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THE LEGAL ORIGIN OF THE PRINCIPLE OF 'FREE, PRIOR, INFORMED CONSENT' AND ITS APPLICATION TO NATURAL RESOURCE PROJECT DEVELOPMENTS

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ABSTRACT

Natural resources are key to development of many nations, based primarily on the age old Smithian principle of comparative advantage. However, natural resource exploitation raises key problems to the indigenous populations in the areas of natural deposits, including, but limited to conflicts, environmental degradation, displacement, non recognition of cultural rights, destruction of cultural sites, and inequitable distribution of resources from the said exploitation. All these problems are compounded by institutional bottlenecks of government bureaucracy and corruption, as well as the legal and policy lacuna of various countries in respect to protection of such rights of the indigenous peoples. In the context of Africa, these problems are exacerbated by the current wave of exploitation led by China and India, which countries do not tie human rights and governance guidelines to their contracts of engagement with African governments. In this article, the author argues that it is only the principle of free, fair and prior informed consent that can lead to sustainable resource project development. However, there are key challenges, namely, corruption, secrecy, nepotism and lack of legal and institutional regime to enforce the principle of free prior informed consent. The author asserts that these can be addressed through effecting institutional reforms aimed at ensuring that the systems for natural resource project development are transparent and accountable; and to build technical expertise of the various government officials as regards to exploitation of natural resource development projects in indigenous territories.

KEYWORDS

Natural Resource Project Development, Indigenous Peoples Rights, Africa, Principle of Free Prior Informed Consent, Kenya, Emerging Economies, China.

BACKGROUND: NATURAL RESOURCE EXPLOITATION AND INDIGENOUS PEOPLES RIGHTS

The exploitation of resources is a natural right of any government. However, the process of such exploitation in areas occupied by indigenous peoples often leads to allegations, and sometimes evidence, of human rights abuses, destruction of cultural centres and sites, inequitable sharing of benefits, and forced relocation of the communities. All these lead to the need to find a better way for countries to exploit their natural resources while at the same time, respecting the rights of the indigenous peoples.

Development projects and operations, legal and administrative regimes have had and continue to have a devastating impact on indigenous peoples, undermining their ability to sustain themselves physically and culturally. These threats have been documented by many studies and experiences that the Principles of FPIC of IPs to development projects and plans that may affect them has emerged as the desired standard to be applied in protecting and promoting their rights in the developmental process¹. Indeed, the World Bank's Extractive Industries Review (EIR) concluded that recognition and implementation of the rights of affected people to prior and informed consent is a necessary condition for extractive projects to be successful in contributing to poverty alleviation and sustainable development.

The Principle of 'Free, Prior, Informed Consent' (FPIC), is a key tool in relation to development projects affecting indigenous peoples, ensuring that:

- i. Indigenous peoples are not coerced, pressured or intimidated in their choices of development;
- ii. Indigenous peoples' consent is sought and freely given prior to the start of development activities;
- iii. Indigenous Peoples have full information about the scope and impacts of the proposed development activities on their lands, resources and well being;
- iv. Indigenous peoples' choices to give or withhold consent over developments affecting them is respected and upheld.

Indigenous Peoples' right to free, prior and informed consent (FPIC) has been recognized by a number of intergovernmental organizations, international bodies, conventions and international human rights law in varying degrees and increasingly in the laws of State².

FREE, PRIOR, INFORMED CONSENT IN NATURAL RESOURCE DEVELOPMENT PROJECTS

Definition and Scope

Free, prior and informed consent (FPIC) refers to the rights of local communities, particularly indigenous peoples, to participate in decision making about issues impacting them. Examples include natural resource management, economic development, uses of traditional knowledge and genetic resources, health care and education. The role of indigenous peoples' FPIC in decisions about infrastructure or extractive industries developed on their ancestral domain is of concern within international law.³

The following elements, but shall not be limited to, are a set of core principles of FPIC in relation to indigenous peoples:

The principle of FPIC recognizes IPs' inherent and prior rights to their lands, territories and resources and respects their legitimate authority and requires processes that allow and support meaningful choices by indigenous peoples about their development path.

The principle of FPIC is central to IPs' exercise of their right to self-determination with respect to developments affecting them⁴.

In International Sphere

The principle of FPIC within international development is most clearly stated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Article 10 states:

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.⁵

Articles 11, 19, 28 and 29 of the declaration also explicitly use the term.⁶ It is also established in international conventions, notably the ILO Convention 169 on Indigenous and Tribal Peoples. Countries including Peru, Australia and the Philippines have included FPIC in national law.⁷

ILO 169/1989 refers to the principles of FPIC: Article 6, 7, 16, 16 and 22 provides that the government shall consult the peoples concerned, through appropriate procedures prior to exploration or exploitation of sub-surface resources (article 15.2); when any consideration is being given to indigenous and tribal peoples' capacity to alienate their lands or to transmit them outside their own communities (article 17); and prior to relocation, which should take place only with the FPIC of IPs (article 16).

Further, Article 15 of the CBD provides: "Respecting established legal rights of indigenous and local communities associated with the genetic resources being accessed or where traditional knowledge associated with these genetic resources is being accessed, the prior informed consent of indigenous and local communities and the approval and involvement of the holders of traditional knowledge, innovations and practices should be obtained, in accordance with their traditional practices, national access policies and subject to domestic laws."

Also, the Cartagena Bio-Safety Protocol (2000) to CBD applies to the transboundary movement, transit, handling and use of all living modified organism that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health.

Interpretation of the principle of FPIC should be embedded in international human rights instruments, conventions and in UNDD on the rights of IPs, which provides a comprehensive set of indigenous peoples rights.

Finally, the Rotterdam Convention on the Prior Informed Consent procedure for certain hazardous chemicals and pesticides in international trade, 1998 (Enforced in February 2004) applies to banned or severely restricted chemicals; and severely hazardous pesticide formulations that may impact on human health and the environment. This Convention was developed on the works undertaken by the UNEP and FAO in the operation of voluntary prior informed consent procedure, as set out in the UNEP amended London guidelines for the Exchange of Information on Chemicals in International Trade and the FAO International Code of Conduct on the Distribution and Use of Pesticides.

In summary, international law provides, explicitly for protection, guarantee, and promotion of the rights of the indigenous peoples in the process of exploitation of natural resources.

In Kenya

Kenya does not have a national legislation on the free, prior and informed consent of indigenous peoples for all activities affecting their lands and territories. Under Article 63, community land shall vest in and be held by communities identified on the basis of ethnicity, culture or similar community of interest. Article 56 specifically provides for the affirmative action for minorities and marginalized groups through programmes designed to ensure that they participate and are represented in governance and other spheres of life, are provided special educational and economic opportunities, access to employment, programmes to develop their cultural values, languages and practices and also ensure that they have reasonable access to water, health services and infrastructure. Article 7 of the new constitution obliges the state to promote and protect the diversity of language of the people of Kenya. The state is also obliged to promote the development and use of indigenous languages. Article 11 recognizes culture as the foundation of the nation and obliges the state to promote all forms of cultural expression through literature, the arts, traditional celebrations, science, communication, information, mass media, publications, libraries and other cultural heritage.

RECOMMENDATIONS

Various strategies can be implemented by governments to ensure that the indigenous peoples experience the benefits of free, prior and informed consent, and consequently, enjoy development benefits. These include reforms in the legal framework, promotion of participatory development, and enforcement of the rights, as below:

Participatory Development

Participation of indigenous peoples is key to the design, decision, implementation and evaluation of any activity in providing FPIC. Through participatory development, the indigenous peoples can influence and share control over development initiatives, and over the decisions and resources that affect their lives⁸. For effective participation, the citizens must be capacitated through information so as to make informed choices.⁹ In *Development as Freedom*, Sen argued that individuals act in their best interest whenever they have the choice, that is, when they possess adequate knowledge.¹⁰ Indeed, for truly participatory development to take place anywhere in a modern nation state, the people must have access to information. Information ensures public awareness from which people can make informed choices, such as assessment of political and economic regimes. Confucius warned long ago that, "*The people may be made to follow the course of action; but they must be made to understand it.*"¹¹ Access to information makes people understand the course of action. Further, Professor Michael Todaro (1977) sees three objectives of development as producing more „life sustaining“ necessities such as food, shelter, and health care and broadening their distribution; raising standards of living and individual self esteem; and expanding economic and social choice and reducing fear. He thus puts participation of the indigenous communities at the centre of development.¹²

Legal Enactment and Recognition

FPIC is an established feature of international human rights norms and development policies pertaining to indigenous peoples. Legislative and administrative measures, development projects planning and all activities affecting indigenous peoples' culture, history, traditional knowledge, lands, territories, natural resources, genetic resources, climate, environment, arts and artifacts, historical and sacred sites require FPIC. There is need to have internationally agreed definition or understanding of the principle or mechanism for implementation. Further, FPIC should be recognized legally in national legislation and FPIC should be legally enforceable through the courts.

Definition and Interpretation of FPIC Concepts

Definition of Terminologies such as Free, Prior, Informed and Consent is required formally. This will make FPIC to be fitted, easily, into the core principles and elements as a practical tool for providing technical guidance to policy makers and actors, whether in national or local government, the private sector, multinationals, indigenous and local communities and other organizations; and whether in regional or international level or UN agencies at interagency level – country offices in CCA, UNDAF and MDGS. Further, the interpretation of the principle of FPIC should be embedded in international human rights instruments, conventions and in draft declaration on the rights of IPs, which provides a comprehensive set of indigenous peoples' rights. Such interpretation will make the principle of FPIC an obligatory methodology for the States and project developers in activities relating to indigenous peoples.

Applying the Human Rights Based Approach

The principle of FPIC should be implemented based on human rights approach. This approach promotes, protects and defends the rights – particularly the social, economic and cultural rights – of the most vulnerable and marginalised as being integral to sustainable development¹³. The African governments should avoid their polarisation and ensure that all rights – including social, economic and cultural rights – are protected and promoted. To avoid the usual polarisation between the latter rights and political and civil rights, it is suggested that a human-rights-based approach to development be adopted. Such an approach combines social, economic and cultural rights with civil and political rights, and the building of a just, equitable social contract between State and citizen.¹⁴

A human-rights-based approach will also assist in linking the human rights agenda to the broader development agenda, capacitating the people to enjoy development results¹⁵. The current discourse on human security and human rights is very relevant to the AU agenda. A human rights approach would also require governments to develop clear plans of action with targets, objectives and measures for achieving them, and to allocate substantial resources to their achievement¹⁶.

Further, Samuel Huntington's modernity theory in development propounds development (of which resource exploitation is a part) to be a linear process which every country must go through, with the state as the central actor in modernizing "backward" or "underdeveloped" societies. He hence put the state at the centre of development, and deductively, the chief duty bearer.¹⁷

Contesting claims between States and other stakeholders including IPs should be resolved and have clear institutional arrangements (mechanism) for monitoring compliance and redress of grievances.

Empirical Studies & Environmental Impact Assessments

The governments, and other stakeholders, advocacy organisation, and civil society groups, should commission case studies to explore the possibility of developing international legal frameworks on the principles of FPIC in order to elaborate and harmonize the implementation of the UN Agencies in relation to indigenous peoples and local communities. This is both a requirement in international and national laws, as well as a prudential feature of community led development efforts.

CONCLUSION

Africa is a rising continent. New resources are being discovered, and commercial exploitation are being executed, with mixed results of related development, as well as corruption. It is important that Africa develops a novel methodology of engaging the players in the public resource management arena in indigenous areas, so that the development gravy train of Africa can trickle down, and cause real change in human development indices, and not just percentage bleeps in

Gross Domestic Products (GDPs) and other national macroeconomic indicators, while leading to human rights abuses, and lop sided development in the indigenous regions. It is only through such approach that development will lead to the expansion of capabilities; production of necessities; and the enhancement of social choice and effectively give the people the freedom and capacity to choose *how* they want to live.¹⁸

Further, Professor Dudley Seers¹⁹ argues that development is about outcomes, that is, development occurs with the reduction and elimination of poverty, inequality, and unemployment within a growing economy. Effectively, there is need for the states to ensure equitable distribution of resources to the indigenous communities.

In addition, Ekins has argued for *development from below*, as the philosophy and action of *learning* from below. Development from below seeks to consult first with "those who are last" in determining the development agenda. The spinal cord of development from below is participation of the people in formulating the plans, implementing them and participating in the sharing of benefits resulting from such developmental processes. This view is very representative of the principle of participatory development.²⁰ To this end, participation by indigenous communities in resource extractions in their communes is non-negotiable.

Finally, there is need to differentiate state sovereignty from state resources. There is an argument that FPIC contravenes state sovereignty in general, including state sovereignty over natural resources. To quote a line from American TV Drama, *Madam Secretary*, on a scene where China and Japan are conflicting on natural resources, the American Secretary of State says "*we have proven that we can share natural resources without splitting natural sovereignty.*"²¹

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