

## SIGNIFICANCE OF GRAM SABHAS IN THE EXERCISE OF FREE, PRIOR AND INFORMED CONSENT BY INDIGENOUS PEOPLES IN INDIA

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### **Abstract**

The paper analyses the relevance of the principle of free, prior and informed consent by indigenous peoples before the lands they occupy can be diverted for developmental projects. It addresses how the *gram sabha* has come to embody the protection of the rights of indigenous peoples by their exercise of consent in India by drawing from international law and the principles enshrined under the Constitution of India. The recent executive orders and generally the tone of the new government in India have brought the focus back on the clash between the rights of indigenous peoples to their lands and the concept of economic development'.

*Gram sabhas* represent the voice of the indigenous peoples which must not be stifled otherwise it would lead to their destruction and also the destruction of the ecology. The Supreme Court of India has recognised this and dealt a blow to any circumvention of the mandatory requirement of consent through *gram sabhas*, however, the recent executive orders are aimed at completely diluting the powers of the *gram sabha*. These actions are violative of the domestic laws and the fundamental rights of the indigenous peoples in the Constitution as also the principle of free, prior and informed consent recognised in international law.

### **Introduction**

*Independence must begin at the bottom. Thus, every village will be a republic or Panchayat having full powers. It follows, therefore, that every village has to be self-sustained and capable of managing its affairs even to the extent of defending itself against the whole world. Thus, ultimately, it is the individual who is the unit.*<sup>1</sup>

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<sup>1</sup>THE CAMBRIDGE COMPANION TO UTOPIAN LITERATURE, 241(Gregory Claeys ed.,Cambridge University Press2010).

The ideology of Mahatma Gandhi reflected in the above quote, with respect to decentralization of power to the basic units at the village level, holds more significance for the rights of the indigenous peoples in India (known as *adivasis*, tribals, Scheduled Tribes, etc.) than any other community. This is because such devolution of power is central to the idea of self-determination which in the case of indigenous peoples signifies the ability to manage their affairs in their own interests.<sup>2</sup> This essay will focus on a key institution in India, the *gram sabha* (village assembly), which has bestowed indigenous peoples with self-autonomy while recognising them as victims of long standing prejudices. The essay will trace the evolution of *gram sabhas* in the context of indigenous peoples and how it has evolved as a voice of the indigenous peoples to articulate their consent or resistance in order to put forth their own concept of the right to development. While doing so, it will focus on the manner in which the right of free, prior and informed consent of indigenous peoples is being diluted by government action in favour of 'economic development'. The government of India has recently made it clear to the World Bank that it is not 'comfortable' with the idea of mandatory free, prior and informed consent of the indigenous peoples who would be displaced due to the project funded by the World Bank.<sup>3</sup> In this context, it is pertinent to revisit the relevance of the concept deriving its validity from international and domestic law.

Firstly, it is necessary to analyse the constitutional measures and safeguards for the indigenous peoples. The Constitution of India has been hailed as a 'living document' which is reflected in many examples, one of which is the creation of the *Panchayati Raj* envisaging the devolution of self-autonomy powers right down to the village level. This was brought about through the 73<sup>rd</sup> and 74<sup>th</sup> amendments to the Constitution, thus creating the *gram sabhas* and the *gram panchayats* at the village level as institutions of self-government.<sup>4</sup> The criticism of a centralized form of governance in a country like India, where the majority of population resides in villages forming the backbone of an agrarian economy, forced the government to amend the Constitution. Under the aegis of these amendments, the federal states were required to enact appropriate legislatures to establish such local representative institutions.

With respect to tribal communities, the Constitution provides for the specification of certain tribes as 'Scheduled Tribes' which have been identified due to the discrimination and wrongful

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<sup>2</sup>AsbjørnEide, *The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples*, in *MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 32, 37 (Claire Charters & Rodolfo Stavenhagen eds., 2009).

<sup>3</sup>NitinSethi, *Government against consent of tribals for displacement*(Business Standard March 31, 2015) available at [http://www.business-standard.com/article/economy-policy/govt-against-consent-of-tribals-for-displacement-115033100028\\_1.html](http://www.business-standard.com/article/economy-policy/govt-against-consent-of-tribals-for-displacement-115033100028_1.html) (last accessed on April 5, 2015).

<sup>4</sup>See CONSTITUTION OF INDIA articles 243, 243A-243-O, 244,.

perpetration faced by them through the colonisation period.<sup>5</sup> In pursuance thereof, the National Commission for the Scheduled Tribes has been established whose duties include, *inter alia*, reviewing and monitoring of specific complaints of deprivation of rights, planning and advising on the process for socio-economic development, etc.<sup>6</sup> Further, recognizing that these communities require a separate legislative and administrative process so as to render them effective to practice self-government and autonomy, they have been brought under the Fifth Schedule of the Constitution which makes the areas designated as 'Scheduled Areas' immune from the application of laws which are not specifically addressed to people in these areas.<sup>7</sup> Therefore, the application of the 73<sup>rd</sup> and 74<sup>th</sup> amendments to the Constitution was, as such, not available to the Scheduled Tribes.

In this context, the enactment of the Panchayats (Extension to the Scheduled Areas) Act, 1996 ('PESA') played a pivotal role in extending the provisions relating to the Panchayats to the Scheduled Areas.<sup>8</sup> It provided that 'a State legislation on the Panchayats that may be made shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources'.<sup>9</sup> The states also needed to ensure that adequate safeguards were put in place so that *Panchayats* at the higher level do not assume the powers and authority of the *Panchayats* at the lower levels or of the *gram sabhas*.<sup>10</sup> PESA recognised *gram sabhas* as 'competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution'.<sup>11</sup> The *gram sabhas* were given the right to be consulted before any acquisition of land in Scheduled Areas for developmental projects.<sup>12</sup> Moreover, their recommendations had to be mandatorily sought before granting licences for mining or other developmental projects.<sup>13</sup>

Thus, the idea of a village assembly wherein indigenous peoples would have a voice to address their issues and resist forceful evictions in the name of 'development' was crystallised in the form of *gram sabhas*.

With the background of the constitutional decentralization of autonomy resulting in the creation of *gram sabhas*, it is pertinent to analyse how this institution has come to embody the rights of

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<sup>5</sup> See CONSTITUTION OF INDIA, article 342 read with Fifth Schedule.

<sup>6</sup> See CONSTITUTION OF INDIA, article 338A.

<sup>7</sup> *Supra* n.4.

<sup>8</sup> Ajit Menon, *Engaging with the Law on Adivasi Rights*, 2239, 2240 (Economic & Political Weekly, Vol.42, No.24 June, 2007).

<sup>9</sup> See PESA Section 4(a).

<sup>10</sup> See PESA Section 4(n).

<sup>11</sup> See PESA Section 4(d).

<sup>12</sup> See PESA Section 4(i).

<sup>13</sup> See PESA Section 4(e)(i).

indigenous peoples available to them under national and international law. The attempts by state agents to dilute the powers of the *gram sabhas* (or to take them away completely) in the interests of developmental/mining projects would be highlighted by the example of Vedanta in Odisha. Finally, the essay will conclude by addressing the need to strengthen the non-derogable right to consult *gram sabhas* before any developmental project can be undertaken in order to progress the constitutional rights of indigenous peoples in India and recommendations for the government and the civil society will be put forth on the basis of the Alta Conference outcome document.

### **Domestic Legislative Framework for the Protection of the Right to Free, Prior and Informed Consent**

Indigenous peoples have a unique relationship with the lands and resources over which their survival depends.<sup>14</sup> This relationship encompasses social, cultural, spiritual and economic contours where the lands are not a resource to be acquired; rather, they are for the collective enjoyment of all.<sup>15</sup> This relationship is naturally at odds with the conception of economic development which has been the focus of nations in the era of globalisation. In such a scenario, the rights of the indigenous peoples face widespread threat from powerful influences. In this context, it is relevant to revisit the concerns of this marginalised section of the society who have been victims of displacement and isolation for a long time.<sup>16</sup>

Free, prior and informed consent is the cornerstone of the rights of indigenous peoples since it provides them with a voice in relation to the development projects to exploit the rich resources in the forests which have traditionally been occupied by such indigenous peoples.<sup>17</sup> In India, the forest belt, particularly the forests in Central East India, is extremely rich in minerals such as bauxite, aluminium, coal, iron ore, etc. It, therefore, is a source of huge income for the state governments who stand to gain if industries are set up to extract these resources.<sup>18</sup> This is reflective of a paradox of competing interests which is faced in such situations when indigenous peoples' traditionally owned and controlled lands are rich in natural resources and 'come in the way of economic development'.<sup>19</sup> The biggest impediment these companies and the state

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<sup>14</sup> Mauro Barelli, *Free, Prior and Informed Consent in the Aftermath of the UN Declaration on the Rights of Indigenous Peoples: Developments and Challenges Ahead*, 1(The International Journal of Human Rights, Vol.16, Issue 1, 2012).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Supra* n.2 at 43.

<sup>18</sup> Geetanjoy Sahu, *Mining in the Niyamgiri Hills and Tribal Rights*, 19, 19 (Economic & Political Weekly, Vol.43, No.15 April, 2008).

<sup>19</sup> *Supra* n.13.

governments face is the diversion of forest lands for such projects which can be done only after taking the consent of the *gram sabhas*.<sup>20</sup>

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 ('FRA') is one such attempt which came as a defining moment in the struggle of India's forest dwelling indigenous communities by recognizing their pre-existing customary rights (which had been denied from the colonization period until the enactment of FRA) over the forest lands and exercising them through a democratic and self-autonomous institution of *gram sabha*.<sup>21</sup> It marked a magnanimous shift from the vesting of forests lands in forest authorities under the archaic colonial Indian Forests Act of 1927 to the recognition that the forests lands must be under the control of those whose livelihoods depend on them since 'forest dwellers are integral to the very survival and sustainability of the ecosystem'.<sup>22</sup>

Whereas the British colonisers' interests were to isolate the indigenous tribal communities by terming them criminals and barbarians to gain complete control over forest resources, freedom from colonization meant that the role of colonisers was assumed by the governments in the context of such indigenous peoples.<sup>23</sup> Thus, the indigenous peoples suffered continuously, even after independence, since the government imposed control over their lands through archaic colonial legislatures.<sup>24</sup> These legislations were at complete odds with the protection envisioned for indigenous peoples under the Constitution of India.<sup>25</sup> Hence, the FRA was introduced to correct the historical injustice meted out to the forest dwelling Scheduled Tribes and other traditional forest dwellers by recognizing and vesting in such communities, forest rights and occupation in forest land.<sup>26</sup> It ensures that state governments in the interests of the companies do not impair the rights of the indigenous peoples by upholding the importance of free, prior and informed consent through the *gram sabhas*.<sup>27</sup>

The FRA recognised the forest rights widely for the benefit of the indigenous peoples as right to hold and live in the forest land for occupation or self-cultivation and also gave them rights over

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<sup>20</sup>*Supra* n.7.

<sup>21</sup>Archana Prasad, *Conservation and Tribal Development in the "Forest Rights Bill": Looking Beyond the Joint Parliamentary Committee Report*, 17, 4 (Social Scientist, Vol.34, No.3/4 July-August, 2006).

<sup>22</sup>See Preamble to the FRA.

<sup>23</sup>SharachchandraLélé, *A 'Defining' Moment for Forests?*, 2381, 2379 (Economic & Political Weekly, Vol.42, No.25 June, 2007).

<sup>24</sup>SharadKulkarni, *Proposed Forest Act: An Assessment*, 1909, 1909 (Economic & Political Weekly, Vol.29, No.30 July 1994).

<sup>25</sup>*Supra* n.7 at 2242.

<sup>26</sup>MadhuRamnath, *Surviving the Forest Rights Act: Between Scylla and Charybdis*, 37, 37 (Economic & Political Rights, Vol.43, No.9 March, 2008).

<sup>27</sup>*Id.*

traditionally disputed lands with the State authorities.<sup>28</sup> Indigenous peoples were also recognised as the protectors of the forest which was a result of giving precedence to sustainable development through recognition of their unique role. They were recognised as having a prominent role in the conservation of the forests and maintaining the ecological balance while pursuing their livelihood through the forests. Another provision which pointed to the recognition of the indigenous peoples' rights over the forest lands was 'the right to access biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity'.<sup>29</sup> Thus, the rich indigenous knowledge of the indigenous peoples was sought to be protected in present times where such knowledge is invaluable.

The FRA, therefore, aimed to pursue a dual purpose and in this respect, it was hailed as a progressive legislation recognising and promoting the rights of indigenous forest dwelling peoples in India as well as taking a step forward towards sustainable development and conservation of forests.<sup>30</sup>

An important provision in the FRA was for obtaining free, prior and informed consent of the indigenous peoples before any resettlement programme can be initiated.<sup>31</sup> Further, such resettlement programme must contain adequate compensation, alternate land allocation and provision for return of the indigenous peoples on the completion of the project.<sup>32</sup> The rehabilitation provision is retrospective in nature, protecting the rights of indigenous peoples who were illegally displaced before the enactment of FRA.<sup>33</sup> The *gram sabhas* have been entrusted with the supervision of the process of obtaining the consent of the indigenous peoples for which they have been provided with wide powers in the FRA. A *gram sabha* is defined as 'a village assembly which shall consist of all adult members of a village.....with full and unrestricted participation of women'.<sup>34</sup> The role of *gram sabhas*, as laid down in PESA read with the powers granted in FRA, is of a democratic institution which is competent to safeguard the interests of the indigenous peoples since it is comprised of such peoples themselves.

A subsequent executive order has strengthened the process for obtaining consent by *gram sabhas* by introducing additional safeguards in the form of certified letters to be filed by the state governments as evidence that the procedure for obtaining the consent through *gram sabhas* as

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<sup>28</sup> See FRA Section 3 for a list of rights under 'Forest rights'.

<sup>29</sup> FRA Section 3(k).

<sup>30</sup> MadhuSarin, *Scheduled Tribes Bill 2005: A Comment*, 2132-2133, 2131 (Economic & Political Weekly, Vol.40, No.21 May 2005).

<sup>31</sup> FRA Section 4.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> FRA Section 2(g).

envisaged under the FRA has been completed.<sup>35</sup> State governments are also mandated to file all documentary evidences in relation to it. This was essential to prevent state governments from circumventing the provisions relating to obtaining free, prior and informed consent of the indigenous peoples before diverting forest lands for development projects.

Thus, the domestic legislative framework in relation to the right of indigenous peoples to be consulted, before any decision impacting them can be undertaken, has been greatly strengthened by the crystallisation of the institution of *gram sabhas* through progressive legislations like PESA and FRA. This, however, does not necessarily reflect in the conditions of indigenous peoples in the country which have continued to be the poorest sections of the population and the areas inhabited by them are deprived of the basic facilities of healthcare, education, etc.

### **Analysing the Extent of Violations of the Rights of Indigenous Peoples through the case of the DongriaKondh tribe in Odisha**

The ramifications of rights violations of indigenous peoples are difficult to assess because of the lack of information and concrete data. However, these issues can be gauged from specific case studies which managed to attract the attention of the public.

A case worth analysing to understand the extent of the transgressions by companies and the state machinery against the rights of the indigenous peoples is the case of Vedanta, a UK-registered company, having widespread mining operations in India, which constantly faces allegations of human rights abuses.<sup>36</sup> Vedanta was accused of circumventing the requirement of obtaining free, prior and informed consent of the indigenous peoples in the state of Odisha in order to set up a bauxite mining project.<sup>37</sup> The company required additional land for this project which included lands situated on a part of the forest called the Niyamgiri hills. The Niyamgiri hills are the sole habitat of the DongriaKondh tribe 'whose distinctive identity is evident in their unique language, agro-forestry expertise, social structure, and religious practices'.<sup>38</sup> These hills are considered sacred by the DongriaKondh tribe, holding a spiritual significance and responsible for sustenance of

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<sup>35</sup> Circular of the Ministry of Environment and Forests dated August 3, 2009 available at <http://www.moef.nic.in/divisions/forcon/3rdAugust2009.pdf> (last accessed on February 20, 2015).

<sup>36</sup> Report, *Vedanta's Perspective Uncovered: Policies cannot mask practices in Orissa*, 4 (Amnesty International 2012).

<sup>37</sup> *Id.* at 9.

<sup>38</sup> Report, *Saxena Committee Report for Investigation into the Proposal Submitted by the Orissa Mining Company for Bauxite Mining in Niyamgiri*, 5 (August 16, 2010) available at [envfor.nic.in/sites/default/files/Saxena\\_Vedanta-1.pdf](http://envfor.nic.in/sites/default/files/Saxena_Vedanta-1.pdf) (last accessed on February 20, 2015).

many generations of this tribe.<sup>39</sup> The members of this tribe use the medicinal plants found in this region to treat various ailments like scorpion and snake bites, stomach disorders, arthritis, tuberculosis, paralysis, cholera, acidity, eczema, tumours, menstrual disorders, wounds and sores, diarrhoea, dysentery, bone fractures, rheumatism, asthma, malaria, etc.<sup>40</sup> The mining operations were expected to bring ecological damage to the Niyamgiri hills which would have completely devastated the livelihood of the tribe and threatened their very existence.<sup>41</sup>

Due to these reasons it was extremely difficult for Vedanta to get a clearance for its project as the consent of *gram sabhas* in this region would not have been forthcoming. However, with the assistance of the state government and the state machinery, it did manage to obtain such clearance initially, albeit controversially, until this was challenged before the Supreme Court.<sup>42</sup> The state government and the company were accused of falsifying the fact that the consent of the tribe was taken before the land was sought to be diverted for the mining project.<sup>43</sup> Widespread human rights abuses were documented which were related to stifling any opposition of the indigenous peoples to the mining project.<sup>44</sup> It was found that the police were acting in concert with the interests of the company by booking protestors and members of the tribe under false charges and imprisoning them in addition to employing coercive threats.<sup>45</sup>

However, the resolve of the indigenous peoples led to litigation before the Supreme Court of India which upheld their claims on the basis of the provisions under the FRA read with the constitutional rights available to them.<sup>46</sup> The court found that there were irregularities in granting clearance for the acquisition of forest land in this case, particularly on the issue of non-transparent process of obtaining the consent of the indigenous peoples.<sup>47</sup> The court ordered the process of taking consent through the *gram sabhas* to be carried out again in a transparent manner in which the indigenous peoples, the DongriaKondh, unanimously rejected the proposal to set up the bauxite mining project by Vedanta on their sacred lands including the Niyamgiri hills.<sup>48</sup> This stalled the project which was seen as a victory of the indigenous peoples in their struggle to protect the forests and their links of livelihoods and sacredness to the forests.

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<sup>39</sup>*Supra* n.17 at 20.

<sup>40</sup>*Supra* n.37.

<sup>41</sup>*Id.* at 7.

<sup>42</sup>*Supra* n.35 at 19-22.

<sup>43</sup>*Id.* at 16.

<sup>44</sup>*Supra* n.17 at 20.

<sup>45</sup>*Supra* n.35 at 21.

<sup>46</sup>*Id.* at 3.

<sup>47</sup>*Orissa Mining Corporation Ltd. v. Ministry of Environment and Forest & others*, Writ Petition (Civil) No. 180 of 2011 available at [http://www.menschenrechte.uzh.ch/entscheide/Vedanta\\_Orissa.pdf](http://www.menschenrechte.uzh.ch/entscheide/Vedanta_Orissa.pdf) (last accessed on February 20, 2015).

<sup>48</sup>*Id.* at 86-87.

However, this represented a rare victory for the indigenous peoples in the country, many of whom are still fighting a hopeless struggle against the mighty coercion of the state machinery with the financial backing of mining companies who have huge economic interests in the lands occupied by such indigenous peoples.

The state governments as well as the central governments have been responsible for coming out with various executive orders to undermine the power of the *gram sabhas* which are in violation to the order of the Supreme Court. It has been pointed out repeatedly that the procedures under the FRA are non-derogable and the attempts by state governments to divert forest lands in breach of the provisions in the FRA by bypassing the requirement of getting the consent of the *gram sabhas* are illegal in this respect.<sup>49</sup> For example, in October 2014, the Ministry of Environment, Forests and Climate Change (a central government wing overlooking environmental matters and tasked with providing environmental clearances to developmental projects) came out with a notification allowing for transgression to bypass taking of consent from *gram sabhas* for development projects under the FRA in villages which have no recorded population of Scheduled Tribes or other forest dwellers (indigenous peoples) as per the recent census count.<sup>50</sup> This is a clear violation of the FRA since *gram sabhas* are the body entrusted with the task of recording whether indigenous peoples are likely to be affected and its consent is mandatory. Moreover, the census is not always accurate especially in case of indigenous peoples many of whom do not possess the relevant papers to prove their status for the purposes of the census.<sup>51</sup>

Thus, there have been constant attempts by the government to undermine the powers of the *gram sabhas* and the rights of indigenous peoples to free, prior and informed consent or resistance before any development/mining project can be undertaken which may have an impact on the forests and subsequently their livelihoods.

### **Protection of the Right of Free, Prior and Informed Consent of the Indigenous Peoples under International Law**

The ILO Convention No.169 is the foremost legally binding instrument which specifically relates to the rights of the indigenous peoples. The convention recognises the ownership of lands by the

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<sup>49</sup> Letter of the Minister of Tribal Affairs dated December 7, 2012 available at [www.forestrightsact.com/resources-for-activists/item/download/85](http://www.forestrightsact.com/resources-for-activists/item/download/85) (last accessed on February 20, 2015).

<sup>50</sup> Circular of the Ministry of Environment, Forests and Climate Change dated October 28, 2014 available at [http://forestsclearance.nic.in/writereaddata/public\\_display/schemes/1717277111\\$Guideline.pdf](http://forestsclearance.nic.in/writereaddata/public_display/schemes/1717277111$Guideline.pdf) (last accessed on February 20, 2015).

<sup>51</sup> *Supra* n.25 at 38.

indigenous peoples over the territories and resources on it which have been utilised by such peoples.<sup>52</sup> Further, it provides them with autonomy to participate in all levels of decision making with regard to the programmes affecting their rights over such lands which includes the right to be consulted.<sup>53</sup> It places a prerogative on governments to consult the indigenous peoples who may be affected before permitting exploration or exploitation of resources on their lands.<sup>54</sup> Thus, the convention lays down the principle of free, prior and informed consent of the indigenous peoples before undertaking any project affecting the lands to which they traditionally have had access for subsistence.<sup>55</sup>

The UN Declaration on the Rights of the Indigenous Peoples came as a watershed moment for the recognition of the core principles essential for the attention to the rights of the indigenous peoples.<sup>56</sup> Though not a binding document, it lays down in succinct terms the fundamental tenets which are of paramount importance to address the concerns of these peoples. Its adoption by the General Assembly is a victory and a huge step forward in the recognition of these rights and the duties of the States towards the protection of indigenous peoples within their territories.<sup>57</sup> The Declaration provides for participation of indigenous peoples in matters affecting them and to maintain and develop their own decision-making institutions. It places an obligation on States to consult and cooperate in good faith with the indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing any legislative or administrative measures affecting their interests.<sup>58</sup>

These are key instruments which recognise the principle of free, prior and informed consent as fundamental to the protection of the rights of the indigenous peoples.<sup>59</sup>

India is not a signatory to the ILO Convention No.169 on Indigenous and Tribal Peoples. Moreover, the UN Declaration on the Rights of Indigenous Peoples, which is not a legally binding instrument, has been endorsed by it with reservations, one of them being the

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<sup>52</sup> Federico Lenzerini, *Reparations for Indigenous Peoples: International and Comparative Perspectives*, 85 (Oxford University Press 2008).

<sup>53</sup> *Ibid.*

<sup>54</sup> Adelfo Regino Montes & Gustavo Torres Cisneros, *The United Nations Declaration on the Rights of Indigenous Peoples: The Foundation of a New Relationship Indigenous Peoples, States and Societies*, in *MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 138, 157 (Claire Charters & Rodolfo Stavenhagen eds., 2009).

<sup>55</sup> *Supra* n.51 at 85.

<sup>56</sup> Les Malezer, *Dreamtime Discovery: New Reality and Hope*, 29, 29, in *REALIZING THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: TRIUMPH, HOPE AND ACTION* (Jackie Hartley, Paul Joffe & Jennifer Preston eds., Purich Publishing Limited 2010).

<sup>57</sup> *Id.* at 34.

<sup>58</sup> *Supra* n.51 at 87.

<sup>59</sup> *Supra* n.35 at 9.

interpretation that all Indians are indigenous on account of their descent as being distinct from their colonisers, thus, its application in India is unclear.<sup>60</sup> This is a misreading of the concept of indigenous itself as it does not take into account the aspects of a traditional link with the land for sustenance and marginalisation on the grounds of isolation from the general population.<sup>61</sup>

The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognise the right of self-determination of all people which is also relevant for the indigenous people in the form of autonomy to participate in matters relating to their own internal affairs and the principle of free, prior and informed consent is of paramount importance in this regard.<sup>62</sup>

Further, the Committee for the Elimination of Racial Discrimination (CERD) affirmed the right of indigenous peoples to preserve their culture and identity and in this regard States have a responsibility to return such lands belonging to them which had been obtained without their free, prior and informed consent. Failure to do so would entail responsibility for racial discrimination under the International Convention on the Elimination of All Forms of Racial Discrimination.<sup>63</sup>

India is a signatory to the ICCPR, ICESCR and the Convention against Racial Discrimination and thus has an obligation to consult the indigenous peoples before initiating any mining or development project which may have an impact on their livelihood.<sup>64</sup>

### **Recommendations for the Protection of the Autonomy of *Gram Sabhas* to the Civil Society and the Government of India**

In suggesting measures to be taken, especially by States, the Outcome Document of the Global Indigenous Preparatory Conference for the United Nations World Conference on Indigenous Peoples, which took place in Alta, Norway, June 8-13, 2013, is a key reference document for the

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<sup>60</sup>Response of the Indian representative, Ajai Malhotra at the UN General Assembly available at <http://www.un.org/press/en/2007/ga10612.doc.htm> (last accessed on February 20, 2015).

<sup>61</sup>Virginia Xaxa, *Tribes as Indigenous Peoples of India*, 3589, 3589 (Economic & Political Weekly, Vol. 34, No.51 December 1999).

<sup>62</sup>John B Henrikson, *The UN Declaration on the Rights of Indigenous Peoples: Some Key Issues and Events in the Process*, in *MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 78, 80 (Claire Charters & Rodolfo Stavenhagen eds., 2009).

<sup>63</sup>*Supra* n.51 at 94.

<sup>64</sup>*Supra* n.35 at 10.

measures which shall be the guiding principles in upholding the rights of the indigenous peoples.<sup>65</sup>The recommendations below generally reflect the outcome in Alta Conference.

Further, the UN Guiding Principles on Business and Human Rights stresses on the prerogative that companies should conduct human rights due diligence process in order to identify, prevent and mitigate the impact of their operations on human rights. States can impose this on companies where significant risk to human rights can be foreseen.<sup>66</sup>

Above all, the government must ensure respect for the importance of the rights granted to the indigenous peoples since under the Constitution of India and the domestic legislations, read with the judgment of the Supreme Court, the government (central and state) has an obligation to protect the provision of free, prior and informed consent of the indigenous peoples through the *gram sabhas* before initiating any project, policy or other programmes which may have an impact on their rights.

Thus, it is suggested that the government undertakes the following steps:

- Immediately ratify the ILO Convention No.169 and respect the principles enshrined in the UN Declaration on the Rights of the Indigenous Peoples in all spheres of policy-making and decision-making;
- Ensure that the principles in the UN Declaration upholding the rights of the indigenous peoples are respected in local laws, policies and procedures, all forms of decision-making, national laws, administrative and executive programmes, etc;
- Ensure full participation of indigenous peoples in matters affecting their interests by giving full credence to their own self-autonomous institutions which are important to their participation in decision-making having an impact on their lives;
- Consider the institution of *gram sabhas* sacrosanct as the protector of the non-derogable right of free, prior and informed consent of indigenous peoples before allowing any developmental/mining project on lands traditionally occupied by such peoples. In this regard, the judgment of the Supreme Court must be respected and no derogation must be attempted from the requirement of taking the consent of the *gram sabhas*;

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<sup>65</sup>Alta Conference Outcome Document available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N13/474/69/PDF/N1347469.pdf?OpenElement>(last accessed on February 20, 2015).

<sup>66</sup>Guiding Principles on Business & Human Rights, 3 (United Nations Human Rights Office of the High Commissioner 2011) available at [www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) (last accessed on February 20, 2015).

- Work closely with the civil society to sensitise the government officials to the importance of rights of the indigenous peoples in considering developmental/mining projects and to be mindful of the impact which such projects may have on the survival of the cultures, traditions and languages of the indigenous peoples;
- Ensure that the ecological balance in the areas affected by the projects is maintained and in this endeavour must include the participation of indigenous peoples themselves as well as other environmental organisations and the companies;
- Ensure that the companies undertaking developmental/mining projects strictly comply with the provisions under FRA at all stages before and after obtaining the consent of the *gram sabhas*.

The civil society must ensure that the institution of *gram sabhas* is functioning in an autonomous, transparent and impartial manner for the benefit of the indigenous peoples. This can be done by taking the following steps:

- Ensuring that minutes and videography of the proceedings of the *gram sabhas* are recorded;
- Conducting fact finding missions to record the concerns of the indigenous peoples where developmental/mining projects are proposed to be undertaken;
- Working with the relevant local organisations to ascertain the impact of such projects on the ecology, social and cultural life of the indigenous peoples, wildlife, etc., in such areas;
- Informing the indigenous peoples of the findings independent of the information provided by the companies and the state governments to the *gram sabhas*;
- Overseeing the resettlement programme in case the *gram sabhas* so give their consent to a project and ensuring that each stage of the programme is undertaken without any detriment to the indigenous peoples;
- Working closely with the relevant government authorities, the companies, indigenous peoples and other institutions/organisations in the interests of a balance between the rights of the indigenous peoples, the ecological concerns in such areas and economic development and ensuring that under no circumstances the rights of the indigenous peoples which are closely linked to their sustenance and also the survival of the forests are sacrificed in favour of economic development.

