

## Indigenous People, their Human Right to Health and its Violation: An Analysis

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Indigenous people who have been victims of historic subjugation have, since the end of the settler rule, preferred to live in isolation and developed their own unique ways of life. Whatever level of interactions that they have had with the more dominant, non-indigenous counterparts has rendered the indigenous more vulnerable. The indigenous people inherently carry low levels of immunity and their poor health levels stand further aggravated due to a systematic violation of their human right to health. Increasing levels of inequalities, lack of availability of medical facilities, low levels of awareness due to social isolation and incessant grabbing of their traditionally held lands and natural resources have serious repercussions not only on their physical but mental health as well. All these challenges hinder the effective access to and realization of their human right to health. While the human right to health of the indigenous has been internationally recognized, there are numerous associated challenges.

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## I. Introduction

Indigenous communities, the world over, are one of the most marginalized groups in society, often left neglected and victimized at the hands of their non-indigenous counterparts. The latter, on account of their large numbers, enjoy a more dominant position consequently rendering the numerically weaker indigenous people more vulnerable. Each indigenous community, inhabiting the world, has its own distinct set of culture, custom, language, dressing, religious practices and traditional beliefs which they seek to safeguard. Land, territories and natural resources originally owned and utilized by indigenous communities hold an indispensable significance, including emotional significance, in their lives. In fact, 'land rights' play the most crucial part in preserving their distinct identities. They, however, are often left dispossessed of their lands due to industrial projects initiated by modern man in his quest for achieving development.<sup>1</sup> Adding to their plight is the choice they often have to make in the battle between conservation of their traditional practices and protecting their lands on the one hand and opening up to development and modernization on the other. The scepticism and apprehension they display towards the modern man's practices is deeply rooted in the years of subjugation they have lived in and their determination for preserving their historically unique identity besides ensuring the passing on from one generation to another their ancient traditional customs and practices. Any threat to

these is indeed a threat to the existence of the very indigenous way of their life.

International law, including international human rights law, faces a peculiar challenge while dealing with the human rights of indigenous people, primarily on account of the absence of a uniform, universal definition of the term 'indigenous people' or 'indigenous communities'. This absence of a universal definition leads to a multitude of working definitions and conceptions that are placed by various scholars and authorities from time to time. Often, 'indigenous people' are considered and treated at par with minorities on account of their miniscule numbers.<sup>2</sup> Quite often than not multiple terminologies are used while referring to them, including phrases such as 'adivasis', 'hunter-gatherers', 'aboriginals' or 'tribals'. The alongside frequent use of multifaceted and wide array of descriptive terms for such communities, besides the lack of a uniform definition, cripples their status.

All across the globe, different cultural and social groups often identify themselves as indigenous in the context of certain common features and characteristics they possess which distinctly separates them from the more dominant section of the society. However, within the four corners of international law, indigenous people have now come to be identified as a set of humans who, over generations, were subjugated to years of colonialism and foreign occupation.<sup>3</sup> While dealing with indigenous people and their right to health, it becomes important to understand in the first place

as to who 'indigenous people' are, what international recognition has been afforded to their right to health and where the two stand *viz-à-viz* each other.

### Indigenous People

'Indigenous people', simply put, are those people who originally inhabited geographical territories or countries, at such time when people from diverse cultural and/or ethnical backgrounds began to arrive on these lands.

Outnumbering the indigenous people, the new arriving population eventually became dominant and spread over the land that was originally inhabited by the former. This gradual establishment over their lands happened either by way of subjugation, colonization, occupation, settlement or such other means.<sup>4</sup> The Ainu of Japan, the Bushmen of Botswana, the Yanomami of Brazil, the Maori of New Zealand, the Tribal or Adivasis of India such as the Jarawa, may differ from each other with respect to their customs and traditions but they form a part of the group now known as 'indigenous people' – this on account of their historical occupation and subjugation at the hands of the settler population.

The prime reason for the absence of a uniform definition of the term 'indigenous people' is the fact that various communities amongst this population, practice and exhibit distinct customs, traditions and qualities which makes it challenging to bring all of these communities under an overarching umbrella term. However, a remedy to this challenge is identifying indigenous people on the basis of certain key parameters, such as the following:

- People who identify and consider themselves as being distinct and different from the majority;

- People who have strong emotional affection as well as affection towards their territories, land, environment, minerals and other natural resources;
- People who have developed their very own unique political, economic and social systems and institutions and a way of ensuring their functioning; and,
- People who seek to preserve and safeguard their distinct language, cultures, traditions and religions from extinction or any form of threat.<sup>5</sup>

Thus, although the Yanomami or the Maori may have practices and customs which are fundamentally different from those exhibited by the Jarawa or the Onge in India, nevertheless their common history of colonial subjugation, affection for their lands and territories and their unique mechanism for dealing with political, social and economic ways of life have been used as key indicators to identify them as indigenous.

In the absence of a universal definition, the Conventions adopted by the International Labour Organization [hereinafter 'ILO'] become particularly important in understanding who the indigenous people are. The ILO has been largely working in the field of indigenous and tribal communities since the early 1920s and has made considerable contribution in laying down initiatives that recognize their rights. The Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1991 (ILO Convention No. 169) adopts a very practical approach towards this question and provides answers by adopting certain objective and subjective criteria. Self-identification is heavily emphasized upon in ILO Convention No. 169 and emphasis is placed upon those who are descendants of people who originally inhabited a particular territory, before it fell to colonial rule.

Despite being vanquished to foreign control, indigenous people managed to retain their traditions and institutions as well.

However, in the period before the ILO Convention No. 169 came into being, the United Nations Organization [hereinafter 'UNO'] had already started playing an important role in the field of the rights of indigenous people. One of its major achievements can be said to be the working definition of the term that was put forward by José Martínez Cobo, Special Rapporteur for the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in the year 1971 [hereinafter 'Martínez Cobo Report'] as part of his study titled "Problem of Discrimination against Indigenous Populations"<sup>6</sup> which was presented before the United Nations Economic and Social Council. This definition runs as follows:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form, at present, non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

This definition has been widely received as coming true of the legal definition of the term 'indigenous people'. Another important achievement of the UNO in the field was the adoption of the historic document in 2007 known as the United Nations Declaration on the Rights of Indigenous Peoples [hereinafter 'UNDRIP']<sup>7</sup>, which recognized that these people have 'the right to have rights'.<sup>8</sup> Nearly all groups of indigenous populations face a common set of problems that primarily stem from years of oppression that they have faced at the

hands of their colonizers. The UNDRIP was a long struggle undertaken by representatives of different indigenous communities, seeking to ensure that the most inherent rights of these people are not compromised by the majoritarian population and the state governments concerned. In a sense, it indeed is a historic document since for the first time it recognized the non-negotiable rights and called upon respect for these communities and the people. Nevertheless, the UNDRIP does not provide a definition of 'indigenous people'.

### Health

The term 'health' means the degree or the extent of any person's physical, mental, social and emotional ability to cope with his or her environment. While speaking from a medical perspective, health is the sum total of the functional efficiency of any living organism. Many define health negatively to mean the absence of any disorder or disease whilst others look at the concept of health as simply referring to the physical well-being i.e. indicating the absence of diseases. Mental and spiritual well-being have also evolved as important components of health. The well-being of an individual and health are deeply personal matters. Historically, health was considered to be a privately held affair. It was only with the establishment of the World Health Organization [hereinafter 'WHO'] that global consensus on health began accumulating and eventually the right to health came to be internationally recognized. An acceptable definition of health can be traced to the Constitution of the WHO, 1948 that defines health as 'a state of complete physical, mental and social well being and not merely the absence of disease or infirmity.'<sup>9</sup> Additionally, the Constitution of the WHO also recognizes that:<sup>10</sup>

... the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without

distinction of race, religion, political belief, economic or social condition.

The right to health has, in fact, found explicit recognition as a 'fundamental human right' in Article 12 of the International Covenant on Economic, Social and Cultural Rights, 1966 [hereinafter 'ICESCR']<sup>11</sup> which signifies the enormity of importance that is attached to it. Additionally, several other rights depend upon this right in order to be able to be effectively realized. Health is not an independent phenomenon and must not be viewed in isolation. In fact, it needs to be looked upon and evaluated from various socio-economic variables, such as an individual's physical environment and surroundings, levels of immunity and susceptibility to sickness, his or her behavior and genetics.

What emerges as a huge area of concern and requires attention is the health related challenges faced by indigenous communities. They continue to suffer from disproportionately higher rates of health problems, particularly on account of growing levels of inequalities and the widening gap between them and the dominant population, poverty, lack of awareness about their rights and the facilities that are available for their welfare. Additionally, when compared to others, indigenous people continue to face considerable economic backwardness, discrimination, inequality of opportunity and the continuance of a form of anachronistic land tenure and economic systems that prevent them from improving their marginal social status. This pushes them to conditions of economic impoverishment as compared to the rest of the population and ensures that their standards of living are low.

Given that indigenous people are categorized as vulnerable groups, efficient and effective measures for ensuring that their rights are protected ought to

exist. Right to health is particularly important as health is the basis of all aspects of life. Despite several international documents and declarations highlighting the importance of this right, these communities continue to suffer on account of poor health due to lack of access to health care facilities and are likely to die much younger as compared to the rest of the population. It is imperative to note that despite the recognition of the 'right to health' as a fundamental right, access to health care is a far-fetched dream for the indigenous communities since they predominantly live in isolation and away from modernity. Challenges may also arise with respect to assimilating and communicating with them and bringing them into the mainstream while at the same time ensuring that no harm is caused to their cultures, traditions and rich knowledge. The right to health of indigenous communities must be safeguarded against any kind of abuse and constructive steps must be taken to ensure that this right is not denied, thus, ensuring a life to them which is not bereft of dignity.

## **II. International Legal Framework for Indigenous People's Right To Health**

It was on September 13, 2007 that the UNO adopted the UNDRIP thereby bringing conclusion to the negotiations spanning over forty-five years between the indigenous communities and member states. The UNDRIP is the most comprehensive document that specifically addresses the plight of indigenous people and is significant in the sense that it recognizes the most fundamental of rights that such communities inherently possess, namely, civil, political, cultural, economic and health rights.<sup>12</sup> The knowledge that these communities possess has contributed significantly to the development of stronger respect for the preservation of environment and natural resources. Likewise, their knowledge with respect to

traditional medicines has contributed in manifold ways towards the protection of health of indigenous as well as non-indigenous populations.<sup>13</sup>

Nevertheless, prior to the adoption of the UNDRIP several attempts had been made by the ILO as well as the UNO in recognizing some of the most basic human rights (of indigenous people) which are briefly enumerated hereunder.

### **ILO Conventions 107 and 169**

As stated above, the ILO was the first organization that addressed the concerns of the indigenous and tribal people; calling for co-operation amongst contracting states to adopt necessary measures for protecting and promoting their rights. In addition to ILO Convention No. 169, ILO Convention No. 107 (which is now closed for ratification) had an important role to play in protecting their human rights. With the advent of the human rights movement, the UN was established which also continued to work in the field of promoting and protecting the rights of the indigenous people. The Martinez Cobot Report indicated the discrimination that is subjected upon the indigenous people and called upon measures, recommendations and suggestions for the improvement in their conditions. Various drafts were prepared following the study which ultimately paved way for having a universal, highly negotiated document that appropriately laid down the bare minimum standards to be followed for promoting and protecting the rights of the indigenous people.

### **ICESCR**

The ICESCR provides for everyone to have the 'right to the highest attainable standard of physical and mental health'<sup>14</sup> and carves an obligation for the contracting states to take measures to achieve the full realization of this right, including measures

for reduction of prenatal mortality rate, ensuring better quality of industrial as well as environmental hygiene and creating such conditions as are necessary to ensure medical attention and service to all in times of sickness.

### **CESCR**

Another important document to note in this regard is the General Comment No. 14 [hereinafter 'GC 14'] of the Committee on Economic, Social and Cultural Rights [hereinafter 'CESCR'] given in the year 2000. The GC 14 is frequently considered to be an authoritative interpretation of Article 12 of the ICESCR as it specifies and elucidates upon the concept of the right to health in terms of obligations of the States.

### **UNDRIP**

By far the most exhaustive legal instrument recognizing the rights of the indigenous people, the UNDRIP, gives them the right, *inter alia*, to the improvement of their economic and social conditions, including health and sanitation.

#### *Right to Traditional Medicines and Health*

UNDRIP, through its Article 24,<sup>15</sup> calls for the protection of rights of and extension of social as well as health related facilities to indigenous people as well as indigenous individuals. It has been drafted in consonance with the provisions contained in the Constitution of the WHO. At the same time, it also imposes obligations upon contracting states to take concrete steps to achieve this right. Moreover, this right is intertwined with the principles of non-discrimination and equality which is embodied in the most fundamental international human rights treaties and instruments. This article gives indigenous people the right to healthcare facilities as well as social services such

as pre-natal care, services with respect to housing and food, and so on.

#### *Right to Health of Indigenous Children*

Children as well as the youth are vulnerable and require special protection from respective states, agents of states as well as their parents and society. This special protection has been clearly carved in Article 17 of the UNDRIP. Various international instruments and documents have time and again recognized the importance of protection of the health of children and mandate states to ensure that they are not subjected to any kind of labour or work related activity that exposes them to any kind of harm or danger. Most notably, the UN Convention on the Rights of the Child affords a similar protection to all children and also reiterates the importance of the principles of non-discrimination against any children.

#### *Enhancing socio-economic conditions*

Indigenous people have been accorded the right under Article 21 of UNDRIP, to achieve improvement in respect of their economic and social conditions, in a number of areas including in matters of health. Along with this, the contracting states have been called upon to undertake such appropriate measures that are required for enhancing their economic and social conditions while calling for special attention and assistance to the plight of women, children, elders as well as persons with disabilities. This brings the UNDRIP in line with other international human rights documents and conventions while protecting the human rights of these categories of people.

#### *Participation in Health Related Programmes*

Article 23 of UNDRIP mandates active participation and involvement of indigenous people in the identification, determination as well as development of the health related programmes that

affect them. It also calls for their participation with respect to the administration of these programmes through their own organizations and institutions.

#### **International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)<sup>16</sup>**

The International Convention on the Elimination of All Forms of Racial Discrimination [hereinafter 'ICERD'] imposes obligation upon the contracting states who are parties thereto to take appropriate steps to work towards the elimination and prohibition of racial discrimination of all forms.<sup>17</sup> Additionally, it also calls upon the states to ensure that the right to equality before law is guaranteed to everyone, irrespective of factors such as colour, race, religion or ethnicity. This right becomes notably important in matters pertaining to medical care, public health, social services and social security.

#### **Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)<sup>18</sup>**

Article 12 of CEDAW necessitates that the States take all measures as are necessary to eliminate all forms of discrimination that may be employed against the indigenous women with respect to healthcare in order to ensure that these women are able to derive equal access with respect to health care services. The States have also been brought under a mandate to provide appropriate services to indigenous women in situations of maternity, including facilities for the use of their traditional medicines.

#### **United Nations Convention on the Rights of the Child (UNCRC)<sup>19</sup>**

The United Nations Convention on the Rights of the Child [hereinafter 'UNCRC'] mandates the state parties to guarantee to all children such

facilities as are necessary to enjoy the highest attainable levels of health and to also have access to such facilities.

Children belonging to indigenous communities are more vulnerable to health related issues as compared to their respective non-indigenous counterparts. This is primarily on account of inaccessible health care services and facilities.

### **III. Challenges in Indigenous People's Right to Health**

As is evident, there is no dearth of legal provisions in the field of international law, particularly international human rights law, that deal with the protection and promotion of the human rights of indigenous communities. Yet, they continue to witness several crucial challenges in enjoying and exercising this right which primarily stems from the life of isolation and weak numerical community strength. As a consequence, they are often victims of social as well as economic exclusion and discrimination.<sup>20</sup> More specifically, with reference to the right to health, indigenous people often face discrimination and challenges which bars the attainment of the highest standard of physical, mental and spiritual levels of health. These communities end up suffering from various diseases and disorders that considerably reduce their life expectancy rates.

#### **Growing Levels of Inequalities between Indigenous and Non-Indigenous Populations**

Indigenous people around the globe have extremely low standards of physical and mental health compared to other communities. In fact, they have been found to have poorer health as a result of which they face enhanced vulnerability, disability, and poorer qualities of life and hence, die far earlier in comparison to those who are non-indigenous.<sup>21</sup>

Decreased livelihood on account of loss of land, and distortions to their culture, history, language and traditions can make them even more vulnerable to diseases and health related disorders. Additionally, development and industrial activities such as mining and dam projects that take away their traditionally held lands makes them even more vulnerable to health related inequities.

A constant apprehension of devastation and reluctance to welcome development, which is deeply engrained in their way of life, lead to poverty, low levels of income, discrimination and lack of access to appropriate facilities.

In fact, in the report on his visit to Malaysia, the UN Special Rapporteur had noted that the health of indigenous people is significantly worse than the health of non-indigenous population in the peninsular region of Malaysia.<sup>22</sup> A factor primarily responsible for the health related inequities and disparities amongst the indigenous and non-indigenous populations is the lack of mechanism used for the registration of births amongst the former and identification thereof.

#### **Lack of Registration of Births**

National identification documents are indispensable in so far as they make people eligible for availing and obtaining facilities offered by national governments to their people. These documents, almost at all times, require birth certificates to be given as proof to the issuing authorities in turn for an identification document. Indigenous children often do not have birth certificates that make them invisible in the society and prevent them from availing benefits that may be otherwise available. For example, in an investigation, it was reported that one out of six children born into indigenous communities in Queensland do not have birth certificates, and as a result of which, are unable to

receive education and adults are not able to access benefits provided by the government.<sup>23</sup> Non-availability of such documents hampers full participation of these people in the decision making process of the country. This may also render them to be discriminated against at the hands of authorities and others who are in possession of the requisite documents.

### **Indigenous Women**

Women, in general, are considered to be very vulnerable and marginalized, thus requiring special measures for their welfare and protection. As such, when it comes to access to health care facilities, they often suffer heavily on account of their vulnerability. Diabetes, cardiovascular diseases, cancer and higher maternal mortality rate are just some of the critical challenges they suffer from that impede their overall health. Diabetes in the long run can lead to complicated life-threatening situations, some of which can develop immediately when it strikes upon a person whilst the others may take a considerable period of time to be diagnosed. Thus, with respect to indigenous women, the prevalence and diagnosis of diabetes and other diseases is significantly lower on account of lack of awareness coupled with absence of documents of identification and recognition. When diseases and their complications are detected at a later stage, the chances of cure are far less as a result of which the life-span of these women stand drastically reduced. Cancer affecting women includes their organs and body parts such as breast, ovaries as well as lung. The most common type of cancer affecting the indigenous women in New South Wales continues to be lung cancer that may be deeply associated with after effects of industrial activities that are carried out in their regions.<sup>24</sup>

Violations of sexual as well as reproductive rights of indigenous women, including forced contraception, are closely related to and intertwined with their basic rights and violations thereof that arise from a number of factors such as unemployment, poverty, and vulnerability. It is reported that around forty-three per cent of indigenous women in Nepal<sup>25</sup> are unable to access the healthcare facilities on account of lack of availability of money. The situation becomes even more gruesome especially in post-disaster situations, be it man-made or natural, that makes the women even more prone to contracting diseases. In India, it has been reported that the Jarawa women have faced sexual abuse and exploitation at the hands of outsiders and intruders as part of the safari services that are offered to gain a better understanding of this tribe.<sup>26</sup> Such cases of sexual violence against indigenous women are a direct assault on their human rights to life and personal liberty, in addition to their right to health.

### **Indigenous Children**

Increasing rate of drug addiction as well as the growing cases of HIV/AIDS is a matter of great concern for these children. Unemployment, lack of access to education, and consequent disruption they face is responsible for the dilapidated situation of health amongst indigenous children and youth. Extractive industries such as mining are also responsible for the increasing levels of drugs and alcohol abuse as well as prostitution amongst indigenous people who live close to project sites.<sup>27</sup> Silts and fumes and other particulate matter that are emitted in the process expose indigenous children to various illnesses such as lung cancer and other skin related diseases.

### **Discrimination in Access to Healthcare**

Lack of availability of doctors and access to clinics as well as hospitals is a major struggle that indigenous populations face. Multiplying their woes is their life in isolation that puts them out of touch with the moving realities of times. Lack of awareness of their rights and non-availability of identification documents render them incapable of accessing basic healthcare facilities. These factors also do lead to discrimination in treatment.

### **Environment, climate change and health**

The indigenous people have fostered a strong bond with their environment as well as natural resources but are, at the time, facing irreparable disproportionate impacts of climate change and other environment related problems. Growing concern over climate change has affected almost all species of the ecosystem. However, the magnitude of environmental damage puts them particularly at more risk. A large number of diseases are spreading amongst them due to rising temperatures and their inability to adapt to the same. Loss in biodiversity due to prevalence of drought and famines, contamination of ecosystems and forest fires also often limit their traditional medicine and other health related practices.<sup>28</sup> They may also not possess specific skills for rehabilitation and resilience that may be required to deal with the after effects in case of disasters.

### **Traditional Knowledge**

A challenge unique to indigenous people is with respect to exercising the right to health *vis-à-vis* their traditional knowledge. They are considered primary holders of their special knowledge that is now under threat on account of violation of various other rights, especially those with respect to preservation of their land, natural resources,

forests, plants as well as animals.<sup>29</sup> This affects different sectors of health related issues.

### **Mental Health**

Mental health is a crucial component of the overall health of individuals. The quality of mental health amongst indigenous people is particularly low. Exclusion, poverty, violence, racism, discrimination, loss of livelihoods on account of dispossession of their lands to make way for development contribute greatly to the deteriorating mental health of the indigenous.<sup>30</sup> This has resulted in various neuropsychiatric and behavioural problems amongst them. Coupled with alcoholism and drug addiction, their conditions tend to worsen over time. Anxiety, depression, epilepsy, mental retardation and suicide have frequently been observed amongst these people.<sup>31</sup>

## **IV. Impact of Developmental Projects on Health**

Despite the fact that indigenous people once dominated and controlled vast lands comprising natural resources, in the present day world order they live in dire poor circumstances and face obstacles in exercising their rights. This greatly hurts their health and livelihood. Extractive industries too play a major role in their health related issues. Further, enforced displacement and relocation aggravate the health related issues.<sup>32</sup>

A central theme that underlies the rights of indigenous people is their right to traditional lands and resources available thereon, upon which various other human rights depend. However, from the standpoint of history, the indigenous have lost control over their lands to the settlers and the colonizers.<sup>33</sup>

A large part of the indigenous population inhabits some of the world's most vulnerable ecosystems, be it the tundra and the arctic, the tropical rainforests, mountains, riverines and coastal regions as well as semi-arid rangelands. On account of the conditions in these ecosystems, the indigenous suffer from lack of basic health facilities, education and unemployment coupled with high rates of mortality and illiteracy. Although at a point in time, these regions and the resources available thereon, minerals, hydroelectric capability and oil seemed to be out of the reach of non-indigenous people, these are now easily available due to advancement in technology. Consequentially, their lands have now become available to governments, multinational corporations, development banks as well as entrepreneurs on account of the growing demands of industrialization.

Numerous contraventions of the right to health of indigenous communities in Espinar and Cuninico regions of Peru, on account of development and industrial activities, have been reported.<sup>34</sup> The Amnesty International Report titled "A Toxic State: Violations of the Right to Health of the Indigenous Peoples in Cuninico and Espinar, Peru" records as to how the local indigenous women and children have suffered from several health issues because of exposure to heavy metals and toxic substances.<sup>35</sup> There have been reported cases of adverse impact on the central nervous system and consequently on the mental health on account of loss of land to which they have an emotional connect, skin related disorders including rashes and cancer, various other chronic illnesses. Additionally, the report also records large number cases of miscarriage due to exposure to heavy metals and toxic substances. Adding further to their grievances is the lack of availability of appropriate medical staff, doctors,

ambulances and medication that has resulted in poor quality of health.

Indigenous populations have become victims of development related activities that are largely considered to be in direct consequence of denial of their fundamental right of self-determination.<sup>36</sup> Constructions of dams and hydroelectric power plants have also threatened the life as well health of indigenous people in various countries. In India, the Sardar Sarovar Project<sup>37</sup> in Gujarat is said to have had disastrous effects on the local tribal population in terms of health and sources of livelihood. Development and industrial activities, being carried out independent of human rights considerations, have adverse effects on the health of the people not just in the developing countries but also in developed nations.

The Hon'ble Sup. Ct.'s ruling in the year 2002<sup>38</sup> imposing prohibitions on tourist establishments such as hotels, bars, restaurants and paying guests services except those that which were government run along with a complete ban on commercial activities employing twenty or more persons or having a turnover of over INR One Crore in certain identified buffer zones in the Jarawa Tribal Reserve as identified under the Andaman and Nicobar Islands (Protection of Aboriginal) Regulations, 1956 deserves a mention. This prohibition was in view of the deterioration of health of the members of the tribe which was a consequence of sharing of foods and intoxicants with the tourists.

## V. Concluding Remarks: The Way Forward

It is very evident that indigenous people have historically been suppressed which makes it particularly important to adopt mechanisms and measures that aim to undo these wrongs. Despite according international protection to indigenous

under international documents and the imposition of obligations upon member states to work towards the full realisation of their right to health, violations continue unabatedly; states have miserably failed to duly discharge the obligations towards the indigenous, especially in the area of health.

Health rights of the indigenous people can be better protected by targeted welfare state action besides protecting socio-economic interests. For this, it is first necessary to ensure that there is an enhanced political will to incorporate all the provisions contained in international legislations in national legislations, especially those with respect to the protection of the human rights of the indigenous people. This would ensure recognition of indigenous communities as subjects of rights and those requiring protection.

It is also imperative that affordable quality medicines along with suitable infrastructure in the form of health camps, health centres and hospitals are established in areas inhabited by them.

Another way to effectively work towards the right to health of this population would be to bring about an enhanced level of their involvement and participation in the decision-making process. After being in historic subjugation and colonization that has made the indigenous averse to the idea of reconciling with their mainstream counterparts, measures may be directed towards undoing these wrongs and using measures that have been successful in other areas having an impact on them albeit with suitable modifications. Spreading awareness about their rights in general, identifying the challenges that exist and finding suitable solutions to overcome the same may be considered. More important would be to enlighten and involve the indigenous women and youth. Measures should also be taken to ensure that the indigenous

women's reproductive rights are not violated merely by making them aware of the health related benefits, policies and programmes that are available to them.

Specifically with regard to the disastrous consequences that follow ill conceived development and industrial activities, it becomes pertinent to ensure that prior free and informed consent is obtained prior to jumpstarting these projects especially which concern their land and territories. They should be informed of the consequences that these projects and activities could have on their lands, territories and natural resources and consequently upon their health. An important aspect is the inevitable unprotected interaction which flow as a consequence of developmental projects. This makes the indigenous particularly more vulnerable to health threats.

It is imperative that industrialization and other developmental projects must be carried on in accordance only with policy frameworks which encompass the human rights aspect of the vulnerable indigenous population. All possible attempts for reconciliation of the interests of the mainstream with those of the indigenous people should be made.

All possible measures need to be undertaken to ensure that an appropriate system is evolved to safeguard indigenous peoples' rights to traditional health practices and medicines. Coordinated efforts should also be made to ensure a wise balance is reached between the traditional health practices of these people and the modern health knowledge that is being developed. A mechanism needs to be established to monitor as well as scrutinize the level of compliance that the contracting states have ensured with respect to the health of these people, more particularly the indigenous women, children,

persons with disabilities and elders, in accordance with the relevant international standard and more particularly the UNDRIP.

Overall, health related facilities should be made available to all people, including those belonging to the indigenous communities. One may argue that since they may be reluctant to opening up to outsiders and prefer non-communication, their privacy ought to be respected. However, be as it may, in cases of those communities who are willing to open up and establish contact with other populations, all measures must be taken to educate them and make them aware so as to achieve and foster a bond of trust between them and the non-indigenous people. Inducing behavioural changes by eliminating an attitude of racism and discrimination towards them, understanding their needs for seclusion and preservation of their cultures and respecting these as indispensable for survival, may help break down the barriers and may ease them from any looming threat they have in their minds about outside interaction.

## Notes

<sup>1</sup> WHO, Fact Sheet No. 326, (October 2007), available at: <http://www.who.int/mediacentre/factsheets/fs326/en/> (Last Visited Feb. 16, 2019).

<sup>2</sup> The World Bank reports that indigenous peoples make up only 5 percent of the global population of which 15 percent are extremely poor.

<sup>3</sup> Erica-Irene A. Daes, Working Paper by the Chairperson-Rapporteur, U.N.Doc. E/CN.4/Sub.2/AC.4/1996/2 (June, 1996), available at: <https://documents-dds-ny.un.org/doc/UNDOC/GE/N/G96/129/80/PDF/G9612980.pdf?OpenElement> (Last Visited Feb. 16, 2019).

<sup>4</sup> J K Das, *Human Rights and Indigenous Peoples* 1-2 (A.P.H. Publishing Corporation, 1<sup>st</sup> edn., 2001).

<sup>5</sup> *Supra* note 3.

<sup>6</sup> UNESCO Commission of Human Rights, Study of the Problem of Discrimination against Indigenous Populations (June, 1982), available at [https://www.un.org/esa/socdev/unpfi/documents/MCS\\_v\\_en.pdf](https://www.un.org/esa/socdev/unpfi/documents/MCS_v_en.pdf) (Last Visited Feb. 16, 2019).

<sup>7</sup> General Assembly, Report of the Human Rights Council, Supplement No. 53 (A/61/53) (2006), available at: <https://www2.ohchr.org/english/bodies/hrcouncil/docs/A.61.53.pdf> (Last Visited Feb. 20, 2019).

<sup>8</sup>S. James Anaya, "International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State" 21 *Arizona J. of Int. and Comp. Law* 13 (2004).

<sup>9</sup> See Constitution of the World Health Organization 1948, available at: [http://www.who.int/governance/eb/who\\_constituti\\_on\\_en.pdf](http://www.who.int/governance/eb/who_constituti_on_en.pdf) (Last Visited Feb. 12, 2019).

<sup>10</sup> *Ibid.*

<sup>11</sup> See International Covenant on Economic, Social and Cultural Rights as adopted on December 19, 1966 and in force from January 3, 1976, available at: [https://www.ohchr.org/en/professi\\_onalinterest/pages/cescr.aspx](https://www.ohchr.org/en/professi_onalinterest/pages/cescr.aspx) (Last Visited Feb. 12, 2019).

<sup>12</sup> See United Nations Declaration on the Rights of the Indigenous Peoples, available at: [https://undocs.org/A/RES/61/2\\_95](https://undocs.org/A/RES/61/2_95) (Last Visited Feb. 16, 2019).

<sup>13</sup> The World Health Organization reports that the Chinese indigenous herb *artemisia annua* is highly effective in the treatment of malaria and possesses the potential of preventing approximately 1 million deaths that occur every year due to malaria.

<sup>14</sup> International Covenant on Economic, Social and Cultural Rights, 1966, art. 12.

<sup>15</sup> United Nations Declaration on the Rights of Indigenous Peoples, 2007, art 24. "Art. 24: (1) Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services. (2) Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right."

<sup>16</sup> ICERD was adopted and opened for signature and ratification by the UNGA resolution 2106 (XX) of Dec. 21, 1965. It entered into force on January 4, 1969.

<sup>17</sup> International Covenant on Elimination of All Forms of Racial Discrimination, art. 5.

<sup>18</sup> CEDAW was adopted by UNGA Resolution 34/180 of 18 December 1979. It entered into force on Sept. 3, 1981.

<sup>19</sup> UNCRC was adopted by UNGA Resolution 44/25 of Nov. 20, 1989. It entered into force Sept. 2, 1990.

<sup>20</sup> Aman Gupta, *Human Rights of Indigenous Peoples* 56-57 (Isha Books, 1<sup>st</sup> edn., 2005).

<sup>21</sup> United Nations 2009 State of the World's Indigenous Peoples Report, available at: <https://www.un.org/esa/socdev/unpfi/documents/SOWIP/press%20package/sowip-press-package-en.pdf> (Last Visited Feb. 17, 2019).

<sup>22</sup> UN Special Rapporteur Report 2014, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15370&LangID=E> (Last Visited Feb. 15, 2019).

<sup>23</sup> Ben Smee, "Alarm raised over huge number of Indigenous children without birth certificates" *The Guardian*, June 18, 2018, available at: <https://www.theguardian.com/australia-news/2018/jun/19/queensland-indigenous-children-no-birth-certificate> (Last Visited Feb. 20, 2019).

<sup>24</sup> Australian Indigenous Health Reviews, Summary of Indigenous Women's Health, No. 10 (May, 2013), available at: <https://healthinfonet.ecu.edu.au/uploads/docs/womens-health-review-2013.pdf> (Last Visited Feb. 20, 2019).

<sup>25</sup> OHCHR, Situation of the Right to Health of Indigenous Peoples in Asia, available at: <http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Health/AIPP.pdf> (Last Visited Feb. 20, 2019).

<sup>26</sup> Gethin Chamberlain, "Jarawa tribe now face sexual abuse by outsiders on Andaman Islands" *The Guardian*, Feb. 1, 2014.

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<sup>27</sup> *Supra* note 19, at 70-75.

<sup>28</sup> Department of Economic Affairs, United Nations – Indigenous Peoples – Health, available at <https://www.un.org/development/desa/indigenouspeoples/mandated-areas1/health.html> (Last Visited Feb. 28, 2019).

<sup>29</sup> *Supra* note 17.

<sup>30</sup> Alex Cohen, WHO, The mental health of indigenous peoples: An international overview, available at: [https://apps.who.int/iris/bitstream/handle/10665/65596/WHO\\_MNH\\_NAM\\_99.1.pdf?sequence=1&isAllowed=y](https://apps.who.int/iris/bitstream/handle/10665/65596/WHO_MNH_NAM_99.1.pdf?sequence=1&isAllowed=y). (Last Visited Feb. 28, 2019).

<sup>31</sup> *Ibid.*

<sup>32</sup> United Nations Fact Sheet, Indigenous People Indigenous Voices: Fact Sheet, available at: [http://www.un.org/en/events/indigenousday/pdf/Indigenous\\_Industry\\_Eng.pdf](http://www.un.org/en/events/indigenousday/pdf/Indigenous_Industry_Eng.pdf) (Last Visited

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Feb. 28, 2019).

<sup>33</sup> *Supra* note 4, at 58.

<sup>34</sup> Amnesty International, A Toxic State: Violations of the Right to Health of the Indigenous Peoples in Cunicio and Espinar, Peru (2017), available at: <https://www.amnesty.org/download/Documents/AMR4670482017ENGLISH.PDF> (Last Visited Feb. 28, 2019).

<sup>35</sup> *Ibid.*

<sup>36</sup> ICCPR and ICESCR, common art. 1.

<sup>37</sup> The Project has displaced many people from the indigenous Barela Adivasi community and caused severe health related problems.

<sup>38</sup> *LG, Andaman & Nicobar Islands & Ors. v. M/S Bare Foot Inns & Leisure Pvt. Ltd.*, SLP (Civil) No.:12125/2010.

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