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PROTECTION OF INTEREST OF THE INDIGENOUS PEOPLE: HUMAN RIGHTS INITIATIVE & REGIONAL COOPERATION

Neha Trehan *

Abstract

It is necessary to distinguish human rights as an idea from human rights in law and try to work out a proper relationship between the two. The idea of human rights is very strong, emancipatory, progressive and liberating. A political idea achieves adulthood when turned into law. The genesis of Human rights was a political conception which, of course longed to be transformed into law. It is clear human rights as an idea demands that certain things should not be done. The universality of human rights is derived from the requirement that we do not restrict compassion to our immediate circle. Inscrutable scope of the Human rights jurisprudence has made a clarion call for the protection of interest and the development of human rights for the Indigenous people. Indigenous people are the repositories of distinct cultural traits, customs and ethnicity. Inspite of their rich and distinct cultural heritage, they have been experiencing common problems and grievances for retaining their own identity and diverse cultural heritage, leading to their struggle for survival with human dignity. Indigenous peoples have strong spiritual, cultural, social and economic relationship with their traditional lands, but their land rights are often the most precarious. Hence, indigenous peoples' issue is of central importance. Several nations have taken a leap in recognizing the land rights of the aboriginal people which is necessary in order to protect their lost identities. The above expounds the human rights violation experienced by the Indigenous people all over the world. The efforts made to secure human rights to such individuals by the collective efforts of the SAARC nations shall be the prime focus of this research. The Human right initiative undertaken by the South Asian nations' vis-à-vis the interest involved of the Western World shall form the starting reference for this research. The paper aims to expound the perceptions and realities underlying the legal regime aimed to protect the interest of indigenous people. The paper shall entail the comparative study of human rights of indigenous people developed amongst the SAARC nations as well as in OAS States.

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*B.A LL.B(Hons.) [2007-2012] from Dr. Ram Manohar Lohiya Ntional Law University, Lucknow. LL.M [2012-2014] from the University of Delhi, New Delhi

INTRODUCTION

The indigenous movement at the international forum can be traced back to 1921 when the General body of the ILO showed concern for indigenous workers and constituted the Committee of Experts on National labour prior to the adoption of Convention No. 50 concerning the Regulation of Certain Special Systems of Recruiting Workers. This was the pre-cursor to the issue being considered from the angle of Human Rights in the 1980s. Prior to it in the year 1971, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Commissioned a study on discrimination on indigenous peoples. The absence of legal regimes in the domestic systems of most of the countries has resulted in the immense miseries of these people over the years. The long concerted struggle ultimately led to the adoption of the Declaration on Indigenous Peoples by the United Nations General Assembly in September 2007. The significant issue of Human Rights concern involves diverse aspects; cultural expression, customary rights, the subjugation and destabilisation of indigenous peoples, their access to justice, conflict resolution, displacement, Intellectual Property Rights included. These aspects merit much attention and needs to be addressed elaborately. This research aims to explore the said arena of human rights and how it operates in the SAARC region and OAS States.

INTERNATIONAL LEGAL REGIME CONCERNING RIGHTS OF INDIGENOUS PEOPLE

1.1 Basic concerns faced by the Indigenous Community across the Globe

Indigenous peoples constitute a sizable population of the world. It is significant to observe that Asia alone is the home to more than 60% of the indigenous population and within Asia India accounts for 84.33 million of them.[1] The indigenous people have not only been responsible for introducing many of the foods that we consume and more than half of the plant based pharmaceuticals have been derived from the medicinal plants found in their habitat.[2] Yet this pervasive contribution of the indigenous peoples to the modern world has not been adequately recognized and the same treatment extends to the sphere of their intellectual Property rights as well. The descendants have found it hard to

[1] 2001 Census of Government of India. It lists 461 groups, as indigenous peoples
[2] http://race.eserver.org/indigenous.html Texas A&M University (last visited on 18/7/2014)

practice their cultures and practices handed down to them by their ancestors, not to speak about their participation in decision making process and preventing a process of dominating interaction among different cultures.[3] They have not been able to preserve their land, traditional knowledge and livelihood in consonance with nature and environment among others, and have been subjected to systematic discrimination and marginalization. Some of these groups were systematically excluded as well. Their traditional cultures have been eroded and they have been subjected to confiscation of their land holdings, resulting in their present plight. The indigenous knowledge base of these people has been explored and exploited by the pharmaceutical industries without any resultant benefits to them, which in a way amounts to piracy.[4] Infact they are often robbed of their legitimate wealth and cultural patrimony. [5] The gradual deterioration of indigenous societies could be attributed to the lack of recognition for their relationship with their lands, air, water, coastal areas, forest, fauna and other natural resources linked to their culture.[6]

1.2 International Legal Instruments concerning Indigenous People

The international Labour Organization happens to be the first international organization to adopt measures to promote the rights of indigenous groups through Convention No. 107[7] and subsequently Convention No. 169.[8] The Indigenous delegations were able to convince the ILO to reflect on their concerns during Convention No. 107 through an amendment and update it with indigenous inputs.[9] The latter Convention observed that no State or social group has the right to deny the identity of an indigenous claimant,

[3] L. Vlloapolo Herrara, *The Right to Cultural Identity of Indigenous Peoples and National Minorities :A look from the Inter-American System*, 5 Sur Journal on Human Rights 46 (2006)
[4]Refer to State of the World's Indigenous People, ST/ESA/328 United Nations publication, No. 09.VI.13, 2009 ISBN 92-1-130283-7
[5] *Supra* note 2
[6] E.Dias, *Indigenous Populations and their relationship with the Land, Sub-commission on Prevention of discrimination and Protection of Minorities*, Commission on Human Rights, E/CN.4/sub.2/2000/25/2000 quoted in 5 SUR Journal on Human Rights, 59 (2006)
[7] Available at http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm (last visited on 8/08/2014)
[8] *Ibid*
[9] Willie Littlehead Rapporteur of the UN Permanent Forum on Indigenous Issues in Advancing. The Human Rights of the Indigenous Peoples-A critical Challenge for The International Community-Voices from a forum at 61st Session of the UN Commission on Human Rights, 13th April, 2005. Refer www.amnesty.ca/themes/resources/unchr.ip-rights.booklet.pdf

requiring the State concerned to ensure the participation of Indigenous Peoples while recognizing their rights and integrity. Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.[10] In the given world order, growing concern for the indigenous peoples is not so much for them as for the modern people themselves. The indigenous population is one among the priority areas of concern for giant international organization like ILO, UNESCO, World Bank and WTO.[11] Amongst them ILO has provided for a functional definition for all practical purposes through its Convention No. 169 way back in 1989.[12]

The United Nations indicated that the very concept of indigenous embraces the notion of a distinct and separate culture and way of life, based upon ancient knowledge and the traditions which are fundamentally linked to a specific territory.[13] A long concerted movement of Indigenous people extending more than two decade, involving four different United Nations bodies, culminated in the adoption of the Declaration on Indigenous People in 2007. Coordinated efforts by the member States as well as the leaders of indigenous peoples[14] is a proof of the fact that the adoption of the Declaration was the result of broad based consensus as is evident from the necessity of amendment of the Draft being confined to nine areas from the proposed 36. It brought an end to nearly 25 years of contentious negotiations over the rights of native peoples to protect their

[10] Refer Article 3(1) of *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (adopted 27 Jun 1989 76th ILC session, Geneva, entered into force on 05th Sep 1991) available at http://www.ilo.org/

[11] Amitabh Baxi, *Back to future*, The Economic Times, Bangalore Edition, 15th April 2007 at 12

[12] Article 1(1) of the ILO Convention No. 169 is as follows:

This Convention applies to

(a) Tribal people in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special Laws or regulations;

(b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and which irrespective of their legal status, retain some or all of their boundaries and which irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions

[13] *Supra* note 5

[14] The Chair of the UN Permanent forum on Indigenous Issues while addressing the General Assembly after adoption of the Declaration stated that the day will be remembered "when the United Nations and its Member States, together with indigenous Peoples, reconciled with past painful histories and decided to march into the future on the path of Human Rights."

lands and resources, and to maintain their unique cultures and traditions.[15] The Declaration reiterated several provisions of different Human Rights instruments and in doing so simply reaffirmed the principles of equality and non-discrimination, the core values for which the United Nations stands for.[16] Significantly, the Declaration reaffirms the equality and dignity of the Indigenous Peoples and recognizes their right to maintain their own institutions, cultures and spiritual traditions.[17] While recognizing the individual and collective rights of the indigenous people, it establishes standards to combat discrimination and marginalization, ensuring adherence to the basic tenets of Human Rights and consequent elimination of existing violations of the rights of these people, through their effective participation in matters concerning them.[18] It also emphasizes on their right to pursue development in keeping with their own needs and aspirations. [19]

1.3 Defining 'Indigenous People'

Given the diversity of indigenous peoples, there is international consensus that a universal definition of indigenous peoples is neither necessary nor desirable. Instead, the recommended approach is to identify the peoples concerned in a given country context, based on a flexible combination of subjective and objective criteria such as descent from populations, who inhabited the country or geographical region at the time of conquest, colonization or establishment of present state boundaries; they retain some or all of their own social, economic, cultural and political institutions, irrespective of their legal status; they have social, cultural and economic conditions that distinguish them from other sections of the national community; they have their status regulated wholly or partially by their own customs or traditions or by special laws or regulations; they identify themselves

[15] General Assembly GA/10612. Department of Public Information* News and Media Division* New York "Major Step Forward Towards Human Rights" says President

[16] Declaration on the Rights of Indigenous Peoples GA/RES/61/295, Indigenous and Tribal Peoples Convention, 1989 (No. 169); Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities General Assembly resolution 47/135 of 18 December 1992

[17] Antony Taubman and Matthias Leistner, *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore*, Silke Von Lewinski (ed.), Kluwer Law International, 2nd Edn. p.172

[18] UN Press Release dated 14th September 2007, Adoption of Declaration on Rights of Indigenous Peoples a historic moment for Human Rights, UN Expert says http://www.unhc.hr.ch/huricane/huri.

[19] Conclusion and recommendation of the Seminar on Treaties, Agreements and other Construcive Arrangements between states and Indigenous Peoples. E/CN.4/2004/111

as indigenous peoples. These peoples are often known by national or local terms such as adivasis, aboriginals, hill tribes, hunter-gatherers, pastoralists etc., or simply by the name of the specific people (Quechuas, Aymaras, Maasai, San, Batwa etc).In all parts of the world, there is growing recognition of the importance of protecting indigenous peoples' rights, as an integral element of the promotion of human rights, democracy, good governance, sustainable development and environmental protection. This global commitment was clearly expressed in 2007, when 144 governments voted in favor of the adoption of the UN Declaration on the Rights of Indigenous People (UNDRIP). The UNDRIP, along with the complementary ILO Convention No. 169, define indigenous peoples' rights to lands, territories and resources under international law.[20] Both instruments are based on the recognition of the particular significance and cultural and spiritual values that indigenous peoples attach to their lands and territories, which go far beyond the simple monetary or productive value.[21] Further, both instruments stipulate that indigenous peoples have the right to determine the priorities and strategies for development and use of their lands, territories and resources.

1.4 Preserving the Rights of Indigenous People

In general, indigenous peoples' rights to land, territories and resources must be understood in the broader context of these peoples' right to self-determination,[22] as well as their rights to property, nondiscrimination,[23] cultural integrity and development[24]. The essential elements of indigenous peoples' rights to lands, territories and resources encapsulate the following:-

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[20] Refer Article 13-19 of the *Convention concerning Indigenous and Tribal Peoples in Independent Countries* (adopted 27 Jun 1989 76th ILC session, Geneva, entered into force on 05th Sep 1991) available at http://www.ilo.org/

[21] *Ibid, article 5* of ILO Convention No. 169 lay down as follows:

In applying the provisions of this Convention:

(a) the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;(b) the integrity of the values, practices and institutions of these peoples shall be respected; (c) policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

[22] *Ibid,* article 1

[23] *Ibid,* article 3

[24] *Ibid,* article 7

» Rights to territories, encompassing the total environments of the areas which they occupy or otherwise use, inclusive of natural resources, rivers, lakes and coasts.

» Rights to the natural resources of their territories, including the right to own, use, develop and control these resources. As a basic principle, these resources comprise both renewable and non-renewable resources such as timber, fish, water, sand and minerals. In cases where States retain ownership over mineral and sub-surface resources, Convention No. 169 (Article 15.2) stipulates that indigenous peoples have rights to consultation, participation in the benefits of resource exploitation as well as compensation for damages resulting from such exploitation.

» Rights to lands, territories and resources based on traditional occupation, ownership or use meaning that it is the traditional occupation and use which is the basis for establishing indigenous peoples' land rights, and not the eventual official recognition or registration of that ownership[25].

» Collective rights to lands, territories and resources as intrinsically linked to their collective rights to self-determination, non-discrimination, cultural integrity and development as distinct peoples.

» Right not to be removed from lands or territories. If relocation is necessary, it should happen only with the free, prior and informed consent of the concerned people and with the right to return to traditional lands or territories as soon as the reason for relocation is no longer valid.

It is states' duty to ensure not only adequate recognition but also effective protection of indigenous peoples' land and resource rights. This will in most cases require a combined set of procedures and mechanisms, including identification, demarcation, titling or other legal recognition along with adequate access to justice and penalties for unauthorized intrusion. Further, States have a duty to consult indigenous peoples in order to obtain their free, prior and informed consent, prior to approval of any projects affecting their

[25] *Handbook for ILO Tripartite Constituents: Understanding ILO Convention No. 169, 2013*, International Labour Office, Geneva available at http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/indigenous-and-tribal-peoples/WCMS_205225/lang--en/index.htm

lands, territories or resources, particularly in the context of resource exploration and exploitation.

Beyond UNDRIP and ILO Convention No. 169, these rights are reflected and underpinned in other international and regional human rights instruments such as the International Covenant on Civil and Political Rights,[26] the International Covenant on Economic, Social and Cultural Rights,[27] International Convention on the Elimination of all forms of Racial Discrimination,[28] ILO Convention No. 111 on discrimination in employment and occupation,[29] the Convention on Biological Diversity,[30] the American Convention on Human Rights[31] and the African Charter on Human and Peoples Rights.[32] All of these instruments have proved to be useful when indigenous peoples make use of international and regional human rights mechanisms to assert their rights to lands, territories and resources.

CONCERNS OF THE INDIGENOUS COMMUNITIES IN INDIA & REPRESSION UNDER FOREST LAWS

2.1 Position of Indigenous Community in India

The earth belong to the indigenous people although everywhere they are exterminated or are on the retreat, denied basic rights and equal status and treated as human curiosities

[26] *International Covenant on Civil and Political Rights* (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

[27] *International Covenant on Economic, Social and Cultural Rights* (adopted 16 December 1966 entered into force 3 January 1976) available at http://www.ohchr.org/EN/ ProfessionalInterest/Pages/ cescr.aspx

[28] *International Convention on the Elimination of all forms of Racial Discrimination*, (adopted 21 December 1965 entered into force 4 January 1969) available at http://www.ohchr.org/EN /ProfessionalInterest /Pages/CERD.aspx

[29] *Convention concerning Discrimination in Respect of Employment and Occupation (*adopted 25 June 1958 entered into force 15 Jun 1960) available at http://www.ilo.org/dyn/normlex/en/ f?p= 1000:12100:0::NO::P12100_ILO_CODE:C111

[30] *Convention on Biological Diversity (*adopted 5June 1992 entered into force on 29 December 1993) available at http://www.cbd.int/convention/text/

[31] *American Convention on Human Rights* (adopted 22 November 1969 entered into force 18 July 1978) available at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm

[32] *African Charter on Human and Peoples Rights* (adopted 27 June 1981, , entered into force 21 October 1986) OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) available at http://www.achpr.org /files /instrumentts/achpr/banjul_charter.pdf

who have outlined the time.[33] Indigenous/tribal people of India, known as the Scheduled Tribes, continued to be disproportionate victims of "development", displacement and dispossession. The Indian Constitution contains many provisions for the protection and the welfare of the tribal population.[34] Article 46 mentions that the State is committed to the welfare of the SC/ST and their protection from all types of socio-economic exploitation.[35] Many tribal communities including Birhores of Jharkhand, Karbongs of Tripura, the Great Andamanese, Onges, Shompens, Jarawas, and Sentinelese of Andaman and Nicober have been facing extinction.[36]

2.2 Rights of Tribal Groups from a Judicial Standpoint

The land on which the tribes have inhabited assures them not only equality of status and dignity of person but is also a means to economic and social justice and is a potent weapon of economic empowerment in a social democracy.[37] In 2002, the Supreme Court ordered the closure of those parts of the Andaman Trunk Road that run along and through the Jarawa Tribal Reserve as it threatens their survival. But the Andaman Trunk Road continued to remain open in gross violation of the Supreme Court orders.[38] Another instance of land alienation and displacement is exemplified by the circumstances

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[33] Justice V R Krishna Iyer, *The Dialectics and Dynamics of Human Rights in India*, Eastern Law House, Calcutta 1999, p.234

[34] Article 330/331 of the Constitution makes special provision for reservation of seats for Schedule Castes, Scheduled Tribes in the Lok Sabha and Legislative Assemblies of State. Article 335 seeks reservation of posts in public services for SC/ST's but this must be consistent with the maintenance of efficiency of administration. Article 338A provides for the establishment of a National Commission for Scheduled Tribes which is duty bound to safeguard the interest of the ST's in India.

[35] Refer Article 275 provides for special grants for tribal welfare from the Government of India to some States and forms part of the Sixth Schedule. Article 164 makes it obligatory to appoint a Minister-in-charge of tribal welfare in the State of Bihar, Madhya Pradesh and Orissa. Article 244 makes applicable the provisions of the fifth Schedule to the administration and control of Schedule areas and Schedule Tribes in any State specified in Part A and B of fifth Schedule. The fifth Schedule makes provision for establishment of Tribes Advisory Councils examining applicability of laws to the Schedule Areas, delineation of boundary of Schedule areas and making amendment of the Schedule as such.

[36] The Constitution does not define a 'tribe'. The President of India is empowered by Article 342(i) to notify and specify any tribe/tribal community from any area as 'Scheduled Tribe'. On such notification the tribe so specified is added to the List of Schedule Tribes in the Fifth Schedule of the Constitution. Article 366 specifies the meaning of Schedule Tribes which means , "such tribes or tribal communities or parts or groups within such tribe or tribal communities as are deemed to be Scheduled Tribes for the purpose of the Constitution".

[37] *Samantha v. State of AP*, (1997) 8 SCC 191

[38] "Andaman activists allege sexual exploitation of Jarawa women", The Kashmir Times, 20 August 2005

following the Sardar Sarovar Dam Project, the largest dam being constructed on the Narmada river would displace 400,000 persons including 200,000 by the reservoir at the proposed height of 136.5 meters.[39] Most of the developmental activities are carried out in the tribal areas. This location is important because it is beneficial to the non tribals in plains while the tribals get alienated from their land. The Land acquisition Act provides for compensation. In November 2005, the Narmada Bachao Andolan (NBA) alleged that the Narmada basin States were violating the Supreme Court order of March 2005 in the Sardar Sarovar Project case by disbursing cash to the displaced families instead of providing "land for land."[40] Earlier in September 2005, the Government of Madhya Pradesh informed the Narmada Control Authoritty that out of 30,690 families to be affected in 177 villages by Sardar Sarovar Project at the proposed dam height of 121.92 metres, 17,288 had been resettled including 4,262 families in Gujarat. The remaining 13,402 families were yet to be resettled. These included a backlog of 13,233 families at the current height of the dam, which was 110.64 metres at the end of 2005.[41] These figures were contested by the NBA. The Jharkhand Government reportedly signed over 42 MoUs with investors including Mittal Steel, Tata Steel, Jindal Steel and Power Company Limited worth about Rs 1,69,198.26 crores since Jharkhand became a state in 2000. Approximately 47,445 acres of land would be required for the projects in mineral-rich Kolhan Region, which was likely to affect about 10,000 families and cause deforestation of 57,15 kms land.[42] The issue of tribals ousted from forest areas for development has been dealt with in the case of *Narmada Bachao Andolan v. Union of India*[43]. In this case the SC expressed the view that the lands allotted to the displaced people are equal to, or better in quality then what evicted persons originally owned. Although the land of the tribal people will submerge the Court found that the construction of the dam will result multifold improvement in the environment of the area where the canal waters reach. Though the stand of the Court has been positive regarding the developmental activities yet number of non-governmental agencies has shown a different

[39] "Narmada Dams: No Judicial euphemism", *Indigenous Rights Quarterly* (Vol. I, No. 01, April - June, 2006), Asian Indigenous & Tribal Peoples Network
[40] "Basin States violating court order: NBA", The Hindu, 16 November 2005
[41] "Cash, not land, on offer for the displaced", The Hindu, 1 December 2005
[42] "Jharkhand tribals up in arms against projects", The Hitavada, 16 November 2005
[43] AIR 2000 SC 3751

trend as far as the interest of tribal community is concerned. A study by People's Union for Civil Liberties showed that over 74 lakh tribals were displaced in Jharkhand by different projects between 1950 and 1990. Out of them, only 18.45 lakhs displaced tribals were rehabilitated.[44] During 2002-2005, the Orissa government signed 42 MoUs with companies for proposed steel and other plants in the state and thousands of tribals would be displaced.[45] The MoU with Korean steel major Pohang Steel Company (Posco) signed on 22 June 2005 for setting up a steel plant at Paradeep in Jagatsinghpur district in Orissa with a total investment of $12 billion would displace around 4,000 tribal families.[46] About 1.4 million people, most of them tribals, have been reportedly displaced in Orissa between 1951 and 1995 due to dams, canals, mines and other industries. Majority of the displaced persons have not received compensation and rehabilitation. Another 80,000 to 1,00,000 tribals from 50 villages in Subdega and Balisankra blocks in Jharsuguda district of Orissa faced imminent displacement due to the proposed dam on the State river. [47] In October 2005, the Central government reportedly granted "forest and environmental clearance" to the multi-purpose Polavaram project being built across the Godavari river at Polavaram in West Godavari district of Andhra Pradesh. [48] The proposed 46-metre high Polavaram multi-purpose dam is likely to displace nearly 2,00,000 people, of which about 150,000 are tribals. The Union Ministry of Environment and Forests also admitted that about 193,350 persons would be displaced in three states - Andhra Pradesh (175,275), Orissa (6,316) and Chhattisgarh (1,766). [49]

Thousands of petty cases have been lodged against the tribals under the Forest Act of 1927. This necessitated the enactment of a legislation protecting the rights of the tribal and indigenous people. The Supreme Court-appointed Central Empowered Committee in its report submitted on 29 April 2005 stated that the State government of Kerala could transfer forest land to tribals if compensated with afforestation programmes. The State

[44] "Homeless in rush for progress - Alarm over displacement", The Telegraph, 25 April 2005
[45] Refer to http://orissagov.nic.in/e-magazine/orissaannualreference/ORA-2005/pdf/mou_signed_with_companies.pdf
[46] "All about India's biggest FDI project", 23 August 2005, available at http://www.rediff.com/money/2005/aug /23posco.htm
[47] Joseph Marianus Kujur , "Development not for tribes", *The Pioneer*, 18 June 2005
[48] "Polavaram project gets clearance", The Hindu, 2 October 2005
[49] "State Pulse: AP: Dam to displace hundreds", The Central Chronicle, 14 December 2005

government was reportedly willing to resettle 53,000 tribal families in the forests of Muthanga Sanctuary by transferring nearly 7,000 hectares of forest land.[50] The government also finally registered success by enacting the law to protect the interest of the tribal communities. The rights including community tenures of habitat and habitation for primitive tribal groups and pre-agricultural communities are allowed by the law of the land[51] and in the cases of illegal eviction or displacement they have a right to *in situ* rehabilitation including alternative land.[52]

SAARC Policy Initiatives Regarding Indigenous Rights And Challenges

3.1 SAARC: Aims and Objectives in the context of Human Rights

The South Asian Association for Regional Cooperation (SAARC) is the only one regional instrument of South Asia established with the initial objective of improving the quality of life of the people of South Asia by accelerating the economic and social development in the region.

The existing regional human rights mechanisms in Europe, Latin-America and Africa have contributed in the protection and promotion of human rights in these respective regions. The Association of South East Asian Nations (ASEAN) countries have been successful to establish ASEAN Inter-Governmental Commission on Human Rights (AICHR) through the ASEAN Charter 3 followed by long efforts of the human rights defenders. However, there is no regional human rights mechanism in South Asia except the emerging National Human Rights Institutions (NHRIs).However, they have capacity gap to work for the human rights issues beyond national level. Therefore, concerted and consistent efforts are necessary from the civil society organizations and key stakeholders

[50] "Kerala leads the way in tribal forest rights crusade", The Pioneer, 3 May 2005
[51] The Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights)Act, 2006 Section 3(1)(c)
[52] The Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights)Act, 2006 Section 3(1)(m)

for the establishment of regional and sub-regional institutions and mechanisms for the promotion and protection of human rights in South Asia.

However, the SAARC still has a long way to go for creating a robust human rights mechanism by instilling human rights value and standards as one of the core principle in the SAARC process. In the arena of preservation of rights of the indigenous people the SAARC has not made a significant contribution. Neither it has adopted any Convention nor made a declaration recognizing the rights of the tribal communities. Nevertheless, SAARC Development Goals has mentioned in its Goal 5 to strengthen connectivity with the social groups including representation of the excluded groups (tribals/indigenous groups) in Local Governance.[53] Also in another document brought out jointly by UNEP and the SAARC named, *South Asia Environment Outlook 2009* [54] mentions about protection of community rights as a policy and institutional option. The development and establishment of strong community rights' systems that recognize the collective nature of local innovation promote its development and application; encourage conferring clear and unambiguous legal rights to genetic resources, this is closely linked with the recognition of the rights of indigenous peoples and local communities to such resources. This means that basic issues of self-determination, sovereignty and communities' own definitions of their rights need to be dealt with and built into statutory law and policy at national level.[55]

3.2 Concerns for the Indigenous Groups amongst SAARC Nations

The SAARC no doubt lacks a legislative framework regarding protection of the rights of the indigenous people. Moreover, the current practice of SAARC restricting access of civil society organizations in the debate, dialogue and discussion needs to be changed and the voice of the people of South Asia and their opinion on how they want to pursue the democratization and human rights must be heard as per the demand made by the vibrant civil society organizations of the region. SAARC has a regional agenda and mechanism on development related matters but it is high time for SAARC to have one focused agenda on human rights agenda in the SAARC In February 2011, the SAARC countries

[53] Taking SDGs Forward, SAARC Development Goals (2007-2012) ISACPA, INDEPENDENT SOUTH ASIAN COMMISSION ON POVERTY ALLEVIATION, MARCH 2007 p.14

[54] ISBN : 978-92-807-2954-2

[55] *Ibid.*, at p. 99-100

have approved the SAARC Charter of Democracy with very narrow aims "to shield the democracies in the region from extra-constitutional takeovers". However, drafting process of SAARC is still made through the closed door meeting among government representatives without representation and meaningful participation of civil society organizations of the region. Moreover, the current practice of SAARC restricting access of civil society organizations in the debate, dialogue and discussion needs to be changed and the voice of the people of South Asia and their opinion on how they want to pursue the democratization and human rights must be heard as per the demand made by the vibrant civil society organizations of the region with appropriate mechanism to address the pertinent issues of human rights. The regional human right organizations should continue their concerted efforts for the strong advocacy for the establishment of strong regional human rights mechanism at the national, regional and international forum through concerted efforts and shared vision and strategies.

EFFORTS OF ORGANISATION OF AMERICAN STATES IN SAFEGUARDING THE INDIGENOUS RIGHTS

4.1 Human Rights Initiative in OAS States

The General Assembly meeting in 1989, asked the Inter-American Commission on Human Rights (the IACHR) to prepare a "legal instrument be adopted in regard to the human rights of the indigenous peoples" for adoption in 1992.[56] The legal instrument prepared by the IACHR was submitted to the Permanent Council on April 10, 1997, as a draft declaration, with the title [Proposed American Declaration on the Rights of Indigenous Peoples] (hereinafter "the Proposed American Declaration prepared by the IACHR"). The goal of the Working Group is to adopt each provision by consensus, as established by the successive resolutions on the matter and the chosen working

[56] See para 13 of Resolution [AG/RES. 1022 (XIX-O/89)

methodology.[57] In an effort by the Department of International Law of the Secretariat for Legal Affairs of the Organization of American States conducted a workshop on "Mechanisms for Protecting the Rights of Indigenous Peoples" for the delegations of missions to the OAS and General Secretariat staff. In the area of indigenous affairs, the Department embarked on a "Program of Action on Indigenous Peoples in the Americas" aimed at promoting and strengthening participation by indigenous peoples in internal and international decision-making processes, increasing general social awareness of this topic, training representatives of indigenous peoples in a number of areas contributing to the integral development of their communities, and facilitating the incorporation of indigenous issues into a series of OAS projects and activities.[58]

The Inter-American Court of Human Rights has observed that: 1) traditional possession of their lands entitles indigenous people to demand official recognition and registration of property title; 2) members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, and 3) members of indigenous peoples who have unwillingly lost possession of their lands are entitled to restitution thereof or to obtain other lands of equal extension and quality. Consequently, possession is not a requisite conditioning the existence of indigenous land restitution rights[59]. Likewise, in the ground-breaking Endorois case, the African Commission on Human and Peoples Rights affirmed the rights of the Endorois over their traditional lands, concluding that forced eviction of the Endorois from their ancestral lands interfered with their rights to religious freedom, property, culture, development and to freely dispose of wealth and natural resources[60] In the context of Canadian Charter of Human Rights the Inter-American Court of Human Rights require that the equality analysis of the provisions relating to aboriginal people must always proceed with

[57] "Proposed procedure for promptly concluding the negotiations in the quest for points of consensus of the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples" (GT/DADIN/doc.246/06 rev.7, of December 6, 2007).

[58] Available at the http://www.oas.org/en/sla/dil/indigenous_peoples_activities_workshopmechanisms_protect ing_oct-2013.asp (last visited on 8/9/2014)

[59] *Case of the Sawhoyamaxa Indigenous Community v. Paraguay*, Inter-American Court of Human Rights, Judgment of March 29, 2006, para. 128.

[60] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, African Commission on Human and Peoples Rights, 276/3003 (4 February 2010)

consideration of and respect for aboriginal heritage and distinctiveness, recognition of aboriginal and treaty rights and with emphasis on the importance for aboriginal Canadians of their values and history.[61]

4.2 Preserving the Rights of the Indigenous Groups in Canada, an OAS Member

The Supreme Court of Canada made a landmark decision on Aboriginal title by recognizing the land rights of the Tsilhqot'in Nation.[62] The Court declared that the Tsilhqot'in Nation has Aboriginal title to part of their traditional territory.[63] The Court did not create a new right, but simply recognized the Tsilhqot'in Nation's existing title. In this decision, the Supreme Court followed a long line of court decisions about Aboriginal title. Court confirmed the potential for Aboriginal title in ancestral lands.[64] The Tsilhqot'in has an Aboriginal title right to part of their traditional territory. This means they have ownership rights similar to any other landowner, such as occupying the land, deciding how the land is used, enjoying the economic benefits of the land, and managing and otherwise using the land. Like any other landowner, they also have a right to exclude others from their land. The only limitation on their use of the land is that it cannot be used in a manner that would destroy the land's ability to sustain future generations of Tsilhqot'in people[65] This Court confirmed the sui generis nature of the rights and obligations to which the Crown's relationship with Aboriginal peoples gives rise, and stated that what makes Aboriginal title unique is that it arises from possession before the assertion of British sovereignty, as distinguished from other estates.[66] The concepts of sufficiency, continuity and exclusivity provide useful lenses through which to view the question of Aboriginal title. This said, the court must be careful not to lose or distort the Aboriginal perspective by forcing ancestral practices into the square boxes of common law concepts, thus frustrating the goal of faithfully translating pre-sovereignty

[61] *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, 17th September 2003. Ser. A OC-18/03, at para. 110
[62] http://www.kairoscanada.org/dignity-rights/indigenous-rights/ (last visited on 15/7/2014)
[63] *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44
[64] *Guerin v. The Queen*, [1984] 2 S.C.R
[65] *Supra* note 63, at para 121
[66] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

Aboriginal interests into equivalent modern legal rights. Sufficiency, continuity and exclusivity are not ends in themselves, but inquiries that shed light on whether Aboriginal title is established.[67] Further, the Aboriginal title right to exclusive occupation can be **justifiably infringed** by the government in certain circumstances. The process of reconciling Aboriginal interests with the broader interests of society as a whole is the raison d'être of the principle of justification. But the Court made it clear that these are intended to be high hurdles for the government to meet: the government has to show that the purpose of the infringement is a "**compelling and substantial public purpose**"[68] the government has to show that the incursion is necessary to achieve the government's goal, the government has to show that the infringement does not infringe on Aboriginal title any further than necessary to achieve that purpose , the government has to show that the benefits expected from the infringement are not outweighed by the adverse effects on Aboriginal interests. So, if the Crown wants to develop lands subject to Aboriginal title, it has two choices. Either it needs the consent of the Aboriginal title-holders or it must be confident that the development is a "justified infringement" of Aboriginal title. The Court cautions that projects begun without consent on claimed Aboriginal title lands may need to be cancelled, if the title claims are eventually proven and the Crown can't show justified infringement[69]. One other important outcome of this case is the Court's confirmation that provincial laws of general application apply to Aboriginal title lands. Both federal and provincial laws apply to Aboriginal title lands unless they constitute an infringement on Aboriginal rights or title and cannot be justified according to the framework discussed above.[70] This is a landmark decision, in that it is the first time a Canadian court has issued a declaration of Aboriginal title, but it is important to remember that this decision is not a revolution. Here is a brief review of what Aboriginal title means and a reminder that this case simply recognizes land rights that have existed for a very long time: Aboriginal title recognizes the right of Aboriginal people to occupy and use their own lands, and not to have their lands taken away by others without their consent. This right is not new but is older than Canada. Most settler Canadians live on

[67] *Supra* note 65
[68] *Supra* note 63, at para 84, 87
[69] *Ibid,* at para. 92
[70] *Ibid* at para. 151

lands where there already has been some agreement about Aboriginal title. These agreements are called treaties, and hundreds of them have been made. But not all land in Canada is covered by treaties. For lands not covered by treaties, Aboriginal title has existed since time immemorial, continued to exist when settlers first arrived, and continues to exist today. Unfortunately, courts and governments in Canada have not always recognized this fact. In some areas of Canada, such as British Columbia, settler governments made a decision early on to pretend as if Aboriginal people did not exist, and simply took their lands. First Nations in BC have been trying to go to court to stop the government from taking their lands since more than a century ago. The *Indian Act* was actually amended to prevent First Nations from hiring lawyers to pursue these claims, and this provision was only lifted in 1951.The Supreme Court of Canada first recognized that First Nations have an Aboriginal title right to their lands in 1973, but it was not until 1997 that the Supreme Court of Canada provided a way for them to prove it. In the *Tsilhqot'in Nation* case, in the lower courts, the provincial and federal governments tried to argue that Aboriginal people have no rights to lands except for "salt licks, narrow defiles between mountains and cliffs, particular rocks or promontories used for netting salmon, or […] buffalo jumps". The Supreme Court of Canada has forcefully rejected this restrictive view of Aboriginal land rights, and affirmed the right of the Tsilhqot'in Nation to their territory. The Court has therefore also forcefully rejected the idea that First Nations had no ownership over their lands.

EFFECTIVE PROTECTION OF INDIGENOUS RIGHTS: LESSONS FROM REGIONAL CONGLOMERATES

Civil society awareness of SAARC activities and its attempts to participate in and influence the SAARC process has also stepped up in recent years. A glance at the list of SAARC's Apex Bodies and SAARC Recognized Bodies reveals that SAARC is more interested in working with technical civil society organizations than civil society organizations working on human rights and democratization. Still, groups such as the South Asian Free Media Association (SAFMA), South Asians for Human Rights (SAHR), and South Asia Forum for Human Rights (SAFHR) now try to lobby SAARC

into addressing a wider range of human rights issues than it has in the past. The largest network of civil society groups working to push SAARC deeper into acting on human rights is People's SAARC, a collective of people's movements, rights groups, and prominent members of civil society across South Asia. The SAARC came up with the Kathmandu Declaration,[71] demanding the establishment of a regional human rights mechanism in South Asia similar to the Asian Intergovernmental Commission on Human Rights (AICHR) in ASEAN, the Inter-American Commission on Human Rights, the African Commission on Human and Peoples' Rights, and the European Court of Human Rights. The 2011 Workshop has come up with Kathmandu Statement 2011 and establishment of an informal Working Group among the human rights experts and practitioner of South Asia to facilitate dialogue and discussion with SAARC and South Asian Governments and enhancing civil society participation in the SAARC process. This enhanced civil society stakes in human rights initiatives has been the significant lesson learnt from the experiences of the HR cult prevalent in American States.

A regional mechanism is the most difficult thing we can think of due to regional mistrusts, regional challenges and regional gaps which contribute to SAARC's dysfunctional nature. The functioning of the SAARC and to some extent OAS shows that the primacy of politico-security issues has stymied regional cooperation under the Co-operations. There has hardly been any serious debate in the region to reform, re-orient the association both structurally and operationally, which will enhance its effectiveness as a dynamic vehicle of regional cooperation. This is high time to revisit the main rationale of the process adopted by these regional associates, its main objectives, structures and modalities. The geo-political situation and ongoing human rights violations in many South Asian countries and American regions have raised number of challenges in the establishment of a human rights mechanism in these States. OAS member States have still to a limited extent within their national jurisdictions gained some measure of advance in its legal regime vis-à-vis protection of human rights, yet much needs to be done to make the associations workable and efficient. Countries of ASEAN have

[71] In 2011 Second Sub-Regional workshop on human rights mechanism in South Asia has been organized as an followed by the First Sub-Regional workshop on a South Asian Human Rights Mechanism, March 24-25,Kathmandu Nepal was held, and participants emerged with the said declaration

established an Inter-Governmental Commission on Human Rights (AICHR) and have focused the systemic lacunae in the regional forums. Some of the major challenges have been highlighted as follows. These shortcomings though in terms of SAARC region are witnessed commonly amongst other regional cooperation like OAS.

(I). Slow Democratization Process: The process of democratization and human rights movement haven't still been able to create higher momentum for the South Asian governments to push in serious discussion among the SAARC governments and dialogue with civil society for the consolidation of democracy and human rights during more than 25 year's history of the SAARC. The Association moved slowly both in terms of its institutions and its programmes. The major weaknesses of SAARC have been its restrictive agenda, weak Secretariat, ineffective implementation machinery and lack of a dispute settlement mechanism.

(II). Lack of Enforcement Mechanism: The South Asian countries have been witnessing the increasing number of reported and unreported cases of human rights violations followed by institutional failures and attack against the human rights defenders, defenders of freedom of expression and right to information. Adoptions of SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution and SAARC Convention on Regional Arrangements for the Promotion of Child Welfare in South Asia on January 5, 2002 at the Eleventh SAARC Summit held in Kathmandu were a timely initiative and significant milestone in combating and preventing trafficking. However, there is no effective implementation mechanism in place to implement these Conventions.

(III). Lack of Strong Commitment towards Human Rights: The South Asian governments haven't taken human rights as their priority agenda and genuine efforts in addressing the ongoing human rights violations such as Extra Judicial Executions (EJE), disappearances, torture, gender based violence and the common human rights issues of the region such as human trafficking, migration and rights of the minorities.

(IV). Deficit of Democracy and Good Governance: The South Asian government and the democratic institutions are still suffering due to lack of transparency, accountability and deficit of democracy. Despite the establishment of number of democratic institutions including the National Human Rights Institutions (NHRIs), they are grappling with difficulties and capacity gap. The judiciary and quasi-judicial bodies haven't been able to function effectively. The Right to Information Act and the Anti-corruption Commissions has been enacted in most of the countries .However, and the Judges of the Judiciary more to serve the interests of the government than that of the people.

(V). Lack of Conflict Resolution Mechanism: There is no proper mechanism within the SAARC in resolving the conflicting issues at sub-regional level unlike Europe and other parts of the world. The official SAARC Summit can't put the conflicting issues as the agenda of SAARC. As result number of issues with major impact on human rights including the human trafficking, refugees and internally displaced persons (IDPs), border disputes, fisher folks, climate change and labour migration and management of natural resources for the mutual benefits such as water management haven't been adequately addressed and some of the ad-hoc efforts taken at bilateral level are patchy without effective implementation and monitoring mechanism.

CONCLUSION

Despite international recognition and acceptance of the Universal Declaration of Human Rights, which guarantees the fundamental rights of all human beings, in practical fact Indigenous Peoples' human rights remain without specifically designated safeguards. To this day, Indigenous Peoples continue to face serious threats to their basic existence due to systematic government policies. In many countries, Indigenous Peoples rank highest on such underdevelopment indicators as the proportion of people in jail, the illiteracy rate, unemployment rate, etc. They face discrimination in schools and are exploited in the workplace. In many countries, they are not even allowed to study their own languages in schools. Sacred lands and objects are plundered from them through unjust treaties.

National governments continue to deny Indigenous Peoples the right to live in and manage their traditional lands; often implementing policies to exploit the lands that have sustained them for centuries. In some cases, governments have even enforced policies of forced assimilation in efforts to eradicate Indigenous Peoples, cultures, and traditions. Over and over, governments around the world have displayed an utter lack of respect for Indigenous values, traditions and human rights.

In international discussions on the protection and promotion of Indigenous Peoples' human rights, some States have argued that a more conscientious application of human rights standards would resolve the issue. On the other hand, Indigenous Peoples argue that such international human rights standards have consistently failed to protect them thus far. What is needed, they argue, is the development of new international documents addressing the specific needs of the world's Indigenous Peoples. Although the Universal Declaration of Human Rights is designed to protect the human rights of all individual human beings, international law concerning collective human rights remains vague and can fail to protect the group rights of Indigenous Peoples.

However the regional instruments have certain strengths in safeguarding the interest of indigenous people. [72] Some of the major opportunities that could deliver by the regional mechanism can be elaborated as follows:

(I). Regional mechanism could help overcome procedural and institutional weaknesses and shortcomings of some domestic jurisdictions and of the international system;

(II) Regional mechanism could help overcome tack of expertise and experience in human rights jurisprudence;

(III) Regional mechanism could lead to more effective implementation and enforcement of human rights norms and standards;

(IV) Regional mechanism could draw on the concepts and values which are integral to the intellectual and religious traditions and world-views of Asia and the Pacific;

[72] Establishing a Robust Regional Human Rights Mechanism in South Asia an article by Surya Deuja published in the: Asian Human Rights Defender (Vol. 6 No. 1, June 2010) available at: http://archive.forumasia.org/index.php?option=com_content&task=view&id=2631&Itemid=34 (last visited 8/8/2014)

(V) Regional mechanism could address regional human rights problems (e.g. trafficking, refugees and displaced persons, migrant workers) more effectively;

(VI) Regional mechanism would be one of the more credible mechanisms as the moral legitimacy would stem from being drawn up by the governments, scholars, lawyers and civil society representatives of the region.

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