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

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Indian laws – the 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 government bodies and the promoters of projects to obtain the consent of Indigenous people and other communities who hold traditional land rights before acquiring any of their land for large-scale projects. A widespread perception among corporations and India's bureaucracy is that such consent, and the procedures required for obtaining it, 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 conflicts that hold up large projects arise not because consent is sought but due to lack of implementation, and violation or subversion of the consent provisions, where information in the process of seeking consent has been concealed or falsified.

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LIST OF ABBREVIATIONS

- CBD** Convention on Biological Diversity
- CAG** Office of the Comptroller & Auditor General of India
- EIA** Environmental Impact Assessment
- FPIC** Free, Prior, and Informed Consent
- FRA** Forest Rights Act
- ICCPR** International Covenant on Civil and Political Rights
- ICESCR** International Covenant on Economic, Social and Cultural Rights
- LARR** Transparency in Land Acquisition, Rehabilitation and Resettlement Act
- LCW** Land Conflict Watch
- MFP** Minor Forest Produce
- MoTA** Ministry of Tribal Affairs
- MMDR** Mines and Minerals (Development and Regulation) Act
- NCO** No Objection Certificate
- NTFP** Non-Timber Forest Produce
- OBC** Other Backwards Classes
- PESA** Panchayats (Extension to Scheduled Areas) Act
- PVTG** Particularly Vulnerable Tribal Groups
- SDGs** Sustainable Development Goals
- ST** Scheduled Tribes
- UNDRIP** UN Declaration on the Rights of Indigenous Peoples

1. INTRODUCTION

The right to self-determination is enshrined within the Charter of the United Nations,¹ the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), amongst other instruments. Too often, the principle of self-determination is associated with processes of state sovereignty, self-organization and free association with other nation states (Barnsley and Bleiker, 2008). However, self-determination goes beyond these nation-state conceptualizations, 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 Labour 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 in relation to projects that may affect them or their territories (FAO, 2016).

Land acquisition laws in India have historical roots in British colonial laws. Since independence, these laws have formed the basis for new pieces of legislation at both the state and central government levels (Wahi et al., 2017). In the past two decades, different laws have been enacted to ensure a just process for acquisitions of private lands as well as forest lands in the country. The research for this study has focused on land conflicts across these two land tenure systems and the legal provisions that require the consent of people holding rights over such lands prior to its acquisition. 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 pieces of legislation that have been put in place to ensure that rights are protected, in both private and communal land acquisitions.

With land being a central issue in the culture, pursuit of livelihoods, and wellbeing of communities, conflicts that interfere with access, ownership, and use of and control over land have direct impacts on the exercise of a wide range of human rights. A central concept at the heart of conflicts arising from land acquisition is 'self-determination', a fundamental principle in international law and a concept that enshrines a degree of autonomy, for both people and communities, in matters that affect their lives.

Land Conflict Watch (LCW) undertook a data-research project that has recorded 49 land conflicts in India that specifically cite 'consent' or the process of obtaining consent as a central issue in the dispute. Almost 50% of these conflicts were located in Fifth Schedule Areas, the regions specifically designated by the Indian Constitution for the protection of Indigenous people's rights. Our analysis of these 49 cases shows that land conflicts do not arise because 'consent' is sought, but rather due to lack of implementation (Broome et al., 2019), violation and undermining of laws, (Shrivastava, 2018) and conceal or falsify information during the process of seeking consent. To date, there has 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, LCW has compiled an exhaustive dataset combining quantitative and qualitative data that identifies and addresses the fundamental factors contributing to the perpetuation of land conflicts across the country.

Using preliminary data from LCW, we found 23 instances where the government forest department, the Indian Forest Service, felled trees or created plantations on lands traditionally

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inhabited by communities who held rights over these lands. In 80% of these cases, communities indicated that the forest department did not follow the required consent process. LCW also documented 35 cases where Indigenous people protested against the diversion of forest land for industrial and development projects. The process for the diversion of forest land for non-forest purposes is laid down under the Forest Conservation Act, 1980, – also linked to the FRA 2006, – which recognizes the rights of forest-dwelling communities. As per the Forest (Conservation) Rules, such diversion is not allowed without the consent of village assemblies of the Indigenous people. Collecting case studies from affected areas reveals that many such projects were given approval by the authorities after information was concealed or falsified during the process of seeking consent. It is also observed that, since the democratic and transparent processes laid down in the laws were not followed, the projects then led to conflicts on the ground. Together, these conflicts affect close to one million people in India and involve land spread over an area of 1,734 sq km. We downloaded the approval documents for 23 of these projects from the website of the Union Ministry of Environment, Forests and Climate Change.³ 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 areas affected by the project or falsified certificates so they stated that forest rights had been settled and the community did not oppose the project.

Individual tenure holders are also subject to laws that uphold their right to self-determination. The LARR 2013 is one such provision ensuring that land owners and those who lose their livelihoods do not suffer disproportionate burdens from the threat of losing their lands. Initial figures from LCW show 15 land conflicts in which the consent procedure for land acquisition was completely absent. In four of these cases, title holders only learned about the acquisition of their lands from public notices in local newspapers. By analyzing cases such as these, we have identified several instances where legislation enacted by state governments undermines the LARR, which is a central law, and removes the requirements of consent altogether. We found that this practice is common, and the mechanism which enables it is enshrined in the Indian Constitution. The continued monitoring of land conflicts has enabled LCW to identify the mechanisms and state legislation that undermines the LARR and, as a result, the right to self-determination within processes of land acquisition.

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2. THE CONCEPT OF FREE, PRIOR AND INFORMED CONSENT

THE GENESIS OF FPIC

To mitigate some of the impacts faced by Indigenous communities all over the world as a result of marginalization and exploitation, in 2007 the UN General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), recognizing their rights and making specific mention of free, prior and informed consent (FPIC) as a prerequisite for any activity that affects their ancestral lands, territories and natural resources. However, despite its approval in 2007, progress towards the implementation of FPIC by individual countries has been slow and uneven.

The concept of FPIC is most clearly stated in Articles 10, 11, 19, 28 and 29 and 30 of UNDRIP, which explicitly articulate the terms of the principle.

Table 1: Articles of UNDRIP relevant to FPIC

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 which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. 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.
Article 29	Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. 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.

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>
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Source: https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

These articles 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, the dumping of hazardous wastes or the taking of Indigenous property. 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. In the context of ‘development’, Article 28 of UNDRIP may be viewed as the main provision for FPIC, stating 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 was a key element in negotiations on the Sustainable Development Goals (SDGs) and the Paris Agreement on climate change, and is central to their successful implementation.

FRAMEWORK OF FPIC

The normative framework of FPIC consists of a series of legal international instruments including UNDRIP, the International Labour Organization Convention 169 (ILO 169) and the Convention on Biological Diversity (CBD), among many others, as well as national laws.

Indigenous peoples’ right to 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 individual states.

In the past two or three years, development experts have recognized that FPIC is not only important for Indigenous peoples but that it is also good practice to undertake the process with local communities, as involving them in decision making about 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’, ‘with’ and ‘by whom’ are just as important as ‘what’ is being proposed. For an FPIC process to be effective and to result in consent or its denial, the way in which the process is conducted is paramount. The time allocated for discussions among the Indigenous peoples themselves, the cultural appropriateness of the way that the information is conveyed and the involvement of the whole community, including key groups such as women, elders and youth in the process, are all essential in carrying out a thorough FPIC process, which helps to guarantee everyone’s right to self-determination, allowing them to participate in decisions that affect their lives.

Table 2: Definition of FPIC recognized in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

Free	Refers to 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, older people and persons with disabilities as far as possible.

Source: https://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

3. THE CONTEXT OF STATES DOMINATED BY INDIAN TRIBAL PEOPLES – THE PARADOX OF DEVELOPMENT

During its post-liberalization period (since 1991), India has achieved a high rate of economic growth in a relatively short period of time. Despite the global economic slowdown in 2011–12, it achieved an average growth rate of 7.9% during its 11th national plan period (2007–12). However, despite impressive overall growth rates, this trend appears to have widened the gap between those at the top and those at the bottom of the wealth distribution.

While market-friendly reforms have succeeded in pulling millions of Indians out of poverty, economists say that 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 disproportionately large share of the nation's wealth. There are also large regional disparities, as well as disparities across social groups in India.⁴

According to the most recent census (2011), as many as 21.9% of the population were living below the poverty line (21.2% live on less than \$1.90 per day). At the same time income inequality – the gap between the haves and the have-nots – has increased sharply (World Bank, 2017). Over half the population still faces deprivation with respect to health, education and living standards.

Scheduled Tribes (STs) – also known as Adivasi (original inhabitants) – constitute 8.6% of the country's total population; they are considered to be the most deprived and least developed social group and hence the most vulnerable of all. Poverty and landlessness are widespread amongst the STs, with 47.1% of all STs living below the poverty line in rural areas, compared with a national average of 33.8%, and 28.8% of all STs in urban areas. Despite being the only group with constitutional protections for their land rights, 9.4% of the STs are landless compared with the national average of 7.4%. Though being just 8.6% of the total population, it is estimated that STs constituted 40% of all people who were displaced from 1951 up to 1990, some of them more than once, due to the construction of dams and mines, industrial development and the creation of wildlife parks and sanctuaries. Only 24.7% of the ST population that was displaced during this period was rehabilitated.

THE PARADOX OF THE RESOURCE CURSE

Forests are not only the most important ecosystem on the planet but also provide the resources on which nearly 275 million poor people in India, especially tribal communities, depend for subsistence and livelihoods – food, fodder, housing, agriculture, minor forest produce/non-timber forest produce (MFP/NTFP) and so on. Almost 50% of forest dwellers' food requirements are provided by forests (Gupta Bhaya, 2018).

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Almost 60% of India's forest cover is found in states dominated by tribal peoples. The states with the largest forest cover in terms of absolute area are also states with substantial tribal populations, among them Jharkhand, Chhattisgarh and Odisha (Ministry of Tribal Affairs, 2014). These three states are also storehouses of considerable mineral reserves – 70% of the country's coal, 80% of high-grade iron ore, 60% of bauxite and almost 100% of chromite reserves. However, the paradox of resource-endowed tribal areas is evident in the very low human development indicators for these communities – including poor health status, low levels of literacy, food insecurity and low levels of economic development. Many of these tribal communities are categorized by India's Ministry of Home Affairs as Particularly Vulnerable Tribal Groups (PVTGs), who are at the bottom of the development indicators. They also score low on various development indices as a result of systemic exclusion and discrimination. Of the rural ST population, 47.1% live below the poverty line, which is much higher than the country's overall figure for the rural poor at 33.8% (Ministry of Tribal Affairs, 2013). Thus the STs lag 20 years behind national averages on human development indicators (Perspectives on Poverty in India, World Bank, 2011). However, research shows that almost 65% of mineral production is concentrated in the states that have Fifth Schedule Areas. Accruals of royalties from these states account for as much as 88.5% of the national total (Wahi and Bhatia, 2018).

REASONS FOR THE PROBLEM

Chronic poverty as a result of dispossession from resources, internal conflict, socio-cultural taboos, human rights abuses, violence against women, large-scale displacement and alienation from land due to large infrastructure development projects and mining are some of the factors that have intensified the struggle that tribal communities face. Over 70% of the forest land that has been cleared for mining since 1981 was cleared in the period 1997–2007. Of the 14,000 sq km of forests cleared over three decades, the largest area was given over to mining (4,947 sq km), followed by defence projects (1,549 sq km) and hydroelectric projects (1,351 sq km).⁵ It is estimated that more than 60 million people have been displaced since India's independence, of whom 30% have been tribal (Ministry of Tribal Affairs, 2014).

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

The conflict over resources, coupled with a long history of oppression and exploitation of the vulnerable communities in these areas, has given rise to left-wing extremism (internal armed rebellion), and communities have been caught between radical groups on one side and the military and paramilitary forces of the state on the other. Tribal leaders who raise their voices against land alienation and eviction are often charged with supporting extremist groups and are put on trial. There are cases of human rights violations and often state and paramilitary forces are called in to break up protests by communities, which results in violence.⁶

4. SPACE FOR FPIC IN INDIA'S LAWS

In India the primary laws relating to FPIC are derived from three sources:

- The Constitution of India;
- Legislation enacted by Parliament and state legislatures;
- Judicial decisions that have emerged from courts of law, primarily the Supreme Court and the High Court.

CONSTITUTIONAL PROVISIONS

Article 366(25) of the Constitution of India defines Scheduled Tribes as 'tribes or tribal communities or parts of or groups within such tribes or tribal communities' as are deemed to be 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 – the Fifth and Sixth Schedules to the Constitution under Article 244 – make special provisions for areas inhabited by STs. A large number of areas predominantly inhabited by Adivasis or Indigenous groups were declared to be Excluded or Partially Excluded areas during 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 Schedules and are now referred to as Scheduled Areas. They have special status under the Constitution in terms of autonomy and governance, and in these areas decision making on land use is decentralized to the level of village council.

One of the most significant steps towards decentralization in contemporary India came with the 73rd Amendment to the Constitution in 1992. There are two significant elements of this amendment. First, it established 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 the *gram sabha* 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.' The 73rd 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.

The 42nd Amendment to the Indian Constitution of 1976 was significant as it moved forests from the State List to the Concurrent List of the Constitution. This gave powers to the Union Government to administer forests along with the state governments. In cases of overlap, the central government laws prevail.

Article 48-A in Part IV provided for the protection and improvement of the environment and safeguarding of forests and wildlife. It emphasizes 'Fundamental Duties', placing a duty on

¹¹ Subversion of due process of seeking consent of communities in land acquisition and resultant land conflicts

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

PROTECTIVE LEGISLATION

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 resettlement/rehabilitation 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.

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 use.⁷ Until 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, prior permission from the central Ministry of Environment and Forests has been a legal requirement. In order to use a forest for an explicit non-forest purpose or de-reserve it (from its Reserved Forest status), 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 the forest rights movement in the country, and the product of a long period of struggle by tribal groups. The Act seeks to recognize and vest forest rights and occupation of 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. It also seeks to provide for a framework to record forest rights, so as to undo a serious historical injustice. There are two 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 sabhas*⁸ 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:

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- Protect wildlife, forests and biodiversity;
- Ensure that adjoining catchment areas, water sources and other ecologically sensitive areas are adequately protected;
- Ensure that the habitat of forest dwelling STs and OTFDs is protected from any form of destructive practice affecting their cultural and natural heritage;
- Ensure that the decisions taken in the *gram sabha* to regulate access to community forest resources, and stop any activity which adversely affects wild animals, forests and biodiversity, are complied with.

With the enactment of the FRA and subsequent clarifications⁹ issued by the MoEFCC, it was communicated to the state/UTs that prior to diversion of forest land for non-forest purposes, the process of FRA must be complied with and the following documentary evidence must be submitted:

- 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 *gram sabha* of forest-dwellers concerned, who are eligible under the FRA;
- A letter from each of the *gram sabhas* concerned, 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 the 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 have taken place only when there was a quorum of minimum 50% of members of the *gram sabha* present, obtaining the *gram sabha*'s written consent to or rejection of the proposal;

Protected Areas (PAs)

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

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

Section 4 (2) of the FRA states that the forest rights recognized under this Act in critical wildlife habitats of national Parks and sanctuaries may subsequently be modified or resettled, provided

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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'. The conditions have two important provisions, among others:

- A resettlement or alternatives package that provides a secure livelihood for the affected individuals and communities has been prepared and communicated to them;
- The free informed consent to the proposed resettlement and to the package of the *gram sabhas* in the areas concerned has been obtained in writing.

Environmental 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, there is a requirement for industrial, infrastructure or extractive projects to undergo the regulatory process of preparing environmental impact assessment reports, conducting public consultations and submitting to expert scrutiny before land use can be changed.

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

Box 1: Public Consultation

Public Consultation (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 comprise of:

1. A public hearing at the site or in its close proximity, to be carried out in the manner prescribed in Appendix IV, for ascertaining concerns of local affected persons;
2. Obtainment of responses in writing from other concerned persons having a plausible stake in the environmental aspects of the project or activity.
3. 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 days of a request to the effect from the applicant.

Source: <http://moef.gov.in/wp-content/uploads/2018/03/so1533.pdf>

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

The environmental clearance process for new projects will comprise 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

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- Stage (3) Public Consultation
- Stage (4) Appraisal.

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 tribal people with respect to these areas. The law allowed the government to acquire lands upon payment of cash compensation for any 'public purpose', which included 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.
- The 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.
- It must be ensured that adequate representation has been given to the representatives of the *panchayat*, *gram sabha*, municipality or municipal corporation, as the case may be, at the stage of carrying out the social impact assessment study. The SIA will be completed within a period of six months from the date of its commencement.
- The Act further stipulates that in the 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 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 (CBA), 1957

Land acquisition for coal mining by the government is carried out under the 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 the 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

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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. There is no requirement for authorities to pay compensation before taking possession of land. Anyone who wishes to claim compensation must submit written objection within 30 days from issue of notice of acquisition.¹⁰ 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 labourers.

Mines and Minerals (Development and Regulation) Act, 1957

Parliament enacted the Mines and Minerals (Development and Regulation) Act (MMDR), 1957 to regulate the mining sector in India, which specifies requirements for obtaining and granting mining leases for mining operations. Under the MMDR Act, the Mineral Concession Rules, 1960, and the Mineral Concession and Development Rules, 1988, outline the relevant procedures and conditions for obtaining a Prospecting Licence 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 the issuance of mining and prospecting licences. In line with the recommendations of the Supreme Court in the Samata judgment,¹¹ this amendment also mandated the creation of District Mineral Foundations ('DMFs') in all districts affected by mining operations. In a notification dated 16 September 2015, the central government directed states to set up DMFs by 10 October 2016.

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5. EROSION OF PROTECTIVE PROVISIONS

EMINENT DOMAIN, CONSULTATION AND CONSENT

The international processes around FPIC and provisions in Indian law have acknowledged that the right to self-determination, especially of Indigenous and tribal communities, are key to ensuring basic human rights and justice for the most marginalized communities. Yet the burden of policies around 'development' fall differently on different sections of society, given the clear power asymmetry between the state and local communities as well as large corporations/industries.

In the context of India, most of the laws as discussed here, barring a few examples in recent times, have been largely restricted to 'consultation' with local communities. This consultation is not equivalent to consent, and in general 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 'public purpose' and 'urgency' are wide open to interpretation. Ramanathan goes on to argue that since the 1980s, involuntary acquisition and dispossession have caused mass displacement in the name of 'public purpose', which has posed a threat to the legitimacy of the projects 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' is at stake, projects are considered to be 'public purpose' or 'urgent for development', and governments and corporations are afraid of ceding power to communities for decisions. 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).

The crux of the problem lies in the paradox that impacted groups lack power over decision making, even when their rights to consultation and consent have been recognized under national laws. 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 that has been wrested away from affected groups.

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

Even though a consent clause was introduced in the progressive RFCTLARR 2013, five major categories of projects are exempted from the consent and SIA requirements of the LARR Act. These categories include defence, rural infrastructure, affordable housing, industrial corridors and infrastructure projects, including public–private partnerships (PPPs). 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, the Mumbai–Ahmedabad bullet train project commissioned in 2019 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*.¹²

While on the one hand emerging legislation provides space for public decision making, on the other hand it is assumed that such processes delay project operations. As a result, various loopholes or legal options are identified to dilute clauses that are specific to the preparation of social impact assessments, as well as clauses pertaining to consent.

- At least six state governments have enacted their own land acquisition laws by seeking Presidential consent between 2016 and 2018.
- States are drafting state rules, thereby attempting to ‘amend’ the central law and enacting new laws keeping certain state legislation outside the purview of the 2013 Act.
- State-level rules are diluting the applicability of progressive clauses such as prior consent, public hearings or social impact assessments.
- 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 compensation to be paid when acquisitions take place.

HOW SPACES FOR COMMUNITY PARTICIPATION ARE DILUTED IN THE LEGAL FRAMEWORK

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

Table 3: Example: Clauses under Central LARR Act weakened in practice by states

	Subjects	Provisions under the LARR Act	Dilutions by states
1	<i>Public hearing</i>	The notice period for ensuring participation in public hearing must be 30 days	Reducing the notice period to 1–2 weeks . Andhra Pradesh and Uttar Pradesh governments will serve a notice period of one week to ensure participation in a public hearing. Jharkhand, Kerala, Odisha, Sikkim, Tamil Nadu and Tripura will serve a notice of two weeks.
2	<i>Consent and SIA</i>	In Scheduled Areas, prior consent of the concerned <i>gram sabha</i> 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. In other areas consultation is mandatory.	Andhra Pradesh, Telangana, Tripura, Gujarat and Jharkhand have done away with consent, questioning the very objectives of the Central Act.
3	<i>Compensation</i>	To decide final compensation, taking into consideration the different parameters as mentioned under Section 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, are 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 costs are to go 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.

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4	<i>Land acquisition</i>	Five categories of land use are exempt from certain provisions: (i) defence, (ii) rural infrastructure, (iii) affordable housing, (iv) industrial corridors, and (v) infrastructure projects including PPP projects where the government owns the land.	Maharashtra has also excluded land acquisition under four state Acts (the Maharashtra Highways Act, 1955; the Maharashtra Industrial Development 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.
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THE TOP GOVERNMENT AUDIT OFFICE DEMONSTRATES THAT ENVIRONMENTAL VIOLATIONS HAVE TAKEN PLACE

In its report¹³ on environmental and post-clearance monitoring, the country's top government audit office, the Office of the Comptroller & Auditor General of India, (commonly known as CAG), observed that environmental impact assessment (EIA) reports did not comply with their original Terms of Reference in 25% of cases. It also goes on to say that cumulative impact studies were not made mandatory before preparing the EIA reports and, as a result, the impact on the ecosystem of a number of regional projects was not known. It clearly states in the report that the concerns and reservations of local people expressed at public hearings were not included in final environment impact assessment reports. In many cases, public hearings did not have a quorum, and many people who participated were not residents of the area. There was no provision for the project proponents to fulfil their commitments in a particular timeframe, and the commitments made by the project proponents in EIA reports during public hearings were also not monitored.

Other major observations include that in 56% of cases, approval of the competent authority was not obtained for the actual number of trees cut down by the project proponents. Ground water was used without permission of the competent authority in 19% of cases. The scope of work was changed after obtaining environmental clearance in 10% of cases.

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

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 project proponents at fault, 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.

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6. THE GAP BETWEEN POLICY AND PRACTICE: THE IMPACT IN AFFECTED AREAS

As discussed above, FPIC – implied in the right to say ‘no’ and the power to veto – serves as an organized effort to resist and roll back land grabs (Franco, 2014). Consent, as established by the Obama administration in the USA, 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, n.d.).

BREACH OF CONSENT AND RESULTING LAND CONFLICTS

The questions of ‘Whose consent is required?’ and ‘How is it taken?’ lie at the core of the issue of consent. 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 has two key pieces of legislation – the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Resettlement Act, 2013 (LARR) and the Forest Rights Act, 2006 (FRA). These 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. The first is a market-based rationale that seeks to increase the ability of land owners to leverage the value of the land and its resources in the market through, for instance, the ability to sell the land, use it as collateral, or make capital-intensive investments without fear of losing them. The second is a 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 and Cotula, 2010). Under the FRA, 2006, the government policy on consent seeks a mix of these goals, for example confirming customary land tenure without alienating them from their common resources as well as recognizing their decision making power over their traditional resources

However, even well-intentioned reformist legislation is enacted within an environment of limited resources and competing interests. The interpretation and use of this legislation work in tandem with the subjective way in which peoples perceive the security of their rights and distributional factors such as the nature, content, clarity and duration of their rights, as well as and procedural factors such as the certainty of enforcement and their bargaining power.

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

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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 study *Locating the Breach*¹⁴, undertaken by Land Conflict Watch in collaboration with Oxfam India and Rights and Resources Initiative, documents the processes and conflicts associated with land acquisition. In the study, there are a total of 703 cases of ongoing land conflicts recorded by Land Conflict Watch. These cases occupy a land area of 2.1 million ha and affect over 6.5 million people in the country. Evidence-based data on investments locked in these land conflicts were available for only 335 of the 703 documented cases. At least INR 13.7 trillion were found to be either committed, earmarked or planned as potential investment in these 335 cases of land conflicts. This is 7.2% of the revised estimate of the country's GDP for 2018-19. More than three million people have been impacted in these conflicts. Out of the 722 conflicts, 285 deal with breach of consent as a central and associated struggle to assert rights over the land. The breach of consent is both a procedural breach in the acquisition of land and a distributive breach in providing fair compensation and promised rehabilitation and resettlement. There are 49 cases where consent was central to a land conflict, meaning that people have been fighting the authorities over their failure to seek consent before commencing projects. Out of the 49 recorded cases, 14 were related to breach of consent under LARR, 2013. The remaining 35 cases involved a violation of the Forest Rights Act, 2006 over 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 that since the forest is a common property of forest dwellers, the permission of the *gram sabha* must be given to divert the forest for non-forest purposes. Under the Act, such diversion is not allowed without the consent of village assemblies of the Indigenous people. As stated earlier, many of these projects concealed information and false evidence was created during the process of seeking consent, which led to the projects becoming embroiled in conflict. Together, these conflicts affect close to 1 million people and are spread over 1,734 sq km. In the study mentioned above, it was found that in 13 of the 35 cases related to forest rights, consent was bypassed by manipulating the documents. It is most commonly found that the provision of consent is circumvented in three ways. The first is 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. The third is by granting 'in principle' approvals under the Forest (Conservation) Act, 1980, with conditions that all processes to seek clearance, including the recognition of rights, will be completed, thus making the consent-seeking process 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 the forest rights of tribal peoples under the FRA. However, 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 and consent for acquisition, but also distributive justice – the right to fair compensation for foregone resources, access and assets. A record number of 236 cases out of the 703 recorded suggest that consent was breached both in 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, the study undertaken by Land Conflict Watch on consent in land deals suggests that land conflicts are not necessarily occurring over the seeking of consent, but over the breach of consent. This occurs through the lack of implementation of relevant laws; the violation and undermining of those laws; the curbing of the ability to bargain or give free consent; or through disingenuous acts that conceal or falsify information during the process of seeking consent

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(Shrivastava, 2018). It can also be argued that the procedure of consent as determined in the legislation through eliciting and reporting the views and opinions of the villagers provides them with 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.

CASE STUDIES

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

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

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 only when the company's surveyors reached the village. They soon realized 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, non-forestry activity cannot be started in an area like this without the ministry's permission. One of the proposal papers signed by the district collector of South Bastar and dated 26 September 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, an investigation revealed that for the first stage of environmental clearance, a public hearing was organized on 30 September 2016. The proceedings of this public hearing, which were submitted at Chhattisgarh Environment Conservation board, mention 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 journalist resident in Alnar village, the journalist said that no public hearing notices were given to the residents of Alnar. 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 had given out their land to other members of their community for livelihood activities as part of their traditional practice. 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.

Consent forged to clear forest and pave way for coal mining in Talabira

The Talabira forest in Sambalpur district is on the verge of being wiped out. On 9 and 10 December 2019, more than 40,000 trees were felled for an opencast coal mine. The move came after the Ministry of Environment, Forest and Climate Change granted Stage II clearance to divert 1,038 ha of forestland for the mining project on 28 March 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 recommended 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

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villages have not seen these documents in English, drafted by forest officials, that culminated in the forest clearance for the Talabira II and III Open Cast Coal Mine in March 2019. But the people here strongly disagreed with the forest conservator that the impact of felling more than 1,000 trees is negligible.

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 had been forged for the forest clearance. They can produce the written complaints about this they sent in October 2019 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. All in all, there appear to be serious legal lacunae in the forest diversion process.

Telangana state bypasses LARR, 2013, which 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 asserting that they will not give over their land until they are rehabilitated and given compensation as per the Land Acquisition Act. The notification for land acquisition was issued in newspapers with the 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, the land acquisition was done through the use of a Government Order (GO. No.123) instead of the Land Acquisition Act. On 7 January 2018, the Hyderabad High Court directed the Telangana government to stall the process of land acquisition for the Mallannasagar 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.

FINDINGS AND CONCLUSIONS

The findings of the Land Conflict Watch report show that there are 703 ongoing land conflicts documented over the last three years. Over 2.1 million ha of land is embroiled in these conflict, and 43% of these conflicts are related to infrastructure projects, followed by conservation- and forestry-related activities. More than three million people are affected. Land conflicts over mining projects are the second highest cause of distress, affecting over 800,000 people.

As indicated in the previous chapters, a large number of the conflicts arise when the due process of law is not followed, or it is assumed both by the private sector and the government that such processes delay projects and 'ease of business' is more important for economic growth. However, research and experience in affected areas point to the fact that often processes are only carried out on paper, and it is only during physical construction or through notices sent out to communities that people are informed of land acquisition or forest diversion. This leads to conflict. The report shows that as a result of these conflicts, 13.7 trillion Indian rupees of money (190 billion USD) committed, earmarked and planned as potential investment was found to be involved in 335 of the 703 land conflicts. This is 7.2% of the revised estimate of the country's GDP for 2018–19, and it is 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 in the report relate to the commons and impact 79% of all the affected people. The Scheduled Areas, which have special protection under the law due to their high Indigenous/tribal population, are the site of 26% of the conflicts, involving 41% of the total area impacted by land conflicts. These areas contain nearly 28% of the 6.5 million people in total affected by land conflicts in India.

The fact that so many of the conflicts involve common lands emanates from a narrative that has been built since colonial times to the present day: the state exercises its ownership even when tenurial rights are recognized under the Forest Rights Act or governance power is enshrined under PESA, recognizing the right to self-determination of tribal communities. Such state acquisition of land has historically been the source of significant dispute.

The Centre for Policy Research's comprehensive study of land acquisition (Wahi, 2019) reveals that all land litigation before the Supreme Court over a 66-year period, from 1950 to 2016, involves privately held land. Thus, it is clear that in the face of state acquisition of land, when people have 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 critical, for communities who depend on the forest, land and other natural resources are not just an economic resource, but also a 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 the case of forest diversion, the Forest Rights Act recognizes the community's roles in decision making, the 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, and such meetings are often held in high-security zones and in an intimidating atmosphere, where 25 Subversion of due process of seeking consent of communities in land acquisition and resultant land conflicts

communities have very little prior knowledge of the projects and their impacts. The list of projects exempted from such a process keeps growing, indicating that there is a huge deficit of trust between the government and people, and the critical importance of seeking consent. Long-term investment in community processes related to project information and monitoring will go a long way towards establishing trust and processes for negotiations. Respect for community decisions, even when communities reject project proposals, has to be taken into account.

Communities have sought multiple types of remedy in addressing these conflicts, and a combination of different strategies (Kohli, 2018) works on the ground. Numerous court orders and administrative solutions have calculated compensation in different ways, while in some cases, only direct land owners or those whose land is acquired are considered. However according to the LARR, 2013 compensation must take into consideration the different parameters as mentioned under Section 28 of the Act.

People have also approached different institutions such as the courts or enforcement authorities demands to close down construction or project operations, with varying degrees of success. As the CPR and NAMATI study shows, two things can happen – one is when project activities have been recently initiated and there appears to be the possibility of stopping the change in land use, and the second is when several attempts at seeking compensation, employment or restoration of damage have failed. As per the analysis of the 75 cases, demands for project closure were part of the redress that people sought in 19 cases. In seven other cases, this was the only remedy they sought. The analysis reveals that in eight cases, where communities have demanded the cancellation of projects, they have achieved redress such as temporary or permanent closure, or suspension of approval. It is to be noted that these were very high-profile projects with heavy investment in them.

Communities also seek redress for environmental violations including the dumping of waste or extraction due to mining operations. Another type of redress is where the project has been withdrawn, and communities demand the restoration of their land and livelihoods.

The scale of the problem in India is huge. Over the period from 2005-2016 2,962 environment clearance letters for four sectors – mining, thermal power, river valley projects, infrastructure and coastal regulation zones – with a total land use change of 12,44,736 ha, was officially approved (CPR & NAMATI). This averages out at a minimum of 1, 24,473 ha per year. As indicated earlier, most of these projects involve common land such as forest/grazing land. During the period 2013–16, 80% of mining projects were on non-forest land.

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

The major recommendations of this study are as follows:

- The process of seeking consent cannot be a one-time activity, and local communities need to be involved in the monitoring of social impact, environmental and land compliance on a regular basis. Post-approval compliance needs to be strengthened and monitored, with clear analysis of compliance needs placed in the public domain. The process of seeking consent after environmental clearance or project sanctions makes 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 focused on decisions and engagement in the process, and the redress should focus on a combination of factors rather than a 'yes' or 'no'. However, where a clear 'no' to consent is emerging, these views need to be respected.

- Multiple and overlapping laws need to be amended to incorporate the FPIC guidelines.
- The 'polluter pays' model does not ameliorate environmental degradation or other non-compliance, such as irregularities in public hearings or consent of village assemblies. While financial penalties are part of the solution, the solution should also focus on future project operations.
- Regulatory and financial institutions need to look beyond just the 'financial viability' of projects. For both the enforcement authorities and financial institutions, the basis of regulatory procedures should shift from approvals to compliance. Environmental clearances and permits need to be based on an established record of high compliance and meeting legal standards. For this, robust monitoring mechanisms, with communities playing a central role, should be considered.
- Monitoring or conducting social and environment assessments 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 – should be established.
- Any violations of the processes should have an impact on the expansion of a project and future renewal of permits and clearances.
- Clear remedies and multiple options must be made available to communities. Compensation in terms of financial payments must take into consideration a wide range of factors and livelihood dependence, including community rights to common resources. Further restoration of livelihoods, addressing land degradation and environmental security also need to be part of the conditions for project operations.

BIBLIOGRAPHY

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 September 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, 30 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>

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 February 2020].

S. Radhakrishnan. (2018). The Hindu explains: Sterlite protests. *The Hindu*. <https://www.thehindu.com/news/national/tamil-nadu/the-hindu-explains-sterlite->

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protests/article23969542.ece; Business Standard. (2016). Human rights violations at mines run by Coal India: Amnesty.

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. and 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*. New Delhi: Centre for Policy Research.

World Bank. (2017). *Country Poverty Brief, South Asia, India*. World Bank.

World Bank. (2011). *Perspectives on Poverty in India : Stylized Facts from Survey Data*. World Bank. © World Bank. <https://openknowledge.worldbank.org/handle/10986/2299> License: CC BY 3.0 IGO.”

NOTES

¹ UN Charter, article 1, para. 2. <https://www.un.org/en/sections/un-charter/un-charter-full-text/>

² Though India has not ratified ILO 169.

³ <http://parivesh.nic.in/>

⁴ Particularly socially disadvantaged groups such as Scheduled Castes, Scheduled Tribes, Other Backward Classes (OBCs), etc.

⁵ Compensatory Afforestation Fund Management and Planning Authority (CAMPA), Ministry of Environment and Forests.

https://www.business-standard.com/article/pti-stories/human-right-violations-at-mines-run-by-coal-india-amnesty-116071301103_1.html

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.

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.

⁹ MOEFCC guideline vide letter No.11-9/98-FC(pt) dated 3 August 2009.

¹⁰ (<http://www.indiaenvironmentportal.org.in/files/file/WHEN%20LAND%20IS%20LOST,%20DO%20WE%20EAT%20COAL.PDF>)

¹¹ <https://cjp.org.in/wp-content/uploads/2018/08/Samatha-Judgement-1997-SC.pdf>;
<https://www.mmpindia.in/samata-judgement/>

¹² <https://www.downtoearth.org.in/news/agriculture/-state-govts-acquire-land-by-subverting-rights-and-bending-the-law--62463>)

¹³ 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 10 March 2017.

¹⁴ <https://www.oxfamindia.org/knowledgehub/workingpaper/locating-breach-mapping-nature-land-conflicts-india>

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