
THE ROLE OF ENVIRONMENTAL LAW IN PROTECTING THE INDIGENOUS COMMUNITY

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ABSTRACT

This research paper focuses on the important overlap between Indigenous community's protection and environmental legislation. It looks at how environmental law and policy can protect the right to the land, protect ways of life, and manage resources sustainably while remembering about the problems that Indigenous people faced and still face. The paper focuses on how environmental legislation contributes in protecting the rights of the Indigenous community.

INTRODUCTION:

The very foundation of environmental law is tilted towards the protection of the indigenous people whose lands and resources are most of the time under threats from external aggressions, such as environmental degradation and legal impunity. Industrial ventures including mining, timber extraction and infrastructure development, tend to violate indigenous rights and more often it results in adverse environmental impacts.

In many regions of the world, Indigenous peoples have always retained a strong bond with their traditional lands, generally succeeding in achieving a balance with nature through sustainable habits and customs. Still, these people are under considerable pressure from outside forces such as industrialization, the felling of trees, and the extraction of resources tend to disturb their lifestyle, pollute the environment, and devalue their cultures and social systems. There is hope that environmental laws, both at the international and national levels, will serve as a powerful protective shield over the lands, rights and customs of Indigenous people against such intrusions. Still, the protection provided by lawmakers to the Indigenous population is not only inconsistent, but also often insufficient.

Over the past few decades, there has been growing recognition, especially on the part of international legal instruments elaborated for such other peoples as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), to incorporate measures to

safeguard the rights of indigenous people in matters pertaining to land, resources and selfdetermination. National laws of countries such as Canada, Australia, and the United States have established provisions to this effect, although to various extent and levels of seriousness.

The focus of this paper is on the enforcement of environmental laws for the benefit of indigenous peoples. It investigates the possibilities provided by the law to shield indigenous territories and to make sure that the ongoing programs do not infringe upon the ethnic arts and customary ecological knowledge of the native peoples.

Historical Context and Indigenous Land Rights:

Colonialism in History and the Land Dispossession

The colonial conquest of the land rights of native people has been very active and extensive. After the late 15th century, beginning with the exploration of new territories, European countries started to expand their rules even more and did several colonizing practices claiming that they had their land rights, which is referred to 'terra nullius' meaning no one owned them, therefore denying any existing systems of government or land. Such legal reasoning enabled the colonialist nations to remove from the area and take possession of a great stretch of land without recognizing the native peoples rights to ownership. In many situations, however, native populations were ethnically cleansed, either by forcibly relocating them, Waging Wars, or inflicting policies.

For instance, in the dislocation suffered by Native American tribes in North America, the federal government entered into a number of treaties, and ignored enforcement of the treaties afterwards. In the same manner, the natives in Australia were not only subjected to forced removal, but also dispossession, as the British Crown claimed their lands to be 'vacant.'

The Quest for Land Rights:

For countless years, Indigenous peoples have been dispossessed of their lands. However, Indigenous communities have often stood up against these practices with the aim to reclaim and regain control over their lands and territories. For instance, in the 20th century, there was a surge in Indigenous peoples' activism and litigation, which led to major changes in the domestic and international legal frameworks. The most significant shifts occurred with the introduction of international laws that recognized Indigenous land rights.

In the 1970s and 1980s, the first political movements and legal battles arose, to break down the mentalities that had been built to support colonialism. It is Canada again that provides example of such changes in peoples' societal structure. For example, the Calder case in 1973 recognized Aboriginal title which prompted the signing of the Nisga'a Treaty (1998) and the James Bay and Northern Quebec Agreement (1975) from Indigenous Nations recognizing their land rights title. In Australia, the Mabo v Queensland case (1992) extinguished the terra nullius doctrine and accepted the notion of Native Title which protected the Indigenous peoples' right to land owned prior to colonization. These legal victories, however, did not come easy, and the battle for Indigenous land rights is still ongoing.

The Role of Environmental Legislation:

Although Indigenous land rights are shaped by a lengthy history, in recent years, modern environmental legislation has started to be looked at, as a way in which such lands can be protected. Instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), approved in 2007, assist in understanding self-determination and the control over indigenous peoples' lands and resources. The UN declaration encourages the Informed Consent of indigenous people for development that may affect their land.

Much has been achieved, but the quest for the full legal recognition of Indigenous land rights is still far from reached. It is that these systems of law have to progress to better accommodate and safeguard the interests of the land-based rights of all Indigenous peoples and that their involvement in the making of strong decisions regarding the environment is real.

People are fighting for their land rights even today due to past colonization and dispossession of the Indigenous population from their lands but the laws on environment still remain a vital tool of protection. The legal framework is gradually developing with the help of continuous legal struggles, activism and indigenous knowledge systems in promoting the rights of indigenous individuals and their connection to their land.

Rights of Indigenous Communities:

1. Right to Self-determination

One of the primary objectives of international human rights law is The right of a people to self determination. This means that Indigenous peoples have the right to decide which political

status to be a part of and developments of their economic, social and cultural systems without external influences. This right gives us a broader perspective wherein the Indigenous people have the right to self-rule, self-management, and self-determination. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), is a declaration adopted by the General Assembly in 2007 which enshrined the right and accepted the needs and requirements of Indigenous peoples to govern their internal and local affairs.

2. The Right to Land and Territories

The land is their heart of the existence of all Indigenous people. Land for them does not only refer to the area they live in but also extends to their interaction and attachment to that particular piece of land in terms of resources, the environment, and even religion, if any, associated with it. More often than not Indigenous people tend to view land in a comprehensive manner where the land cannot be separated with culture, identity, and ethnic knowledge. Certain important legal provisions, like Article 26 of UNDRIP, provide for the right of Indigenous people to own, use, and manage the lands and the resources within them, that they have traditionally occupied and used. This right also includes the prevention of undemocratic activities as regards to the Indigenous people's land and resource management, including acts like land grabbing, over-exploitation and development of peoples' territories without consultation and agreement with the rightful people.

In the past few decades, attitudes towards recognition of indigenous land rights have been changed. Some progressive decisions have been made that recognize as rightful land title the lands of Indigenous peoples- *Mabo v Queensland* (1992) in Australia, and *Tsilhqot'in Nation v. British Columbia* (2014) in Canada. In spite of these triumphs in legal systems, tribal populations are still at risk because of external threats like resource extraction, deforestation and encroachment on their lands.

Right to Free, Prior, and Informed Consent (FPIC)

The principle of Free, Prior, and Informed Consent (FPIC) is a cornerstone of Indigenous rights in relation to land and natural resources. FPIC asserts and argues that Indigenous communities must be consulted and give their free, informed, and voluntary consent before any development project, whether it be a dam, mining, logging, or other large-scale project that can take place on their lands. This right is intended to prevent exploitation and ensure that Indigenous

communities are fully informed of the potential impacts of such projects on their environment, health, and culture.

FPIC is enshrined in international frameworks such as UNDRIP (Article 32) and is considered a fundamental principle of environmental and human rights law. However, despite its legal recognition, FPIC is frequently violated in practice. Indigenous communities are often not properly consulted, and their opposition to projects is disregarded, resulting in longlasting environmental and social consequences.

Right to Cultural Integrity and Identity:

Cultural rights are key aspects in safeguarding the indigenous languages, practices, rituals and the structure of the society. In this case, the indigenous persons are free to pursue their culture and even express it but this includes the right to hold, defend, and foster one's culture, way of life and cultural institutions. This right also includes the respect and care for places of worship, the resting places of their ancestors, etc.

Right to health:

Health "the wish to be normal as long as possible" is what all human being at the end of the day wants. Everyone has the right to maintain freely the health, as well as the absence of physical and mental disabilities, and to care for it, without interference of anybody. In the context of an ever-changing world, the existence and health of the whole society, including communities, nations, and ethnic groups, naturally assume the existence of superior institutions for supervision, regulation, and management. Practice demonstrates that a healthcare system which operates across relevant extended sectors satisfies ethical principles, maximizes health gains, and promotes real efficiency. With respect to the Sovereign Rights of Indigenous Peoples it is hard to imagine that the health and health care systems in those societies are of the same type with the western model of care. The current versions of the ICESCR and the African Charter on Human and peoples Rights include two major constituents; the right to health and the right to health care. The notion underlying the fact that "indigenous peoples have the right to the highest standard of physical and mental health" is a statement under current human rights principles.

The Indian Constitution: Article 48A and its implications on the rights of the indigenous people:

Article 48A of the Indian Constitution belongs to the Directive Principles of State Policy, which are intended to guide the State in enacting laws and policies and it is aimed at achieving social upliftment and justice. Although these principles are not based on the rule of law, they are very important in running the country and assist the State in its obligations in making sure that the society is fair and just.

In Article 48A, the State is in turn required to take measures to “protect and improve the environment and to safeguard the forests and wildlife of the country.” Such provision is very important aspect in relation to the protection of the environment from degradation and is directly in line with several other international environmental protection strategies such as the 1972 Stockholm Declaration on the Human Environment and the protocols thereafter.

In India, Indigenous communities particularly the Scheduled Tribes (STs) are the owners of the forests and natural resources. They do not only hold economic rights over these resources but cultural and spiritual rights as well. The states’ responsibility to protect forests and wildlife, as Article 48A does, is also in support of the protection of the environment of the Indigenous people.

Article 48A can be seen as an instrument which guarantees that any policies or initiatives for the enhancement of the environment do not violate the rights of these communities. In particular, this means that in cases of development projects or resource extraction activities affecting tribal lands, the people concerned will be consulted and will give their Free, Prior, and Informed Consent (FPIC) before such activities can be undertaken. With this view, Article 48A carves out an avenue for environmental justice within the Constitution.

The Indian Constitution: Article 51A(g) and its implications on the rights of the indigenous people:

Article 51A(g) is found in the chapter on Fundamental Duties enshrined in the Indian Constitution. This chapter specifies the duties of the citizens of India. This particular provision states that, “It shall be the duty of every citizen of India to maintain and improve the natural environment, including forests and lakes rivers and wildlife and to have compassion for living

creatures.”

Fundamental Duties (like Article 51A) are of a positive nature and every citizen is bound by them in spite of the fact that the Directive Principles of State Policy which are nonjusticiable, lay down the policies to be followed by the government. In Directives Principles, there are provisions relating to duties of the state to the society, whereas in Article 51A(g), it has been emphasized that protecting and conserving the environment is the duty of every individual. This is in consonance with the increasing realisation that environmental conservation is not just a duty that the state has, but also one that each and every citizen has, especially with regard to the forests, water bodies, wildlife and similar other significant ecosystems.

It has been noted for quite some time that Indigenous peoples are caretakers of the environment where they indulge in practices such as traditional farming systems, forests preservation, and wildlife control. These members of the society possess great understanding of the local environment ecologies and practices and these are referred to as the Traditional Ecological Knowledge (TEK). Indigenous peoples have existed, enhancing their roles as environmental protectors. In this regard, including in the article 51A(g) forests, rivers, lakes and even animals serves as protective intent towards the balance of nature that sustains the indigenous people. This may be interpreted that the society has the right to maintain its customs and the traditions which include the environment.

The Indian Constitution: Article 47 and its implications on the rights of the indigenous people:

Article 47 of the Constitution of India, which appears in part of the Directive Principles of State Policy (DPSP), directs, the State, “to raise the level of nutrition and the standard of living of its people and improve the public health”. This particular provision is of great significance, in fact because it enjoins the state with the duty of taking care of its citizens, particularly with regard to health and nutrition.

Article 47, which obliges the state to safeguard and promote the health of the public, refers to the broader context of environmental health that encompasses air, water and soil quality, which supports the sustenance of Indigenous people. Health problems such as, malnutrition, respiratory problems, waterborne disease are very much common in their communities because

they are closely dependent on nature. Therefore, it is the duty of the state under Article 47 to protect the environment where these Indigenous communities live.

For instance, activities like mining, deforestation directly influence the quality of the tribal region. In that case, it could result in contamination of water bodies, or depletion of plants with traditional medicinal value or loss of other flora and fauna which Indigenous peoples use for their subsistence. In such a scenario, the obligation of the state to promote the health of the population is immediately coupled with the protection of tribal land and preservation of their resources for these peoples' use.

Healthcare services, provision of nutrition, and even sanitation are some of the areas that indigenous people are deprived of. Article 47 states that in addition to safeguarding the environment, the state is also mandated to promote the health of all citizens including the indigenous peoples. More often, tribal areas suffer poor roads, they have very few hospitals, and there is hardly any health programs that is been organised because they are located in the most far flung areas.

The state carries very significant responsibility in promoting living standards and nutrition among indigenous people. This is in relation to tackling the issue of malnutrition which is very high in many tribal areas as a result of poor foods and health services. People should also be helped to get clean water and health services at affordable costs. It means that tribal people should be enabled to access food by securing the forests and prevailing over the farming systems that they rely on for survival.

Importance of the Forest Rights Act (FRA) in Health

Among the various laws in India relating to the rights of the indigenous peoples, the Forest Rights Act (FRA) of 2006 recognizes the rights of forest-dwelling people over the lands and resources that they have been occupying and using for generations. The Forest Rights Act aims to redress the tribal and forest-dwelling peoples' historical wrongs and the injustices inflicted on them especially regarding with their access and rights to forest land, thereby safeguarding their means of livelihood and customs.

In the light of Article 47 of the Constitution, the FRA enjoys relevance for the greater good of the health and nutrition of the Indigenous peoples. It does this by conferring and protecting the

fundamental right to forest resource for food, medicine and other life supporting needs without which such peoples would be assured of their existence in the environment without fears of being uprooted or having their means of existence, resources, destroyed.

Consequently, the environmental health of indigenous populations is preserved, which aids public health improvement.

In line with Article 47, the obligation placed upon the state in relation to public health is very much important, especially critical in the case of Indigenous people whose nutrition security and general wellness depend on functional ecosystems. For these people the land is treated as sacred and every practice capable of sustaining them such as hunting, gathering, farming or even growing medicinal plants is placed on the ground and resources.

Thus, the responsibility of the state in relation to public health promotion should not only focus on the physical wellbeing of the people but also should focus on the cultural wellbeing of the Indigenous individuals. This means that the sustainable development projects should not lead to the destruction of the indigenous people's culture and they should be allowed to preserve their cultural surroundings. Therefore, in as much as their right to health is concerned, feeling healthy is dependent on having access to healthy ecosystems as well.

Article 21 in protecting the Indigenous community's rights:

The Right to Livelihood: Over the years, the Supreme Court has broadened the scope and interpretation of Article 21 to encompass the right to earn a livelihood. For indigenous people who are often agriculturists, they rely on forests and accumulate their own knowledge. Any intervention which jeopardizes their means of livelihoods, such as activities like mining, deforestation, fishing, can be understood as a breach of the right to earn a living. For example, in some of these cases such as *Vellore Citizens Welfare Forum v. Union of India* (1996), the Court also viewed pollution as an infringement of the right to life.

Right to a Healthy Environment: Article 21 also recognizes the right of everyone to a healthy environment. Indigenous communities, especially those residing in areas sensitive to the ecology, have an intrinsic relationship with their environment. There is likely to be a breach of their right to life protected by Article 21 in cases where a development project involves environmental degradation like felling of trees or pollution, which leads to endangering their

access to clean air, water, and land. This right is also recognized in policies such as the Forest Rights Act, 2006, which acknowledges the rights of peoples residing in forested regions to conserve and use the available forest resources.

Cultural and Social Identity: The essence of Article 21 has been interpreted to mean the right to live with dignity, which is usually associated with cultural preservation. For indigenous peoples, culture, traditions, and the way of life are essential survival and identity components. Constructing developmental projects such as dams or mining activities may displace individuals without due consideration for rehabilitation and it ultimately leads to the loss of their native lands, customary practices. The Supreme court in *Narmada Bachao Andolan* case noted that the fundamental right to life includes the dignity of all human beings and no one can be removed from their homes or residences for any reason, particularly without rehabilitation.

Right to Rehabilitation and Compensation: Article 21 is also crucial when it comes to the right to rehabilitation and adequate compensation for displaced indigenous communities. The Supreme Court has ruled that adequate rehabilitation is necessary for people whose livelihoods are disrupted by large infrastructure projects, any kind of failure would violate their fundamental right to life. This is especially significant for indigenous people who rely on land based resources for their survival.

The Fifth Schedule: Administration and Control of Scheduled Areas

The Fifth Schedule aims at ensuring that the native populations are not exploited:

Tribal Advisory Councils (TAC): As per Article 244(1), Tribal Advisory Councils may be formed in Scheduled Areas of the States. The councils are called upon by the Governor to give counsel in all matters concerning the betterment and development of the tribes in that area. This helps in ensuring that the tribal people are active in decision making process that impacts their lives and their lands.

Regulation of Land Transfers: In Scheduled Areas tribal land is not allowed to be transferred to non-tribals or the law regulates such transactions in order to mitigate land alienation. In history, many tribals have suffered in the course of selling their lands to non-natives, which led to losing land as well as their way of life.

Special Legislation: The Fifth Schedule provides for the protection of the land and other resources of the tribals and to safeguard them from any form of exploitation including that by way of development projects, industries, mines etc.

For instance, under the Fifth Schedule, The Forest Rights Act of 2006, though it is not directly incorporated under the Fifth Schedule, the implementation of the Forest Tribes Act is critical for the tribes of the Scheduled Areas. The purpose is to recognize and grant forest rights to the tribals residing in forests in order to protect their interests against unmitigated displacement and loss of their livelihood.

Conclusion:

Environmental legislation is an important protecting factor for the indigenous population of India as it helps in implementing the constitutional provisions concerning their land, culture, and means of livelihood. The Constitution of India promotes particularly social justice and protection of the weaker sections of the society in its Directive Principles of State Policy and Fundamental Rights. For many of the indigenous people, the natural resources have integral cultural significance. For the tribals, it is not just a piece of land where they reside. They have their own cultural identity that has to be preserved, so that the future generations know what the history was and how much it is important to maintain a cultural identity. Moreover, constitutional provisions, such as the Fifth Schedule, Article 21, Article 51A(g), Article 48A and Article 47 ensure that the indigenous areas are safe from aggressive proliferation of industries and loss of land. To conclude, adequate environmental law is instrumental in realizing the constitutional rights of the indigenous people.

References:

1. The Constitution of India (1950)
2. The Forest Rights Act, 2006, (The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006
3. "Environmental Law and Policy in India" by Shyam Divan and Armin Rosencranz, Oxford University Press, 2001.
4. Vellore Citizens Welfare Forum v. Union of India, (1996) 5 SCC 647.
5. United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), 2007
6. Rights of Indigenous Peoples in India: A Socio-Legal Perspective" by Sandeep Chachra, Routledge India, 2020.
7. Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664