



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



SUBVERSION OF THE DUE PROCESS FOR SEEKING CONSENT OF COMMUNITIES IN LAND ACQUISITION AND THE RESULTANT LAND CONFLICTS

Kumar Sambhav Shrivastava, Sreetama Gupta Bhaya and Thomas Worsdell
Oxfam India and Land Conflict Watch, India

Presenting sreetama@oxfamindia.org and kumarsambhav.08@gmail.com

**Paper prepared for presentation at the
“2020 WORLD BANK CONFERENCE ON LAND AND POVERTY”
The World Bank - Washington DC, March 16-20, 2020**

Copyright 2020 by author(s). All rights reserved. Readers may make verbatim copies of this document for non-commercial purposes by any means, provided that this copyright notice appears on all such copies.



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



Abstract

The Indian laws—Forest Conservation Act, 1980 along with The Forest Rights Act (FRA), 2006 and the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act (LARR), 2013 make it mandatory for the government bodies and project promoters to take consent of indigenous people and other communities, who hold traditional land rights, before acquiring their land for large-scale projects. A widespread perception among corporations and the Indian bureaucracy is that the consent, and the procedures required for obtaining consent, are hindrances to economic development and progress. Through a systematic analysis of over 700 cases of ongoing land conflicts in India, mapped and documented by Land Conflict Watch (LCW), we found that that conflicts that stall large projects arise not because the consent is sought, but due to lack of implementation, violation or subversion of the consent provisions, through disingenuous acts that conceal or falsify information in the process of seeking consent.

Key words: Consent, FPIC, Forest Rights Act, Indigenous Rights, Land, Land Acquisition.



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



Contents

Contents	2
1. Introduction.....	3
2. The Concept of Free Prior Informed Consent.....	6
2.1. The Genesis of FPIC.....	6
2.2. Framework of FPIC.....	7
3. The context of Indian Tribal dominated States – Paradox of development.....	9
3.1 Paradox of resource curse:	10
3.2 Reasons for the problem:	10
4. Space for FPIC in the Indian Laws	12
4.1 Constitutional Provisions:	12
4.2 Protective Legislations.....	13
4.3 Forest land use and environmental regulations.....	13
5. Withering of protective provisions	20
5.1 Eminent domain, Consultation and consent.....	20
5.2 Government apex institution of Audit reiterates environmental violations	23
6. Gap between policy and practice: Impact on the ground – Case studies	25
6.1. Breach of Consent and the resulting Land conflicts	25
6.2. Case studies.....	27
8. Findings and conclusion	30



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



1. Introduction

The right to self-determination is enshrined within the Charter of the United Nations¹, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), amongst others. Too often, the principle of self-determination is associated to processes of state sovereignty, self-organization and the free-association with other nation states (Barnsley and Bleiker, 2008). However, self-determination goes beyond these nation-state conceptualisations, applying as a human right in the context of autonomy, multiculturalism, democratic participation, and, the obligation for states to refrain from any forcible actions that deprive peoples of enjoying such rights.

When discussing community land rights, the right to self-determination is represented in the right to land, territories, natural resources, and, Free Prior and Informed Consent (FPIC). For indigenous and tribal peoples, the normative framework for FPIC can be found within the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), the International Labor Organization Convention 169 (ILO 169)², and, the Convention on Biological Diversity (CBD), to name a few international instruments. As a specific right, FPIC allows Indigenous and Tribal Peoples to give or withhold consent over projects that may affect them or their territories (FAO, 2016).

Land acquisition laws across India have historical roots in British colonial laws. Since independence these laws have formed the basis for new legislations at both the state and central government levels (Wahi et al, 2017). In the last two decades, different laws were enacted to ensure a just process for acquisition of private lands as well as the forest lands in the country. This research has focused on land conflicts across these two land-tenure systems and the legal provisions that require consent of people holding rights over such lands prior to the acquisition of such land. The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (LARR) and the Forest Rights Act, 2006 (FRA) are two such legislations in place to ensure the protection of rights is adhered, in both private and communal land acquisition respectively.

With land being a central issue in the culture, pursuit of livelihood, and wellbeing of communities, conflicts that interfere in the access, ownership, use of and control over land directly impact the exercise of a wide

¹ U.N. Charter art. 1, para. 2.

² India has not ratified the ILO 169.



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



range of human rights. A central concept at the heart of land acquisition conflicts is ‘self-determination’, a fundamental principle in international law, and a concept that enshrines a degree of autonomy, on both people and communities, in matters that are to impact their lives.

Land Conflict Watch, a research-based data journalism project, recorded 49 land conflicts specifically citing ‘consent’ or the process of obtaining consent as a central issue behind the disputes. Almost 50% of these conflicts were located in Scheduled Five Areas, the regions specifically designated by the Indian Constitution for protection of Indigenous people’s rights. Our analysis of these 49 cases showed the land conflicts do not arise because the ‘consent’ is sought, but due to lack of implementation (Broome et al, 2019), violation and undermining of laws (Shrivastava, 2018), through disingenuous acts that conceal or falsify information during the process of seeking consent. To date, there had been no systematic review that analyses the relationship between land acquisition laws and the violation of self-determination in the Indian context. By using an extensive network of regional researchers and data analysts, Land Conflict Watch has compiled an exhaustive dataset that combines quantitative and qualitative data that identifies and addresses the fundamental factors that contribute to the perpetuation of land conflicts across the country.

Using preliminary data from Land Conflict Watch, we found 23 instances where the Indian forest department felled trees or created plantations on lands traditionally inhabited by communities who held rights over these lands. In 80 per cent of these cases, communities indicated that the forest department did not follow the required consent process. Land Conflict Watch also documented 35 cases where indigenous people protested against the diversion of forestland for industrial and developmental projects. Under the Forest Rights Act, 2006 with is linked to Forest Conservation Act,1980 such diversion is not allowed without the consent of village assemblies of the indigenous people. Though these projects were cleared by authorities by concealing or falsifying information during the process of seeking consent, the projects got embroiled into conflicts on the ground. Together, these conflicts affect close to 1 million people and are spread over 1,734 Square Kilometers. We downloaded the approval documents for 23 of these projects from the Union Ministry of Environment, Forests and Climate Change website. A review of these documents, revealed that 13 projects failed to mention consent in the official documents. In 10 cases, local authorities claimed that there were no indigenous people living in the project-affected areas or falsified certificates that stated the forest rights had been settled and that the community did not oppose the projects.

Individual-tenure holders are also subject to laws that uphold their right to self-determination. The LARR, 2013, is one such provision that ensures land owners and livelihood losers do not suffer disproportional burdens in the prospect of losing their lands. Initial figures from Land Conflict Watch have shown 15 land



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



conflicts in which the consent procedure of land acquisition was completely absent. In four of these cases, title holders were informed of the acquisition of their lands from public notices in local newspapers. By analyzing cases such as these, we have identified several instances in which legislatures enacted by the state governments undermine the LARR, which is a central law, and remove the requirements of ‘consent’ altogether. We found that this practice is common, and, the mechanism which enables this, is enshrined in the Indian Constitution. The continued monitoring of land conflicts enabled us to identify the mechanisms and state legislations that undermine the LARR, and, as a result, the right to self-determination within land acquisition processes.



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



2. The Concept of Free Prior Informed Consent

2.1. The Genesis of FPIC

To mitigate some of the effects, in 2007, the UN General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples, recognizing their rights and making specific mention of Free, Prior and Informed Consent (FPIC) as a pre-requisite for any activity that affects their ancestral lands, territories and natural resources. Despite its approval in 2007, progress towards the implementation of FPIC has been slow and uneven by countries, private sector corporations,

The concept of FPIC is most clearly stated in the United Nations Declaration on the Rights of Indigenous Peoples² (“UNDRIP”) in Articles 10, 11, 19, 28 and 29 and 30 which explicitly articulate the terms of the Principle.

Relevant Articles under The United Nations Declaration on the Rights of Indigenous Peoples	
Article 10	Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return
Article 11	Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs
Article 19	States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them
Article 28	Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



	<p>which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.</p> <p>Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress</p>
Article 29	<p>Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources.</p> <p>States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.</p>
Article 30	<p>Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.</p> <p>States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.</p>

They prescribe situations in which FPIC must be obtained and also provide for instances where compensation may be sought if FPIC has not been obtained for example, for dumping of hazardous wastes, or for the taking of indigenous property³. In the development discourse, FPIC is particularly relevant when discussing large-scale undertakings such as construction projects including mega-hydroelectric dams, resource extraction and the designation of protected areas for conservation.⁴ In this context of “development”, Article 28 of the UNDRIP may be viewed as the main endowment of FPIC which states that indigenous people have a right to redress in the form of restitution or compensation if their lands and/or resources have been used or taken without their prior consent

The importance of protecting and expanding indigenous and community ownership of land has been a key element in the negotiations of the Sustainable Development Goals and the Paris Agreement on climate change, and is central to their successful implementation.

2.2. Framework of FPIC

The normative framework of FPIC consists of a series of legal international instruments including the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the International Labour



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



Organization Convention 169 (ILO 169), and the Convention on Biological Diversity (CBD), among many others, as well as national laws.

Indigenous Peoples’ right to free, prior and informed consent (FPIC) has been recognized by a number of intergovernmental organizations, international bodies, conventions and international human rights law in varying degrees and increasingly in the laws of State.

In the last two or three years, development experts have recognized that FPIC is not only important for indigenous peoples but it is also good practice to undertake with local communities, as involving them in the decision making of any proposed development activity increases their sense of ownership and engagement and, moreover, helps guarantee their right to development as a basic human rights principle. In an FPIC process, the “how”, “when” and “with” and “by whom”, are as important as “what” is being proposed. For an FPIC process to be effective and result in consent or lack of it, the way in which the process is conducted is paramount. The time allocated for the discussions among the indigenous peoples, the cultural appropriateness of the way the information is conveyed, and the involvement of the whole community, including key groups like women, the elderly and the youth in the process, are all essential thorough and well carried in FPIC process, which helps guarantee everyone’s right to self-determination, allowing them to participate in decisions that affect their lives

Free:	refers to a consent given voluntarily and without coercion, intimidation or manipulation. It also refers to a process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed.
Prior	implies that time is provided to understand, access, and analyze information on the proposed activity. The amount of time required will depend on the decision-making processes of the rights-holders
Informed	refers mainly to the nature of the engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process
Consent	refers to the collective decision made by the rights-holders and reached through the customary decision-making processes of the affected Indigenous Peoples or communities. Consent must be sought and granted or withheld according to the unique formal or informal political-administrative dynamic of each community. Indigenous peoples and local communities must be able to participate through their own freely chosen representatives, while ensuring the participation of youth, women, the elderly and persons with disabilities as much as possible



3. The context of Indian Tribal dominated States – Paradox of development

India during its post liberalization period, (since 1991) has achieved a high growth rate in a relatively short period of time. Despite the global economic slowdown during 2011-12, India achieved an average growth rate of 7.9 percent during the 11th plan period (2007-2012). At the same time, this trend seems to have widened the gap between those at the top and the bottom of the wealth distribution, despite India's impressive economic growth rates³.

While market-friendly reforms have succeeded in pulling millions of Indians out of poverty, economists say a significant proportion of the population is not reaping the benefits of economic growth. This, in turn, has led to a small elite owning a high share of the nation's wealth. There are also high regional disparities as well as disparities between the social groups in India

According to the latest Census (2011), as many as 21.9 percent of the population, were below the poverty line. (21.2% live under 1.90 USD per day) At the same time income inequality – the gap between the haves and the have-nots – has increased sharply (World Bank, 2017).⁴ Over half the population still faces deprivation with respect to health, education and living standards.

Scheduled Tribes (STs) constitute 8.6 percent of the total population of India who are considered the most deprived and least-developed social group and hence, the most vulnerable of all. Poverty and landlessness are rampant amongst the STs. 47.1% of all STs are below the poverty line in rural areas as compared to 33.8% for the national average, whereas 28.8% of all STs are below the poverty line in urban areas. In spite of being the only group with constitutional protections for their land rights, 9.4 % of the STs are landless compared to 7.4% for the national average.¹⁹ While STs constitute 8.6% of the total population, it is estimated that they have constituted 40% of all people who have been displaced from 1951 to 1990, some more than once, due to the construction of dams, mines, industrial development, and the creation of wildlife parks and sanctuaries.²⁰ Only 24.7% of the ST population that was displaced during this period was rehabilitated.²¹

⁴ World Bank



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



3.1 Paradox of resource curse:

Forests are not only the most important ecosystem on the planet but also are the resources on which nearly 275 million poor people of India, especially tribal, depend for subsistence and livelihoods - food, fodder, housing, agriculture, Minor Forest Produce/Non-Timber Forest Produce (MFPs/NTFPs) etc. Almost 50 percent of the food requirements of forest dwellers are provided by forests (Gupta Bhaya, 2018)⁵.

Almost 60 percent of the forest cover of the country is found in tribal dominated States. The states with largest forest cover in terms of absolute area are also states with substantial tribal population which includes Jharkhand, Chhattisgarh and Odisha (Ministry of Tribal Affairs, May, 2014). These three states are also storehouses of considerable mineral reserves – 70 percent of coal, 80 percent of high-grade iron ore, 60 percent of bauxite and almost 100 percent of chromite reserves. However, the paradox of resource endowed tribal areas are evident in the very low human development indicators for these communities - from poor health status, low levels of literacy, food insecurity and low economic development. Many among these tribal communities are Particularly Vulnerable Tribal Groups (PVTGs) - categorized by the India's Ministry of Home Affairs - who are at the bottom of the development pyramid. They also score low on various development indices as a result of systemic exclusion and discrimination. 47.1 percent of the rural ST population are below the poverty line which is much higher than the overall country's rural poor which is 33.8 percent (Ministry of Tribal Affairs, 2013). Thus the schedule tribes also known as Adivasi (original inhabitants) lag 20 years behind national averages on human development indicators. However, research shows that mineral production values reveals almost 65% of mineral production is concentrated in the states that have Fifth Schedule Areas. Royalty accruals from these states are as high as 88.5% of the total royalty accruals in India. (Wahi, 2018)

3.2 Reasons for the problem:

Chronic poverty as a result of dispossession from resources, internal conflict, socio-cultural taboos, human rights travesty, violence against the women, large scale displacement and alienation from land due to large infrastructural development projects and mining are some of the factors that have intensified the struggle that tribal communities face. Over 70 percent of the forest land which was cleared for mining since 1981 happened in the period 1997-2007. Of the 14,000 sq kms of forests cleared over three decades, the largest area was given over to mining (4,947 sq km), followed by defense projects (1,549 sq km) and hydroelectric



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



projects (1,351 sq km)⁶. It is estimated that more than 60 million people were displaced since India's Independence of which 30 percent are tribal (Report of High-level Committee, Ministry of Tribal Affairs, 2014).

These factors coupled with poor access to rights over forest resources adds to livelihood insecurity among them. The Indian Forests Act, 1927 (carried forward after independence) made cultivation on forest land illegitimate and recording of forest rights of tribal communities was discontinued. Many other conservation promoting legislations added to the woes of the tribal community which distanced them from forests that they traditionally protected and managed. Eventually the forest owners came to be sadly seen as forest encroachers.

The conflict over resources, coupled with long history of oppression and exploitation of the vulnerable communities in these areas have also given rise to Left Wing Extremism (internal armed rebellion) and the communities are caught between these radical groups on one side and military and paramilitary forces of the State on the other. Tribal leaders who raised voices against the land alienation and eviction were charged on allegations for supporting extremist groups and are under trial. There has been violation of human rights; often violence is used to break protests by communities.

Constitutional and legal provisions around FPIC in India

The primary source of law is derived from 3 sources

- The Constitution of India
- Legislations as enacted by Parliament and State Legislatures
- Judicial decisions that have emerged from Courts of law primarily that of Supreme Court and High Court

⁶ Compensatory Afforestation Fund Management and Planning Authority (CAMPA), -Ministry of Environment and forests.



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



4. Space for FPIC in the Indian Laws

4.1 Constitutional Provisions:

Article 366(25) of the Constitution defines Scheduled Tribes as “tribes or tribal communities or parts of or groups within such tribes or tribal communities” as are deemed to be Scheduled Tribes (“STs”) under Article 342 of the Constitution.

Article 342 vests the President with the power to declare by public notification “the tribes or tribal communities or parts of or groups within tribes or tribal communities” as STs for a state or union territory.

Two Schedules – Fifth and Sixth Schedules to the Constitution of India under Article 244 provide for special provisions for areas inhabited by STs. A large number of areas predominantly inhabited by adivasis/indigenous population of India had been declared to be Excluded/Partially Excluded areas during the colonial rule. These areas came under the purview of the Scheduled District Act of 1874 and the Government of India (Excluded and Partially Excluded Areas) Order 1936. Following Independence, these areas were brought under the Fifth and Sixth schedule and now referred to as Scheduled areas.ⁱ These areas have special status under the Constitution in terms of autonomy and governance. In these areas’ decision making on land use are decentralized upto the level of Village council and urban wards

One of the most significant steps towards decentralization in contemporary India was through the 73rd Amendment to the Constitution in the year 1992. There are 2 significant elements of this amendment. First, is the establishment of a three-tier structure for Panchayati Raj Institutions (PRI), with elected bodies at village block and district levels.” Second, it recognized the Gram Sabha or village assembly as the main deliberative body at the village level (GoI, 1992; Johnson, 2003).

The Indian Constitution defines Gram Sabhas or village assembly as “a body consisting of persons registered in the electoral rolls relating to a village comprised within the area of Panchayat at the village level.” This amendment ushered in the era of devolution of powers to Gram Panchayats (village councils) so that they could exercise authority and function as institutions of self-governance.

42nd Amendment made some key changes in the constitutional approach to forests and environment. Article 48-A in Part IV provides for the protection and improvement of the environment and safeguarding of the forests and wildlife. Article 51 –A(g) in Part IV-A (Fundamental Duties) placing a duty on the



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



citizens to “protect and improve the natural environment including forests, lakes, rivers, and wildlife and to have compassion over living creatures”.

In addition, legislative power to make laws on forest and wildlife was removed from the State list and made part of the Concurrent list wherein Both Central and State legislatures were vested with power and in case of overlap, the Central laws prevail.

4. 2 Protective Legislations

- **Special power for the tribal Areas: Panchayats (Extension to the Scheduled Areas) Act, 1996** (PESA) with the explicit purpose of extending provisions of the 73rd constitutional amendment to Scheduled Areas. Under the PESA Act, 1996, Gram Sabhas must approve of social and economic development plans prior to their being implemented at the village level by the Panchayat. It is also mandated that before any land acquisition takes place in Scheduled Areas, or the resettling/rehabilitating of affected persons takes place, Gram Sabhas are to be consulted.

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

Section 4(i): “The Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled Areas; the actual planning and implementation of the projects in the Scheduled Areas shall be coordinated at the State level.” The act empowers the Gram Sabha to safeguard and preserve its community resources, and requires that the Gram Sabha or Panchayat at appropriate level be consulted before acquiring land in Scheduled Areas for development projects.

4.3 Forest land use and environmental regulations

- **Forest (Conservation) Act 1980:** State governments have the final authority to sanction the use of forest lands for non-forest use⁷. Till 1980 this give and take was only between a concerned user agency (public or private) and the state government (through its forest department). Since 1980, with the enactment of the Forest Conservation Act, the requirement for a prior permission from

⁷ non-forest purpose broadly as the breaking up or clearing of any forest land for the cultivation of tea, coffee, spices, rubber, palms, oil-bearing plants, horticultural crops or medicinal plants and for any purpose other than reforestation



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



the central Ministry of Environment and Forests was made a legal requirement. In order to use a forest for an explicit non-forest purpose or de-reserve it (from its Reserved Forest status), an approval needs to be sought from the Ministry of Environment, Forests and Climate Change (MoEFCC) (MoEF, 2004; Kohli et al., 2011).

- **The Scheduled Tribes and Forest Dwellers (Recognition of Forest Rights) Act, 2006** referred to as the Forest Rights Act (FRA) was a watershed moment in the history of forest rights movement in the country. It was a product of a long period of struggle by the tribal groups. The Act seeks to recognize and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded and to provide for a framework for recording the forest rights so and thus to undo a serious historical injustice. There are 2 main aspects of the FRA, which involve -
 - ❖ recognition and vesting of substantive rights and providing a framework for recording of rights, and
 - ❖ Empowering the forest rights holders, Gram Sabhas⁸ and other local level institutions with the right to protect, regenerate, conserve and manage any community forest resource. This marks a decisive step towards resource governance itself.
 - ❖ Further Section 5 of the Act empowers the Forest dwelling communities to
 - ❖ Protecting the wildlife, forest and biodiversity
 - ❖ Ensuring that adjoining catchments area, water sources and other ecological sensitive areas are adequately protected
 - ❖ Ensuring that the habitat of forest dwelling STs and OTFDs is preserved from any form of destructive practices affecting their cultural and natural heritage
 - ❖ Ensuring that the decisions taken in the Gram Sabha to regulate access to community forest resources and stop any activity, which adversely affects the wild animals, forests and the biodiversity are complied with.

⁸ As defined in Section 2 (g) of FRA: a village assembly which shall consist of all adult members of a village and in case of States having no Panchayats, Padas, Tolas and other traditional village institutions and elected villages committees with full and unrestricted participation of women



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



With the enactment of Forest Rights Act, 2006 and subsequent clarifications⁹ issued by the MoEF&CC where in it had communicated to the to the State/ UTs that prior to diversion of forest land for non-forest purpose , the process of FRA has to be complied with and following documentary evidences has to be submitted which include

- ❖ A letter from the State Government certifying that the complete process for identification and settlement of rights under the FRA has been carried out for the entire forest area proposed for diversion, with a record of all consultations and meetings held;
- ❖ A letter from the State Government certifying that proposals for such diversion (with full details of the project and its implications, in vernacular/local languages) have been placed before each concerned Gram Sabha of forest-dwellers, who are eligible under the FRA;
- ❖ A letter from each of the concerned Gram Sabhas, indicating that all formalities/processes under the FRA have been carried out, and that they have given their consent to the proposed diversion and the compensatory and ameliorative measures if any, having understood the purposes and details of proposed diversion.
- ❖ A letter from the State Government certifying that the diversion of forest land for facilities managed by the Government as required under Section 3(2) of the FRA have been completed and that the Gram Sabhas have consented to it.
- ❖ A letter from the State Government certifying that discussions and decisions on such proposals had taken place only when there was a quorum of minimum 50% of members of the Gram Sabha present; Obtaining the written consent or rejection of the Gram Sabha to the proposal.
- ❖ A letter from the State Government certifying that the rights of Primitive Tribal Groups and Pre-Agricultural Communities, where applicable, have been specifically safeguarded as per Section 3(1)(e) of the FRA and the Ministry of Tribal Affairs (MoTA) wherein it was communicated to the State/ UTs that prior to diversion of forest land for non-forest purpose wherever the process of settlement of Rights under the FRA has been completed or currently under process, required to enclose a letter from each of the concerned Gram Sabhas, indicating that all formalities/processes under the FRA have been carried out, and that they

⁹ MOEFCC guideline vide letter No.11-9/98-FC(pt) dated 3.08.2009



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



have given their consent to the proposed diversion and the compensatory and ameliorative measures if any, having understood the purposes and details of proposed diversion and obtaining the written consent or rejection of the Gram Sabha to the proposal.

- **Protected Areas (PA)**

Largely the approach to Protected Area management in India has borrowed heavily from the Western model of creating inviolate pristine zones and ‘protect park’ from people living in surrounding areas and shield wildlife and other natural resources from any “disturbances”. In this scenario, attempts to protect PAs from human intervention by coercion have often led to hostile attitudes of local people towards wildlife management and forestry staff, and sometimes to open conflict.

However, it is largely debatable if such a model has been successful in enhancing forest and wildlife in the country. It led to the erosion of traditional practices which aid conservation and have caused further impoverishment of already economically marginal communities. Protected Areas is largely governed by Wildlife (Protection) Act, 1972 where rights of people can be acquired for wildlife conservation but due process of law has to be followed. However, with enactment of FRA these processes have been strengthened.

Section 4 (2) of FRA states that the forest rights recognized under this Act in critical Wildlife habitats of National Park and Sanctuaries, may subsequently be modified or resettled, provided that no forest rights holders shall be resettled or have their rights in any manner affected for the purposes of creating inviolate areas for wildlife conservation except in case all the following conditions are satisfied” . It lays has two important provisions among other things

- a resettlement or alternatives package has been prepared and communicated that provides a secure livelihood for the affected individuals and communities
- the free informed consent of the Gram Sabhas in the areas concerned to the proposed resettlement and to the package has been obtained in writing

- **Environment Regulation**

Since the early 1990s, use of any land or water resource by projects of a specific kind and scale, is required to be appraised by specialized environmental expert committees or approval bodies. In addition to going through the legal procedures for land acquisition or forest diversion, industrial, infrastructure or extractive projects are required to go through regulatory requirements of preparing



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



environmental impact assessments reports, public consultations and expert scrutiny before land use can be changed by specific types of projects.

- ❖ Public Consultation¹ (EIA Notification, 2006 MOEFCC) refers to the process by which the concerns of local affected persons and others who have plausible stake in the environmental impacts of the project or activity are ascertained with a view to taking into account all the material concerns in the project or activity design as appropriate
 - ❖ The Public Consultation shall ordinarily have two components comprising of:-
 - ❖ a public hearing at the site or in its close proximity- district wise, to be carried out in the manner prescribed in Appendix IV, for ascertaining concerns of local affected persons;
 - ❖ Obtain responses in writing from other concerned persons having a plausible stake in the environmental aspects of the project or activity.
- (iii) the public hearing at, or in close proximity to, the site(s) in all cases shall be conducted by the State Pollution Control Board (SPCB) or the Union territory Pollution Control Committee (UTPCC) concerned in the specified manner and forward the proceedings to the regulatory authority concerned within 45 (forty five) of a request to the effect from the applicant.

The environment clearance process was introduced in India with the purpose of identifying and evaluating the potential impacts (beneficial and adverse) – environmental, social, cultural and aesthetic – of developmental and industrial projects on the environment. All of these are critical to determine the viability of a project and to decide if a project should be granted environmental clearance and what the conditions for clearances should be. The process of obtaining clearance includes the preparation of a detailed environmental impact assessment (EIA) report and organizing a public hearing.

Stages in the Prior Environmental Clearance (EC) Process for New Projects:-

- ❖ 7(i) The environmental clearance process for new projects will comprise of a maximum of four stages, all of which may not apply to particular cases as set forth below in this notification. These four stages in sequential order are:-
- Stage (1) Screening (Only for Category ‘B’ projects and activities)
- Stage (2) Scoping
- Stage (3) Public Consultation
- Stage (4) Appraisal



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



- **Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013**

The Land Acquisition Act, 1894, originally enacted for the territory of British India was, following independence, extended to cover the entire territory of India except for the state of Jammu and Kashmir. This Act remained in force for a period of 119 years although it was amended frequently during this time. The last amendment to this law was made in 1984. The special constitutional provisions safeguarding tribal rights to land in the Fifth Schedule areas do not recognize the sovereignty of the tribal with respect to these areas. The law allowed the government to acquire lands upon payment of cash compensation for any “public purpose” which includes mining and dams

In 2013, the 1894 Act was repealed and replaced by the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (“RFCTLARR Act”). The RFCTLARR Act, 2013 recognizes the special situation of the Scheduled Tribes.

- ❖ In case of acquisition or alienation of any land in the Scheduled Areas, the RFCTLARR Act mandates that prior consent of the concerned Gram Sabha or the Panchayats or the autonomous District Councils, as the case may be, must be obtained, in all cases of land acquisition in such areas, including acquisitions in cases of urgency.
- ❖ Whenever the appropriate Government intends to acquire land for a public purpose, it shall consult the concerned panchayat. Municipality or Municipal Corporation, as the case may be, at village level or ward level, in the affected area and carry out a Social Impact Assessment study in consultation with them,
- ❖ Social Impact Assessment study shall be made available in the local language to the panchayat, Municipality or Municipal Corporation, and in the offices of the District Collector, Sub-Divisional Magistrates and the Tehsil.
- ❖ Ensure that adequate representation has been given to the representatives of panchayat, Gram Sabha, Municipality or Municipal Corporation, as the case may be, at the stage of carrying out the Social impact Assessment study: and SIA will be completed within a period of six months from the date of its commencement.
- ❖ The Act further stipulates that in case of a project involving land acquisition on behalf of a Requiring Body which involves involuntary displacement of the Scheduled Castes or the Scheduled Tribes families, a Development Plan shall be prepared, in such form as may be



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



prescribed, laying down the details of procedure for settling land rights due, but not settled and restoring titles of the Scheduled Tribes as part of the land acquisition.

- **Coal Bearing Areas (Acquisition and Development) Act, 1957**

Land acquisition for coal mining by the government is carried out under CBA, 1957. The Ministry of Coal is responsible for monitoring the implementation of the Act. Under the Act, when the government is satisfied that coal can be obtained from a certain area, it declares its “intention to acquire” the land in the official government gazette. There is no requirement to consult affected communities, or seek the free, prior and informed consent of Indigenous peoples, as stipulated by international law. Anyone who objects to the acquisition and who is entitled to claim compensation must file written objections within 30 days of the notice of acquisition to the office of the Coal Controller, under the Ministry of Coal which goes on to make recommendations to the central government.

After considering the recommendations, the central government can issue a declaration of acquisition of the land and all rights over it. These rights can then be transferred to a government company such as CIL. There is no requirement for authorities to pay compensation before taking possession of land. The law has no provisions for ensuring that human rights impact assessments are conducted prior to land acquisition proceedings. There are no requirements to consult with non-landowners who may be affected by land acquisition, such as landless laborers.

- **Mines and Minerals (Development and Regulation) Act, 1957**

Parliament enacted the, to regulate the mining sector in India, which specifies requirements for obtaining and granting mining leases for mining operations. Under the MMDR Act, Mineral Concession Rules, 1960, and the Mineral Concession and Development Rules, 1988, outline the relevant procedures and conditions for obtaining a Prospecting License or Mining Lease. The affected communities are not required to be informed or consulted. The mineral policy only refers to Adivasis in the context of the need to ensure effective rehabilitation of displaced persons. In 2015, the MMDR Act was significantly amended by the Mines and Minerals (Development and Regulation) Amendment Act, 2015, which stipulated certain rules and conditions for issuance of mining and prospecting licenses. In line with the recommendations of the Supreme Court in the Samata judgment, this amendment also mandated the creation of District Mineral Foundations (“DMFs”) in all districts affected by mining operations. By a notification dated 16 September 2015, the central government directed states to set up DMFs. As of 10 October 2016.



5. Withering of protective provisions

5.1 Eminent domain, Consultation and consent

The international processes around FPIC and the spaces provided in the Indian laws have acknowledged that right to self-determination especially of the indigenous and tribal communities are key to ensuring basic human rights and justice to the most marginalized communities. Yet the burden of policies around “development” fall differently on different sections of the communities given the clear power asymmetry between the State and local communities as well as the large corporations/ industries.

In the context of India, most of the laws as discussed here, barring a few in the recent times have largely restricted itself to “consultation” with the local communities. The consultation is not equivalent to consent and largely the State in India functions as the Sovereign entity and the Acquisition of land laws follow the principle of Eminent Domain.

Ramanathan (2009) states that “premised on the doctrine of eminent domain, it presumes a priority to the requirements of the State which, by definition, is for the general good of the public, over the interests of landowners and users. The doctrine of eminent domain invests power in the state to acquire private land for public purpose on payment of compensation.”

However, using the premise of eminent domain what constitutes as “public purpose”, “urgency” is wide open to interpretation and use. She goes on to argue that in the name of “public purpose”, since the 1980s, involuntary acquisition and dispossession has caused mass displacement which has posed an early threat to the legitimacy of the project of development. “This phenomenon defied the logic of eminent domain in demonstrating that the link between “public purpose” and acquisition was incapable of acknowledging the thousands, and hundreds of thousands, who would stand to lose their livelihood, security, support structures when land was acquired and whole communities uprooted

Wherever “large profit “ was at stake, projects are considered as “public purpose “ or “urgent for development”, governments and corporations are scared to cede power to communities for decisions and consultation and consent mechanisms have served to proscribe participation, and to depoliticize substantial conflicts of interest and disagreements (Perreault 2015; see also Leifsen et al. 2017; Li 2009). In fact, texts such as the International Financial Corporation’s Equator Principles limit FPIC to a risk management strategy, which undermines the very principle of self-determination and collective welfare, and eventually legitimizes resource transfer (Bustamante 2015; Fontana and Grugel 2016)



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



The crux of the problem lies in the paradox that impacted groups lack power over decision-making, even when they have clinched rights to consultation and consent, drawing on notions of ownership. Whereas “participation” and “consent” signal the capacity to meaningfully intervene in, and even veto proposed extractive projects (Kirsch 2014; Schilling-Vacaflor 2017), this is precisely the decision-making power wrested away from affected groups.

Where there is a need to strengthen the laws related to public participation in the decision making related to the projects, the trend is that these laws are often modified through guidelines and notifications, the central and parent law is amended through change in state level rules.

Even when in the progressive RFCTLARR 2013, consent clause was introduced, five major categories of projects are exempted from the consent and SIA requirements of the LARR Act. These categories include defense, rural infrastructure, affordable housing, industrial corridors and infrastructure projects, including Public Private Partnerships. These exempted categories accounted for half of all contested land acquisition cases before the Supreme Court over a 66-year period (Wahi et al). For example; Mumbai– Ahmedabad bullet train project falls under this category. Funded by the Japan International Cooperation Agency, the project is facing stiff resistance from the farmers of southern Gujarat and northern Maharashtra. “The project will affect 192 villages in Gujarat. Fertile and well-irrigated agricultural land is being diverted for the train project, and no consent has been sought from the gram sabhas.

While on one hand emerging legislations, provide space for public decision making specially of the indigenous groups in case of industrial purpose for land and environment clearance, on the other hand it is assumed that such processes delay project operations and therefore various loopholes or legal options are identified to dilute clauses that are specific to preparation of Social Impact assessment and clauses pertaining to consent

- At least six state governments have enacted their own land acquisition laws by seeking Presidential consent
- States are drafting of state rules, thereby attempting to ‘amend’ the central law and enacting new laws keeping certain state legislations outside the purview of 2013 Act.
- State level rules are diluting the applicability of the progressive clauses like prior consent, public hearings or Social Impact Assessment (SIA).
- States are repatriating unused acquired land into land banks rather than returning it to the original owners as required by the central law.
- State Rules are reducing the amount of compensations to be paid against acquisitions.



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



How spaces for community participation are diluted in legal framework

The Supreme Court in December 2018 issued notices to the states of Gujarat, Andhra Pradesh, Telangana, Jharkhand and Tamil Nadu on a plea challenging state amendments to the central land acquisition law following arguments that the states cannot make changes to the central law.

	Subjects	Provisions under LARR Act	Dilutions in the State
1	Public Hearing	notice period for ensuring participation in public hearing has to be 30 days	Reducing the notice period to one–two weeks . Andhra Pradesh and Uttar Pradesh governments will serve a notice period of one week to ensure participation in public hearing, Jharkhand, Kerala, Odisha, Sikkim, Tamil Nadu and Tripura will serve a notice of two weeks.
2	Consent and SIA	In Scheduled Areas, prior consent of the concerned Gram Sabha or the Panchayats or the autonomous District Councils, as the case may be, must be obtained, in all cases of land acquisition in such areas, including acquisitions in cases of urgency. Other areas consultation is mandatory	Andhra Pradesh, Telangana, Tripura and Gujarat, Jharkhand has done away with consent questioning the very objectives of the Central Act
3	Compensation	To decide the final compensation taking into consideration the different parameters as mentioned under Sec 28 of the Act. Apart from the compensation a solatium amount is to be paid equivalent to 100% of the compensation amount. The Act also provides for compensation in cases of multiple displacement and urgency. compensation claims of a ‘person interested’ which include all persons claiming an interest in compensation to be made on account of the acquisition of land under the Act, Scheduled Tribes and Other Traditional Forest Dwellers, who have lost any of their recognized rights, a person interested in easement affecting the land, a person having tenancy rights and any person whose primary source of livelihood is likely to be affected resettlement cost to each affected family	In computing compensation for land acquired in the states of Haryana, Chhattisgarh and Tripura, state rules have fixed the multiplying factor for rural land at 1 as opposed to 2 in the LARR Act, while Telangana has fixed it at 1.25.
4	Land Acquisition		Maharashtra has also excluded land acquisition under four state Acts (the Maharashtra Highways Act, 1955; the Maharashtra Industrial Development



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



			Act, 1961; the Maharashtra Regional and Town Planning Act, 1966; and the Maharashtra Housing and Area Development Act, 1976) from the purview of the Central Act.
--	--	--	---

5.2 Government apex institution of Audit reiterates environmental violations

The apex government institution that conducts audit in India, Office of the Comptroller & Auditor General of India commonly known as CAG in its report¹⁰ on environmental and post clearance monitoring observed that EIA assessment reports did not comply with Terms of Reference in 25% of the cases. It also goes on to say that the cumulative impact studies were not made mandatory before preparing the EIA reports and as a result the impact of a number of projects in a region on the ecosystem was not known. It clearly states in the report that the concerns and reservations of the local people in the public hearing was not included in the final environment impact assessment report and in many cases public hearings did not have quorum for the meeting and many people who participated were not residents of the area. There was no provision for the Project Proponents to fulfill their commitments in a time bound manner and the commitments made by Project Proponents in Environment Impact Assessment report during public hearing were also not monitored.

Other major observations include that In 56 per cent of the cases approval of the Competent Authority was not obtained for the actual number of trees cut by the Project Proponents. Ground water was used without permission of the Competent Authority in 19 per cent of the cases. The scope of work was changed after obtaining the Environmental Clearance in 10 per cent of the cases.

Major lacunae were found in the compliance and monitoring of the projects. There was non-compliance in setting up of separate monitoring cell with adequate manpower in 98 projects. In 71 projects there were shortfalls in monitoring of environmental parameters by the Project Proponents. There were inadequacies in monitoring by third party/agencies in 201 projects.

¹⁰ The Comptroller & Auditor General of India Performance Audit Report No. 39 of 2016 on Environmental Clearance and Post Clearance Monitoring was tabled in Parliament on 10th March 2017



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



In terms of the action taken in the cases of lapses pointed out by CAG, it is stated that Regional Offices have not been delegated the powers to take action against the defaulting Project proponents and they had to report the violations of the Environmental Clearance conditions to the central Ministry. The Ministry did not have a database of cases received by it where the violations were reported by Regional Offices. No penalty was imposed by the Ministry for violating conditions of Environmental Clearance in the last two years.



6. Gap between policy and practice: Impact on the ground – Case studies

As discussed above, Free, Prior and Informed Consent (FPIC) --implied in the right to say “no” and the power to veto-- serves as an organized effort to resist and roll back land grab (Franco, 2014). Consent, as established by the Obama Administration in the United States of America, is a process to express ‘good faith aspiration’ (Franco, 2014) as opposed to an absolute requirement. However, this attenuates the obligatory nature of consent to mere consultation. Consent, closely tied to the right to self-determination, has a more absolute interpretation of the “share and transfer of decision-making authority to those who will be directly affected” (Baue)

6.1. Breach of Consent and the resulting Land conflicts

At the core of the question on consent lies--whose consent is required? How is it taken? Therefore, the extent to which national policy legal frameworks provide adequate safeguards for land rights, and effective mechanism for local participation in decision making, determine whether land deals translate to new opportunities or further marginalization.

The Government of India has enacted legislation and policy in recent decades to provide further recognition and protection of land. The legal framework surrounding land in India provides for two legislations- The Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (LARR) and the Forest Rights Act, 2006 (FRA), that have accorded a proper significance to Consent, in both private and communal land acquisition respectively.

The rationale falls in two categories for consent under the LARR, 2013, a market-based rationale that seeks to increase beneficiaries’ ability to leverage the value of the land and its resources in the market through, for instance, ability to sell the land, use it as collateral, or make capital-intensive investments without fear of losing these. And, the rights-based rationale that seeks to improve, through greater security in land-holdings, people’s capacity to achieve human rights such as the right to food and the right to shelter (Vermeulen & Cotula, 2010). Under the FRA, 2006, the government policy on consent seeks a mix of these goals, for example, confirming customary land tenure without allowing an individual or alienable property rights.



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



However, even well-intentioned reformist legislation is enacted within an institution of limited resources and competing interests. The interpretation and use of these legislations, work in tandem with subjective elements interpreted in peoples' perception of the security of their rights and objective elements substantiated with the distributional factors like the nature, content, clarity and duration of their rights and the procedural factors like the certainty of enforcement and the bargaining power.

The legal empowerment theorists argue that the ability to wield legal rights is only as good as the underlying legislation (Bainik, 2009). However, in this context of land deals, the attention to bureaucratic and administrative procedures is not simply a technical exercise but a means to identify mechanisms that circumvent the democratic procedure and reinforce power differences.

The wide and rich study of Land conflicts undertaken by Land Conflict Watch documents the extent to which local land users are included in the deal-making and acquisition process. There are a total of 772 cases recorded by Land conflict watch on land conflicts. These 722 cases occupy a land area of 2.1 million ha and an approximately committed, earmarked and potential invested amount of 1.7 million Indian rupees. This is 7.2% of the revised estimate of country's GDP for 2018-19. More than 3 million people have been impacted in these conflicts. Out of 722, 285 conflicts deal with breach of consent, as a central and associated struggle to gain right over the land. The breach of consent is both procedural breach in acquisition of land and distributive breach in providing fair compensation and promised rehabilitation and resettlement. There are 49 cases where consent was central to land conflict, meaning, people have been fighting over the negligence of authorities to seek consent before commencing any project. Out of the 49 recorded cases, 14 cases were related to breach of consent under LARR, 2013. The remaining 35 cases involved a violation of the Forest Rights Act, 2006 over the failure to seek permission from the village assembly.

The Forest Rights Act, 2006 makes it mandatory to establish consent through the village assembly. It says, the forest being a common property of forest dwellers, mandates the permission of Gram Sabha or village assembly to divert for non-forest purposes. Under the Forest Rights Act, 2006, such diversion is not allowed without the consent of village assemblies of the indigenous people. Though these projects were cleared by authorities by concealing or falsifying information during the process of seeking consent, the projects got embroiled into conflicts on the ground. Together, these conflicts affect close to 1 million people and are spread over 1,734 Square Kilometers. In our study on how consent is circumvented, Land Conflict Watch found that in the 13 of the 35 cases related to forest rights, the consent was bypassed by manipulating the



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



documents. It is most commonly found that the provision of consent is circumvented in three ways. First, by simply not respecting the law. The second is to get a forged certificate issued from the district collector that all the requirements under the Forest Rights Act have been completed, and, third, by using other forest laws to give conditional rights to tribal and make the Forest Rights Act look redundant. Many state governments still do not recognize the provision of consent and deliberately confuse consent by village assemblies with some kind of NOCs (no-objection certificates) by the village assemblies. In all these cases, villagers were protesting against the cited projects (Chaudhary, 2019).

Consent, however, is only the second step. The first step is to recognize forest rights of tribal under the FRA. But, the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013, moves one step further. It establishes the need for consent in acquisition, compensation and rehabilitation. The act highlights not just procedural justice or the consent for acquisition but also distributive justice or the right to fair compensation for foregone resources access and assets. A record number of 236 cases out of the 703 recorded cases suggest that consent was breached both in the forest and urban areas over the failure to fair, minimum compensation. As yet, it is not clear, how the breach of enforceable investor promises on local benefits, fits within the confines of consent under the LARR, 2013.

Overall, in the study undertaken by Land Conflict Watch on consent in Land deals, it is suggested that land conflicts are not necessarily occurring over seeking of consent, but over the breach of consent identified through the lack of implementation of laws, violation and undermining of laws, curbing the ability to bargain or give free consent, or through disingenuous acts that conceal or falsify information during the process of seeking consent (Shrivastava, 2018). It can also be argued that the procedure of consent as determined in the legislation through eliciting and reporting views and opinions of the villagers provides a greater voice. However, in reality, the procedure does not confer any authority to veto or shape the terms of land acquisition or investments-- which falls short of consent.

6.2. Case studies

The following case studies reiterate how consent has been breached and bypassed in land deals in India.

1. Land acquired for mining without any prior consultation in Alnar, Chattisgarh.



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



Residents of Alnar village came to know about the allocation of forest land near their village to the Raipur based Aarti Sponge and Power Limited in April 2017 when the company's surveyors reached the village. They soon figured that the land has been allotted without prior information and permission from the Village Assembly. The website of the union ministry of environment, forests and climate change (MoEFCC) showed that the Chhattisgarh government had sent the company's proposal to mine 31.55 ha of forestland to the ministry in August 2016. Under existing laws, the non-forestry activity cannot be started in an area like this without the ministry's permission. One of the proposal papers signed by Saurabh Kumar, the district collector of south Bastar and dated September 26, 2016, certified that the traditional rights of the tribal and forest dwellers on the land had been "settled". Villagers through their gram (village) panchayat had consented to the mining proposal, the document stated.

However, the on-ground investigation revealed that for the first stage of environment clearance, a public hearing was organised on September 30, 2016. The proceedings of this public hearing which were submitted at Chhattisgarh Environment Conservation board mentions that around 150 people attended the meeting and 91 signed the attendance register but there is no mention of people from Alnar village. When the Land Conflict Watch researcher interviewed a local resident journalist of the Alnar village, the journalist said that no public hearing notices were given to the residents of Alnar village. People who were present at the public hearing are suspected to have come from other villages. The forested hill which is allocated for mining belongs to two powerful persons of the tribe who provides their land for livelihood activities to the other members of the tribe and this is the cultural set up of the tribe. Although no mining activity has begun, residents of the village are certain that they do not want the mine because it will affect their livelihood.

2. Consent forged to wipe forest and pave way for Coal mining in Talabira.

The Talabira forest in Sambalpur district is on the verge of being wiped out. On December 9 and 10, 2019, more than 40,000 trees were cut for an open cast coal mine. The move came after the Ministry of Environment, Forest and Climate Change granted Stage II clearance to divert 1,038 hectares of forestland for the mining project on March 28, 2019. A senior forest department official, Regional Chief Conservator of Forests, Sambalpur Division, wrote in February 2014, "the impact of felling 130, 721 trees will be negligible". He was recommending that 2,500 acres of forestland in the villages of Talabira and Patrapali, on the border of Odisha's Sambalpur and Jharsuguda districts, be handed over for a coal mine. The residents of the two villages haven't seen these documents in English, drafted by forest officials, that culminated in



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



the forest clearance for the Talabira II and III Open Cast Coal Mine in March 2019. But the people here could not agree less with the official's opinion – who is a designated 'conservator'.

According to the letter submitted to the Central government by the Forest and Environment Department of Odisha seeking approval for the mining, the project in the two blocks will displace 1,894 families. However, residents of Talabira allege that the *gram sabha* consent resolution of their village has been forged for the forest clearance. They show their written complaints about this sent in October to several authorities across the state government. Kanchi Kohli, senior researcher, Centre for Policy Research, New Delhi, who has studied the Talabira forest clearance documents says, "In general, forest diversion processes have been extremely opaque. Affected people hardly ever have access to inspection reports and recommendations for approval. The Talabira case is symptomatic of this problem. It is only when tree felling activity took place that villagers got a sense of the scale of the mine expansion on forest areas whether historical rights persist." The village assembly resolutions have not been verified by the forest advisory committee of the environment ministry. In all, there appear to be serious legal lacunae in the forest diversion process.

3. Telangana state bypasses LARR, 2013 that provides for landowners' consent to acquire land.

Residents of 14 villages, which are likely to be submerged by a proposed Mallannasagar Reservoir in Telangana's Medak district, are protesting that they won't give their land till they are rehabilitated and given compensation as per the Land Acquisition Act. The notification for land acquisition was issued in newspapers with names of farmers without seeking their consent. There are procedural violations related to the acquisition of land as no time and space were given to people for filing their objections and opinions. Importantly, land acquisition was done through the use of a Government Order (GO. No.123) instead of the Land Acquisition Act. On January 7, 2018, the Hyderabad High Court directed the Telangana government to stall the process of land acquisition for the MallanaSagar Reservoir project. The court ordered the state to fulfil the demands of all those who would be affected by the project before commencing the process of land acquisition.



8. Findings and conclusion

The findings of the land conflict watch report shows that there are on-going 703 land conflicts documented over the last three years. Over 2.1 million ha of land is embroiled in the conflict and 43% of these conflicts are related to infrastructural projects followed by conservation and forestry related activities. This is affecting more than 3 million people. Land conflicts over mining projects are the second highest cause of distress affecting over 0.8 million people.

As indicated in the previous chapters, a large part of the conflict arises when the due process of law is not established or it is assumed both by the Private Sector and the Government that such processes delay projects and “ease of business” is important for economic growth. However on ground research and experience points to the fact that often processes are carried out on paper and it is actually during the “physical construction” or notices sent out to communities that people are informed of land acquisition or forest diversion and conflicts arise. Land conflict report shows that as a result of the conflict, 13.7 trillion INR worth of committed, earmarked and potential investment was found to be embroiled in 335 of the 703 land conflicts. This is 7.2% of the revised estimate of the country’s GDP for 2018-19. This is again a very conservative figure as accurate ascertainable data is not available for all 703 cases.

It is also interesting to note that 68% of land conflicts relate to commons and impact 79% of all the affected people. The scheduled areas (as discussed earlier) which has the special protection under law as they have high indigenous/ tribal population have 26% of the conflicts located involving 41% of total area impacted by land conflicts affecting almost 28% of total 6.5 million affected by land conflicts.

The fact that a large part of the conflict is located in the common lands emanate from the narrative that has been built since colonial time to present day policy space where State exercises its ownership even when tenurial rights are recognised under Forest Rights Act or governance power enshrined under PESA recognising rights to self-determination of tribal communities. Such state acquisition of land has historically been the source of considerable dispute

Centre for Policy Research’s comprehensive study of land acquisition (Wahi.N, 2019) reveals that litigation before the Supreme Court over a 66- year period, from 1950 to 2016, reveals that all litigation is with respect to privately held land. Thus, it is clear that in the face of state acquisition of land, when people have



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



legally recognized land rights, they go to court. Where their rights are insufficiently recognized, there is protest on the ground.

The other major narrative is that, when faced with situations of crisis, often the solution available to the Government and Private sector is that of financial compensation. While financial compensation is very critical but views of communities who depend on forest, land and other natural resources see this as an economic, social and cultural resource over which multiple groups exercise property rights. It is not just a physical asset in the production system, it is a way of life and identity

As indicated earlier there are also multiple laws that govern land and resources in India, enacted and amended at different points of time with different intent. While in case of forest diversion when linked to forest rights act recognises the community's roles in decision making, Coal bearing Area Act has no such provisions. The process of seeking consent is often diluted and often reduced to "yes" or "no". There is no long-term engagement with communities to engage and such meetings are often held in high security zones and intimidating atmosphere where communities have very little prior knowledge of the projects and its impacts. The list of exempted projects from such a process keeping going up indicating that there is a huge deficit of trust between Government and people and the critical importance of seeking consent. Long term investment in community processes related to the project information and monitoring goes long way in establishing trust and processes for negotiations. Respect for community decisions even when communities reject project proposals has to be considered

In terms of remedies that communities have sought in addressing these conflicts are multiple in nature and a combination of different strategies (Kohli, 2018) works on the ground. Numerous court orders and administrative solutions have calculated compensations in different ways, while in some cases, direct land owners or whose land is acquired are only considered, however in the LARR, 2013 compensation taking into consideration the different parameters as mentioned under Sec 28 of the Act.

As remedies people have also approached different institutions such as court of law, enforcement authorities with the demand of closing down the construction or operations of a project with varying degree of results. As CPR and NAMATI study shows, there can be two instances- one where project activities have been recently initiated and there appear to be possibilities of holding back land use change and the second where several attempts at seeking compensations, employment or restoration of damages have



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



failed As per the analysis of the 75 cases, the demands for project closure were in the bundle of remedies that people sought in 19 cases. In 7 other cases, this was the only remedy they sought. The analysis reveals that in 8 cases, where the communities have demanded the cancellation of projects, they have achieved remedies such as temporary or permanent closure, or suspension of approval. It is to be noted that these were very high profile projects with heavy investments

Communities also seek remedies from environment violation that can cause dumping of waste or extraction due to mining operations. The other set of remedies is also where project has withdrawn, and communities demand for restoration of land and livelihood.

The scale of problem in India is huge. 2,962 environment clearance letters for 4 sectors that of mining, thermal power, river valley projects, infrastructure and Coastal regulation zone sectors with a total land use change of 12,44,736 hectares was officially approved over ten years. (CPR&NAMATI). This averages to a minimum of 1, 24,473 hectares per year for four sectors only. As indicated earlier most of these projects involve common land such as forest/ grazing. During 2013-16 80% of mining project was on non-forest land

The analysis of the Supreme Court cases on land acquisition during 1950-2016 shows that 95% of the disputes arose because of administrative non-compliance with legal procedures for and acquisition and 34% of the disputes involved irregularities in completion of the procedure for acquisition

The major recommendations involve

- The process of seeking consent cannot be one time activity and local communities need to be involved in the monitoring of the social impacts, environment and land compliances on a regular basis. Post approval compliances need to be strengthened and monitored with clear analysis of compliance needs to be placed at public domain. The process of seeking consent after environment clearance or project sanctions make the public decision null and void
- Transparent information and access to information is very important and critical for community decision making. Consent should be more about decisions and engagement in the process and the remedies should focus on a combination of factors rather than a yes or no. However, where clear “no” to consent is emerging, the views need to be respected



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



- Multiple and overlapping laws need to be amended to include the provisions to incorporate the FPIC guidelines
- The polluters pay model does not correct the environmental degradation and other non-compliances such as irregularities in public hearing or consent of village assemblies. While financial penalties are a part solution, the solution should focus on future operation of the projects
- Regulatory and financial institutions need to look beyond “financial viability” of projects. For both enforcement authorities and the financial institutions, the basis of regulatory procedures should shift from approvals to compliance. Clearances for environment and permits need to be based on established record of high compliance and meeting the legal standards. For this robust monitoring mechanisms, with communities playing a central role should be considered.
- Monitoring or conducting social and environment assessment are primarily done by the project proponents with the certified Consultants and approved by the enforcement authorities, This needs to be expanded and multidisciplinary teams with communities –through a third party monitoring system established.
- Any violations of the processes should have impact on expansion of the project and future renewal of permits and clearances

Clear remedies and multiple options must be made available to the communities. Compensation in terms of financial payments which take into consideration a wide range of factors and livelihood dependence including the community rights on common resources. Further restoration of livelihoods, addressing land degradation, environmental security also needs to be part of the conditions for project operations.



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



References

- Banik, D. (2009). Legal empowerment as a conceptual and operational tool in poverty eradication. *Hague Journal on the Rule of Law*, 1, 117–31.
- Barnsley, I. and Bleiker, R. (2008). *Self-determination: from decolonization to deterritorialization*. *Global Change, Peace & Security*, 20(2), pp.121-136.
- Bijoy, C.G, Gopalkrishnan, S and Khanna, S, (2010), *India and the Rights of Indigenous Peoples: Constitutional, Legislative, and Administrative Provisions Concerning Indigenous and Tribal Peoples in India and Their Relation to International Law on Indigenous People*. Asia Indigenous Peoples Pact.
- Broome, N. P., Ajit, S. and Tatpati, M. (2019). *The Indian Forest Act's proposed amendment is dangerous and fanciful*. [online] Downtoearth.org.in. Available at: <https://www.downtoearth.org.in/blog/forests/the-indian-forest-act-s-proposed-amendment-is-dangerous-and-fanciful-64319> [Accessed 25 Sep. 2019].
- Baue, B. (n.d.) 'Communities, Corporations, and the Difference between Consent and Consult'. CR Corporate Responsibility Magazine.
- Chaudhary. M. (2019). *Government, Industries Nationwide Dodge Law, Take over forest land without the consent of tribal communities*. Available Online at Indiaspend. <https://www.indiaspend.com/government-industries-nationwide-dodge-law-take-over-forest-land-without-consent-of-tribal-communities/>
- Franco, J. (2014). *Reclaiming Free Prior and Informed Consent (FPIC) in the context of global land grabs*. Amsterdam: Transnational Institute (TNI).
- FPP briefing paper, "Indigenous peoples' right to free, prior and informed consent and the World Bank's Extractive Industries Review."
- Gupta Bhaya, S. Kurup R. (2018, April 30th April) Aljazeera. *India's forests are under threat*. New Delhi, India. Online Available at <https://www.aljazeera.com/indepth/opinion/india-forests-threat-180425104442969.html>



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020



- Gupta Bhaya, S. K. (2018, April 30th April). India's forests are under threat. New Delhi, India
- Kohli, K. K. (2018). *Midcourse Manoeuvres: Community strategies and remedies for natural resource*. New Delhi: CPR-Namati Environmental Justice Program.
- Ministry of Tribal Affairs. (2013). *Statistical Profile Of Scheduled Tribes In India*. New Delhi: Ministry of Tribal Affairs, statistical division, Government of India.
- Ministry of Tribal Affairs. (May,2014). *Report Of The High Level Committee On Socioeconomic, Health And Educational status Of Tribal Communities Of India*. New Delhi: Government of India. [online] Available at <http://www.indiaenvironmentportal.org.in/files/file/Tribal%20Committee%20Report.%20May-June%202014.pdf>
- Shrivastava, K., S. (2018). *From compulsory consent to no consultation: How the government diluted Adivasi rights to forestlands*. [online] Scroll.in. Available at: <https://scroll.in/article/871191/from-compulsory-consent-to-no-consultation-how-the-government-diluted-ativasi-rights-to-forestlands> [Accessed 11 Feb. 2020].
- The Food and Agriculture Organization of the United Nations (FAO) (2016). *Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities*. Manual for Project Practitioners. [online] Available at: <http://www.indiaenvironmentportal.org.in/files/file/Free%20Prior.pdf> [Accessed 25 Sep. 2019].
- Vermeulen, S., & Cotula, L. (2010). *Over the heads of local people: consultation, consent, and recompense in large-scale land deals for biofuels projects in Africa*. The Journal of Peasant Studies, 37(4), 899-916.
- Wahi N. (2019). *Understanding Land Conflict in India*. New Delhi: Centre for Policy research.
- Wahi, N, Bhatia,A (2018). *The Legal Regime and Political Economy of Land Rights of Scheduled Tribes in the Scheduled Areas of India*,. (Bijoy, 2010)New Delhi,: Centre for Policy Research
- Wahi, N., Bhatia, A., Gandhi, D., Jain, S., Shukla, P., and Chauhan, U. (2017) “*Land Acquisition in India: A Review of Supreme Court Cases from 1950 to 2016*”, Centre for Policy Research, New Delhi, 2017
- World Bank. (2017). *Country Poverty Brief, South Asia, India*. World bank.



Institutions for Equity & Resilience

ANNUAL WORLD BANK CONFERENCE ON LAND AND POVERTY
WASHINGTON DC, MARCH 16-20, 2020

