



FREE PRIOR AND INFORMED CONSENT WHERE INDIAN LEGISLATION STANDS

I. INTRODUCTION

The concept of Free, Prior and Informed Consent, which stems from the collective rights of self-determination of indigenous people is largely being seen as becoming a part of customary international law. First formally introduced through the International Labour Organisation's Convention on Indigenous and Tribal Peoples in Independent Countries (ILO 169)¹,

the concept was reiterated in the 2007 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which laid down a series of situations where FPIC should become the standard "best practice" for negotiations between indigenous peoples and any other party.

FREE	No coercion, intimidation or manipulation.
PRIOR	Consent is sought far enough in advance of any authorization or commencement of activities, and the time requirements of indigenous consultation and consensus processes are respected.
INFORMED	All information relating to the activity is provided to indigenous peoples and that the information is objective, accurate and presented in a manner or form that is understandable to indigenous peoples. Relevant information includes: <ol style="list-style-type: none"> 1. the nature, size, pace, duration, reversibility and scope of any proposed project 2. the reason(s) or purpose of the project 3. the location of areas that will be affected 4. a preliminary assessment of the possible economic, social, cultural and environmental impacts, including potential risks and benefits 5. personnel likely to be involved in the implementation of the project 6. procedures that the project may entail.
CONSENT	Indigenous peoples have agreed to the activity that is the subject of the consultation. Indigenous peoples also have the prerogative to withhold consent or to offer it with conditions. Consultation must be undertaken in good faith, which, among other things, requires that indigenous views are accommodated in the process or objective justifications are provided as to why such accommodation is not possible. The parties must establish a dialogue allowing them to identify appropriate and workable solutions in an atmosphere of mutual respect and full and equitable participation, with ample time to reach decisions. Indigenous peoples and local communities must be able to participate through their own freely chosen representatives and customary or other institutions. The participation of women, youth and children is preferable where appropriate.

¹ **Article 6**

1. In applying the provisions of this Convention, governments shall:
 - (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly;
 - (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;
 - (c) establish means for the full development of these peoples' own institutions

and initiatives, and in appropriate cases provide the resources necessary for this purpose.

2. The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.

Article 7

1. The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social

II. INTERNATIONAL STATUTES

United Nations Declaration on Rights of Indigenous Peoples (UNDRIP)

Endorsed by 143 countries, the declaration provides provisions recognizing the duty of states to secure FPIC in the following circumstances-

- Population relocations
- Dispossession of cultural, intellectual, religious and spiritual property
- Confiscated taken, occupied, used or damaged lands, territories and resources before adopting and implementing legislative or administrative measures and prior to the approval of any project affecting lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

As written in Article 19 of the UN Declaration on the Rights of Indigenous Peoples, “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.”

INTERNATIONAL LABOUR ORGANISATION CONVENTION 169

Ratified by 22 countries, this convention is binding and it guarantees the rights of indigenous peoples to their land and to be involved in any decisions that affect their resources and livelihoods. It was the first document to recognize the rights of indigenous communities within their sphere of political and economic

and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

2. The improvement of the conditions of life and work and levels of health and education of the peoples concerned, with their participation and co-operation, shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement.
3. Governments shall ensure that, whenever appropriate, studies are carried out, in co-operation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities.
4. Governments shall take measures, in co-operation with the peoples concerned, to protect and preserve the environment of the territories they inhabit.

Article 9

1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected.
2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

institutions, in order to maintain their identities, languages, religions, values and their customs.

CONVENTION ON BIOLOGICAL DIVERSITY

Ratified by 196 countries, the convention protects indigenous knowledge by allowing its use only with prior approval. According to Article 8(j)-

“Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.”

The Convention has emphasized the mandatory prior informed approval from the holders of such knowledge, innovations and practices which are wished to be accessed. Therefore, it has explicitly affirmed the principle of prior and informed consent.

III. INDIA

Although party to ILO Convention 107 on Indigenous and Tribal Populations which guarantees the right to participation in decision making processes with regard to community and traditional lands, India is not yet a signatory to the ILO Convention 169, which has replaced the former.

Economic, social and political rights of many local communities living within PAs have been undermined without consultation, consent and provision of adequate alternatives as they face physical displacement. It is important to note that local stewardship for conservation cannot be built if conservation paradigms do not address the social costs of conservation or take into account indigenous knowledge and common property management practiced by local communities for the past millennia.

There are various examples² of forests, wildlife, biodiversity conserved by people based on their dependence on forests:

- a. Runpur block, Bhubaneshwar, Orissa, 180 villages have come together to form a federation.
- b. Nagaland, hunting and resource extraction is completely prohibited through community decision making in the Khonoma Tragopan and Wildlife Sanctuary.

Within the last year, there have been several instances of activism shown on part of indigenous communities in order to wrest their rights from violating authorities.

- On March 16, five Adivasi villages in Raigarh, Chhattisgarh, unanimously vetoed the plans of South Eastern Coalfields Limited (SECL), a subsidiary of India's public sector coal mining giant Coal India Limited (CIL), to mine their forests. These villages were Pelma, Jarridih, Sakta, Urba and Maduadumar.
- On March 23, the Kamanda gram sabha of Kalta G.P in Koida Tehsil of Sundargarh district in Odisha unanimously decided not to give its land for the Rungta Mines proposed by the Industrial Infrastructure Development Corporation of Odisha Limited (IDCO).
- On May 4, the National Green Tribunal directed that before clearance can be given the Kashang hydroelectric project (to be built by the State-owned body Himachal Pradesh Power Corporation Ltd. or HPPCL), the proposal be placed for approval before the Lippa village gram sabha in Kinnaur district of Himachal Pradesh. The 1,200 residents of Lippa have been waging a seven-year struggle against the project.
- And then on May 6, the Supreme Court rejected a petition by the Odisha Mining Corporation seeking the reconvening of gram sabhas in the Niyamgiri hills to consider a mining proposal that the sabhas had rejected in 2013. The court observed that the conclusion of the gram sabhas at that time was to reject the mining, and the petitioner would have to approach an appropriate forum if it wanted to challenge this.

A. CONSTITUTIONAL PROVISIONS AND OTHER LEGISLATION

Under Schedule V of the Constitution of India, laws are to be framed by State Governments to 'prohibit or restrict the transfer of land by or among members of the Scheduled Tribes' in Scheduled Areas.³

3 CONSTITUTION OF INDIA, 1950

5. Law applicable to Scheduled Areas.-

(2) The Governor may make regulations for the peace and good government of any area in a State which is for the time being a Scheduled Area.

In particular and without prejudice to the generality of the foregoing power, such regulations may-

- prohibit or restrict the transfer of land by or among members of the Scheduled Tribes in such area;
 - regulate the allotment of land to members of the Scheduled Tribes in such area;
 - regulate the carrying on of business as money-lender by persons who lend money to members of the Scheduled Tribes in such area.
- In making any such regulation as is referred to in sub-paragraph (2) of this paragraph, the Governor may repeal or amend any Act of Parliament or of the Legislature of the State or any existing law which is for the time being applicable to the area in question.
 - All regulations made under this paragraph shall be submitted forthwith to the President and, until assented to by him, shall have no effect.
 - No regulation shall be made under this paragraph unless the Governor making the regulation has, in the case where there is a Tribes Advisory Council for the State, consulted such Council.

In this context, the *Samatha v. State of Andhra Pradesh*⁴ (also called *Samatha judgment*) is of relevance. The judgment states:

*"The members of (Constituent) Assembly deliberated to protect tribal land for the economic empowerment, economic justice, social status and dignity of tribal persons. This entailed retention of land with the tribals, not only the land belonging to them, but also Government land in Scheduled Areas. ... This manifested the intent of the founding fathers... to prohibit transfer between tribals and non-tribals and provided for allotment of land to the members of the Scheduled Tribes in such areas"*⁵

The judgment went on to prescribe the role of gram sabhas in preventing the alienation of lands in scheduled areas and in ensuring that the minerals of the areas were tapped solely by the tribal people.

Panchayats (Extension to Scheduled Areas) Act, 1996 (PESA)

The Act provides a place for the Gram Sabha at the heart of local governance by creating a mechanism for autonomous decision making through jurisdiction over local resources such as minor forest produce, minor minerals, and minor water bodies.

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.

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

It also places the village/ hamlet level Gram Sabha at the centre of the rights recognition process. As per Section 5 the Gram

4 (1997) 8 SCC 191

5 Dias, Anthony: *Development and its human cost: Land acquisition, displacement and rehabilitation of tribals*. New Delhi: Rawat Publications, 2012.

Sabha of forest dwellers is vested with the power, as well as a duty, to protect, preserve, conserve and manage its community forest resources which it has traditionally been conserving for sustainable use:

- “5. The holder of any forest right, Gram Sabha and village level institutions in areas where there are holders of any forest right under this Act are empowered to:
 - a) protect the wildlife, forest and biodiversity;
 - b) ensure that adjoining catchments area, water sources and other ecological sensitive areas are adequately protected;
 - c) ensure that the habitat of forest dwelling Scheduled Tribes and other traditional forest dwellers is preserved from any form of destructive practices affecting their cultural and natural heritage;
 - d) ensure 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, forest and the biodiversity are complied with.”

B. Orissa Mining Corporation vs. Union of India and Ors – Conceptualizing FPIC in India

The Supreme Court’s judgment on the Vedanta mining project in Orissa was delivered on April 18th, 2013, in the case *Orissa Mining Corporation vs. Union of India and Ors*. In this case the Court has made a number of key observations about forest dwellers and the Forest Rights Act.

1. Linkages of indigenous rights, the constitutional provisions for the protection of Scheduled Tribes (Article 244) and religious rights (Article 25 and 26) and the FRA, as part of one set of protections, intended for the protection of STs and Other Forest Dwellers (Para 38)
2. That the *gram sabha* has both, a duty and a power over forest management, which it is “empowered to carry out”, as per section 5 of the Act. This includes “*the preservation of habitat from any form of destructive practices affecting their cultural and natural heritage.*”
3. That the “*Gram Sabha has a role to play in safeguarding the customary and religious rights of the STs and other TFDs under the Forest Rights Act. Section 6 of the Act confers powers on the Gram Sabha to determine the nature and extent of “individual” or “community rights*”. In this connection, reference may also be made to Section 13 of the Act coupled with the provisions of PESA Act...” (para 56) followed by “*Therefore, Grama Sabha functioning under the Forest Rights Act read with Section 4(d) of PESA Act has an obligation to safeguard and preserve the traditions and customs of the STs and other forest dwellers, their cultural identity, community resources etc., which they have to discharge following*

the guidelines issued by the Ministry of Tribal Affairs vide its letter dated 12.7.2012.” (Para 58)

In this manner, the court was able to ‘construct’ the FRA in a manner which was binding on every High Court, Supreme Court bench of less than three judges as well as on the Government. There is no mention of “the national interest in mining”, “development projects” or the “need” to mine. Thus these rights and powers are asserted without any caveats.

The Court’s construction of the FRA says that the gram sabha can decide on rights, that decision is final, and the gram sabha has the power to decide on protecting forests and natural heritage. In particular, by sending the matter back to the gram sabha because a key matter has “not been placed before it for its active consideration” the court is treating the gram sabha as a statutory, legal authority at the same rank as, say, the FAC or MoEF. In that sense the court has gone well beyond the question of “consent” as such and instead treated the gram sabha as a regulatory authority. Notably the court says nothing about anyone having the power to overrule the gram sabha.⁶

Further, the Court also directed the MoEF take into account other illegalities in the environmental clearance, and the gram sabha proceedings should be verified by a district judge to ensure there is no interference by the government or by the company.

Problems

The Tribal Committee Report of June 2014,⁷ provides one with data reinforcing the fraudulent nature of ‘consent’ obtained on

6 59. Under Section 6 of the Act, Gram Sabha shall be the authority to initiate the process for determining the nature and extent of individual or community forest rights or both and that may be given to the forest dwelling STs and other TFDs within the local limits of the jurisdiction. For the said purpose it receive claims, and after consolidating and verifying them it has to prepare a plan delineating the area of each recommended claim in such manner as may be prescribed for exercise of such rights. The Gram Sabha shall, then, pass a resolution to that effect and thereafter forward a copy of the same to the Sub-Divisional Level Committee. Any aggrieved person may move a petition before the Sub- Divisional Level Committee against the resolution of the Gram Sabha. Sub- section (4) of Section 6 confers a right on the aggrieved person to prefer a petition to the District Level Committee against the decision of the Sub- Divisional Level Committee. Sub-section (7) of Section 6 enables the State Government to constitute a State Level Monitoring Committee to monitor the process of recognition and vesting of forest rights and to submit to the nodal agency. Such returns and reports shall be called for by that agency.

60. Functions of the Gram Sabha, Sub-Divisional Level Committee, District Level Committee, State Level Monitoring Committee and procedure to be followed and the process of verification of claims etc. have been elaborately dealt with in 2007 Rules read with 2012 Amendment Rules. Elaborate procedures have therefore been laid down by Forest Rights Act read with 2007 and 2012 Amendment Rules with regard to the manner in which the nature and extent of individual or customary forest rights or both have to be decided. Reference has already been made to the details of forest rights which have been conferred on the forest dwelling STs as well as TFDs in the earlier part of the Judgment.

7 REPORT OF THE HIGH LEVEL COMMITTEE ON SOCIO-ECONOMIC, HEALTH AND EDUCATIONAL STATUS OF TRIBAL COMMUNITIES OF INDIA, June 2014

behalf of the Gram Sabha. For eg: In Chattisgarh, the Report noted:

1. That the information collected by RTI researchers revealed that the consent of the Gram Sabhas was not obtained as per the provisions of PESA.
2. That in connection with the acquired land for the Loker Dam, that in various districts, no Gram Sabha meeting had taken place to approve the project which was set to affect 9 Panchayats.
3. That people have started organizing themselves to protect natural resources and resources of their livelihood under the banner of Jashpur Jan Sangharsh Samittee, Jashpur and Chhattisgarh Visthapan Virodhi Manch, Raipur against the unconstitutional and illegal way of exploring minerals and alienating tribal land in the name of development and thereby destroying their traditions and distinctive cultures and disrupting well-knit communities.
This is unquestionably in contravention of both ILO 107 as well as 169.
4. That there have been recorded cases of Gram Sabha consent being fraudulently obtained or forged; such conduct must face penalties, and projects that proceed on the basis of consent so obtained cannot be allowed to proceed.
5. That the effective participation of women in FRA processes has to be increased, given the close relationship between forests, forest produce and women's lives.
6. On the question of Critical Tiger Habitats (CTHs) and Critical Wildlife Habitats (CWHs), the Committee recommended a sound and complete policy for Protected Areas (PAs), which incorporated the consent of the gram sabhas in the undertaking of any project of either category. While the purpose of CTHs is tiger conservation, CWHs are for the purpose of general wildlife conservation. CWHs mention the 'free informed consent' of the Gram Sabha in writing as a pre-condition, which CTH only mentions 'informed consent'. CWH, from which relocation has taken place, cannot be subsequently diverted by the state government, central government or any other entity for any other use. There is no such restriction on CTH.

CONCLUSION: CHALLENGES TO FPIC AND THE WAY AHEAD

1. DECLINATION TO ADOPT FPIC INTO DOMESTIC LEGISLATION

Although the ILO 169 is legally binding, it has only been ratified by 22 countries. Such conventions and guidelines are largely seen as 'soft law' and therefore, glossed over by most nation states. In most cases, the inducements for the acquisition of land without FPIC include false promises of relevant schemes, creation of jobs and pipe dreams of development.

While the Philippines, Colombia and Peru are the only three that have incorporated strong FPIC rights for indigenous com-

munities in their national laws, Australia, Bolivia, South Africa, South Sudan and Tanzania have also made some progress by incorporating a skeletal form of FPIC as part of negotiations between the government and indigenous groups. More recently in 2016, India, the African Group, Timor Leste and Indonesia lobbied for a diluted guideline structure that allowed countries to obtain consent as per their national legislations for commercially using their traditional knowledge at the UN Convention of Biological Diversity (CBD). Eventually, the CBD approved a compromised text of the guideline that says the countries can seek "prior informed consent," "free prior informed consent" or "approval and involvement," depending on "national circumstances".⁸

2. CONSENT, NOT CONSULTATION

Another important aspect of the FPIC debate is the fine line between consultation and consent. Keeping in mind the right to collective self-determination of indigenous populations, the process of seeking consent cannot be reduced to mere consultation, bereft of active participation. Recently, a set of amendments proposed by the National Advisory Council (NAC) to the Panchayat (Extension to Scheduled Areas) Act, 1996 (known as PESA) has been a refreshing development. The NAC recommended that the free prior and informed consent (FPIC) of affected Adivasi communities be mandatorily obtained before the government acquires any land for development projects, or decides on rehabilitation packages. Not "consultation", or "recommendation", as the PESA currently says, but "prior informed consent". Indigenous Peoples from US, Australia, New Zealand and Canada also argue that a "consultative" approach doesn't always benefit their communities.⁹

FPIC cannot be fully realized without governments incorporating it into domestic laws and implementing it in gender-sensitive ways. When protected by law and implemented appropriately, FPIC can ensure that lands and resources are governed responsibly.¹⁰ ○

Gayatri Raghunandan

Research Associate, Supreme Court of India, New Delhi

⁸ <http://www.hindustantimes.com/india-news/india-others-get-un-rules-on-tribal-rights-diluted/story-xtD82yGjleAo4jV8y7QZl.html>, Accessed on 10th of February, 2017.

⁹ <http://www.deepseaminingoutofourdepth.org/what-is-free-prior-and-informed-consent/>, Accessed on 10th of February, 2017.

¹⁰ The article reflects the authors' own views and opinions and not necessarily those of IWGIA itself. IWGIA can furthermore not be held responsible for the accuracy of the content.