

डा. रामेश्वर उराँव

अध्यक्ष

भारत सरकार

राष्ट्रीय अनुसूचित जनजाति आयोग

Dr. RAMESHWAR ORAON

Chairperson

Government of India

National Commission for Scheduled Tribes



सत्यमेव जयते

SPEED-POST

(भूतपूर्व सांसद-लोकसभा)
(पूर्व जनजातीय कार्य राज्यमन्त्री)

(Ex Member Parliament-LS)
(Former Minister of State for Tribal Affairs)

D.O. JHARKHAND/1/2016-RU-III

31st August 2016

Respected Rajyapal jee ,

The National Commission for Scheduled Tribes (NCST) has received the copies of the proposed ordinances to amend the Chotanagpur Tenancy Act, 1908 (CNTA) and the Santhal Pargana Tenancy (Supplementary Provisions) Act, 1949 (SPTA) respectively by exercising powers vested in you under Article 213 of the Constitution from Ministry of Tribal Affairs, Government of India for its advice.

2. It is mentioned that NCST a Constitutional body constituted under Article 338A have been assigned duty to investigate and monitor all matters relating to the safeguards provided for Scheduled Tribes under the Constitution and any other law for the time being in force (Article 338A clause 5(a)) amongst other things and render advice to the Union and State Governments on all major policy matters affecting Scheduled Tribes.

3. The Commission after due examination of the proposed amendments has observed as follows:

Constitutional issues.

Scheduled Areas of Jharkhand are governed by two special laws (which apply to two different geographical areas of the state) proposed for amendments. The primary focus of both the laws is land ownership, tenancy, transfer (includes sale, mortgage etc) and governance of Scheduled Areas. They are core to host of rules, regulations, notifications, guidelines relating to land and governance in these Scheduled Areas. Even though both the legislations date back to Colonial Government they have been granted Constitutional protection under Article 31 (B) (Validation of certain Acts and Regulation) by including them in IXth Schedule of the Constitution at SI No. 209 & 210.

In addition, the Constitution of India has continued with special governance mechanism for Scheduled Areas as provided under Article 244 read with Fifth and Sixth Schedule of Constitution of India. For peace and good government of Scheduled Area under Fifth Schedule, Governor of the State has been vested with powers to make regulations. One of the major areas of power in Para 5 of the said Schedule is to "prohibit or restrict transfer of land by or among members of the Scheduled Tribes in such areas".

By proposed amendments, it would permit :-

- (a) non-agriculture uses of tribal lands by owners/ tenants, where at present agriculture and allied use of land permitted.
- (b) transfer of tribal land without mandatory prior written permission of the Deputy Commissioner (DC) for a variety of commercial purposes which are at present prohibited.

The commercialisation of land use and the lifting of constitutional and statutory restrictions on land transfer in Scheduled Areas run contrary to constitutional norms. The importance of protection of tribal land rights in Scheduled Areas has been emphasised by the Constitutional courts through various judgements. There are numerous such laws such as SPTA and CNTA, which prohibit / restrict alienation of tribal lands and require restoration of lands illegally transferred. These laws are consistence with Article 15(4) "Special provisions of advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and Scheduled Tribes" Hence, they have stood judicial/ legal scrutiny.

In a leading case of Samatha vs State of Andhra Pradesh & others (1997) 8 SCC 191, the Supreme Court has highlighted that the object of Para 5 of the V Schedule to establish egalitarian social order ensuring socio-economic empowerment to the Scheduled Tribes. It has highlighted ensuring customary and traditional rights protection and strict enforcement of state regulations for protection of tribal lands from alienation. Further, it has held that executive power under Article 298 and the legislative power under Article 245 to dispose of government property are subject to Para 5 of the said Schedule.

To prevent tribal land alienation in Scheduled Areas, constitution has provided high level of protection to both the laws and the Bihar Scheduled Areas Regulation, 1969 by including them IXth Schedule (Article 31B) of the Constitution of India at Sl. No. 209, 210 and 211 respectively.

In view of the above, the Governor while exercising under Article 213 seems to have not considered these important points for peace and good government in Scheduled Areas; particularly preventing alienation of tribal land. Even if considered papers sent do not speak of it or give rationale for the proposal.

After 1969 Regulation, it is learnt that amendments to the SPTA and CNTA (for Scheduled Areas of Jharkhand) were carried out through amendments to the Bihar Scheduled Areas Regulation, 1969. (In 1972, 1974, 1983 and 1986 in CNTA and in 1972, 1986 and 1998 in SPTA (through amendments in Bihar Scheduled Areas Regulation, 1969). Proposed ordinances seek direct amendments to SPTA and CNTA, which deviates from the above norms.

Some specific comments with regard to the proposed amendments:

Proposed amendments to SPTA and CNTA seek to make substantial changes to render them ineffective in safeguarding tribal land uses Eg., Sec 13 of SPTA and Sec 21 of CNTA that prohibit non agriculture use of land by land owner/ tenant, even all these very proscribe is sought to be lifted by proposed amendments Sec 13 (A) of SPTA and Sec 21 (B) of CNTA to allow non-agricultural use.

Similarly, Sections 46, 47, 48, and 240 of the CNTA, which impose restrictions on the transfer of tribal lands to non-tribals in a variety of situations without the prior written permission of the DC, remain unaltered under the proposed amendments. Transfer without such permission of the DC is restricted to two scenarios under section 49(1). It is important to reiterate that 'transfer' is widely understood to include sale, mortgage, lease, gift, contract or agreement. Also unchanged is Section 71B, which prescribes that land transfers in violation of these provisions is a criminal offence punishable with imprisonment which may extent to three years and / or fine.

Once the land use is changed from agriculture to non-agriculture the restrictions placed on transfer of tribal lands by sections 46,47and 48 of CNTA and section 20 of SPTA will cease to apply. Transfer of such non-agriculture lands will then be governed by the Transfer of Property Act and none of the beneficial restrictions of CNTA and SPTA will apply. Thus, the proposed amendments will open the floodgates for alienation of tribal lands.

However, the proposed amendments to Section 49(1) seeks to insert a new sub-clause (c) which permits transfer of tribal land without the written permission of the DC for a host of developmental activities "or any public purposes/ project or activity which the State Government may add by way of notification in the official gazette". Although there is a

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requirement for recommendation of the Tribes Advisory Council, such requirement appears to be optional.

A plain reading of the proposed amendment clearly demonstrates that the State executive would be vested with enormous powers to permit the alienation of tribal lands for any project or activity it may specify, thus rendering the substantive prohibitions under the body of the law otiose.

The proposed amendments fall squarely within the meaning of colourable exercise of power, thus rendering them extremely vulnerable to legal challenge in the constitutional courts.

Delegation of power

It is further observed that a substantive change in the meaning and content of the law must be made through an amendment in the statute itself (which is a legislative act) rather than through rules and notifications (which are executive acts). Even if, in certain situations, such power is delegated to the executive by the legislature, there should be clear and unambiguous guidelines on how this delegated power is to be exercised. It is well established that the failure to provide such guidelines renders such delegation of power arbitrary and excessive, and hence contrary to Article 14 of the Constitution of India (See, for instance, *Agricultural Market Committee vs. Shalimar Chemical Works Ltd.* (1997) 5 SCC 516; *Kishan Prakash Sharma &Ors. Vs. Union of India &Ors.* (2001) 5 SCC 212; *K.T. Plantation Pvt. Ltd. Vs. State of Karnataka* (2011) 9 SCC 1).

In view of the above, the proposed amendments would result in a paradigmatic substantive change in the extant law relating to prevention of alienation of tribal lands in the Scheduled Areas of Jharkhand. However, the proposed amendments give no guidance on what is the nature and extent of such change, delegating the power to define the boundaries of such change in the State executive.

To illustrate, the proposed Section 13(A) of the SPTA and the proposed Section 21(B) of the CNTA both enable the State executive to "regulate the non-agricultural use of the land in such geographical areas and for such uses as notified from time to time by the State Government" (emphasis added). There is no indication, however, how such uses and areas are to be determined.

In addition, the proposed sub-clause (c) to Section 49(1) of the CNTA vests the State Government with sweeping powers to exempt "any public purposes/ project or activity

which the State Government may add by way of notification in the official gazette on the basis of the recommendation of Tribes Advisory Council in the State of Jharkhand or for any other purposes which the State Government may by notification declare to be subsidiary thereto or for access to land used or required for any such purpose." (emphasis added). There are no guidelines on how the State executive shall determine which projects shall be thus notified except the requirement of the Tribes Advisory Council's recommendation. Even this requirement is unhappily worded and appears to be optional.

It is clear from the above that the substantive content of the change is completely delegated to the State executive through the framing of Rules for this purpose and/or notifications. There are no guidelines in the proposed amendments for the exercise of such delegated power; on the contrary it could be argued that such delegation is vague, excessive, and therefore contrary to Article 14 of the Constitution.

It is also inexplicable that the proposed amendments vest such sweeping rule-making powers in the state executive without proposing any amendment to the statutory provisions which vest the State Government with rule-making powers in the first place, being Section 71 of the SPTA, and Section 264 and 266 of the CNTA.

Conformity with Central Legislations

Another area of concern is the potential conflict between the proposed amendments to the SPTA and CNTA, where such field is already occupied by pre-existing Central Legislations which are also applicable to Scheduled Areas.

The Panchayats (Extension to Scheduled Areas) Act, 1996 (PESA) is an important legislation enacted in terms of the mandate of Article 243-M (4) of the Constitution of India, with respect to governance in Scheduled Areas "notwithstanding anything in this Constitution". Thus, PESA has overriding effect over the various provisions of the Constitution, including those relating to division of legislative powers between the Centre and the State.

PESA requires that the State Government shall make laws relating to panchayats which are "in consonance with the customary law, social and religious practices and traditional management practices of community resources" (Section 4 (a)) and shall further ensure that the Gram Sabha are "Competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution" (Section 4 (d)).

With regard to economic development, PESA requires that the Gram Sabha should approve of the plans, programmes and projects for social and economic development before such plans, programmes and projects are taken up for implementation by the Panchayat at the village level" (Section 4 (e) (i)). Section 4 (i) further requires "Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for Development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled Areas".

Specific to the issue at hand is Section 4 (m) (iii) of PESA, which requires that "the power to prevent alienation of land in the Scheduled Areas and to take appropriate action to restore any unlawfully alienated land of a Scheduled Tribe "should be vested in the Gram Sabha.

The Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 (FRA) has been enacted by Parliament in exercise of its legislative power under Entry 17-A and 17-B of List III of the Seventh Schedule, and it is further provided in the legislation itself that has overriding effect (Section 4 (1) and 13 of FRA). The role of the Gram Sabha in decision-making regarding its customary forest and resources under FRA has received the imprimatur of the Supreme Court of India in Orissa Mining Corporation vs. Ministry of Environment and Forests (2013) 6 SCC 476.

The Right to Fair Compensation and Transparency in - Land Acquisition, Rehabilitation and Resettlement Act, 2013 (LARR Act), enacted by Parliament in exercise of its powers under Entry 42 of List III of the Seventh Schedule, also recognises the special status of tribal lands in Scheduled Areas. This is specifically states in Section 2 (2) of LARR Act as under:

"Provided also that no land shall be transferred by way of acquisition in the Scheduled Areas in contravention of any law (including any other or judgment of a court which has become final) relating to land transfer, -prevailing in such Scheduled Areas."

Section 41 of the LARR Act proscribes the acquisition of land in Scheduled Areas, and where such acquisition is absolutely necessary, their prior consent of the Gram Sabha is a pre condition Section 42 further requires the compensation resettlement of forest rights under the FRA, where such rights are to be acquired under the LARR Act.

It is stated that the proposed amendments to the SPTA and the CNTA are being made in exercise of prior under Entry 18, List II of the Seventh Schedule.

The proposed amendments make no reference to the aforesaid or any other Central legislations, nor conform to the requirements of these legislations. There is no provision for safeguarding the rights of the community as a whole over the lands which would become open to commercial non-agricultural use and transfer, whether through consultation with the Gram Sabha, the village headman, or any other mechanism. Nor is there any provision for the involvement of the Gram Sabha in the decision-making process when lands are transferred for development activities, or prior consent when such lands are acquired. Indeed, the existing controls, which are limited in nature, are also sought to be dismantled.

The proposed amendments, in so far as these are contrary to the Central legislations which already occupy the field, would be beyond the legislative competence of the State Legislature, and therefore of the Governor also.

Legislation through an Ordinance

An ordinance under Article 213 of the Constitution is subject to judicial review in the same manner as any legislation, namely, on the grounds of lack of legislative competence, colourable exercise of power, and violation of fundamental right (see, for instance, *Sat Pal and Co. Vs. Lt. Governor Delhi* (1979) 4 SCC 232; *T. Venkata Reddy vs. State of Andhra Pradesh* (1985) 3 SCC 198; *Gurudevadatta VKSS Maryadit vs. State of Maharashtra* (2001) 4 SCC 534).

Under Article 213 of the Constitution, the satisfaction of the Governor that "circumstances exist which render it necessary for to take immediate action" is not subject to judicial review. It is necessary, however, that the Governor should have satisfied himself that such circumstances exist, and the facts and materials in this regard are justiciable (see *A. K. Roy vs. Union of India* (1982) 1 SCC 271). The materials available in the present case do not demonstrate that such circumstances exist.

According to information available in the public domain, the proposed amendments were discussed by the Tribes Advisory Council in January, 2016, and thereafter were approved by the State Cabinet in May 2016. The Jharkhand Vidhan Sabha, which was in session till recently, will reconvene shortly for its next session. There does not appear to be any factual basis for promulgating these far-reaching amendments through Ordinances under Article 213 of the Constitution, when in a few short weeks the same will have to be placed before the Vidhan Sabha, and subjected to the scrutiny of the elected representatives.

For the reasons, it may be prudent not to adopt the procedure under Article 213 to bring amendments to the SPTA and the CNTA, choosing instead present the same in the form of Bills before the State Legislature instead.

Given the sensitive nature of protection of land rights of tribals in Fifth Scheduled Areas, and the complex architecture of constitutional and legislative provisions as well as judicial precedent on the subject, and for the reasons stated in above paragraphs the Commission has recommended that assent of the Hon'ble President of India may not be accorded to the proposed Ordinances till they are revised thoroughly in order to bring these in conformity with the letter and the spirit of the Constitution and the Laws made thereof.

with regards.

Yours Sincerely

Rameshwar Oraon
(Dr. Rameshwar Oraon)

Ms Draupadi Murmu
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