
INDIGENOUS RIGHTS AND LEGAL FRAMEWORKS: A COMPARATIVE STUDY OF INTERNATIONAL AND INDIAN PERSPECTIVES

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ABSTRACT

Indigenous people across the world have traditionally faced systemic marginalization, forced displacement, and violations of basic rights that every individual must get. While there has been significant growth in recognizing these rights at international and national levels, there are still impediments that work against the effective protection and implementation of these rights. This paper examines the legal frameworks aimed at protecting indigenous rights, with a specific focus on International frameworks such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Judicial decisions, including landmark judgements from the Inter-American Court of Human Rights, show the changing judicial dynamics regarding Indigenous self-determination, land rights, and most importantly cultural preservation.

In India, Indigenous people are classified as Scheduled Tribes and are protected by constitutional safeguards and specific legislative enactments, such as the Forest Right Act of 2006 (FRA) and the Panchayats (Extension to the Scheduled Areas) Act of 1996 (PESA). However, despite these constitutional and legislative safeguards, issues such as land alienation, inadequate enforcement of welfare programs, and violations of the principle of Free, Prior, and Informed Consent (FPIC) continue to be prevalent. Through a review of a series of landmark judgements, like the Orissa Mining Corporation case and the Samatha case, this document clarifies the role of the judiciary in protecting Indigenous rights.

While progress has been made in the recognition of Indigenous rights, there remain significant gaps in granting them, especially regarding access to health, education, and socio-economic development. This paper concludes by calling for more effective policy initiatives, effective monitoring from judiciary, and enhanced enforcement of existing laws to ensure holistic protection and empowerment of Indigenous people in India.

Introduction

Indigenous people have in common a historical continuity with a given region before colonization and a strong link to their lands.¹ Indigenous and tribal people are frequently identified by various national terms such as native people, aboriginal people, First Nations, Adivasi janjati, hunter-gatherers or hill tribes.² However, the rights of the indigenous people are rarely addressed. The major issue faced by the Indigenous people is the forced eviction from their ancestral land, lack of self-determination, education, healthcare, sanitation, and participation in decision-making.

In recent decades, there has been an increase in recognition at both the international and domestic levels of Indigenous rights. The judicial decisions of the Inter-American Court of Human Rights, through the Case of the Yakye Axa Community³ and Case of the Sarayaku⁴, and such international declarations as the United Nations Declaration on the Rights of Indigenous People of 2007 (UNDRIP), International Covenant on Civil and Political Rights, 1966 (ICCPR), and International Covenant on Economic, Social and Cultural Rights 1966, (ICESCR) have considerably enhanced those rights.

In India also various cases like the Orissa Mining case,⁵ Samantha case⁶ paved the way for the preservation of such people, including legislations like the Forest Rights Act, 2006, Provisions of the Panchayats (Extension to Scheduled Areas) Act, 1996 and other state laws for their welfare.

In this paper, I will discuss the developments which secured the rights of Indigenous people in the international arena through the judiciary as well as through declarations and conventions. I will also look into what extent they are implemented in the Indian context and how far we have to go to ensure other rights as well, provided under the UNDRIP. This paper will pay special emphasis on the Forest Rights Act 2006, which was considered the saviour of Forest Dwellers right in India. Along with it, this paper will also discuss the opposition this Act is facing in its implementation.

¹ <https://www.un.org/en/fight-racism/vulnerable-groups/indigenous-people>

² Ashok Brahma, Safeguarding the Rights of Indigenous People in India, 24 IOSR J. Hum. & Soc. Sci. 1 (2019).

³ Yakye Axa Indigenous Community. v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, 1-2 (June 17, 2005).

⁴ Kichwa Indigenous Community Sarayaku v. Ecuador, Inter-Am. Ct. H.R. (ser. C) No. 245, 1-2 (June 27, 2012).

⁵ Orissa Mining Corp. Ltd. v. Ministry of Env't & Forests, (2013) 6 S.C.C. 476.

⁶ *Samantha v. State of Andhra Pradesh* 1997 (8) SCC 191

International Framework

Under international human rights, various frameworks have emerged to address the challenges faced by Indigenous people. Some of them are mentioned below:

UN Declaration on the Rights of Indigenous People, 2007

The UN Declaration on the Rights of Indigenous People (UNDRIP) represents a significant milestone in dealing with ongoing human rights violations that are happening to Indigenous people across the globe. It is the most comprehensive International declaration that specifically deals with the Indigenous people's human rights. This declaration provides a normative legal framework for fostering harmony between the Indigenous global tribes with Non indigenous ones. The declaration does not establish new rights but underscores the crucial need to respect and advance the rights of Indigenous people.⁷

It affirms that Indigenous people are entitled to among all other things, all human rights that are provided under international law should be treated equally with other people. These include self-determination, self-governance, recognition and enforcement of treaties, identification and membership, cultural traditions, access to conventional remedies and health practices, and developments, rights to land, territories and resources, education, and environmental conservation.

Even after being a non-binding declaration, it has gained substantial legal significance through its integration with customary international law and other human rights frameworks. Courts and International bodies are increasingly using it as a guiding document to interpret indigenous rights.⁸

The Declaration fosters positive and collaborative relationships between Indigenous people and states through various means.⁹ It gives significance to land rights, as most of the rights are born out of it, and for their enjoyment having right over land is necessary.¹⁰

⁷ *Questions and Answers about the United Nations Declaration on the Rights of Indigenous Peoples*, KAIROS Canada (Sept. 30, 2024), <https://www.kairoscanada.org/what-we-do/indigenous-rights/undrip-questions-answers>.

⁸ Sylvanus Ghendazhi Barnabas, *The Legal Status of the United Nations Declaration on the Rights of Indigenous People (2007) in Contemporary International Human Rights Law*, 6 INT'L HUM. RTS. L. REV. 242 (2017).

⁹ G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Oct. 2, 2007) Available at: <https://www.refworld.org> (last visited Oct. 11, 2024).

¹⁰ S. James Anaya & Robert A. Williams Jr., *The Protection of Indigenous People' Rights over Lands and Natural Resources under the Inter-American Human Rights System*, 14 HARV. HUM. RTS. J. 33 (2001).

Subsequently, *the Report of the Special Rapporteur on the Rights of Indigenous People (A/HRC/27/52)*, also discussed the challenges faced by the Indigenous people in securing their economic and social rights. There is a disproportionate impact of poverty on the Indigenous people which severely impacts their ability to secure other rights such as housing, healthcare, and education. These people often face cultural insensitivity and discrimination which affects their right to attain the highest standard of health. Educational barriers in accessing their language which is relevant to their cultural traditions is also a major issue for them. This report emphasizes the need for the states to ensure equal access to services while respecting indigenous cultures and traditions.

International Covenant on Civil and Political Rights (ICCPR), 1966

The preamble of this covenant recognises that by the UDHR, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.¹¹

The covenant clearly states that the states should not deny the minorities of their country, whether it be cultural, linguistic, or ethnic, to enjoy their own culture, to profess and practice their religion, or to use their language.¹² Embarking the right in ICCPR demonstrates the urgency of such rights for Indigenous people because this covenant imposes an immediate obligation on the state to enforce them as soon as possible. The Indigenous people's economic and social rights are inextricably linked to their lands, territories, and natural resources. The violation of land rights directly impacts their right to adequate food, housing, health, and education.

International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966

The ICESCR urges states to foster universal respect for human rights and freedoms. It recognises that individuals, who have responsibilities to both other individuals and their communities, play a role in promoting and upholding the rights elucidated in the current covenant. This covenant obligates the state to take suitable measures immediately to ensure the

¹¹ International Covenant on Civil and Political Rights, U.N. Doc. A/RES/2200A (XXI) (Dec. 16, 1966), 999 U.N.T.S. 171. Available at: <https://www.refworld.org/> (last visited Sept. 1, 2024).

¹² Article 27 of International Covenant on Civil and Political Rights, art. 27, U.N. Doc. A/RES/2200A (XXI) (Dec. 16, 1966), 999 U.N.T.S. 171.

Economic, social and cultural rights of its citizens.¹³ Although this doesn't specifically talk about the indigenous people's rights but covers people as a whole. It states that the State Parties to the present Covenant recognize the right of everyone to social security, including social insurance.¹⁴

Even though these international frameworks provide for the protection of the rights of Indigenous people, violations of their fundamental rights still occur in many parts of the world. The two landmark cases *Yakye Axa Indigenous Community vs. Paraguay* and the *Sarayaku Case* highlight the ongoing struggle for Indigenous rights in Latin America. These cases have also served to illustrate how the legal framework has been resorted to in defense of the dignity and rights of Indigenous people to protect not only their lands but also self-determination and participation in decisions related to their territories. Below is a detailed explanation of these cases:

Yakye Axa Indigenous Community vs. Paraguay case

It was one of the leading cases decided by the Inter-American Court of Human Rights which ensured the rights of the indigenous people. The Yakye Axa was a community of hunters and gatherers in Paraguay. They were displaced in 1979 because of a government development program, which had to be in their ancestral lands. This forced eviction left them in unsuitable lands without adequate food, water, sanitation or access to healthcare facilities. The community also tried to reclaim their land in 1969 but was denied, resulting in living in extreme poverty on a national road while advocating for their land rights. They also faced malnutrition, poor health, and a lack of basic services. They were deprived of their economic, social, and cultural rights provided to them under UNDRIP 2007 as well as ICESCR 1966.¹⁵

The court found that the state violated Article 4 of the American Convention on Human Rights, emphasizing that the right to life is foundational to all other rights. It ordered the state of Paraguay to provide immediate relief to the Yakye Axa community, including access to clean water, healthcare, food, and sanitation facilities. It emphasized the fact that denying the community access to their ancestral lands directly impacts their health and violates their right

¹³International Covenant on Economic, Social and Cultural Rights, U.N. Doc. A/RES/2200A (XXI) (Dec. 16, 1966), 993 U.N.T.S. 3. Available at: <https://www.refworld.org> (last visited Sept. 1, 2024).

¹⁴ International Covenant on Economic, Social and Cultural Rights, art. 9, U.N. Doc. A/RES/2200A (XXI) (Dec. 16, 1966), 993 U.N.T.S. 3.

¹⁵ Supra Note: 2

to a decent life. The ruling emphasized the duty of the state to uphold socio-economic rights, especially for Indigenous people, and to ensure that they live with dignity.

Sarayaku case

The Sarayaku people of Ecuador filed a case against their government, which had allowed an Argentine Oil company to conduct exploratory activities on their territory without consultation. It violated their right in decision-making and right to Free, Prior and Informed consent provided by Article 10 of the UNDRIP. As the activities of the company were also causing environmental harm and cultural disruption to the Sarayaku, it violated their other rights as well.¹⁶

The court case ruled in favour of indigenous people, holding that the government violated their rights by failing to consult them and allowing the company to proceed without their consent. This case strengthened the legal requirement for states to obtain the Free, Prior and Informed Consent (FPIC) of the Indigenous people before carrying out resource extraction or development projects on their land.

The International courts ensured the rights provided to the Indigenous people under the UNDRIP whether it be self-governance, FPIC, protection of ancestral lands, self-determination, or participation in the decision-making process.

Indian Legal Framework

In India, Indigenous people are referred to as 'Scheduled tribes' as it is an administrative term used to provide constitutional privileges, protection, and benefits for a specific section of people, who were considered underprivileged and backwards historically. Indian Constitution provides various provisions for the protection including:

- **Article 15(4):** The State is empowered to make special provisions for the advancement of any socially and educationally backward classes of citizens or for (the Scheduled Castes) and the STs.
- **Article 46:** The State, to promote with special care the educational and economic interests of the weaker sections of the people, and in particular of (the Scheduled Castes and) the STs, and protect them from social injustice and all forms of exploitation,

¹⁶ Confirming Rights: Inter-American Court Ruling Marks Key Victory for Sarayaku People in Ecuador, Cultural Survival (Aug. 17, 2012), <https://www.culturalsurvival.org/>.

- **Article 338A:** The State is to make special provisions for the advancement of any socially and educationally backward classes of citizens or for (the Scheduled Castes) and the STs, etc.¹⁷

Most of the constitutional provisions which talk about the welfare of the indigenous people were added later through amendments to the constitution. The addition of provisions in constitutions for the welfare of Indigenous People through time shows that they are not overlooked by the government.

The *National Commission for Scheduled Tribes* was also set up by the 89th Amendment to oversee the implementation of various safeguards provided under the Indian Constitution to Scheduled tribes. It enquires into specific complaints concerning the deprivation of rights and safeguards of the STs. It also looks into the Planning Process for the scheduled tribes like Tribal Sub Plans (TSP) to ensure their growth.¹⁸ This looks into the socioeconomic rights of STs including health, education, and *yojanas* for their economic upliftment. But still, a lot of work needs to be done to secure other economic, social, and cultural rights and increase their living standards.

Other legislation protecting the rights of Indigenous people

Various other legislations were also made separately to ensure the rights provided to Indigenous people under UNDRIP 2007.

The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006

This act was introduced by the Indian government to ensure forest dwellers various rights like self-determination, legal ownership over ancestral property, participation in decision-making, and FPIC. This act has the potential to democratize forest governance by recognising community forest resource rights. It will ensure that the people get to manage their forest on their own, which will regulate the exploitation of forest resources by officials, improve forest governance and better management of rights of tribal people.

¹⁷ The Constitution (Eighty-ninth Amendment) Act, 2003, created the National Commission for Scheduled Tribes, a constitutional authority that promotes the economic advancement of India's Scheduled tribes. This act provided for the establishment of a separate body and gave it a constitutional status. This body works for the welfare, protection and socio-economic development of the tribal communities.

¹⁸ Socio-Economic Development for Scheduled Tribes, National Commission for Scheduled Tribes (Sept. 29, 2015), <https://ncst.nic.in/sites/>.

This act also grants power to gram-sabha to decide who should get ownership rights over the land in the village. The land is provided to the people who justify their claim by proving that, they have been living in that village (forest area) for the last 3 generations (*i.e.* 75 years).

It provides Gram-Sabha with two major powers. Firstly, the Gram Sabha has the authority to decide who is eligible for 4 hectares of land and has lived in that area for the last three generations. Secondly, if any environmental development project has to take place in the Forest area where Indigenous people reside or they are affected in any way, the free, prior, and informed consent of Gram Sabha is needed to begin that project, and overlooking such could be fatal as seen in Vedanta Sterlite case.¹⁹

Despite such noteworthy legislation, there was no significant change in the status of Indigenous people as there were constant efforts to dilute such legislation. The authorities overlooked the major chunk of applications filed for the allotment of land, the state amendments were made by the state to decrease the power of the Gram-Sabha in giving prior approval to the development projects.²⁰ There were even instances where the consent of Gram Sabha was forged and work was started without complying with the requirements.²¹

The Act, initially a legislative breakthrough in protecting tribal and forest-dwelling communities, is gradually being dismantled through a complex interplay of legal ambiguities, state interventions, and corporate interests.²²

The Panchayats Extension to Scheduled Areas (PESA) Act, 1996

It was enacted by the Indian Government on the recommendation of the Bhuria Committee²³ recommendations in 1995, to recognize, empower and promote the social, economic, cultural and political way of life of the Scheduled Tribes (Adivasis). This act was made to fulfil the purpose of the 73rd Constitutional Amendment, which is to strengthen the local governance in Rural India.

There was a history of self-governance by the tribal people regarding matters concerning them, and The Panchayats Extension to Scheduled Areas Act (PESA) was made to recognise the

¹⁹ AIR 2019 SC (CIV) 1286

²⁰ Meena Menon, The Unmaking of the Forest Rights Act, *Economic & Political Weekly*, 51(36), 15-18 (2016)

²¹ Anupam Chakravarty, *Mahan coal block dispute before green tribunal*, (May 21, 2014), <https://www.downtoearth.org.in/environment/mahan-coal-block-dispute-before-green-tribunal-44477>.

²² Meena Menon, The Unmaking of the Forest Rights Act, *Economic & Political Weekly*, 51(36), 15-18 (2016)

²³ Bhuria Committee Report, Scheduled Areas and Scheduled Tribes Commission, Government of India (Aug. 30, 2013), <https://tribal.nic.in/downloads/other-important-reports/BhuriaReportFinal.pdf>.

traditional system of decision-making process. It provides Gram-Sabha with various powers and functions like;

- Right to mandatory consultation in land acquisition, resettlement and rehabilitation of persons who are displaced.
- Protection of traditional beliefs, and the culture of the tribal communities
- Ownership of minor forest products.
- Resolution of local disputes
- Prevention of alienation
- Any other rights involving the Scheduled Tribes.

It was done to make sure that STs are getting the rights that are provided to them under UNDRIP. However, the implementation of the PESA Act was always in question, as it is not being effectively implemented in all areas. Some states like Odisha and Jharkhand have not formulated rules to operationalize the act.²⁴ Administrative challenges are also being faced by this act as Revenue Officers have denied permission to Gram Sabhas, and there have also been delays in the process.

Judicial rulings on the rights of the Indigenous people

Judiciary through its various judgments made it clear that the rights ensured to the tribal people should be provided to them, and the efforts should be made for their welfare and upliftment. It ensures that legislation like PESA 1996, and the Forest Rights Act 2006 should be implemented properly and not breached by anyone.

The judgment of the Supreme Court in *Orissa Mining Corporation Vs Ministry of Environment and Forest*²⁵ ensured various rights of tribal people. The Orissa Mining Corporation (OMC) filed a petition, challenging the rejection of stage II forest clearance by the Ministry of Environment and Forest (MOEF) for bauxite mining in the Niyamgiri hills, which was the home to the Dongoria Kondh and Kutia Kondh Tribes.

The court held that the consent of the Gram Sabha must be obtained before proceeding with the project. The Court underscored that the forest land in question is of great cultural and

²⁴ PESA 1996 (Panchayats (Extension To Scheduled Areas) Act): Features, Provisions, And Implications For Tribal Governance, PWOnlyIAS (Mar. 4, 2024), <https://pwnonlyias.com/current-affairs/panchayats-act-1996/>.

²⁵ (2013) 6 SCC 476

religious significance to the local tribes, and their rights under the Forest Rights Act, of 2006, must be respected. The Court ruled that the environmental concerns and tribal rights needed thorough evaluation by the Gram Sabha, which should decide on the community's cultural and religious claims.

This case has strong implications for Economic, Social, and Cultural rights, especially for the indigenous communities residing there. The decision to mandate the involvement of the Gram Sabha reaffirmed the ESR rights of the Dongaria Kondh and Kutia Kondh tribes, especially their rights to land, culture, and religious practices, as provided under the Forest Right Act 2006. The decision underscored that the development projects must respect the livelihoods, environment, and cultural heritage of Indigenous people, aligning with the principles of ESR rights.

Similarly in the landmark judgement of *Samantha v. State of Andhra Pradesh*,²⁶ the Supreme Court decided that government land, tribal land, and forest areas in the Scheduled area cannot be leased out to private industries without the consent of the local tribal communities. This judgement strengthened the rights of the tribal people by giving them more control over their lands and participation in decision-making.

Therefore, the Indian government has made various efforts to ensure rights like ownership of land, self-governance, FPIC, and participation in decision-making. But still, they are not provided fully and there are many instances of overlooking it, as seen in the Mahan Coal mine in Madhya Pradesh, where the clearance report of Gram-Sabha was forged.²⁷ Apart from this, scheduled tribes in India are deprived of education, minimum healthcare and Nutritional food.²⁸ As seen in the Attappadi region of Kerala, the statistics showed that over 100 infants died and miscarriage took place due to lack of proper nutrition and health care during pregnancy.²⁹ According to the report of the National Rural Health Mission (NRHM), most of the tribal infants were underweight too.³⁰

²⁶ 1997 (8) SCC 191

²⁷ Anupam Chakravarty, *Mahan coal block dispute before green tribunal*, (May 21, 2014), <https://www.downtoearth.org.in/environment/mahan-coal-block-dispute-before-green-tribunal-44477>.

²⁸ Subramanyam, V., & Rao, N. (2023). Food Insecurity, Poverty and Malnutrition among Particularly Vulnerable Tribal Groups in Andhra Pradesh: Role of the Government to Mitigate Problems, *Indian Journal of Anthropological Research*, 2: 1, pp. 77-94. <https://doi.org/10.47509/IJAR.2023.v02i01.06>

²⁹ *Attappadi reports 121 child deaths despite Rs 131 crore financial support in 8 years*, (Nov. 28, 2021), <https://www.onmanorama.com/content/mm/en/kerala/top-news/2021/11/28/attappadi-infant-deaths-kerala-malnutrition-poverty.html>.

³⁰ Swarajya Staff, *The Starving Tribals of Kerala's Attappady: A Shocking Case of Government Apathy*, Swarajya (Feb. 26, 2018), <https://swarajyamag.com/>.

After more than seven decades of independence, the Indian government has managed to secure many rights of Scheduled Tribes.

Recommendations

Some of the recommendations to strengthen the rights of scheduled Tribes in India are as follows;

- Strengthen the land rights of the Scheduled tribes by providing them ownership rights under the Forest Rights Act 2006, and the procedure of granting the ownership rights over land should be made easier and more accessible to the people because most of the tribal people are illiterate and not aware of their rights.
- The Indian government should start various policies for the welfare of the tribal people. They should be provided with adequate means to make their lifestyle better and improve healthcare, education, and sanitation.
- The government of India should consider augmenting the powers of the National Commission for Scheduled tribes to enable it to comprehensively address all the matters concerning tribal communities and ensure the effective implementation of constitutional safeguards.
- Judicial activism is also needed in cases, where it is seen that the violation of the rights is done by the state only. It should provide the rights in consonance with the international frameworks.
- Gram Sabha should be given the power of self-governance, and its powers should not be curtailed or overlooked by state machinery.

Conclusion

Many of the Indigenous people who were deprived of their economic, social, and cultural rights for centuries are living in woeful conditions, facing atrocities, being removed from their ancestral lands, lacking self-determination, and self-governance. The legal framework done at both international and domestic levels strengthened their rights in society. International conventions and declarations like UDHR, ICESCR, ICCPR, and most importantly UNDRIP consist of provisions ensuring various rights to indigenous people. International courts also intervene in situations where the rights of such people are violated by their respective states.

In India, various laws have been made like FRA and PESA to ensure certain economic, social

and cultural rights of the scheduled tribes, like ownership over land, self-governance, participation in decision-making, etc. But still, many of the scheduled tribes are untouched with basic rights like healthcare, sanitation, education and housing. Therefore, more policies are needed to provide tribal people with proper facilities and ensure them with these basic rights, and the proper implementation of these legislations must be ensured.