

BIOCULTURAL RIGHTS OF INDIGENOUS PEOPLES IN UNITED STATES OF AMERICA AND INDIA: AN ANALYSIS

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ABSTRACT

The indigenous people are the most vulnerable and excluded groups in the economic development process. The biocultural rights are the bundle of rights that protect, recognise, welcome, emphasise, consider, bear, believe and solemnly declare certain traditional practices, knowledge and values in order to bring the indigenous peoples, tribals and other distinct local communities into the mainstream of the development process. The right to development and right to self-determination is core of the biocultural rights of the indigenous people. Their traditional system of knowledge, biocultural heritage and traditional authorities need to be protected. The development is inclusive only when the decision-making process at local, regional and national level involves participation of the affected people. This research study is an attempt to find out the impact and implications of various conventions and UN Declaration on the indigenous people under the international law. It acknowledges that indigenous people were subject to historical injustices, colonial exploitation and impacted by human rights violation and dispossession of the forest land in the development process. It provides the permanent forum for resolving indigenous issues through the specialised national, international and UN agencies.

KEYWORDS: *Biocultural Rights, Indigenous & Tribal People, Distributive Justice, Right to Development, Right to self-determination*

1. INTRODUCTION

Conceptually, the biocultural rights combine the culture and nature together by taking considerations of historical background, present trends and future prospectives. These are the indispensable elements of the indigenous peoples, tribals and distinct local communities in their lives and protect the cultural values, inheritances and resources effectively and holistically. The biocultural rights are the bundle of rights that protect, recognise, welcome, emphasise, consider, bear, believe and solemnly declare certain traditional practices, knowledge and values in order to bring the indigenous peoples, tribals and other distinct local communities into the mainstream of the development process. The biocultural rights provide two-way strategies- firstly, establishing their right to natural resources as their historical right and secondly, right to conserve and manage. The interconnectedness between these two are the essence of the biocultural rights. The sole philosophical foundation of the concept of 'biocultural' is the inextricably link between the cultural diversity and biodiversity and the universalisation of such rights with special reference to tribal and distinct local communities.¹ The biocultural heritage, traditional knowledge system and protection of the same is the core idea behind the

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¹ CHER WEIXIA CHEN AND MICHAEL GILMORE, *Biocultural Rights: A New Paradigm for Protecting Natural and Cultural Resources of Indigenous Communities* 6 THE INTERNATIONAL INDIGENOUS POLICY JOURNAL 11, 15-19 (2015).

biocultural rights of the indigenous peoples. The tribal communities, indigenous peoples and distinct local communities need both special and universal approach to protect, promote among themselves and to manage the same. The biocultural rights are necessarily for the protection of the abovementioned people and sufficiently provide the effective legislative framework at both national and international level. The indigenous traditional knowledge systems consist of languages, literature, writing and educational systems and philosophies. Removing the historical injustices and discrimination of indigenous peoples, tribals and distinct local communities is the core idea of the Distributive justice. The term Distributive justice is the inclusive one, it is all about the just and fairness in the distribution and allocation of the societal resources.²

Internationally, the rights of the indigenous peoples, tribal and distinct local communities are gaining traction after the World War II while the different movements for the same are existent variably at local, regional and global levels and are recorded back more than two hundred years back from colonialism to modern democracies. Indigenous peoples, tribal and distinct local communities are demanding the recognition of their rights over the forests, forest lands, occupations and other traditional dwelling activities under the protection of the Universal Declaration of Human Rights, 1948. The bio-cultural rights of the abovementioned peoples and communities are already covered in the form of socio-economic and cultural rights under the Universal Declaration of Human Rights. The economic exploitation; by colonial powers and corporates; of forest and natural resources of the indigenous and tribal peoples are considered as both historical injustice and exclusion of the process of distributive justice in the development process. Sometimes the exclusion of the indigenous people in the modern development process is considered as the racial discrimination. The disaggregation of the aboriginals, distinct local communities, indigenous peoples and natives from the development process, on the basis of the language, culture and tradition by differentiating them in the allocation and distribution of the financial, natural and forest resources is considered as the continuation of historical injustice. The exclusion of national minorities of indigenous characteristics in the process of the decision making and participatory democratic process in the national public life is considered as the violation of the human rights in the form of the civil & political and social cultural and economic rights.³

² FABIEN GIRARD, INGRID HALL, CHRISTINE FRISON, *BIOCULTURAL RIGHTS, INDIGENOUS PEOPLES AND LOCAL COMMUNITIES PROTECTING CULTURE AND THE ENVIRONMENT* 122-136 (Routledge Publication, Yew York, edn. 1st 2022).

³ LARS AND ANDERS BAER, *The Rights of Indigenous Peoples – A Brief Introduction in the Context of the Sámi* 12 (INTERNATIONAL JOURNAL ON MINORITY AND GROUP RIGHTS, 631, 654-657 2005).

Academically, particularly in the environmental jurisprudence the concept of biocultural rights is very popular to empower and preserve the tribal culture by protecting the intangible cultural heritage of indigenous peoples. The intangible cultural heritage is the protection available to the tribal communities against the ever-growing globalisation. The international environmental law and human rights approaches are growing since the 1980s, in the response of the ever-rising economic globalisation for the protection of the regional, local, natural and forest resources from the multinational and transnational corporations in the name of the integration of the local markets with the rest of the world. The term 'biocultural rights' cover a broad array of customary practices, articulations, conventions and rules designed by the communities related to their social, economic and cultural lives. It is also well-established fact that only the traditional authorities, customary laws, practices and traditional knowledge systems help in the protection, promotion and conservation of the communities' values and the biocultural rights of the indigenous people, tribal and distinct local communities. It is also accepted academically, that without considering interconnectivity between the land rights, forest rights, socio-economic rights and customary practices the understanding of the biocultural rights is not possible.⁴ "Indigenous peoples' cultures include tangible and intangible manifestations of their ways of life, achievements and creativity, are an expression of their self-determination and of their spiritual and physical relationships with their lands, territories and resources. Indigenous cultures is a holistic concept based on common material and spiritual values and includes distinctive manifestations in language, spirituality, membership, arts, literature, traditional knowledge, customs, rituals, ceremonies, methods of production, festive events, music, sports and traditional games, behaviour, habits, tools, shelter, clothing, economic activities, morals, value systems, cosmovision's, laws, and activities such as hunting, fishing, trapping and gathering."⁵ Recognition, respect and restoration of traditional knowledge, customs, language, history and distinct traditional cultures seems to be the duty of the State to provide legal protection to promote and preserve the cultural identity and allowing the conditions to prevail that lead towards the sustainable development of the indigenous peoples, tribal and distinct local communities. It is also the duty of the State to ensure that the tribal and indigenous peoples can exercise their practices over their traditional knowledge. The development process must be inclusive and sustainable which connects the economic development with the social and cultural development. The rational approaches of the State on the basis of the modern development foreign practices exclude the indigenous spiritual practices of inherent communities that undermine their

⁴ JOSE R. MARTINEZ COBO, *Study of the Problem of Discrimination against Indigenous Population, Volume V Conclusions, Proposals and Recommendations* (UNITED NATIONS, 1987).

⁵ *Committee on Economic, Social and Cultural Rights, general comment No. 21 on the right to culture*, para. 10. (2009).

right to conserve culture and further prohibit such practices. The rights of the indigenous peoples are established both on community and individual basis but to a large extent these rights are available at group or community level. Indigenous people and tribal population recognise their societies as a group. Collective rights of indigenous peoples promote and sustain the community otherwise there may a risk of disappearing of such culture by its assimilation with the mainstream or dominating society.⁶

Indigenous people have ancient and long traditional authorities for decision making, self-determination, traditional self-governance and traditional institutional framework. The affirmation of the right to self-determination it deems that international documents respect the territorial integrity and cultural autonomy for the promotion and sustainability of their traditions. The right to self-determination is the collective right that must be exercised in accordance to the principles of democracy, justice and good governance.⁷ The scope of the right to self-determination should be understood to bargain, to represent and to negotiate through the established State institutional mechanism or outside such mechanism by respecting the traditional authorities of such people. The State must first respect them as their citizens and then consider them as distinct people or communities in such negotiation through the social and political institutions that promote the national interests and the process of nation building. The enhancement of the self-determination of the indigenous people should be subject to the human dignity, respect and human development otherwise, the indigenous people will feel themselves as isolated or inferior in the participatory process of development. The State must ensure the strengthening of the traditional authorities and self-governance structures for promoting their cultural aspects and overall sustainability of indigenous tribes and communities.⁸

Indigenous people have a close and special relation with their land, the tribal population have a special and deep relation with the forest and forest land while the distinct local communities have the same with the practices, occupations and land. Such relationships are the lynchpin to their livelihood, sustainability and ultimately, the existence of such communities. The territorial integrity and access to such lands, forests and occupations are the fundamental freedoms that

⁶ REPORT ON RIGHTS OF INDIGENOUS PEOPLE, *Concluding Observations on Argentina* paras. 12 and 25 (2011).

⁷ INTER-AGENCY SUPPORT GROUP ON INDIGENOUS ISSUES, *United Nations Development Group Guidelines on Indigenous Peoples' Issues* 17, 21-26 (2009).

⁸ J. ANAYA, *The right of indigenous peoples to self-determination in the post-Declaration era in Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*, 193 THE INTERNATIONAL INDIGENOUS POLICY JOURNAL 11, 15-16 (2010).

indigenous tribal groups and people enjoy, sustain, and claim.⁹ The nature of relationship with the lands and forests of the indigenous and tribal population is universal as it relates to their livelihood and culture. Therefore, the demand for the recognition, protection and respect for the territorial integrity is the foundation of the biocultural rights. The exclusion from the lands, forests and forest lands resulted into the dispossession and displacement of indigenous peoples, tribal people and distinct local communities from their territories. Their survival is threatened without respecting and depriving them of the access to the land rights. In order to sustain and survive as distinct local community, tribal and indigenous people, they need to own, manage, protect and conserve their territories and forest land. The deprivation from the land and forest particularly, and from the territory in general, results into the deprivation of their cultural, economic and political aspects of life. It further excludes them from the development process and self-determination.¹⁰ The human rights approach to the protection of the biocultural rights of the indigenous peoples addresses the more economic and cultural aspects rather than social and political ones. This approach emphasises on the international human rights instruments and principles for the protection of such rights. The rights of indigenous people should be understood within the scope of the human rights and minority rights at the international level.¹¹

1.1 OBJECTIVES OF STUDY

The objectives of the research work are following:

- I. To analyse the impact of the United Nations Declaration on the Rights of Indigenous Peoples, 2007 on the indigenous peoples, tribal population and local distinct communities in the United States and India.
- II. To evaluate the national legislative framework in comparison with UN Declaration of 2007 in achieving the aims and objectives of the Declaration in order to bring the indigenous people, economically, socially and culturally into the main stream of the society.

2. RESEARCH METHODOLOGY

This research work is based on the doctrinal method of research. It analyses the already published works including reports of different institutions and

⁹ INTER-AMERICAN COMMISSION, “*Human Rights, Indigenous and Tribal Peoples’ Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*” 59(2009).

¹⁰ CHER W. CHEN AND M. GILMORE, *Biocultural Rights: A New Paradigm for Protecting Natural and Cultural Resources of Indigenous Communities* 6 THE INTERNATIONAL INDIGENOUS POLICY JOURNAL 11, 22-29 (2015).

¹¹ PATRICK THORBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* 69-78 (Manchester University Press, United Kingdom, 2002).

international documents available on the present subject matter. The outcomes of research work are based on the empirical work.

3. INCLUSIVITY, TRIBAL RIGHTS & DEVELOPMENT

Development is a long run phenomenon, it is a multidimensional concept that focuses on the over-all development i.e. social, political and economic but largely, it is considered as an economic phenomenon. The inclusive nature of such rights is an array of different historical claims against the capitalism and globalisation. These rights are significant in the development context for the indigenous peoples such as right to decision making, participation in their public affairs, right to self-determination and right to conserve and protect their culture. The inclusivity depends upon the participatory process while the State agencies are constructing national and international projects such as dams, roads, industrial clusters and national and international corridors that affect the rights, lands and forests of indigenous and tribal peoples. Their exclusion in such decision making resulted in their losing control over their lands and forests.¹²

The development is inclusive only when it is participatory in the terms of decision-making process at local, regional and national levels. It become effective only when the indigenous people have the right to restitution in order to get back their lands and forests that were confiscated, damaged and encroached upon without their consent. Moreover, indigenous people have right to justice to get compensation in the form of resources and participation in the national development projects that strengthens their status as minorities or distinct local communities. The government must ensure through the legislative framework that indigenous people get ultimate control over their territories, forests and resources. There must be a balance between the national interest and interest of the indigenous peoples during the national and international developmental projects if there is any conflict of interest. The State must pay due consideration to the historical factors and traditional occupation of land and forest resources by the indigenous people, tribal people and distinct local communities.¹³ The right to development of indigenous people cannot be exercised without the aid of the State, so, it shall be the duty of the State to build potential in terms of technical and managerial for the representative organisation of indigenous peoples. State may promote the private sector only for the purpose of consultation and building the commercial capacities, making business and economic models that can commercialise the economic activities in their territories and forest lands. The indigenous and tribal people across the

¹² BENEDICT KINGSBURY, *Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy* 92 AM. J. INT'L L. 414, 419-421 (1980).

¹³ HELEN QUANE, *The Rights of Indigenous Peoples and the Development Process* 27 HUMAN RIGHTS QUARTERLY 651, 659-663 (2005).

globe are facing exclusion in the national developmental process, continuing the marginalisation of these communities that resulted in them exhibiting low and backward socio-economic indicators. Absence of the institutional mechanism for the issues that arise and conflict resolving, persisting discrimination and time lag in the protection of their lands and forest are the causes of the extinction of indigenous peoples and sustainable development crisis. The right to development of indigenous people must be understood in the light of both modern international documents and historical injustices meted out to them and their legitimate claims. The right to development can only be realised when there they are given access to the land resources, forest and control over their territories. The State should ensure the same through effective and functioning legislative and institutional framework. The right to development of the indigenous people is incomplete without paying due consideration to the conditions and rights of the women. Another important aspect of the right to development of the indigenous people is the participation of the traditional authorities along with the participation of the indigenous women, especially abled persons and youth. The essence of the right to development is not only to secure the right to livelihood, to participate in the national decision making but to improve the overall socio-economic conditions of the indigenous people especially women and youth.¹⁴

The right to development is important to manage the diversity, development and demography in order to achieve inclusive development. The indigenous people were denied the right to opportunities and were excluded from the developmental process and state failed to pay due consideration to their priorities and needs. Exclusionary development process is a curse to the indigenous peoples all over the globe, development that caused damage, harm and degradation of the forests resources, tribal and indigenous ecosystem, traditional knowledge system and traditional land territories further resulting in urban migration and permanent displacement of these communities from their traditional lands and territories. The exclusionary development process sometimes resulted into the short-term consequences which were more economic in nature such as poverty and unemployment and systematic discrimination. The same process created more extraordinary and extreme adversities for indigenous peoples, tribal people and distinct

¹⁴ INTERNATIONAL LABOUR OFFICE, *Follow-up to the Strategy for indigenous peoples' rights for inclusive and sustainable development* Second Item on the Agenda, POLICY DEVELOPMENT SECTION EMPLOYMENT AND SOCIAL PROTECTION SEGMENT, (334th Session, Geneva, 2018).

local communities such as natural calamity, pollution, degradation and depreciation of their economic and natural resources.¹⁵

The inclusiveness in the development process arises from the all-anti-discrimination public policies and affirmative action that leads to the participatory decision making. Both formal and informal economies of the indigenous people must be respected by the State in their policy formulation, like the right to employment and occupation, education and training in their traditional occupations through their traditional knowledge system of knowledge. The training provided by the state must focus on the capacity building of the indigenous people in order to achieve sustainability. The right to development of the indigenous women must be addressed through skill development and reducing gender discrimination, ethnic discrimination and violence against women. The labour welfare legislation must be gender neutral respecting both international labour standards and traditional & customary practices in both the formal and informal indigenous economic activities.¹⁶

4. DISTRIBUTIVE JUSTICE AND RIGHTS OF INDIGENOUS AND TRIBAL PEOPLE

Distributive justice is purely an economic phenomenon. Academically, it is all about just and fairness in the allocation and distribution of the societal resources either on the basis of egalitarian or utilitarian principles. Even the economic development is positively visible on the international scale but the forced land acquisition, ethnic violence and assimilation of the tribal and indigenous people are continuing making them persistent victims of such exclusionary developmental process. Indigenous people are designated and converted into the marginalised groups and socially and cultural backward people. The national and international development projects in the territories, lands and forests of indigenous and tribal people that resulted into their displacement from their lands and forests are examples of exclusionary development process. The concern of the indigenous people in the distributive justice is the allocation and distribution of the natural, financial and societal resources.¹⁷

¹⁵ BAMBANG SUSANTONO, *Indigenous Peoples, Development, Diversity and Inclusion Ongoing and Emerging Challenges in Asia and the Pacific* Lecture Series (ASIAN DEVELOPMENT BANK, 2020).

¹⁶ PATRICK THORNBERRY, *INDIGENOUS PEOPLES AND HUMAN RIGHTS* 69-78 (Manchester University Press, United Kingdom, 2002).

¹⁷ UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS INDIGENOUS PEOPLES, *Human rights and Indigenous Peoples* TRUSTED FUND, 123, 129-136 (2019).

The distributive justice is a multi-dimensional phenomenon but it needs special attention when it is applied to the delivery of the rights of the indigenous and tribal peoples. The historical injustice to the indigenous peoples, tribal and distinct local communities can only be addressed through the theory of the distributive justice. Indigenous people are forced since the colonialism and continue to be forced in the present times, in the wake of globalisation. The globalisation in the form of the international capital investment in the territories, lands and forests land of the indigenous people proved to be discriminatory and exclusionary. The colonised countries are facing two-fold problems in applying the theory of the distributive justice viz. firstly that the alien settlers sponsored by the colonial State occupied the traditional territory of the indigenous people and secondly, after encroachment, designated the indigenous people as backward and inferior people, disrespecting their culture and traditions.¹⁸

The indigenous people have been reduced to the minority and singular groups and their culture, geography, their traditional authorities and institutions are on the lines of extinction across the globe. The distributive justice as both global and national phenomenon depends on how the governments at the national level treat these indigenous and tribal people, how it defines them, how it manages the demography, development and diversity while at the international level it depends upon how international institutions, international communities design the framework for the protection and promotion of the indigenous people. The inclusive development is possible only when the indigenous, tribal and other local distinct communities get access to their land and forests along with their due participation in the decision making. The indigenous people must be designated as the descendants of those who inhabited lands, forests, and territories since the times immemorial and there should not be any interference by the State actors in their affairs. The distributive justice is possible when the State respects their traditional territories and traditions. The distributive justice to the indigenous communities can only be realised through their traditional ways of indigenous justice. Providing and protecting their ancient, traditional and harmonious relations with their land and forest is central to the distributive justice for the indigenous people.¹⁹ The recognition of the rights of the indigenous people requires indigenous perspectives in order to remove the contemporary and historical injustices among the state, society and indigenous and tribal peoples. The historical and

¹⁸ G. PETER PENZ, *Development Refugees and Distributive Justice: Indigenous Peoples, Land, and The Developmentalist State* 6 PUBLIC AFFAIRS QUARTERLY 59, 66-74 (1992).

¹⁹ STEPHEN PRZYBYLINSKI AND JOHANNA OHLSSON, *Indigenous Approaches to Justice* 112-126 (Bristol University Press, Bristol, England 2023).

contemporary injustices experienced by the indigenous and tribal people is a product of transgenerational discrimination during colonial period, denial of right to development and cultural diversity by the State, civil and political disenfranchisement by the mainstream society. The international capitalism through the globalisation influenced the national polity, policies and legislation which successfully conceptualised indigenous, tribal and other distinct local communities as backward, disrespecting their relationship with land and forest traditional authorities and traditional system of knowledge. Another failure of the distributive justice to the indigenous and tribal communities is not recognising their relationship with their environment and ecosystem. Distributive justice is not possible without recognition of the right to development, right to self-determination, rights to land & forests and right to cultural preservation.²⁰

Distributive justice, theoretically applying to indigenous and tribal groups, means complete inclusivity of indigenous peoples, tribal population and distinct local communities which aims to correct the historical injustices that resulted into the economic, social and cultural injustices in the distribution of the societal resources to such communities. The policies that focus on the recognition and redistribution of national and local resources while paying all due consideration to the indigenous and tribal communities are promoting the cause of distributive justice. Distributive justice focuses on and removes or pay due consideration to all ethnic inequalities and differences while recognising and distributing resources and rights.²¹ The transformation in the work culture of the indigenous people influenced by the persistent inequalities, reduced them to backward and marginalised communities, forced and coercive practices in land acquisition and discrimination during the colonial period. Indigenous people were forced to work in the modern developmental process that disrespected their traditional occupation and culture. Their displacement from the traditional lands caused them to settle into the urban areas and were forced to work in different range of modern activities. Such markets cannot do justice to the indigenous people and tribal people. The modern globalised markets are alien and discriminating towards the indigenous people and offered them only the odd jobs considering them unskilled. The indigenous people who are skilled in the traditional occupations and economies got enslaved by the global capitalism in the process of globalisation. The indigenous people are more vulnerable in the developed countries. The infringement by the global capital, of the ancient and sacred relationship between the lands, forest and the

²⁰ D. FOLEY, *Indigenous Epistemology and Standpoint Theory* 22 SOCIAL ALTERNATIVES 42, 49-56 (2003).

²¹ M. LAGOS AND P. CALLAS, *The State as a Message of Domination* 19 ANTROPOLOGÍA DEL ESTADO. DOMINACIÓN Y PRÁCTICAS CONTESTATARIAS EN AMÉRICA LATINA, La Paz: UN, CUADERNO FUTURO 1, 13-32 2(007).

indigenous and tribal people, and of the rights recognised by State permanently deprived them from their land territories and forest.²²

5. INTERNATIONAL DEVELOPMENTS AND FRAMEWORK FOR THE PROTECTION OF THE INDIGENOUS PEOPLE

5.1 THE INTERNATIONAL AND TRIBAL POPULATION CONVENTION (1957)

The International Labour Organisation attempted first time to codify the States obligations for recognising and protecting the tribal groups and indigenous people under the international law. The International and Tribal Population Convention concluded that international law should addresses the problem of indigenous people with the integrational approaches and inclusive development strategies. Another important outcome of the Convention of 1957 was that it changed the term indigenous population to indigenous people and converted indigenous people from temporary societies to the permanent entities in the international law. The convention further highlighted the importance of the intellectual property rights for the protection of the traditional system of knowledge and cultural diversity.²³

5.2 AGENDA 21: INTERNATIONAL CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, 1992

Chapter 26 of Agenda 21 explicitly stated the need for strengthening the role of the tribal and indigenous people. The tribal, indigenous people and other distinct local communities actively participated and engaged in pre and post conference, bargaining for their space in the international law. The indigenous people participated in all the dialogues related to the development and sustainable development. The final outcome of the conference of 1992 was that it recognised the importance of the tribal and indigenous peoples' relationships with their lands and forest lands and traditional system of knowledge.²⁴

5.3 CONVENTION ON BIOLOGICAL DIVERSITY, 1993

The United Nations Environment Programme achieved another milestone for protecting biological diversity in Rio-de-Janeiro in 1993. The Convention on Biological Diversity concluded by recognising the importance of traditional and

²² REPORT, *Indigenous peoples in a changing world of work: Exploring indigenous peoples' economic and social rights through the Indigenous Navigator* THE INTERNATIONAL WORK GROUP FOR INDIGENOUS AFFAIRS & INTERNATIONAL LABOUR ORGANIZATION (2012).

²³ THE PREAMBLE, "*The Indigenous and Tribal Populations Convention*" (ILO No. 107, 1957).

²⁴ UN Conference on Environment and Development, (1992).

tribal knowledge system and conservation and protection of the biodiversity in the development process. The striking feature of the convention was that it urged the contracting parties to provide access to the indigenous people in matters of genetic resources along with the obligation to respect the traditional authorities and their relations with the land and forests. The benefit arising out from the biological diversity should be understood at both local and global levels and it also stressed on their equitable sharing. The convention encouraged the contractual parties to protect the biological resources in accordance with traditional system of knowledge and cultural practices.²⁵

5.4 UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, 2007

The UN General Assembly adopted resolution on 13th September, 2007. This UN Declaration is the most significant development in the tribal and indigenous people rights' movement. It is a crucial milestone which set a new international standard and advocated for more equitable and equal treatment to the indigenous and tribal people. The Declaration recognised the land and forest rights of the indigenous people. It stated that right to development and right to self-determination are indispensable along with the other rights as such as right to culture, right to traditional practices and right to traditional authorities for their self-governance. The Human Rights Council recommended the same in 2006. The UN General Assembly stated in the document that it was guided by the purposes and principles in UN Charter that all States in good faith must fulfil the obligations set out in the Charter. The Declaration affirmed that the indigenous people enjoy the right to equality while recognising their ancient, distinct and traditional identities at the same time. It further affirmed that all people contribute in the protection of the richness, diversity of civilisation promoting and protecting the common heritage of humankind. Additionally, it condemned those practices, policies and doctrines whether, local, regional, national and international which advocated for the superiority of the individuals over others on the basis of the cultural, religious, racial or ethnic differences as socially unjust, legally invalid, racist in nature, scientifically false and morally condemnable. While reaffirming the right of the indigenous people over their lands and forests without any discrimination, it acknowledged the fact that indigenous people were subjected to the historical injustice, colonial discrimination that lead them their dispossession from the forests land, territories and traditional practices, along with the fact that the right to development was not exercised according to their interests and needs. The Declaration further recognised the urgent need to promote and respect the inherent rights of tribal and indigenous peoples, the rights to establish their socio-economic and political structures, their histories, spiritual traditions and

²⁵ THE PREAMBLE, *Convention on Biological Diversity*, UNITED NATIONS ENVIRONMENT PROGRAMME, (1993).

philosophies. It emphasised that these rights should be respected in agreements, constructive arrangements and in treaties. It welcomed the traditional authorities of the indigenous people in their daily political, social and economic lives and further practices that helped to end all forms of discrimination. The Declaration further states that all the development process that affects their resources, territories should be controlled by themselves, strengthening their institutions, traditions and culture and promoting the same in accordance with their needs and aspirations. It recognised that indigenous people vary locally, regionally, nationally, internationally and from countries to countries in their history, societies and culture so state should pay due consideration to such background factors. It solemnly proclaimed that this Declaration is a standard of achievement in the terms of ensuring mutual respect and in the spirit of partnership and their right to development.²⁶

6. NATIONAL LEVEL LEGISLATIVE AND POLICY FRAMEWORK FOR THE PROTECTION OF THE INDIGENOUS PEOPLES

6.1 AMERICAN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, 2016

The American Declaration on the Rights of Indigenous Peoples, 2016 recognised the rights of the indigenous people that constitute the minimum requirement and standards for a dignified human life and over all well-being of the American indigenous peoples. It stated that the higher standards set out in UN Declaration would apply to a particular situation. It affirmed their right to self-determination, right to cultural practices, right to access to the traditional territories, and right to development. The Declaration stated that the people voluntarily residing in isolation and subject to and affected by the internal armed conflict are protected under the Declaration. Like the UN Declaration the American Declaration also addressed the issue of racial discrimination that resulted into disability and gender equality. It further promoted to eradicate all forms of discrimination and violence especially against women and children and committed to take necessary measures by the states for the same. The Declaration recognised both collective and individual rights. The Declaration further ensures right to culture, spirituality, education, language and right to indigenous family accompanied by the recognition to the traditional authorities and indigenous legal system of the indigenous people.²⁷

6.2 SCHEDULED TRIBES AND OTHER TRADITIONAL FOREST DWELLERS (RECOGNITION OF FOREST RIGHTS) ACT, 2006

Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 passed by the Parliament of India recognised the rights of the

²⁶ ARTICLE 3, United Nations Declaration on the Rights of Indigenous Peoples, (2007).

²⁷ ARTICLE 5, American Declaration on the Rights of Indigenous Peoples, (2016).

tribal communities and other traditional forest dwellers over their forest land, forest and forest resources. The Forest Act, 2006 recognised a variety of rights of tribal and forest dwellers such as right to development, right to livelihood, right to self-determination, right to habitation and all rights over their socio-economic and cultural needs. The Act further recognised the symbiotic relationship of tribals with forest and importance of their dependence on the forest land and resources. “An Act to recognise and vest the forest rights and occupation in forest land in forest dwelling Scheduled Tribes and other traditional forest dwellers who have been residing in such forests for generations but whose rights could not be recorded; to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land.”²⁸ It secured the protection of the traditional wisdom and knowledge of the tribal communities through their traditional knowledge system. It stated that right to self-cultivation and right to habitation are individual rights and also recognised the community rights such as grazing, fishing and access to forests, land and water bodies. The Act gave special attention to the Pastoral and Nomadic communities, the right to intellectual property, their traditional knowledge and customary rights. It further ensured the right to allocation of forest land for basic infrastructural facilities for the purpose of sustainable development and other development purposes. The tribal population got protection in case of acquisition of their lands under the Right to Fair Compensation and Transparency in Land Acquisition, Rehabilitation and Settlement Act, 2013, further protecting the tribals against the forced eviction without settlement and rehabilitation. It acknowledged the historical injustices caused to the tribal and forest dwelling groups. The Act promotes the conservation of biodiversity, establishes the traditional authorities over the forest rights and aims to maintain the ecological balance. The Act carries the idea of ‘community forest resources’ which includes the customary and traditional boundaries and seasonal use of land for the purpose of the livelihood of the pastoral and nomadic groups in the reserve and protected forests. Section 3 of the Act carries a wide range of forest rights of forest dwelling Scheduled Tribes and other traditional forest dwellers. It includes right to habitation, right to live in the forest, right to hold land and self-cultivation for livelihood by the members of the community. It further protects all the practices of pre-agricultural communities and primitive tribal groups for the management of the community forest resources.²⁹

7. CONCLUSION AND SUGGESTIONS

²⁸ THE PREAMBLE, Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, (2006).

²⁹ SECTION 3, *Forest rights of Forest dwelling Scheduled Tribes and other traditional forest dwellers*” Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, (2006).

The UN Declaration on the Rights of Indigenous people is the first significant development in the indigenous peoples' right arena and in the Human Rights movement. The indigenous movement against the discrimination of indigenous and tribal population and the protection of the minorities started as a reaction to international capital and globalisation. The UN Declaration is a watershed in the prevention of the continuous historical injustice and invasion that took place before the colonial period and continued thereafter. The UN Declaration empowered the indigenous people to sustain, protect and promote their traditional system of knowledge, transmit their knowledge to future generations through their inbuilt educational system, access to their traditional territories, legal systems, social institutions and cultural patterns. The UN Declaration gave much needed recognition to indigenous people in the international law, making the rights and claims of such communities to dominate in the international law. It will always remind us that indigenous people were subject to historical injustices and were impacted by human rights violations and dispossession from the forest land in the development process. It provides a permanent forum for resolving indigenous issues through the specialised national, international and UN agencies.

On the basis of the analysis of legislation of the USA and India it is suggested that:

1. Both the statutes need to define the term 'Indigenous Peoples', as lack of proper definition of the local, distinct and tribal peoples create obstacles to recognise their rights.
2. The institutional framework both at international and national levels needs to be strengthened for the purposes of recognising, protecting and promoting the biocultural rights of the indigenous communities.
3. The national legal framework should be in consonance with the international human rights instruments generally, and with the UN Universal Declaration of Human Rights, 1948 and International Covenant on Civil and Political Rights, 1966.

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