

INDIGENOUS WOMEN AND THE LAW

by

Snehanshu Bhushan

&

Samiksha

Index

[1.1] Indigenous Peoples: Introduction

[1.2] Indigenous Women's

- Situation of Indigenous women's
- What are some of the challenges that need to be addressed concerning gender and indigenous peoples?

[1.3] Rights of indigenous Women's

- How Indigenous Women Define Indigenous Women's Human Rights

[1.4] Aboriginal Rights

- What are Aboriginal rights?

[1.5] The situation of the rights of indigenous peoples in India

- Rights of Indigenous Women
- Human rights defenders

[1.6] INDIGENOUS WOMEN IN ASIA: NO PARTICIPATION IN DECISION MAKING AND INCREASING EXPERIENCE OF VIOLENCE

- Indigenous Women, Decision Making and Customary Law
- Traditional values, customary law and violence against women
- Rights of Indigenous People in India:
- Rights of Indigenous People under International Law:

[1.7] Rights of Tribal's in India with respect to access to justice

[1.8] Indigenous Women's Rights under the International Convention on the Elimination of All Forms of Discrimination against Women

Abbreviations and Acronyms

CEDAW: Convention on the Elimination of All Forms of Discrimination Against Women

CERD: Convention on the Elimination of All Forms of Racial Discrimination

CESCR: Covenant on Economic, Social and Cultural Rights

CSW: Commission on the Status of Women

EMRIP: Expert Mechanism on the Rights of Indigenous Peoples

FPP: Forest Peoples Programme

GR General Recommendation

ILO: International Labour Organization

NGO: Non-Governmental Organization

OP-CEDAW: Optional Protocol to CEDAW

PF UN: Permanent Forum on Indigenous Issues

SRIP UN: Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples UN United Nations

UNDRIP UN: Declaration on the Rights of Indigenous Peoples WGIP UN Working Group on Indigenous Populations

Introduction

Indigenous populations are communities that live within, or are attached to, geographically distinct traditional habitats or ancestral territories, and who identify themselves as being part of a distinct cultural group, descended from groups present in the area before modern states were created and current borders defined. They generally maintain cultural and social identities, and social, economic, cultural and political institutions, separate from the mainstream or dominant society or culture.¹

Indigenous peoples are inheritors and practitioners of unique cultures and ways of relating to people and the environment. They have retained social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live. Despite their cultural differences, indigenous peoples from around the world share common problems related to the protection of their rights as distinct peoples.

Indigenous peoples have sought recognition of their identities, way of life and their right to traditional lands, territories and natural resources for years, yet throughout history; their rights have always been violated. Indigenous peoples today, are arguably among the most disadvantaged and vulnerable groups of people in the world. The international community now recognizes that special measures are required to protect their rights and maintain their distinct cultures and way of life. Find below a short history of the indigenous struggle in the international stage.²

Given the diversity of peoples it aims at protecting, the Convention uses the inclusive terminology of “indigenous and tribal peoples” and ascribes the same set of rights to both groups.³

The Indigenous peoples view themselves as having a historical existence and identity that is separate and independent of the states now enveloping them. Lands located in a specific geographic area form a central element in their history and identity and are central regarding their

¹WHO; Indigenous Populations (Health Topics)

<https://www.who.int/topics/health_services_indigenous/en/#:~:text=Indigenous%20populations%20are%20communities%20that,were%20created%20and%20current%20borders>accessed on April 18, 2021

² United Nations: Department of Economic and Social Affairs Indigenous Peoples; Indigenous Peoples at the United Nations <<https://www.un.org/development/desa/indigenouspeoples/about-us.html>>accessed on April 18 2021.

³ International Labour Organization: Who are the Indigenous or tribal peoples? <https://www.ilo.org/global/topics/indigenous-tribal/WCMS_503321/lang--en/index.htm> accessed on April 18 2021

contemporary political demands. The United Nations Permanent Forum on Indigenous Issues has developed an understanding of the term based on the following:

- Self-identification as indigenous peoples at the individual level and accepted by the community as their member.
- Historical continuity with pre-colonial and/or pre-settler societies
- Strong link to territories and surrounding natural resources
- Distinct social, economic or political systems
- Distinct language, culture and beliefs
- Form non-dominant groups of society
- Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.⁴

They often subscribe to their customary leaders and organizations for representations that are distinct or separate from those of the mainstream society or culture. Many Indigenous peoples still maintain a language distinct from the official language or languages of the country or region in which they reside.⁵

Indigenous Women's

Being an Indigenous woman means living under a society and 'civilization' that benefit from your voicelessness, invisibility, disappearance, non-existence, and erasure.⁶ Indigenous women play important roles in their communities and beyond, and UN Women stands with them every day as they strive for rights, protection and their rightful seat at any table where decisions impacting their lives are being made. For indigenous women and girls, the inability to express themselves in the

⁴ ARCTIC CENTRE, University of Lapland: Definition of Indigenous Peoples

<<https://www.arcticcentre.org/EN/arcticregion/Arctic-Indigenous-Peoples/Definitions>>accessed on 18 April 2021

⁵ The World Bank: Indigenous Peoples < <https://www.worldbank.org/en/topic/indigenouspeoples>> accessed on April 18 2021

⁶ Veldon Coburn: Why are the deaths of indigenous women and girls ungrievable?;Policy Options (June 11, 2019) <<https://policyoptions.irpp.org/magazines/june-2019/why-are-the-deaths-of-indigenous-women-and-girls-ungrievable/>> accessed on 18 April 2021

language of their choice and culture renders them even more invisible in public life. It restricts access to participation, justice, and critical services like education and health care.

Indigenous women have always been part of their peoples' struggles, whether nationally or at international fora. There is a legacy of extraordinary women, who came to the UN since the very first year of the Working Group on Indigenous Populations, in 1982 in Geneva, Switzerland. Today, at the UN Permanent Forum on Indigenous Issues indigenous women participate in great numbers and have a strong voice. The interface between indigenous women's movement and the international women's movement varies through the years. Not always were they close, most of all due to particularities in the situation of indigenous women who live in communities in struggle. However, in recent years the two movements are getting closer. For instance, indigenous women are now raising stronger voices in claiming the Beijing Declaration and Platform for Action.⁷

Indigenous women face different obstacles, including the following: severely restricted opportunities to join the labor market; unique geographic and economic challenges to gain access to health and education services; limited access to social programs and services; high rates of illiteracy; low participation in the political process; and social marginalization.

They have played a crucial role in the history of the struggle for the self-determination of their peoples and for their rights as women, they are known as the guarantors of their culture, and they play fundamental roles within their families, their communities and their countries, as well as at the international level. Indigenous women must be understood as holders of rights, recognizing their right to actively participate in all the processes that affect those rights.⁸

Indigenous women face significant challenges to the full enjoyment of their human rights. Indigenous women experience multiple forms of discrimination, often lack access to education, health care and ancestral lands face disproportionately high rates of poverty and are subjected to violence, such as domestic violence and sexual abuse, including in the contexts of trafficking and armed conflict. As the United Nations Permanent Forum on Indigenous Issues (UNPFII) has

⁷ United Nations: Department of Economic and Social Affairs Indigenous Peoples; Indigenous Women's and the United Nations <<https://www.un.org/development/desa/indigenouspeoples/about-us.html>> accessed on April 18 2021.

⁸ IACHR, Inter-American Commission of Human Rights: Indigenous Women's (Booklet) <<https://www.oas.org/en/iachr/indigenous/docs/pdf/Brochure-MujeresIndigenas-en.pdf>> accessed on April 18 2021.

stated, globalization presents additional challenges in many parts of the world. Indigenous women's roles have eroded due the compounding factors of loss of natural resources and depletion of the ecosystems, their transformation into cash economies, changes in local, social and decision-making structures, and their lack of political status within States.⁹

Indigenous women have organized at local, national and international levels to address the specific issues and challenges that they face. At the United Nations, indigenous women have been advocates and leaders since the very first year of the Working Group on Indigenous Populations, in 1982 in Geneva, Switzerland. Indigenous women were active participants and contributors during the more than two decades of negotiations regarding the UN Declaration on the Rights of Indigenous Peoples, which was adopted by the General Assembly in September 2007. As a result of their advocacy, indigenous women also ensured that a resolution on indigenous women was adopted at the 49th Session of the Commission of the Status of the Women (CSW) in March 2005, which is the first ever on indigenous women by this body. It is now clear that indigenous women are claiming gender equality and the implementation of the body.¹⁰

Situation of Indigenous women's

From India to Peru, Indigenous women have higher rates of maternal mortality, teenage pregnancy and sexually transmitted diseases and are more likely to suffer violence.

Indigenous women are less likely to use health care facilities when pregnant because of discrimination and mistreatment; and so, they are more likely to die giving birth. For example, in Panama and Russia, Indigenous women are about six times more likely to die in childbirth than women from the non-Indigenous population. The birth rate for Amerindian adolescent girls is twice that of the general Guyanese population. In Kenya, Maasai women are twice as likely to

⁹ United Nations Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the United Nations Permanent Forum on Indigenous Issues: Gender and Indigenous Peoples.(Paras 1-3; pg- 1) <<https://www.un.org/esa/socdev/unpfii/documents/Briefing%20Notes%20Gender%20and%20Indigenous%20Women.pdf>> accessed on April 19 2021

¹⁰ United Nations Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the United Nations Permanent Forum on Indigenous Issues: Gender and Indigenous Peoples.(Paras 1-3; pg- 1) <<https://www.un.org/esa/socdev/unpfii/documents/Briefing%20Notes%20Gender%20and%20Indigenous%20Women.pdf>> accessed on April 19 2021

have had no antenatal care, and in Namibia, San women are ten times more likely to give birth without skilled attendance.

In a horrifying violation of their human rights, more than 2,000 poor Indigenous and campesino women were allegedly sterilized without their consent by state authorities in Peru in the 1990s. On 22 January 2014, the Public Prosecutors office in Lima closed their case and denied them justice.

In some countries, Indigenous women suffer disproportionately from domestic violence as they bear the brunt of frustration and anger, resulting from deep-seated discrimination affecting the wider community.

Indigenous children are also vulnerable to abuse. In southern Africa, the children of the San, and other Indigenous peoples find it hard to access education. In south-east Asia, most women and girls trafficked across state borders are from Indigenous communities.¹¹

What are some of the challenges that need to be addressed concerning gender and indigenous peoples?

Some of the challenges that need to be addressed concerning gender and indigenous peoples are the following: The dominant gender-neutral conception of equality prevailing in countries where indigenous peoples live has not been adequate in addressing the multiple disadvantages of indigenous women. It has become a daunting task in each country to repeal policies and practices that diminish opportunities for indigenous women and perpetuate their disempowerment. Demolishing structural barriers to eliminate complex oppressions experienced by indigenous women is the major challenge for indigenous peoples throughout the world. The reluctance of many States to implement international human rights conventions is a major hurdle in overcoming educational, health, vocational/economic, and political disadvantages for indigenous women. Denial of indigenous peoples' rights has disenfranchised women severely relative to male members of indigenous peoples in most countries. The removal of structural barriers to achieving

¹¹ Amnesty International: Indigenous Peoples <<https://www.amnesty.org/en/what-we-do/indigenous-peoples/>> accessed on April 19 2021

a multi-cultural democracy is one of the foremost challenges for gender equality that will impact indigenous women.¹²

Rights of indigenous Women's

The international movement of indigenous peoples has since the 1970's articulated indigenous peoples' aspirations in human rights terms. Indigenous women and men have struggled together at national, regional and international fora to define and promote the human rights of indigenous peoples. Article 2 of the Declaration on the Rights of Indigenous Peoples adopted by the General Assembly in September 2007 states that "indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity." This note focuses on indigenous women's human rights within the broader context of internationally recognized human rights, including the human rights of indigenous peoples. In recent years, indigenous women have made important strides in advancing their rights as women and as indigenous peoples through the use of a human rights framework. Positing indigenous rights and women's rights as inextricably linked, indigenous women work to secure these inter-related rights using international human rights instruments such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

While indigenous women conceive of women's human rights and collective rights as two parts of a coherent whole, conventional interpretations and applications of human rights often compartmentalize sets of rights, sometimes even setting them in opposition to one another. For this reason, the ways in which indigenous women claim and use human rights at times departs from the conventional human rights framework. However, rather than causing discord, that difference can provide a point of vibrant engagement, strengthening an intercultural, gendered understanding and application of human rights that both promotes the rights of indigenous women and enhances the human rights framework itself. Indigenous women seek to protect and advance

¹² United Nations Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the United Nations Permanent Forum on Indigenous Issues: Gender and Indigenous Peoples.(B.f Note- 1; pg- 5) <<https://www.un.org/esa/socdev/unpfii/documents/Briefing%20Notes%20Gender%20and%20Indigenous%20Women.pdf>> accessed on April 19 2021

the fundamental principles of human rights, including the indivisibility and the universality of human rights, inflecting each with a unique indigenous women's perspective. Indigenous women draw on instruments including the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant of Civil and Political Rights, and the International Convention on the Elimination of all Forms of Racial Discrimination⁵ to promote their rights as women and the collective rights of indigenous peoples, taking gender and the principle of non-discrimination into account.¹³

How Indigenous Women Define Indigenous Women's Human Rights

Indigenous women hold that the indivisibility of rights means that indigenous women do not enjoy the full range of human rights when the collective rights of their peoples are violated. Indigenous women's capacity to Gender and Indigenous Peoples' Human Rights 30 Briefing Note No. 6, Gender and Indigenous Peoples' Human Rights exercise the fundamental social, economic, cultural, and political rights guaranteed in international instruments is inextricably tied to their right to self-determination in their territories. These ancestral lands are the basis of indigenous cultures, traditions, spiritual practices, economies, and political systems. Indigenous women's claim for a conception of women's human rights predicated on collective rights challenges both the conventional human rights paradigm and mainstream conceptions of women's human rights, which both posit the individual as the only subject of rights. Since the World Conference on Human Rights in Vienna in 1993, the global women's movement has succeeded in shifting the traditional rights framework by displacing the dichotomy between the private and public spheres and insisting on states' responsibility for rights violations committed by non-state actors. But indigenous women's claims represent more than an extension of the existing human rights

¹³ United Nations Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the United Nations Permanent Forum on Indigenous Issues: Gender and Indigenous Peoples.(B.f Note- 4; pg- 29) <<https://www.un.org/esa/socdev/unpfii/documents/Briefing%20Notes%20Gender%20and%20Indigenous%20Women.pdf>> accessed on April 19 2021

framework: they require an overhaul of underlying assumptions starting with the notion that collective rights threaten, rather than complement, individual rights.¹⁴

Aboriginal Rights

What are Aboriginal rights?

Aboriginal rights are collective rights which flow from Aboriginal peoples' continued use and occupation of certain areas. They are inherent rights which Aboriginal peoples have practiced and enjoyed since before European contact.

It is difficult to specifically list these rights, as Aboriginal peoples and the Canadian government may hold differing views. Some rights that Aboriginal peoples have practiced and recognized for themselves have not been recognized by the Crown. In a move towards addressing this gap, in 1982 the federal government enshrined Aboriginal rights in Section 35 of the Canadian Constitution, and in Section 25 of the Charter of Rights and Freedoms, the government further ensured that Charter rights cannot "abrogate or derogate" from Aboriginal rights. Yet the ensuing First Ministers' Conferences could not reach a consensus on what specifically qualifies as an Aboriginal right, and the federal government has since recognized that, while Aboriginal rights exist, what these specific rights are will have to be determined over time through the court system.¹⁵

The situation of the rights of indigenous peoples in India

Rights of Indigenous Women: India supported a recommendation to continue to promote the rights of women in their choice of marriage and their equality of treatment independently of tribe and other considerations.³⁷ India has not implemented this recommendation. Indigenous women continue to face discrimination and unequal treatment in many forms. In a shadow report to CEDAW, indigenous women's groups from India have detailed out such discrimination in

¹⁴ United Nations Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the United Nations Permanent Forum on Indigenous Issues: Gender and Indigenous Peoples.(B.f Note- 4; pg-30) <<https://www.un.org/esa/socdev/unpfii/documents/Briefing%20Notes%20Gender%20and%20Indigenous%20Women.pdf>> accessed on April 19 2021

¹⁵ First Nations & Indigenous Studies; The university of Columbia: Aboriginal Rights <https://indigenousfoundations.arts.ubc.ca/aboriginal_rights/> accessed on April 19, 2021

education, health and other social and economic areas. Child marriage practice, as per the report, still exists in rural tribal areas, which can be stopped and prevented through quality education and rigorous mass awareness. Around 70 cases of such violence against tribal women were collected from across the country in the report. In 2014, CEDAW noted India's efforts to enact a legal framework to prevent and respond to violence against women, including Adivasi women, and the establishment of a committee on amendments to criminal law to review existing normative gaps in 2013. However, it also expressed concern about the poor implementation of the Scheduled Castes and the Scheduled Tribes Act and the impunity of perpetrators of serious crimes against women and that women from scheduled tribes face multiple barriers in gaining access to justice, owing to legal illiteracy, lack of awareness of their rights and limited accessibility of legal aid . The Government of India should devise and effectively implement strong temporary special measures for women and girls from scheduled tribes, including for enrolment in education and employment, as per CEDAW's. In line with CEDAW's recommendation 41, India should monitor the availability and efficiency of the legal services authorities, implement legal literacy programmes, raise the awareness of women and girls from scheduled tribes of all legal remedies available to them and monitor the results of such efforts.¹⁶

Human rights defenders

India noted two recommendations in relation to protection of human rights defenders, including through enacting a law, with particular emphasis on those defenders facing greater risks, such as the rights of scheduled tribes. India has not implemented this recommendation. No step has been taken to enact such law. While UN Special Rapporteur on the situation of Human Rights Defenders have reported on particular risks of human rights defenders working on the rights of indigenous peoples in India⁴², indigenous women human rights defenders such as Soni Sori and Dayamani Barla, who are facing criminal charges, are confronted with additional challenges including sexual violence or risks thereof, including in custody, lack of legal support as well as access to justice and effective remedy. On the other hand, civil society organizations in India have been facing a worsening crackdown, involving an intensification of judicial harassment, arbitrary arrests and intimidation. In April 2015, Ministry of Home Affairs cancelled the registration of 8,975 NGOs

¹⁶ Joint Stakeholders' submission; The situation of the rights of indigenous peoples in India<https://www.upr-info.org/sites/default/files/document/india/session_27_-_may_2017/js46_upr27_ind_e_main.pdf> accessed on April 20, 2021

working in India, on the basis of violating reporting requirements under the draconian Foreign Contributions (Regulation) Act (FCRA). Many organizations targeted by the FCRA have been deemed as ‘anti-national’ and the cancelled registrations unfairly target a number of environmental NGOs, particularly those working on accountability in the context of mining, dams and nuclear projects. Many of those projects primarily concern number of indigenous groups in India. India must enact a specific law for protection of human rights defenders, with particular attention on defenders working for the rights of scheduled tribes and women. Further, in line with the recommendation of Special Rapporteur on Human Rights Defenders, the Government must implement a comprehensive, independent and adequately resourced protection programme for human rights defenders and witnesses with the National and State Human Rights Commission.. India must repeal the FCRA, which is been increasingly used to obstruct civil society’s access to foreign funding, and fails to comply with international human rights norms and standards, as called on by UN Special Rapporteurs.¹⁷

INDIGENOUS WOMEN IN ASIA: NO PARTICIPATION IN DECISION MAKING AND INCREASING EXPERIENCE OF VIOLENCE

The socio-cultural diversity of indigenous peoples and the often rapid changes they are currently undergoing make it difficult to provide a general picture of the situation of indigenous women in Asia. However, just as it is possible to point out a number of critical key issues indigenous peoples in Asia are generally confronted with, it is possible to identify similarities in the situations of indigenous women of this region.

It is well known that above all the loss of lands and resources due to commercial logging, land-conversion for monoculture plantations, extractive industries, dams or protected areas is seriously impacting on the lives of indigenous peoples. Women in particular feel the impact of loss of land and access to resources, maybe even more than the men since they are more directly responsible for taking care of and bringing up their children. Often, dispossession goes hand in hand with

¹⁷ Joint Stakeholders’ submission; The situation of the rights of indigenous peoples in India<https://www.upr-info.org/sites/default/files/document/india/session_27_-_may_2017/js46_upr27_ind_e_main.pdf> accessed on April 20, 2021

violence by state armed forces, settlers or the security personnel of private companies. The occupation of indigenous peoples' land not only means forced eviction but murder and sexual harassment including rape of indigenous women.¹⁸

Indigenous Women, Decision Making and Customary Law: Customary law and institutions still exist in all six project areas, but they differ with respect to their strength and thus relevance in the daily lives of people. In all areas, the customary governance institutions have been weakened through the imposition of the state's political-administrative system. In some cases, such as among the Naga people of Manipur, India, or some of the tribes in the Cordillera in the Philippines, the customary governance institutions exist parallel to the local government institutions. In others, like among other communities in the Cordillera, they have somewhat merged, while among the B'laan in Mindanao, Philippines, the local government body has largely replaced the customary governance institutions. Traditional leaders, however, still play an important role in conflict resolution there. In the Philippines, the Indigenous Peoples Rights Act recognizes customary self-governance of indigenous communities and in Nepal, since the ratification of ILO Convention 169, customary law and institutions are supposed to be recognized by the state. It was also pointed out that the two systems were often in conflict with each other. In Jharkhand in India, the integration of customary governance and local government institutions appears to be more successful and most of the people interviewed during the survey were of the opinion that the local governance system is recognizing the traditional system.¹⁹

Traditional values, customary law and violence against women

In all communities involved in the project, customary law provides women some protection. Among the Bontok, for instance, it provides for the protection of pregnant women by giving them deserved rest when they have recently given birth. Husbands are expected to do the heavy chores

¹⁸ AIPP(Asia Indigenous Peoples Pact): VIOLENCE, CUSTOMARY LAW AND INDIGENOUS WOMEN'S RIGHTS IN ASIA
<0659_Violence_Customary_Las_and_IP_omen_Rights_in_Asia.pdf> accessed on April 20, 2021

¹⁹ AIPP(Asia Indigenous Peoples Pact): VIOLENCE, CUSTOMARY LAW AND INDIGENOUS WOMEN'S RIGHTS IN ASIA
<0659_Violence_Customary_Las_and_IP_omen_Rights_in_Asia.pdf> accessed on April 20, 2021

and relatives also help the family of women who have recently given birth in getting firewood and in working the fields.

Women as victims of armed conflicts and militarization: Armed conflicts and militarization are a serious problem and the cause of countless cases of violence against women in all six project areas. In the Philippines, the project communities lie in some of most heavily militarized areas of the country.

Bonded labor: the Kamlari in Nepal: Specific to Nepal, Kamaiya (male and female agricultural workers) and Kamlari (young female domestic servants) are forms of bonded labor in which servants are bound to specific individuals or families to pay off debts incurred by them or by their previous generations. Although deemed illegal, both forms of servitude exist in various parts of the country today and most of Kamlaria come from the Tharu community – the indigenous people from the southwest Nepal.

Prostitution, trafficking and labor migration: Rapidly decreasing agricultural lands, weakening of social cohesion and traditional systems of solidarity and cooperation, poverty, lack of proper education, increasing globalization and invasion of media among others have resulted in luring young ambitious and unsuspecting indigenous girls and youth to seek alternative means of survival in the dance bars and night clubs in the cities.²⁰

Preventing Child Trafficking in Jharkhand In Jharkhand, the project team members have established good cooperation with the district police office (in which there is a special women cell) and the trainees are making good use of it. For instance, in September 2011, a 15 year old girl from Helenpur in Simdega district was lured away for trafficking. On learning this, PumanKullu along with others filed an FIR in the police station. She had learned how to do this during one of the project's inter-community training sessions on indigenous women's leadership. When hearing that the police were searching for the girl, the culprit brought back the girl and dropped her off near her house late at night. In April 2012 a 13 year old girl from Khunti district was rescued from

²⁰ AIPP(Asia Indigenous Peoples Pact): VIOLENCE, CUSTOMARY LAW AND INDIGENOUS WOMEN'S RIGHTS IN ASIA

< 0659_Violence_Customary_Las_and_IP_omen_Rights_in_Asia.pdf> accessed on April 20, 2021

Delhi by two trainees of the project. Sapna Bhengra and Sarojani Purty have successfully applied their knowledge on FIR against a woman who sold the girl to pimps in Delhi.

Rights of Indigenous People in India:

A various debates took place in Geneva and India that whether Scheduled Tribes of India whether included under the term of Indigenous people or not. A symposium was organised at New Delhi by The Indian Council of Indigenous and Tribal Peoples (ICITP), which was formed in 1987 and affiliated to the World Council of Indigenous Peoples on the topic who are indigenous people. In the symposium ICITP agrees that Scheduled Tribes of India are part of the term indigenous people. In India, 461 ethnic groups are recognized as Scheduled Tribes and they are India's indigenous people. It is not defined in the Constitution of India as to which person belong to Scheduled tribes and which are those which belongs to Scheduled Caste but Article 341 and A342 empowers the president to make a list of those caste and tribes after consultation with the governor of the respective state India has several constitutional laws which recognize indigenous people and their rights are as follows:

- I. Protection of Economic and Political Rights: To protect the economic rights of the indigenous people we have Article 244 which deals with the administration of Scheduled Area and Tribal Area. Article 275 also empowers parliament to make special grants given to the state which undertakes the scheme of development for the purpose of promoting the welfare of Scheduled Tribes. To protect the political rights of the Tribal we have Article 244, A330, A334, A371 and A164 (1). A164 (1) which empowers the state to establish the special ministry for the scheduled tribes in the state like Chandigarh, Madhya Pradesh and Orissa. We also have Fifth and Sixth Schedule which ensures proper control and administration of Scheduled Tribes and their areas.
- II. National Commission for Scheduled Tribe: This commission was formed through Constitution (89th Amendment) Act, 2003. It comprises of Vice-Chairperson and three full-time Members (including one female Member). The term of all the Members of the Commission is three years from the date of assumption of charge. The duty of this commission is to inquire into complaints with respect to deprivation of their rights and also to safeguard them. They also monitor all their matter under constitution or any other law.

The commission also takes part in advising in the development of ST's and also to evaluate their development progress.

- III. Various Acts for their protection: Scheduled Caste's and Scheduled Tribe (Prevention of Atrocities) Act, 1985 and 1995 is to protect them from any discrimination and from any kinds of torture. The Scheduled Tribe's Bonded Labour Abolition Act, 1976 is to protect them from bonded labour and other practices where less money is given to them for their work. We also have Forest Conservation Act, 1980 to protect and conserve the tress as these tribes are dependent on them.
- IV. Supreme Court and High Court case: In the case of M C Valsala vs. State of Kerala a rule was strike down by the Supreme Court The rule states that if any children goes for inter caste marriage and if any of the parent belong to SC or ST category can claim for any reservation benefits but for that they need to show that the person is handicapped and disadvantaged on being born as member of SC/ST family. In the case of State of Madras vs. Champakam Dorirajan a government order was held null and void so as to help the backward classes. Along with this a clause 4 was also added in the Article 15 so that state can make special provision for the advancement of socially and educationally backward classes.²¹

Rights of Indigenous People under International Law:

Indigenous people were the first people of our nation that's why it was very important to protect their rights. There are 370 million Indigenous people in the world. These groups are very diverse but there are common issues that affect Indigenous people globally. Over many years the world started to recognize their importance and then many organizations define their rights For Example: International Labour Organization and United Nation.

²¹ Lakshay Bansal; Rights of Indigenous People under Indian and International Law; Latestlaws.com<<https://www.latestlaws.com/articles/rights-of-indigenous-people-under-indian-and-international-law-by-lakshay-bansal/>>accessed on April 20, 2021

International Labour Organization on the rights of Indigenous People

ILO adopted first international instrument to recognize the rights of indigenous people in 1957. First of all the ILO Convention No. 107 was adopted and its aim was to remain the integration of indigenous people and also given certain protective measures for indigenous people. But this convention was lack of any reference to the self-identification so after a two-year revision process ILO Convention No. 169 was adopted in Geneva. The purpose of which was to respect the wishes and the identity of the indigenous people. Some of the important features of the convention are as follows:

1. Protection of cultural, social and integrity values: According to the Article 5 of the convention social, cultural and spiritual values of the indigenous people should be protected. Their practices and values should be respected
2. Duties of the Government: According to the Article 6(1) of the convention government should make sure that the indigenous people can freely participate and can also be part of administrative decisions. These people should be helped in their development
3. Right to retain customs: According to the Article 8(1) national laws and the regulations should be in concerned with the customs of indigenous people. They also have right to retain their customs and values... According to Article 13(1) while applying the provisions of the constitution their cultural values and customs should be respected.
4. Right to Decide: Indecisions people have all right to decide their priorities of life and how they want to live their life.

United Nation Declaration on the Rights of Indigenous peoples

The UDHR is an international instrument passed by the United Nation in 2007. It defines the rights of indigenous people including their rights to cultural, identity, language and many more. It helps to prevent any discrimination against them and also help them to pursue their own vision of economic and social development. Some of the major principles of the declaration are as follows:

1. **Fundamental Rights with no Discrimination:** Article 1 of the declaration provides that indigenous people are entitled to enjoy every fundamental right and according to the Article 2 they have right to free from discrimination against them.
2. **Cultural Rights:** According to the Article 7 they have right to free from any acts of violence or genocide and also have right to live peacefully. They also have right to maintain and strengthen their cultural rights with free from destruction of their culture.
3. **Self-Determination Right:** This is one of the important principles because the indigenous people have continuously fought for this right. Article 3 provides the indigenous people the right to self-determination. By this right they can determine their political status and can also pursue for the development of their culture.
4. **Rights to use land, territories and other natural resources:** They have right to control and maintain their land, territories and natural resources for self-determination and for sustaining their culture.
5. **Rights to ownership and control:** Article 36 of the declaration provides that they have right to land, territories and natural resources which they originally acquired. They can own, control and use of their land and various natural resources. State has duty to protect their land and natural resources for the sustainability of their cultures and traditions.²²
6. **Certain State Responsibilities:** State are requires to give financial and technical assistance to the indigenous people by consulting them. Indigenous people are also entitled to adequate grievances and effective remedies whenever their rights are violated.²³

Rights of Tribal's in India with respect to access to justice

India has the second largest tribal concentration in the world spread across various parts of the country mainly in forests and hilly regions. The characteristics of these communities are their

²² Lakshay Bansal; Rights of Indigenous People under Indian and International Law; Latestlaws.com<<https://www.latestlaws.com/articles/rights-of-indigenous-people-under-indian-and-international-law-by-lakshay-bansal/>>accessed on April 20, 2021

²³ Lakshay Bansal; Rights of Indigenous People under Indian and International Law; Latestlaws.com<<https://www.latestlaws.com/articles/rights-of-indigenous-people-under-indian-and-international-law-by-lakshay-bansal/>>accessed on April 20, 2021

particular geographical location, distinct culture, economic backwardness and aloofness from the society at large.

Article 366(25) refers to Scheduled Tribes as such tribes or tribal communities or groups as are deemed under Article 342 of the Constitution. According to Article 342 of the constitution, the Scheduled tribes are the tribes or tribal communities which have been declared as such by the President through a public notification. It is given in Article 14 of the Indian Constitution: “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” In India, since these people are considered low and are not treated well the Constitution of India provides several rights to these people for safeguarding their interests. There are a number of social problems which are associated with these people like untouchability, illiteracy etc. Various other provisions are also made by the Constitution of India to improve the life of the Scheduled Tribes and social activists who helped in improving the condition of Scheduled Tribes and safeguarding their rights.²⁴

Constitutional Rights to Tribal People

The Constitution of India has provided special provisions to the tribal people to safeguard their interests. Article 15 of the Indian Constitution, states that the state shall not discriminate any citizen on grounds of religion, race, caste, sex, place of birth or any of them. This explains that every citizen of India is provided equal rights and opportunities without any discrimination.

Government of India has made reservation for the tribes in employment under Article 16(4) of the Constitution of India.

The Government of India has reserved seats in The House of People (Lok Sabha) and The State Legislative Assemblies under Article 330 and 332 of The Constitution of India.

Article 19(5) of the Constitution of India guarantees the tribal people right to own property and enjoy it in any part of the country.

²⁴ Anuj Kumar; Rights of Tribal's in India with respect to access of justice; Legal desire(June 25, 2016) < <https://legaldesire.com/rights-of-tribals-in-india-with-respect-to-access-to-justice/>> accessed on April 21, 2021

Article 338 of The Constitution of India grants the right to appoint a Commissioner to look after welfare activities of tribes

Article 46 of the Constitution of India states that, The State shall promote with special care the educational and economic interests of the weaker sections of the people and in particular, the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Under Article 275(i) of the Constitution of India the Centre Government is required to give grants-in-aid to the State Government for approved Tribal Welfare Schemes.²⁵

Land Rights to Tribal's

Schedule 5 of the Constitution of India and other state laws prohibits any transfer of property belonging to tribal communities or the land which is being cultivated by these people for a long time. Rights of tribes over Forest are an inalienable and irrefutable historical fact. But in the colonial rule the tribal people were deprived of their land rights and many people started encroaching lands of the tribal people but encroachments on forestlands was made an offence under the Indian Forest Act, 1927. After Independence, the forest department ingeminated the right of tribal people to the forest land and passed the Forest Conservation Act, 1980 which regularized the encroachments of forest lands.

With regard to the protection of the tribal rights over community forests and other lands, following the central legislation introduced in 1996, the Gram Sabha (Village Assemblies) in the tribal areas has been entrusted to protect the community rights over community land and forest. The Environment Ministry of India has also tried various measures to curb the problem of encroachments. In the guidelines issued by the Environment Ministry on September 18, 1990, State Governments were asked to evict all ineligible categories of pre 1980 settlers and encroachers after October 25, 1980. The Scheduled Tribe and Other Traditional Forest Dwellers Act in 2006 recognizes the ownership rights of tribes and other forest dwellers who are living or cultivating a specific land for a very long period of time. UNDP (United Nations Development Programme) in partnership with the Ministry of Law and Justice, Government of India, is helping the poor and

²⁵ Anuj Kumar; Rights of Tribal's in India with respect to access of justice; Legal desire(June 25, 2016)
< <https://legaldesire.com/rights-of-tribals-in-india-with-respect-to-access-to-justice/>> accessed on April 21, 2021

marginalized to access justice and demand and access entitlements.[16] In 2011, a forty year old man Naran Majhi applied for the regularization of the Scheduled Tribe and Other Traditional Forest Dwellers Act in 2006 on his land to be recognized legally as the owner of the land which his family used to farm for over 200 years.

The Government of India also ensures equal land rights to the tribal women as tribal men have. In the Case of Madhu Kishwar & Ors. Etc v. State Of Bihar & Ors [17], it was held by the court that the Scheduled Tribe women succeed to the estate of their parent, brother, husband as heirs by intestate succession and inherit the property with equal share with male heir with absolute rights as per the general principles of Hindu Succession Act 1956, as amended and interpreted by this Court and equally for the Indian Succession Act to tribal Christian.²⁶

The 20 point programme: The point 11 (b) of 20-point programme is to provide economic assistance to the scheduled tribe families to enable them to rise above poverty line. The ST families are assisted through various schemes implemented by departments of agriculture, rural development, horticulture, animal husbandry, sericulture, forestry, small cottage industries, etc. The ministry fixes the targets for 22-states/union territories and also monitors the progress of achievements on monthly basis. The officers of the ministry inspected more than 75 projects in the states of Andhra Pradesh, Assam, Manipur, Meghalaya, Orissa, West Bengal, Jharkhand, Maharashtra and Madhya Pradesh.[18]

Formation of PESA (Panchayats Extension to Scheduled Areas) Act, 1996:

PESA Act is laws enacted by the Government of India to enable the Gram Sabah's of the tribal regions to self govern and protect their natural resources. PESA was made applicable to 9 states viz. Andhra Pradesh, Chhattisgarh, Gujarat, Himachal Pradesh, Jharkhand, Madhya Pradesh, Maharashtra, Odisha and Rajasthan and not to other Scheduled Areas including those in Manipur. PESA imposed restriction on the State Legislature and decentralized more power in the hands of

²⁶ Anuj Kumar; Rights of Tribal's in India with respect to access of justice; Legal desire(June 25, 2016) < <https://legaldesire.com/rights-of-tribals-in-india-with-respect-to-access-to-justice/>> accessed on April 21, 2021

the Gram Sabha or Panchayat. It may be observed that the powers that can be exercised by the Gram Sabha under this Act relate to the tribes' customs, traditions, religion, land and mineral resources.[19] The act made the Gram Sabah's independent and competent to preserve and safeguard the customs and the traditions of the people and community resources.

The act gave the power to the Gram Sabah's to commend the programmes, plans and projects made for the development of the tribal people and they should be consulted before making any acquisition of land in Scheduled Tribe areas for the development programmes. Overall this act provided the people the right to preserve their land and natural resources and recommendation of the Gram Sabha at appropriate levels for any developmental programme in the tribal area.²⁷

Indigenous Women's Rights under the International Convention on the Elimination of All Forms of Discrimination against Women

Indigenous women around the world continue to suffer from systematic violations of their human rights. Not only as indigenous peoples but also as women. This updated Guide to Indigenous Women's Rights under the International Convention on the Elimination of All Forms of Discrimination against Women is written to assist indigenous women in seeking recognition and protection of their human rights through the use of the International Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). This Convention was adopted in 1979 and is one of the six core international human rights instruments. It is also one of the most widely ratified treaties with 187 member states as of May 2012. Compliance of CEDAW is monitored by the Committee on the Elimination of Discrimination against Women (CEDAW Committee). While indigenous women used to be practically invisible in the work of this Committee, in recent years, in particular after the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) in 2007, indigenous women's concerns have featured more prominently in the dialogue between the Committee and member states.²⁸

²⁷ Anuj Kumar; Rights of Tribal's in India with respect to access of justice; Legal desire(June 25, 2016) < <https://legaldesire.com/rights-of-tribals-in-india-with-respect-to-access-to-justice/>> accessed on April 21, 2021

²⁸ Ellen–Rose Kambel: A guide to Indigenous Women's Rights under the International Convention on the Elimination of All Forms of Discrimination against Women.(2nd edition , 8 June 2012)< [cedaw-guide-english 2nd ed.pdf](#)> accessed on April 21 ,2021

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly, Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfillment of the obligations assumed by States in accordance with the Charter, Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such, Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind, Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust, Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind, Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.²⁹



Journal of Multi-Disciplinary
Legal Research

²⁹ UNDIP 61/295. United Nations Declaration on the Rights of Indigenous Peoples
<https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf>

CONCLUSIONS AND RECOMMENDATIONS

Keeping in light here are some of the following concerns that must be taken in regard to the status of indigenous women's and for maintenance of their rights by respective authorities.

For States to strengthen the legal framework for the recognition of the rights of women under CEDAW, the enforcement of related policies addressing violence against women through information and education campaigns and capacity-building of relevant government agencies and institutions i.e. judicial bodies, law enforcement agencies, women and service-related institutions. Further, to establish specialized bodies at the national and/or sub-national levels (where relevant) to specifically address the conditions of indigenous women with appropriate policies and programmes to be designed with the full and effective participation of indigenous women. National census and data-collection on socio-economic and wellbeing indicators should include data disaggregation in relation to indigenous peoples – and in relation to indigenous women.

For UN agencies to develop specific programmes that shall address the promotion and protection of the rights of indigenous women and issues related to violence against women, with the full and effective participation of indigenous women. This shall include but not be limited to a) focused research and studies on the situation of indigenous women and experiences, good practices and lessons learned on issues related to violence against women, b) empowering indigenous women through various forms of needed and appropriate capacity building activities,

For States, UN agencies, funds and programmes to support the initiatives of indigenous women's organizations especially relating to capacity-building, organization-strengthening, networking, and advocacy at all levels; the establishment of indigenous women's federation and networks at the national level; services for victims of violence against women among indigenous women; support to travel and provision of a related budget for indigenous women's effective participation in regional and international processes, relevant conferences and workshops among others.³⁰

³⁰ AIPP(Asia Indigenous Peoples Pact): VIOLENCE, CUSTOMARY LAW AND INDIGENOUS WOMEN'S RIGHTS IN ASIA

< 0659_Violence_Customary_Las_and_IP_omen_Rights_in_Asia.pdf> accessed on April 21, 2021

Bibliography

- VIOLENCE, CUSTOMARY LAW AND INDIGENOUS WOMEN'S RIGHTS IN ASIA - AIPP Briefing Paper 2012
- A Guide to Indigenous Women's Rights under the International Convention on the Elimination of All Forms of Discrimination Against Women 2nd Edition, 8 June 2012 Ellen-Rose Kambel
- Report of the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli Corpuz
- Introduction to "Indigenous Women: The State of Our Nations" Bonita Lawrence and Kim Anderson
- 61/295. United Nations Declaration on the Rights of Indigenous Peoples
- United Nations Office of the Special Adviser on Gender Issues and Advancement of Women and the Secretariat of the United Nations Permanent Forum on Indigenous Issues
- [iachr.org/Indigenous Women](http://iachr.org/Indigenous%20Women)



Journal of Multi-Disciplinary
Legal Research