Tribes in every Central or State Legislation affecting the habitat tribals' property rights and enjoyment of lands occupied, the religion, customs and culture of these people and traditional relationship with their environment (as obligated under UN Conventions). Beside establishing Advisory Councils for all States with Scheduled Tribe Population, the Advisory Mechanism should be restructured to ensure meaningful deliberation on the above issues with purposefulness and alacrity. To this end, the Union Government should issue directions under the Constitution**

providing a more active role for the Governor of the State in the affairs of the Advisory Councils, to require him to preside over its meetings (and also afford "arms-length" distance from the executive arm of the State Government in its deliberations). Further, it should direct that its membership will not be limited to political functionaries alone, who are perhaps constrained in legislative introspection by their political applications/ obligations; and adequate representation in the Councils be given to Social Scientist, Anthropologists and persons with administrative experience. The review of legislative enactments in the interregnum should also be mandated as a "standing" item of the Council's agenda for discussion, together with issues of Governance, administration of justice and creation/ provision of infrastructure/ services under Central aegis-so that local development matters do not crowd out others with long term consequences for the tribal community.

SUGGESTIONS FOR AMENDMENT OF CONSTITUTION

1.52 From the foregoing it is also apparent that the Constitutional provisions in the Vth/ VIth Schedule require to be reviewed and refreshed in the light of past experience, international best practices and necessary administrative reforms. It appears high time that a comprehensive, universal Charter of Rights of Tribal communities was incorporated into the Fifth Schedule (also declaring tribal areas to be Scheduled Areas), incorporating the best practices emerging from the ILO Conventions as well as various bodies like the Administrative Reforms Commission, etc.

- (i) **Protection of religious, social, cultural and educational rights**
- (ii) **Sustaining traditional means of livelihood and special protection regarding employment**
- (iii) **Protection of customary laws and inheritance rights**
- (iv) **Protection of habitat and environment**
- (v) **Protection of land (surface and sub-surface) rights**
- (vi) **Protection from removal from occupied lands for public purposes**
- (vii) **Right to Relocation from occupied lands with appropriate compensation/ guarantees**
- (viii) **Protection of traditional community institutions**
- (ix) **Strengthening of Administrative mechanisms for tribal areas (under Union oversight)**
- (x) **Development and Planning for Scheduled Tribes (refurbished development strategy predicated on primary financial and administrative responsibility of the Union Government)**

1.53 In order that this Charter may not remain a dead letter, the Union Government should use its discretionary powers under the existing Schedule to directing promulgation in the form of regulations for peace and good government of Schedule/ Tribal Areas. The proposed regulations may ensure (i) adaptation of Rules, Regulations and Instructions for reorienting administration in Scheduled Areas to make it clean, transparent, sensitive and responsive administration (ii) maintenance of transparency in appointments postings, and transfers of officers and staff in tribal and Scheduled Areas, and (iii) overseeing

implementation of rapid/ upgradation of infrastructure and services in Scheduled areas

1.54 Considering the special provisions of the Constitution relating to Schedule V and Schedule VI in relation to the Scheduled Tribes and Scheduled Areas, opinion of the Attorney General regarding Governors' role in Scheduled Areas and the inadequacy in formulation and implementation of Tribal Sub-plan both at the State as well as at the Centre, the National Commission for Scheduled Tribes makes the **following recommendations** in relation to good governance in tribal development administration and administration in Scheduled Areas.

- (i) **Robust "pre-facto" mechanism have to be grafted to Constitutional provisions which would ensure requisite attention to tribal concerns- foremost of which would be the mandatory inclusion of a separate chapter on Special Provisions for Scheduled Areas/ Scheduled Tribes in every Central or State Legislation affecting the habitat tribals' property rights and enjoyment of lands occupied, the religion, customs and culture of these people and traditional relationship with their environment (as obligated under UN Conventions)**
- (ii) **There is a need to evolve a mechanism headed by Governor in the States having Scheduled Areas under Fifth and Sixth Schedule, to monitor and ensure implementation, in letter and spirit, the provisions contained in Fifth and Sixth Schedule to the Constitution, so that Governor may play an oversight role in the matter.**
- (iii) **The Tribes Advisory Councils (TAC) for all States with Scheduled Areas as well as tribal areas may be headed by the Governor as Chairperson of the Council, while Secretariat support may continue to be provided by the Tribal Development Deptt. of the State, till requisite machinery is created in the Governor's Sectt. The Chief Minister of the State may act as Vice Chairperson of the TAC. The TAC should be reconstituted regularly as per the provisions and the meetings of the TAC should be held at least twice in a year or as expedient, as provided in the Constitution.**
- (iv) **The Governors should promulgate detailed regulations for peace and good governance as suggested in para 1.51 above.**
- (v) **It is desirable that all Acts and laws should be reviewed for their adaption to the Scheduled Areas, but this is not practically feasible by the concerned departments. The Law Commission (under the Ministry of Law) should be entrusted this responsibility of review of existing Laws affecting property rights, succession, marriage, land holdings, indebtedness, constitution and management of public/administrative services for adaption to Scheduled Areas in consultation with Ministry of Tribal affairs, State Govts., NCST, etc. Any weak areas in schemes / policies for Tribal areas should be got remedied either directly or indirectly by MTA**

- (vi) The strategy for all programmes, particularly the major missions/schemes of the Ministries/Deptts, should comprise sub-Chapters for accelerated development of the Scheduled Area. In particular, it is necessary to have specific Tribal Sub Plan (TSP) component in all the major missions/ schemes/ programmes of all Ministries/Deptts to have a clear focus on formulation of schemes/programmes concerning the STs and their effective implementation and monitoring. The TSP component should not be per population share but according to "problem-share"; and "need-based" taking into account the extent of deprivation, or even more than that to make up the backwardness/ negligence experienced over the years. Unless the earmarking of TSP outlays exceeds the relative share of incidence of residual problems eg. drinking water, primary health care and education, nutritional support, unemployment etc., the relative gap in physical quality of life is likely to persist.
- (vii) The National Tribes Advisory Council should be established with clear definition of scope and terms & condition. It should also co-ordinate the governance of Scheduled Areas.
- (viii) The Ministry of Tribal Affairs should prescribe a uniform format for preparation and submission of the reports by the Governors in respect of 5th Schedule States with particular reference to its contents. The Ministry of Tribal Affairs should also issue the following instructions to the State Governments to the effect that:
- (a) The Report relating to the financial year should reach the Govt. of India (Ministry of Tribal Affairs) within a period of six months of closing of the financial year.
- (b) The reports should contain a detailed note on the implementation of the constitutional safeguards for promotion of educational and socio-economic development of the Scheduled Tribes. These reports should also contain a brief on problems relating to law and order, naxal movements and tribal unrest. The reports should also make a mention about Central and State laws enacted in the State during the report period, and action taken regarding extension/applicability of those laws to Scheduled Areas in the light of the powers of the President, Governor under Fifth and Sixth Schedule. Working of PESA Act in the State should also be integral part of the Governor's report.
- (c) Considering the comprehensive nature of the task, it is not pragmatic to expect the desired report to be compiled by the Governor. Every department in the State should submit a report about the schemes/policies being run by them to the Tribal Welfare department of the State, which in turn should compile these reports to identify the strong areas and weak points for presentation to the Governor.

- (d) In case the reports do not contain the observations of TAC, they may be sent back to the State Governments advising them to apprise the Central Government of the observations of the TACs and action taken on the observations of TAC.
- (e) The reports should be thoroughly examined in the Ministry of Tribal Affairs on the basis of the material contained in them and the State Governments should be apprised of the assessment to enable them to take necessary follow-up action.
- (g) A copy of the Governor's Report should be made available to the National Commission for Scheduled Tribes immediately after receipt of the Report in the Ministry to enable the Commission to examine the same and offer its comments thereon.
- (h) The States, which have TACs, should ensure that TACs are constituted/ reconstituted timely and that their meetings are held regularly as per Constitutional provisions. The agenda of the TAC should inevitably include the subject of adaptation of Central or State laws enacted during the interregnum of its meetings so that the same are not routinely extended to Scheduled Areas/Tribes. A similar mechanism (like TAC) should be established for Schedule VI States also.
- (ix) Notwithstanding the specific provisions in the Fifth and the Sixth Schedule, the legislative proposals mooted by the Union and the State Governments especially those relating to Tribal Rights Charter should have a separate Chapter "Applicability to Scheduled Tribes and the Scheduled Areas (under Fifth and Sixth Schedule)" This would compulsorily require consultations with all the stake holders, including States having Scheduled Areas under Fifth and Sixth Schedule, Ministry of Tribal Affairs and the National Commission for Scheduled Tribes also and the question relating to adaptation of any Act to Scheduled Tribes and the Scheduled Areas may not be always necessary.

CHAPTER 2

REGULATIONS REGARDING PEACE AND GOOD GOVERNANCE

INTRODUCTION

The Constitution of India seeks to secure for all its citizens, among other things, social and economic justice, equality of status and opportunity and assures the dignity of the individual. The Constitution further provides social, economic and political guarantees to the disadvantaged sections of people. Some provisions are specific to both Scheduled Castes and Scheduled Tribes and some are specific to only Scheduled Tribes. These special provisions aim at safeguarding and promoting the rights of Scheduled Tribes along with development of tribal areas. The Constitutional provisions have also authorized the Government of India to issue guidelines and directions on these matters to the States; and also release Grants-in-aid in various forms and for various purposes depending upon the nature of schemes and measures to be taken up by the State Governments.

2.2 In the preceding Chapter, the Commission has recommended that a comprehensive, universal Charter of Rights of Tribal communities be incorporated into the Fifth Schedule (simultaneously declaring all tribal areas to be Scheduled Areas), incorporating the best practices emerging from the ILO Conventions as well as recommendations made by various bodies like the Administrative Reforms Commission, etc. In order that this Charter may not remain a dead letter, the Union Government should use its discretionary powers under the (existing) Fifth Schedule to direct the promulgation of the regulations for peace and good government of Scheduled/ tribal areas on the following subjects:

- (i) Protection of religious, social, cultural and educational rights
- (ii) Sustaining traditional means of livelihood and special protection regarding employment
- (iii) Protection of customary laws and inheritance rights
- (iv) Protection of habitat and environment
- (v) Protection of land (surface and sub-surface) rights
- (vi) Protection from removal from occupied lands for public purposes
- (vii) Right to Relocation from occupied lands with appropriate compensation/ guarantees
- (viii) Protection of traditional community institutions
- (ix) Strengthening of Administrative mechanisms for tribal areas (under Union oversight)
- (x) Development and Planning for Scheduled Tribes (refurbished development strategy predicated on primary financial and administrative responsibility of the Union Government)

2.3 The proposed regulations should ensure (i) adaptation of existing laws, Rules, and instructions for reorienting governance in Scheduled Areas to make it simple, transparent, sensitive and responsive (ii) cleaner administration through transparency in appointments, postings and transfers of officers and

staff in tribal and Scheduled Areas, and (iii) implementation of rapid upgradation of infrastructure and services in Scheduled areas. In its previous Annual Reports, the Commission has made observations/ recommendations on related issues which are re-capitulated below for contextual reference.

IDENTIFICATION OF SCHEDULED AREAS AND SCHEDULED TRIBES

2.4. The increasing Competition for political power, resources and opportunities in the Indian State has witnessed strident demand from the relatively more developed sections of society in different parts of the country to be declared as Scheduled Tribes, defying earlier norms for such identification viz; backwardness and isolation. These demands are stoked by political parties in order to derive political advantage without care for their deleterious impact on the rights of tribal communities as well as erosion of Constitutional safeguards. **Commission recommends that in the context of continuing demand for inclusion of new areas /communities, there is a need to review the list of Scheduled Areas/ Scheduled Tribes objectively in a time-bound manner. Appropriately, therefore, the Scheduled Area & Scheduled Tribes Commission should be constituted every 10 years to look into such demands under Article 339 of the Constitution. SA & ST Commission should be entrusted the review of Scheduled Areas, Scheduled Tribes list and Laws and rules relating to administrative and financial structure.**

2.5. **De-scheduling of certain ST communities as a whole would not be in the interests of still poor and backward families among those Scheduled Tribe communities. The Government may, however, devise measures to ensure that share of the weakest amongst the Scheduled Tribes in the development schemes and economic upliftment programmes are not cornered by those members of Scheduled Tribes who have already availed the benefits and have risen to the average of the society. Moreover, the criteria for identifying a community as Scheduled Tribes as adopted so far needs to be followed strictly so that only deserving communities and economically weaker among those deserving communities are able to reap the benefits.**

2.6. **Involuntary relocation of tribal communities because of calamity, insurgency, and large development projects has also entailed forfeiture of Constitutional Safeguards because their tribal status is not legally maintainable. There is need to advise the State Governments that:-**

- (a) **they should issue instructions to provide that the families and children of the in-voluntarily migrated ST parents will continue to enjoy the same status in the State where they are resettled in case the community/ communities to which they belong has already been notified as Scheduled Tribe/ Scheduled Tribes in that State, and avail the benefits admissible to the Scheduled Tribes in that State.**
- (b) **In case the community/ communities to which the resettled tribals belong has/ have not been notified as Scheduled Tribes in the State of resettlement, they (i.e. the State Govts.) should immediately initiate**

action to get that/ those community/ communities notified as Scheduled Tribe/ Scheduled Tribes effective from the date of resettlement; and also ensure that pending the issue of said notification, the resettled tribals are allowed to avail the benefits admissible to Scheduled Tribes in that State.

(i) Protection of religious, social, cultural and educational rights

2.7. Whilst reservation for Scheduled Tribes in educational institutions and public employment is not restricted by religious beliefs, and there are other safeguards for Legislative and religious minorities also in the Indian Constitution, specific rights of tribal communities need to be enumerated to focus legislative/ administrative treatment.

(A). IMPLEMENTATION/ AMENDMENT OF SCs & STs (POA), ACT, 1989

2.8. Despite greater interaction between Communities and increased social acceptance of communal diversity, it has not been possible to eliminate social prejudice against backward communities. The experience relating to the implementation of the Scheduled Castes & Scheduled Tribes (Prevention of Atrocities), Act, 1989 revealed that in many cases it took several years to dispose the cases which, possibly, leading to acquittal in large number of cases. The Consumer Protection Act, 1986 (Section 3A) provided for time-bound disposal of the cases by the Consumer Forums (within 3 to 5 months). The National Commission for Women had also recommended that the Courts may dispose the cases relating to rape in a time-bound manner (within 6 months). It was felt that since the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is a special Act for protection of the Scheduled Tribes, similar provision should be incorporated in this Act also. While the provision for setting up Special Courts in the Act was aimed at speedy disposal of cases registered under the Act, experience so far had belied this expectation. **The Commission, therefore, suggested that the cases registered under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 should be disposed by the Special Courts within 6 months. To meet this objective, the Act could also be amended to provide for setting up exclusive Special Courts (instead of designating a Session Court as a Special Court) for trial of cases under this Act. (The recommendation of the Commission was forwarded to the Ministry of Social Justice and Empowerment vide letter, dated 16/07/2009).**

2.9. A proposal of Ministry of Social Justice & Empowerment inter-alia, sought amendment in Rule 7 of SCs and STs (Prevention of Atrocities) Rules, 1995 to insert clause 7-A to obtain timely information in respect of the cases of atrocities, especially pertaining to heinous offences. The proposal mentioned that whenever a FIR is registered under clause (i), (iv) or (v) of sub section (2) of section 3, the concerned District Magistrate shall submit a preliminary report in the matter, within 4 days, to the State Govt, MHA, MoSJ&E/MTA and NCSC/NCST as per the case (whether SC or ST). Proposed amendment further mentioned that State Govt. shall submit a detailed report within 45 days to the Ministries and the concerned National Commission. The Commission

noted that at present, there is no definition of heinous offences in the Indian Penal Code. It is also not mandatory under the Criminal Procedure Code to register an FIR immediately when a complaint is made. **The Commission has also observed that a large number of atrocities against Scheduled Tribes primarily pertain to grabbing of tribal land and crimes against (their) women folk. Therefore, it is advisable to report cases registered under sub-clause (iii), (v), (xi) or (xii) of sub-section (1) of Section 3 too for monitoring purposes. The Commission also feels that there should be prompt reporting of all such complaints made to the police, without awaiting the registration of an FIR.**

(B) DEVELOPMENT OF PARTICULARLY VULNERABLE TRIBAL GROUPS (PTGs)

2.10. The policy should aim at the development of the most vulnerable PTGs, while protecting them from cross infection and exploitation by the outside world. They should be regularly provided with food items and health services beside special schools for education of their children. The following measures may also be suitably incorporated in the policy :

- (a) The number of regulated contact points may be increased suitably.
- (b) Instead of keeping PTGs entirely dependent on forest for livelihood, they may also be introduced to settled agriculture (by supplying them improved seeds, agricultural kits, plough bullocks, bullock carts etc.), horticulture and animal husbandry (by supplying them crossbreed cows, she buffaloes, sheep/piggery units etc. and providing suitable training therefor).
- (c) Efforts may also be made to provide education and play way/sports activities to children of PTG community for which the staff and officers may have to make special efforts to make sporting contacts with them and persuade them to send their children to the special residential schools where every need of the children should be fulfilled free of cost. This may also help in checking the trend of diminishing population. This would certainly need careful selection of the staff and giving them suitable training for enabling them to have peaceful and fruitful relations with the PTGs. As and when possible, local eligible and suitably trained youth/women should be appointed as Teacher in the special schools.
- (d) The Primary Health Centres (PHCs) are generally located far away from the inhabitations of sparse PTG population and, therefore, they are not in a position to avail of medical facilities in the time of emergency. In order to provide emergency and regular treatment facilities, one Medical Mobile Van equipped with primary treatment facilities and medicines along with minor surgical equipments should be arranged at each contact point

for the PTGs.

- (e) The local administration may be advised to arrange free distribution of food and consumer items available under PDS to needy persons.

2.11 In order to increase the attendance and also to decrease the drop-out rates of PTGs students in the schools, one Primary school for each village may be opened in each PTG village/hamlet.

2.12 One mini deep tube well for each PTG village/hamlet may be installed to make safe drinking water available to the PTGs throughout the year. In areas where there is no supply of electricity, hand pumps may be installed. The Commission further recommends that till such time the facilities of tube well/hand pumps are provided in the PTGs villages/hamlets, arrangements should be made for disinfecting of drinking wells during rainy seasons.

2.13 In order to provide emergency and regular treatment facilities to the PTGs, one Medical Mobile Van equipped with primary treatment facilities and medicines along with minor surgical equipments should be arranged for each block in the interior areas. The State Govts. having PTGs should also make special arrangements to provide nutrition-rich items like ragi, minor millets, tubers etc. to lactating and expectant mothers to combat malnutrition.

2.14 The State Govts. should arrange distribution of consumer items available under PDS through mobile vans in respect of such PTGs who live in inaccessible forest/hilly areas where PDS outlets within reasonable distance are not available. The Commission further recommends that the State Govt. should make arrangements for organizing weekly markets (haat bazaar) where PTGs could come, sell the products crafted by them and purchase items of their needs.

2.15 The State Govts. are advised to provide financial assistance to the PTGs families to enable them to construct houses as per their needs.

2.16 Almost all the PTG families are BPL families and, therefore, there is an imperative need to involve them in income generating activities. Efforts should be made to encourage them to take to settled agriculture. They should also be provided training in cane and bamboo craft, carpentry, LMV driving, tailoring and coir craft to generate self-employment among them.

2.17 The State Governments which have PTGs should be advised to formulate schemes for recruitment of candidates belonging to PTGs in Group C & D posts of Teaching category in various grades without subjecting them to the recruitment process provided they possess the minimum qualification prescribed for the posts

(C) EDUCATION

(I) Primary and Secondary Education

2.18 Educational standards and pattern of examination should be comparable throughout the country so that ST students who generally join local Govt. schools are not put to disadvantage and are able to compete for admissions in institutes for higher studies.

2.19 The National Council of Educational Research and Training (N.C.E.R.T.) and State Council of Educational Research and Training (S.C.E.R.T), Non-Governmental Organisations (NGOs) should take up preparation and induction of bi-lingual text books in first two standards wherever that particular dialect is the mother tongue of a sizeable population. N.C.E.R.T should be made responsible for the introduction of such text books in all the States and Union Territories of the country at least by the end of next plan period.

2.20 As each region of tribal areas follow their own ritual and agricultural calendar, the concerned tribal research institutes should prepare teaching calendars either region-wise or tribe-wise and furnish the same to the education department for taking necessary action.

2.21 Mid-Day Meal programmes in tribal areas should take into account the locally available food material and culinary habits of the local tribals, besides ensuring that food items served under the programme are hygienic and contain necessary nutrients.

2.22 Teaching-aids should be prepared based on local culture and environment. Local Tribal Folk dances, and Music-both Vocal and Instrumental, should be included in the curricular and co-curricular activities.

2.23 Most of primary schools in tribal areas are run by a single teacher. In case he/ she takes leave due to illness or for any other domestic reason, there is no teacher left in the school with the result the education of the children suffers. There is therefore, an urgent need to post one more teacher in all the single teacher schools in tribal areas. The State Govts./UT Administrations should fill up vacancies of teachers by evolving schemes of giving various incentives; such as decent accommodation, medical facilities etc. to teachers and also by ensuring that the posts of teachers in schools in tribal areas are filled, as far as possible, by appointing teachers from amongst local tribal candidates.

2.24 The basic reason behind the drop out of ST students can be attributed to the poor economic condition of the family and this situation compels the tribals to utilize their children as an economic unit to bring some income to the family. It is also necessary that some National Scheme of economic incentives are given to such parents of the children whose income is below the poverty line with a view to wean them away

from the compulsion of using their children as economic support instead of sending them to schools.

2.25 Another reason for dropouts is the repeated failure of tribal children in a class, which may be reduced by identifying weak and below average tribal students and making arrangements for providing them remedial instructions/ coaching on the holidays or at night by providing some cash incentives to the teachers. Additional incentives in the form of cash award should also be granted to each student having more than 75% attendance/ work done in the school note books. Besides, those students who secure 60% or above marks in the examinations should also be given cash awards.

2.26 There is a need to provide attractive incentives to the parents of the girls for sending them to the schools, apart from the existing incentives which are being given to the ST children in the form of free textbooks, uniforms, stationery, school bags, cooked food through mid-day-meal Scheme etc.

(II) Higher Education

2.27 The State Governments which have schemes for providing scholarships to tribal students at pre-matric levels should abolish the income ceiling in respect of the parents of all the tribal children studying in Classes from I to X.

2.28 The Central assistance for cooked mid-day meal during summer vacations to school children in drought affected areas should be extended to the children in tribal areas as about 60% or more ST children are undernourished in the States like Gujarat, Himachal Pradesh, Karnataka, Kerala, Andhra Pradesh, Madhya Pradesh and Maharashtra.

2.29 One of the major constraints in the dissemination of education among STs is that their parents resort to seasonal migration to other places in search of livelihood during the period from April to middle of June and this is the period for the school examinations. When the parents move out of their habitations to other places, they have to take their children along with them leading to dropouts. State Govts. may be advised to formulate suitable schemes for boarding and lodging of children of those ST families who decide to temporarily migrate to other places in search of their livelihood. Alternatively, special arrangements be made for conducting special examinations of the ST children when they return to their original habitations from the places of their temporary migration.

2.30 The income ceiling in respect of the parents of the students for the purpose of grant of the Post-Matric Scholarship may be raised.

2.31 The tribal students who are day-scholars but who reside in rented accommodation due to non-availability of hostel accommodation

should be treated on par with hostellers and the amount of scholarship in their case also should not be less than to that of hostellers.

2.32 The disbursement of Post-Matric Scholarship in most of the States is being delayed due to non release of funds both from the Govt. of India (over and above the committed liability of the State Govts.) and the State Govts. Ministry of Tribal Affairs should also ensure timely release of the funds to the State Govts. The State Governments should release their share of funds to the district authorities (upto the committed liability) in time to ensure timely disbursement of these scholarships and explore the possibilities of disbursing the scholarship money to the students through their Bank Accounts.

2.33 There should be 8.2% (proportion of STs to the total population of the country as per 2001 Census) reservation for Scheduled Tribes in awarding fellowships and/or in granting scholarships in the schools, colleges, Universities, Educational and Technical Institutions etc. The Ministry of HRD and the Ministry of Minority Affairs should consider suitable amendment in the Central Educational Institutions (Reservation in Admission) Act, 2006 to ensure that reservation for STs is made applicable in admissions to those Govt. run educational institutions also which have been granted minority status. The scope of reservation should also be extended to such educational institutions, hospitals etc. which though not funded by the Government had received/continue to receive concessions from the Government in respect of acquisition of lands, buildings electricity, water, provision of public transport etc.

2.34 Scheme of Mid -day meals should be extended up to high-school level at least for ST girl students. This will provide huge relief to the family of the ST girl students and it will improve enrolment of ST girl students and also reduce their dropout.

2.35 In tribal areas, the capacity of hostels particularly for ST girls is much less than the requirement and this is one of the major reasons for less enrolment and increased dropout of ST girl students. There is an urgent need of construction of more hostels for ST girls. The number of Ashram Schools, Kasturba Gandhi Balika Vidyalyas in ST concentration blocks should be increased.

2.36 There is a genuine need to increase the number of Government. schools of excellence/ Central Schools/ Eklavaya Modal Residential Schools (EMRS) in States/UTs which have sizeable number of ST population. Norms of opening of EMRS should be urgently reviewed.

(ii) Sustaining traditional means of livelihood and special protection regarding employment

(A) MGNREGA

2.37 In a rapidly changing development perspective which relies heavily on private initiatives and investments, the marginal sections of

the economy need specific attention and efforts to sustain employment and incomes. The higher participation of the STs among the beneficiaries of the MGNREGA scheme is the indication of the fact that this section of the society needs more attention in this regard. There is need to incorporate a TSP component in the implementation of the Scheme in order to meet the objective of inclusive growth, which should not be based merely on the population share, but rather on the extent of deprivation. Considering the fragile economic condition of the tribals, and their poor agricultural practices including single crop culture, rather than relying on capricious demand estimates, it is desirable to ensure a minimum 100 days of employment to all tribal families as per the latest census in the tribal areas; and earmark sufficient funds, under the TSP component of the Scheme to ensure adequate livelihood opportunity in these areas. The Scheme should be designed for providing sustainable rural livelihood in respect of STs, strengthening its convergence with use of natural resources, productivity, human development, etc. It should also be ensured that the focus on the unemployed poor is not diluted by enlarging coverage to other groups in the guise of promoting skill development graduating to semi-skilled to skilled work, etc.

2.38 Keeping in view the lack of managerial capacity in the Panchayats, the MGNREGA Scheme should develop a need based approach/plan of implementation based upon pro-active assessment of the demand for work in tribal areas. The demand for the work should be properly anticipated through local surveys in ST areas and villages having ST population, taking into account all factors such as availability of work on account of industries, agriculture and other seasonal activity, schooling of children, wage level of households, etc. The communication with tribals should also be strengthened to build up their capacity to articulate and demand rights.

2.39 The limit of providing maximum 100 days employment to a household in a given financial year under MGNREGA should be removed, as in tribal areas agriculture work is available only for a period of 2-3 months during the year. If need be, the concerned Ministry may bring amendments in the Act to this effect/ necessary adaption may be made by State Governors using the powers given in the Fifth Schedule.

2.40 The Commission has noted that requisite entries relating to the work demanded by the MGNREGA Job Card Holders and the details of work done by him/ her and the amount paid/ due to be paid to him/ her are not made in the Job Cards as also in the Rozgar Registers maintained in the Gram Panchayats. In most of the cases pages in the Job Cards were blank while Rozgar Registers carried some entries but not all the entries corresponding to the entries in the concerned Muster Rolls. Consequently, the Job Card Holder has no Certificate about any work having been done by him/ her in a particular week/ fortnight and therefore, in absence of the Certificate, he/ she may not be able to claim payment of wages for the work done. In order to ensure effective implementation of the Act it is necessary to maintain transparency in

every field of action envisaged under the Act. It has also been noted with concern that adequate mandays of work have not been generated under several Gram Panchayats. This is despite the fact that each Panchayat is also assisted by an Assistant Secretary or the Village Rozgar Sahayak specifically in matters relating to MGNREGA. This indicates lack of action on the part of Gram Panchayat and the Panchayat Secretariat in anticipating and creation of the works required for development of the villages and for creation of employment/ man days in the villages for the needy wage earners/ Job Card holders. This requires immediate amendment to the MIS under MGNREGA.

2.41 MoRD may consider amending MGNREGA for partial reimbursement (out of Gol funds) of payment of unemployment allowance, while instituting controls to minimize chances of persons drawing unemployment allowance. This is required to be implemented in the tribal districts on priority as the tribals are generally illiterate, don't know their rights and are easily victimized. In the present scenario, since State Govts. have to provide funds for payment of unemployment allowance, there is an incentive for non-transparent recording of employment demand.

2.42 There is a need to strengthen existing mechanism in MGNREGA for enforcing accountability in respect of the following in ST dominated areas:

- (i) Section 25: Fine for failure to perform duty under the Act.
- (ii) Schedule II Section 30: Compensating workers for delays in payment.
- (iii) Section 19: Urgent framing of Grievance and Redressal Rules.
- (iv) Need for independent grievance Redressal Mechanism.
- (v) STs' participation in Social Audit

(B) Migration.

2.43 As per 'The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979', no principal employer of an establishment to which the Act applies shall employ inter-State migrant workmen in the establishment unless a certificate of registration in respect of such establishment issued under this Act is in force. Further, a contractor has to obtain a license to employ inter-State workmen. A contractor is required to issue a pass-book to every inter-State migrant workman with a passport size photograph, name and place of establishment, period of employment, the proposed rates and modes of payment of wages, displacement allowance payable, return fare payable on expiry of period of employment, deductions made and other such particulars. As per provisions, inter-State migrant workman shall in no case be paid less than wages fixed under the Minimum Wages Act, 1948. However, this Act is applicable only to inter-State migrant workman employed in an establishment. The Commission, therefore, recommended that provision of the Act should also be made applicable to the placement

agencies in respect of Migrant Domestic Workers from tribal areas, which are being driven by indigence to seek traditional employment.

2.44 After the commencement of 'The Bonded labour System (Abolition) Act, 1976, the bonded labour system stands abolished and every bonded labour stands freed and discharged from any obligation to render any bonded labour. Any custom or tradition or any contract, agreement or other instrument leading to bonded labour is also void and inoperative. Every obligation of a bonded labourer to repay any bonded debt shall be deemed to have been extinguished. All the property of vested in a bonded labourer mortgaged in connection with any bonded debt shall stand freed and discharged. No creditor shall accept any payment against any bonded debt, which has been fully satisfied by virtue of the provisions of this Act. These provisions need to be adapted for overseeing contract labour to ensure humane treatment of Migrant workers who are easily exploited by greedy contractors.

(C) Food Security

2.45 Food security in Scheduled Areas is especially fragile because of primitive agricultural practices/low production, difficult access, poor infrastructure and logistical services and underdeveloped markets, besides endemic poverty and lack of opportunities for livelihood maintenance. Both availability of food grains and affordability are inter-meshed problems; and food security is not merely a question of subsidizing the prices for the poorer sections of the populace in these areas. Therefore, there is compelling reason to recognize these special characteristics; and have a differentiated approach for Scheduled Areas by way of provision of adequate entitlement of requisite food stocks, strengthening of warehousing and logistics, financial resources and responsibilities.

2.46 The public distribution system must assure reasonable food availability to all residents in Scheduled Areas keeping in view their special problems of availability and affordability. The number of priority households should not be arbitrarily determined; and they should be identified on the basis of discernible wealth/income-related criterion. Special arrangements, including build-up of inventory have to be made for remote, inaccessible areas, so that food availability is not often compromised by logistical failures. It is not sufficient, or desirable, to provide an allowance in lieu thereof because that leaves availability issues unresolved.

2.47 Since remote tribal areas also have acute problems of availability/ marketing infrastructure, foodgrain entitlements should not be differentiated according to economic status, which is relevant only for the quantum of eligible subsidy. Food entitlement should be specified on the basis of recommended nutritional requirements to enable purchase of needed quantity at option; or yearly aggregate entitlements may be specified instead, since the average off-take may fluctuate at different

times of the year depending upon prices or alternate sources of supply, and it may be more relevant for planning subsidy/ logistic requirements.

2.48 Besides, use of information technology for increasing transparency of transactions, the monitoring mechanisms in Scheduled Areas should be strengthened through reliable reporting systems to enable rapid awareness of related transactions – stocks, movement, issues, etc - at all locations upto fair price shop level, and providing timely feedback for prompt remedial action to rectify logistical failures which imperil food security in remote areas.

2.49 In view of the special Constitutional mandate to the Union Govt. for Scheduled Areas, and the persisting poor health and economic standards of tribals, full financial/ logistical responsibility to ensure food security in such areas should vest in the Union Government. It is not appropriate to cast such responsibility on the State Governments, also because they have limited capacity to mobilize foodgrains from low-production regions, arrange credit and subsidize logistical/ distribution costs.

2.50 The special obligations of the Central Government in Scheduled Areas should include provision of food grains in desired quantity (as per nutritional requirements) for all residents, supplemental logistical arrangements (road/rail transportation, depots/ issue points and increased inventory) as well as priority in food grain allocations, (since resort to payment of allowance is not a feasible option because the same will compromise food security)

(iii) Protection of customary laws and inheritance rights

2.51 The Hindu Succession Act, 1956 governs and prescribes rules of succession applicable to Hindus, Sikhs, Budhhists, Jains etc. whereunder, since 1956, if not earlier, the female heir is put at par with a male heir. Under the Shariat Law, applicable to Muslims, the female heir has an unequal share in the inheritance, by and large half of what a male gets. The Indian Succession Act, 1925 which applies to Christians and people not covered under the aforesaid two laws, confers in a certain manner, heir ship on females as also males. Certain chapters thereof are not made applicable to certain communities. Sub-section (2) of Section 2 of the Hindu Succession Act significantly provides that (2) Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribe within the meaning of Clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.

2.52 Further, Section 3 of the Indian Succession Act,1925 provides as follows:

" (1) The State Government may, by notification in the Official Gazette, either retrospectively from the sixteenth day of March, 1865, or prospectively, exempt from the operation of any of the following

provisions of this Act, namely, sections 5 to 49, 58 to 191, 212, 213 and 215 to 369, the members of any race, sect or tribe in the State, or of any part of such race, sect or tribe, to whom the State Government considers it impossible or inexpedient to apply such provisions or any of them mentioned in the order.”

2.53 Thus the tribes of Mundas, Oraons, Santals etc. in the State of Bihar (now Jharkhand) have been so exempted. The customs of tribal inheritance are also declared to be in consonance with the provisions of Articles 14, 15 and 21 of the Constitution. However, **custom, as is well-recognised, varies from people to people and region to region; and needs to be codified for the guidance of legal forums/ practitioners as has been done in the State of Madhya Pradesh, where customary laws have been codified as "Madhya Pradesh Rajya Ki Anusuchit Janjatiyon Ki Roodijanya Vidhi Sanhita,1992".**

(iv) Protection of habitat and environment

2.54 The globalization of the Indian economy has serious impact on tribals relating to their environment due to exploitation of its rich natural resources, forests, mining etc, health, livelihood, including employment and the availability of essential commodities, socio-cultural life, including their cultural and religious practices, and has resulted in particular problems relating to their marginalization due to displacement, forced migration and land alienation. The recommendations of the Commission in the related areas are as under:

(A) Forest Rights

2.55 **Suitable amendments should be made in the Indian Forest Act, 1927 to make its provision consistent with the provisions of PESA Act, 1996 in respect of endowing Panchayats at the appropriate level and the Gram Sabhas with necessary powers with respect to conferring ownership of minor forest produce.**

2.56 **All the cases of alleged encroachment of forest land by the Scheduled Tribes which were registered prior to 31.12.2007 may be withdrawn by the concerned authorities and their claims on forest lands may be settled as per provisions under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007.**

2.57 **The Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act, 2006 and Rules provide for settlement of individual as well as community claims. The claim of community over land and resources is of much relevance to all the inhabitants of the area and therefore, distribution of title deeds about community rights also has same relevance as the settlement of individual claims. The Ministry of Tribal Affairs and the State Governments should evolve a strategy (i) for disposal of all the claims within a prescribed time frame, (ii) ensuring that**

genuine claims are not rejected, (iii) title deeds are distributed to all the approved claimants within the set time frame and (iv) furnishing full details in respect of individual claims as well as community claims separately under Forest Right Act.

(B) Restoration of Mining areas

2.58 Land used for mining should be returned to the owners after ecological reclamation of mined areas.

2.59 It is necessary to incorporate an essential, specifically delineated provision for rehabilitation & resettlement for the project affected/ displaced persons under the obligations set out in a mining lease. (It may be mentioned that the draft Land Acquisition, Rehabilitation & Resettlement Bill, 2011, which is awaiting approval of the Parliament, has integrated the provisions of rehabilitation and resettlement with the land acquisition process, but doesn't explicitly cover R & R in respect of the project-affected/ displaced persons as a result of diversion of forest land/ private lands leased for mining). The R & R obligations also need to be ensured in respect of incremental leasing of adjacent areas and extension of current leases in perpetuity also. Rehabilitation and Resettlement (R & R) plans should be linked to the Mining Plan, so that R & R activities are satisfactorily completed before the lessee ceases operations in a specified area. Similar to the corporate social responsibility document, there should also be a R & R document which should document the obligation/ efforts and outcomes achieved. Before granting approval for extension of a mining lease, special report regarding implementation of R & R obligation should also be sought. Besides failure or delay in commencement of mining operations, leases should also lapse in case R & R obligations have not been discharged.

(v) Protection of land (surface and sub-surface) rights

(A) Land alienation

2.60 In most States, (laws/ regulations) already exist to prevent alienation of tribal land, which should be implemented with greater sincerity. Pending cases should be settled on the priority and illegally alienated land restored to the tribals.

2.61 Land is the only asset tribals are having and is also the source of their livelihood. Tribals are facing difficulties in meeting special needs like marriages, educational needs, housing etc. To meet their requirements they are taking loans from the public financial institutions by mortgaging their land. The Commission has impressed the need to find other solutions to ensure that public financial institutions do not lose their money and the Scheduled Tribes also do not lose their ownership over land. If necessary, the Government should step in as a "purchaser of the last resort" in these cases. On the lines of the Credit Guarantee Fund set up for the comfort of the lenders under the scheme of Ministry of Micro, Small and Medium Enterprises, a similar scheme may also be

considered for the benefit of the tribals. To safeguard the livelihood of tribal farmers, the Government could consider setting up Land Banks comprising lands resumed by the Govt. in cases of mortgage default; and such lands may be leased to the previous ST owners with the opportunity/ right to re-purchase the same at any subsequent stage of time, beside rights to additional potential compensation due to change in land use pattern in future.

(B) Mineral Rights

2.62 In SLP (civil) 4601-02 of 1997, Samatha Vs. Govt. Of Andhra Pradesh and Ors, the Supreme Court had observed that Minerals in Scheduled Areas have to be exploited by the tribals or State instrumentalities alone. If mineral extraction is authorized by private entities in case of the Scheduled Areas, the Govt. should be willing to shoulder vicarious responsibility for providing habitat and livelihood security in such areas. The State is one of the principal beneficiaries of the mineral extraction projects, as the royalty levied by the State on minerals extracted far exceeds the rents paid by the lessee to the tribal owners. To ensure livelihood security to tribals, the State must ensure alternative land in case they will be substantially deprived of their holdings, as well as give them a due share of the profits to be derived from mining.

2.63 **Since mineral extraction is generally destructive of soil surface, it can't usually be restored to original land use subsequently. An effective and equitable compensation arrangement should ensure lifelong annuities sufficient to substitute income deprivation for the land owners (adjusted for likely inflation), besides creating alternative vocations for them. The land owners should also get a reasonable share in the profits distributed/ retained by the mining enterprise. Besides annual compensation in lieu of land surface rights, future (and sometimes windfall) earnings from mining activity should also be shared with land rights holders in reasonable measure. If some land rights are being ceded in perpetuity, the retained earnings from the project activity should also be shared with the land owners in the forms of "sweat-equity" (beside compensation for denial of use of land surface). Share of earnings from alternative users of land should also be provided, if future land use is of a commercial nature. Benefits/privileges available to mineral right holders may also be accorded to ordinary landholders also in Scheduled areas.**

(vi) Protection from removal from occupied lands for public purposes

2.64 A general law for acquisition of private land for public purposes 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. 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. 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.

2.65 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. 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. 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.

2.66 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. In Scheduled Areas, therefore, 'Public purpose' should, therefore, be determined through a participatory and transparent process incorporating additional safeguards for tribals including judicial review.

2.67 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.

2.68 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/privately owned 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 justifiable in respect of Scheduled Areas.**

2.69 Social Impact Assessment (SIA) / Economic Impact Assessment (EIA) 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'. 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.**

2.70 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.

2.71 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. **Compensation should also be given 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. 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, 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.**

2.72 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 re-payment 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.

2.73 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) 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.

(vii) Right to Relocation from occupied lands with appropriate compensation/ guarantees in extra ordinary circumstances

2.74 The exercise of the principle of eminent domain for acquisition of private land has been leading to involuntary displacement of people, depriving them of their land, livelihood and shelter; restricting their access to traditional resource base; and uprooting them from their socio-culture environment. This has resulted in an imperative need to recognized resettlement and rehabilitation

issues as intrinsic to the development process formulated with the active participation of the affected persons, rather than as externally-imposed requirements. The socio-economic impact of displacement has also called for a broader concerted effort on the part of the planners to include in the displacement, resettlement and rehabilitation process framework not only those who directly lose land and other assets but also those who are affected by such acquisition of assets.

2.75 The displacement of tribals from their habitats raises issues not just of monetary compensation but other related issues too which pertain to their sustainable livelihood, preservation of the traditional sense of community, trauma of dislocation and alienation, deforestation and its related social and psychological impacts. Such adverse effects on tribals, as a result of loss of their land and consequent collateral damages are not exclusive to the nature/ type of displacement viz. voluntary or involuntary or even to the existing land use, viz agriculture or forest. Further potential risks of landlessness, joblessness, homelessness, marginalization, increasing morbidity and mortality, loss of access to common services and social (community) disarticulation are also invariably associated with both voluntary and involuntary displacements. Therefore, besides land acquired by the appropriate Govt., all 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 be accompanied by comprehensive rehabilitation plans. Involuntary displacement of permanent nature due to disasters/ natural calamity, external/ internal and conflicts should also be treated in similar fashion. **In case of displacement due to disasters/ natural calamity and conflicts, the responsibility for resettlement and rehabilitation lies on the appropriate Government, while in the case of displacement occasioned by development projects, this responsibility should be of the requiring body (individual/ corporate house/ Govt.). In the case of displacement arising from projects implemented by non-government/ corporate bodies, the entire onus of implementing rehabilitation and resettlement plans should be that of the requiring body (individual/ corporate house) to avoid fragmentation/ dereliction of responsibility. Only in default, the appropriate Govt. may undertake rehabilitation/ resettlement (as for Govt. investments) at their cost.**

2.76 The need for diversion of forest area for non-forest use for development and infrastructural projects like mining, construction of hydro power projects, highways, SEZ etc, involving displacement of tribals will continue as in the past. The adverse effects on tribals, as a result of loss of their land and consequent collateral damages, as well as potential risks are also relevant to their displacement arising from diversion of forest area for non-forest use for development and infrastructural projects, involving displacement of tribals. In all such cases, it is also necessary that rights of the tribal people should be settled as per the provisions of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act before implementation of the project.

2.77 Since the tribal way of life has close attachment with the environment, habitat and traditional occupation, assessment of social impact

(SIA) on tribals due to their displacement from scheduled areas, irrespective of the number of the displaced families, is essential. Therefore, SIA should:

- (i) 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 number of families it displaces or the voluntary/ involuntary nature of the displacement,
- (ii) be conducted by multi-disciplinary teams considering the impact that the project will have in terms of landlessness, joblessness, homelessness, marginalization, increased morbidity and mortality, food insecurity, loss of access to common resources and services and social disarticulation,
- (iii) identify affected areas (including contiguous forest lands, water bodies, wherein tribals have rights) and enumerate all affected (interested) persons to facilitate enquiry into objections (and subsequent determination of 'public purpose' under concerned LA Act),
- (iv) SIA/EIA should identify collateral effects and remedial measures, which should be undertaken in the short, medium and long-term by the requiring body,
- (v) focus first on measures to prevent the adverse social and environmental impact of the projects, then measures to minimize, mitigate or compensate for them,
- (vi) incorporate views of the concerned elected local bodies in the Scheduled areas.

2.78 SIA/ EIAs are necessary to provide a good substrate for resettlement planning to address/ mitigate ensuing problems. Barring emergencies beyond control, projects involving land proposed to be acquired under urgency provisions should, not be exempted from the requirements of EIA/ SIA. To be a participatory exercise, the expert group to review the SIA and accord clearance should also include a representative of the displaced families. The implications of the SIA/ EIA should also be explained to the persons likely to be displaced in public hearings, besides obtaining the views of the concerned elected local bodies, so that their informed concerns are comprehensively deliberated by the expert group.

2.79 **The responsibility for SIA, preparation of RR plans and implementation should be that of the requiring body which may do the job itself or outsource it to other agencies. Baseline survey should essentially aim to enumerate all the affected persons, nature of rights affected by displacement and resettlement requirements which could form the basis of the R & R plan. The RR plan should be approved and implemented under the supervision of an RR Committee constituted at the local level.**

2.80 **The Resettlement site should aim to offer better living conditions to families affected and should recognize subsequent division of joint families/ separation of adult members in the matter of benefits till**

the RR plan is published. Forest dwellers affected by diversion of forest land should be resettled in the forest. Compensation in lieu of land should be discouraged. Resettled tribals should also continue to enjoy reservation benefits in the resettlement area by concurrent modification of the Scheduled Tribes Reservation Orders.

(viii) Protection of traditional community institutions

2.81 The State legislations on Panchayats should conform with the customary law, social and religious practices and traditional management practices of community resources. In terms of Section 4(n) of the PESA Act, 1996 Panchayats should be equipped with requisite powers and authority to enable them to function as institution of self-government.

2.82 The elections to the lowest body of the administration i.e. Gram Panchayat are fought on party lines or influenced by the political parties. Therefore, these institutions are incapable of functioning on the basis of bipartisan interest, as was the case with the traditional system. Therefore, the elections to the lower bodies should be conducted keeping in view only the interest of inhabitants without any overt political involvement.

2.83 Modern society faces many economic/social issues which confound decision makers who struggle with capacity constraints. Oversight mechanisms are also necessary along with devolution of powers.

2.84 PESA envisaged democratic institutions of administration. To provide sustained co-ordinated emphasis to the problems of Scheduled Tribes/Areas, multiplicity of agencies should be avoided and ITDAs should be merged with ZPs.

2.85 There is a need to devise a mechanism, which would enable the field formations to receive funds directly instead of being routed through State Hqrs. by enforcing on them a system of accountability for proper utilization of those funds.

(ix) Strengthening of Administrative mechanism for tribal areas (under Union oversight)

2.86 A single-line administration, in which head of the district is head of all the departments / local bodies in the district, (which was followed in earlier days), is an effective form of administration for robust decision-making in times when the administrators enjoy high personal credibility. Nowadays, administrators also lack self- confidence, due to high degree of politicization, intrusive oversight mechanisms and heightened expectations. The current environment is not conducive for Single line administration, as specialized and more refined administrative practices have come to be followed, which may not be easily reversible. For single-line administration to be effective, besides PESA, operating / legal frame work is required to be simplified, in addition to

ensuring availability of administrators committed to rule of law and public interest.

2.87 There is general reluctance on the part of the officers and staff for posting in Scheduled Areas/ Tribal Areas on account of lack of housing, medical and education facilities, which has been exponentially compounded by the general climate of permissiveness fostered by rampant political interference and collusive abandonment of responsibilities in search of greener pastures. In order to address these problems, **the Commission is of the view that Government should formulate specific regulations in respect of Scheduled Areas for personnel management with the formation of a State level Civil Services Authority for Scheduled Areas, which would deal with matters of assignment of functional domains to officers, preparing a panel for posting of officers, fixing tenures for senior posts etc., in line with the Central Civil Services Authority proposed by the ARC. In order to improve personnel management in respect of all category of employees, it is necessary to fix a minimum tenure for various cadre posts, which be filled on the basis of merit, suitability and experience, prescribe norms and guidelines for transfers and posting to maintain continuity and predictability in career advancement and acquisition of necessary skills and experiences as well as promotion of good governance. The normal tenure of all public servants may not be less than two years and Transfers before the specified tenure should only be for valid reasons to be recorded in writing. These recommendations are in accordance with the observations contained in para 8.5.11, 8.5.12 and 8.5.14 of the 10th Report of the 2nd Administrative Reforms Commission. Department of Personnel and Training may issue detailed guidelines for improvement of personnel policies and systems in Tribal Areas in the interest of peace and good governance. Defence forces, financial institutions etc have formulated personnel policies for “hardship areas” prescribing minimum periods of mandatory service in such locations during their career – which can be emulated to pool services of personnel from all Central/ All-India Services (irrespective of other service conditions) and meet skilled personnel/ managerial requirements in tribal/ Scheduled areas.**

(x) Development and Planning for Scheduled Tribes-refurbished development strategy predicated on primary Union Government financial and administrative responsibility

A. THE TRIBAL SUB-PLAN STRATEGY

2.88 The Tribal Sub-Plan strategy for tribal development adopted since Fourth Five Year Plan comprised:

- (i) Identification of development block in the State where tribal population was in majority and their constitution into ITDPs with a view to adopting therein an integrated and project based approach for development,

- (ii) Earmarking of funds for the Tribal Sub-Plan and ensuring flow of funds from the State and Central Plan sectoral outlays, Special Central Assistance and from Financial Institutions; and
- (iii) Creation of appropriate administrative structure in tribal areas and adoption of appropriate personnel policy.

2.89 The salient features in respect of the State/ UT Tribal Sub-Plan are:

- (i) Preparation of a plan meant for the welfare and development of tribals within the ambit of a State or a UT plan is a part of the overall plan of a State or UT, and is therefore called a Sub-Plan.
- (ii) The funds provided under the Tribal Sub- Plan out of State Plan have to be at least equal in proportion to the ST population of each State or UT.
- (iii) Tribals and tribal areas of a State or a UT are given benefits under the Tribal Sub-Plan, in addition to what percolates from the overall Plan of a State/ UT.
- (iv) The Tribal Sub-Plan is expected to:
 - a.) Identify the resources for TSP areas;
 - b.) Prepare a broad policy framework for development; and,
 - c.) Define a suitable administrative strategy for its implementation
- (v) The TSP funds, comprising the TSP component of various departments/ sectors of the States, have to be aggregated in a separate demand head in the budget of the Tribal Development Department of the State.

2.90 To focus on the needs of the tribal population under the new Tribal Sub-Plan strategy in a coordinated manner, Integrated Tribal Development Projects (ITDP) were conceived during the Fifth Five Year Plan. The Tribal development strategy now comprises the following multi-prong approach:

- (i) Integrated Tribal Development Project (ITDP) areas : These are generally contiguous areas of the size of a block or a tehsil or more within a district, in which the ST population is 50% or more of the total population.
- (ii) Modified Area Development Approach (MADA) pockets : These are identified pockets having 50% or more ST population of a total population of 10,000 or more.
- (iii) Clusters : These are identified clusters of villages, altogether having ST population of 5000 or more, which constitutes 50% or more of the total population of the cluster.
- (iv) Primitive Tribal Groups : These are characterized by a low rate of growth of population, pre-agricultural level of technology and extremely low level of literacy. Keeping in view the need for special attention towards these communities these Groups have been rechristened as Particularly Vulnerable Tribal Groups.

- (v) Dispersed tribal population outside the categories at Sr. No.(i) to (iv) above

(B) Consolidated Guidelines for Tribal Sub-Plan (and SCSP)

2.91 The Planning Commission issued consolidated guidelines to all State Governments/UTs vide D.O. No. 13011/3/2005-SP-Co dated 31/10/2005.

(a) For States and UTs

- (i) *Earmarking of funds for (SCSP and) TSP from the total State Plan outlay should at least be proportionate to the (SC and) ST population of the State/UT.*
- (ii) *Making the Social Welfare/Tribal Welfare Department—which are concerned with the well-being and development of (SCs and) STs—the nodal department for formulation and implementation of (SCSP and) TSP.*
- (iii) *Placing the funds earmarked for (SCSP and) TSP at the disposal of the Principal Secretary/Secretary, Social Welfare/Tribal Welfare, who will work as Planning Secretary and have exclusive authority for the reallocation of funds to other line departments in respect of (SC and) ST development schemes.*
- (iv) *Placing the funds earmarked for (SCSP and) TSP under separate budget head/sub-head for each development department.*
- (v) *Backing the (SCSP and) TSP earmarked funds by 100% budget provision, sanctions and timely release of funds to the line departments and implementing agencies.*
- (vi) *Including only those schemes under (SCSP and) TSP that ensure direct benefits to individuals or families belonging to (Scheduled Castes or) Scheduled Tribes.*
- (vii) *Preparing a detailed (SCSP and) TSP document with physical and financial targets against each Scheme with the objective of bridging the gap between the rest of the population and the (SCs and) STs within 10 years.*
- (viii) *Ensuring that the other line departments cooperate in the proper implementation of the (SCSP and) TSP schemes allocated to them and put up the schemes to the nodal departments for sanction and release of funds.*
- (ix) *To circumvent the problem of non-divisible nature of funds for certain sectors like major irrigation, power, roads, and so on, (SCSP and) TSP funds may be accounted only to the extent of about 5% or the actual area (belonging to STs) being covered or benefited by the projects and not the population percentage. The percentage of (SC and) ST beneficiaries and the area being covered/ benefited is always less than the population percentage of the (SC and) ST population in the State/UT.*

- (x) *Preventing the diversion and lapse of funds allocated to (SCSP and) TSP in the Annual Plans. (SCSP and) TSP should not be allowed to be changed at revised estimate (RE) stage by the Planning Commission.*
- (xi) *Carrying forward the lapsed/unutilized (SCSP and) TSP amount to the next Annual Plan of the State/UT as an additional fund for SCSP and TSP.*
- (xii) *All the CSS and SCA Schemes of the Centre necessarily should have a (SCSP and) TSP component in them as per the proportion of (SCs and) STs in the States/UTs.*

(b) For Central Ministries/Departments

- (i) *Earmarking of funds by every Central Ministry/Department towards (SCSP and) TSP should be as per the proportion of (SC and) ST population in the country. Non-earmarking of (SCSP and) TSP funds by the Ministry/ Department will result in non-approval of their Annual plan.*
- (ii) *(SCSP and) TSP funds should be non-divertible. Creation of separate budget heads and minor heads ([789 for SCSP and] 796 for TSP).*
- (iii) *A dedicated (SCSP and) TSP unit should be created for the formulation and implementation of (SCSP and) TSP schemes and programmes.*
- (iv) *Only those schemes/programmes should be implemented which accrue direct benefit to (SCs and) STs.*
- (v) *All the other guidelines issued to Central Ministries/Departments should be followed strictly.*

2.92 A Planning Commission Task Force under the Chairmanship of Dr. Narendra Jadhav, Member, Planning Commission made certain recommendations with respect to preparation of Tribal Sub-Plan by Central Ministries/ Departments. The Task Force has recommended that 68 Ministries / Departments of the Central Government can be grouped into four categories:

- I) *No Obligation;*
- II) *Earmarking less than 15 % for Scheduled Castes and 7.5 % for Scheduled Tribes ;*
- III) *Earmarking outlays between 15%-16.2% for Scheduled Castes and 7.5% - 8.2% for Scheduled Tribes ;*
- IV) *Earmarking more than 16.2% for Scheduled Castes and 8.2% for Scheduled Tribes.*

2.93 Observing the problem to be more acute at the Central level, the Task Force has, in the first instance, recommended that, from the financial year 2011-12, substantial reforms be introduced in the SCSP/TSP system, for Central Ministries/Departments, which can be further refined from the XII Five Year Plan commencing in 2012- 13.

2.94 The Task Force is of the view that the Plan outlay and expenditure falling under the following two broad categories will be eligible for being classified in SCSP/TSP:-:

- (i) Expenditure on Poverty Alleviation and individual beneficiary oriented schemes, e.g. MGNREGA, IAY, NRLM, SGSRY, PMEGP etc., and
- (ii) Expenditure on other schemes which is incurred in:
 - a) SC and ST concentration areas respectively, i.e. in the villages, blocks and districts having more than 40% SC/ST population respectively, and largely benefiting such villages, blocks and districts, and
 - b) in other areas, but which demonstrably benefits Scheduled Castes /Scheduled Tribes respectively

2.95 Following from the above broad principles, detailed criteria for categorization of plan expenditure under SCSP/TSP and the extent to which this may be done, with reference to some major schemes, has been recommended by the Task Force (**ANNEXURE 2.I**)

2.96 The Task Force has further recommended that the SCSP and TSP funds (shown respectively under the Minor Head 789 and 796 of all Ministries) remaining unutilized at the end of a financial year may be transferred, on the lines of the Non-lapsable Central Pool of Resources (NLCPR) for the North Eastern Region, to two Pools to be named as “Non-lapsable Central Pool of SCSP Funds (NLCPSF)” and “Non-lapsable Central Pool of Tribal Sub-Plan Funds (NLCPTF)” - two Heads to be created in the Public Account similar to that created for NER. The funds from these non-lapsable pools may be allocated to the Ministry of SJ&E and Ministry of Tribal Affairs respectively for implementing schemes for SCs and STs Development as well as for providing incentives to State Governments for effective implementation of SCSP and TSP, which may form a part of Central Assistance for State Plans.

2.97 The Ministry of Finance, in its Budget Circular for 2011-12 has incorporated the following instructions:

“From 2011-12 Budget, the Planning Commission will be making separate allocations for the SC Sub-Plan/Tribal Sub Plan as part of the Plan allocations, and the same will also be indicated clearly in the Memorandum of Understanding signed between the Planning Commission and the concerned Ministry/Department. The Ministries/Departments for which such allocations are made by the Planning Commission as part of the Plan Agreement in Budget 2011-12, must ensure that the provisions are accurately reflected in the concerned Minor Heads relating to Scheduled Caste Sub-Plan and Tribal Sub Plan in their Detailed Demands for Grants by opening a minor head “Special Component Plan for Scheduled Castes” Code ‘789’ for SCSP and a minor head ‘Tribal Sub Plan’ Code ‘796’ below the functional major/sub-major heads whenever necessary, in terms of the instructions under Para 3.8 of the General Directions to the List of Major and Minor Heads of Accounts.”

B. REFURBISHED TRIBAL SUB-PLAN STRATEGY FOR SCHEDULED/ TRIBAL AREAS

2.98 The Tribal Development (TD) Division was created during 5th Five-Year Plan in MHA, after acceptance of the TSP strategy by the Government with a view to ensure implementation of Tribal Sub-Plan guidelines and programmes. The TD Division has later been upgraded into a full-fledged Ministry of Tribal Affairs. Similar steps were taken in Planning Commission also by restructuring the then BC Division (now BC&TD Division). **Both Planning Commission and Ministry of Tribal Affairs should take immediate steps to ensure strict formulation and implementation of Tribal Sub-Plan by States/ UTS as well as Central Ministries/ Departments.**

2.99 **The strategy for all development programmes, particularly the major missions/ schemes of the Ministries/ Departments, should comprise sub-Chapters for accelerated development of the tribal areas. In particular, it is necessary to have specific Tribal Sub Plan (TSP) component in all the major missions/ schemes/ programmes of all Ministries/ Deptts to have a clear focus on formulation of schemes/ programmes concerning the STs and their effective implementation and monitoring. The TSP component should not be per population share but according to "problem-share"; and "need-based" taking into account the extent of deprivation, or even more than that to make up the backwardness/ negligence experienced over the years. Unless the earmarking of TSP outlays exceeds the relative share of incidence of residual problems eg. drinking water, primary health care and education, nutritional support, unemployment etc., the relative gap in physical quality of life is likely to persist.**

2.100 **Constitutional provisions have to be interpreted in proper context. Since no regulatory matter is involved, it is quite niggardly for the Union Govt. to confine its development support for Scheduled / tribal Areas to the issue of directions. Appropriately, it must shoulder direct financial responsibility for the accelerated development of scheduled areas/their population through all the Ministries and Departments.**

2.101 **The Government of India should bear the responsibility for infrastructure development/ upgradation of Administration in Scheduled Areas under Art. 275 of the Constitution. The costs of governance framework/ manpower in tribal areas should also be funded under Article 275(i) grants. Besides, financial support for Tribal Sub-Plan should not be per population share but according to "problem-share" and "need-based".**

2.102 **The funds allocated under Tribal Sub-Plan of the States should be non-divertible and non-lapsable with the objective of bridging the gap in socio-economic development of the Scheduled Tribes/ Scheduled Areas and other areas in a time bound manner. The Ministry of Finance, Ministry of Tribal Affairs and the Planning Commission may take necessary steps for creation of a non-lapsable Tribal Sub-Plan fund under**

each State/ UT having Tribal Sub-Plan and formulate guidelines for utilisation of such funds. Infrastructure development aimed at accelerated development of the Tribal Sub-Plan areas should be a priority area for expenditure from the non-lapsable fund.

2.103 **The Planning Commission, in its communication to the State Governments, regarding preparation of Annual Plan and Five Year Plan should invariably emphasize that the Plan proposals of the State Government for Annual Plan as well as Five Year Plan will not be considered unless Tribal Sub-Plan document is also received. The communication should also clearly specify that the State Governments will simultaneously sent the copies of State Plan documents and Tribal Sub-Plan documents to the National Commission for Scheduled Tribes.**

2.104 **As has been the practice in the past, the draft Tribal Sub-Plan of the State should also be discussed by the Planning Commission in the first phase by the Ministry of Tribal Affairs and the revised Tribal Sub-Plan document may be discussed for final approval in the Planning Commission, after finalization of the Five Year Plan/ Annual Plan size of the State. The Tribal Sub-Plan outlays approved in the meeting in the Planning Commission should be adhered by the State Government.**

2.105 **In order to ensure non-diversion of Tribal Sub-Plan funds, the Planning Commission and the Ministry of Tribal Affairs should ensure that each State Government budgets the earmarked TSP funds under a single budget demand head under the control of the State Tribal Welfare/ Development Department of the State, (as envisaged in the Maharashtra Model and advocated by Planning Commission as well as Ministry of Tribal Affairs from time to time).**

2.106 **The Commission has noted that some of the Ministries/ Departments which have been listed by the task force in 'No Obligation' category for the Tribal Sub-Plan are responsible for infrastructure development and public services in critical areas. The Commission, therefore, recommend that appropriate outlays for TSP should also be earmarked in respect of all these Ministries/ Departments, to ensure that TSP areas/ Scheduled Areas don't continue to be hamstrung by poor infrastructure/services.**

2.107 **In the recent past various Ministries concerned with development and services have formulated National Missions on crucial services like National Rural Health Mission, National Drinking Water Mission, MGNREGA. These missions have direct impact on the life of Scheduled Tribes but do not make specific provisions for Scheduled Tribe beneficiaries. The Commission recommends that the Ministries/ Departments administering the National Missions must ensure that adequate investments/ benefits are earmarked for Scheduled Tribes under Tribal Sub-Plan of the Ministry/ Department during each plan period so as to provide for their accelerated development and in general each Ministry/ Department should consult the**

National Commission for Scheduled Tribes in all policy matters affecting Scheduled Tribes, as provided under Article 338A(9) of the Constitution.

2.108 It is suggested that unutilized TSP funds should be placed by Central Ministries in a non-lapsable infrastructure development fund administered by the MTA. For this purpose, appropriate guidelines should be formulated, on the lines of the guidelines issued by the Ministry of Development of North Eastern Region for administration of non-lapsable central pool of resources, to ensure utilization consistent with objectives.

2.109 The Planning Commission should not consider the Five Year Plan/ Annual Plan proposal of any Ministry/ Department which is not accompanied by the Tribal Sub-Plan, which should be finalized after discussion with the representatives of the Ministry of Tribal Affairs.

2.110 Each Ministry should set up TSP Cell as in the past. The TSP Cell should be functional throughout the year like the Official Language Section in each Ministry/ Department. The TSP Cell will monitor implementation of TSP schemes of the Ministry and, by using the inputs received through monitoring, prepare the TSP component, of Annual Plan and Five Year Plan of the Ministry/ Department in terms of financial and physical aspects. The TSP Cells should be manned by personnel having special background and expertise in various fields of Tribal development and Administration. In order to ensure continuous monitoring of TSP, the posts in TSP Cell should not be allowed to remain unfilled. This will be possible only if the personnel for these Cells belong to an organised cadre of specialised experts. Personnel for Tribal Sub-Plan Cells in the Ministries/ Departments should be drawn from the separate specialised Organised Cadre proposed for the National Commission for Scheduled Tribes and its Regional Offices (presently part of Joint Cadre of National Commission for Scheduled Tribes, National Commission for Scheduled Castes, Ministry of Social Justice & Empowerment and the Ministry of Tribal Affairs). This Cadre should be developed and function on the lines of the specialised cadre of Official Language Department of Ministry of Home Affairs and personnel for TSP Cell in each Ministry/ Department should be made available from the above mentioned organised specialised Cadre.

CHAPTER 3

NEED FOR MEANINGFUL CONSULTATIONS WITH COMMISSION

INTRODUCTION

In order to buttress Constitutional protection for Tribal Rights, the Commission has recommended that a separate Chapter be incorporated in all legislations materially impinging on the suggested Charter of Tribal Rights. However, constant vigilance is necessary to ensure that Tribal Rights are not eroded through cavalier treatment; or worse still, by benign neglect which has been observed to be the defining characteristic of legislative attention to tribal concerns in the last sixty years of the Indian Constitution. Therefore, it is equally necessary to strengthen the mechanisms for monitoring Constitutional safeguards, which are in grave danger of becoming dysfunctional on account of administrative apathy which also lapses into perfidious obstinacy on occasion.

3.2 It may be recalled 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. The views proffered by the Commission on policy-related issues fall in 3 categories as under:

- I Proposals received from the Central and the State Governments/UT Administrations pursuant to Clause 9 of Article 338A of the Constitution.
- li Suo-motu recommendations by the Commission on various tribal concerns.
- lii Submissions made in Court cases in which the Commission is one of the Respondents.

3.3 The policy matters referred to the Commission are discussed in detail in the meetings of the Commission on the basis of the views expressed by the Members and the notes on the subject matter, indicating historical background, current status and relevant Rules etc., prepared by the Commission's Secretariat; and the views of the Commission are communicated in substantive fashion, also seeking feedback regarding the outcome of such consideration. However, all Ministries/ Departments and the State Governments do not refer all such matters for advice of the Commission. Generally, matters for advice of the Commission are received through the Ministry of Tribal Affairs, at the time when the concerned Ministry is seeking the comments of the Ministry of Tribal Affairs (and not those of the National Commission for Scheduled Tribes) during the process of Inter-Ministerial consultations on the proposal. Advice is thus sought from this Commission much before finalising the draft proposal/ note for placing the same before the Parliamentary Committee, the Cabinet Committee or similar body as per process for finalisation of policy or legislative

matters - treating the Commission as a subordinate office of the Ministry of Tribal Affairs and not a Constitutional body. Further, from the feedback received in the Commission, it is noted that the views of the Commission/ advice rendered by it was not placed by the Ministry of Tribal Affairs or the concerned Ministry before the Apex decision-making Committees considering the matter; and, consequently the views of this Constitutional Commission, vested with the duty to safeguard the rights of the Scheduled Tribes, could not be reflected while finalizing decisions. Even in a matter in which comments were sought from the NCST regarding problems being faced in efficient functioning and performance of the Commission, the views of the Commission were not placed before the Parliamentary Committee on the Welfare of Scheduled Castes and Scheduled Tribes *in-extenso*. Consequently, the factual position got suppressed; and the Committee was left to arrive at a decision on the basis of the perception of the Ministry of Tribal Affairs.

3.4 Similar is the position in regard to drafting of legislative Bills by the Government. It is observed that all legislative proposals affecting Scheduled Tribes are not received for advice in the Commission. Legislative Bills, when received, are generally being referred to the Commission at the preliminary drafting stage. It is not appropriate for the Commission to comment on draft legislations received from any intermediate level organization of the Government, because the autonomy conferred by the Constitution does not require the Commission to work as a subordinate line functionary of the Government. Besides, in the interest of the Scheduled Tribes, it is necessary to ensure that the views of this Constitutional Commission on the Bill receive proper attention at the highest decision-making levels of the Government; and do not loose definition in the maelstrom of the Government's internal processes. This matter has earlier been discussed in the past Reports of the Commission also (Para 1.4.15 and 7.8 of the 5th annual Report for 2009-10).

3.5 While the Constitutional provisions regarding consultation with the Commission on policy matters (which would include legislative matters) affecting Scheduled Tribes and the Scheduled Areas have been in existence for a long period (a similar provision existed regarding the predecessor National Commission for Scheduled Castes and Scheduled Tribes since 1990), it has been noted by the Commission that various Ministries/ Departments of the Government of India have not respected this mandate in desired spirit. Ministries/ Departments are often wanting in proper understanding of the Constitutional provisions (Clause 9 of Article 338A) – in particular, the obligation to consult the Commission in a meaningful manner, maintaining transparency of actions regarding implementation of Constitutional safeguards with respect to Scheduled Tribes and exhibiting sensitivity of approach in respect of matters affecting the Scheduled Tribes and Scheduled Areas specified under Schedule V and Schedule VI to the Constitution. Their apathy is demonstrably revealed from the processes adopted by the Ministry of Tribal Affairs, Ministry of Rural

Development, Ministry of Mines and the Ministry of Consumer Affairs (Department of Food & Public Distribution) in the context of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, the Land Acquisition, Rehabilitation & Resettlement Bill, 2011, Mines and Minerals (Development and Regulation) Bill, 2011 and National Food Security Bill, 2011 respectively, which are briefly recounted below.

(A) The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006

3.6 No formal reference was made by the Ministry of Tribal Affairs (MTA) seeking the views of the Commission on the Scheduled Tribes (Recognition of Forest Rights) Bill, 2005 to the National Commission for Scheduled Tribes (NCST) as required under Article 338A (9). The Commission, however, considered it appropriate to make a detailed mention in its First Report (submitted to the President on 8/8/2006) about its observations on the various provisions included in the draft Bill, that was available in public domain through the website of the Ministry of Tribal Affairs. However, by the time the First Report of the Commission was finalized, it was learnt that the Bill had already been introduced in the Parliament and referred to the Joint Parliamentary Committee (JPC) headed by Shri V Kishore Chandra S Deo for further examination. MTA did not consult the Commission while framing the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007 also.

3.7 The case illustrates that the Ministry of Tribal Affairs, which amended the Constitution, making provision therein that the Union and every State Government shall consult the NCST on policy matters affecting the Scheduled Tribes, completely disregarded the mandate of the NCST while finalising the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Bill; and also while drafting the Rules thereunder, viz. the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules 2007.

(B) Mines and Minerals (Development and Regulation) Bill, 2011

3.8 The National Commission for Scheduled Tribes noticed from news Reports that the Group of Ministers (GoM) had approved the new draft Mines and Minerals (Development & Regulation) Bill, 2010 (MMDR Bill, 2010). As mining affects tribals in a large measure, particularly their livelihood, settlements, environment and culture, this Commission felt anxious that certain important concerns need to be adequately addressed in the Bill, notwithstanding the fact that the Ministry of Mines had not referred the draft Bill for advice of the Commission before its submission to the GoM. Accordingly, the comments of this Commission, regarding safeguards of the Scheduled Tribes, on the MMDR Bill, 2010 were communicated to Hon'ble Minister for Mines vide DO letter No.12/2/2009-Coord dated 11/10/2010. The Ministry, however, did not inform the

Commission regarding the action taken on the comments/ suggestions made by the Commission.

3.9 In the meanwhile, a DO letter on the subject was also sent to the Union Minister of Mines on 13/07/2011 with the request to have the views of the Commission in the matter considered by the Council of Ministers before re-introducing the Bill in the Parliament. In pursuance of the observations of the Committee on the Welfare of Scheduled Castes and Scheduled Tribes in its 33rd Report, wherein the Committee had desired feedback regarding action taken by the concerned Ministries/ Departments/ Organizations on the recommendations/ observations of the Commission of various policy related matters, the Chairperson, NCST decided to have discussions on the subject with the Secretary, Ministry of Mines on 25/07/2011. The Secretary, Ministry of Mines, who attended the Sitting on 25/07/2011 along with other senior officers, was informed that Clause (9) of the Article 338 A of the Constitution makes it obligatory on the part of all the Ministries/ Departments/Organizations to consult the Commission on all major policy matters affecting Scheduled Tribes; but, the Ministry of Mines had not so far sought views/ comments of the Commission on the draft MMDR Bill, 2010. Representative of the Ministry of Mines clarified during the Sitting 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 a policy matter, the draft MMDR Bill was not referred to the NCST. However, once the concerns of the NCST were received, the same were considered suitably for incorporation. As the draft MMDR Bill had been referred by the Cabinet Secretariat to a Group of Ministers, and the GoM had held two rounds of meetings, Vice-Chairman, NCST was so informed by Hon'ble Minister of Mines vide his D.O dated 27/9/2010. The Draft MMDR Bill, 2010 after consideration by the Group of Ministers (GoM) had been recommended by the GoM to the Cabinet after legal vetting for consideration and the concerns of the Commission on various provisions of the draft Bill had been appropriately taken care of.

3.10 The Commission observed that since the draft MMDR Bill, as finalized and being processed had not been referred to the National Commission for Scheduled Tribes for comments by the Ministry of Mines, the Commission was not in a position to discharge its mandated function in regard to an important legislation relating to STs. A copy of the draft MMDR Bill, as recommended by the Group of Ministers, was also called for from the Ministry of Mines. The Joint Secretary, Ministry of Mines, promptly informed vide letter dated 11/08/2011 as follows:

“2 While appreciating the need to share the draft MMDR Bill with the Commission, since the draft Bill is presently under Cabinet process, and in order that no violation of the established process is committed, a clarification has been sought from the Department of Legal Affairs in the matter on:

(i) Whether the draft MMDR Bill, 2011, as a legislation based on National

Mineral Policy, 2008, qualifies as a policy matter affecting Scheduled Tribes in terms of the provisions of clause (9) of Article 338A of the Constitution of India, and

(ii) Whether the draft MMDR Bill, 2011, can be shared at this stage with the National Commission for Scheduled Tribes, when the Group of Ministers has recommended the draft Bill to be placed before the Cabinet (since it is a part of the Cabinet process)

3. Based on the outcome of the advice of the Department of Legal Affairs, further action in the matter is intended.”

3.11 Disagreeing with the contention of the Ministry of Mines, the Commission decided to hold another Sitting with the Secretary, Ministry of Mines on 17/08/2011 wherein it was informed that the reference to the Ministry of Law in the matter and their views, if received, would be made available to the Commission. Vide DO letter dated 09/09/2011, addressed to the Secretary, the Ministry of Mines was again apprised of the need to forward the draft Bill finalized in the Ministry to the Commission. As the views of the Ministry of Law, and action taken by the Ministry of Mines in the matter was not received, another Sitting was held on 15/09/2011, which was attended by the Secretary, Ministry of Mines and the Joint Secretary, Deptt. of Legal Affairs, Ministry of Law and Justice on behalf of the Secretary. The Joint Secretary (Legal Affairs) informed that the Ministry of Law was in the process of finalization of its views in the matter and its opinion would be communicated shortly. Vide his letter dated 22/09/2011 the Joint Secretary (Legal Affairs), informed the Commission that opinion of his Department had been sent to the Ministry of Mines per FTS No.3120/11/Adv.A on 15/09/2011. A copy of the advice sent to the Ministry of Mines was also received from the Department of Legal Affairs, relevant extracts from which are reproduced below:

"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 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 possesses powers of Civil Court under Article 338(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 06/08/2010 (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 the Commission before its submission to the Cabinet."

3.12 Since the Bill was approved by the Cabinet on 30/09/2011, without referring the same to the Commission, the above position was brought to the notice of the Hon'ble Prime Minister vide D.O. letter dated 17/10/2011 from the Chairperson, NCST (**ANNEXURE 3. I**) requesting the Prime Minister to have the views of the Commission considered by the Government even while the matter was engaging the attention of the Standing Committee of the Parliament. It was also requested that the 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 recommended 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.

3.13 Further, 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, to Shri S. Vijay Kumar, then Secretary, Ministry of Mines, was requested vide letter dated 13/10/2011 (**ANNEXURE 3.II**) to:

- a) produce a chronological record of the action taken on the request made by the Commission regarding the MMDR Bill, 2010,
- b) explain the reasons to avoid meaningful consultations with the Commission on the important legislation concerning the STs; and
- c) explain why legal action should not be instituted against him 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.

3.14 In response to the communication, the Ministry of Mines vide their OM dated 24/10/2011 furnished a background brief on the observations of the NCST and the action taken on various references from the NCST in the matter, in which they urged that neither the Ministry nor the Secretary, Ministry of Mines sought to deny the NCST a finalized copy of the MMDR Bill, as approved by the Government. Further, neither the Ministry nor the Secretary Ministry of Mines had any intention to disregard the NCST or avoid meaningful consultations with the NCST and Secretary, Ministry of Mines had, in fact, appeared before the Commission three times and explained in detail the extent to which the concerns of the Commission were being addressed.

3.15 In the Sitting held by the Chairperson on 3/11/2011, Under Secretary, Ministry of Mines also handed over a letter dated 3/11/2011 enclosing a modified version of the background brief (with addition of para 3.4 and modification of para 4 of their earlier brief communicated vide their OM dated 24/10/2011) as the statement of the Secretary, Ministry of Mines to be taken on record. Para 3.4 stated that Cabinet Sectt., with reference to a similar reference from the MoRD regarding mandatory consultations with the Commission, had informed (Cabinet Sectt. letter dated 21/10/2011) that the sponsoring Ministry may consult the administrative Ministry/ Department dealing with the relevant Constitutional Body/ Commission. Chairman, NCST again clarified to Shri S. Vijay Kumar, then Secretary, Ministry of Mines that the Commission, in particular, desired a chronological statement of the manner in which the request of the Commission for submitting a copy of the draft Bill had been dealt with by different officials at different stages, so that the case can be included in the Annual Report of the Commission and appropriate legal action taken against the delinquent. In the Sitting, Shri S. Vijay Kumar, Secretary, Ministry of Mines was also requested to furnish his comments along with documentary evidence within a fortnight in respect of the following:

- (i) Why he had disregarded to his obligation under Rule 11 of the Transactions of Business Rules to ensure proper transaction of business and failed to observe due diligence in the discharge of his duties according to Rule of Law.
- (ii) Reasons of his failure to understand the problem of STs and deal with them sympathetically as expected of all India Service officers.

3.16 In pursuance of the discussions held in the meeting on 03/11/2011, Under Secretary, Ministry of Mines vide OM dated 21/11/2011 forwarded a Statement on behalf of the Ministry of Mines. Along with the Statement was attached a revised Note (with addition of para 3.4 and modification of para 4 of their earlier brief communicated vide their OM dated 24/10/2011). The OM dated 21/11/2011 mentioned that Secretary, Ministry of Mines in the meeting taken on 3/11/2011 had affirmed that he did not disregard obligations under Transactions of Business Rules, nor did he fail to observe due diligence since instructions on the subject referred for Cabinet process were duly followed; and that he had also elaborated the provisions included in the draft MMDR Act which showed adequate understanding of the problems of STs, especially in relation to mining sector. In the (further) modified para 4 of their communication dated 21/11/2011, the Ministry of Mines expressed that consultation through Administrative Ministries would lead to not only a comprehensive coordinated and meaningful consultation, but would also ensure that the administrative Ministry viz. MTA and the Commission (NCST) do not work at cross-purposes. Ministry of Mines did not furnish any documentary evidence as emphasized in the meeting taken by the Chairperson on 3/11/2011.

3.17 Examination of the reply of the Ministry of Mines vide their OM dated 24/10/2011 reveals that:

- (i) Though the letter was addressed by name to Shri S. Vijay Kumar, then Secretary, Ministry of Mines, reply has been received from some other person (Shri Anil Subramaniam, US, Ministry of Mines), which was not even authenticated by Shri S. Vijay Kumar, then Secretary, Ministry of Mines. (Vide letter No. Secy(RD)/Misc/ 2012(NCST) dated 09/02/2012, Shri Vijay Kumar, now Secretary, Department of Rural Development subsequently affirmed that the same was “my written statement for taking it on record, but refused to comment “on any official action which occurred during my tenure in the Ministry of Mines”.)
- (ii) The reply furnished by the Ministry of Mines vide OM dated 24/10/2011 and 21/11/2011 only details the action taken by the Ministry of Mines in the matter but doesn't furnish any related record/ documentary evidence, as requested. In its absence, the manner in which the request of the Commission for submitting a copy of the draft Bill had been dealt with by different officials at different stages cannot be ascertained for documenting the factual position in this regard, and also for recommending action against the delinquents and remedial measures to avoid recurrences of such cases in future.
- (iii) No reasons were stated by the Under Secretary, Ministry of Mines or Shri S. Vijay Kumar, then Secretary, Ministry of Mines as to why a copy of the Bill was not sent to the NCST immediately after receiving the opinion of the Ministry of Law on 22/09/2011. The gratuitous opinion of the Ministry of Mines (para 4 of their modified Note received alongwith OM dated 21/11/2011), that the clarification given to Department of Land Resources by the Cabinet Secretariat (vide their OM dated 21/10/2011) that “the sponsoring Ministry for any draft legislation or policy should consult the concerned administrative Ministry/ Department dealing with the relevant Constitutional body/Commission is appropriate for the reason this would lead to not only a comprehensive, coordinated and meaningful consultation but would also ensure that the Administrative Ministry (here Ministry of Tribal Affairs) and the Commission (here National Commission for Scheduled Tribes) do not work at cross purposes” is not only an insolent afterthought, but also betrays complete lack of understanding of the role of the Commission, as observations and views of the NCST on various issues concerning the STs may often be at variance with the views of the MTA. Also, Cabinet Secretariat guidelines cannot supersede NCST's request for production of documents, which has the force of law as a direction from a Civil Court.
- (iv) Shri S. Vijay Kumar, currently Secretary, Department of Land Resources (then Secretary, Ministry of Mines) has not effectively complied with the advice rendered in the meeting taken on 3/11/2011 to submit his comments

in the matter with documentary evidence within a fortnight, preferring to raise extraneous and illusory questions of procedure instead of replying to substantive points. It is debatable whether he would take these pleas when giving evidence before a regular Civil court.

3.18 Consequently, vide NCST letter dated 3/02/2012, Shri S. Vijay Kumar former Secretary Ministry of Mines (now Secretary, Ministry of Rural Development) was offered a final opportunity to discuss his reply and explain his position on the above issues in another Sitting on 13/2/2012. Shri S. Vijay Kumar, Secretary, MoRD, in his statement dated 13/2/2012, (**ANNEXURE 3.III**) while drawing attention to his response communicated vide MoRD letter no. Secy 1(RD)/Misc/2012(NCST) dated 9/2/2012, clarified as under:

- (i) All letters/requests of the NCST regarding consultation with NCST in terms of clause (9) of Article 338A of the Constitution have been promptly responded from the Ministry of Mines (reference letters dated 11/8/2011, 17/8/2011, 13/9/2011, 30/9/2011, 24/10/2011, 3/11/2011 and 21/11/2011). In addition Hon'ble Minister of Mines has also written to NCST on 27/9/2010;
- (ii) All meetings of the NCST have been attended by me as requested (meetings dated 25/7/2011, 17/8/2011, 15/9/2011 and 3/11/2011);
- (iii) In the meeting with the Commission on 3/11/2011, in my then capacity as Secretary, Ministry of Mines, I explained the entire matter in detail and also left a written copy of my statement vide letter no. 16/83/2009-M(VI)(Part V) dated 3/11/2011 which may be taken on record;
- (iv) Based on the minutes of the meeting held on 3/11/2011, a further response was given vide Ministry of Mines OM No. 16/83/2009-MVI (Part V) dated 21/11/2011;
- (v) It has been reiterated in the letters and meetings that there was no intention of disregarding obligations under the Transaction of Business Rules, and that due diligence was observed at all times in terms of the instructions on a subject referred for Cabinet process, as is evident from the chronology provided in response to the requests of the NCST.
- (vi) The matter relates to Clause (9) of Article 338A of the Constitution of India which enjoins mandatory consultation of Government of India with the NCST on matters of policy. Since all proceedings of the Commission in this matter have been under Clause (9) of the Article, any further requests in the matter need to be made to the Ministry of Mines, Government of India. In case the NCST requires any specific document pursuant to Clause (9) of Article 338A of the Constitution, they may make a specific request to the Ministry of Mines. I am no longer in the Ministry of Mines and am therefore not in a position to assist the NCST in the matter.

3.19. The Commission has noted that despite repeated exhortations, the draft Mines and Mineral (Development & Regulation Bill) 2011, as finalized by the Ministry of Mines, was withheld from the Commission till after consideration was completed by the Council of Ministers on 30/09/2011; and, its directions mentioned in the NCST communication dated 13/10/2011 to produce

documents/ a chronological record of the action taken on the request of the Commission to forward the draft Bill for its views/ comments, and in the Sitting taken on 3/11/2011 to submit comments in the matter with documentary evidence within a fortnight have not been complied. Further, instead of responding substantively to the issues raised by the Commission, extraneous and illusory questions of procedure have been urged. The Commission has, therefore, viewed these transgressions as a flagrant disregard of the authority vested with the Commission under Clause (8) (b) of Article 338 A, whereby the Commission, while investigating any matter, inter- alia, referred to in sub-clause (a) has all the powers of a Civil Court in regard to production of documents. The Commission has further noted that in the treatment of the case, Shri S. Vijay Kumar, in his capacity as the Secretary, Ministry of Mines has reflected lack of proper understanding of Constitutional provisions – in particular, the obligation to consult the Commission in a meaningful manner as mandated under the Constitution; which in the context of non-production of documents, has been viewed by the Commission as deliberate attempt to evade repeated persuasions by the Commission to submit the draft Bill for Commission’s views/comments. The Commission is distressed to observe that inspite of receiving Ministry of Law’s unambiguous advice on the subject, the Bill was forwarded to the NCST only on the day it was considered by the Cabinet, effectively forestalling the consideration of NCST’s comments by the Council of Ministers.

3.20 The Commission has viewed that such perfidious actions on the part of a very senior officer of the level of Secretary to the Government are to be deprecated as deliberate failure to maintain transparency of actions regarding implementation of Constitutional safeguards with respect to Scheduled Tribes; and the same do not exhibit the expected sensitivity of approach/attitude towards weaker sections. These findings of the Commission have been communicated to Shri S. Vijay Kumar, Secretary, MoRD vide letter dated 6/03/2012, with a copy to the Secretary, DoPT and the Cabinet Secretary (**ANNEXURE 3.IV**). However, taking a lenient view of the matter Shri S. Vijay Kumar has been informed that the Commission has decided to advise the DoPT, (which is the Cadre Controlling Authority for the All India Services (IAS)) , as well as the Cabinet Secretariat, to take appropriate action in the matter; and also take requisite measures to avoid recurrence of such cases in future keeping in view the instructions contained/ in the DoPT O.M. No.36036/2/97-Estt (Res) dated 01/01/1998 and 30/11/1998, relevant extracts of which are re-produced below:

DoPT O.M. No.36036/2/97-Estt (Res) dated 01/01/1998

“The Court also held that the powers of the Commission in terms of Article 338(8) of the Constitution are all the procedural powers of a civil court for the purpose of investigating and inquiring into the matters and that too for that limited purpose only”.

DoPT O.M. No.36036/2/97-Estt (Res) dated 30/11/1998:

“The National Commission for Scheduled Castes and Scheduled Tribes is assigned the important role of safeguarding the interests of the Scheduled Castes and the Scheduled Tribes and has been vested with certain powers in discharge of its role in terms of Article 338 of the Constitution. The Ministries/Departments, etc. are therefore expected to extend maximum cooperation to the commission in the discharge of its role and to give its recommendations/ suggestions due consideration”.

3.21 Since there was no information from the Ministry of Personnel and Training (Department of Personnel and Training) about action taken on the recommendation made in the Commission's letter dated 06/03/2012, a Sitting was held with the Secretary, Department of Personnel and Training in the Chamber of Hon'ble Chairperson NCST on 16/05/2012. The Secretary, Department of Personnel and Training informed during the Sitting that the Commission's letter dated 06/03/2012 regarding complaint against Shri S. Vijay Kumar Secretary, Ministry of Rural Development had been forwarded to the Cabinet Secretariat, vide their UO No.104/92/2012-AVD.I on 14/04/2012 for taking action in terms of instructions contained in DoPT OM No. 104/100/2009-AVD.I dated 14/01/2010. There is, however, no information about further action taken by the Cabinet Secretariat in this matter.

3.22 In this case also, MTA, the administrative Ministry dealing with NCST has not consulted the Commission on the Bill. The views expressed by the Secretary, Ministry of Mines, that MMDR Bill 2010 being a legislation based on National Mineral Policy 2008 may not qualify as a policy matter affecting STs in terms of the provision of Clause (9) of Article 338A of the Constitution, and proceeding to seek the opinion of the Ministry of Law in the matter is by itself a reflection of the poor understanding of the Constitutional provisions regarding mandatory consultation with the Commission; and the subsequent delay to act according to the advice received from the Ministry of Law sharply demonstrates the need for modifying the Transaction of Business Rules of the Government to unambiguously implement this Constitutional obligation in terms of the legal advice tendered by the Ministry of Law.

(C) Land Acquisition, Rehabilitation & Resettlement Bill, 2011

3.23 The Commission learnt 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. These Bills were passed by the Lok Sabha, but could not be tabled in the Rajya Sabha. The Commission noted that the Ministry of Rural Development did not consult the National Commission for Scheduled Tribes before introducing the Bill in the Parliament. However, considering the imperative need for normative definition/ implementation of rehabilitation and resettlement measures through law, the Commission conveyed detailed comments on the proposed legislation to

the Ministry of Rural Development and Ministry of Tribal Affairs vide d.o. letter dated 6/08/2010 and 25/8/2010 respectively from Shri Maurice Kujur, Vice-Chairperson, and acting Chairperson, National Commission for Scheduled Tribes.

3.24 As there was no communication from the MoRD, the Chairperson, NCST again addressed the Union Minister of Rural Development vide letter dated 20/05/2011. Since it elicited no response from the MoRD, the Chairperson, NCST vide his letter dated 13/07/2011 again invited the attention of the new Union Minister for Rural Development towards the concern of the NCST regarding the draft Bills of 2007. The Union Minister for Rural Development vide his letter dated 15/07/2011 assured the Chairperson that the views of the NCST would be fully considered before finalizing a new legislation on Land Acquisition.

3.25 In order to follow up the matter, a Sitting was held by the Chairperson NCST with the Secretary, Deptt. of Land Resources (DoLR), on 29/07/2011, in which the Secretary, DoLR mentioned that the Department was processing an integrated Bill covering both land acquisition and resettlement and the Bill had special provision for the Scheduled Tribes. The Commission was also informed that the draft Integrated Bill was being hosted on the website; and after examination of suggestions/ comments, the Department will initiate inter-Ministerial consultations and at that stage the views of the Commission will also be sought. The Commission emphasized that the matter (for advice under the provisions of Article 338A(9)) may be referred to the Commission after completion of internal process of drafting the Bill and before submission to the Cabinet. The Commission also observed that in view of the various issues highlighted during the discussion, a separate Chapter, mentioning the manner in which the provisions of the draft Bill will be applicable to the Scheduled Tribes and the Scheduled Areas, should be included in the Bill. The Secretary, DoLR mentioned that the Department would consider the observations of the NCST and, if considered necessary, the matter will be decided in consultation with the Ministry of Law.

3.26 As land acquisition effectively transfers ownership of tribal land to others, the Commission was anxious that certain important concerns be adequately addressed in the Bill, and requested the Department of Land Resources, Ministry of Rural Development, on several occasions to submit the Bill as finalized for obtaining the views/ comments of the Commission under Article 338A(9) of the Constitution. The Ministry of Rural Development vide letter dated 19/08/2011 informed the Commission that a draft Land Acquisition, Rehabilitation & Resettlement Bill, 2011 has been prepared and put in the public domain; and sought the comments and suggestions of the Commission thereon. The NCST vide letter dated 30/08/2011 highlighted that for a meaningful consultation, the Commission would be able to furnish the comments only after the draft Bill has been finalised by the Ministry of Rural Development. A reminder

to the Secretary, Department of Land Resources was sent on 09/09/2011, (with a copy to the Secretary, Department of Legal Affairs, Ministry of Law) for apprising the Commission about the progress in the matter in pursuance of the discussions in the Sitting held on 29/07/2011 but without result.

3.27 Since the Bill was introduced in the Lok Sabha on 07/09/2011, without referring the same to the Commission, the above position was brought to the notice of the Hon'ble Prime Minister vide D.O. letter dated 17/10/2011 from the Chairperson, NCST requesting the Prime Minister to have the views of the Commission considered by the Government even while the matter was engaging the attention of the Standing Committee of the Parliament. It was also requested that the 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 recommended 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. In addition, the Chairperson, National Commission for Scheduled Tribes vide letter dated 14/10/2011 decided to call the Secretary, Department of Land Resources, Ministry of Rural Development for discussions on 3/11/2011 to:

- Produce a chronological record of the action taken on the requests made by the Commission regarding the (i) Land Acquisition (Amendment) Bill, 2007, (ii) Rehabilitation and Resettlement Bill, 2007 and (iii) Land Acquisition and Rehabilitation & Resettlement Bill, 2011.
- Explain the reasons for avoiding meaningful consultation with the Commission on this important legislation concerning the STs; and
- Explain why legal action should not be instituted against the Secretary, Deptt. of Land Resources, MoRD, 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.

3.28 In the NCST communication dated 14/10/2011 it was also 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 that the Ministry 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. In the Sitting held by the

Chairperson on 3/11/2011 (attended by the then Secretary DoLR) it was requested to furnish comments also in respect of the following:

- (i) Why the Secretary, DoLR had disregarded to his obligation under Rule 11 of the Transactions of Business Rules to ensure proper transaction of business and failed to observe due diligence in the discharge of his duties according to Rule of Law.
- (ii) Reasons for the Secretary's failure to understand the problem of STs and deal with them sympathetically as expected of all India Service officers.

3.29 Chairman, NCST had also clarified to the then Secretary, DoLR that the Commission desired, in particular, a chronological statement of the manner in which the request of the Commission for submitting a copy of the draft Bill had been dealt with by different officials at different stages so that the case can be included in the Annual Report of the Commission and appropriate legal action taken against the delinquent. The then Secretary, DoLR was also requested to submit comments on the above mentioned issues with documentary evidence within a fortnight.

3.30 The Deptt. of Land Resources (DoLR) vide letter dated 21/11/2011 (**ANNEXURE 3.V**), furnished a reply, inter-alia stating that the Department had followed the guidelines/ instructions of the Cabinet Secretariat regarding inter-ministerial consultations. It was also highlighted in the letter that the Cabinet Secretariat vide its letter dated 21/10/2011 has informed that "the sponsoring ministry/ department may consult the administrative Ministry/ Department dealing with the relevant Constitutional body/ Commission/ Statutory body etc. except in cases where there is no administrative Ministry/ Department specified for such bodies/Commission etc." DoLR did not communicate details of their reference to the Ministry of Law, if any, in the matter as mentioned in the meeting held on 29/07/2011.

3.31 While the Department's reply was a clear afterthought (Cabinet Secretariat letter is dated 21/10/2011 while the Bill was introduced in Parliament on 07/09/2011), the case reveals that the DoLR disregarded the provision under Article 338A(9) of the Constitution, despite several communications from this Commission, and also contravening the advice of the Ministry of Law that Ministries are obligated by the Constitution to consult the Commission on the provision of the draft bill affecting Scheduled Tribes. It would also appear that the Cabinet Secretariat have not been fully cognizant of the import of Constitutional obligations. The Law Secretary, vide his letter dated 26/10/2007 (**ANNEXURE 3.VI**), had written to the Cabinet Secretary requesting him to advise all Ministries/ Departments to follow strictly the provision contained in the said Article 338A(9). This advice of the Law Secretary is not correctly reflected in the clarification issued to the DoLR, which attempts to transfer this obligation to "Administrative Ministries". Interestingly, MTA, the administrative Ministry dealing with the NCST, also did not refer the Bill to NCST for consultations.

3.32 Examination of the reply of the DoLR vide their OM dated 21/11/2011 reveals that:

(i)	Though the letter was addressed by name to Ms. Anita Chaudhary, Secretary, DoLR, reply has been received from some other person (Shri Surendra Kumar, Joint Secretary, DoLR) vide DoLR OM No. 210111/04/2011-LRD dated 21/11/2011, which does not even purport to be authorized by her.
(ii)	DoLR's reply is a clear afterthought, since the Bill was introduced on 7/9/2011 and the advice of the Cabinet Secretariat was issued on 21/10/2011.
(iii)	No reasons have been stated in DoLR letter dated 21/11/2011 as to why a copy of the Bill, as finalized before submission to the Cabinet could not have been communicated to the Commission.

3.33 Therefore, Chairman, NCST called another sitting on 03/02/2012 to offer a final opportunity to Ms. Anita Chaudhary, Secretary, DoLR to explain her position on the above issues. Since it was learnt that Ms. Anita Chaudhary had been on long leave due to her illness, the sitting was re-scheduled for 16/02/2012. In the Sitting held on 16/02/2012, Ms. Anita Chaudhary, Secretary, DoLR mentioned that she had been on leave from August 2011 to February 2012. She also clarified that copies of the relevant documents had already been enclosed to the Department's letter dated 21/11/2011. However, if NCST wishes to peruse any other records in this regard, DoLR will be willing to provide the same. Subsequently, vide letter dated 17/02/2012, Mrs Chaudhary confirmed this position. **(ANNEXURE 3.VII)**

3.34 The Commission has noted that non-compliance/non-receipt of any response from Ms. Chaudhary to the NCST communication dated 14/10/2011, asking her to produce a chronological record of the action taken on the request of the Commission, has been occasioned as a result of her absence on long medical leave during the period. The Commission has, therefore, decided not to proceed with any action in this regard. The Commission has, however, noted that despite exhortations, the draft Land Acquisition and Rehabilitation & Resettlement Bill, 2011 was not forwarded to the Commission for its views/comments even at the time of inter-Ministerial consultations, as assured by Ms. Chaudhary in the meeting taken by the Chairperson on 29/07/2011. In the treatment of the case in her capacity as the Secretary of the DoLR, Ms. Chaudhary has reflected lack of proper understanding of Constitutional provisions – in particular, the obligation to consult the Commission in a meaningful manner as mandated under the Constitution. Further, instead of responding substantively to the issues raised by the Commission in the meeting taken by the Chairperson on 29/07/2011, extraneous and illusory questions had been raised by Ms. Chaudhary regarding the powers of the Commission (refer para 6 of minutes of the Meeting held on 29/07/2011) **(ANNEXURE 3.VIII)**. These

transgressions are viewed as deliberate disregard of the authority vested with the Commission under Clause (8) (b) of Article 338 A, whereby the Commission, while investigating any matter, inter- alia, referred to in sub-clause (a) has all the powers of a Civil Court in regard to production of documents. The Commission has viewed that such perfidious actions on the part of a very senior officer of the level of Secretary to the Government are to be deprecated as deliberate failure to maintain transparency of actions regarding implementation of Constitutional safeguards with respect to Scheduled Tribes; and the same do not exhibit the expected sensitivity of approach/attitude towards weaker sections. These findings have been communicated to Ms. Anita Chaudhary, Secretary, MoRD vide letter dated 14/03/2012, with a copy to the Secretary, DoPT and the Cabinet Secretary (**ANNEXURE 3.IX**). However, taking a lenient view of the matter, Ms. Anita Chaudhary has been informed that the Commission has decided to advise the DoPT, which is the Cadre Controlling Authority for the All India Services (IAS), as well as the Cabinet Secretariat, to take appropriate action in the matter; and also take requisite measures to avoid recurrence of such cases in future, keeping in view the instructions contained/ in the DoPT O.M. No.36036/2/97-Estt (Res) dated 01/01/1998 and 30/11/1998 (**ANNEXURE 3.X**) and (**ANNEXURE 3.XI**) respectively, relevant extracts of which are quoted in para 3.26 above.

3.35 Since there was no information from the Ministry of Personnel and Training (Department of Personnel and Training) about action taken on the recommendation made in the Commission's letter dated 14/03/2012, a Sitting was held with the Secretary, Department of Personnel and Training in the Chamber of Hon'ble Chairperson NCST on 16/05/2012. The Secretary, Department of Personnel and Training informed during the Sitting that the Commission's letter dated 14/03/2012 regarding complaint against Ms. Anita Chaudhary Secretary, Department of Land Resources, Ministry of Rural Development had been forwarded to the Cabinet Secretariat, vide their UO No.104/92/2012-AVD.I on 14/05/2012 for taking action in terms of instructions contained in DoPT OM No. 104/100/2009-AVD.I dated 14/01/2010. There is, however, no information about further action taken by the Cabinet Secretariat in this matter.

(D) National Food Security Bill, 2011

3.36 It was learnt from the news reports that the Department of Food & Public Distribution, Ministry of Consumer Affairs is processing the Draft National Food Security Bill and it has been hosted on the Ministry's website. This Commission vide D.O. letter dated 18/10/2011 requested the Secretary, Deptt of F & PD, Ministry of Consumer Affairs, Government of India to forward a copy of the Bill, as finalized, for seeking the views of the Commission in accordance with the provisions of Clause 9 of Article 338A of the Constitution. In this connection, the opinion of the Ministry of Law emphasizing that the Ministries are obliged by

the Constitution to consult the Commission on the provision of a draft Bill affecting STs, was also forwarded to the Department.

3.37 In response, the Department of F& PD vide letter dated 21/10/2011 sought the views of the Commission on the Bill as available in the public domain only. Subsequently, the Secretary, Department of F & PD was informed vide D.O. letter dated 27/10/2011 that the Deptt. of F& PD had failed to appreciate the purport of NCST's communication, wherein it was clearly mentioned that views of the Commission were required to be sought on the Bill, as finalized by the Ministry, for meaningful consultation with the NCST as envisaged under Article 338A(9) of the Constitution. The Secretary, Department of F&PD was also informed that seeking views of the Commission at this stage, when the Ministry has not finalized its views on the Bill, does not serve the intended purpose and the spirit of the Constitution.

3.38 It was further understood from the news reports that the draft Bill, after incorporating certain changes to the version provided in the public domain would be drafted by the Department of F & PD shortly. The matter was placed before the Chairperson, National Commission for Scheduled Tribes and he decided to discuss the matter with the Secretary, Deptt. of F & PD, Ministry of Consumer Affairs, F & PD, on 11/11/2011. The Sitting held by the Chairperson, National Commission for Scheduled Tribes on 11/11/2011 was attended by the Joint Secretary, Department of F & PD as the Secretary was stated to be away who informed the Commission that first round of discussion on the Bill was already over and inter-Ministerial consultations were being held on the Bill. At this stage, the Ministry of Consumer Affairs, F&PD, was also separately referring the Bill to the National Commission for Scheduled Tribes for their comments. The Commission again emphasized that seeking views of the Commission at this stage, when the Ministry has not finalized its views on the Bill, does not serve the intended purpose and the spirit of the Constitution, as envisaged under Article 338A(9) of the Constitution. Attention was also invited to the opinion of the Ministry of Law & Justice in the matter. The Joint Secretary, Department of F&PD mentioned that after receipt of comments from the various Ministries on the Bill, the Deptt. of F& PD is expected to finalize it within a very short period. He assured that the draft Bill after its finalization by the Ministry, and before consideration of the Cabinet, would be referred to the Commission for seeking views/ comments. He, however, requested the Chairperson, NCST to have views/ comments of the Commission on the draft Bill, as finalized by Ministry of Consumer Affairs, F & PD, within one or two days.

3.39 Pending receipt of final draft Bill from the Department of F & PD, the observations of the Commission on the draft Food Security Bill, 2011 (as circulated for inter-ministerial consultations) were also forwarded to the Department of F&PD, Ministry of Consumer Affairs vide letter dated 22/11/2011. It was pointed out to the Ministry that the revised Bill circulated for inter-ministerial consultations was not substantially different from the earlier version

available in the public domain. The Ministry was, therefore, requested to forward by 28/11/2011 a copy of the Bill as finalized by the Ministry for consideration of the Cabinet. The Chairperson, NCST also held a Sitting with the Secretary, Department of F&PD, Ministry of Consumer Affairs on 28/11/2011. During the Sitting, Secretary, F&PD assured the Chairperson that the final draft Bill would be made available to the Commission by hand by 10:00 AM on 01/12/2011 and requested that the views/ comments of the Commission may be made available to the Ministry at the earliest as the Bill was slated to be submitted to the Cabinet shortly. The Department of F&PD, Ministry of Consumer Affairs F &PD, vide letter dated 01/12/2011 forwarded for views/ comments of the Commission, a copy of the revised National Food Security Bill, 2011 as finalized by the Department before its submission to the Cabinet. The Commission held a special meeting on 01/12/2011 to consider the final draft of the National Food Security Bill, 2011 as received from the Ministry.

3.40 The Commission noted that the Bill, as finalised by the Department of F&PD was not much different in substance than the earlier draft and the views/comments of the Commission, communicated earlier vide letter dated 22/11/2011 did not appear to have been considered while finalizing the final version forwarded by the Ministry on 01/12/2011 for comments of the Commission. These views/ Comments, of the Commission on the final version of the Bill were forwarded to the Deptt of F &PD, Ministry of Consumer Affairs, F & PD, on the same day i.e. 01/12/2011, with the request to communicate the action taken on the recommendations for its inclusion in the forthcoming Report to be submitted by the Commission to the President. As information about the action taken on the recommendations made by the Commission on the Bill was not forthcoming from the Deptt. of F & PD, Chairperson, NCST held another Sitting with the Secretary, Deptt. of F & PD on 05/1/2012 to ascertain the position. The Secretary, Deptt. of F & PD informed in the meeting that a major concern of the NCST incorporating a separate chapter on STs in the NFSB were met by inclusion of a new section (Section 38) in the NFSB for special focus on tribal area in implementation of the Act. Other comments of the NCST alongwith responses of the Deptt. of F & PD were also enclosed with the final Note on the Bill for the Cabinet. Deptt. of F &PD also informed that in pursuance to the discussion held in the meeting on 11/11/2011, Deptt. of F & PD had also sought legal opinion from the Department of Legal Affairs on the points of mandatory consultation with the NCST on NFSB and the stage at which the consultation should be held. Deptt. of F&PD, also informed that Deptt. of Legal Affairs vide their note, approved by the Minister of Law and Justice on 25/11/2011 have, inter-alia, opined that in view of the provisions of the Constitution, the NCST may be consulted on the draft NFSB. Ministry of Law further stated that in the absence of any statutory provision or any provision in the 'Manual of Parliamentary Procedures in the Government of India', it is for the administrative department to take an appropriate decision as at which stage, the Commissions (NCST and NCSC) should be consulted. (**ANNEXURE 3.XII**)

3.41 The case reveals that despite the Constitutional provisions MTA, the administrative Ministry for the Commission did not seek consultation with the Commission on the Bill. The Ministry of Consumer Affairs, Deptt. of F&PD also did not seek views/comments on the Bill; and a copy was forwarded to the Commission only after repeated persuasion through letters and Sittings at the level of the Chairperson and after obtaining legal opinion by the Ministry of F&PD in the matter. Finally, the views of the Commission were sought by the concerned Department but with a condition that the comments may be communicated to them same day. Further, though the Commission had specifically requested the Ministry to inform the consideration, if any, given by the Ministry to the views/ comments furnished by the Commission, also highlighting that this was required for incorporation in the forthcoming reports of the Commission to be presented to the President, the Ministry, on their own, did not communicate the same. These were submitted by the Ministry only when the Commission held a Sitting with the Secretary, F & PD.

Mandatory Consultations with NCST under Art 338 A(9) – Amendment In Handbook Of Instruction of Cabinet Secretariat.

3.42 The Commission's experience highlighted following major areas of concern:

- i. Ministry of Tribal Affairs, the administrative Ministry for the NCST, did not consult the Commission even on important legislation concerning the Scheduled Tribes like the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, Land Acquisition (Amendment) Bill, 2007, Rehabilitation and Resettlement Bill, 2007, Land Acquisition and Rehabilitation & Resettlement Bill, 2011, Mines and Minerals (Development and Regulation) Bill, 2011, National Food Security Bill, 2011.
- ii. Notwithstanding the explicit provisions in the Constitution, none of the Ministries dealing with the above Bills sought the comments of the Commission.
- iii. Even when the Commission communicated its recommendations *suo-moto*, in respect of the Land Acquisition (Amendment) Bill, 2007, Rehabilitation and Resettlement Bill, 2007, Land Acquisition Rehabilitation & Resettlement Bill, 2011, Mines and Minerals (Development and Regulation) Bill, 2011, the concerned Ministries do not seem to have placed the Commission's recommendations for consideration by the Cabinet.
- iv. Even after being reminded of Constitutional obligations by the NCST, the concerned Ministries dealing with Rehabilitation and Resettlement Bill, 2007, Land Acquisition, Rehabilitation & Resettlement Bill, 2011, Mines and Minerals (Development and Regulation) Bill, 2011 sought views of the Commission on the draft Bill as available in the public domain, which negated the purpose, because for a meaningful consultation as envisaged under Article 338A(9) of the Constitution, it is desirable for the concerned Ministry to seek consultation with the Commission after completion of the

internal processes of drafting/ inter-Ministerial consultations.

- v. The repeated efforts by the Commission to impress upon the concerned Ministry dealing with these Bills to incorporate the recommendations of the Commission for consideration of the Cabinet did not yield any result; and the Ministries indulged in wasting time and finding ways and means to avoid consultations with NCST by seeking clarifications (from the Cabinet Secretariat and the Ministry of Law) on a provision incorporated into Constitution over 20 years ago.
- vi. Though after repeated communications/ Sittings taken by the Chairperson, Department of F&PD referred the Bill to the Commission for its views/ comments indicating that these are required within a day. Thus, adequate time was not given to the Commission in the matter. Further, though the Commission, while communicating their comments on the Bill had specifically requested the Ministry to communicate the consideration, if any, given by the Ministry to the views/ comments furnished by the Commission, also highlighting that this was required for incorporation in the forthcoming reports of the Commission to be presented to the President, the Ministry, on their own, did not communicate the same. These were submitted by the Ministry only when the Commission convened a Sitting with the Secretary, F & PD to obtain the same.
- vii. The existing instructions (as well as the clarifications issued to the Ministry of Rural Development by the Cabinet Secretariat. vide letter dated 21-10-2011) have not been able to serve the intended objective regarding mandatory consultation enshrined under Article 338A (9) of the Constitution, which have also been emphasized by the Ministry of Law and Justice.
- viii. There appears to be a vast gulf of understanding amongst the Ministries of the Government/ Cabinet Secretariat regarding the constitutional responsibility of the NCST and the constitutional obligation of the Union Government under Article 338A(9) of the Constitution; and also considerable lack of sensitivity towards the needs and problems of the Scheduled Tribes and the Scheduled Areas in the country, for which special provisions have been incorporated in the Constitution.
- ix. The National Commission for Scheduled Tribes is a Constitutional body and it cannot be treated by the Cabinet Secretariat/ Ministries of the Government as a subordinate organization. Further, the views/ recommendations made by the Commission are required to be laid in both Houses of Parliament along with action taken Memorandum explaining the acceptance/ non-acceptance of those recommendations. Therefore, Ministry of Tribal Affairs, or for that purpose any other Ministry, has no "oversight role" to play in the context of recommendations made by the Commission, or amending those recommendations. The direction to seek consultation with the Ministry/ Department only, (as per existing instruction 39 of Hand Book on "Writing Cabinet Notes"), and consultation with the Commission through the concerned Ministry/Department (as per the clarifications issued to the Ministry of Rural Development by the Cabinet Secretariat. vide letter dated 21-10-2011 refer) circumscribe the role of the Commission and dilute the provisions regarding mandatory consultation enshrined in Article 338 (A)(9) of the Constitution.
- x. The Commission has recommended in its earlier reports that whenever

matters are referred to this Commission for advice or comments, the views expressed by this Commission should invariably be placed, without any oversight or modification, before the concerned authorities for their consideration, as the final decision on the issue rests with the concerned authority. The instructions no.39 of the consolidated instructions applicable to Notes for the Cabinet/ Cabinet Committees/ EGoM/ GoMs issued by the Cabinet Secretariat, viz. the views of the consulted Ministries/ Departments need to be faithfully reflected in the main note to ensure that the Cabinet/ Cabinet Committees could peruse them before arriving at a decision. The comments of the consulted Ministry should not be edited or para-phrased in a manner as to alter their connotation and all the comments/ conditionalities should be incorporated in the note/ annexures, should therefore, be strictly followed in respect of the recommendations of the Commission too.

- xi. The Commission is expected to indicate the Action taken on its recommendations on the matters concerning the Scheduled Tribes in the Report to be submitted to the President as required under Article 338A of the Constitution. The recalcitrance/ absence of feed-back from the concerned Ministries in this regard has incapacitated the Commission to discharge its constitutional duties in such an important area.

3.43 The Commission has been perturbed by the cavalier disregard exhibited by some Ministries, specifically those dealing with social issues, 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 Fourth Annual Report of the Commission for the year 2008-09 and Fifth Annual Report for the period 2009-10, which unfortunately have still to be placed in Parliament. In those Reports, the Commission had specifically recommended to the President that the Cabinet Secretariat and the Ministry of Law, Justice and Legal Affairs should be tasked with the responsibility of ensuring meaningful consultations with the Commission before legislative proposals are placed for consideration by the Council of Ministers. The matter was also specifically brought to kind attention of the Prime Minister after submitting these reports to the President (D.O. letters No 4/5/2010-Coord dated 09/09/2010 and No 4/2/11/11-Coord dated 20/07/2011 refer). Accordingly, the Chairperson, National Commission for Scheduled Tribes decided to hold a Sitting at 12:00 Hrs. on 04/01/2012 to discuss the matter with the Cabinet Secretary in person. A detailed note on the subject matter was also forwarded to the Cabinet Secretary. **(ANNEXURE 3.XIII)** Shri Alok Rawat, Secretary (Coord.), along with Shri Rajive Kumar Additional Secretary and Smt. Nivedita Shukla Verma, Joint Secretary in the Cabinet Secretariat, attended the Sitting. During the Sitting, the Commission was informed that after receipt of the NCST communication, the concern raised by the Commission was considered at the highest level in the Cabinet Secretariat and the lapse on the part of the Ministries by not consulting the Commission in policy matters including legislative matters affecting the Scheduled Tribes and the Scheduled Areas was viewed as a serious matter indicating violation of the provisions of Article 338A(9) of the Constitution.

3.44 The Commission was further informed that in order to ensure that all Ministries strictly follow the provisions laid down in the said Article, the Cabinet Secretary, vide his D.O. letter No. 703/1/1/2011-CA.V dated 04/01/2012, addressed to the Secretaries of all the Ministries and Departments has requested them to strictly follow the provisions of Article 338A(9) of the Constitution (**ANNEXURE 3.XIV**). A copy of the D.O. letter was also placed before the Commission. The Commission invited the attention towards Instructions for Inter-Ministerial Consultations in the HANDBOOK of INSTRUCTIONS of the Cabinet Secretariat, specifically towards Instructions No.46 to 49 relating to mandatory consultations with certain Ministries/ Departments/ Organisations on specified policy issues. Instruction No. 49 envisages that "*in respect of social sector schemes, the Ministries/Departments should necessarily consult the Ministry of Panchayati Raj to enable empowerment of these democratic institutions at grass root level. The Ministry of Panchayati Raj should also be consulted in all cases relating to centrally sponsored Programmes`/ Schemes*". The Commission also observed that, past experience shows that instructions issued through letters do not have lasting effect unless these instructions are incorporated in the Handbook of Instructions of the Cabinet Secretariat through suitable amendments issued by the Cabinet Secretariat. The Commission, therefore, advised the Secretary (Coord.), Cabinet Secretariat to review the position in the matter and inform the Commission. The Secretary (Coord.) assured the Commission that action taken in the matter will be submitted shortly.

3.45 Subsequently, in the Sitting held by the Hon'ble Chairperson, NCST on 21/02/2012 with the officials of the Cabinet Secretariat, Commission noted that the Secretary (Coord. & PG) vide D. O. letter No.703/1/1/2011-CA.V dated 10/02/2012 (**ANNEXURE 3.XV**) had reiterated the instructions contained in the D.O. letter dated 4th Jan., 2012. The letter further clarified that such consultations with the National Commission for Scheduled Castes and the National Commission for Scheduled Tribes in respect of major policies are to be carried out through the concerned administrative Ministries in respect of all major policy issues including those placed before the Cabinet/ Cabinet Committees as required under the Constitution. Further, according to the revised instructions issued vide OM dated 16/2/2012, (**ANNEXURE 3.XVI**), the sponsoring Ministries/ Departments were advised to ensure that the National Commission for the Scheduled Castes, and the National Commission for the Scheduled Tribes, as the case may be, shall mandatorily be consulted by them through the Ministry/Department administratively concerned with the Commission before finalization of such notes for consideration of the Cabinet/Cabinet Committees. In all such cases, the administrative Ministry/Department concerned will place the views of the concerned National Commission, as the case may be, as received by them, before the Minister-in-charge of the Ministry/ Department concerned before their final views/ comments on such issues were

communicated to the sponsoring Ministry/ Department. Further, the unabridged/ unedited views of the concerned Commission along with the views of the Ministry/ Department administratively concerned with the Commission be included in/ enclosed with the note for consideration of the Cabinet/ Cabinet Committees along with responses thereon by the sponsoring Ministry/ Department.

3.46 The Commission pointed out to the officers from the Cabinet Secretariat that the revised procedure for consulting the Commission through the Ministry of Tribal Affairs creates a dilatory mechanism, which circumscribes and dilutes the responsibility of all Ministries the Govt., under Article 338A of the Constitution, to ensure mandatory meaningful consultation with the Commission on policy related matters concerning STs. Further, none of the Bills viz. the (Integrated) Land Acquisition, Rehabilitation & Resettlement Bill, 2011, Mines and Minerals (Development and Regulation) Bill, 2011 were forwarded to this Commission by the sponsoring Ministries or the Administrative Ministry, and the Commission had suo-moto advised these Ministries to seek consultation with the Commission. Yet, these Ministries resorted to seeking opinion of the Ministry of Law for seeking legal opinion in such matters deliberately thwarting the process of consultation. These cases clearly reflected (i) *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, (ii) maintaining transparency of actions regarding implementation of Constitutional safeguards with respect to Scheduled Tribes and (iii) and lack of expected sensitivity of approach/ attitude towards weaker sections.* The Commission, therefore emphasized that the revised instructions/ procedures are also fraught with risk of such failures as noticed in the past and therefore, a fool proof system should be designed to avoid recurrence of such cases in future. The Commission invited the attention of the Cabinet Secretariat towards instructions No. 46 to 49 of the Handbook of instructions issued by the Cabinet Secretariat. These instructions read as follows:-

46. National Manufacturing Competitiveness Council should be consulted in all cases relating to manufacturing sector.
47. All proposals concerning revival or restructuring of public sector undertakings should be first referred to BRPSE and thereafter brought up before the Cabinet/Cabinet Committees after necessary inter-ministerial consultations.

3.47 Instructions no. 46 and 47 specifically require consultation with the NMCC and BRPSE respectively without mentioning that such consultations will be done through their administrative Ministry/ Department. In this context it is worth mentioning that the NMCC, which is to be consulted in all cases relating to manufacturing sector ,is an autonomous body set up in October 2004, by a Government Order, under the Department of Industrial Policy and Promotions in

the Ministry of Commerce and Industry and similarly, BRPSE, to which proposals concerning revival or restructuring of public sector undertakings should be first referred to, is an Advisory Body set up in December, 2004, by a Resolution of the Government, under the Department of Public Enterprises in the Ministry of heavy Industries & Public Enterprises. In contrast, the National Commission for Scheduled Tribes is a Constitutional Commission having legendary existence since the adoption of the Constitution. Therefore, in view of the above, the Cabinet Secretariat should have no problem in issuing an instruction directing all Ministries for meaningful consultation with the National Commission for Scheduled Tribes in all major policy matters (including Notes for Cabinet Committees and the Legislative proposals) affecting Scheduled Tribes. The sponsoring Ministries may also be required to specifically mention in their Note/ proposal that the National Commission for Scheduled Tribes have been consulted and the views/ comments furnished by the concerned Commission were appended to the Note/ proposal. The Cabinet Secretariat assured the Commission that the revised instruction/procedures would be reviewed after sometime and requisite corrections, if necessary, will be issued and incorporated in the Handbook of Instructions. Proceedings of the Sitting held on 21/02/2012 is placed at **ANNEXURE 3.XVII**

3.48 The Commission regret to observe that since the obligations of the Government are now sought to be fastened to a (nodal) Administrative Ministry, such bureaucratic obfuscation of Constitutional responsibilities only bodes ill for further interaction between the Commission and other Ministries of the Govt; who would be seen from the experience, (as highlighted in para 27 & 28, 42 and 52 above), to be apathetic, recalcitrant, and even perfidious at times in the discharge of Constitutional obligations towards Scheduled Tribes; and resulting stand-offs may have to be arbitrated in the Courts – to the embarrassment and ridicule of all concerned.

3.49 **The Commission therefore recommends that the revised instructions issued by the Cabinet Sect. vide OM dated 16/02/2012 should be amended, on the lines of directions contained in Instruction No. 46 and 47 of the Handbook of Instructions, with advise to the sponsoring Ministries, to provide for directly seeking the advice of the NCST on policy related matters/ legislative proposals under Article 338A(9) of the Constitution and not through the Administrative Ministry as that Ministry has a role different from that of the NCST and the Ministry cannot play an oversight role in obliging/ restricting the Commission to make a particular recommendation or in a particular manner.**

CHAPTER 4

SUMMARY OF RECOMMENDATIONS

The recommendations of the Commission on various aspects have been highlighted in the respective Chapters to facilitate convenient identification for the purpose of taking up follow up action on them. A summary of these recommendations is given as below:-

CHAPTER-1: GOOD GOVERNANCE IN SCHEDULED AND TRIBAL AREAS

1. Based on the position emerged from the discussion, Commission recommends to the Govt. for considering the need for amendments of Schedule V and VI to provide a comprehensive Charter for tribal communities incorporating the best practices enumerated in the ILO Convention (s)

[Ref. Para 1.27]

2. The Commission has noted that the Government has not taken any decision on the 10th Report of Administrative Reforms Commission-“Refurbishing of Personnel Administration, Scaling New Heights” (November, 2008)- which has important recommendations relating to the Scheduled Tribes. The NCST has noted that general reluctance on the part of the officers and staff for posting in Scheduled Areas/ Tribal Areas on account of lack of housing, medical and education facilities has been exponentially compounded by the general climate of permissiveness fostered by rampant political interference and collusive abandonment of responsibilities in search of greener pastures. In order to address these problems, the Commission is of the view that Government should formulate specific regulations in respect of Scheduled Areas for personnel management with the formation of a State level Civil Services Authority for Scheduled Areas, which would deal with matters of assignment of functional domains to officers, preparing a panel for posting of officers, fixing tenures for senior posts etc., in line with the Central Civil Services Authority proposed by the ARC. In order to improve personnel management in respect of all category of employees, it is necessary to fix a minimum tenure for various cadre posts, which be filled on the basis of merit, suitability and experience, prescribe norms and guidelines for transfers and posting to maintain continuity and predictability in career advancement and acquisition of necessary skills and experiences as well as promotion of good governance. The normal tenure of all public servants may not be less than two years and Transfers before the specified tenure should only be for valid reasons to be recorded in writing. These recommendations are in accordance with the observations contained in para 8.5.11, 8.5.12 and 8.5.14 of the 10th Report. Department of Personnel and Training may consider the above views of the Commission and issue detailed guidelines for improvement of personnel policies and systems in Tribal Areas in the interest of peace and good governance under intimation to the Commission.

[Ref Para 1.45]

3. The Constitutional provisions in the Vth/ VIth Schedule require to be reviewed and refreshed in the light of past experience, international best practices and necessary administrative reforms. It appears high time that a comprehensive, universal Charter of Rights of Tribal communities was incorporated into the Fifth Schedule (also declaring tribal areas to be Scheduled Areas), incorporating the best practices emerging from the ILO Conventions as well as various bodies like the Administrative Reforms Commission, etc.

- (i) Protection of religious, social, cultural and educational rights
- (ii) Sustaining traditional means of livelihood and special protection regarding employment
- (iii) Protection of customary laws and inheritance rights
- (iv) Protection of habitat and environment
- (v) Protection of land (surface and sub-surface) rights
- (vi) Protection from removal from occupied lands for public purposes
- (vii) Right to Relocation from occupied lands with appropriate compensation/ guarantees
- (viii) Protection of traditional community institutions
- (ix) Strengthening of Administrative mechanisms for tribal areas (under Union oversight)
- (x) Development and Planning for Scheduled Tribes (refurbished development strategy predicated on primary financial and administrative responsibility of the Union Government)

[Ref Para 1.52]

4. Considering the special provisions of the Constitution relating to Schedule V and Schedule VI in relation to the Scheduled Tribes and Scheduled Areas, opinion of the Attorney General regarding Governors' role in Scheduled Areas and the inadequacy in formulation and implementation of Tribal Sub-plan both at the State as well as at the Centre, the National Commission for Scheduled Tribes makes the **following recommendations** in relation to good governance in tribal development administration and administration in Scheduled Areas.

- (i) Robust "pre-facto" mechanism have to be grafted to Constitutional provisions which would ensure requisite attention to tribal concerns- foremost of which would be the mandatory inclusion of a separate chapter on Special Provisions for Scheduled Areas/ Scheduled Tribes in every Central or State Legislation affecting the habitat tribals' property rights and enjoyment of lands occupied, the religion, customs and culture of these people and traditional relationship with their environment (as obligated under UN Conventions)
- (ii) There is a need to evolve a mechanism headed by Governor in the States having Scheduled Areas under Fifth and Sixth Schedule, to monitor and ensure implementation, in letter and spirit, the provisions contained in Fifth and Sixth Schedule to the Constitution, so that Governor may play an oversight role in the matter.

- (iii) The Tribes Advisory Councils (TAC) for all States with Scheduled Areas as well as tribal areas may be headed by the Governor as Chairperson of the Council, while Secretariat support may continue to be provided by the Tribal Development Deptt. of the State, till requisite machinery is created in the Governor's Sectt. The Chief Minister of the State may act as Vice Chairperson of the TAC. The TAC should be reconstituted regularly as per the provisions and the meetings of the TAC should be held at least twice in a year or as expedient, as provided in the Constitution.
- (iv) The Governors should promulgate detailed regulations for peace and good governance as suggested in para 1.51 above.
- (v) It is desirable that all Acts and laws should be reviewed for their adaption to the Scheduled Areas, but this is not practically feasible by the concerned departments. The Law Commission (under the Ministry of Law) should be entrusted this responsibility of review of existing Laws affecting property rights, succession, marriage, land holdings, indebtedness, constitution and management of public/administrative services for adaption to Scheduled Areas in consultation with Ministry of Tribal affairs, State Govts., NCST, etc. Any weak areas in schemes / policies for Tribal areas should be got remedied either directly or indirectly by MTA
- (vi) The strategy for all programmes, particularly the major missions/schemes of the Ministries/Deptt.s, should comprise sub-Chapters for accelerated development of the Scheduled Area. In particular, it is necessary to have specific Tribal Sub Plan (TSP) component in all the major missions/schemes/ programmes of all Ministries/Deptts to have a clear focus on formulation of schemes/programmes concerning the STs and their effective implementation and monitoring. The TSP component should not be per population share but according to "problem-share"; and "need-based" taking into account the extent of deprivation, or even more than that to make up the backwardness/ negligence experienced over the years. Unless the earmarking of TSP outlays exceeds the relative share of incidence of residual problems eg. drinking water, primary health care and education, nutritional support, unemployment etc., the relative gap in physical quality of life is likely to persist.
- (vii) The National Tribes Advisory Council should be established with clear definition of scope and terms & condition. It should also co-ordinate the governance of Scheduled Areas.
- (viii) The Ministry of Tribal Affairs should prescribe a uniform format for preparation and submission of the reports by the Governors in respect of 5th Schedule States with particular reference to its contents. The Ministry of Tribal Affairs should also issue the following instructions to the State Governments to the effect that:
 - (a) The Report relating to the financial year should reach the Govt. of India (Ministry of Tribal Affairs) within a period of six months of closing of the financial year.
 - (b) The reports should contain a detailed note on the implementation of the constitutional safeguards for promotion of educational and socio-economic development of the Scheduled Tribes. These reports

should also contain a brief on problems relating to law and order, naxal movements and tribal unrest. The reports should also make a mention about Central and State laws enacted in the State during the report period, and action taken regarding extension/applicability of those laws to Scheduled Areas in the light of the powers of the President, Governor under Fifth and Sixth Schedule. Working of PESA Act in the State should also be integral part of the Governor's report.

- (c) Considering the comprehensive nature of the task, it is not pragmatic to expect the desired report to be compiled by the Governor. Every department in the State should submit a report about the schemes/policies being run by them to the Tribal Welfare department of the State, which in turn should compile these reports to identify the strong areas and weak points for presentation to the Governor.
- (d) In case the reports do not contain the observations of TAC, they may be sent back to the State Governments advising them to apprise the Central Government of the observations of the TACs and action taken on the observations of TAC.
- (e) The reports should be thoroughly examined in the Ministry of Tribal Affairs on the basis of the material contained in them and the State Governments should be apprised of the assessment to enable them to take necessary follow-up action.
- (g) A copy of the Governor's Report should be made available to the National Commission for Scheduled Tribes immediately after receipt of the Report in the Ministry to enable the Commission to examine the same and offer its comments thereon.
- (h) The States, which have TACs, should ensure that TACs are constituted/ reconstituted timely and that their meetings are held regularly as per Constitutional provisions. The agenda of the TAC should inevitably include the subject of adaptation of Central or State laws enacted during the interregnum of its meetings so that the same are not routinely extended to Scheduled Areas/Tribes. A similar mechanism (like TAC) should be established for Schedule VI States also.
- (ix) Notwithstanding the specific provisions in the Fifth and the Sixth Schedule, the legislative proposals mooted by the Union and the State Governments especially those relating to Tribal Rights Charter should have a separate Chapter "Applicability to Scheduled Tribes and the Scheduled Areas (under Fifth and Sixth Schedule)" This would compulsorily require consultations with all the stake holders, including States having Scheduled Areas under Fifth and Sixth Schedule, Ministry of Tribal Affairs and the National Commission for Scheduled Tribes also and the question relating to adaptation of any Act to Scheduled Tribes and the Scheduled Areas may not be always necessary.

[Ref Para 1.42]

CHAPTER-2: REGULATIONS REGARDING PEACE AND GOOD GOVERNANCE

1. The increasing Competition for political power, resources and opportunities in the Indian State has witnessed strident demand from the relatively more developed sections of society in different parts of the country to be declared as Scheduled Tribes, defying earlier norms for such identification viz; backwardness and isolation. These demands are stoked by political parties in order to derive political advantage without care for their deleterious impact on the rights of tribal communities as well as erosion of Constitutional safeguards. Commission recommends that in the context of continuing demand for inclusion of new areas /communities, there is a need to review the list of Scheduled Areas/ Scheduled Tribes objectively in a time-bound manner. Appropriately, therefore, the Scheduled Area & Scheduled Tribes Commission should be constituted every 10 years to look into such demands under Article 339 of the Constitution. SA & ST Commission should be entrusted the review of Scheduled Areas, Scheduled Tribes list and Laws and rules relating to administrative and financial structure.

[Ref Para 2.4]

2. Involuntary relocation of tribal communities because of calamity, insurgency, and large development projects has also entailed forfeiture of Constitutional Safeguards because their tribal status is not legally maintainable. There is need to advise the State Governments that:-
 - (a) they should issue instructions to provide that the families and children of the in-voluntarily migrated ST parents will continue to enjoy the same status in the State where they are resettled in case the community/ communities to which they belong has already been notified as Scheduled Tribe/ Scheduled Tribes in that State, and avail the benefits admissible to the Scheduled Tribes in that State.
 - (b) In case the community/ communities to which the resettled tribals belong has/ have not been notified as Scheduled Tribes in the State of resettlement, they (i.e. the State Govts.) should immediately initiate action to get that/ those community/ communities notified as Scheduled Tribe/ Scheduled Tribes effective from the date of resettlement; and also ensure that pending the issue of said notification, the resettled tribals are allowed to avail the benefits admissible to Scheduled Tribes in that State.

[Ref Para 2.6]

3. It was felt that since the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is a special Act for protection of the Scheduled Tribes, similar provision should be incorporated in this Act also. While the provision for setting up Special Courts in the Act was aimed at speedy disposal of cases registered under the Act, experience so far had belied this expectation. The Commission, therefore, suggested that the cases registered under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 should be disposed by the Special Courts within 6 months. To meet this objective, the Act could also be amended to provide for setting up exclusive Special Courts (instead of

designating a Session Court as a Special Court) for trial of cases under this Act. (The recommendation of the Commission was forwarded to the Ministry of Social Justice and Empowerment vide letter, dated 16/07/2009).

[Ref Para 2.8]

4. The Commission noted that at present, there is no definition of heinous offences in the Indian Penal Code. It is also not mandatory under the Criminal Procedure Code to register an FIR immediately when a complaint is made. The Commission has also observed that a large number of atrocities against Scheduled Tribes primarily pertain to grabbing of tribal land and crimes against (their) women folk. Therefore, it is advisable to report cases registered under sub-clause (iii), (v), (xi) or (xii) of sub-section (1) of Section 3 too for monitoring purposes. The Commission also feels that there should be prompt reporting of all such complaints made to the police, without awaiting the registration of an FIR.

[Ref Para 2.9]

5. The policy should aim at the development of the most vulnerable PTGs, while protecting them from cross infection and exploitation by the outside world. They should be regularly provided with food items and health services beside special schools for education of their children. The following measures may also be suitably incorporated in the policy :

- (a) The number of regulated contact points may be increased suitably.
- (b) Instead of keeping PTGs entirely dependent on forest for livelihood, they may also be introduced to settled agriculture (by supplying them improved seeds, agricultural kits, plough bullocks, bullock carts etc.), horticulture and animal husbandry (by supplying them crossbreed cows, she buffaloes, sheep/piggery units etc. and providing suitable training therefor).
- (c) Efforts may also be made to provide education and play way/ sports activities to children of PTG community for which the staff and officers may have to make special efforts to make sporting contacts with them and persuade them to send their children to the special residential schools where every need of the children should be fulfilled free of cost. This may also help in checking the trend of diminishing population. This would certainly need careful selection of the staff and giving them suitable training for enabling them to have peaceful and fruitful relations with the PTGs. As and when possible, local eligible and suitably trained youth/women should be appointed as Teacher in the special schools.
- (d) The Primary Health Centres (PHCs) are generally located far away from the inhabitations of sparse PTG population and, therefore, they are not in a position to avail of medical facilities in the time of emergency. In order to provide emergency and regular treatment facilities, one Medical Mobile Van equipped with primary treatment facilities and medicines along with minor surgical equipments should be arranged at each contact point for the PTGs.
- (e) The local administration may be advised to arrange free distribution of food and consumer items available under PDS to needy persons.

[Ref Para 2.10]

6. In order to increase the attendance and also to decrease the drop-out rates of PTGs students in the schools, one Primary school for each village may be opened in each PTG village/hamlet.
[Ref Para 2.11]
7. One mini deep tube well for each PTG village/hamlet may be installed to make safe drinking water available to the PTGs throughout the year. In areas where there is no supply of electricity, hand pumps may be installed. The Commission further recommends that till such time the facilities of tube well/hand pumps are provided in the PTGs villages/hamlets, arrangements should be made for disinfecting of drinking wells during rainy seasons.
[Ref Para 2.12]
8. In order to provide emergency and regular treatment facilities to the PTGs, one Medical Mobile Van equipped with primary treatment facilities and medicines along with minor surgical equipments should be arranged for each block in the interior areas. The State Govts. having PTGs should also make special arrangements to provide nutrition-rich items like ragi, minor millets, tubers etc. to lactating and expectant mothers to combat malnutrition.
[Ref Para 2.13]
9. The State Govts. should arrange distribution of consumer items available under PDS through mobile vans in respect of such PTGs who live in inaccessible forest/hilly areas where PDS outlets within reasonable distance are not available. The Commission further recommends that the State Govt. should make arrangements for organizing weekly markets (haat bazaar) where PTGs could come, sell the products crafted by them and purchase items of their needs.
[Ref Para 2.14]
10. The State Govts. are advised to provide financial assistance to the PTGs families to enable them to construct houses as per their needs.
[Ref Para 2.15]
11. Almost all the PTG families are BPL families and, therefore, there is an imperative need to involve them in income generating activities. Efforts should be made to encourage them to take to settled agriculture. They should also be provided training in cane and bamboo craft, carpentry, LMV driving, tailoring and coir craft to generate self-employment among them.
[Ref Para 2.16]
12. The State Governments which have PTGs should be advised to formulate schemes for recruitment of candidates belonging to PTGs in Group C & D posts of Teaching category in various grades without subjecting them to the recruitment process provided they possess the minimum qualification prescribed for the posts
[Ref Para 2.17]
13. Educational standards and pattern of examination should be comparable throughout the country so that ST students who generally join local Govt. schools are not put to disadvantage and are able to compete for admissions in institutes for higher studies.
[Ref Para 2.18]
14. The National Council of Educational Research and Training (N.C.E.R.T.)

and State Council of Educational Research and Training (S.C.E.R.T), Non-Governmental Organisations (NGOs) should take up preparation and induction of bi-lingual text books in first two standards wherever that particular dialect is the mother tongue of a sizeable population. N.C.E.R.T should be made responsible for the introduction of such text books in all the States and Union Territories of the country at least by the end of next plan period.

[Ref Para 2.19]

15. As each region of tribal areas follow their own ritual and agricultural calendar, the concerned tribal research institutes should prepare teaching calendars either region-wise or tribe-wise and furnish the same to the education department for taking necessary action.

[Ref Para 2.20]

16. Mid-Day Meal programmes in tribal areas should take into account the locally available food material and culinary habits of the local tribals, besides ensuring that food items served under the programme are hygienic and contain necessary nutrients.

[Ref Para 2.21]

17. Teaching-aids should be prepared based on local culture and environment. Local Tribal Folk dances, and Music-both Vocal and Instrumental, should be included in the curricular and co-curricular activities.

[Ref Para 2.22]

18. Most of primary schools in tribal areas are run by a single teacher. In case he/ she takes leave due to illness or for any other domestic reason, there is no teacher left in the school with the result the education of the children suffers. There is therefore, an urgent need to post one more teacher in all the single teacher schools in tribal areas. The State Govts./UT Administrations should fill up vacancies of teachers by evolving schemes of giving various incentives; such as decent accommodation, medical facilities etc. to teachers and also by ensuring that the posts of teachers in schools in tribal areas are filled, as far as possible, by appointing teachers from amongst local tribal candidates.

[Ref Para 2.23]

19. The basic reason behind the drop out of ST students can be attributed to the poor economic condition of the family and this situation compels the tribals to utilize their children as an economic unit to bring some income to the family. It is also necessary that some National Scheme of economic incentives are given to such parents of the children whose income is below the poverty line with a view to wean them away from the compulsion of using their children as economic support instead of sending them to schools.

[Ref Para 2.24]

20. Another reason for dropouts is the repeated failure of tribal children in a class, which may be reduced by identifying weak and below average tribal students and making arrangements for providing them remedial instructions/ coaching on the holidays or at night by providing some cash incentives to the teachers. Additional incentives in the form of cash award should also be granted to each student having more than 75% attendance/ work done in the school note books. Besides, those students who secure 60% or above

marks in the examinations should also be given cash awards.

[Ref Para 2.25]

21. There is a need to provide attractive incentives to the parents of the girls for sending them to the schools, apart from the existing incentives which are being given to the ST children in the form of free textbooks, uniforms, stationery, school bags, cooked food through mid-day-meal Scheme etc.

[Ref Para 2.26]

22. The State Governments which have schemes for providing scholarships to tribal students at pre-matric levels should abolish the income ceiling in respect of the parents of all the tribal children studying in Classes from I to X.

[Ref Para 2.27]

23. The Central assistance for cooked mid-day meal during summer vacations to school children in drought affected areas should be extended to the children in tribal areas as about 60% or more ST children are undernourished in the States like Gujarat, Himachal Pradesh, Karnataka, Kerala, Andhra Pradesh, Madhya Pradesh and Maharashtra.

[Ref Para 2.28]

24. One of the major constraints in the dissemination of education among STs is that their parents resort to seasonal migration to other places in search of livelihood during the period from April to middle of June and this is the period for the school examinations. When the parents move out of their habitations to other places, they have to take their children along with them leading to dropouts. State Govts. may be advised to formulate suitable schemes for boarding and lodging of children of those ST families who decide to temporarily migrate to other places in search of their livelihood. Alternatively, special arrangements be made for conducting special examinations of the ST children when they return to their original habitations from the places of their temporary migration.

[Ref Para 2.29]

25. The income ceiling in respect of the parents of the students for the purpose of grant of the Post-Matric Scholarship may be raised.

[Ref Para 2.30]

26. The tribal students who are day-scholars but who reside in rented accommodation due to non-availability of hostel accommodation should be treated on par with hostellers and the amount of scholarship in their case also should not be less than to that of hostellers.

[Ref Para 2.31]

27. The disbursement of Post-Matric Scholarship in most of the States is being delayed due to non release of funds both from the Govt. of India (over and above the committed liability of the State Govts.) and the State Govts. Ministry of Tribal Affairs should also ensure timely release of the funds to the State Govts. The State Governments should release their share of funds to the district authorities (upto the committed liability) in time to ensure timely disbursement of these scholarships and explore the possibilities of disbursing the scholarship money to the students through their Bank Accounts.

[Ref Para 2.32]

28. There should be 8.2% (proportion of STs to the total population of the

country as per 2001 Census) reservation for Scheduled Tribes in awarding fellowships and/or in granting scholarships in the schools, colleges, Universities, Educational and Technical Institutions etc. The Ministry of HRD and the Ministry of Minority Affairs should consider suitable amendment in the Central Educational Institutions (Reservation in Admission) Act, 2006 to ensure that reservation for STs is made applicable in admissions to those Govt. run educational institutions also which have been granted minority status. The scope of reservation should also be extended to such educational institutions, hospitals etc. which though not funded by the Government had received/continue to receive concessions from the Government in respect of acquisition of lands, buildings electricity, water, provision of public transport etc.

[Ref Para 2.33]

29. Scheme of Mid -day meals should be extended up to high-school level at least for ST girl students. This will provide huge relief to the family of the ST girl students and it will improve enrolment of ST girl students and also reduce their dropout.

[Ref Para 2.34]

30. In tribal areas, the capacity of hostels particularly for ST girls is much less than the requirement and this is one of the major reasons for less enrolment and increased dropout of ST girl students. There is an urgent need of construction of more hostels for ST girls. The number of Ashram Schools, Kasturba Gandhi Balika Vidyalayas in ST concentration blocks should be increased.

[Ref Para 2.35]

31. There is a genuine need to increase the number of Government. schools of excellence/ Central Schools/ Eklavya Modal Residential Schools (EMRS) in States/UTs which have sizeable number of ST population. Norms of opening of EMRS should be urgently reviewed.

[Ref Para 2.36]

32. The higher participation of the STs among the beneficiaries of the MGNREGA scheme is the indication of the fact that this section of the society needs more attention in this regard. There is need to incorporate a TSP component in the implementation of the Scheme in order to meet the objective of inclusive growth, which should not be based merely on the population share, but rather on the extent of deprivation. Considering the fragile economic condition of the tribals, and their poor agricultural practices including single crop culture, rather than relying on capricious demand estimates, it is desirable to ensure a minimum 100 days of employment to all tribal families as per the latest census in the tribal areas; and earmark sufficient funds, under the TSP component of the Scheme to ensure adequate livelihood opportunity in these areas. The Scheme should be designed for providing sustainable rural livelihood in respect of STs, strengthening its convergence with use of natural resources, productivity, human development, etc. It should also be ensured that the focus on the unemployed poor is not diluted by enlarging coverage to other groups in the guise of promoting skill development graduating to semi-skilled to skilled work, etc.

[Ref Para 2.37]

33. Keeping in view the lack of managerial capacity in the Panchayats, the

MGNREGA Scheme should develop a need based approach/plan of implementation based upon pro-active assessment of the demand for work in tribal areas. The demand for the work should be properly anticipated through local surveys in ST areas and villages having ST population, taking into account all factors such as availability of work on account of industries, agriculture and other seasonal activity, schooling of children, wage level of households, etc. The communication with tribals should also be strengthened to build up their capacity to articulate and demand rights.

[Ref Para 2.38]

34. The limit of providing maximum 100 days employment to a household in a given financial year under MGNREGA should be removed, as in tribal areas agriculture work is available only for a period of 2-3 months during the year. If need be, the concerned Ministry may bring amendments in the Act to this effect/ necessary adaption may be made by State Governors using the powers given in the Fifth Schedule.

[Ref Para 2.39]

35. The Commission has noted that requisite entries relating to the work demanded by the MGNREGA Job Card Holders and the details of work done by him/ her and the amount paid/ due to be paid to him/ her are not made in the Job Cards as also in the Rozgar Registers maintained in the Gram Panchayats. In most of the cases pages in the Job Cards were blank while Rozgar Registers carried some entries but not all the entries corresponding to the entries in the concerned Muster Rolls. Consequently, the Job Card Holder has no Certificate about any work having been done by him/ her in a particular week/ fortnight and therefore, in absence of the Certificate, he/ she may not be able to claim payment of wages for the work done. In order to ensure effective implementation of the Act it is necessary to maintain transparency in every field of action envisaged under the Act. It has also been noted with concern that adequate mandays of work have not been generated under several Gram Panchayats. This is despite the fact that each Panchayat is also assisted by an Assistant Secretary or the Village Rozgar Sahayak specifically in matters relating to MGNREGA. This indicates lack of action on the part of Gram Panchayat and the Panchayat Secretariat in anticipating and creation of the works required for development of the villages and for creation of employment/ man days in the villages for the needy wage earners/ Job Card holders. This requires immediate amendment to the MIS under MGNREGA.

[Ref Para 2.40]

36. MoRD may consider amending MGNREGA for partial reimbursement (out of GoI funds) of payment of unemployment allowance, while instituting controls to minimize chances of persons drawing unemployment allowance. This is required to be implemented in the tribal districts on priority as the tribals are generally illiterate, don't know their rights and are easily victimized. In the present scenario, since State Govts. have to provide funds for payment of unemployment allowance, there is an incentive for non-transparent recording of employment demand.

[Ref Para 2.41]

37. There is a need to strengthen existing mechanism in MGNREGA for

enforcing accountability in respect of the following in ST dominated areas:

- (i) Section 25: Fine for failure to perform duty under the Act.
- (ii) Schedule II Section 30: Compensating workers for delays in payment.
- (iii) Section 19: Urgent framing of Grievance and Redressal Rules.
- (iv) Need for independent grievance Redressal Mechanism.
- (v) STs' participation in Social Audit

[Ref Para 2.42]

38. As per 'The Inter-State Migrant Workmen (Regulation of Employment and Conditions of Service) Act, 1979', no principal employer of an establishment to which the Act applies shall employ inter-State migrant workmen in the establishment unless a certificate of registration in respect of such establishment issued under this Act is in force. Further, a contractor has to obtain a license to employ inter-State workmen. A contractor is required to issue a pass-book to every inter-State migrant workman with a passport size photograph, name and place of establishment, period of employment, the proposed rates and modes of payment of wages, displacement allowance payable, return fare payable on expiry of period of employment, deductions made and other such particulars. As per provisions, inter-State migrant workman shall in no case be paid less than wages fixed under the Minimum Wages Act, 1948. However, this Act is applicable only to inter-State migrant workman employed in an establishment. The Commission, therefore, recommended that provision of the Act should also be made applicable to the placement agencies in respect of Migrant Domestic Workers from tribal areas, which are being driven by indigence to seek traditional employment.

[Ref Para 2.43]

39. After the commencement of 'The Bonded labour System (Abolition) Act, 1976, every obligation of a bonded labourer to repay any bonded debt shall be deemed to have been extinguished. All the property of bonded labourer mortgaged in connection with any bonded debt shall stand freed and discharged. No creditor shall accept any payment against any bonded debt, which has been fully satisfied by virtue of the provisions of this Act. These provisions need to be adapted for overseeing contract labour to ensure humane treatment of Migrant workers who are easily exploited by greedy contractors.

[Ref Para 2.44]

40. Both availability of food grains and affordability are inter-meshed problems; and food security is not merely a question of subsidizing the prices for the poorer sections of the populace in these areas. Therefore, there is compelling reason to recognize these special characteristics; and have a differentiated approach for Scheduled Areas by way of provision of adequate entitlement of requisite food stocks, strengthening of warehousing and logistics, financial resources and responsibilities.

[Ref Para 2.45]

41. The public distribution system must assure reasonable food availability to all residents in Scheduled Areas keeping in view their special problems of availability and affordability. The number of priority households should not be arbitrarily determined; and they should be identified on the basis of

discernible wealth/income-related criterion. Special arrangements, including build-up of inventory have to be made for remote, inaccessible areas, so that food availability is not often compromised by logistical failures. It is not sufficient, or desirable, to provide an allowance in lieu thereof because that leaves availability issues unresolved.

[Ref Para 2.46]

42. Since remote tribal areas also have acute problems of availability/ marketing infrastructure, food grain entitlements should not be differentiated according to economic status, which is relevant only for the quantum of eligible subsidy. Food entitlement should be specified on the basis of recommended nutritional requirements to enable purchase of needed quantity at option; or yearly aggregate entitlements may be specified instead, since the average off-take may fluctuate at different times of the year depending upon prices or alternate sources of supply, and it may be more relevant for planning subsidy/ logistic requirements.

[Ref Para 2.47]

43. Use of information technology for increasing transparency of transactions, the monitoring mechanisms in Scheduled Areas should be strengthened through reliable reporting systems to enable rapid awareness of related transactions – stocks, movement, issues, etc - at all locations upto fair price shop level, and providing timely feedback for prompt remedial action to rectify logistical failures which imperil food security in remote areas.

[Ref Para 2.48]

44. In view of the special Constitutional mandate to the Union Govt. for Scheduled Areas, and the persisting poor health and economic standards of tribals, full financial/ logistical responsibility to ensure food security in such areas should vest in the Union Government. It is not appropriate to cast such responsibility on the State Governments, also because they have limited capacity to mobilize food grains from low-production regions, arrange credit and subsidize logistical/ distribution costs.

[Ref Para 2.49]

45. The special obligations of the Central Government in Scheduled Areas should include provision of food grains in desired quantity (as per nutritional requirements) for all residents, supplemental logistical arrangements (road/rail transportation, depots/ issue points and increased inventory) as well as priority in food grain allocations, (since resort to payment of allowance is not a feasible option because the same will compromise food security)

[Ref Para 2.50]

46. Custom, as is well-recognised, varies from people to people and region to region; and needs to be codified for the guidance of legal forums/ practitioners as has been done in the State of Madhya Pradesh, where customary laws have been codified as "Madhya Pradesh Rajya Ki Anusuchit Janjatiyon Ki Roodijanya Vidhi Sanhita,1992".

[Ref Para 2.53]

47. Suitable amendments should be made in the Indian Forest Act, 1927 to make its provision consistent with the provisions of PESA Act, 1996 in respect of endowing Panchayats at the appropriate level and the Gram

Sabhas with necessary powers with respect to conferring ownership of minor forest produce

[Ref Para 2.55]

48. All the cases of alleged encroachment of forest land by the Scheduled Tribes which were registered prior to 31.12.2007 may be withdrawn by the concerned authorities and their claims on forest lands may be settled as per provisions under the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Rules, 2007.

[Ref Para 2.56]

49. The Scheduled Tribes and Other Forest Dwellers (Recognition of Forest Rights) Act, 2006 and Rules provide for settlement of individual as well as community claims. The claim of community over land and resources is of much relevance to all the inhabitants of the area and therefore, distribution of title deeds about community rights also has same relevance as the settlement of individual claims. The Ministry of Tribal Affairs and the State Governments should evolve a strategy (i) for disposal of all the claims within a prescribed time frame, (ii) ensuring that genuine claims are not rejected, (iii) title deeds are distributed to all the approved claimants within the set time frame and (iv) furnishing full details in respect of individual claims as well as community claims separately under Forest Right Act.

[Ref Para 2.57]

50. It is necessary to incorporate an essential, specifically delineated provision for rehabilitation & resettlement for the project affected/ displaced persons under the obligations set out in a mining lease. (It may be mentioned that the draft Land Acquisition, Rehabilitation & Resettlement Bill, 2011, which is awaiting approval of the Parliament, has integrated the provisions of rehabilitation and resettlement with the land acquisition process, but doesn't explicitly cover R & R in respect of the project-affected/ displaced persons as a result of diversion of forest land/ private lands leased for mining). The R & R obligations also need to be ensured in respect of incremental leasing of adjacent areas and extension of current leases in perpetuity also. Rehabilitation and Resettlement (R & R) plans should be linked to the Mining Plan, so that R & R activities are satisfactorily completed before the lessee ceases operations in a specified area. Similar to the corporate social responsibility document, there should also be a R & R document which should document the obligation/ efforts and outcomes achieved. Before granting approval for extension of a mining lease, special report regarding implementation of R & R obligation should also be sought. Besides failure or delay in commencement of mining operations, leases should also lapse in case R & R obligations have not been discharged.

[Ref Para 2.59]

51. Land is the only asset tribals are having and is also the source of their livelihood. Tribals are facing difficulties in meeting special needs like marriages, educational needs, housing etc. On the lines of the Credit Guarantee Fund set up for the comfort of the lenders under the scheme of Ministry of Micro, Small and Medium Enterprises, a similar scheme may also be considered for the benefit of the tribals. To safeguard the livelihood

of tribal farmers, the Government could consider setting up Land Banks comprising lands resumed by the Govt. in cases of mortgage default; and such lands may be leased to the previous ST owners with the opportunity/right to re-purchase the same at any subsequent stage of time, beside rights to additional potential compensation due to change in land use pattern in future.

[Ref Para 2.61]

52. Since mineral extraction is generally destructive of soil surface, it can't usually be restored to original land use subsequently. An effective and equitable compensation arrangement should ensure lifelong annuities sufficient to substitute income deprivation for the land owners (adjusted for likely inflation), besides creating alternative vocations for them. The land owners should also get a reasonable share in the profits distributed/retained by the mining enterprise. Besides annual compensation in lieu of land surface rights, future (and sometimes windfall) earnings from mining activity should also be shared with land rights holders in reasonable measure. If some land rights are being ceded in perpetuity, the retained earnings from the project activity should also be shared with the land owners in the forms of "sweat-equity" (beside compensation for denial of use of land surface). Share of earnings from alternative users of land should also be provided, if future land use is of a commercial nature. Benefits/privileges available to mineral right holders may also be accorded to ordinary landholders also in Scheduled areas.

[Ref Para 2.63]

53. 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 owned 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 justifiable in respect of Scheduled Areas.

[Ref Para 2.68]

54. Social Impact Assessment (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'. 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.

[Ref Para 2.69]

55. Compensation should also be given 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. 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. 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, because land is the principal ingredient of the activity and its value continues to rise exponentially while other appurtenances depreciate.

[Ref Para 2.71]

56. 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 re-payment 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.

[Ref Para 2.72]

57. 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) 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.

[Ref Para 2.73]

58. In case of displacement due to disasters/ natural calamity and conflicts, the responsibility for resettlement and rehabilitation lies on the appropriate Government, while in the case of displacement occasioned by development projects, this responsibility should be of the requiring body (individual/ corporate house/ Govt.). In the case of displacement arising from projects implemented by non-government/ corporate bodies, the entire onus of implementing rehabilitation and resettlement plans should be that of the requiring body (individual/ corporate house) to avoid fragmentation/ dereliction of responsibility. Only in default, the appropriate Govt. may undertake rehabilitation/ resettlement (as for Govt. investments) at their cost.

[Ref Para 2.75]

59. The responsibility for SIA, preparation of RR plans and implementation should be that of the requiring body which may do the job itself or outsource it to other agencies. Baseline survey should essentially aim to enumerate all the affected persons, nature of rights affected by displacement and resettlement requirements which could form the basis of the R & R plan. The RR plan should be approved and implemented under the supervision of an RR Committee constituted at the local level.

[Ref Para 2.79]

60. The Resettlement site should aim to offer better living conditions to families affected and should recognize subsequent division of joint families/ separation of adult members in the matter of benefits till the RR plan is

published. Forest dwellers affected by diversion of forest land should be resettled in the forest. Compensation in lieu of land should be discouraged. Resettled tribals should also continue to enjoy reservation benefits in the resettlement area by concurrent modification of the Scheduled Tribes Reservation Orders.

[Ref Para 2.80]

61. The State legislations on Panchayats should conform with the customary law, social and religious practices and traditional management practices of community resources. In terms of Section 4(n) of the PESA Act, 1996 Panchayats should be equipped with requisite powers and authority to enable them to function as institution of self-government.

[Ref Para 2.81]

62. PESA envisaged democratic institutions of administration. To provide sustained co-ordinated emphasis to the problems of Scheduled Tribes/Areas, multiplicity of agencies should be avoided and ITDAs should be merged with ZPs.

[Ref Para 2.84]

63. There is a need to devise a mechanism, which would enable the field formations to receive funds directly instead of being routed through State Hqrs. by enforcing on them a system of accountability for proper utilization of those funds.

[Ref Para 2.85]

64. Commission is of the view that Government should formulate specific regulations in respect of Scheduled Areas for personnel management with the formation of a State level Civil Services Authority for Scheduled Areas, which would deal with matters of assignment of functional domains to officers, preparing a panel for posting of officers, fixing tenures for senior posts etc., in line with the Central Civil Services Authority proposed by the ARC. In order to improve personnel management in respect of all category of employees, it is necessary to fix a minimum tenure for various cadre posts, which be filled on the basis of merit, suitability and experience, prescribe norms and guidelines for transfers and posting to maintain continuity and predictability in career advancement and acquisition of necessary skills and experiences as well as promotion of good governance. The normal tenure of all public servants may not be less than two years and Transfers before the specified tenure should only be for valid reasons to be recorded in writing. These recommendations are in accordance with the observations contained in para 8.5.11, 8.5.12 and 8.5.14 of the 10th Report of the 2nd Administrative Reforms Commission. Department of Personnel and Training may issue detailed guidelines for improvement of personnel policies and systems in Tribal Areas in the interest of peace and good governance. Defence forces, financial institutions etc have formulated personnel policies for "hardship areas" prescribing minimum periods of mandatory service in such locations during their career – which can be emulated to pool services of personnel from all Central/ All-India Services (irrespective of other service conditions) and meet skilled personnel/ managerial requirements in tribal/ Scheduled areas.

[Ref Para 2.87]

65. Both Planning Commission and Ministry of Tribal Affairs should take immediate steps to ensure strict formulation and implementation of Tribal Sub-Plan by States/ UTS as well as Central Ministries/ Departments.

[Ref Para 2.98]

66. The strategy for all development programmes, particularly the major missions/ schemes of the Ministries/ Departments, should comprise sub-Chapters for accelerated development of the tribal areas. In particular, it is necessary to have specific Tribal Sub Plan (TSP) component in all the major missions/ schemes/ programmes of all Ministries/ Depts to have a clear focus on formulation of schemes/ programmes concerning the STs and their effective implementation and monitoring. The TSP component should not be per population share but according to "problem-share"; and "need-based" taking into account the extent of deprivation, or even more than that to make up the backwardness/ negligence experienced over the years. Unless the earmarking of TSP outlays exceeds the relative share of incidence of residual problems eg. drinking water, primary health care and education, nutritional support, unemployment etc., the relative gap in physical quality of life is likely to persist.

[Ref Para 2.99]

67. Constitutional provisions have to be interpreted in proper context. Since no regulatory matter is involved, it is quite niggardly for the Union Govt. to confine its development support for Scheduled / tribal Areas to the issue of directions. Appropriately, it must shoulder direct financial responsibility for the accelerated development of scheduled areas/their population through all the Ministries and Departments.

[Ref Para 2.100]

68. The Government of India should bear the responsibility for infrastructure development/ upgradation of Administration in Scheduled Areas under Art. 275 of the Constitution. The costs of governance framework/ manpower in tribal areas should also be funded under Article 275(i) grants. Besides, financial support for Tribal Sub-Plan should not be per population share but according to "problem-share" and "need-based".

[Ref Para 2.101]

69. The funds allocated under Tribal Sub-Plan of the States should be non-divertible and non-lapsable with the objective of bridging the gap in socio-economic development of the Scheduled Tribes/ Scheduled Areas and other areas in a time bound manner. The Ministry of Finance, Ministry of Tribal Affairs and the Planning Commission may take necessary steps for creation of a non-lapsable Tribal Sub-Plan fund under each State/ UT having Tribal Sub-Plan and formulate guidelines for utilisation of such funds. Infrastructure development aimed at accelerated development of the Tribal Sub-Plan areas should be a priority area for expenditure from the non-lapsable fund.

[Ref Para 2.102]

70. The Planning Commission, in its communication to the State Governments, regarding preparation of Annual Plan and Five Year Plan should invariably emphasize that the Plan proposals of the State Government for Annual Plan as well as Five Year Plan will not be considered unless Tribal Sub-Plan document is also received. The communication should also clearly specify that the State Governments will simultaneously sent the copies of State

Plan documents and Tribal Sub-Plan documents to the National Commission for Scheduled Tribes.

[Ref Para 2.103]

71. As has been the practice in the past, the draft Tribal Sub-Plan of the State should also be discussed by the Planning Commission in the first phase by the Ministry of Tribal Affairs and the revised Tribal Sub-Plan document may be discussed for final approval in the Planning Commission, after finalization of the Five Year Plan/ Annual Plan size of the State. The Tribal Sub-Plan outlays approved in the meeting in the Planning Commission should be adhered by the State Government.

[Ref Para 2.104]

72. In order to ensure non-diversion of Tribal Sub-Plan funds, the Planning Commission and the Ministry of Tribal Affairs should ensure that each State Government budgets the earmarked TSP funds under a single budget demand head under the control of the State Tribal Welfare/ Development Department of the State, (as envisaged in the Maharashtra Model and advocated by Planning Commission as well as Ministry of Tribal Affairs from time to time).

[Ref Para 2.105]

73. The Commission has noted that some of the Ministries/ Departments which have been listed by the task force in 'No Obligation' category for the Tribal Sub-Plan are responsible for infrastructure development and public services in critical areas. The Commission, therefore, recommend that appropriate outlays for TSP should also be earmarked in respect of all these Ministries/ Departments, to ensure that TSP areas/ Scheduled Areas don't continue to be hamstrung by poor infrastructure/services.

[Ref Para 2.106]

74. In the recent past various Ministries concerned with development and services have formulated National Missions on crucial services like National Rural Health Mission, National Drinking Water Mission, MGNREGA. These missions have direct impact on the life of Scheduled Tribes but do not make specific provisions for Scheduled Tribe beneficiaries. The Commission recommends that the Ministries/ Departments administering the National Missions must ensure that adequate investments/ benefits are earmarked for Scheduled Tribes under Tribal Sub-Plan of the Ministry/ Department during each plan period so as to provide for their accelerated development and in general each Ministry/ Department should consult the National Commission for Scheduled Tribes in all policy matters affecting Scheduled Tribes, as provided under Article 338A(9) of the Constitution.

[Ref Para 2.107]

75. It is suggested that unutilized TSP funds should be placed by Central Ministries in a non-lapsable infrastructure development fund administered by the MTA. For this purpose, appropriate guidelines should be formulated, on the lines of the guidelines issued by the Ministry of Development of North Eastern Region for administration of non-lapsable central pool of resources, to ensure utilization consistent with objectives.

[Ref Para 2.108]

76. The Planning Commission should not consider the Five Year Plan/ Annual Plan proposal of any Ministry/ Department which is not accompanied by the Tribal Sub-Plan, which should be finalized after discussion with the representatives of the Ministry of Tribal Affairs.

[Ref Para 2.109]

77. Each Ministry should set up TSP Cell as in the past. The TSP Cell should be functional throughout the year like the Official Language Section in each Ministry/ Department. The TSP Cell will monitor implementation of TSP schemes of the Ministry and, by using the inputs received through monitoring, prepare the TSP component, of Annual Plan and Five Year Plan of the Ministry/ Department in terms of financial and physical aspects. The TSP Cells should be manned by personnel having special background and expertise in various fields of Tribal development and Administration. In order to ensure continuous monitoring of TSP, the posts in TSP Cell should not be allowed to remain unfilled. This will be possible only if the personnel for these Cells belong to an organised cadre of specialised experts. Personnel for Tribal Sub-Plan Cells in the Ministries/ Departments should be drawn from the separate specialised Organised Cadre proposed for the National Commission for Scheduled Tribes and its Regional Offices (presently part of Joint Cadre of National Commission for Scheduled Tribes, National Commission for Scheduled Castes, Ministry of Social Justice & Empowerment and the Ministry of Tribal Affairs). This Cadre should be developed and function on the lines of the specialised cadre of Official Language Department of Ministry of Home Affairs and personnel for TSP Cell in each Ministry/ Department should be made available from the above mentioned organised specialised Cadre.

[Ref Para 2.110]

CHAPTER-3: *NEED FOR MEANINGFUL CONSULTATIONS WITH COMMISSION*

- 1 The Commission therefore recommends that the revised instructions issued by the Cabinet Sect. vide OM dated 16/02/2012 should be amended, on the lines of directions contained in Instruction No. 46 and 47 of the Handbook of Instructions, with advise to the sponsoring Ministries, to provide for directly seeking the advice` of the NCST on policy related matters/ legislative proposals under Article 338A(9) of the Constitution and not through the Administrative Ministry as that Ministry has a role different from that of the NCST and the Ministry cannot play an oversight role in obliging/ restricting the Commission to make a particular recommendation or in a particular manner.

[Ref Para 3.49]