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## **The Growth and Development of Biocultural Rights Jurisprudence**

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### **ABSTRACT**

The international framework for the protection of biocultural rights started post-World War II. The struggle for the protection of bio-cultural rights started against the colonial/imperial power in order to protect the land, territories and natural resources. The ‘salt water doctrine’ or the ‘blue water thesis’ were the major challenges for homogenous and indigenous peoples for claiming their traditional territories from the newly emerged States in the process of decolonisation. The rise and development of the international customary law is a significant development in the growth and protection of the biocultural rights of indigenous, tribal and local communities. The principles of natural justice voluntarily accepted in the trade intercourse between the nation states and the international customary law being considered as the part of the domestic law by the rule of law-based countries played an important role in the recognition and protection of the biocultural rights of the indigenous and tribal communities.

**Keywords:** Biocultural Rights Jurisprudence, Indigenous Peoples & Communities, Right to Self-determination, Right to development and legislative & Institutional Framework

### **1. INTRODUCTION**

The rise and development of the international customary law is a significant development in the growth and protection of the biocultural rights of indigenous, tribal and local communities. The principles of natural justice voluntarily accepted in the trade intercourse between the nation states and the international customary law being considered as the part of the domestic law by the rule of law-based countries played an important role in the recognition and protection of the biocultural rights of the indigenous and tribal communities. The International Law or the national legal framework ignored the indigenous communities in order to take advantage or benefits arising out from the biodiversity in the early years of the institutionalism. The first international document is the International Labour Organisation the Indigenous and Tribal Population Convention (No. 107) in the year of the 1957 that took a serious note of the issue and seriously attempted for protecting the rights of the indigenous people across the globe. It provided the jurisprudential space to protect the rights of the indigenous people through the legal and extra-legal methods. This convention is dedicated to improve the living conditions of the indigenous people across the globe. The convention enlarged its scope in the year of 1989 as it was renamed and revised as the Indigenous and Tribal People Convention (No. 169). The convention recognised the right to self-determination of the indigenous people within the national framework in which the tribal people are residents, citizens or nationals. The convention guides the national legal systems for setting the minimum standards for delivering the social, political and cultural rights to the indigenous peoples and policy framework for the same. Article 7 of the convention reminds and guides governments to maintain the historical status through the legal framework concerning indigenous communities. Article 44 of the convention carries the provisions that national legal and policy framework must respect the hopes and aspiration of the indigenous people to hold their traditional territories, forests land and their social, political and economic way of life.

The biocultural jurisprudence strengthens the struggle of the indigenous peoples by developing the discourse on the collective rights of such communities. It develops conceptual and theoretical framework for the promotion of the collective rights along with the bio-cultural rights of the indigenous people. The social, political and economic struggle of the indigenous, other distinct and local communities was brought from local to global level. Their ancestral inheritance and traditional system strengthened by the collective efforts of the civil societies, resulted into the UN Declaration on the Rights of the Indigenous People, 2007 (UNDRIP). The UN Declaration of 2007 is a landmark achievement in the struggle of the indigenous, tribal, distinct and local communities. Jurisprudentially, the UNDRIP paves the way for a nation state to start recognising the local, distinct and indigenous people and provide them with right to land, right to forests, territory and natural resources. The most important feature of the UNDRIP is the introduction of the free, prior and informed consent (FPIC). The roots of the FPIC go back to the Indigenous and Tribal People Convention, 1989 where for the first time such idea and concept were discussed and developed. FPIC is the safeguard for the indigenous peoples as it protects their right to be consulted and right to participate or right to

enter into an agreement. It is the key mechanism to exercise their right to self-determination helping them to freely determine their social, political and economic status to pursue their future endeavours in the light of the traditional knowledge. The principle of self-identification is important contribution made by UNDRIP in the struggle for the protection of the rights of the indigenous. The Nagoya Protocol, 2010 carries the provision to access the traditional knowledge of the indigenous, local and distinct communities and strengthen them in exercising their traditional knowledge, practices, innovations and beliefs. The protocol strongly recognised the inseparable relationship between the traditional knowledge and genetic resources. It also recognised the circumstantial diversity owned by the indigenous, distinct and local communities associated with genetic resources and established the right of the indigenous communities as holders of the genetic resources. It affirmed the rights recognised by the UNDRIP. Article 5(2) directed each party to frame policy, along with administrative and legislative measures for proper utilisation and to get benefits arising out from the genetic resources. The party shall respect the fair and equitable principle while legislating on the rights of the indigenous communities over genetic resources. Article 6(f) states that the prior consent of the indigenous community is to be taken for accessing and to get benefits arising out of the genetic resources subject to the domestic legislative framework. Article 7 further mandatorily provides for the participating party to take suitable measures to obtain prior and informed consent for interfering in the genetic resources and also it has to mutually agree with them to use traditional knowledge. Article 11 carries the provision of the transboundary cooperation if the genetic resources found *in situ* are territories of different parties. Section 11(2) states that where the indigenous communities reside in more than one nation, the parties shall cooperate in implementing the protocol. Therefore, the Nagoya Protocol enlarged the scope of the biocultural jurisprudence. The distinct, local and indigenous groups or communities claim their historical share in the national and natural resources. They are struggling for having access to their land territories, forest lands and forest areas that they inherited from their ancestors. The United Nations Declaration on the Right to Development, 1986 is a new jurisprudential development in the struggle for the protection of the rights of the indigenous peoples. The UN Declaration of 1986 has practical implications related to the exercise of the rights conferred by United Nations Declaration on the Rights of the Indigenous Peoples, 2007. The right to development is centric to the human right approach while it is also inculcated in the biocultural right of the indigenous peoples. The UN Declaration on Right to Development and on the Rights of the Indigenous Peoples considered indigenous peoples as an antecedent of the development in the struggle for such rights. These UN Declarations enlarged and enhanced the jurisprudentially scope of the struggle for the protection of the rights of the indigenous and local peoples. The right to development ensures that the indigenous peoples and local communities have right to equitable distribution in the national and world natural and economic resources.<sup>1</sup>

The indigenous and traditional justice system is considered as better than the judicial administration of the modern and colonised world developed in the last two centuries. The modern jurisprudence is silent on the contributions of the indigenous and tribal justice system; it ignored or failed to recognise the principles evolved through the centuries in such justice systems. The modern jurisprudential approaches are not sufficient to deliver justice to the indigenous and tribal communities. Therefore, the biocultural rights jurisprudence is not able to deliver justice in the indigenous and tribal communities without applying the principles of the indigenous and tribal justice systems.<sup>2</sup>

The Aboriginal, indigenous and tribal culture and the historical significance of their occupational practices are continuously ignored in the domestic legislative framework in granting the social, economic and cultural rights to such communities. The history and culture of the indigenous and tribal peoples are continuously misunderstood and neglected in context of the biocultural jurisprudence.<sup>3</sup> The international human rights discourse is very slow to recognise the collective rights of the indigenous peoples while it is an accepted fact that the collective rights are the basis of the land, forests and resources. The right to self-determination is also a collective right of the indigenous peoples while international human rights recognise it, majority of the States do not. The difference between the indigenous rights and human rights is that indigenous people historically did not experience the discriminating practices in their societies. Therefore, the international movement of the indigenous peoples stressed on recognition of the right to self-determination and collective rights in the framework of the international human rights. The international norms and the international human rights regime favours the claims of the indigenous peoples for the right to self-determination and as collective right.<sup>4</sup>

The international framework for the protection of the biocultural rights started post-world war II. The struggle for the protection of bio-cultural rights started against the colonial/imperial powers in order to protect the land, territories and natural resources. The emergence and rise of the international law, growing influence of the positivism in the 19<sup>th</sup> century in the favour of the States to acquire territories and people, international human rights framework, international instruments for the protection of the biocultural rights of the indigenous communities and the international institutionalism are some of the most important events and movements in the growth and development of the biocultural rights. The process of decolonising; denied the statehood and independent cultural identity to indigenous people and tribal communities; was another cause for the rise of the biocultural rights after the State acquired territories and established sovereignty over the indigenous peoples and traditional territories. The early developments in the international law denied the rights to the indigenous peoples and supported the establishments of the territorial sovereignty over the lands, indigenous and tribal peoples. The major change in the international law began during and after the decolonisation and decline of imperialism across the globe. The UN Charter, the UN Declaration of Human Rights, 1948, the International Covenant on Civil and Political Rights, 1966, the International

Covenant on Economic, Social and Cultural Rights, 1966, the UN Declaration on the Right to Development, 1986, Report of the World Commission on Environment and Development: Our Common Future, 1987, the International Labour Organisation Declaration on the Indigenous and Tribal Peoples Convention, 1989, the UN Declaration the International Decade of the World's Indigenous Peoples, (1994-2005) and finally the United Nations Declaration on the Rights of the Indigenous Peoples, 2007 are the most important declarations for the protection of biocultural rights of the indigenous peoples.<sup>5</sup> The regional developments along with national legal and policy developments play a very significant role in the protection of the biocultural rights of the indigenous peoples. The Aboriginal Protection Act, 1869, the Aborigines Protection Act, 1909 were some of the earlier national legislations that empowered the indigenous and local peoples. The Indigenous Peoples' Rights Act, 1997 passed by the Congress of Philippines and Protection, Promotion, Development and Management of Indigenous Knowledge Act, 2019 are considered as significant developments in the Biocultural jurisprudence. The studies of independent working groups, treaties and agreements promote the biocultural rights at international levels.<sup>6</sup> The Convention on Biological Diversity, 1992, The Nagoya Protocol, 2010 are part of important UN framework for the member nations in order to protect and promote fair and efficient use of the biological diversity for the humankind. The Indigenous Peoples Economic and Trade Cooperation Arrangement (IPETCA), 2021 strengthens the economic and commercial interests of the indigenous and tribal communities.<sup>7</sup>

## **2. INTERNATIONAL LAW, INTERNATIONAL FRAMEWORKS AND BIOCULTURAL RIGHTS**

The rise and development of the international customary law is a significant development in the growth and protection of the biocultural rights of indigenous, tribal and local communities. The principles of natural justice voluntarily accepted in the trade intercourse between the nation states and the international customary law being considered as the part of the domestic law by the rule of law-based countries played an important role in the recognition and protection of the biocultural rights of the indigenous and tribal communities.<sup>8</sup> The continuous struggle of the indigenous people against the suppression and subjugation by the imperial and colonial coercion, annexations of the land, traditional territories and resources formed the foundation for the biocultural rights movements. The customary international law, international human rights instruments and the United Nations biocultural rights systems and studies play an important role in the development of the biocultural rights of the indigenous peoples. The international global capital flow into the traditional territories, commercialising natural resources and biocultural diversity for the profit motives, were opposed by these communities. The modernisation of the indigenous peoples on the basis of the scientific and economic development, was attempted, supported by an argument given by the international finance capital but opposed by the local communities by arguing that their resources and cultural identity must be respected.<sup>9</sup>

## **3. THE ROLE OF UNITED NATIONS IN THE RECOGNITION, PROTECTION AND PROMOTION OF THE BIOCULTURAL RIGHTS OF INDIGENOUS PEOPLES**

The United Nations plays a significant role in recognising the biocultural rights of the indigenous, tribal, distinct and other local communities. The United Nations framework on the recognition, protection and promotion of biocultural rights of such communities guides the national legislative and policy framework for the same. The institutional mechanism that the UN has been developing since the declaration of the human rights and the human rights system established for delivering, protecting and promoting the human rights contributed a lot in the development of the biocultural rights.<sup>10</sup> The UN and its agencies are doing commendable work on the protection and promotion of the biocultural rights. The UN human rights system recognised the biocultural rights of the indigenous people as collective as well as individual rights. Historically, the biocultural rights are the collective rights as the tribal communities didn't recognise the individual rights of the member of such communities. The UN human rights system empowered and recognised the individual rights of the members of such communities. The development of the UN human rights system particularly the civil rights movements, the right to development and right to self-determination strengthened the struggle for the biocultural rights of the tribal, local, Aboriginal and indigenous peoples.<sup>11</sup>

The UN human rights systems recognised indigenous peoples as sustained economic, social and environmental communities from the times immemorial. Their resilient ecological relationships sustained the richness of the natural resources, their effective utilisation and management during the natural calamities such as fire, floods and droughts. The natural resources management system of the indigenous peoples is the best one under the care and control of the indigenous peoples. The UN human rights system further recognised the sustainable approaches to the management of the biological diversity, of the renewable and unrennewable resources.<sup>12</sup> The indigenous traditional knowledge system is also highlighted by the UN human rights system as lessons can be taken from such traditional knowledge systems for managing and conserving the biological diversity. The UN human rights and international institutionalism accepted that the indigenous people are against the penetration of the international capital inflows and commercialising their resources.<sup>13</sup> The UN-WIPO also accepted that the issue of traditional knowledge is inextricably linked with concept of the traditional territories, sovereignty and cultural continuity and cultural survival. Such linkage of the indigenous communities with their traditional territories is disturbed by the international capital inflows in the form of investments.<sup>14</sup>

### 3.1 THE UN CHARTER

The UN Charter recognised the principle of self-determination in Article 1(2) which all nations follow and respect. The UN Charter is the first international instrument that stresses on the promotion of the human rights, individual freedoms and embody the rights of individuals indirectly in the international law generally. It guides the States in their discretion in the domestic affairs related to the human rights. As a result, the contemporary international human rights instruments successfully started the discourse that valued human rights over the collective interests of the State. The UN Charter maintains the principles of territorial integrity and sovereignty among the member nations and in their domestic affairs while practicing non-intervention in internal matters. The UN Charter ensures participation of the non-state and non- governments entities in the deliberative processes in their individual capacity.<sup>15</sup>

The UN Charter discredit colonialism and imperial power acquiring new territories and peoples and making them their subjects. The decolonialism regime has been implemented by the UN Charter requiring the self-governing governments to administer independent territories and peoples, as a result the indigenous, local and tribal communities strengthened their position in the struggle for the protection of the biocultural rights. It further promoted principles of social justice generally and racial justice particularly and started anti-racist and anti-colonial discourse and consciousness among the indigenous peoples for the protection of the biocultural rights. The local and indigenous communities are taking advantages of the de-colonisation and anti-imperialism, internationalising their struggle for the protection of the biocultural rights. The newly emerged States in establishing their governments largely bypassed the traditional territories, indigenous peoples, their traditional patterns and their traditional government structures. The Belgian thesis was defeated in the UN badly as all the countries argued that the homogenous peoples or population should be considered minorities within the States. The Belgian thesis stated that the right to self-determination should be applied universally by arguing that the most of the States are governing the territories that historically, traditionally and legally don't belong to them, such territories are the well-defined boundaries and limits, inhabited by indigenous, locals and homogenous peoples since the centuries. Such homogenous peoples are struggling to maintain their traditional and cultural identities and its continuity.<sup>16</sup>

The 'salt water doctrine' or the 'blue water thesis' were the major challenges for homogenous and indigenous peoples for claiming their traditional territories from the newly emerged States in the process of decolonisation. These developments were not in the favour of the indigenous peoples as a resulted such indigenous communities ceded their right to territories and their traditional territories to the newly emerged States. The UN Charter in such international political environment helped the indigenous, local and homogenous in strengthening their struggle for the protection of the biocultural rights.<sup>17</sup>

Article 62(1) of the UN Charter carries the provision to conduct or to initiate studies and prepare reports on the international matters related to the health, education, economic, cultural and social aspects and make recommendations on such matters. The interests of the indigenous peoples or communities can be protected and promoted by the UN Economic and Social Council. Article 62(2) further stated that the Economic and Social Council may make recommendations for the purpose of protecting and promoting the fundamental freedoms, human rights and promoting respect for the same. It may promote economic and social interests arising out from the fundamental rights in all the aspects of life that depend upon the social and economic necessities under Article 68. The UN Charter is the first document that laid foundation for the fundamental freedoms for the indigenous, local and tribal peoples in claiming their traditional identities, traditional territories and to preserve and protect their traditional knowledge systems, their traditional governance structures and cultural integrity.<sup>18</sup> The rights embedded in Charter are based on the universal nature of the human rights and are sufficient to establish the communities or group rights to protect indigenous peoples requiring no special rights for the same. The UN Charter is considered as the foundational stone for the protection of the biocultural rights in the form of right to self-determination.

### 3.2 THE UN DECLARATION OF HUMAN RIGHTS, 1948

The Preamble of the Universal Declaration of Human Rights (UDHR) recognised inalienable rights, individual's inherent dignity, freedom and peace as the foundational values for the human development. The biocultural rights of the indigenous peoples arising out from the such attributes of human life and development are considered and delivered by the Universal Declaration of Human Rights. It affirms that fundamental human rights carry the values that are determined to promote gender justice, racial justice and which lead to social progress and human development. Article 2 of Universal Declaration of Human Rights ensures that right to language, right to property are the inherent rights of the individuals. The biocultural rights of the indigenous peoples arising out from Article 2 states that there shall be no distinction made among the individuals on the basis of the territorial belongingness or as result of the limitation of sovereignty. Article 17 further stresses on the right to own property. By the application of this Article the indigenous peoples are empowered to claim their traditional territories and natural resources. Article 18 talks about the right to belief and right to religion, worship and observance. It provides for the right to hold traditional knowledge systems, traditional belief systems, worship of their God and the traditional teaching practices. The indigenous peoples are fully protected under the human rights approach to the biocultural rights of carrying and

practicing their traditional knowledge systems, their belief systems and all traditional practices. Article 20 recognises the traditional societies or communities; their right to associate and assembly peacefully. Article 21(2) highlights that the will of the people is the basis of the establishment of the government in the country. Therefore, the will and role of the indigenous peoples are very important in the formation of the government. The legitimate authority arises from the will of the people. The indigenous peoples claim to establish their territorial integrity on the basis of the will of the peoples. Article 22 declares that the cultural rights are indispensable for the dignity of the individuals, their personality and personal development. Every member of the society is entitled to carry his or her economic and cultural rights and heritage. The indigenous peoples are empowered to carry their traditional economic rights and cultural continuity as per the human rights granted under Article 22. Article 23 talks about the right to work and the right to choice of employment, the indigenous peoples are entitled under the human right approach to continue their traditional activities and innovations. Article 26(2) directs that the education should promote both, the respect for the human rights and the human rights while 26(2) is a human right available for the parents to give education to their children of their choice. Therefore, the indigenous peoples are free by this Article to educate their children in their traditional ways and their belief, values and moral systems. Article 27(1) lays the core idea that the indigenous peoples follow i.e. the cultural integrity and participation in the cultural life should be free from outside interference. Article 27(2) further provides that individuals can protect their material and moral interest, their artistic or literary works, as a result the indigenous peoples can claim to protect their cultural and traditional rights. Article 29(1) carries that individual should be free in order to develop their personality in the culture of their communities.

The human rights-based approach simply means that while managing and protecting the biocultural diversity and environment, the policies, legislative framework and the affirmative action of the States shall not violate either in the formulation or in the implementation of human rights of individuals or communities rather it should respect cultural, social and economic rights arising from the human rights. The State must provide a mechanism in which the individuals and the right holders and possessors can participate. The human rights approach further, in practice, should be sustainable in the manner to conserve, manage, protect and promote the biocultural rights resulting into arrest of biodiversity loss and degradation in the environmental quality. The human rights approach must be equitable and should be in a sustained manner to promote the quality of human life while restoring, conserving and managing the natural resources. The human rights framework ensures the current enabling conditions that follow throughout the policy and legal framework along with the monitoring of such legal and policy frameworks.<sup>19</sup>

The human rights-based approach to biocultural rights of the indigenous peoples, in addition to the legal and policy framework, should be morally and ethically respected, leading to effective, equitable and efficient safeguarding of environment and management of biodiversity.<sup>20</sup> The rights of the indigenous, local, tribal and rural peoples should be successfully conserved and protected under the international human rights framework. The conserving and protecting strategies must follow, respect and promote the customary rights of the indigenous peoples by employing the traditional knowledge and innovation of the rural, tribal and indigenous peoples.<sup>21</sup> The human rights-based approach to the protection of the biocultural rights of the traditional communities and indigenous communities are strengthening their struggle for the protection of bio cultural rights under the UN human rights monitoring frameworks. The international human rights instruments are largely recognising the biocultural rights of the indigenous peoples in the form of social, economic and cultural rights arising from the UN Declaration of Human Rights.<sup>22</sup>

The core framework of human rights approach to the biocultural rights, is to seek the transformation of indigenous communities on their cultural and traditional lines without disturbing their social, political, economic and cultural framework. The relationships of the indigenous people with their land, territories and resources must be respected by the national legal and policy frameworks in delivering, promoting and protecting the human rights. It must ensure that the national legal and policy framework and the affirmative action of the States should pay due considerations to the contribution, efforts and traditional practices in protecting, preserving and sustaining their environment generally and management of the biocultural diversity particularly.<sup>23</sup>

The human rights based on the utilitarian principles protect both the communities and the individuals in utilising the communities' resources. Further, it is for the States to follow the United Nations framework in implementing human rights in accordance to the 'guiding principles' of the UN. The human rights-based approach is needed for gender justice, gender sensitive approaches, equal and effective participation of youth in the decision-making and at implementation levels. The utilitarian based human rights approach focuses on protecting, promoting and recognising all such rights that arise out from the international human rights instruments and UN human rights systems.<sup>24</sup>

### **3.3 THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 1966**

The International Covenant on Civil and Political Rights (ICCPR) 1966 recognises that the rights of all people are derived from inherent dignity. Further Article 1(1) of the Covenant recognises the right to self-determination. The indigenous peoples by exercising such right can enjoy their economic, social and cultural rights. The rights to self-determination is the most important right in the UN human rights frameworks in order to protect the biocultural rights

of the indigenous peoples. Further Article 1(2) states that all the people are free to dispose of their natural resources and wealth subjected to the national legal framework, the international law and the principles of the fair sharing of mutual benefits and in welfare of the human kind. Paradoxically, the International Covenant on Civil and Economic Rights neither establishes the property rights nor rights over land but Article 1 makes explicit references to the indigeness and is interpreted as the main tool for protection of the international human rights generally and biocultural rights particularly. The Indigenous people directly are not mentioned in the Covenant but Article 27 constitutes the cultural minorities. The Human Rights Committee stated that the indigenous communities and groups identify themselves as distinct cultural communities or these groups fall under the category mentioned in the Article 27(1). Hence, the International Covenant on the Civil and Political Rights doesn't recognise the position of the indigenous peoples as a distinct category. Only after the working of the Human Rights Committee, it was asserted that the other communities distinct from the dominant section if subject to the subjugation or in situation of the dispossession or minority cultural groups, are entitled under Article 27 to protect themselves culturally, linguistically or ethnically. The Covenant further states that if a minority group politically, linguistically, ethnically or identify themselves as distinct from the dominant group or the majority community they are recognised as 'peoples' under the international law and are entitled under Article 27 and can also exercise the right to self-determination.<sup>25</sup>

The most striking feature of the International Covenant on Civil and Political Rights that distinguishes it from the Universal Declaration of Human Rights is that the latter does not recognise the minorities in the international law while the former recognised minorities on cultural, linguistic, ethical and religious basis. Therefore, Article 27 imposes a negative obligation on the part of the State to not to deny cultural rights to any of the members of the minority or more specifically the indigenous community. Article 27 is available for the members of the communities while the substance of the community, indigenous or minority rights entails as the 'collective right'. Therefore, biocultural rights of the indigenous peoples and the rights of the other such as the cultural, linguistic or ethnic minorities guaranteed under Article 27 are considered as legitimate differentia on the basis of the objective and reasonable criteria. Article 27 of the Covenant includes different manifestation of the cultures as it explains that the indigenous peoples are distinct by following a different way of life. The specific traditional way is sufficient to consider a particularly community as distinct in order to pursue their traditional activities as their occupations such as fishing, hunting etc. The right of the individual, if he or she considers himself or herself as member of any such community, as interpreted by the judiciary, such right of the individual depends upon the community if the question of identity arises. If an individual is identified as the member of the community, then the community can't deny the individual rights of such member as it comes out from the international human rights system. On the gender justice aspect, the Covenant found the violation of rights of women if she married outside the community leading to her permanent expulsion from the community of the birth and her rights would perish.<sup>26</sup>

### **3.4 THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 1966**

The text of Article 1(1) of the International Covenant on Economic, Social and Political Rights, 1966 accepted and recognised the right to self-determination of the minority communities in decolonised countries against the discrimination faced by the minorities and indigenous peoples during the colonial rule and coercive accession of territories and people. The said Article provides the right of self-determination that all people politically, socially, economically and culturally can determine their status and development thereof. Clause (2) provisioned that all people have right to subsistence according to their traditional occupational practices, freedom to dispose natural resources and wealth according to their community protocols, follow obligations imposed by the international law and other international documents in order to attain mutual economic cooperation and principle of mutual benefits. Clause (3) guides the States to carry responsibilities to promote the interests of the minorities and indigenous peoples and non-State actors in administering the trust territories; and to respect and realise their right to self-determination.<sup>27</sup>

The Preamble of the International Covenant on Economic, Social and Political Rights, 1966 recognises the social and cultural rights of the peoples. The indigenous peoples fall within the preambular scope for the purpose of their biocultural rights. The preambular ideas of social, cultural and economic recognition strengthens the indigenous peoples as political groups in their struggle for the protection of the civil and biocultural rights.<sup>28</sup>

The anti-colonialist thesis of the UN further promotes the right to self-determination in order to strengthen the struggle for the protection of the bio-cultural rights of the indigenous peoples. The UN Charter stated that the colonialism is against the basic spirit and foundational principles of the UN Charter and a violation of international law. It further states that colonised people have inherent and customary rights in international law to struggle against the colonial powers to attain their freedom and territories. The States should provide material and moral assistance to the local, tribal and indigenous people to attain and maintain their independence and freedom.<sup>29</sup> The scope of the biocultural rights is enlarged by exercising the right to self-determination. Initially the right to self-determination was available for countries for establishing themselves as nation under the 'principle of nationalities'. After the right to self-determination got incorporated in the UN Charter, international law and human rights instruments made it available for people to reattain the traditional territories on the basis of the cultural identities and historical ties with their land and resources. The principle of nationalities strengthens the right to self-determination for the indigenous peoples and

their struggle for the protection of biocultural rights as the UN Charter shifts the right to self-determination from nations to the peoples. Therefore, the right to self-determination is considered as a fundamental right for people available as a community or a group constituted on the basis of their social, ethnic, linguistic or cultural distinctiveness.<sup>30</sup>

The Preamble of the Indigenous and Tribal Peoples Convention of the International Labour Organisation calls upon the international human rights instruments consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights to prevent exclusion and prohibit discrimination of indigenous and tribal peoples. It further considered the developments in the international law related to the situations of the indigenous and tribal peoples to analyse the status of the human rights of such people and assimilation of new standards in the international law and human rights instruments. It further noted that the indigenous and tribal peoples are not able to exercise their fundamental human rights in the same degree as the majority communities or as the rest of the non-indigenous population.<sup>31</sup>

### **3.5 THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, 2007**

The United Nations Declaration on the Rights of the Indigenous Peoples, 2007 is the most comprehensive international instrument. It is a result of the struggle by the indigenous, locals, tribals, Aboriginals and other distinct cultural groups during and after the colonisation to protect their social, cultural, economic and occupational rights, collectively which can be called biocultural rights. The UN Declaration shows that there is an urgent need to protect the biocultural rights of the indigenous peoples. The Declaration recommends the pragmatic approach to protect, promote the rights of the indigenous peoples by strengthening their traditional knowledge, traditional practices and the transmission thereof. The Declaration doesn't create any additional or new right for the indigenous peoples but it elaborates the various existing human rights instruments and treaties in order to protect the biocultural right of the indigenous peoples. The protection of the indigenous, tribal and local peoples lies in the protection of their cultural, economic and social rights collectively as the biocultural rights. The traditional knowledge system of the indigenous peoples is the basis for their occupational patterns and cultural rights. The practices they are following since centuries protect their culture and occupations. The traditional knowledge system passes from generation to generation in oral forms and is expressed in the songs, stories, cultural values and day to day activities. The Declaration protects, and promotes such interests of the indigenous communities in order to protect their biocultural rights. The land and forests use patterns are sustainable as they manage the environment and development. The traditional and occupational practices along with the traditional knowledge system are the core of the indigenous and tribal identities. Therefore, the protection of the traditional knowledge system and the occupational practices is the matter of survival and foundation for the biocultural rights of the indigenous peoples.<sup>32</sup>

The Preamble of the Declaration observes and recognises that there is an urgent need to protect the biocultural rights of the indigenous peoples by protection and promoting their social, cultural, economic and occupational rights. It further states that the indigenous peoples are free, independent and can exercise the right to development and right to self-determination in order to determine their political, cultural, social and economic status. The indigenous people are free from any discrimination based on the cultural, social, economic aspects or historical injustice that creates any disability for such communities or members of the communities.<sup>33</sup>

The most striking features of the Declaration is the right to self-determination for the indigenous peoples. The Preamble of the declaration affirms the right to self-determination by acknowledging International Covenant on Civil and Political Rights, 1966, the International Convention on Economic, Social and Cultural Rights, Vienna Convention and Programme of Action, that all people have the right to self-determination in order to determine and decide their political and economic status to pursue their social, economic and cultural development. It further states that the indigenous peoples exercise their right to self-determination in conformity with the international law.<sup>34</sup>

## **4. CONCLUSION**

The indigenous community's movement resulted into a successful developmental milestone in the history of the modern world in the form of a comprehensive, conclusive and codification of the UN Declaration on Rights of Indigenous Peoples, 2007. The Indigenous communities now can contest with the modern commercial and competitive world as the UN Declaration of 2007 guaranteed them to use their traditional knowledge and education for their personal and commercial benefits. The indigenous communities are rich in their traditional wisdom, traditional knowledge, traditional practices recognizing, protecting and promoting the same further resulted into the indigenous or tribal governance. The UN Declaration on the Rights of the Indigenous Peoples paved the way for enhancing the demarcated principles such as right to self-governance and promoting the principles embodied in the United Nations Charter such as the right to self-determination.

The UN Declaration on the Rights of the Indigenous Peoples, 2007 recognises the bio-cultural rights of the indigenous peoples and provides roadmap and guiding principles for the member nations in their legislative and policy framework



on all the aspects and various dimensions arising out from the biocultural rights of the Tribal, Aboriginals and, distinct and local cultural communities. The traditional knowledge, traditional education and traditional wisdom are the most important aspects of the biocultural rights to be protected and promoted.

The right to self-determination is the product of the international tribal and indigenous struggle and movement over a long period of time especially in the decolonised societies. The biocultural rights are based upon the fundamental principles of Universal Declaration of Human Rights, particular circumstances to particular communities, natural law and the principles carried by the UN Charter. The right to self-determination is basically fair and evenly distribution of the sovereign power and rights among the different sections of a particular political society and the rights of the tribal and indigenous communities arising from the international law generally and international customary law particularly. The international law gave space to the international indigenous global political movement that established a legal and political order for the international indigenous political through the instruments and principles embodied in the UN Charter e.g. the right to self-determination. The indigenous peoples should be treated as the vulnerable organic communities that have a special kind of relationship with their traditional and ancestral land, traditional knowledge system, traditional values system, traditional practices and occupational patterns. Therefore, the national legislative enactments and policy measures should respect all such aspects while designing such legislative and policy measures. The research work links and contributes in the rise of the tribal governance and biocultural jurisprudence by promoting and advocating the protection and promotion of traditional knowledge, traditional wisdom and traditional culture in the matters related to the political and economic affairs of the indigenous communities.

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