Environment Impact Appraisal (EIA)- Greater role for project-affected communities and Gram Sabhas in decision making

Articles 48A and 51A of the Constitution obligate the State and the citizen respectively to protect and improve the environment. The Environment (Protection) Act, 1986 (EPA1986), Environment (Protection) Rules, 1986 (EPR86) and EIA Notification of 2006 (EIA2006) have laid down an elaborate procedure for appraising the environment impact of projects and for putting in place the necessary safeguards, while taking decisions on such projects. “Public consultation” is an important stage in this procedure.

The purpose of public cnsultation is to take into account the “concerns of local affected persons and others who have plausible stake in the environmental impacts of the project or activity”.

The important stakeholders in the EIA process are the project proponent, the government, the communities likely to be affected and such others who may have a direct or an indirect stake in it. With a view to simplify the procedure from the point of view of the government and the project proponent, the EIA Notification of 2006 provided several exceptions, including exemption from the mandatory requirement of the public consultation process in certain cases. As evident from the draft EIA Notification of 2020 (draft EIA2020) published recently, the Ministry of Environment, Forests and Climate Change (MEFCC) has proposed further simplifications, largely in favour of the project proponent, that tend to restrict the requirement for the public consultation process.

At present, the public consultation process is structured on highly ad hoc lines. It does not afford an equal opportunity to all those likely to be affected by the proposed project either in the matter of understanding the environment implications of the

project fully or for expressing their views, apprehensions and objections to it. The local Panchayats, the Gram Sabhas, the local municipalities and the Ward Committees which are concerned with the communities likely to be affected by the project are not given their due importance, though they are bodies created under the Constitution. As a result, the public consultation process which constitutes an essential stage in the EIA process is reduced to a formality that the authorities usually wish to fulfil in a haste, rather than using it as an effective instrumentality for participative decision making.

The reason for this is primarily that the government largely follows the "Decide-Announce-Defend (DAD)" approach, rather than the more appropriate "Engage-Deliberate-Decide (EDD)" approach (1). In the former approach which seems to dominate today, the process is tilted heavily against the affected communities, as they are forced to face a fait accomli situation in which the decision to site the project has already been taken. Usually, even the land acqisition process stands finalised and the lands of the community members forcibly taken before the EIA process begins. In the public consultation process which is held as a part of the EIA procedure, the objections of the affected persons, if any, are viewed more as an avoidable irritant than a valuable means to elicit their concerns about the way the project affects their lives.

The EIA reports are prepared by consulting firms who are chosen and paid for by the project proponents. The consulting firms view the exercise more as a commercial proposition than as an onerous responsibility to analyse the environmental impacts in a comprehensive, scientific manner to enable the affected communities to understand the implications accurately and express their views in a meaningful manner. In the EIA reports, there are many gaps in scientific knowledge (2). For example, EIA reports on many coal-based power projects are silent on the presence of mercury and radioactive isotopes in the coal that is used and its long-term adverse impact on the health of the people. Such a glaring omission took place partly as a result of the lack of adequate scientific knowledge at a given point of time and partly as a result of the

routine manner in which such reports are prepared. Subsequently, on complaints received from the local residents about serious health problems, some agencies carried out scientific studies on the same and found that such toxic pollutants caused health problems. In other words, the EIA reports are generally inadequate and biased more in favour of the project proponent than the affected communities. There is an information asymmetry that places the affected communities at a disadvantage in a public consultation process.

When a project is set up, there may be both risks and returns for the project promoter as well for the communities at the receiving end of the project. However, the values assigned by the project propoenent to the risk-return profile of a project may differ significantly from those perceived by the affected communities. The prime reason for this is that the communities residing in the vicinity of the project site have their lives symbiotically linked to the local environment and its natural resources. The local environment provides them sustenance and livelihood. Their culture and socio-economic milieu is determined by the local ecology which the proposed project may interfere with, causing disruption to their lives. Considering the need to harmonise development with the protection of the environment of which the local communities are an integral part, it is imperative that their assessment of the risks and the returns from the project are elicited and evaluated before a decision is taken on such crucial aspects as the siting of the project, its size and the safeguards required to minimise the social costs and maximise the social benefits. The present approach i.e. DAD usually makes the project a fait accompli for the affected communities.

Once the government takes a decision on a project, the entire government machinery moves in the direction of acquiring the land required for it and obtaining the necessary clearances. Such clearances are rarely denied. In the specific case of statutory Environment Clearance (EC), thouh EPA1986 has empowered the Ministry of Environment, Forests and Climate Change (MEFCC) to constitute an independent quasi-judicial authority to oversee the EIA process, grant EC and monitor its compliance, MEFCC has not so far set up any such authority. In the absence of it, the

EIA process is supervided by the executive that is subject to political control. That is the reason why projects are cleared under EPA1986 and EIA2006 in a routine manner and violations of the EC are rarely questioned. For example, though EIA2006 has stipulated that no project should be taken up without prior EC, projects are allowed to be taken up without fulfilling that condition. The Polavaram Irrigation project which has displaced lakhs of adivasis is one such project. MEFCC is allowing project to be constructed without a valid EC, depriving the displaced adivasis of the individual and the community occupation rights to which they are entiltled under the Forest Rights Act (FRA) i.e. the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act. Though both FRA and PESA vest considerable authority in the local Gram Sabhas on several matters including projects that affect the adivasi lives and livelihoods, the so-called “public consultation” process failed to elicit the Gram Sabhas' views and consent. The aderse impacts of such projects on the environment are mostly irreversible and once such an impact has taken place, it is difficult to reverse it. Such violations therefore defeat the letter and the spirit of Article 48A and the provisions of EPA1986.

As already stated, the EIA process and the monitoring of implementation of the EC are presently administered by MEFCC. Though Section 3(3) of the EPA1986 empoers MEFCC to constitute an independent statutory authority to attend to these functions and suchother functions mandated in the Act, MEFCC is yet to constitute such an authority. The apex court has, in the Lafarge case (3), has issued a mandamus to MEFCC to institute such an authority but MEFCC is yet to comply with the same. In the absence of such an statutory authority that functions in a transparent and a judicious manner, the EIA process has remained ad hoc and non-compliance with the conditions precedent to the EC rarely questioned.

Importance of the public cnsultation process:

Hon'ble Supreme Court, in their Order dated 29-3-2019 in Civil ppeals No. 12251/2018 & 1053/2019 emphasised the importance of the public consultation process in the EIA process in the following words.

"*100. The importance of public consultation is underscored by the 2006 notification. Public consultation, as it states, is 'the process by which the concerns of local affected persons and others who have a plausible stake in the environmental impacts of the project or activity are ascertained with a view to take into account all the material concerns in the project or activity design as appropriate'. This postulates two elements. They have both, an intrinsic and an instrumental character. The intrinsic character of public consultation is that there is a value in seeking the views of those in the local area as well as beyond, who have a plausible stake in the project or activity. Public consultation is a process which is designed to hear the voices of those communities which would be affected by the activity. They may be affected in terms of the air which they breathe, the water which they drink or use to irrigate their lands, the disruption of local habitats, and the denudation of environmental eco-systems which define their existence and sustain their livelihoods.*

101 Public consultation involves a process of confidence building by giving an important role to those who have a plausible stake. It also recognizes that apart from the knowledge which is provided by science and technology, local communities have an innate knowledge of the environment. The knowledge of local communities is transmitted by aural and visual traditions through generations. By recognizing that they are significant stakeholders, the consultation process seeks to preserve participation as an important facet of governance based on the rule of law. Participation protects the intrinsic value of inclusion"

<u>Role of the Gram Sabhas, the Gram Panchayats and the municipal Ward Committees in public consultation</u>:

The Eleventh and the Twelfth Schedules to the Constitution list the functions that the

States may entrust to the Gram Panchayats. The Gram Panchayats derive their authority from the Gram Sabhas. The States have enacted their respective laws on the Panchayatraj institutions. For example, the AP Panchat Raj Act (APRA1994) has empowered the Gram Panchayat in a wide range of activities that include the management of the public lands, water bodies, village forests, activities aimed at promoting the safety, health, sanitation, convenience, comfort and moral, social and material well being of the residents of the village. To exclude such institutions (Gram Panchayats and Gram Sabhas) in public consultation which forms part of the EIA process does not stand to reason. A similar reasoning should apply to the municipal Ward Committees.

Role of the Gram Sabh in decision making under EPA1986:

Under PESA and FRA, as already stated, the adivasi Gram Sabhas in the Scheduled Areas have been vested with authority in the matter of permitting projects and other ecoomic activity. The apex court has reiterated this in detail in the Vedanta case (Bauxite mining in Odisha).

Outside the Scheduled Areas, the Right to Fair Compensation and Transparency in Land Acquisition, Rahabilitation and Resettlement Act, 2013 (RFCTLARRA2013) has landmark provisions on partivipative decsion making in land acquisition.

The preamble to RFCTLARRA2013 reads as follows.

"*An Act to ensure, in consultation with institutions of local self-government and Gram Sabhas established under the Constitution, a humane, participative, informed and transparent process for land acquisition for industrialisation, development of essential infrastructural facilities and urbanisation with the least disturbance to the owners of the land and other affected families and provide just and fair compensation to the affected families whose land has been acquired or proposed to be acquired or are affected by such acquisition and make adequate provisions for such affected persons for their rehabilitation and resettlement and for ensuring that the cumulative*

outcome of compulsory acquisition should be that affected persons become partners in development leading to an improvement in their post acquisition social and economic status and for matters connected therewith or incidental thereto"

Sections 4 to 8 of that Act provide for an elaborate Social Impact Assessment (SIA) study that evaluates the social costs and the social benefits of a project, independently peer-reviwed, to be made available in the local language to the affected families, the local bodies in whose areas the project will have an impact so that they may take part in the decision making process. Section 4(4) of the Act requires the SIA to address the following issues.

a) whether the proposed acquisition serves public purpose;
b) estimation of affected families and the number of families among them likely to be displaced;
c) extent of lands, public and private, houses, settlements and other common properties likely to be affected by the proposed acquisition;
d) whether the extent of land proposed for acquisition is the absolute bare-minimum extent needed for the project;
e) whether land acquisition at an alternate place has been considered and found not feasible;
f) study of social impacts of the project, and the nature and cost of addressing them and the impact of these costs on the overall costs of the project vis-a-vis the benefits of the project:

Section 2(2)(b) of the Act makes it mandatory, in the case of acquisition of land for a public purpose, for private companies, the prior consent of at least eighty per cent, of the affected families, and, for public private partnership projects, the prior consent of

at least seventy per cent. of the affected families. Section 4(4) also requires that the EIA study for the project shall be carried out simultaneously and shall not be contingent upon the completion of the Social Impact Assessment study.

Section 10 of RFCTLARRA2013 stipulates a minimum threshold of land under agriculture to be maintained for each region in order to ensure food security.

The legislative intent underlying these provisions is clear. If there are risks and returns from the project for the project proponent, there are a different set of risks and returns for the affected families. In the case of the latter, the costs arise from displacement, degradation of the environment on which they critically depend and loss of natural resources that provide them sustenance. Usually, the costs imposed on the affected families are not fully assessed and taken into account while a decision on the project is taken, as such a decision is taken long before the EIA process and any consideration of the social costs incurred by the affected families assumes a lower priority. This places the affected families at a serious disadvantage.

The doctrine of equality is enshrined in the preamble to the Constitution ("equality of status and of opportunity") and spelt out in Article 14 as a fundamental right ("the State shall not deny to any person equality before the law or the equal protection of the laws"). By treating the project-affected families as "partners in development", RFCTLARRA2013 has implicitly recognised their right to equality. The power to take a decision on land acquisition as per this Act is shared by the affected families. The same Act also provides a pre-eminent role for the local bodies including the Gram Sabhas. The same Act requires the EIA process to take place simultaneously. The ambit of the SIA overlaps to some extent that of the EIA. Considering that RFCTLARRA2013 is a more recent Act compared to EPA1986, adopting a constructive interpretation of both the Acts read together, it will stand to reason that the same right to equality will be available to the affected families and the local bodies under the EPA1986, as in the case of RFCTLARRA2013.

1. https://lup.lub.lu.se/luur/download?

fileOId=2172960&func=downloadFile&recordOId=2172946

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2. Antina Sander: Thesis for the fulfilment of the Master of Science in Environmental Management and Policy, Lund, Sweden, September 2011 “From ‘Decide, Announce, Defend’ to ‘Announce, Discuss, Decide’? Suggestions on how to Improve Acceptance and Legitimacy for Germany’s 380kV Grid Extension”