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Biodiversity and Ecological Environment Protection and Human Rights 3.0

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Abstract:

Environmental pollution is a worldwide problem of modern industrial civilization. Interests of indigenous peoples are land based socio-economic prosperity. The Sustainable Development Goals (SDGs) are a set of 17 interconnected goals adopted by the 193 member countries of the United Nations General Assembly in 2015. According to the United Nations, the SDGs are a “universal call to action to end poverty, protect the planet and improve the lives and prospects of everyone, everywhere”. Environmental pollution is a worldwide problem of modern industrial civilization. Interests of indigenous peoples are land based socio-economic prosperity. Related to these interests are entitlements of development and environmental security interlinked with the principle of self-determination. However, the adverse impact of development on indigenous peoples has been pointed out over last few decades. In this perspective, the contemporary issues in indigenous peoples, sustainable development human rights 3.0 have been discussed.

Keywords: Environmental security, PublicHealth, Ecology disaster. Biodiversity loss

1. Introduction:

Indigenous peoples¹ inhabit large areas of the earth's surface. Nearly 350 million indigenous individuals belonging to 5,000 or so groups are scattered in more than 70 countries. More than half of the indigenous populations live in China and India, some 10 million in Myanmar and 30 million in South America. Among many indigenous peoples are the Tribals (*Adivasis*) in India,

¹ *Convention (No.169) Concerning Indigenous and other Tribal Peoples in Independent Countries*, adopted, by the General Conference of the *International Labour Organisation*, Geneva, June 27, 1989. Entered into force Sept 5, 1991 contains the definition of indigenous peoples in Article 1.1. as thus:“(a)tribal people in independent countries whose social, cultural and economic conditions distinguishes them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.” Governments, UN Secretariat employees and NGO lawyers often carefully distinguish between “peoples” and “populations” on the theory that designation as a “people” automatically entitles the group so characterized to assert a right to self-determination. However, indigenous peoples are exempted from the full enjoyment of this right.



Pakistan and Bangladesh, Aborigines and Torres in Australia, Indian of Americas, the Maori of New Zealand, Yanomami of Brazil, and the Saami, Inuit, Pygmy and Tiruray of the Norway, Denmark, Cameroon and Philippines respectively.² These and most other indigenous peoples have retained social, cultural, economic and political characteristics which are clearly distinct from those of the other segments of the national population.

Although the Union Government found itself unable to define who the indigenous peoples were in India, the World Bank on its own classified in 1991 the Scheduled Tribes as indigenous peoples in India for various developmental programmes³. The indigenous peoples' interests in a secure land base are both cultural and economic. Related to these interests are entitlements of development and environmental security interlinked with the principle of self-determination. However, the adverse impact of development on indigenous peoples has been pointed out over last few decades. Building upon the Charter provisions, the International Covenant on Economic, Social, and Cultural Rights affirms an array of social welfare rights and corresponding State obligations that are to benefit "everyone". The UN Declaration on the Right to Development ensures the realization of the right to development through international cooperation and domestic programs. It is undisputed that indigenous cultures have an intimate relationship with land and nature, particularly the environment in which they live. Besides, cultures of indigenous peoples contain the concept of sustainable development. In this perspective, the contemporary issues in indigenous peoples, sustainable development human rights have been discussed. These issues are relating to adverse impact of development on indigenous peoples, sustainable development and indigenous peoples, right to development of indigenous peoples under international human rights law and Indian practice.

2. Right of Indigenous Peoples related to Non-discrimination:

Right relating to non-discrimination of indigenous peoples is essential for the exercise of self-determination particularly in its ongoing aspect is the absence of individual discrimination against individuals or groups. Article 1(3) of the UN Charter recognizes "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." This principle of non-discrimination is emphasized and elaborated upon in numerous existing international and regional human rights instruments, including the Universal Declaration of

² UN, *Human Rights Fact Sheet No. 9*, Geneva (1990) at p.1.

³ *World Bank Operational Manual: Operational Directive 4.20: "Indigenous Peoples,"* Paragraph 15 (c)(1991) establishing recognition of customary or traditional indigenous land tenure systems as a premise of bank-assisted projects and in Paragraph 3 recognises scheduled tribes in India as "Indigenous Peoples". This directive was adopted by the World Bank on September 1991. See, UN Doc.E.CN.4/Sub.2/AC.4/1995/3at p.12.



Human Rights⁴, the American Declaration of the Rights and Duties of Man⁵, International Convention on the Elimination of All Forms of Racial Discrimination⁶, the American Convention on Human Rights⁷, and the Declaration on the Elimination of All Forms of Discrimination Based on Religion or Belief⁸. Besides these, States are enjoined by customary international law not to promote systemic racial discrimination. The non-discrimination principle has special implications for indigenous peoples. Therefore, the “problem of discrimination against indigenous populations” was in fact the point of departure of the UN activity concerning indigenous peoples over last several decades. Thus, UN Economic and Social Council Resolution of 1971 authorizing the UN Sub-commission on Prevention of Discrimination and Protection of Minorities to conduct “complete and comprehensive study of the problem of discrimination against indigenous populations”.⁹ A seminar of experts convened by the United Nations to discuss the effects of racial discrimination on indigenous-state relations concluded: “indigenous peoples have been, and still are, the victims of racism and racial discrimination”¹⁰. The report of the seminar further states:

Racial discrimination against indigenous peoples is the outcome of a long historical process of conquest, penetration and marginalization, accompanied by attitudes of superiority and by a projection of what is indigenous as “primitive” and “inferior”. The discrimination is of a dual nature: on the one hand, gradual destruction of the material and spiritual conditions [needed] for the maintenance of their [way of life], on the other hand attitudes and behavior signifying exclusion or negative discrimination when indigenous peoples seek to participate in the dominant society.

Both ILO Convention No. 169 of 1989 and UN Declaration on the Rights of Indigenous Peoples reiterate the principle of law against discrimination with special reference to indigenous peoples. The ILO Convention No. 169 prescribes that governments take affirmative steps to eliminate the incidents and legacies of discrimination against indigenous peoples as well as individual identity. Article 2 of the Convention No. 169 provides: “Government shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and

⁴ Universal Declaration of Human Rights [G. A. Res. 217A (III) December 10, 1948] affirming, *inter-alia*, in Articles 1 and 2 that “All persons are born free and equal in dignity and rights” and entitled to the enjoyment of human rights “without distinction of any kind”.

⁵ American Declaration of the Rights and Duties of Man [adopted by the Ninth International Conference of American States (March 30-May 2, 1948) OSA Res. 30; OSA Doc. OEA/ Ser. L /V/1.4, Rev. 1965] affirming, *inter-alia*, in Article II that “All persons are equal before the law ... without distinction as to race, sex, language, creed or any other factor.”

⁶ International Convention on the Elimination of All Forms of Racial Discrimination [December 21, 1965, GA Res. 2106 A(XV), 660 UNTS 195; entered into force January 4, 1969].

⁷ American Convention on Human Rights [November 22, 1969, OAS Treaty Ser. No. 36, 1144 UNTS 123; entered into force July 18, 1978] affirming, *inter-alia*, in Article 24 that “all persons are equal before the law.”

⁸ Declaration on the Elimination of All Forms of Discrimination Based on Religion or Belief [GA Res. 36/55, November 25, 1981, UN. GAOR thirty sixth Session Supp. No. 51, at 171, UN. Doc. A/36/684 (1981)].

⁹ ESC Res. 1589(L), May 21, 1971, UN ESCOR, 50th Session Supp. No. 1, at 16, UN. Doc. E/ 50144(1971).

¹⁰ Report of the United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States, UN. Doc. E/CN.4/1989/22/, HR/PUB/89/5(1989) at p. 5.



systemic action to protect the rights of these peoples and to guarantee respect for their integrity...Such action shall include measures for: (a) ensuring that members of these peoples benefit on an equal footing from the rights and opportunities which national laws and regulations grant to other members of the population; (b) promoting the full realization of the social, economic and cultural rights of these peoples with respect for their social and cultural identity, their customs and traditions and their institutions; (c) assisting the members of the peoples concerned to eliminate socio-economic gaps that that may exist between indigenous and other members of the national community, in a manner compatible with their aspirations and ways of life.” The consensus on the need for affirmative action is reflected, for example, in a summary of government and indigenous peoples’ comments on the proposed Organization of American States instrument on indigenous rights, in the part of the summary under the heading “Equality before the law and equal protection under the law”¹¹. Thus, the requirement of such affirmative action is accepted in Article 2 of the UN Declaration on the Rights of Indigenous Peoples thus: “Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity.”

3. Rights of Indigenous Peoples Related to Development and Environmental Security:

The indigenous peoples’ interests in a secure land base are both cultural and economic. Related to these interests are entitlements of development and environmental security interlinked with the principle of self-determination. However, the adverse impact of development on indigenous peoples has been pointed out over the time. Building upon the Charter provisions, the International Covenant on Economic, Social, and Cultural Rights affirms an array of social welfare rights and corresponding State obligations that are to benefit “everyone”. The UN Declaration on the Right to Development ensures the realization of the right to development through international cooperation and domestic programs. It is undisputed that indigenous cultures have an intimate relationship with land and nature, particularly the environment in which they live. Besides, cultures of indigenous peoples contain the concept of sustainable development. In this perspective, the rights of indigenous peoples in relation to development and environmental security have been discussed.

3.1 Adverse Impact of Development on Indigenous Peoples:

Most of the indigenous peoples live in the world’s most vulnerable ecosystem: the arctic and tundra, the tropical rainforests, the boreal forests, river and coastal zones, mountains and semi-

¹¹*Report of the First Round of Consultations Concerning the Future Inter-American Legal Instrument on the Rights of Indigenous Populations* [Reprinted in *Annual Report of the Inter-American Commission on Human Rights 1992-1993*, OAS Doc.. OEA/Ser.L/V/II. 83, at 263, 283-84 (1993)].



arid rangelands. As a result of the adverse ecosystems, many indigenous peoples live in poor social and economic conditions existing in their territories. They suffer from lack of basic health and education, leading to high infant mortality, low life expectancy and high illiteracy rate as well as large scale unemployment.¹² In spite of their vulnerable ecosystems, the territories used and occupied by indigenous peoples are often seen as important repositories of unexploited natural resources. Paradoxically, presence of these resources had turned out to be harmful to the indigenous peoples. Once largely inaccessible, these regions and their mineral deposits, hydroelectric potential, hardwoods, oil and new farm and pasture lands have now been put within men's reach by modern technology. The result has been that during the last forty years or so, these lands have come under unprecedented pressure as governments, development banks, transnational corporations and entrepreneurs have searched out resources to supply the growing demand of industrialized countries as well as of the fast- swelling populations of the nations of the South. The territories used and occupied by indigenous peoples are often seen as important repositories of unexploited riches. Thus, the land and resources of the indigenous peoples have come under their control not for benefiting the local indigenous population but for the benefit of the industrialized countries¹³.

The development schemes devised for the purpose of national development often seriously affect indigenous peoples' environment and their traditional livelihood. Industrialization and technological development put heavy emphasis on the indiscriminate exploitation of natural resources in order to render them productive and to solve the urgent economic needs of the nation states. It has caused much damage to the indigenous peoples especially to their lands, their national resources, and their ecosystem in forest, their way of life, their beliefs and culture.¹⁴ The State planners and policy makers, while launching centrally promoted development programmes, do not take into account either the interest or claims of the indigenous populations and hardly respect their economic and cultural rights. The effect of these programmes, very often initiated in the name of national development, has resulted into the displacement of millions of indigenous peoples all over the world. The construction of dams and hydroelectric projects has threatened indigenous peoples in tropical countries. In India two giant hydroelectric power projects, the *Sardar Sarovar Project* in Gujarat and the *Tehri Project* in Uttar Pradesh are expected to have disastrous effects on the local tribal population. It has been estimated that over the last decade, approximately half a million tribal people have been

¹² Mario Ibarra , "Traditional Practices in Respect of the Sustainable and Environmentally Sound Self-development of Indigenous Peoples", *Background Paper*. UN Doc. E/CN. 4/ Sul/ 1993/ 29, at p.10.

¹³ Fatma Zohra Ksentini, *UN Study on the Human Rights and Environment*, Preliminary Report, UN. Doc. E/CN. 4/Sub. 2/1991/ 8 at Paragraph 26.

¹⁴ Walter Fernandes, "Practice of Indigenous Peoples in the Conservation of Natural Resources and Rehabilitation of the Environment". *Background Paper*, UN. Doc. E/CN. 4/Sub. 2/1993/ 29 at p. 35.



displaced in India as a result of [regional development projects](#).¹⁵ Besides the economic development projects, governments' re-settlement policies cause serious damage and loss to the indigenous and tribal peoples. Thus, the experience of indigenous peoples and development clearly demonstrates that human rights and development are inseparable because the abuse of the rights of indigenous peoples is principally a development issue. For indigenous peoples, these development programmes are in practice *terra nullius* declarations.

The States have often taken decisions unilaterally and have been imposed on the tribal people on the pretext of national interest or interests of the foreign transnational corporations. The indigenous peoples are generally not consulted and denied participation in decision making regarding development programmes and policies. In other words, governments believe that they are incompetent or minorities in the [eyes of law](#).¹⁶ In this way, this forced development has deprived them of their human rights, in particular the right to life and the right to their own means of subsistence, two of the most fundamental of all rights. Indigenous peoples have been, in fact, victims of development policies which deprive them of their economic base, land and resources, and they have never been the beneficiaries. In 1990, the *Global Consultation on the Realization of the Right to Development as a Human Right* convened by the Secretary-General of the United Nations was held in Geneva, Switzerland. The report of this meeting contains the following observations:

*It was underlined that the most destructive and prevalent abuses of indigenous rights are a direct consequence of development strategies that fail to respect the fundamental right of self-determination. Using illustrations, participants described how indigenous peoples are routinely perceived as obstacles to development and excluded from decision making in matters that affect them. The result has been the elimination and removal of natural resources, waters, wildlife, forests and food supplies from indigenous lands either through commercial exploitation or incompatible land use; the degradation of the natural environment, removal of indigenous peoples from their lands; and their displacement or pre-emption from the use of their lands by outsiders.*¹⁷

It is undisputed that indigenous cultures have an intimate relationship with land and nature, particularly the environment in which they live. They have developed their life style in the ecosystem of the forest. However, the irrational exploitation of the natural resources for industrial purposes has created the problem of ecological balance between environment and the forest world over. Thus, the development policies are responsible for ecological degradation, which greatly affects the human rights of indigenous peoples, particularly environment. The preliminary report on the *Study on Human Rights and the Environment* states in this regard:

¹⁵ J. K. Das, "Indigenous Peoples, Development and Environment : The New Approach in International Human Rights Law," *Calcutta Law Times* (2003) Vol. 1 pp. 6-14.

¹⁶ Mario Ibarra. *Traditional Practice*. op. cit. at p. 8.

¹⁷ *The Realisation of the Right to Development, Global Consultation on the Right to Development as a Human Right: Report by the Secretary General*, United Nations Publication, New York, 1991 (HR/PUB/ 91/2) at Paragraph 105.



The prevailing development process.... is not only damaging to the environment but may also be harming the way of life of many people, and especially indigenous peoples. Indeed, it can be said that all environmental degradation has a direct impact on the human rights of the indigenous peoples dependent on that environment. For example, where there is unrestrained deforestation, forest-dwelling indigenous peoples may be forced from their traditional homelands, may thereby be denied a means of livelihood may be driven to take refuge among strangers and, in the most extreme cases, may fall victim to diseases against which they have no immunity. Similarly, desertification, a phenomenon which is as much man-made as it is an act of nature, has led many self-sufficient pastoralists to an impoverished existence in refugee camps. Even small-scale environmental sacrifices - the inundation caused by dam-building, mining, prospecting and so on - have affected indigenous peoples all over the world, causing them to leave lands they have occupied for generations, often without their willing consent or any compensation. Indigenous peoples may, thus, be victims of inappropriate development and environmental degradation. As such their fundamental freedoms and human rights are affected.¹⁸

Thus, in the absence of consultation or participation in discussions or decision-making, the indigenous populations were direct victims of the development model which threatens our planet today. The first cries of alarm were not heeded and the association between industrialization, irrational exploitation of natural resources and the development option and model mentioned was not made. The Supreme Court of India, in *Karnataka Industrial Areas Development Board v. Sri. C. Kenchappa and Ors.*,¹⁹ explained the environment degradation and its consequences. The Court observed that experience of the recent past has brought to us the realization of the deadly effects of development on ecosystem. The entire world is facing a serious problem of environmental degradation due to indiscriminate development. Industrialization, burning of fossil fuels and massive deforestation are leading to degradation of the environment. Today the atmospheric level of carbon dioxide, the principal source of global warming, is 26% higher than pre-industrial concentration. The earth's surface reached its record level of warming in 1990. In fact, six of the seven warmest years on record have occurred since 1980, according to the World Watch Institute's 1992 report. The rise in global temperature has also been confirmed by the Inter-Governmental Panel on Climate Change set up by the United Nations in its final report published in August 1990. The global warming has led to unprecedented rise in the sea level. Apart from melting of the polar ice it has led to inundation of low-lying coastal regions. Global warming is expected to profoundly affect species and ecosystem. Melting of polar ice and glaciers, thermal expansion of seas would cause worldwide flooding and unprecedented rise in the sea level if gas emissions continue at the present rate. Enormous number of gases and chemicals emitted by the industrial plants and automobiles have

¹⁸ Fatma Zohra Ksentini, *UN Study*, op. cit. at Paragraph 27. The Study on Human Rights and Environment prepared for the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1991.

¹⁹ AIR 2006 SC 2038 : (2006) 6 SCC 371.



led to depletion of ozone layers which serve as a shield for problem of life on the earth from the ultraviolet rays of the sun. The dumping of hazardous and toxic wastes, both solid and liquid, released by the industrial plants is also the result of environment degradation in our country.

The problem of "acid rain" which is caused mainly by the emissions of sulphur dioxide and nitrogen oxides from power stations and industrial installations is a graphic example. The ill-effects of acid rain can be found on vegetation, soil, marine resources, monuments as well as on humans. Air pollutants and acids generated by the industrial activities are now entering forests at an unprecedented scale. The 1972 Stockholm Conference on 'Human Environment' secured its place in the history of our times with the adoption of the first global action plan for the environment. Yet, as increasingly grim statistics indicate, over the past decades our global environment and the living conditions for most of the inhabitants of the planet continue to deteriorate. This process has meant significant setback for both the rich and poor. The Declaration of the 1972 Stockholm Conference referred obliquely to man's environment, adding that both aspects of man's environment, the natural and the man-made, are essential for his well-being and enjoyment of basic human rights. In *Essar Oil Ltd. v. Halar Utkarsh Samiti and Ors.*,²⁰ the Supreme Court aptly observed Stockholm Declaration as "Magna Carta of our environment". The Apex Court further observed:

- i) In the Stockholm Declaration principle number two provides that the natural resources of the earth including air, water, land, flora and fauna should be protected. The fourth principle of Stockholm Declaration reminds us about our responsibility to safeguard and wisely manage the heritage of wildlife and its habitat.
- ii) The aim of the above principles is to balance economic and social needs on the one hand with environmental considerations on the other. But in a sense, all development is an environmental threat. Indeed, the very existence of humanity and the rapid increase in the population together with consequential demands to sustain the population has resulted in the conquering of open lands, cutting down of forests, the filling up of lakes and pollution of water resources and the very air which we breathe. However, there need not necessarily be a deadlock between development on the one hand and the environment on the other. The objective of all laws on environment should be to create harmony between the two since neither one can be sacrificed at the cost of another.
- iii) While economic development should not be allowed to take place at the cost of ecology or by causing widespread environment destruction and violation; at the same time, the necessity to preserve ecology and environment should not hamper economic and other development. Both development and environment must go hand in hand. In other words, there should not

²⁰ (2004) 2 SCC 392: AIR2004SC1834.



be development at the cost of environment and vice versa, but there should be development while taking due care and ensuring the protection of [environment](#).²¹

3.2 Sustainable Development and Indigenous Peoples:

For the above-mentioned reasons, the industrial development model which was previously considered and defended in the pretext of progress for mankind is now being questioned by environmentalists, planners and experts. Since 1980s, a new awareness has developed about the limits of development due to industrialization and over-exploitation of natural resources which caused major environmental threats to our planet resulting from, viz., acid rain, depletion of the ozone layer, the greenhouse effect, and depletion of tropical forests. The world opinion realizes that modern development is based on high technology, industrialization and the irrational use of natural resources. This development is destructive to mankind because the existing development model did not respect men. People also began to realize that development demands an approach of humility and respect, of cooperation and the sacrifice of cherished vested interest, and it depends upon participation and wisdom. It is necessary to accept the fact that the just relationships between countries and between communities and individual within countries are fundamental preconditions for [development](#).²² At the beginning of the 1990s, people began to talk about *Human Development*. A start was made on measuring progress by introducing the *Human Development Index* (HDI) instead of *Gross National Product* (GNP) as the instrument of measurement of development. The HDI consists three indicators for measuring development:

- i) Life expectancy (which implies health and living conditions),
- ii) Literacy (which implies education, the ability to hold down a job and appreciate one's surroundings and culture), and
- iii) Purchasing power (which implies the ability to buy products and to satisfy [basic needs](#)).²³

World opinion increasingly recognizes that protection and preservation of the environment of biosphere is *sine qua non* for the achievement of *human development*. If a harmonious balance is not established between the challenges of development and the imperatives of environment, the very survival of mankind will be endangered. Accordingly, the emphasis is now on [sustainable development](#).²⁴ This concept has developed in response to prevailing development model which has caused "cries of alarm" in the contemporary international society. The expression *sustainable development* implies a growth of awareness and a search for balanced

²¹ *Indian Council for Enviro Legal Action v. Union of India*, 1996 (3) SCALE 579: (1996) 5 SCC 281.

²² Peter Adamson, "Development: A Design for the 80s", *UNICEF News*, 3 (1980) pp. 27-29.

²³ Pelter Gally, "What Really Matters: Human Development", *World Development Magazine*, January 1990 at p. 6.

²⁴ On the concept of sustainable development, see Meinhard Schnoder, "Sustainable Development", *Law and State*, 51 (1995), pp. 101-113; Andre Lalonde, "Indigenous Knowledge, Innovation and Sustainable Development: an information since perspective", *SJDA*, 14(1/2) 1995, p. 206-221. R.A. Malviya, "Sustainable Development and Environment: Emerging Trends and Issues", *Indian Journal of International Law*, 3 (1996) pp. 57-74.



development policy and the impact of human activity on the environment. In other words, it implies an attempt to take account of the relationship between the economy and the biosphere. *Sustainable development* should be understood as development which is immediately supportable, but viable and durable too, in other words, development which satisfies the needs of the present without diminishing the capacity of future generations to meet their own needs. The essence of this new approach is the concept of *intergenerational equity*. According to Sylvie Fauchex and Jean Francois, the concept of *intergenerational equity* comprises three basic principles:

- i) each generation must conserve the diversity of the natural and cultural resource base, so that it does not unduly restrict future generation's options. Each generation is entitled to diversity comparable to first generations;
- ii) each generation must maintain the quality of the planet so that it is passed on in no worse condition than it was received. Each is entitled to inherit an Earth comparable to the Earth which sustained its forebears;
- iii) each generation should provide its members with equal rights of access to the legacy from past generations.²⁵

In *State of Uttaranchal v. Balwant Singh Chaufal and Ors.*,²⁶ the Supreme Court of India emphasized that the directions that while deciding a case on development/ sustainable development, the court should meet the requirements of public interest, environmental protection, elimination of pollution and sustainable development. While ensuring sustainable development, it must be kept in view that there is no danger to the environment or the ecology. On sustainable development in *Karnataka Industrial Areas Development Board v. Sri C. Kenchappa and Ors.*,²⁷ the Supreme Court observed that there has to be balance between sustainable development and environment. This Court observed that before acquisition of lands for development, the consequence and adverse impact of development on environment must be properly comprehended and lands be acquired for development such that they do not gravely impair the ecology and environment; State Industrial Areas Development Board to incorporate the condition of allotment to obtain clearance from the Karnataka State Pollution Control Board before the land is allotted for development. The said directory condition of allotment of lands is converted into a mandatory condition for all the projects to be sanctioned in future. In *M.C. Mehta v. Kamal Nath and Ors.*,²⁸ the Supreme Court was of the opinion that Articles 48A and 51A(g) of the Constitution of India have to be considered in the light of Article 21 of the

²⁵ Sylvie Fauchex and Jean Francois. "Les Menaces globales sur l'environnement", Editions La Decouverte, Paris, 1990 at p. 102, Quoted in Morio Ibarra, *Traditional Practice*, op. cit. at p. 17.

²⁶ AIR 2010 SC 2550: (2010) 3 SCC 402.

²⁷ AIR 2006 SC 2038: AIR 2006 SC 2038.

²⁸ 2000 (5) SCALE 69: (2000) 6 SCC 213.



Constitution of India. Any disturbance of the basic environment elements, namely air, water and soil, which are necessary for "life", would be hazardous to "life" within the meaning of Article 21. In the matter of enforcement of rights under Article 21, the Supreme Court, besides enforcing the provisions of the Acts referred to above, has also given effect to Fundamental Rights under Articles 14 and 21 and has held that if those rights are violated by disturbing the environment, it can award damages not only for the restoration of the ecological balance, but also for the victims who have suffered due to that disturbance. In order to protect "life", in order to protect "environment" and in order to protect "air, water and soil" from pollution, this Court, through its various judgments has given effect to the rights available, to the citizens and persons alike, under Article 21. The court also laid emphasis on the principle of "Polluter-Pays". According to the court, pollution is a civil wrong. It is a tort committed against the community as a whole. A person, therefore, who is guilty of causing pollution, has to pay damages or compensation for restoration of the environment and ecology.

In *Glanrock Estate (P) Ltd. v. The State of Tamil Nadu*,²⁹ the Supreme Court held that the doctrine of sustainable development also forms part of Article 21 of the Constitution. The "precautionary principle" and the "polluter pays principle" flow from the core value in Article 21. The important point to be noted in this case is that we are concerned with vesting of forests in the State. When we talk about inter-generational equity and sustainable development, we are elevating an ordinary principle of equality to the level of over-arching principle. In *Vellore Citizens Welfare Forum v. Union of India and Others*,³⁰ the Supreme Court held that the "Polluter Pays" principle as interpreted by the Supreme Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of "Sustainable Development" and as such polluter is liable to pay the cost to the individual sufferers as well as the cost of reversing the damaged ecology. In *Essar Oil Ltd. v. Halar Utkarsh Samiti and Ors.*,³¹ while maintaining the balance between economic development and environmental protection, the court observed as under:

Certain principles were enunciated in the Stockholm Declaration giving broad parameters and guidelines for the purposes of sustaining humanity and its environment. Of these parameters, a few principles are extracted which are of relevance to the present debate. Principle 2 provides that the natural resources of the earth including the air, water, land, and flora and fauna especially representative samples of natural eco-systems must be safeguarded for the benefit of present and future generations through careful planning and management as appropriate. In the same vein, the 4th principle says "man has special responsibility to safeguard and wisely manage the heritage of wild life and its habitat which are now

²⁹ JT 2010 (9) SC 568: (2010) 10 SCC 96.

³⁰ AIR 1996 SC 2715: (1996) 5 SCC 647.

³¹ AIR 2004 SC 1834: AIR 2004 SC 1834.



gravely imperiled by a combination of adverse factors. Nature conservation including wild life must, therefore, receive importance in planning for economic developments". These two principles highlight the need to factor in considerations of the environment while providing for economic development. The need for economic development has been dealt with in Principle 8 where it is said that "economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for improvement of the quality of life".

It is to be noted that the cultures of indigenous peoples contain the concept of *sustainable development*. They have a special relationship with land and the environment in which they live. In nearly all indigenous cultures, land is considered as *Mother Earth*, and it is the core of their culture. Furthermore, indigenous peoples have over a long period of time, developed successful systems of land use and resource management. Traditionally, they have developed thousands of experiences and observations for several millennia, which are relevant in providing future options for *sustainable development*. For a long time, indigenous traditional technology and system, viz., nomadic pastoralist, shifting cultivation, various forms of agro-forestry, terrace agriculture, hunting, herding and fishing were considered inefficient, unproductive and primitive.³² However, as the world opinion grows more conscious of the environment and particularly of the damage being done to fragile habitats, there has been a corresponding interest in indigenous land-use practices. In short, the notion of sustainability is the essence of both *indigenous economies and their cultures*.³³ Obviously much attention is now being taken in adopting the techniques and methods utilized by the indigenous peoples for conservation of natural resources. It is now increasingly being felt that we can learn much how to sustain natural resources and its management from native indigenous peoples. The *Rio Declaration on Environment and Development*³⁴ held in Rio de Janeiro, Brazil in 1992, emphasized the "vital" importance of indigenous peoples' traditional knowledge of the ecosystems in which they live. Principle 22 of the *Declaration* affirmed in the following words:

Indigenous peoples' ecological rights and their communities and other local communities have a vital role in environmental management and development because of their knowledge and practice. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Against this background, the relevant provisions of the UN Charter and the international instruments pertaining to right to development of indigenous peoples under international law may be discussed.

³²Fatma Zohar Ksentini, UN *Study*, op. cit. at Paragraph 25.

³³Das S.C, Sanyal M.K, Das J. K, (2023), *IJISSET*, vol.10(2), pp 78-89.

³⁴UN Chronicle. "The Rio Declaration on Environment and Development", September 1992, pp. 59-67. For the text of the Rio Declaration on Environment (Rio De Janeiro, June/1992). See, UN. Doc. E/CN.4/Sub.2/ Ac. 4/1996/5/ Add: at p. 4.



3.3 Right to Development of Indigenous Peoples under International Human Rights Law:

3.3.1 General Provisions:

An objective reading of the UN *Charter*, the *Universal Declaration of Human Rights*, the two *Human Rights Covenants* and the other human rights instruments including Declarations adopted by various UN organs and specialized agencies indicate that efforts are being made to seek greater happiness for the human species. The idea of development³⁵ is based on the conviction that there exist a closer link between economic, social and cultural development and the realization of human rights. The latest *Declaration on the Right to Development* was adopted by the General Assembly on 4 December 1986. The second paragraph of the Preamble to the *Declaration* states that a development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from". Articles 1 and 2 of the *Declaration* define what the *United Nations* understands by development. Article 1 states that: (i) The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized. (ii) The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subjects to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources. Further, Article 2 provides that: (i) The human person is the central subject of development and should be the active participant and beneficiary of the right to development. (ii) All human beings have a responsibility for development, individually and collectively... These general provisions relating to development are directly related to the situation of indigenous peoples but never implemented.

3.3.2 Specific Provisions:

Besides the general provisions, indigenous right to development have been specifically recognized in *UNESCO Declaration on Ethno-development*, *ILO Convention No. 169* and *UN Declaration on Indigenous Rights* prepared by the UN *Working Group*. The UNESCO Declaration

³⁵ The popular provisions regarding the right to development are: UN *General Assembly Resolution 1161 (XII)* of 26 November 1957; the third paragraph of the preamble to the *International Covenant on Economic, Social and Cultural Rights* (1966); the *International Conference on Human Rights* held in Tehran, Iran, in 1968; *Human Rights Commission's Resolution* 1969; UN *General Assembly Declaration on the Right to Development on 4th December 1986*.



on [Ethno-development, 1981](#)³⁶ recognises that "ethno-development is an inalienable right of Indian groups".³⁷ According to the Declaration, ethno-development is "the extension and consolidation of the elements of its own culture, through strengthening the independent decision making capacity of a culturally distinct society to direct its own development and exercise self-determination, at whatever level, which implies an equitable and independent [share of power](#)".³⁸ The Declaration also expresses the conviction that ethnic group is "a political and administrative unit, with authority over its own territory and decision making powers within the confines of its development project, in a process of increasing autonomy and [self-management](#)".³⁹ According to Article 7 of the ILO Convention No. 169 of 1989, the peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.

The improvement of the conditions of life and work and levels of health and education of the peoples concerned with their participation and cooperation shall be a matter of priority in plans for the overall economic development of areas they inhabit. Special projects for development of the areas in question shall also be so designed as to promote such improvement. Governments shall ensure that, whenever appropriate, studies are carried out, in cooperation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact of planned development activities on them. The results of these shall be considered as fundamental criteria for the implementation of these activities. Government shall also take measures, in cooperation with the peoples concerned to protect and preserve the environment of the territories they inhabit. The right to development of indigenous peoples is also guaranteed in the UN *Declaration on the [Rights of Indigenous Peoples](#)*.⁴⁰ Articles 19 to 24 are concerned with the right to development of the indigenous peoples. Article 23 of the UN Declaration is much more specific. It states:

Human rights for indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and

³⁶ The document known as *Declaration of San Jose on Ethnocide and Ethno-Development, 1981*. See UNESCO Doc. FS82 /WF. 32(1982).

³⁷ Das S.C, Das J. K, (2016), ISBN: 978-81-927804-1-2, pp 76-100.

³⁸ Das S.C, Das J. K, (2019), ISBN: 978-93-85926-06-8, pp121-131,

³⁹ Das S.C, Sanyal M.K, Das J. K, (2023), IJISAET, vol.1(2), pp 7-18.

⁴⁰ Adopted by the United Nations General Assembly on its 107th Plenary Meeting on 13 September 2007 [See Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53), part one, chapter II, sect. A.]



develop all health, housing and other economics and social programmers affecting them and, as far as possible, to administer such programmers through their own institutions.

3.3.3 UN Declaration on Indigenous Rights

Thus, the UNESCO Declaration on Ethno-Development, ILO Convention No. 169 and UN Declaration on Indigenous Rights specially recognized the right to development of indigenous peoples. These instruments attempt to put an end to the outrages that indigenous peoples have suffered in the name of development. In this context, it may be recommended that the indigenous peoples should be given all possible opportunity to participate in the planning, implementation and evaluation of projects affecting their future and living conditions. Machinery and channels should be established and consolidated for consultation and negotiation between governments and indigenous and tribal peoples on any programme that affects them directly. Article 55 of the UN Charter imposes a responsibility upon the United Nations to promote higher standards of living, full employment, and conditions of economic and social progress and development. Building upon the Charter provisions, *the International Covenant on Economic, Social and Cultural Rights* affirms an array of social welfare rights and corresponding state obligations that are to benefit “everyone.”⁴¹ In December 1986, the *UN General Assembly* adopted by an overwhelming majority the *Declaration on the Right to Development*.⁴² The Declaration defines the right to development as “an inalienable human right by virtue of which every human person and all peoples are entitled to practice in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.”⁴³ In response to this historical phenomenon, *ILO Convention No. 169* establishes as “a matter of priority” the “improvement of the conditions of life and work and levels of health and education of [indigenous] peoples,” and it mandates “special projects... to promote such improvement.” The Convention, furthermore, specifies duties on the part of States to ensure the absence of discriminatory practices and effects in areas of employment, vocational training, social security and health, education, and means of communication.⁴⁴ The UN Declaration follows in the same vein, stating that indigenous peoples are entitled “to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political economic, social, cultural and spiritual development.”⁴⁵ Similarly, the *Rio Declaration on Environment and Development* held in Rio de Janeiro, Brazil in 1992, emphasized the “vital” importance of indigenous peoples’ traditional knowledge of the ecosystems in which they live. Principle 22 of the Declaration affirmed:

⁴¹ Article 6 (i) of the ICESCR, 1966.

⁴² Declaration on the Right to Development, G.A. Res. 41/ 128, December 4, 1986.

⁴³ ILO Convention No. 169, Article 7(2).

⁴⁴ Das S.C, Sanyal M.K, Das J. K, (2023), BIMS, vol.7(1,2), pp 11-22.

⁴⁵ UN Draft Declaration on Indigenous Peoples, Article 38.



“Indigenous peoples and their communities and other local communities have a vital role in environmental management and development because of their knowledge and practice. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of [sustainable development](#).”⁴⁶

3.3.4 National Biodiversity Act. and Authority:

India's Biodiversity Act, 2002 envisages the establishment of a National Biodiversity Authority for discharging the statutory powers provided for under the legislation. The chief concerns of the 1992 Convention on Biological Diversity are conservation of biological diversity, sustainable utilization of its components and equitable sharing of benefits. Thus, the last two and half decades has seen two important international instruments such as the 1992 Convention on Biological Diversity and the 1993 Agreement on Trade Related Intellectual Property Rights (TRIPS Agreement) as a part of World Trade Organization (WTO) and are in force. Most of the TRIPS Agreement members are parties to the [1992 Convention](#)⁴⁷. India is the party to both of these instruments. There are many interrelated provisions and diametrically opposite rights and obligations under these instruments. The two main overlapping areas in these Conventions are protection and access to biological and genetic resources. According to the Article 27(1) provides that patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. However, members may also exclude from patentability of diagnostic, therapeutic and surgical methods for the treatment of humans or animals, plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof. Thus, the Article 27(2) provides thus: “Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect order public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the [environment](#)⁴⁸, provided that such exclusion is not made merely because the exploitation is prohibited by their law”. In fact, Article 8(j) of the 1993 TRIPS Agreement authorizes its members, in formulating or amending their national laws and regulations to “adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological developments”., provided such measures are consistent with other

⁴⁶ Rio Declaration on Environment (Rio De Janeiro, June 1992), see, UN. Doc. E/ CN.4/ Sub-2/ AC.4/ 1996/ Add 1, p. 4.

⁴⁷Das S.C., Sanyal M.K. and Das J. K, Jana C, (2019), “Energy rich Environment Management in Sustainable Smart World by Green IoT Applications” on New Paradigms in Management, Kolkata, 24th August 2019, pp 28.

⁴⁸Das S.C. and Das J. K, (2023), “Protection of Green Environment in Smart World using Nanostructured Biosensors: A Techno-legal aspect” Abstract Books of International Seminar (ICBS-2023), 4th January, pp 7-8,(2023).



1993 TRIPS Agreement provisions. In this context, the National Council for Environmental Policy and Planning was established as an authority for environmental protection under the Department of Science and Technology in 1972, which is presently known as the Ministry of Environment and Forest (MoEF) (Jayakumar 1987). MoEF acts as an advisory body in all matters relating to protection of environment and its improvement, but their possibility for execution remains with the various ministries and government agencies⁴⁹. The Government of India declared the Policy Statement for Abatement of Pollution in 1992 which states⁵⁰ "This statement declares the objective of the government to integrate environmental considerations into decision making at all levels."

4. Conclusion:

The principle of quality and non-discrimination concerning indigenous peoples are closely linked with collective human rights. The promotion, protection and realization of such human rights of indigenous peoples have become, during the last two decades, the major challenge of UN human rights activities. The right of self-determination has been considered as the highest substantive right of indigenous peoples by which other rights are to be elaborated. Although there is a general unanimity among the international bodies that recognition of the right to self-determination is a pre-requisite for the realization of the aforesaid collective rights of indigenous peoples, the right related to self-determination, has been, by and large, acceded to in favour of indigenous peoples by the majority of states as the numerical strength of the members of various indigenous groups are small and the lands occupied by the members of such groups have been circumvented by the lands occupied by others within the boundaries of the main sovereign States and, thus, are incapable of forming a viable Nation/State of itself economically as well as geographically. The States are also reluctant, and have virtually refused, to grant full autonomy and self-government to the indigenous people on the ground of the protection of their "territorial integrity", "security" and "sovereignty". The aforesaid two diametrically opposed stands have been tried to be resolved by dividing the right to self-determination into two parts: "external self-determination" and "internal self-determination". While right to external self-determination entailing independence, statehood and secession had been denied outrightly to indigenous peoples, the majority of states including India have made serious efforts to grant indigenous peoples the right to internal self-determination, short of full independence and autonomy to the extent of statehood. The international consensus also appears to favour the internal aspect of the right of self-determination for the realization of rights of indigenous peoples and has circumscribed the exercise of the right of the autonomy or self-government by

⁴⁹Das S.C, Sanyal M.K, Das R, and Das J. K, (2016), "IPR for Good Governance in e-Education and of Innovation Systems" on UGC ponsored National Seminar, NBU, WB, 10th Sept, pp 68-75,(2016).

⁵⁰Das S.C, Sanyal M.K, Das J. K, (2023), "Green IoT vision SDG in the Water, Agriculture, Sanitation and Hygiene Environment Management in Smart World", IJISET, vol. 10, Issue 2, February, pp 78-89,(2023).



the indigenous peoples within the sovereignty of the State in which they reside. The last few decades have witnessed the UN human rights work turning from individual human rights towards collective human rights at the international level culminating into the recognition of certain collective rights of indigenous peoples related to either non-discrimination or land and resources or culture, language and education or cultural and intellectual property or development or environment. These international human rights principles concerning indigenous peoples elaborate the contents of self-determination.

An integral part of international human rights law is the duty of States to secure enjoyment of human rights and to provide remedies where the rights are violated. This duty relates to the substantial corpus of international law on the responsibility of States in regard to unlawful acts or omissions. It is implicit, if not express, in human rights treaties and is similarly implicit in discernible customary human rights law. The *UN Declaration on the Rights of Indigenous Peoples* states: "Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with states, as well as to effective remedies for all infringements of their individual as well as collective rights." The duty to secure enjoyment of human rights is heightened in the context of indigenous peoples and extends beyond States to the international community at large. With increased intensity over the last several years, the international community has maintained indigenous peoples as special subjects of concern and sought cooperation to secure their rights and well-being. The executive authority of state normally operates within framework of a State's Constitution and, at least to some extent, its legislative enactments; and that framework bears upon the scope of executive authority to respond to indigenous peoples' claims or to otherwise implement relevant international standards. Constitutional principles and legislative Acts themselves bear directly upon the effective enjoyment of human rights, including indigenous peoples' rights, if only by omission. Accordingly, legislative institutions and mechanisms of Constitutional reform are potential and often necessary conduits for the implementation of international standards concerning indigenous peoples.

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