

Universal Periodic Review and Position of Tribals in India

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I. Introduction

India indeed is the biggest democracy of the world with a staggering population to deal with. Huge number of people belonging to various religion, caste, creed, colour, culture reside here. It's not easy to come to a conclusion one thing at a very short span of time and that is reasonable and justifiable.

However, there must be enough evidence that India must give at the International level to justify its act of carrying on with the ILO 107 which has been replaced long back with ILO 169 in the year 1989.

Nearly 30 years have passed since India agreed to the principles of ILO 169 by discarding ILO 107 as outdated and appreciated the need to protect the tribal and indigenous peoples of our country. There has been a sea change within these three decades and it been seen that many countries have already shifted to ILO 169 without any big challenge. Even the neighboring country Nepal has ratified ILO 169. This has been a significant achievement in the area of protecting the basic rights of tribal and indigenous communities in that country.

It must be understood that indigenous and tribal people comprises of around 5% of the world's population or nearly 370 million people spread across over 70 countries.²

The tribal people constitute 8.6% of the country's total population.³ In other words there is about 104 million tribal people in India taking into consideration that they are considered to be tribals and there are many groups which do fall into the broader category of the term tribe but has not yet been incorporated in that group.

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² International Labour Organisation website accessed on 02/11/2016 at 10:22am

³ Scheduled Castes and Scheduled Tribes, at www.censusindia.gov.in/Census_and_scheduled_tribes.aspx accessed on 02/11/2016 at 10:34am

Taking such number of people into consideration, India is in a position of carrying a substantial number of tribal people of the world and is subsequently obliged to carry on the benefits that the tribal people should enjoy rather than refraining such rights for the last three decades which unfortunately, India has been doing.

The recent changes made in the name of the protection of the indigenous and tribal people has been all in the direction of the ILO107 in the true spirit and only a handful of them may be considered to be the subject matter of the ILO 169.

To tap this ongoing violation of the human rights of these tribal people which may have been better had been the intent of the state, has been the subject matter of discussion at the international forum. The Universal Periodic Review has been the outcome of such discussion. The plan was to identify the states that need effective mechanism to address the said issue in a better way.

The main objective of the study is to identify the role that UPR in protecting the human rights of the tribal and indigenous people in India and to analyse the mechanism to address the problems of the tribals in India.

It is important at this juncture to identify as to whether the Universal Periodic Review can in any way considered to be with the ability to bite rather than only to bark. Whether they are capacitated to provide specific directions to the member states of the UNO to do or refraining from doing things that violate the basic human rights of the tribal and indigenous people of India.

However, it is pertinent to identify the reason for accepting the ILO 107 and what the approach and why that approach was wrong and why the international community agreed to deviate from that wrong direction. It is important to know why ILO 169 and also to analyse as to why it may be considered to be the right approach. It shall also be the subject matter of discussion as to how many countries of the world being the member of the UNO and ratifying the ILO169 actually accepted that in their legal system and also to identify the theory they have adopted to implement the international law to the domestic forum.

An effort shall also be made in this article to identify the core areas that is the subject matter of political exploitation to deprive the people of our country both tribals and non tribals. Amongst many, the question of

reservation in India shall also be brought forth in this discussion to see whether it passes the test of ILO 169.

II. The Concept of Indigenous and Tribal Peoples under International Law

The term “indigenous peoples” is a common denominator for more than 370 million people, spread across some 90 countries around the world (DESA, 2009: 1). Such diversity made it near impossible to have a unified definition of the term indigenous peoples however, there is also a consensus accepted internationally that a universal definition is neither necessary nor desirable. On the other hand, the approach of self-identification has been emphasized to identify indigenous peoples and communities. This became the recommended approach accepted by most indigenous groups across the world. It has been identified that there are more than 5000 indigenous and tribal groups possessing unique distinctive features living on this planet at this day. Their presence can be felt across all geographical locations and all social systems from primitive to ultra-modern cities.

Irrespective of the geographic positioning, they can easily be distinguished from another by their distinctive cultural presence with special attachment with their land.

With the advent of western dominance on the planet through the process of colonisation, slowly and steadily the indigenous culture and society started the process of evolution towards westernisation with the initiation of the process of traditional and cultural erosion.

Large scale displacement of tribals started in lieu of the process of developmental projects and industrialisation. With this started the process of resettlement in urban and semi urban areas by these uprooted populations which became easy victims of discrimination and exploitation in the hand of non tribals. Lack of state initiative to protect this vulnerable class, instances of atrocities increased leading them to be marginalised amongst all the people of the world.

Those who decided to fight the odds in or around their displaced habitat found their slow and inevitable death due to the absence of their economic system as that was directly related with the land and resources inherent in

such land.⁴The one sided battle left the indigenous communities' strangers in their own land and marked as criminals and offenders against the state. Their struggle ended with the loss of lives of their leaders and forced assimilation of the rest in the lower strata of the urban and semi urban societies. There has been evidence of large scale increase in the unskilled labour market due to the continuous and never ending influx of indigenous and tribal peoples from their displaced habitat.

III. Background and Development of the International Movement to Protect Indigenous and Tribal Rights

The journey of indigenous movement in the international sphere may be said to have started during the 1920s in the ILO as there has been significant interest regarding the natives in the overseas territories within the colonial areas. The primary reason behind this is because of the condition of these people being really bad as there has been a gross violation of human rights of the people in almost all the colonies. And this situation is more significant in the labour front. There has been a predominant view that the European countries have an inherent right over the native peoples and apply them in forced and bonded labour. For the very first time in the ILO the massive exploitation of the native people has been addressed.

In furtherance of this the ILO formulated a few conventions during the 1920s and 30s which became known as the Native Labour Code. One of the primary objectives of this convention is to limit the ways by which these natives could be exploited. This introduced the cardinal questions as to what provided the authority of the Europeans to exploit the natives of various colonies. If the work is forced then under what authority the force is applied. Other questions as to the nature of work, the time of work of the workers have been debated over and this led to the recent conventions on forced labour and time for labour.

A research work was carried out on indigenous people by the ILO during the later 1940s and a book was published in the year 1953 named 'Indigenous Peoples' which was the first of its kind.

⁴“How Many Indigenous Peoples Are There, And Where Do They Live?” available at, [http:// www.NativeNet%gnosys.svle.ma.us@tamvm1.tamu.edu](http://www.NativeNet%gnosys.svle.ma.us@tamvm1.tamu.edu), (Accessed on August 16, 2015)

The first significant step towards the protection of the tribal and indigenous people from atrocities and to provide certain rights was the adoption by the General Assembly of the United Nations (UN) the International Labour Organisation (ILO) Convention 107⁵. It shall be relevant to mention in this regard that the ILO may be considered to be the only organ of the United Nations which has contributed to the highest extent for the protection of the rights of the indigenous and tribal peoples since its inception in the year 1919 as a part of the then League of Nations. It was through the ILO that the discriminatory labour practice has been addressed amongst the independent states relating to indigenous peoples. A significant research work led to the ILO Convention 29⁶ which came up in 1930 on labour practice. This is because of the considerable number of labourers being the members of the indigenous communities across the world. A research work took place by the ILO thereafter on indigenous people and a comprehensive report was drafted in 1953 entitled “Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries”⁷. Then comes the ILO Convention 107 with the assimilationist approach with the objective to bring them (the indigenous and tribal peoples) with the larger community of the society with respectable right of self-reservation of land resources etc of the indigenous and tribal peoples. However with the passage of time this approach was seen to be of an embarrassment to the UN prompting them to reconsider the ILO 107 to formulate a more updated and comprehensive Convention which led to the development of ILO 169⁸. The primary reason for adopting the principles

⁵ C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107)
Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (Entry into force: 02 Jun 1959)Adoption: Geneva, 40th ILC session (26 Jun 1957) - Status: Outdated instrument (Technical Convention).

⁶ C029 - Forced Labour Convention, 1930 (No. 29)
Convention concerning Forced or Compulsory Labour (Entry into force: 01 May 1932)Adoption: Geneva, 14th ILC session (28 Jun 1930) - Status: Up-to-date instrument (Fundamental Convention).

⁷ Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries, available at, <http://www.worldcat.org/title/indigenous-peoples-living-and-working-conditions-of-aboriginal-populations-in-independent-countries/oclc/869643>, (Accessed on December 4, 2015).

⁸ Convention No. 169
Convention No.169 is a legally binding international instrument open to ratification, which deals specifically with the rights of indigenous and tribal

of integration is because that was the philosophy of the time. According to the notion, the problem of the indigenous and non-indigenous issue will settle as the difference between them reduces.

In the decade of 1970-1980 there has been significant development in the position of indigenous people because of the groundbreaking study of the United Nations Special Rapporteur Jose Martinez Cobo. He provided crucial information on the state of these communities across the world to the United Nations.

In the year 1982 the Working Group on Indigenous populations is formed. This is perhaps the most significant step so far taken by the world community for the protection of *inter alia* civil and economic rights of these communities. The work of this group was to develop international standards on indigenous people's rights.

IV. Failure of ILO 107

As stated in the going discussion, there has been long standing criticism on the ILO Convention no. 107 as being assimilationist. There was a need for the necessary changes to the said convention and this led to the undated Convention Concerning Indigenous and Tribal Peoples in Independent Countries commonly known as ILO Convention 169 in the year 1989.

In the year 1993 the United Nations declared the year as the "International Year of the World's Indigenous People". This was done bearing in mind that one of the purposes of the United Nations, as set forth in the Charter, is the achievement of international cooperation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without discrimination as to race, sex, language or religion.⁹ The primary purpose of making this as the "International year of the World's Indigenous People" is to strengthen the international cooperation for the solution of various problems faced by indigenous

peoples. Today, it has been ratified by 20 countries. Once it ratifies the Convention, a country has one year to align legislation, policies and programmes to the Convention before it becomes legally binding. Countries that have ratified the Convention are subject to supervision with regards to its implementation. (<http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>) (Accessed on December 4, 2015)

⁹ UN General Assembly, 85th Plenary Meeting; A/Res/47/75; 14th December 1992

communities in areas such as human rights, environment, development, education and health.¹⁰ Recognising the value and the diversity of the cultures and the forms of social organisation of the world's indigenous people is also one of the primary objectives of this declaration. One of the primary objectives of this declaration was to give recognition to the values and the cultural diversity of the indigenous peoples. It was also worth mentioning that the objectives also included the respect of the diversified forms of social organisation of these peoples.

On the decision of the United Nations General Assembly, the world celebrates 9th August every year as the International Day of the World's Indigenous People. The date marks the day of the first meeting, in 1982, of the UN Working Group on Indigenous Populations of the Sub commission on the Promotion and Protection of Human Rights.¹¹

It must be stated in this regard that the indigenous movement was successful to secure their cultural integrity and status through this development and was in the right direction to meet the challenges to come in the twenty-first century. This achieved the much desired objective of initiating a new relationship based on mutual understanding between the States on one hand and the indigenous peoples on the other.¹²

A voluntary fund was created by the UN Secretary General. This fund was to be used for various educational and cultural events. Every member states were invited to contribute fund in this regard in furtherance of the celebrations of the said International Year for the World's Indigenous peoples.¹³

In order to address various issues of indigenous and tribal peoples, the UN Permanent Forum was demanded to be created. The creation of this permanent forum was the subject matter of discussion at Vienna, Austria at the world conference on Human Rights. It shall be prudent in this regard to

¹⁰ Ibid

¹¹ Background, available at, <http://www.un.org/en/events/indigenousday/background.shtml> (Accessed on August 14, 2015)

¹² Who Are The World's Indigenous Peoples, available at, http://www.ciesin.org/docs/010-000a/Year_Worlds_Indig.html (Accessed on August 14, 2015)

¹³ UN General Assembly, 85th Plenary Meeting; A/RES/47/75; 14TH December 1992

mention in this regard that a similar recommendation was made by the Vienna Declaration. A proposal was given for its establishment within the Decade of the World's Indigenous Peoples. A working group was formed and various other meetings took place that led to the establishment of the permanent forum by the UN ECOSOC Resolution 2000/22 on 28th July 2000.

In furtherance of such recommendation as referred above, a Draft Declaration was formulated by the said Working Group on Indigenous Peoples.

The year 1994 can be remembered as the initiation of the First International Decade of the World's Indigenous People (1995-2004)

2002 was the year that will also remain in the pages of history as for the very first time indigenous peoples, as indigenous-nominated (or government nominated) experts, speak for themselves as full-fledged members of a United Nations body (at the inaugural Session). The primary reason for the establishment of the United Nations Permanent Forum on Indigenous Issues (UNPFII)¹⁴ was to advise Economic and Social Council (ECOSOC)¹⁵ on various aspects of indigenous and tribal population. The issues are mostly concerned with the social and economic development of these people with special reference to Human Rights. After the establishment of UNPFII, another interesting development may be stated to be the announcement in the year 2004, the second International Decade¹⁶ of World's Indigenous People.

Ultimately, United Nations Declaration on Rights of Indigenous Peoples (UNDRIP)¹⁷ was adopted by the UN General Assembly. The adoption of UNDRIP reinstated the contention and reaffirmation of the commitment of the international community to protect various rights of the indigenous and tribal people across the world.

¹⁴The United Nations Permanent Forum on Indigenous Issues (UNPFII) is an advisory body to the Economic and Social Council (ECOSOC), with a mandate to discuss indigenous issues related to economic and social development, culture, the environment, education, health and human rights.

¹⁵ ECOSOC is the United Nations platform on economic and social issues.

¹⁶ 2005-2015.

¹⁷ UNDRIPS (Adopted on 13th September 2007) was the outcome of a long struggle and debate on various levels. The outcome was however rewarding.

It must be understood that the International movement must be understood from the principal point of view. The relevance of these studies must only be accomplished when the member countries accept and adopt the said international development in furtherance of the ratification of ILO Convention 169 and also UNDRIP.

V. The Role of Universal Periodic Review: The Indian Scenario

Universal Periodic Review is a specific one of its kind process to review the Human Rights Records of all 192 UN member states. This process takes place every four years. It provides an opportunity to all the member states to declare the actions taken to improve the human rights situation in their respective states. It also gives an opportunity to address the steps taken by the member states to counter the challenges the human rights violation of the respective countries.

The UPR came up in the year 2006 by the United Nations General Assembly.¹⁸ The primary objective of UPR is the significant improvement of the Human Rights situation of people of respective countries at all level.

The Universal Periodic Review plays a very dominating role in the implementation of international human rights. However, this is limited to the ratification of Convention 169 by India to really make the UPR any impressive role to play in the implementation of the rights of the indigenous and tribal peoples of India.

If a thorough research is done on the UPR Report submitted by India from 2008 till date, it can be noticed that the Scheduled Tribes have a very little place in the said reports. However, the actual scenario is completely different. Apart from the right to property of the tribals, their basic human rights have been frustrated in a large number of occasions. There has been large scale dispossession of these peoples in India in the recent past and the majority of these cases have not been addressed by the State.

Where the laws at the international level are tribal friendly, the laws of the land are not. The *lex loci* in most of the cases uplifts anti tribal interest. One of the most domination changes that have happened in the recent past is the need of protection of the tribals not from the individual perspective but to provide community protection and upliftment. India has alas not changed its

¹⁸ UN General Assembly, 15th March 2006, Resolution 60/251

objective with that of the international Indigenous and tribal rights movement. The need to stop or regulate the political intent of reservation in furtherance of individual rights has come in the fore. But the lack of political intent is evident and clear in the mind of the Indian politician as they failed to ratify the ILO 169 and still carry on the assimilationist approach that was there in ILO 169.

India must come out of this and provide the opportunity to these peoples as a whole in furtherance of their indigenous need. The need to protect them from displacement from their ancestral land in furtherance to the Samatha Case¹⁹ must be done. The political motivation shall not be in furtherance of the philosophy which was fifty years ago but must be updated. It must be relevant to state in this regard that the judgment given in this case is very much related to the case of *Mabo v. Queensland*²⁰ of Australia. It must be stated in this regard that as on this date Australia has also not ratified ILO 169 and there has been a large scale violation of Human Rights of the Indigenous and aboriginal peoples of Australia. However, Australia has gone a long way towards the protection of the rights of these peoples in a variety of ways including protecting the community rights amongst other things. It is not only Australia but many other countries across the globe which is trying in a variety of ways to provide protection to the tribal and indigenous populations of their respective countries. India is also playing a dominating role in the international level while dealing with these peoples. It must be understood that the tribal population in India is huge and that by non-implementation of international standards is causing a large scale irretrievable violation of indigenous culture and tribal autonomy. The national movements of the tribals in India has not grown up in a professional level as it has happened in many other countries. The time has come when the tribal movement reaches a different level and a reflection of the tribal situation in India can be reflected in the international level through the Universal Periodic Review. It must be understood that it is not only the tribals but the non tribals and other concerned must work hand in hand to improve the rights of the tribals in India to reach a sustainable position for the remaining tribal and indigenous culture to remain in the country for the generations to come.

¹⁹Samatha v. State of Andhra Pradesh and ors, AIR 1997

²⁰Mabo v Queensland (1989) 166 CLR 186

VI. Conclusion

The report given by India in Universal Periodic Review can play a very important role to highlight the political intent of the politicians in protecting the human rights of the tribal peoples in India. It shall also be relevant for the tribal movement to take a new dimension which shall be in furtherance of the protection of the cultural and indigenous nature of these peoples. What is needed today is not to provide these peoples some benefits, like reservations etc., but to protect them as who they are how they are and their specific indigenous social needs as a whole. More importance should be given to make the UPR a more responsible review of the actual situation of tribal rights in India. Significant importance should also be given to the realistic need of protecting the cultural heritage of these peoples and measures must be taken to provide adequate implementation of the international standards. India must ratify and do necessary alteration to the plan to protect various rights of these people under ILO 169 and definitely not proceed with the internationally excluded ILO 107. UPR should be more politically excluded to provide major reforms to the tribal communities across the country. As a matter of fact, India can be a major role model in the international front in protecting the various rights of the tribals in the days and years to come. Befitting legislative changes coupled with international collaboration to provide certain minimum standard of rights to the tribals and tribal communities. This should definitely be the mandate of the government by coming out of the reservation politics Indian bureaucrats are famous for.