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Role of International Organisation on protecting the Rights of Indigenous people and Racial Discrimination: A Critique

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ABSTRACT

The rights of Indigenous people in the international organisations are evolving among the world community. The potential significance of adopting international declaration & conventions in the development of international legal standards for indigenous people rights is the centre of study in this research paper. Various international organisations have adopted laws for upbringing the rights of indigenous people in the international arena. The International Labour organisation (ILO) has been actively contributing for developing their rights. Historically, the indigenous people are given very small significance and now their rights are being developed. This article will explore on various declaration and conventions of some international organisation and analyse the development of their rights in IO. It will criticise the legal documents which protects such rights and will try to identify the loopholes on such conventions. Some of the strategies and plans which have been implemented for the Indigenous people have not provided the expected results. Such failures will be discussed and the research will focus on attempting to provide positive suggestions to uplift the position of indigenous peoples rights in the International Organisation. The absence of active involvement of the indigenous people and racial discrimination among others will be criticised in the research. The main question whether indigenous people need special adhoc rights and convention or their rights can be gained with the existing international human rights declaration will be explored.

Keywords: *Discrimination, International, Indigenous, Rights, Society.*

I. INTRODUCTION

“The earth is what we all have in common”²

There is no definition for indigenous people but the ILO convention defines Indigenous people implicitly by differentiating it with Tribal people the verbatim states *“Peoples in independent countries who are regarded as indigenous on account of their descent form from the populations which inhabited the country or a geographical region to which the country belongs, at the time*

¹ Author is a student at Tamilnadu National Law University, India.

² Wendell Berry.

of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions”³.

The following criteria should be considered for application of laws on the indigenous community namely historical relevance, distinctiveness, non-dominance, determination to preserve, develop and transmit their culture and traditions to upcoming generations, link between the territories and surrounding natural resources, distinct socio-economic and political systems, language and cultural beliefs. Indigenous people are self-determining communities who owned their lands and who held rights under natural law, whether derived from God or, as Grotius suggested from reason’ above the positive laws of the state’⁴.

(A) Rights of Indigenous people (IP) in United Nations

‘The purpose of Indigenous rights is to address unfair distribution of sovereign power sanctioned by international law, says Patrick Macklem in his book named “*The Sovereignty of Human Rights*”⁵. Kingsbury says ‘the indigenous peoples’ claims under international law come from five main different directions: non-discrimination, minority rights, self-determination, historical sovereignty, and *sui generis* claims⁶. The participation of indigenous people as an international actor is active and increasing among the UN framework. The first organisation which had the motive on forming indigenous rights is ILO which provided for the detailed list of indigenous people’s rights. The UN declaration expresses that IP are free, equal, and non-discriminatory in exercising their rights based on their indigenous origin or identity⁷. The articles of this declaration talk about IP on self-determination, freedom, autonomy rights, rights of nationality, rights over their culture and habits, protection of their laws, traditions and customs, education, application of laws under international and domestic laws, etc. The document is said to be one of the comprehensive conventions among the UN documents.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) is a resolution adopted in 2007 with 143 votes. The member states who were against this declaration reversed their view towards it after a few years and today they actively support the convention. The

³ Indigenous and Tribal peoples Convention (No. 169), Article 1., 1989.

⁴ Mazel O, *The Evolution of Rights: Indigenous Peoples and International Law*, 13 Australian Indigenous Law Review, Indigenous Law Centre, 140-158 (2009).

⁵ Andrew Erueti *Comparative Approaches, Indigenous Voices from CANZUS*, Centre for International Governance Innovation, 2020.

⁶ B Kingsbury, RECONCILING FIVE COMPETING CONCEPTUAL STRUCTURES OF INDIGENOUS PEOPLES’ CLAIMS IN INTERNATIONAL AND COMPARATIVE LAW, (Oxford University Press, 2001) p. 109.

⁷ United Nations Declaration on the Rights of Indigenous Peoples, art 1, 2007.

convention is found to be a comprehensive document by elucidating the existing human rights standards and basic freedoms as they apply to the specific situation of indigenous peoples⁸. This document tried to emphasize the survival, dignity and well-being of the indigenous people of the world. Secondly, the ILO convention⁹ on Indigenous and Tribal Peoples in Independent Countries, 1989. This document specifically focusses on non-discrimination. It focuses on their rights to development, customary laws, lands, territories, resources, employment, education & health¹⁰.

UN has Working Group on Indigenous Populations (WGIP) which works for the promoting and protecting the human rights and freedom of indigenous populations. Like any minority groups or tribal people who are denied rights in the world, IP also faces the same problems which are tried to be solved by these international laws. The special concentration on having specific laws for promoting their lives shows the significance of their challenges and troubles. For instance, patenting the traditional knowledge of Indigenous people are not protected by conventional intellectual property systems. The group focuses on promoting both collective and individual right to maintain and develop their ethnic cultural characters and identities¹¹. The declaration on rights of IP is read with International Convention on the Elimination of All forms of racial discrimination Convention, 1966 at times to have its full effect in application.

(B) Other international organisations on rights of indigenous people

The rights of indigenous people located in the CANZUS is also governed by the UN Declaration for development and promotion of their rights¹². Apart from that, United States has its own document named “*American Declaration on the rights of Indigenous peoples*’ which covers the countries of North America, Mexico, Central and South America and the Caribbean. The document focusses on promoting the life of IP by way of developing their rights on education, health, self-government, culture, lands, and natural resources¹³. The one common similarity among all the international documents can be that all the document which promotes the rights

⁸ United Nations Declaration on the Rights of Indigenous Peoples, Department of Economic and Affairs <https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html> lastly accessed on 20 Nov 2022.

⁹ *International Labour Organisation: Convention Concerning Indigenous and Tribal Peoples in Independent countries*, International Legal Materials, 28 Cambridge Press University, 1382-1392 (1989).

¹⁰ Report on Indigenous Peoples and the United Nations Human Rights system, United Nations Human Rights Office of the High Commissioner. See, <https://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf> to view the report.

¹¹ Stephan Marquardt, *International law and Indigenous Peoples*, 3 International Journal on Group Rights, 47-76 (1995).

¹² T Mitchell & C Enns, *The UN Declaration on the Rights of Indigenous Peoples: Monitoring and Realizing indigenous rights in Canada*, International Governance Innovation (2014).

¹³ The American Declaration on the Rights of indigenous Peoples, Indian Law Resource Centre, <https://indianlaw.org/adrip/home> lastly accessed on 21 Nov 2022.

of IP related to the application of Declaration on Human right laws.

The African charter on Human and Peoples Rights recognises the collective rights by including the term ‘people’. These collective rights are ensured to the sections of populations with the stat including IP and communities. Coming to the domestic laws of India on Indigenous People which forms a huge population of the country. India has a diversified population including tribal people, minority, scheduled areas, etc.

The IP in India are commonly referred to as ‘Scheduled tribes’ and they are guaranteed with the right to self-determination in the Constitution. Some of the enactments are Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006. Some of rights which the Indian legislations covers their land rights, community rights, ownership over some forest produce, rights on biodiversity, rehabilitation¹⁴ in case of displacement and focusses on protecting their habitat, culture, and natural heritage.

Convention on Biological Diversity deals with the issues faced by IP by the state being the contracting party to the convention. Its application is subject to the national legislation and its main objective is to ensure, preserve, maintain the knowledge and innovations of the IP and local communities.

(C) Role of European Union

European Union has recent developments in protecting the rights of indigenous people by European Commission Working groups and their policies under the European Community’s cooperation. The resolution passed by EU on IP talks about full participation of IP in the democratic processes of their country. Some of the main objectives of the research are; full and free participation in development process; to recognize the diversified concepts, the right to decide their own development paths. The resolution mentioned that ‘*Indigenous cultures constitute a heritage of diverse knowledge and ideas, which is a potential resource to the entire planet*¹⁵’

There are number of measures taken by EU on promoting the rights of IP by allocating budget on specific matters with the help of European Convention on Human Rights (ECHR). Under Article 14 of ECHR, it talks about enjoyment of rights and freedoms without discrimination on

¹⁴ Observations on the State of Indigenous Human Rights in India, The United Nations Human Rights Council Universal Periodic Review 2016, 27th Session Third Cycle. See <https://www.culturalsurvival.org/sites/default/files/INDIAUPR2016final.pdf> lastly accessed on 22 Nov 2022.

¹⁵ Document on ‘The European Union: Human Rights and the Fight against Discrimination’, <https://www.ohchr.org/sites/default/files/Documents/Publications/GuideMinorities14en.pdf> lastly accessed on 22 Nov 2022.

the ground of national minority or other status¹⁶. According to their application of law, they consider ‘indigenous people’ as minorities. There are various action plans and working groups formed for development of IP and some of them are Rainforest Foundation and International Alliance of Indigenous and Tribal Peoples of the Tropical Forests; Saami Council (for protecting the culture and customary law of IP), Actions in favour of Tropical Forests.

(D) The legal status of indigenous people in international arena

To find the legal status, we shall consider two important things –

- (i) Sovereign right of IP – As per the UN charter, these IP are not considered as a sovereign state under international law. For instance, the sovereign rights argued on behalf of the North American Native people for their statehood under International Law (IL). Various treaties have been concluded between European nations and Indian tribes at the time of colonization of North America promotes the legal nature and its application to international law. We must believe IP are neither minority nor a special category from human community and therefore, there is no need for a particular sovereign right.
- (ii) Right to self-determination - Every individual has the rights of self-determination by which they are allowed to freely determine their political status and have the freedom to pursue their social, economic, and cultural development. But when it comes to the case of indigenous people. This right is ensured under Article 1 of ICCPR and ICESCR. This right is considered as a fundamental part of customary international law. Since, ‘indigenous people’ are argued to be a separate category from ‘people, the application of this right is questioned by many scholars. They say that indigenous people do not qualify as people but they might come under the ambit of indigenous populations or as minorities¹⁷.

II. DIFFERENCE BETWEEN INDIGENOUS PEOPLE & MINORITIES

Some of the study made under WGIP of UN has observed that the indigenous community shall be qualifies as ‘minorities’ and not as ‘people’. But recent development in international law had proved that this perception is not true. Because UN considers both as different entities and has separate working groups for achieving their objectives. By viewing the different international instruments with different objectives, we can say that protection of minorities is different from indigenous people. The rights of IP are seen as a collective right rather than individual rights of

¹⁶ European Convention of Human Rights, art 14, 1953.

¹⁷ *Supra*, at note 7.

minorities. Eg. The right of self-determination gives individual right to vote but in essence it is a collective right. The characteristics which determine the indigenous people's identity is quite different from that of minorities mentioned under Article 27 of ICCPR by referring to ethnic, religious, and linguistic minorities Declaration.

(A) Common Challenges faced by Indigenous people in protecting their rights

The primary challenges among these IP are the legal and social recognition of their identity, the rights of traditional knowledge, lands, territories, and resources. Some of the other common problems which IP faces by being a neglected segment of society are the non-representation and participation, economic marginalization and poverty, lack of access to social services and discrimination¹⁸. The paper shall discuss each challenge considering the existing international provisions.

(i) Recognition

The IP are recognised by different terminologies in different countries namely Indigenous population, IP, minorities, Scheduled tribes, community, etc. Recognising them as a separate group of people who need specific rights can be seen from different conventions which are brought for their development. Article 8 of the ILO Draft Convention defined IP have “the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and the right be recognised as such¹⁹”. On the contrary a different stand taken by *Berman*, saying that the indigenous peoples' rights constitute *sui generis* category of rights that arise outside of the positive law system²⁰. But the current document does not have a proper definition for the term IP rather under Article 1 it mentions its applicability to a variety of people. And a separate provision specifies the ‘self-identification as indigenous or tribal shall be a fundamental criterion for identifying the application of this convention’²¹

(ii) Rights of their traditional lands, knowledge, territories, and resources

These people were historically living in certain geographical areas like forest lands, mountains, etc. Article 13 to 19 of the convention talks about rights of IP over lands. They are not given their land rights since generally forest and mountain areas are not owned by anyone except the government. Even though there are numerous traditional knowledge carried by the IP

¹⁸ Indigenous people, Indigenous voices, who are indigenous people, United Nations Forum on Indigenous People, https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf

¹⁹ Jeremie Gilbert, *Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples*, 14 International Journal on Minority and Group Rights, 207-230 (2007).

²⁰ *Supra*, at note 14.

²¹ Indigenous and Tribal People Convention, (No. 169) art 1 of 1989.

generation-wise, there is no protection given by the state or world. The general Intellectual Property Rights given to the inventions are not given to the traditional knowledge because they are not merely inventions rather knowledge transferred from one generation to others.

(iii) Political representation

The participation of IP and their political rights & representation depends on the right to self-determination closely. These political rights include participation in the decision making of any legislative policy and inclusion of their free. Prior and informed consent on such policies before it comes to implementation. This power is given to IP under Article 18 of UNDRIP in addition to the power given to them to accord with their own procedures and maintenance and development of their own decision-making institutions²². But the challenge faced by IP is absence of awareness on the existence of such rights which makes them to be not actively participated in these institutions.

(iv) Poverty and economic marginalization

Compared to the other sections of society, IP have a higher rate of poverty including poor access to education and health. This remains to be a structural discrimination which retracts the low public investment by government on the development of infrastructure and communication. Since, the contribution of IP to the economy remains to be invisible because the sectors they contribute will generally fall under the unorganized and informal sectors. They are largely subsistence-oriented and they include domestic, unskilled labourers, etc. If there is full implementation of the ILO instrument with good governing domestic laws then the contribution to economy by IP might get increased. It shall also be noted, as per the working group study on IP, it states that IP's life expectancy is up to 20 years lower among the other non-indigenous people.

(v) Lack of access to resources

'Resources' mentioned here included natural resources and non-access to other services like communication, internet, education, health, and infrastructure. Though location is a problem behind implementing these services but the government and the organisations which supports IP lacks to provide these services. There is no emergence of hospitals, schools or good internet services developed in the geographical locations of the IP. The absence of political representation of the IP makes these challenges to be more complicated.

(vi) Discrimination

²² United Nations Declaration on Rights of Indigenous People, art 18 of 2007.

Though we have separate laws and conventions to promote the IP, still there is discrimination faced by them in terms of locality, diversified culture, and ethnicity. They are a separate part of society from the people of the country. Considering them as a separate section of society and calling them as minorities or tribal people counts as discrimination. Although international conventions necessitate promotion and development of their rights, the problems like illiteracy, unemployment shows the existing discriminative society.

(B) Analysing the International Convention on Indigenous people

The unspecified provision on self-determination of IP is a major drawback in the conventions. The question that existing conventions are adequate to meet the requirements of IP remains unanswered. Because, the undifferentiated instruments on human rights and rights of minorities bring the problem by not able to identify the individual concerns of the Indigenous people. The international convention on Rights of IP and ILO convention on their rights must focus on the specialised rights of them. Some of the rights which should be considered are protection of their traditional lands to maintain their physical, cultural and spiritual survival; right to practice their own traditions as their business and develop their cultural implications; to be provided with the access to welfare, health and education; the state under which such IP survives must maintain their treaty promises and respect them as people of their nations.

“Indigenous peoples are in the situation where their claims protection cannot be coherently understood except when treated separately²³” Article 27 of UNDRIP talks about adjudicative authority for the indigenous people over land, territory, and resources but it lacks to specify the members or working group of the body. This shows that the IP does not have their own autonomy but they will be covered by the State judiciary whenever there is any dispute. The state forgets to consider their sovereign rights over their lands, territory, and resources. Recognising their rights as a ‘collective right’ will enable them to enjoy human rights.

Though there is specific convention under ILO for labour protection, the people suffer from the worst forms of labour exploitation and are disproportionately represented among the victims of discrimination²⁴. Their limited access to vocal trainings and the significance given to their traditional knowledge is another disadvantage. The conventions must cover the protection of IP from bonded labour, trafficking, hazardous work, and child labour problems²⁵. The IP have weaker connectivity with the working organisations which promotes their rights and not aware

²³ Richard Falk.

²⁴ Handbook for ILO Tripartite Constituents, Understanding the Indigenous and Tribal Peoples Convention, 1989 (NO,169).

²⁵ *Ibid.*

of the existing protections over labour rights. The international convention is not a formally binding treaty. It is the member states which ratified the convention who should take appropriate steps to implement the convention with responsibility. The absence of coordination between international organisation and the member state; the lack of coordination of member state with IP on decision making and absence of their consultation before implementation.

Many indigenous groups who are unidentified by the conventions and its recognition. The UNDRIP does talk about IP and their rights, but there is no provision which talks about searching, finding, and identifying the IP groups who remains to be unidentified.

The private sector has a special responsibility or a duty to respect the IP rights. International law will not directly impose laws or duty on the private sector, but it is the duty of the nations to take initiatives regarding protection of the IPs Traditional knowledge, culture, and land rights.

Reservation of seats for IP representatives is a drawback from the international convention. Since, the document has the objective of active participation by the IP on international organisations to raise their concerns. But it does not talk about specific allocation of seats as the representatives who work for the development of their rights.

A feministic approach – After including the reservation for women in politics, we had the higher challenges of gender inequality and imbalance. Since, the laws are written by men, there was non-involvement of the voices of women and their concerns. Today, we consider women as equally as men and therefore, the problems of gender equality are slowly diminishing. Similarly, history proves that there is no specific rights provided to the IP which puts us in a situation to specifically focus on their specialised rights.

In the case of *Sandra Lovelace v Canada*²⁶, the Indian women was deprived of her rights to own home and denied of rights including education, housing, and social assistance, right to traditional hunting and fishing, cultural benefits, etc under ICCPR by marrying a non-Indian. As under Article 27 of ICCPR, the state cannot deny the right to culture to minority. Though she got married, here inherent rights remain same and she will be given the right to own home and will come under the category under meaning of ‘minority’ of Article 27. This judgement stood as a classic example for both protection of IP rights and a step towards gender equality. Article 3 of the ILO convention talks about application of the convention to male and female members of these people without discrimination.

²⁶ Sandra Lovelace v Canada, Communication No. 24/1977: Canada 30/07/8, United Nations Human Rights Committee.

III. SUGGESTIONS

- Ratification of UNDRIP by many countries will help to promote the rights of Indigenous people. This convention should be considered as an international benchmark for indigenous well-being.
- To advance the political participation of IP as international actors, specific reservation shall be given to them on international organisation to hear their individual voices.
- Consider IP as a special community and treat them with some special provisions to promote their welfare. For example; we have reservation for education, employment for tribal people under Indian constitution for preventing discrimination.
- Promoting specialised rights for IP on their education, employment, protection of their lands and resources
- Though they do not provide patent rights to the traditional knowledge they have under TRIPS, the international organisations should take appropriate steps to provide some level of protection to their traditional knowledge.
- Coherence and cooperation between international laws and domestic legislations to be strengthened.
- Creating awareness to the IP community regarding the rights and protection given to them for their lands, knowledge, territories, and resources.

IV. CONCLUSION

The research discussed about some of the significant challenges encountered by the Indigenous people who are considered as an invisible section of society. The contribution of international conventions over protection of their rights are appreciable in a legislative approach. But the implementation of such convention lacks efficiently due to the historical background of the indigenous people and the non-cooperation of domestic legislations of different states. It must be understood that, the application and efficiency of the convention wholly depends on the domestic laws' implementation. The United Nations Declaration on Rights of Indigenous people and ILO convention of IP tries to promote their rights by forming different administrative sectors and working groups to study their position for providing a better solution. But the inactive participation of Indigenous people in political setup makes their voices unheard²⁷. This initiative to provide the indigenous people with representation on politics and

²⁷ Alexandra Tomaselli, *The Right to Political Participation of Indigenous Peoples*, 24 *International Journal on Minority and Group Rights*, 390-427 (2017).

making them to involve in international affairs will help to achieve the objectives of UNDRIP.

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