

Development And Consent

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ABSTRACT

In recent years Adivasis seem to oppose their displacement from their lands vehemently, and by extension disagree with the economic development policies as well. There are numerous controversies on the processes by which land of the Adivasis has been acquired. Similarly, the design and implementation of resettlement and rehabilitation policies for displaced Adivasis are contentious. In this paper I therefore ask—whether a change of the situation for better may be obtained by instituting free, prior, and informed consent (FPIC) of Adivasis with respect to the proposed “economic development.” This is because through FPIC one seeks to guarantee the right of consent as crucial to the decisions; besides ensuring participation of Adivasis in the processes of economic development. The principle of FPIC assures equal opportunity to all, and consent is obtained voluntarily. In assessing FPIC I apply Habermas’s “communicative action” and discuss how implementing FPIC principle may strengthen deliberative democracy. To illuminate the relevance of FPIC in the Indian context I draw upon some documented experiences of Adivasis from the projects of bauxite mining by Vedanta in Niyamgiri hills, and setting up India’s largest steel plant by POSCO, a South Korean company. I conclude by discussing the larger implication of implementing FPIC to address issues of social exclusion of Adivasis through economic development.

In India, controversies and contentions on policies and conditions that displace Adivasis due to economic development are galore. The development model embodied in the new economic policies of liberalization, privatization and globalization has led to huge transfer of lands by the state, particularly land and forests which are critical for the livelihood and survival of Adivasis, to corporate for exploitation of mineral resources, setting up industries etc. Though the political leadership at the highest levels is cognizant of the issues of Adivasis, the state continues to promote policies on land belonging to Adivasis which favour massive projects of say, mining, coal based electricity generation, construction of multipurpose dams, special economic zones, infrastructure projects of highway construction, airports and the like. Further the resettlement and rehabilitation (R&R) of the displaced people has been negligible and over the years has become contentious. While there are talks of more humane rehabilitation policies, in reality there has been utter callousness and contempt for those displaced.

While displacement is the logical outcome of destructive development projects the brunt of displacement and trauma is borne by the Adivasis, who become the involuntary victims of displacement from their habitat, society and culture. Not only do the poor lose from

displacement, they are even denied their basic rights of lands, resources and self-determination. They are neither consulted during the project planning process nor do they receive any information about the project, compensation and their relocation. Unfortunately, land grabs takes place with authorities going out their way in illegally altering the documents of tribal land.

The displaced and aggrieved people raise doubts on the efficacy of India's liberal democratic polity that cherishes pluralism and hence oppose their displacement vehemently in form of protests and resistances which often turn violent, while the state suppresses their dissenting voice labeling them as anti-development. In such occurrences of forceful and dubious land acquisition process there is an increasing demand for transparency in the dealings of the government and greater participation in the proceedings and negotiations involving displacement of population. Further there must be greater communication and higher dissemination of information from the state and the project proponents and should involve authentic participation of the representatives of the displaced so that they have the ability to influence decisions. Now there is a need for change of situation that not only involves a meaningful participation of the Adivasis in the development process ensuring transparency, accountability, free flow of information but also attains the consent of the Adivasis, as equal partners. One of the way out is Free Prior and Informed Consent (FPIC).

FREE PRIOR INFORMED CONSENT

Free prior and informed consent refers to engagement and decision making in which free and informed consent of an indigenous peoples is obtained in advance for a course of action (Szablowski 2010). The term "Informed Consent" is derived from the principle of "Respect for Autonomy" which has been dominant in the medical research. It is a process that aims to secure from individuals, voluntary, prior, informed consent before undergoing a medical procedure, or participating in medical research. In the context of development projects FPIC provides potentially impacted communities with information about a proposed development project and encourages their consent. It begins with the provision of details on the nature of a proposed action, including the risks, benefits, and alternatives to the proposed action. FPIC protects community members by providing relevant information to them in order to make informed choices; it can also be used as a tool to help developers achieve a "social license" to operate (Goodland, 2004).

Free is the absence of coercion and outside pressure, including monetary inducements and "divide and conquer" tactics. It includes the absence of any threats or implied retaliation if the result of the decision is to say "no". Prior is having sufficient time to allow for information-gathering and full discussion, including translations into traditional languages, before a project starts. It must take place without time pressure or constraints. A plan or project must not begin before this process is fully completed and an agreement is reached. Informed is having all the relevant information available reflecting all views and positions. This includes the input of traditional elders, spiritual leaders, subsistence practitioners and traditional knowledge holders, with adequate time and resources to consider impartial and balanced information about potential risks and benefits. Consent is "harmonious, voluntary agreement with the measures designed to make the proposed project acceptable to the potentially affected communities.

The principle of FPIC has been adopted and recognized in the UN Declaration on the Rights of Indigenous Peoples and organisations such as International Labour organizations, the United Nations Convention on the Elimination of All Forms of Racial Discrimination (CERD), the UN Food and Agriculture Organization (FAO), The United Nations Development Programme (UNDP) and The International Fund for Agricultural Development (IFAD) also supports and implement the rights of indigenous peoples' FPIC in its policies. The main objective of FPIC is to secure the rights of indigenous people to self-determination, control access over land and natural resources and share the benefits when these are utilized by others.

FPIC provides for the recognition of inherent and prior rights to lands, resources and self-determination while concurrently providing a framework for third parties wishing to enter into or develop their territories by respecting the legitimate authority of indigenous peoples to say no. Moreover, FPIC requires processes that allow and support meaningful and authoritative choices by indigenous peoples about their development path. Thus FPIC provides an enabling function for indigenous peoples 'to freely determine their political status, freely pursue their economic, social and cultural development and freely dispose of their natural wealth and resources.' The principle is inextricably linked with the right to self-determination, land rights, and ownership of natural resources (Ludert, 2007).

In India, where the Adivasis continue to face devastating impacts from development projects; often without rights to land, territories and resources or self-determination perceive the need for a standard affirmative protective principle, FPIC seeks to offer an alternative perspective to the seeming intractable impasse in providing a deliberating space and facilitating smoother implementation of development projects.

The principle of FPIC prerequisites for a successful working deliberative democracy. It provides fairness and reciprocity. It does not make prior assumptions about participants' values and interests and ensures non-coercion and non-manipulation as it situates reasoned argument above power that may be, and likely is, hiding subjective values and interests. Procedurally, because consent is distributed equally and is not delegated elsewhere and remains at the grass roots of society, it further allows for ongoing representation, choice of participation and is open to diverse forms and modes of communication. The concept of consent is not a threat to development but acts as optional safeguard to ensure effective development. FPIC through deliberative democracy means that projects should be assessed prior with those likely to be affected by project. This is to ensure that deliberations with affected parties should be conducted by bringing particular views of the project together before decisions are made and plans are drawn. The affected parties should not be viewed as obstacles to development but as equal stakeholders. Endorsing FPIC, on the basis of deliberative grounds would be right start in advancing justice for the Adivasis, marginalized and socially excluded from the development process.

RELEVANCE OF FPIC IN INDIA

To illuminate the relevance of FPIC in the Indian context I draw upon documented experiences of Adivasis from the projects of bauxite mining by Vedanta in Niyamgiri hills, and setting up

India's largest steel plant by POSCO, a South Korean company. The hills of Niyamgiri, a Fifth Schedule area under the Constitution of India and home to DongriaKondhAdivasis, are allegedly under threat from the proposed mining activities of Vedanta Aluminium Ltd (VAL), a subsidiary of the British mining giant Vedanta Resources Plc. VAL is awaiting the second stage of clearance from the Ministry of Environment and Forests (MoEF) for its Niyamgiri project. It got the first-stage clearance from the MoEF in September 2004. The Company has already started operations at its refinery in Lanjigarh, a town downhill from the Niyamgiri forest. The clearance granted to the refinery is also fraught with controversy. The Central Empowered Committee (CEC) constituted by the Supreme Court following a complaint of environmental violations against Vedanta, in its report submitted to the court in September 2005, and accused Vedanta of deliberate violations. The CEC observed that "out of the requirement of 723.343 hectares for the alumina refinery and 721.323 ha for the bauxite mining, 58.943 ha and 672.018 ha, respectively, are forest land" and "since the project involved the use of the forest land for the alumina refinery itself, the environmental clearance could have been granted by the MoEF only after the use of the forest land was permitted under the F.C. [Forest Conservation] Act". The CEC concluded that "M/s Vedanta has deliberately and consciously concealed the involvement of the forest land in the project so that environmental clearance is not kept pending for want of the F.C. Act clearance". It further stated that in violation of the Act the project was split into alumina refinery and bauxite mining although the latter is an integral part of the project and that although the MoEF was "fully aware that the use of the forest land for the mining at Niyamgiri hills is absolutely necessary if the alumina refinery is to be established at Lanjigarh, the environmental clearance to the alumina refinery has been accorded by the MoEF by overlooking these facts". Around 8,000 DongriaKondhAdivasis, who are a Primitive Tribal Group (PTG) notified by the Union government and who revere the Niyamgiri Mountain as their king and god, fear displacement and total disruption of their centuries-old culture once the company gets the clearance to mine the hills? However, the company dismisses all such concerns (Frontline, 2010). Worse, neither the gram sabha was consulted nor the consent of the people was taken by the officials. For instance, to satisfy the requirements in MoEF guidelines there was a public hearing on 7 February held in Lanjigarh about mining Niyamgiri and building the refinery. It was presided by Saswat Mishra, the district collector of Kalahandi but surprisingly it was an unpublic hearing where no Dongrias were present from communities which would be impacted by mining. Similarly in another public hearing held at Muniguda by the Orissa state pollution Control Board (OSPCB) on 17 March 2003, where a number of villagers made their case against the Lanjigarh Project. The Dongrias went there to demonstrate their opposition, but were not allowed in. There has always been deliberate attempts on the part of the Vedanta Alumina Limited to conceal information and falsify it in order to get the project approved (Padel&Das 2010: 151).

In the case of POSCO project, application of Forest Rights Act (FRA) was mandatory because 3,096 of the 4004 acres of land sanctioned for the steel plant in Jagatsinghpur district is officially classified as forest land. When it came to the environmental clearance process, the project was disarticulated into several smaller parts (such as the steel plant, the port, the mines, etc.) which effectively obscured the overall impact of the project, resulting in a lacking of understanding on the part of the public as to the cumulative effects of the totality of the project. To facilitate the

project the Orissa government sought to brush aside all environmental and livelihood concerns. The FRA mandates that no member of a forest dwelling Schedule Tribe or other traditional forest dweller shall be evicted or removed from forest land under his occupation till the recognition (of rights) and verification procedure is complete and it empowers gram sabhas to protect the forests and regulate access to community forest resources. On August 3, 2009 the environmental ministry issued circular to the effect that the diversion of forest land for the POSCO project would have to wait until after the rights of the forest dwellers had been recognized and would require the approval of relevant gram sabhas. However in December 2009, in violation of its own circular the MoEF granted a conditional clearance without even meeting the requirements of law. This change in stand of MoEF appears to be due the visit of South Korean President Lee Myung-Bak in January 2010. Yet in another instance, presumably to nominally comply with FRA requirements the Odisha state government invited the opinion of the Dhinkia, GadaKujanga and Nuagaon gram panchayats, to which they responded by re-asserting their rights under FRA and rejecting the proposed diversion of forest land for the POSCO project. But the administration ignored the gram sabhas' resolution and went ahead that the FRA process had been completed and that there were no other traditional forest dwellers in the area. The state government officially submitted this false information to the MoEF and launched a fresh round of violent attacks on the villagers who dared to assert their legal rights². While the consent of the gram sabha is a precondition for clearance, the Odisha government grossly violated the law and the conditions of the clearance.

The cases demonstrate that while the clearances of the projects were illegal, the consent of the project affected people has never been taken into account. In India, public hearing is the way of attaining consent of the people, but the irony is that they are just one off instances to comply with the procedures of land acquisition wherein the people are just informed about the project and their displacement. While in the case of Vedanta the Dongria Kondhs were not present in the public hearing, in the POSCO project the state government officially submitted the false information of FRA process been completed and there were no forest dwellers even when the gram panchayats had rejected the proposed diversion of forest land to the project. There is polarization of interests between the state and the project affected people; the people strongly oppose such projects while the state in collusion with the project proponents make false claims of having obtained their consent, thereby, deliberately ignoring the real concerns and interests of people. Further, the projects have always concealed information from the public, as such the accountability and transparency in the process of setting up the projects is highly questionable.

FPIC as a way out to the intractable impasse between the project proponents and the project affected people would give the affected people a formal role and some form of bargaining power in the consultations and ultimate decisions about the development projects by making their informed decisions- that is by saying yes or no or might even give consent to the project by stating their conditions and informed choices. Without such informed consent on large projects the people's land and resource rights are compromised. FPIC should include the following:

1. Knowing who is planning the project so that people know who should be seeking consent. The project planner may be the government or a private company. Often large projects

involve a mix of private and government interests and funded by international financial institution. This makes more complex to find information about the project developers.

2. Information about the proposed project and its impact on a community so that people can make informed decision on whether to give or deny consent, make changes to the project design or seek prior conditions to be met before agreeing to the project. If a community believes it would be affected by the project, it becomes important for the community to be fully informed about the project, its potential impacts and what the project developer will do to prevent or reduce them.
3. Information about the geographic scope of the project and to identify all potentially affected communities. It is important to note here that a project based in one region can have impact on community of another region.
4. Rationale for acquiring land, the magnitude and degrees of displacement and the resettlement plan and compensation that may be necessary for the project to proceed.
5. Whether the project secure community land holdings or common pool resources. How would they be compensated? Common pool resources are the integral part of village community life that serves to benefit whole community. Often the people are compensated only for their land but not for the common pool resources.
6. Any development plans associated with the projects such as schools, roads, hospitals etc. which would benefit the whole community in their social and economic well-being.
7. The risks and benefits of the project.
8. The project developer's response to the community concerns by negotiating with the affected communities and considering their opinions. It is important that proponents demonstrate to communities that the process is worthwhile by responding to concerns. In consultations, proponents record community input, and publicly demonstrate how the input influenced project decision-making or improved project design.
9. Means of benefit sharing and redressal mechanisms.

FPIC enables affected people to block unacceptable exploration and investments in their lands and negotiate fair, equitable and enforceable terms of revenue and other benefit sharing. FPIC seeks to make the affected communities benefit from the proposed project and that these benefits will far exceed any worst-case scenario of unforeseen impacts. There may raise differences of opinions and interests among the affected communities. In such case a significant majority suffices. A majority of fifty-one percent suffices in democratic elections, which may be used as a guide to the definition of a "significant majority" (Goodland, 2004).

In India, development is becoming synonymous with displacement from habitats, destruction of livelihoods which has led to the marginalization and social exclusion of Adivasis from the economic development. The central and state government remains apathetic towards its own people and sees the projects more important than the lives of the people. People have always opposed and protested against any development projects because there is a serious problem in the way in which acquisition of land takes place where the project affected people are always left out of the planning and decision making process. These people risk a permanent loss to their livelihoods and cultures. Resettlement is often forced on communities with inadequate

compensation offered. Well, there is now a need for change of situation for better which can be obtained by instituting free, prior, and informed consent (FPIC) of Adivasis with respect to the proposed “economic development. This is because through FPIC one seeks to guarantee the right of consent as crucial to the decisions; besides ensuring participation of Adivasis in the processes of economic development. The principle of FPIC assures equal opportunity to all, and consent is obtained voluntarily. Decision-making with regard to the acquisition of land needs to be the result of fair negotiation where the Adivasis should be engaged as equal stakeholders. No project should go ahead without the consent of the tribals. If they are willing to be displaced, outsees should become project beneficiaries. Development should be consensual and democratic. Any form of democratic that would require the use of force should become unacceptable (Goodland 2004).

The fact that FPIC is not explicitly recognized in our national laws should not prevent the Adivasis from insisting their rights of self-determination, intimately connected to their rights to lands and territories. The strength of FPIC is that it implies a two-way interaction between the tribals and outside interests, in which the tribals have the right to give or withhold consent. It holds true that the Adivasis have a right to development and hence be part of the development process. The principle of free prior and informed consent ushers a new direction in the development discourse by making the affected people a stake holder in the decision making process by granting them the power to consent for a development project or action. Thereby FPIC would seek to promote the end to the exclusion and marginalization of the Adivasis and foster their full contribution to development as valued members of the society.

Notes

¹Habermas defines communicative action as the process in which individuals come to mutual understanding and consensus through open, noncoercive debate and discussion freed from the corrosive effects of money power and manipulation.

²see MoEF: POSCO Illegal, but Clearance stay. (<http://www.forestrightsact.com/statements-and-news/92-moef-posco-illegal>)

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