

FOREST RIGHTS ACT VIOLATION AT POSCO SITE, ORISSA AND HOW TO RESOLVE SUCH CONFLICTS IN FUTURE

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The POSCO-India project in the Jagatsinghpur District of Orissa involved setting up of a steel plant that required an estimated investment of 12 billion US dollars. More than three-fourths of the land that needed to be acquired for the project was inhabited by the tribals and after passing of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forests Rights) Act, 2006 (hereinafter "Forest Rights Act"), they could not be displaced until their rights were settled. Unfortunately, the said Act was not properly implemented. Consequently there were widespread protests against the project. The final clearance however was granted in May, 2011. This paper shall show that in order to avoid conflicts like the POSCO situation in the future, there is a need to lay down a clear environmental clearance policy in India. The paper would firstly deal with the background, benefits and drawbacks of the POSCO project. Secondly, the historical injustice meted out to the tribals shall be discussed to elucidate on the paradigm shift brought about by the Forest Rights Act. Thirdly, the Forest Rights Act violation at the POSCO site in Orissa shall be discussed. The paper shall conclude by stating that in the process of granting of environmental clearance, the stage of public consultation needs to be given more weightage and social impact assessment needs to be incorporated. Social impact assessment is provided in the Rehabilitation and Resettlement Bill,

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2007, a Bill that deals with benefits and compensation that needs to be given to people displaced by land acquisition purchases.

I. INTRODUCTION

In a growing economy like India's, the question of equilibrium between "development" and "displacement" assumes the focus of debates, discussions and the consequent policy formulation. India embarked on its journey of independence by adopting economic policies which focused on increasing the Gross National Product (GNP)¹, which was symbolized by new factories, dams, mega projects, mining, etc.² The erstwhile Prime Minister, Jawaharlal Nehru, armed with socialist faith in an interventionist State and an aristocratic disdain for consumerism, tried to transform India into a giant of heavy industry.³ This State-directed policy resulted in some genuine and substantial gains⁴, however, it also raised issues like slow growth, rising unemployment, and

¹ Gross National Product is the total value of all the goods produced and services provided by a country in one year. See BBC ENGLISH DICTIONARY 509 (1st ed. 1992).

² Biswarajan Mohanty, *Displacement and Rehabilitation of Tribals*, 40 (13) ECO & PL. WEEKLY 1318 (2005) (These mega projects have provided power to growing industries, irrigation to thirsty lands and above all, have brought economic prosperity to the nation).

³ Ramesh Thakur, *India in the World: Neither Rich, Powerful, nor Principled*, 76 FOREIGN AFFAIRS 15 (1997); Dipankar Bhattacharya, *Political Economy of Reforms in India*, 34 (23) ECO & PL. WEEKLY 1408 (1999) (Nehru described India's economic policies as one oriented towards a socialistic pattern of society); V. M. Dandekar, *Indian Economy since Independence*, 23 (1/2) ECO & PL. WEEKLY 41 (1988) (The objective of these policies was promotion of rapid and balanced economic development with equity and justice).

⁴ Ramesh Thakur, *India in the World: Neither Rich, Powerful, nor Principled*, 76 FOREIGN AFFAIRS 15, 15 (1997) (Indian economy grew three times faster during 1950s and 1960s than that during British rule).

forced displacement of tribals, which is relevant for the present paper.⁵

Most of the mineral resources of the country are in tribal areas and exploitation of these for the benefit of the country will entail displacement of tribals but that does not mean that their rights are totally disregarded.⁶ Their situation has deteriorated so much that these people, who for centuries have lived in a relative state of sufficiency and managed their own socio-culture systems without external interventions, now need protection, aid and advice.⁷ This situation has arisen despite the fact that the first Prime Minister of the Country had enunciated Panchsheel principles of tribal policy, also known as Magna Carta principles, way back in 1959.⁸

In order to remedy the situation, successive central governments have passed a number of policies and legislations

⁵ Mohanty, *supra* note 2 (Tribal areas produce most of the country's coal, mica, bauxite and other minerals).

⁶ Gabriele Dietrich, *Dams and People Adivasi Land Rights*, 35 (38) *Eco & PL. WEEKLY* 3379 (2000) (60 per cent of all the people displaced by large-scale development projects have been tribals).

⁷ Suguna Pathy, *Destitution, Deprivation and Tribal 'Development'*, 38 (27) *Eco & PL. WEEKLY* 2382 (2003).

⁸ Rudolf C. Heredia, *Interrogating Integration: The Counter-Cultural Tribal Other*, 37 (52) *Eco & PL. WEEKLY* 5174 (2002) (These principles were proclaimed by Nehru in his foreword to Verrier Elwin's philosophy for North-East Frontier Agency (NEFA) and are: (a) people should be allowed to develop on the lines of their own genius and nothing should be imposed upon them; (b) tribal rights on land and forests should be respected; (c) induction of too many outsiders into tribal areas should be avoided; (d) as far as possible, there should not be over administration of tribal areas, and (e) the results should not be judged by the amount of money spent but by the quality of human character that is involved); PLANNING COMMISSION, GOVERNMENT OF INDIA, *Report of the Steering Committee on Empowering the Scheduled Tribes for the Tenth Five Year Plan (2002-2007)* (2001) (Second Five Year Plan proclaimed that the principles of 'Panchsheel' should be specially adopted in the approach to tribal development as a recognition of the importance of tribal culture and traditions).

which seek to protect the rights of tribals. This paper seeks to analyze these policies and laws in the background of the recent POSCO issue.

II. THE POSCO⁹ -INDIA PROJECT IN ORISSA- BACKGROUND, BENEFITS AND DRAWBACKS

The POSCO-India project was envisaged by the erstwhile Chief Executive Officer (CEO) of POSCO, Ku-Taek Lee.¹⁰ What led him to imagine a project in India included a number of factors such as the capital and world class technological strength of POSCO, the resources of Orissa and the potential of the Indian people. The decision for the POSCO-India project was finalized by the Government of Orissa and Korea in 2004 and a memorandum of understanding was signed between the two on 22nd June, 2005. As per the memorandum¹¹, the Company was to set up a 12 million-tonne per annum green field steel plant near Paradip, Jagatsinghpur District, Orissa with an estimated investment of 12 billion US dollars. The Company was to build a 4 million tonne per annum capacity steel plant during the first phase of the project by 2011-12

⁹ The Pohang Iron and Steel Company or POSCO was established in 1968 in Pohang, South Korea to meet the demand of steel in a country that had been demolished by Japanese colonial rule and which was heading towards infrastructural development and modernization. POSCO's meteoric growth was paralleled by the development of Korea as a globally competitive nation. The company was privatized in 2000. According to the World Steel Dynamics, 2006 POSCO became the fourth largest steel producer in the world. It has production bases and sales foothold across the globe and has also been evaluated as the top global company with corporate transparency and sound financial infrastructure. *See Background, POSCO INDIA*, <http://posco-india.com/website/company/background.htm> (last visited Aug. 31, 2011).

¹⁰ *Id.*

¹¹ Memorandum of Understanding between the Government of Orissa and M/s POSCO for Establishment of an Integrated Steel Plant at Paradeep, available at <http://www.orissa.gov.in/posco/POSCO-MoU.htm> (last visited Aug. 31, 2011).

and then eventually expand the production up to 12 million tonne per annum. In turn, the Government of Orissa was to provide adequate land, water, power, attached minor port, iron ore mines, SEZ recommendation, issue various clearances and facilitate assistance.¹² For this purpose, POSCO-India Pvt. Ltd was incorporated on 25th August, 2005 with the Registrar of Companies, Orissa, under the Companies Act, 1956.

National Council for Applied Economic Research (NCAER) carried out an analysis of the POSCO project and in its report stated that the establishment of the steel plant would help India achieve some of the objectives laid down in the National Steel Policy, 2005. It further observed that if the steel plant was set up then 870,000 person years¹³ of additional employment would be generated each year over the next 30 years. This would translate into Rs 29,800 crores worth of additional output for Orissa and would contribute 11.5% to Orissa's State Domestic Product (SDP) by 2016-17. It also mentioned that if the POSCO-India project was set up in an SEZ area, then it would generate accumulative tax revenue of Rs 174, 970 crores in nominal terms, to the State Government of Orissa and the Government of India over the next 35 operating years.

However, in order to get a holistic view of the proposal to set up a steel plant, the drawbacks associated with the project need to be examined. A Central fact-finding Committee headed by retired judge of the Bombay High Court, Justice H. Suresh, noted that most of the land that had been proposed

¹² R. Venkatesan, National Council for Applied Economic Research, Social Cost Benefit Analysis of the POSCO Steel Project in Orissa (Report) (Jan. 2007), *available at* http://www.gate4india.com/india_info/download.html?filename=1207233783Posco.pdf.

¹³ A unit of measurement based on an ideal amount of work done by one person in a year consisting of a standard number of person-days, *see* Dictionary.com, <http://dictionary.reference.com/browse/person-year> (last visited Sept. 27, 2011).

for acquisition¹⁴ was rare, fertile and rich in biodiversity and eco-diversity.¹⁵ Moreover, this land was inhabited by people who had been living there for centuries and who were engaged in aquaculture and cultivation of cash crops such as betel vine, cashew nut, etc.¹⁶ The Committee remarked that displacing them from the area was a direct attack on their lives and livelihoods and would have a very serious and irreversible impact on the fragile and unique ecology of the area.¹⁷

The beauties and bounties of the area surrounding the site of the plant is a part of a complex natural eco-system. Though the area is adjacent to the Bay of Bengal, surprisingly there are no traces of brackishness in the floor water which makes this area suitable for cultivation of betel vines and certain other crops.¹⁸

The argument that the Steel Plant shall bring about prosperity for the people was also disputed in light of the fact that most of the people in the area were not academically qualified to be employed in the POSCO project.¹⁹ It was

¹⁴ A total of 4004 acres was to be acquired, of which 3566 acres was classified as forest land.

¹⁵ *Scrap Posco Steel Project: Fact-finding Team*, THE HINDU, May 27, 2010, <http://www.thehindu.com/news/states/other-states/article439235.ece>.

¹⁶ *Timeline of Events in POSCO Project Area Relating to Forest Rights*, CAMPAIGN FOR SURVIVAL AND DIGNITY, <http://www.forestrightsact.com/statements-and-news/87-timeline-of-events-relating-to-forest-rights-in-posco-area> (last visited Aug. 31, 2011).

¹⁷ *Supra* note 15.

¹⁸ Mining Zone People's Solidarity Group, *Iron and Steel: The Posco-India Story* (Report) (Oct. 20, 2010), available at <http://miningzone.org/wp-content/uploads/2010/10/Iron-and-Steel.pdf> (The area presents a unique ecology of soil (baloo), sweet water (just 2 kms from the coastline) and certain other forest produce).

¹⁹ A Report on Fact Finding Team of Ektaparisad Orissa on Posco, available at www.avantishanti.de/Posco%20Report.doc (last visited Aug. 31, 2011).

claimed that the plant may end up serving the interest of technocrats, highly skilled personnel, politicians, bureaucrats and microscopic minority elite groups with the people living in the local areas deprived of most of the proposed benefits of the project.²⁰

There were fears that the independent and self-reliant lives of the local population would be reduced to a life of drudgery, physical and mental fatigue as they would have had to work in a polluted environment.²¹ The establishment of the steel plant would have adversely affected their unique lifestyle in which all the members of the family, including children, women and aged members, contributed to the household economy.²² Thus, the local people opposed the project.

Facing a chance of being thrown out of their own homes, deprived of their livelihood and with no law to protect them, the POSCO Pratirodh Sangram Samiti (*hereinafter* "PPSS") was formed to oppose the project in August, 2005 and a people's blockade was declared in the three Gram Panchayat areas that had been affected by the Plant.²³

Before discussing further events with respect to the POSCO plant controversy, an examination of the historical injustice meted out to the tribals is necessary as this would provide an insight into the paradigm shift brought about by the Forest Rights Act, discussed later in the paper.

²⁰ *Id.*

²¹ Mining Zone People's Solidarity Group, *supra* note 18.

²² *Supra* note 19 (It should be noted that the whole family is involved in household works, they engage themselves in taking care of cattle, goat, processing of betel, collection and processing of cashew nuts and betel nuts etc. The establishment of the Plant would adversely affect the contributions made by each member of the family).

²³ *Supra* note 16.

III. TRIBAL POLICIES IN INDIA BEFORE FOREST RIGHTS ACT, 2006: UNDERSTANDING THE LAW FROM A RIGHTS BASED PERSPECTIVE

In this part, policies dealing with tribals shall be discussed and analysed in light of the rights-based approach.²⁴ Firstly, the meaning of a right shall be discussed, followed by what we mean by the rights based approach. Henry Shue's explanation of the rights based approach through his conception of duties shall be explained after that in order to highlight how the Indian State has failed to perform each of those duties.

A right is the rational basis for a justified demand. This implies that demands that are justified shall qualify to be rights. For example – If A demands food since he is starving, then considering that this is a justified demand, it can be said that A has a right to food. However if A demands arms to murder somebody, this clearly is an unjustified demand and then it cannot be said that A has a right to arms.

Justified demands qualify to be rights because they are rational. They are rational since these demands can be made without feeling embarrassed or ashamed. When a person has a right, it is generally said that the person enjoys the right. According to Shue, this is incorrect.²⁵ He says to enjoy a right means to enjoy the substance of the right i.e. to enjoy what the right is for.²⁶ For example – If A has a right to food, then A enjoys the substance of the right that is food. So it would be proper to say that A enjoys food rather than saying A enjoys

²⁴ The authors shall rely on Henry Shue's conception of rights based approach for this analysis. See HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND US FOREIGN POLICY* 13-64 (2nd ed. 1996).

²⁵ *Id.* at 16 (Henry Shue argues that proclamation of a right is not the fulfillment of the right. It may only be a step towards the actual fulfillment of the right).

²⁶ *Id.* at 19-20.

the right to food. This is because A is enjoying food and not the right to food.

Amongst the various rights that exist, special emphasis needs to be placed on basic rights²⁷ since their enjoyment is essential for the enjoyment of all other rights. If one is not entitled to a basic right, then all other rights become futile. An example of a basic right is the right to subsistence.²⁸ For the purpose of this paper subsistence rights are particularly important because it is these rights of the tribals that have not been protected and provided for.²⁹

In a rights-based approach, every human being is recognized as a right holder.³⁰ At the same time there is a duty-bearer which has to respect, protect and guarantee these rights.³¹ The duty-bearer is generally the state.³² Under this approach, the state has three levels of obligation i.e. the duty to respect a right,³³ duty to protect a right³⁴ and a duty to fulfill a right.³⁵

²⁷ *Id.* at 18-22 (A basic right means to have available for consumption what is needed for a decent chance at a reasonably healthy and active life of more or less normal length, barring tragic intervention).

²⁸ *Id.* at 23-24 (Henry Shue defines right to subsistence as a right that includes the provision of subsistence at least to those who cannot provide for themselves).

²⁹ *See infra* Part IV.

³⁰ *The Human Rights Based Approach*, UNITED NATIONS POPULATION FUND, <http://www.unfpa.org/rights/approaches.htm> (last visited Aug. 31, 2011).

³¹ *Id.*

³² *Id.*

³³ This means that one should refrain from interfering with the enjoyment of the right.

³⁴ In order to protect a right the state has to enact laws and create mechanisms to prevent violation of the right by state authorities or by non-state actors. This protection is to be granted equally to all.

³⁵ The government has to take active steps such as putting in place institutions, procedures and allocating resources that shall enable people to enjoy the rights.

Henry Shue's conception of duties helps in understanding the rights-based approach. According to him, every right has three duties namely duty to avoid deprivation, duty to protect the deprived and the duty to aid those who suffer from deprivation. If examined closely with the obligations of the state in a rights-based approach elucidated above, we find that:

1. The duty to avoid deprivation is similar to respecting a right;
2. The duty to protect the deprived is similar to protecting the right;
3. The duty to aid those who have been deprived is similar to fulfilling the right.

As stated above, to enjoy a right means to enjoy the substance of the right. The substance of a right is enjoyed if it is socially guaranteed. A right is socially guaranteed if correlative duties are performed. Thus we can rephrase our understanding of a right from a rational basis for a justified demand to a rational basis for insisting performance of the correlative duties. These correlative duties are namely the duties to avoid, duties to protect and duties to aid.

Duty to avoid deprivation requires that one should refrain from making an unnecessary gain for oneself by a means that is destructive for others.³⁶ Thus, there is a need for institutions that help in ensuring that the duty to avoid is not violated. In other words, there need to be individuals and institutions that enforce the duties to avoid. This is the duty to protect. Hence, the duty to protect in a way is a secondary duty of enforcing the primary duty, namely, the duty to avoid.

³⁶ An interesting point to note here is that if everyone voluntarily followed the duty to avoid, then there would be no need for duties to protect. Since duty to avoid is basically individual self control so that others are not affected it is a little farfetched to imagine that everyone would voluntarily follow the duty to avoid. See SHUE, *supra* note 24, at 55.

The duty to protect, however, is not just restricted to this interpretation. An integral part of the duty to protect also includes drafting laws that rely less on self-control and which guarantee rights in such a manner that the individual cannot violate the duty to avoid. In simpler terms, the duty to protect involves designing institutions in such a manner that individuals cannot violate the duty to avoid even if they had to. Henry Shue describes this part of duty to protect as “*designing institutions that avoid the creation of strong incentives to violate duty to avoid*”.³⁷

The third duty is the duty to aid the deprived. Duty to aid the deprived arises when the deprivation is a result of the failure to fulfill the duty to avoid and the duty to protect. It must be noted that to the extent to which the duties to avoid and protect are fulfilled, the duty to aid would be less burdensome.

In order to show how the Indian State has failed to perform the duties elucidated above the authors shall briefly discuss the tribal policies that have been in place in India and highlight how tribal rights have not been respected, protected and fulfilled. Tribal policies in the Country have shown a “V” curve.³⁸ In the pre-British era, since tribals enjoyed unhindered access to the use of forest resources, it can be said that their right was given due recognition.³⁹ No action was taken against their enjoyment for personal gain. However, this situation

³⁷ SHUE, *supra* note 24, at 59.

³⁸ In the pre-British area, tribals had nearly unhindered rights over forest. After their arrival, tribals’ rights were curbed for English profit making motives. In independent India, initially British policies were followed but eventually tribal rights were given due recognition.

³⁹ Rudolf C. Heredia, *Tribal History Living Word or Dead Letter?*, 35 (18) Eco & PL. WEEKLY 1522 (2000) (Earlier rulers had given the tribals usufructs rights which provided all the produce they required for domestic and agricultural purposes from the forests).

changed with the advent of colonialism. For the first time, tribal resources, particularly land, came to be treated as a commodity and these were exploited extensively.⁴⁰ By exploiting Indian forest resources, the British met their demand for wood as well as increased the area under agriculture.⁴¹ Their subsequent policies were directed towards these ends.

The Forest Rights Act, 1865 curbed the rights of the tribals by regulating their collection of the forest produce. The Indian Forest Act, 1878 was introduced to increase British control over forests.⁴² The Indian Forests Act, 1927⁴³ placed strict restrictions on tribals for using forest produce and strict duties were levied on them.⁴⁴

The introduction of the concept of private property during the 19th century in tribal regions exacerbated the condition of the tribals as traders, moneylenders, liquor contractors and the landlords grabbed tribal lands on large-scale.⁴⁵ The statutes passed for remedying the problem proved

⁴⁰ This happened because the British viewed the forest as a source of revenue to meet their demands. Britain needed huge quantities of wood for its navy, railways and industries and by the sixteenth century, much of Western Europe was deforested, and Northern Europe was under pressure for supplying Britain with large quantities of wood. The Indian forests seemed to be an attractive source for the same.

⁴¹ Agriculture was a source of revenue.

⁴² This Act enacted under the garb of protectionism introduced the concept of Reserve Forests and Protected Forests, whereby curbing the rights of tribals to a large extent. See *Biggest Landlord*, DOWN TO EARTH, June 15, 2007, <http://www.downtoearth.org.in/node/6056> (Reserve Forests were earmarked for commercial exploitation and the indigenous people's customary rights were extinguished. In Protected Forests, rights were recognized but not settled). See also RUCHA SURESH GHATE, *FOREST POLICY AND TRIBAL DEVELOPMENT: A STUDY OF MAHARASHTRA* 34-35 (1992).

⁴³ It was an act passed for consolidating the laws on forests.

⁴⁴ E.g., § 26 of the Indian Forests Act, 1927, prohibited, among other things, cattle rearing, collection or removal of forest-produce from forests categorized as reserved forests.

⁴⁵ K. Gopal Iyer, *Land Alienation, Forest Rights and Displacement:*

to be ineffective because of lack of proper implementation.⁴⁶ This indicates that the British did not respect the rights of the tribals.

Under the rights based approach, they were under a duty to refrain from making an unnecessary gain for themselves by a means that is destructive for others. They breached their duty to avoid deprivation by following policies under which they gained at the expense of the tribals.

This situation ideally should have changed with India gaining independence, however, this was not meant to be. For a long time after independence, no law dealing directly with tribal rights was passed and the laws that did exist, did not include the tribals in the development process. This is evident from the policies that were passed immediately after independence.

In the immediate aftermath of independence, the forest policies had two objectives. The first was to meet the demands and needs of an independent nation eager to modernize and industrialize and the second was to protect and increase the total forest cover to 33% of the total geographic area of the country.⁴⁷

These policies disregarded the need for diverging from the British policies which were directed against the rights of

Predicament of the Tribals in Jharkhand and Madhya Pradesh, in SCHEDULED TRIBES AND DEVELOPMENT 322 (2006).

⁴⁶ *Id.* (However these legislations had no effect as exploitation continued. Non-tribals continued to alienate tribals from their lands through fraudulent suits, *de facto* possession, and transfers in fake and fictitious tribal names by marrying tribal women and so on).

⁴⁷ Manish Tiwari, *Fluid Boundaries of India's Forests: Concessions and Conflicts in Joint Forest Management in Bihar and West Bengal, India* 11 (United Nations University-Institute of Advanced Studies, Working Paper No. 104, 2003), available at www.ias.unu.edu/binaries2/IASWorkingPaper104.doc.

the tribals. The policies continued the exclusion of local populations from decision-making and management and, thereby, ignoring all forms of customary management of forests.⁴⁸ The National Forest Policy, 1952 explicitly mentioned that “just because a village was situated near the forest, it did not have a prejudicial right over the forest resources”.⁴⁹ The use of word “prejudicial” indicates the prejudicial mindset of the framers against the tribals.

Thus, the Indian State instead of framing policies that protected the rights of the tribals continued to hinge its policies on the colonial mindset. By depriving the tribals of their rights, by alienating them from their land, the Government clearly did not respect the rights of the tribals. Since tribal rights were not respected, the question of protection of their rights through enactment of adequate laws did not arise in this period.

A. Change In The Attitude Of Government

The hardships engendered by such exclusionary policies led to intense resistance, forcing the Government to introduce two new policies. First, “social forestry” in the Fifth Five Year Plan, 1974-79 on village commons, government wastelands, and farmlands and second, the policy of Joint Forest Management, which was formalized in the National Forest Policy, 1988. These policies marked the beginning of the shift in policies of the Government from exclusionary to participatory approach. The Government started paying attention to its duty to protect.

Under the concept of “social forestry”, forests were to be raised on wastelands and farmlands to meet the growing

⁴⁸ GHATE, *supra* note 42 (Tribals were perceived as people who were against development and from whom forests should be protected. They were seen as a community that exploited and destroyed forests).

⁴⁹ Ministry of Food and Agriculture Resolution, 12th May, 1952, National Forest Policy, ¶ 7, <http://forest.ap.nic.in/forest%20policy-1952.htm> (last visited Aug. 31, 2011).

demand of the rural poor and to maintain the ecological balance in the surrounding areas with direct participation of rural people.⁵⁰ This policy sought to create a partnership between local community institutions and forest departments for sustainable development and joint profit sharing of public forests.⁵¹ Under joint forest management, forests were to be protected and regenerated with the active involvement of local tribals who in return were to get usage rights over commonly and locally used forest produce such as fuel wood, fodder, fruits, medicines etc.⁵² Sale proceeds from timber and other forest produce were also sought to be shared with the tribals.⁵³

However, these policies failed to produce the desired result. There were many problems such as elusive and unequal participation between tribals and governments, limited livelihood impacts, inadequate resource allocation, unequal access to forests, and more importantly the State through the forest department continued to maintain and extend its control over forests and continued to undermine customary and informal institutions.⁵⁴ Tribals were also very

⁵⁰ Ram A. Sharma, *The Socioeconomic Evaluation of Social Forestry Policy in India*, 22 *AMBIO* 219, 219-220 (1993). In other words, forests outside natural forests were sought to be created for the benefit of tribals. This was considered to be a step towards integrating people with the management of forests at the local and state level. Social forestry was also intended to enable people in the local areas to meet their needs for fodder, firewood, and timber whilst reducing their dependence on forest-land.

⁵¹ Study on Joint Forest Management conducted by TERI for Ministry of Environment and Forests (Report), *available at* <http://envfor.nic.in/divisions/forprt/terijfm.html> (last visited Aug. 31, 2011).

⁵² N.B. Majumdar & Kavita Raghavan, *Joint Forest Management, Committees and the Legal Profile - The Case of Madhya Pradesh*, <http://www.iifm.ac.in/databank/jfm/mpcase.html> (last visited Aug. 31, 2011).

⁵³ *Supra* note 51.

⁵⁴ Kailas Sarap & Tapas Kumar Sarangi, *Malfunctioning of Forest Institutions in Orissa*, 64 (37) *ECO & PL. WEEKLY* 18 (2009); Debnarayan Sarker, *Joint Forest Management: Critical Issues*, 44(4) *ECO & PL. WEEKLY* 15 (2009).

wary of this arrangement, as they did not have confidence in the Forest Department.

Realizing the fact that excluding tribals was not working, the State after 1970's attempted to fulfill its duty to respect by trying to involve tribals in management of forests and granting them certain rights. These attempts were, however, made through policies and not through laws.⁵⁵ The ambiguity of policy as an instrument is that the State can deploy it, as and when it finds it convenient.⁵⁶ The failure of the administration to attract tribals towards the policy points to the failure of mechanisms employed by these policies. Thus, the two components of the duty to protect remained unfulfilled.

Thus, it can be seen that most of the forest policies excluded tribals from their purview and wherever they were sought to be included, bad implementation and lacunae in laws prevented this from happening. It is because of this constant exclusion from forest and development policies that the tribals were unable to trust any project. The Forest Rights Act, 2006 was enacted keeping in mind this exclusion and is a unique piece of legislation as it grants tribals the rights that they have been demanding for so many years.

IV. FOREST RIGHTS ACT- A LANDMARK CHANGE IN THE DOMAIN OF TRIBAL RIGHTS

The Forest Rights Act, 2006⁵⁷ marked a major shift in the attitude and policy of Government towards tribals. This

⁵⁵ It should be noted that duty of protection of rights involves framing such fool proof laws that shall not allow the deprivation of the right in any manner. By enacting policies that could be twisted and turned as per the government's convenience it cannot be said that these measures amounted to protection of rights of tribals.

⁵⁶ Virginus Xaxa, *Politics of Language, Religion and Identity: Tribes in India*, 40 (13) *ECO & PL. WEEKLY* 1363 (2005).

⁵⁷ The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, No. 2 of 2007.

Act, through its Statement of Object and Reasons recognized for the first time that historical injustices had been meted out to the tribals. It further admitted the Government's failure to recognize and respect consolidated rights of tribals on their ancestral land and habitats. The Government through this Act has tried to remedy this situation by fulfilling some of the long term demands of tribals.

This Act secured the traditional rights of tribals⁵⁸ such as the right to hold and live in the forest land under the individual or common occupation for habitation or for self cultivation.⁵⁹ The right of ownership, access to collect, use and dispose of minor forest produce which has been traditionally collected within or outside village boundaries.⁶⁰ Right of settlement of old habitation and un-surveyed villages,⁶¹ community right to intellectual and traditional knowledge relating to forest and cultural diversity,⁶² community rights such as *nistar*⁶³ and any other traditional rights which are part of their customs.

This statutory recognition of rights seeks to mitigate the feeling of insecurity and alienation among tribals. It also ensures that they shall not be exploited by other people. This is highlighted through Section 4(5) of the Act that protects

⁵⁸ It was felt that non recognition of tribal rights led to their exploitation and for their up-liftment recognition of their rights was must. All the rights have been granted in § 3 of the Act.

⁵⁹ *Supra* note 57, § 3(1)(a).

⁶⁰ *Id.* § 3(1)(c).

⁶¹ *Id.* § 3(1)(h).

⁶² *Id.* § 3(1)(k).

⁶³ The right of the people of the area to procure commodities necessary for living from the surrounding area and forests were known as *nistar* rights. See Pankaj Sekhsaria, *Case Studies of Andaman Island, Uttara Kannada and Gadchiroli – Chandrapur, India*, <http://www.wrm.org.uy/deforestation/Asia/India.html> (last visited Aug. 31, 2011).

the tribals from being evicted until and unless their rights are recognized under the Act and the verification procedure⁶⁴ is completed.

This Act also seeks to actively involve tribals in the protection and management of forests.⁶⁵ This has been done by linking rights to duties. It clearly states that those who hold rights shall also be responsible for protection, conservation and regeneration of forests. Forest right holders will have to ensure that no activity is carried out that adversely affects wildlife, forest and biodiversity in the local area.⁶⁶ This can be called a positive step towards their inclusion in forest policies.

Besides granting rights, this Act marks a major shift in the implementation policy of the Government in as much as it for the first time has included the local people in the implementation procedure. Section 6 of the Act grants the Gram Sabha the authority to determine the personal and community rights of tribals which should be granted to them. This is a major policy shift because earlier implementation of policies was always done through forest or other government department(s). Local people were never included in the implementation stage. Thus, long term demand of tribals to be included in implementation is proposed to be fulfilled.

The Act looks appealing on paper but has it been able to achieve the desired effect? Has it been able to grant rights in practice? Or has it failed? In the next part, the authors show

⁶⁴ Verification of rights by Gram Sabha.

⁶⁵ Ashish Kothari & Neema Pathak, *Forests and Tribal Rights*, FRONTLINE, June 3, 2005, <http://www.hindu.com/fline/fl2211/stories/20050603001508800.htm>.

⁶⁶ *Id.*

how the Act has been violated at the POSCO site in Orissa.

V. POSCO-INDIA PROJECT IN ORISSA- GROSS VIOLATION OF FOREST RIGHTS ACT, 2006⁶⁷

The Forest Rights Act was passed in December, 2006 but it came into effect in January, 2008. While the operation of the Act had not yet taken effect, in November, 2007, police attacked the PPSS protest at one of the entry points with bombs in which more than 50 people were injured.⁶⁸

After the Act came into force the Gram Sabha of Dhinkia passed a resolution in March, 2008 for electing a Forest Rights Committee which started the process of granting forest rights as mandated by the Act.⁶⁹ The Committee also passed a resolution under Section 5 of the Act that it shall protect the surrounding areas from environmental destruction. The State Government, however, ignored the Gram Sabha and did not take any steps to implement the Act.

In August, 2008, the Supreme Court upheld in-principle the clearance for use of forest land but directed the Ministry of Environment and Forests (*hereinafter* "MoEF") to proceed

⁶⁷ For certain facts mentioned in this part, authors have relied on a certain timeline, *see supra* note 16.

⁶⁸ *Chapter 1 – Peddling POSCO: An Introduction*, Mining Zone Peoples' Solidarity Group, <http://miningzone.org/campaigns/posco/iron-and-steal/ch01> (last visited Sept. 27, 2011).

⁶⁹ Letter from PPSS to Shri Jairam Ramesh, Minister of State (Independent Charge) for Environment and Forests (Feb. 2, 2011), *available at* <http://moef.nic.in/downloads/public-information/Posco-final-orders-02052011.pdf>.

⁷⁰ *Timeline of Events in POSCO Project Area Relating to Forest Rights*, CAMPAIGN FOR SURVIVAL AND DIGNITY (May 15, 2010), <http://www.countercurrents.org/fra150510A.htm>; *SC Clearance for POSCO's Orissa Plant* (Aug. 8, 2008), http://zeenews.india.com/news/business/sc-clearance-for-posco-s-orissa-plant_460968.html.

in “accordance with law”.⁷⁰ Final clearance of the project was not granted. It must be observed that in the case before the Supreme Court, only Central and State Government along with POSCO were parties. No one who was in opposition to the project was represented.

Finally, a year later following prolonged protests, MoEF in August 2009 issued a circular clearly stating that clearance for using forest land for non-forest use could not be given without the proper certificates of the Gram Sabhas of the affected area. These certificates were to state that the process of implementation of the Forest Rights Act was complete, all rights had been recognized and that the Gram Sabhas had consented to the diversion of the project after being informed of the nature and details of the project.

In pursuance of this order, the Chief Secretary of the State Government of Orissa wrote to all District Collectors, asking them to furnish certificates and other information required for compliance with the Ministry circular in areas proposed for diversion.⁷¹ In December, 2009, the Jagatsinghpur District Collector wrote to the Block Development Officer, Erasama asking him to get the approval of the Gram Sabhas of the area for the proposed diversion for POSCO.⁷²

Later, MoEF in violation of its own Circular issued in August, 2009, granted clearance for the project for diversion of forest land without any Gram Sabha resolution certifying

⁷¹ Letter from Chief Secretary, Government of Orissa, to all District Collectors (Oct. 24, 2009), *available at* www.foresightsact.com/corporate-projects/item/download/41 (Annexure D) (mandating compliance with the Forest Rights Act when diverting forest land).

⁷² Letter from District Collector to Block Development Officer, Erasama (Dec. 19, 2009), *available at* www.foresightsact.com/corporate-projects/item/download/41 (Annexure E) (on conditions on forest diversion).

that the Forest Rights Act had been implemented or that the Gram Sabha had consented to the diversion.

The grant of this clearance led to protests by PPSS and other organizations. PPSS wrote to the MoEF against the illegal action.⁷³ In January, 2010 MoEF clarified that the clearance given in December, 2009 was conditional and subject to the settlement of the rights.⁷⁴ However, the clearance given in December was not withdrawn and all government officials treated it as final.⁷⁵

The Block Development Officer of Erasama also wrote to Sarpanches of the Gram Panchayats asking them for their opinion on the proposed diversion.⁷⁶ PPSS began a three month protest in February, 2010. All the Gram Sabhas passed a resolution reasserting people's rights and powers under the Forest Rights Act while rejecting the proposed diversion. In the midst of this, the District Collector sent a letter to the State Government that the settlement of rights under the Act in the disputed Gram Sabha had already been done. The Collector went on to say there are no tribals or other forest dwellers in the area.

⁷³ Letter from POSCO Pratirodh Sangram Samiti to Ministry of Environment and Forests (Jan. 5, 2010), *available at* www.foresightsact.com/corporate-projects/item/download/41 (Annexure F).

⁷⁴ Ministry of Environment and Forest, *POSCO: Final order and other documents*, Jan. 31, 2011, page 1 *available at* <http://moef.nic.in/downloads/public-information/Posco31012011.pdf>.

⁷⁵ *Supra* note 16.

⁷⁶ Letter from Block Development Officer, Erasama, to Sarpanches of Gadkujanga, Nuagaon and Dhinkia (Jan. 19, 2010) *available at* www.foresightsact.com/corporate-projects/item/download/41 (Annexure F) (requesting resolutions of Gram Sabha to be passed on Proposed Forest Diversion).

⁷⁷ *Supra* note 68.

⁷⁸ *Id.*

In May, 2010, police was deployed in the area and protesters were attacked.⁷⁷ Around 50 people were injured.⁷⁸ Market areas and protest camps were burned.⁷⁹ Following this in July 2010, the Orissa Government started taking over forest lands that was being cultivated in exchange of compensation.⁸⁰ It was claimed that all were willing sellers but there were reports of people returning cheques and others committing suicide.⁸¹ The Ministry immediately constituted a four member Committee, chaired by former Environment Secretary at the Centre, Meena Gupta to look into the questions of “relief and rehabilitation” as well as “settlement of rights under the Forest Rights Act” in the POSCO area.⁸²

MoEF issued order to stop work in Orissa in August, 2010.⁸³ At the same time, PPSS wrote to MoEF demanding withdrawal of illegal forest clearance given in December, 2009 and rejected the Meena Gupta Committee. MoEF later increased the Committee’s mandate to include reviewing compliance with

⁷⁹ *Timeline of Events in POSCO Project Area Relating to Forest Rights*, ORISSA CONCERNS (May 15, 2010), <http://orissaconcerns.net/2010/05/timeline-of-events-in-posco-project-area-relating-to-forest-rights/>.

⁸⁰ *State Asked to Stop Land Acquisition for POSCO*, THE HINDU, Aug. 7, 2010, <http://www.thehindu.com/todays-paper/tp-national/tp-otherstates/article557402.ece>.

⁸¹ *India: POSCO Mining Project Halted by People’s Opposition but Forest Clearance still Stands*, WORLD RAINFOREST MOVEMENT (Aug. 2010), <http://www.wrm.org.uy/bulletin/157/Bulletin157.pdf> (last visited Aug. 31, 2010); Manoj Kar, *Political Boost to Posco Resistance*, THE TELEGRAPH, June 12, 2011, http://www.telegraphindia.com/1110612/jsp/orissa/story_14101706.jsp (In fact, in a majority of cases vineyard owners refused to receive compensation cheques).

⁸² *Supra* note 68; Priscilla Jebaraj, *Meena Gupta’s Posco Recommendations are “Legally Impermissible”*: Rest of Panel, THE HINDU, Oct. 20, 2010, <http://www.thehindu.com/news/states/other-states/article838480.ece>.

⁸³ Letter from H.C. Chaudhary, Assistant Inspector General of Forests, to Principal Secretary, Government of Orissa (Aug. 5, 2010), *available at* <http://moef.nic.in/downloads/public-information/POSCO.pdf>.

Environmental Impact Assessment and Coastal Regulation Zones clearances and other clearances issued by the Central Ministry and State Government.⁸⁴ The Committee submitted its report to the Ministry on 18th October, 2010.⁸⁵ Interestingly however, there was a divide between the Chairman and the other members which led to submission of two reports. The report submitted by the Chairperson Meena Gupta stated that there was no need to cancel clearances but that the project proposal must carry out comprehensive Environmental Impact Assessment (EIA).⁸⁶ The other Report submitted by the remaining three members of the Committee favoured cancellation of the Environmental Impact Assessment and Coastal Regulation Zone clearances granted to POSCO.⁸⁷ Both the reports agreed on the point that Forest Rights Act mandate was not followed properly and that it should be relooked by the State Government.⁸⁸

The reports were then submitted to the Environmental Clearance Division, the Coastal Regulatory Zone Division and the Forest Advisory Committee for their recommendations.⁸⁹

⁸⁴ Debabrata Mohanty, *POSCO: MoEF Panel Visits Captive Port Site*, INDIAN EXPRESS (Sept. 22, 2010), <http://www.indianexpress.com/news/Posco—MoEF-panel-visits-captive-port-site/685601>.

⁸⁵ Meena Gupta, Report of the Committee Constituted to Investigate into the proposal submitted by POSCO India Pvt. Limited for establishment of an Integrated Steel Plant and Captive Port in Jagatsinghpur District, Orissa (2010), *available at* <http://moef.nic.in/downloads/public-information/report-committee-posco.pdf>.

⁸⁶ *Orissa: POSCO Panel Submits Report to Ministry of Environment*, ORISSA DIARY (Oct. 18, 2010), <http://orissadiary.com/CurrentNews.asp?id=21760>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *POSCO Ball in Ramesh's Court after Panel's Split Verdict*, THE ECONOMIC TIMES, Oct. 19, 2010, <http://economictimes.indiatimes.com/news/news-by-industry/indl-goods/-svs/steel/Posco-ball-in-Rameshs-court-after-panels-split-verdict/articleshow/6772145.cms>.

⁹⁰ *Id.*

Simultaneously, consultations were carried out between the Government of Orissa and MoEF.⁹⁰

Finally in January, 2011, Jairam Ramesh gave final clearance to the project subject to 28 additional conditions.⁹¹ He also categorically asked the State Government to give assurance with respect to the implementation of the Forest Rights Act. On April 13th, 2011 the State Government communicated these assurances to MoEF.⁹² However, on April 14th, 2011, MoEF once again referred the matter back to the State Government asking it to verify whether the two resolutions dated 21.2.2011 and 23.2.2011 that had been passed by the Gram Sabhas complied with the Act.⁹³ In letter dated April 29th, 2011 the State Government rejected the two resolutions as invalid and asked for the final clearance.⁹⁴ On May 2nd, 2011, final clearance was granted to the project.

In Part 2 of this paper it has been argued that the reason for failure of government policies and legislation was inefficient and improper enforcement by the State and lack of trust between the State and tribals. This mistrust was based on the fact that the State had failed to perform its duty to

⁹¹ Ministry of Environment and Forests, *supra* note 74; For a brief account of these conditions, see *POSCO Project Gets Environmental Clearance*, CONSTRUCTION WEEK (Feb. 1, 2011), http://www.constructionweekonline.in/article-7014-posco_project_gets_environmental_clearance/.

⁹² Letter from B.P. Singh, Special Secretary to Government, to Assistant Inspector General of Forests, Ministry of Environment and Forests, Government of India (Apr. 4, 2011), *available at* <http://moef.nic.in/downloads/public-information/Posco-final-orders-02052011.pdf> (last visited Aug. 31, 2011).

⁹³ Letter from B.P. Singh, Special Secretary to Government, to Private Secretary to Hon'ble Minister of State (Independent Charge), Ministry of Environment and Forests, Government of India (Apr. 29, 2011), *available at* <http://moef.nic.in/downloads/public-information/Posco-final-orders-02052011.pdf> (last visited Aug. 31, 2011).

⁹⁴ *Id.*

respect and adequately protect tribals from deprivation. It is interesting to note that the final clearance granted by MoEF was based on “faith and trust” in the State Government and its officers. This faith and trust is an important part of cooperative federalism but in present fact situation, where clearance was granted and revoked many times, trusting only the State Government could be contentious. This uncertainty over environmental clearance raises the larger issue whether the environmental clearance policy in India is adequate. The next part shall attempt to highlight these inadequacies.

VI. IMPLEMENTING THE FOREST RIGHTS ACT PROPERLY- ONLY THE FIRST STEP TOWARDS THE SOLUTION AND NOT THE SOLUTION ITSELF

If any solution has to be found to the present problem, then certain modifications need to be made to the Environmental Clearance Policy. This part will first appraise the present environmental clearance process prevalent in the Country and then suggest changes which can make this process stronger and effective.

A. Environment Clearance Policy Of India

For commencement of any big economic activity or project, Environmental Clearance is a must. In order to grant Environmental Clearance, an Environmental Impact Assessment (*hereinafter* “EIA”) has to be carried out. It is a formal study process used to predict the environmental consequences of the proposed development project, find ways to reduce unacceptable impacts, shape the project so that it suits the local environment and present these predictions and options to decision-makers.⁹⁵

⁹⁵ O.V. NANDIMATH, OXFORD HANDBOOK OF ENVIRONMENTAL DECISION MAKING IN INDIA 14 (2009).

⁹⁶ Passed under of Rule 5(3)(d) of the Environment Protection Rules, 1986 and § 3(1)(V) & 3(2) of the Environment (Protection) Act, 1986.

EIA as a process for Environmental Clearance was formally introduced by the 1994 Notification of MoEF, which was later replaced by 2006 EIA Notification.⁹⁶ This Notification contains the procedures for granting of Environmental Clearance to a project.

The 2006 Notification⁹⁷ divides economic activities into two categories namely Category A and Category B. Environmental Clearance for Category A projects is taken from MoEF and for Category B from the State Environment Impact Assessment Authority (*hereinafter* "SEIAA"). SEIAA has to be constituted by the central government in consultation with state government. In this paper, we need not study clearance for Category B projects as we are concerned with POSCO which is a Category A project.

An Expert Appraisal Committee (*hereinafter* "EAC") is constituted by the central government for the purposes of this Notification. The process of Environmental Clearance for Category A projects comprises three stages.

- 1) Scoping
- 2) Public Consultation
- 3) Appraisal

In Scoping, project proponents fill a form in which they give comprehensive details regarding the project. The terms of reference are framed by the EAC based on these details and these terms of reference are followed when the EIA report is prepared.

The second stage is public consultation. This is an important process as it helps in reducing public opposition

⁹⁶ Ministry of Environment and Forests, Notification, Gazette of India, Extraordinary, Part-II, and § 3(ii), New Delhi (Sept. 14, 2006), *available at* <http://envfor.nic.in/legis/eia/so1533.pdf>.

to the project. In public consultation the preliminary EIA report is shown to the people and 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. The consultation takes place through a public hearing that is conducted at a place which is close to the project site. After completion of public consultation, the applicant is expected to address all the material environmental concerns expressed during this process, and make appropriate changes in the draft EIA.

The last stage is appraisal in which a detailed scrutiny of the application and other documents⁹⁸ submitted by the applicant is done by the EAC. The EAC then gives its recommendations and the regulatory authority⁹⁹ based on these recommendations gives its final report.

Though the above is what should be ideally followed, in India the stage of public consultation is perceived as a procedural hurdle. It is not given much weightage. This is evident from the fact that the site chosen for public hearing for the POSCO project was approximately 20 km away from the POSCO site.¹⁰⁰ This was inconvenient for the local population and hence, could not serve any purpose.¹⁰¹

In addition to this, the 2006 Notification lays down certain situations where public consultation can be done away with completely. For example – Section 7(III)(v) of the Notification states that if the local agency responsible for conducting public

⁹⁸ Other documents include documents like the final EIA report, outcome of the public consultation.

⁹⁹ The regulatory authority is the authority that grants the clearance. For a Category-A project it shall be the Ministry of Environment and Forests.

¹⁰⁰ Mining Zone People's Solidarity Group, *supra* note 18.

¹⁰¹ *Id.*

hearing reports to the regulatory authority that owing to the local situation, it is not possible to conduct the public hearing in a manner which will enable the views of the local persons to be freely expressed and if the regulatory authority is convinced that the views cannot be freely expressed then it may decide not to include "public hearing" in the public consultation.¹⁰² Further under Clause 7 III (i), six categories of projects do not require public consultation at all.¹⁰³

If the process for granting clearance for a project of a particular country does not respect the opinion and views of the people who shall stand to be displaced by the project, then the grant of clearance shall always be disputed.

So firstly, the provision of public consultation has to be made mandatory and effective. Only when public consultation through public hearing takes place would the procedure of grant of environmental clearance be more democratic and representative of the voices of the tribals as well.

Secondly, resettlement and rehabilitation policy must be included in the environmental clearance process. Most of the world environmental impact assessment systems are moving towards adopting social impact assessment¹⁰⁴ into their environmental clearance system and rehabilitation and

¹⁰² *Supra* note 97.

¹⁰³ These six categories are (a) modernization of irrigation projects; (b) all projects or activities located within industrial estates or parks approved by the concerned authorities, and which are not disallowed in such approvals; (c) expansion of Roads and Highways which do not involve any further acquisition of land; (d) all Building /Construction projects/ Area Development projects and Townships; (e) all Category 'B2' projects and activities; (f) all projects or activities concerning national defence and security or involving other strategic considerations as determined by the Central Government.

¹⁰⁴ NANDIMATH, *supra* note 95, at 157.

¹⁰⁵ *Id.* at 158-159.

resettlement forms an integral part of it. However in India, we have moved backwards.¹⁰⁵ In the 1994 Notification, it was mandatory for project proponents to prepare a comprehensive rehabilitation and resettlement plan but in the 2006 Notification this component was mysteriously deleted.¹⁰⁶ Social Impact Assessment is necessary because whenever a big economic project is undertaken it affects the culture, tradition and economy of the local population. In most of the cases they have to be resettled. Social Impact Assessment has been provided in the Rehabilitation and Resettlement Bill, 2007 which is discussed in the next part.

B. Rehabilitation And Resettlement Policy In India

India does not have a law with respect to rehabilitation and resettlement, however there is a Bill pending in Parliament with respect to that, called the Rehabilitation and Resettlement Bill, 2007. The Bill identifies the central government as the appropriate government for rehabilitation and resettlement if the land is acquired for a central project.¹⁰⁷ It discusses about conducting a social impact assessment for projects in which large scale displacement takes place. This assessment has to be carried out to measure the impact on public and community properties, assets, and infrastructure. The study is then to be reviewed by an independent expert group. Large scale displacement is described as a situation where more than 400 families are displaced by a particular project. The POSCO project qualifies as one where large scale displacement shall take place.

¹⁰⁶ *Id.*; See also Form A of the 1994 Notification.

¹⁰⁷ PRS LEGISLATIVE RESEARCH, *Legislative Brief, The Rehabilitation and Resettlement Bill, 2007*, available at http://www.prsindia.org/uploads/media/Rehabilitation%20and%20Resettlement/bill168_20080311168_Legislative_Brief_Rehabilitation_and_Resettlement_Bill.pdf (last visited Aug. 31, 2011) (The analysis of the Rehabilitation and Resettlement Bill pending in Parliament shall be based on this legislative brief of PRS).

The Bill proposes appointing of an Administrator for rehabilitation and resettlement who shall be responsible for formulating, executing and monitoring the rehabilitation and resettlement plan.¹⁰⁸ The Administrator should at least be of the rank of the District Collector.¹⁰⁹ The Bill provides that he shall create the rehabilitation and resettlement plan under the supervision of the Commissioner for rehabilitation and resettlement and chair the project rehabilitation and resettlement committee.¹¹⁰ This Committee shall review the implementation of the plan and conduct social audits. It shall include government officials, members from the local community and the local Panchayat Chairperson, Member of Legislative Assembly and Member of Parliament.

The Administrator is also supposed to carry out a survey and census of the land which the government proposes to acquire.¹¹¹ This survey has to be conducted within 90 days¹¹² and a draft has to be prepared in consultation with the local Gram Sabha or corresponding bodies.¹¹³ The plan should include information about the affected land, the displaced persons, their property or assets, benefits and resettlement packages, the time for shifting and resettling, etc.¹¹⁴ All rehabilitation costs are to be borne by the body which needs the land for its project.¹¹⁵ The Bill further provides that the affected families are to be settled in groups¹¹⁶ and should be

¹⁰⁸ The Rehabilitation and Resettlement Bill, 2007, No. 98 of 2007, cl. 9.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* cl. 10 (1).

¹¹¹ *Id.* cl. 21 (1), (2).

¹¹² *Id.* cl. 21 (3).

¹¹³ *Id.* cl. 23 .

¹¹⁴ *Id.* cl. 23 (3).

¹¹⁵ *Id.* cl. 23 (4).

¹¹⁶ *Id.* cl. 26 (1).

¹¹⁷ *Id.* cl. 31.

made part of a Panchayat or Municipality.¹¹⁷ In case of large scale displacement, comprehensive infrastructural facilities and amenities are to be provided in the resettled areas.¹¹⁸ In addition to this, if the body that is acquiring the land is displacing more than 200 tribal families, then a separate Tribal Development Plan needs to be prepared for settling land rights, developing alternate fuel, fodder and non-timber forest produce resources etc.¹¹⁹

The Bill establishes the post of Ombudsman to address any grievances from the rehabilitation and resettlement process.¹²⁰ Civil Courts are barred from entertaining any suits related to this matter.¹²¹ If a person loses his land, the Bill entitles a person to receive one hectare of irrigated land or two hectares of un-irrigated land.¹²²

Though the Bill provides for elaborate provisions for rehabilitation and resettlement, there are certain flaws in it that need to be remedied before it is passed by the Parliament. The authors shall focus on those flaws that are relevant for the paper.

The first drawback is that though the purpose of the Bill is to provide rehabilitation and resettlement, the Bill itself does not require that the displaced persons be resettled. Secondly, though the ombudsman has been granted the power to redress grievances, there is no requirement that he should be judicially qualified. The Bill does not specify any criteria for the appointment of an ombudsman, and whether he is required to possess judicial qualifications or experience. As civil courts are barred from judging these issues, all appeals and petitions will lie directly with the High Courts. The potential large number

¹¹⁸ *Id.* cl. 30.

¹¹⁹ *Id.* cl. 49.

¹²⁰ *Id.* cl. 14 (1).

¹²¹ *Id.* cl. 54.

¹²² *Id.* cl. 36 (1).

of such cases could lead to significant increase in the workload of High Courts, and to delays.

Thirdly, the Bill does not provide for any time frame regarding rehabilitation. Fourthly, irrespective of the land that is acquired, the Bill only entitles a person to receive one hectare of irrigated land or two hectares of un-irrigated land. Thus, there could be situations where land in excess of two hectares is acquired by the government, but only to the limit of two hectares is provided in return.

Thus, before the Bill comes into force, it is important that these deficiencies are made good, especially with respect to the qualifications of the Ombudsman. If the Bill is passed in the present form, then the problem of proper implementation that has been faced with respect to the Forest Rights Act and Environmental Clearance Policy of India could be faced with this law as well. If that happens then the entire purpose of the law would be defeated.

VII. CONCLUSION

The Forest Rights Act was passed to empower the tribals by granting them various rights such as right of ownership, access to collect, use and dispose of minor forest produce, etc. The Act recognized for the first time that historical injustices had been meted out to the tribals. It aimed to respect consolidated rights of tribals on their ancestral land and habitats. However, the Act could not produce the desired result. The authorities that were responsible for the implementation of the Act were indifferent to the rights of the tribals which is evident from the manner in which tribal rights were completely disregarded in Orissa. Their indifference has its roots in the hegemony enjoyed by them over the tribals through centuries. As initially the Act itself was not recognized, there was a lot of confusion over settlement of rights. In light of this deep rooted mistrust between the tribals and administration, relying only on the

State Government's word for grant of final clearance is extremely contentious.

Moreover, to ensure that forest officials and the administration does not ignore the implementation of the Act in future, Section 7 of the Forest Rights Act should be amended. This Section talks about the liability of a public officer if he contravenes any provision of Forest Rights Act. The fine imposed is Rs. 1000. This is inadequate since forest officials may not be deterred from contravening any provision of the Forest Rights Act and thus the fine needs to be increased. Also a penalty other than a mere fine needs to be imposed. One of the major problems at the POSCO site has been the inability to hold the administration accountable for improper implementation of the Act. With a change in Section 7, at least the officers would think twice before violating the provisions of the Act.

To ensure that conflicts like POSCO do not arise in future, a two-fold solution is suggested. Firstly, the Forest Rights Act needs to be properly implemented and amended. And secondly, the Environmental Clearance Policy of the Country needs to be reviewed as it is poorly drafted. The authors would like to recommend the following changes in the Clearance Policy:

Firstly, the Environmental Clearance policy should give proper weight to public consultation through public hearing and not allow it to be bypassed as a mere procedural formality. This means that certain provisions of the 2006 Notification that exclude public consultation should be reviewed and if possible removed. Moreover, for public consultation the local population should be involved at the planning stage of the project itself and not after all the negotiations are over. Involving them at such an early stage would help in reducing or completely eliminating the opposition to the project as they would get a clearer picture of the situation.

Secondly, a social impact assessment for projects needs to be incorporated in the environmental clearance process of the Country. Social impact assessment is provided in the Rehabilitation and Resettlement Bill, 2007. However, that Bill in its present form would fail to make any impact and needs to be suitably modified as mentioned earlier.

On a different note unconnected with Environmental Clearance, the authors would like to emphasize that acquiring land at market prices or giving compensation against it is not the solution. When people's livelihoods are being taken away by a project, then the government has to ensure that they can provide some sort of livelihood to the people. Monetary compensation is just a temporary solution. It does not make the person self-sufficient. As mentioned in the paper, the population which stands to be displaced is a self-sufficient unit. Only a realistic concrete plan that promises self-sufficiency to those who stand to be displaced would be appropriate. In the absence of such a plan, the government would in future projects continue to face resistance.