Misfortunes of Indigenous Peoples in 21st Century: A Comparative Country-Study of India & Philippines and their compliance under International Frameworks

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Submitted to

Central European University

Department of Legal Studies

In partial fulfillment of the requirements for the degree of LLM in Human Rights

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Executive Summary

Though the rights of the indigenous peoples are protected under international conventions and declaration but none of them provide a concrete definition of the term 'indigenous'. One of the reasons could be, granting the discretion to the member states to determine whether the community belongs to the category of indigenous peoples. This research work does not claim that there is an absence of law in the field of right to land and reparation of indigenous peoples. However, this research work delves deep into the work done in this field in the international forum and in the jurisdictions of India and Philippines to find out the status of the indigenous peoples with respect to their land and their right to reparation. The idea of having a comparative study between India and Philippines in this context was because, they both voted in favour of UNDRIP, share common colonial past and have huge chunk of indigenous peoples.

This research at first explains the definition of 'indigenous peoples' given by the UNDRIP, providing general criteria as to who shall be considered as the indigenous peoples. Further it states the drawbacks of the definition such as the definition lumps all the indigenous communities into one identity, which is historically not accurate as all the indigenous communities are different in their own way. Thereafter, it illustrates the definition of indigenous peoples in the jurisdictions of India and Philippines. At this point, it can be noted that Philippines is the first Asian country to define, recognize and protect the rights of indigenous peoples whereas, India does not recognize the term 'indigenous.' It considers Indian natives as '*adivasis.'*

In the second part of this thesis, the protection afforded by the international forum is illustrated and their effectiveness is discussed. International Labour Organisation (ILO) and United Nations (UN) are the international institutions to recognize and protect the rights to land and

reparation of indigenous peoples. Thereafter, it examines the right to land of indigenous peoples in India and Philippines. For this purpose, the thesis critically analyses the relevant domestic legislations to find its competency and effectiveness. In a comparative study, it could be found out that UNDRIP as well as the domestic legislations of Philippines provide for absolute right of indigenous peoples over their land, whether owned or traditionally occupied whereas, the Indian laws provide no specific land rights for the indigenous peoples and in general the State can acquire any land within the territory for public purpose by exercising its power under the doctrine of eminent domain.

In the last part, this thesis assesses the right to reparation of the displaced indigenous peoples. UNDRIP provides guidelines for restitution in the cases where the land of indigenous peoples is occupied but with prior consultation and obtaining the free consent of the inhabitants. A fair and just compensation shall be paid. In Philippines, IPRA, 1997 provides that the state shall take necessary measures to recognize their land and provide them with 'certificate of ancestral domain.' It also provides the same as of UNDRIP in regard to reparation for indigenous peoples. But in India, reparation can be only claimed by the title holders of the land not the occupants. The '*adivasis'* of India have been residing in their lands from ages but not all the indigenous communities are title holders of their land. This grossly violates the right to reparation of the indigenous peoples and is not in conformity with relevant international law.

For the purpose of this research, international legal instruments such as UNDRIP and ILO Convention No. 107 and 169, relevant domestic legislations of India and Philippines are considered. Various scholarly work and judgment of cases delivered by courts of law has been studies and referred to in this thesis. Other secondary sources such as online journals, weekly magazines, background papers, UN factsheets, country reports and reports of special rapporteur has been assessed.

Acknowledgements

I would first like to thank my thesis supervisor, Prof. Stephen Pogány, Visiting Faculty at Central European University. The door to Prof. Pogány's office was always open whenever I ran into a trouble spot or had a question about my research or writing. I am really thankful to him for providing me guidance over skype conversations. He consistently allowed this paper to be my own work, but steered me in the right the direction whenever he thought I needed it.

I would also like to thank the Librarian of SC/ST Research and Training Institute, Library Mr. M.K. Samantray for allowing me to conduct my research in the SCSTRTI Library. He always stood as a support in finding the most relevant books and provided me with relevant information regarding the thesis.

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List of Abbreviations

ADB: Asian Development Bank

ICCs: Indigenous Cultural Communities

IPs: Indigenous Peoples

ILO: International Labour Organisation

IPRA: Indigenous Peoples Rights Act

NIPAS: National Integrated Protected Areas System

ODA: Official Development Assistance

UN : United Nations

UNDRIP: United Nations Declaration on the Rights of Indigenous Peoples

Introduction

The indigenous peoples occupy almost a quarter of the land mass on the earth mostly, such lands include the assets of the earth, example, natural resources, forest products, etc. From this fact, it can be assumed that they enjoy absolute right over their occupied territory, constituting the healthiest and wealthiest community on the earth. But in reality, the indigenous communities lead a very miserable life and are counted among the poorest population on the earth. This is because there is a gross violation of indigenous rights by their concerned authoritative governments. This paper addresses several reasons for violation of such rights.

Though the rights of the indigenous peoples are protected under international conventions[1] and declaration[2] but none of them define the term 'indigenous'. One of the reason could be granting the discretion to the states to determine who do not belong to the category of indigenous people. The 'UN Declaration on the Rights of Indigenous Peoples' prohibits the removal of indigenous peoples from their land forcibly and relocating them without their prior consent[3] and affirms that they have the right to conserve and brace their distinctive spiritual relationship with their traditionally owned or occupied and used lands.[4]

Despite the fact that the term 'indigenous people' is not defined in any international legal instrument, but they enjoy an exclusive right over their land as guaranteed under the UNDRIP. But it evident from the backgrounder prepared to be discussed in the sixth session of the UN

[1] Binding obligations towards indigenous peoples are listed in treaties such as ILO Convention No. 107and 169.
[2] United Nations Declaration on the Rights of Indigenous Peoples, 2007, GA Res. 61/295., *"It is the obligation upon the States to provide effective mechanism for the prevention of any action aimed at dispossessing the indigenous peoples from their land or territory."*
[3] *Id.* art. 10.

[4] *Id.* art. 25.

Permanent Forum on Indigenous Issues[5] that their right to land is often violated everywhere in the world.[6] Their lands are being seized by the government for commercial purposes and for public interest without their consent and also not relocating them.[7]

Hirakud Dam in Odisha, fits perfect as an example at this instance as its construction displaced more than 1,00,000 tribals and farmers. The dam extends over a stretch of 55kms and was the first major river valley project in the independent India. "The inhabitants of the construction site were hard-pressed without their barter economy into a monetized system.[8]" Another example could be the displacement caused by the activity of the Mahanadi Coal Field Limited which adversely affected 19 villages leading to displacement of 130 families for which adequate reparation measures were not taken.[9]

This paper desires to analyze the legal system of India which is applicable to its indigenous population as it claims to be the largest democracy where rights of all the citizens are equally protected. In India, the indigenous peoples are called as *'adivasis'*. In Hindi language, it means 'the native inhabitants.' Out of 1.28 billions of Indian population, these people are estimated to be 84.3 million i.e., 8.2% of the total population."[10] The constitution of India affords legal protection the *adivasis* in its 5th and 6th schedule and there is a separate government ministry for regulating the tribal affairs yet, the nation has failed to protect the rights of its indigenous

[5] The UN Permanent Forum on Indigenous Issues was established by the General Assembly in 2002. "Its central function is to provide substantive assistance and support to the Forum in carrying out its mandate."
[6] Backgrounder, *Indigenous Peoples - Lands, Territories and Natural Resources*, For the discussion in the 6th Session of the UN Permanent Forum on Indigenous Issues (May 14-25, 2007). http://www.un.org/en/events/indigenousday/pdf/Backgrounder_LTNR_FINAL.pdf (last accessed 25 February 2016).
[7] *Id.*
[8] MICHAEL M. CARNEA & CHRIS MCDOWELL, RISKS AND RECONSTRUCTION: EXPERIENCE OF RESETTLERS AND REFUGEES, 206.
[9] Rajashree Mohanty, *Impact of Development Project on the Displaced Tribals : A Case Study of a Development Project in Eastern India*, ORISSA REVIEW (Sept.-Oct, 2011) http://odisha.gov.in/e-magazine/Orissareview/2011/sep-oct/engpdf/68-74.pdf (last accessed 29 October 2015).
[10] Gam A. Shimray, *High Level Committee Report submitted to UPA Government of India*, (2014), http://www.iwgia.org/images/stories/sections/regions/asia/documents/IW2015/India_IW2015_web.pdf (last accessed 29 October 2015).

peoples. At a glance, it seems that such indigenous rights violations occur in terms of the violation of the land rights and the rights to reparation of the indigenous peoples and are outcomes of privatization directly impacting the growth of the largescale industrial and infrastructural investment projects resulting in displacement of tribal population from their habitat.[11] The major legal instrument dealing with land i.e. The Land Acquisition Act, 1894 as amended in 1984 empowers the government to acquire private lands for the interest of general public.[12] This is again a very authoritative Act which gives absolute powers to the states to acquire private lands making the tribal population vulnerable to the activities of the State. Further in 2006, India has implemented The Forest Rights Act, 2006 for entrusting the forest and land rights to the tribal population within the territory of India but it has failed to serve its purpose due to lack of implementation in the grass-root level.

The UNDP in Philippines estimates that there are approximately 14-17 million indigenous peoples, composing about 10% - 20% of the total population of the Philippines and belonging to over 40 distinct ethnolinguistic groups.[13] The problems of indigenous peoples in Philippines especially their right to have access to their land can be traced from the time when Philippines was a Spanish colony. From the colonial period, all the lands belonged to the State including the forest lands but this a bothering situation for the indigenous communities within the country as they reside in the forest areas and are dependent of the forest for their livelihood.[14] Currently,

[11] Rajashree Mohanty, *supra* note 9.
[12] Land Acquisition Act, 1894 (Amendment Act of 1984), sec. 3A.
[13] UNDP, *Fast Facts: Indigenous Peoples in the Philippines*, 2013, http://www.ph.undp.org/content/philippines/en/home/library/democratic_governance/FastFacts-IPs.html (last accessed 20 November 2015)
[14] James F. Eder, *Indigenous Peoples, Ancestral Lands and Human Rights in the Philippines*, ETHNIC CONFLICT: THE NEW WORLD ORDER, (Summer 1994), available at https://www.culturalsurvival.org/ourpublications/csq/article/indigenous-peoples-ancestral-lands-and-human-rights-philippines (accessed 26 February 2016).

they are facing a 'double battle', at one side they are battling with the State for getting access to their lands and on the other side with the politically influenced lowland Filipinos.[15]

Philippines is the first Asian nation to give a legal definition to the term 'indigenous peoples.' It enacted a concrete legislation i.e., The Indigenous Peoples Rights Act in 1997 which defined the term indigenous peoples and also enumerated the rights of the indigenous peoples and the obligations upon the states to protect the rights of the indigenous peoples. The Act provides for the recognition, protection and promotion of the rights of the indigenous communities, create a national commission for them, and provides the provisions for funding them.[16] Prior to the enactment of this Act, the rights of the indigenous peoples were protected under the Presidential Decree No. 410 which declared that their cultivating land was declared as their ancestral land.[17] It marked the first legal protection of the indigenous peoples with respect to their land and safeguarded it from the government's or any other party's interference. Apart from the domestic legislation, the State has reorganized various programs into Integrated Social Forestry Program (ISFP) since 1972. It is controlled by the Department of Environment and Natural Resources of the state.[18]

This thesis portrays instances of violation of the right to land on indigenous peoples and their legal consequences and its outcomes in India and in Philippines. The reason behind such violations is the dearth of suitable legal mechanism enforced for the protection of indigenous people. And the present legal mechanisms that are enforced for safeguarding these peoples have abundant flaws which is a major factor denying justice to the indigenous peoples.

[15] *Id.*
[16] The Indigenous Peoples' Rights Act, 1997, Republic Act No. 8371 of Philippines, Preamble.
[17] Presidential Decree No. 410 (March 11, 1974) http://www.lawphil.net/statutes/presdecs/pd1974/pd_410_1974.html last visited 30 October 2015.
[18] Steve R. Harission, Nick F. Emtage and Bert E. Nasayao, *Past and Present Forestry Support Programs in the Philippines and Lessons for the Future*, 3 Small-scale Forest Economics, Management and Policy 303, 317. *'Description of the programs implemented by the government to support small holder forestry for production and conservation purpose.'*

For the purpose of the comparative study, the jurisdictions of India[19] and Philippines[20] are taken into consideration because both the countries are Asian countries having numerous indigenous issues within their territories and have affirmed the UNDRIP[21] and ensured that their domestic legislations are in conformity with the declaration for the protection of the interest of indigenous communities within their territorial jurisdictions. This paper by probing into the cases filed with the relevant judicial authorities in the above mentioned states, evaluating the domestic legislations and studying various research works by scholars in this sphere, critically analyzes whether their domestic legal instruments and government decisions are in conformity with the UNDRIP and other International Conventions. Further, this analysis emphasizes the need for the efficient legislation on the spheres which are still untouched which results is violation of land rights of indigenous peoples.

[19] 'Situation of Indigenous Peoples in India' See, Minority Rights Group International, World Directory of Minorities and Indigenous Peoples - India: Adivasis, 2008, available at: http://www.refworld.org/docid/49749d14c.html [accessed 24 November 2015]

[20] Rey Ty, *Indigenous Peoples in the Philippines: Continuing Struggle*, ASIA-PACIFIC HUMAN RIGHTS INFORMATION CENTER vol. 62, (2010), http://www.hurights.or.jp/archives/focus/section2/2010/12/indigenous-peoples-in-the-philippines-continuing-struggle.html (accessed 24 November 2015)

[21] The UNDRIP was adopted by 144 countries, with 11 abstentions and 4 countries voting against it. These four countries were Canada, the USA, New Zealand, and Australia.

CHAPTER 1 – UNDERSTANDING THE TERM 'INDIGENOUS'

In the dearth of any concrete definition for the term 'indigenous peoples', the United Nations has defined criteria for recognizing indigenous peoples. These criteria could be used for determining the features of the indigenous communities. These criteria includes that "the indigenous peoples must have a self-identification at the individual level and must be accepted by their community; they must have a historical continuity with pre-colonial and/or pre-sheltered societies with a strong link to their territories and surrounding natural resources possessing a distinct language, culture and beliefs; they must form a non-dominant form of society and should be able to resolve to maintain and; reproduce their ancestral environments and systems as distinctive peoples and communities.[22]" Another international organization i.e. ILO provides for the rights of the indigenous peoples but does not provide a definition of the term 'indigenous peoples rather, it also provides criteria for the recognition of the 'indigenous peoples which are similar to that provided by the United Nations.[23]

This chapter agrees with the fact that a lot of research work has been done in the field of indigenous peoples' right to land. But in order to understand the issue associated with the indigenous peoples' right to land, an understanding of the term 'indigenous peoples' is of utmost importance.

It is important to understand the definition of the term as a mere alteration of any single term in makes a huge difference. For example, ILO Convention No. 169 terms as "indigenous peoples" whereas the ILO Convention No. 107 terms the same as "population". This looks a

[22] Factsheet, *Who are Indigenous Peoples?*, UNITED NATIONS PERMANENT FORUM ON INDIGENOUS ISSUES, http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf (accessed 29 October 2015).
[23] Identification of indigenous and tribal peoples, International Labour Organization, ILO Convention No. 161, http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm (accessed 29 October 2015).

very minor change but its legal consequences are different. In the standpoint of international law, the term 'population' is not commonly used as there are different segments in population based on their ethnicity and religion. But the term 'peoples' is often used in international law but there is no clear expression to it.[24]

Although there is no concrete definition as to who particularly are indigenous peoples, but the international community and the nation-states have come up with criteria for qualifying as indigenous peoples. This chapter tends to provide the legal definition of the term 'indigenous peoples' defined by the international community (i.e. UN and ILO definitions) and the definitions given by the jurisdiction of India and Philippines and further assesses whether the definition serves the purpose of protection of their rights.

1.1. General Definition

Although the term *'indigenous'* is defined in famous English dictionaries but there is no legal definition to it. Oxford Dictionaries define it as *"originating or occurring naturally in a particular place or native"*[25] whereas the Cambridge Online Dictionaries define it as *" naturally existing in a place or country rather than arriving from another place"*[26]. Indigenous peoples are generally defined as peoples living in an area within a nation-state prior to its formation and they do not form the dominant section in the country. At times, they are referred as aboriginals, natives or first peoples.

1.2. Legal Definition

In the mid of 20th Century, the international community recognized that the indigenous communities are autonomous bodies and have a right to decide on their own matters.

[24] NARENDRA KUMAR BEHERA, DISLACEMEN, RESETTLEMENT AND REHABILITATION, 138 (Abhijeet Publications), (2011).
[25] Oxford Online Dictionary.
[26] Cambridge Online dictionary.

The United Nations defines the indigenous peoples as follows:

"Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies and developed on their territories, considered themselves distinct from the other sectors of the societies now prevailing in those territories, or part of them.[27]*"*

Many advocate of human rights, fighting for the recognition of the rights of indigenous peoples have duly criticized this. Their contention was that imposing a common identity on all the indigenous communities ignores a large chunk of indigenous communities.[28]

But the major international instrument i.e. 'United Nations Declaration on Right of Indigenous Peoples' (UNDRIP) is silent regarding the definition of the term *'Indigenous'*. In the dearth of any absolute reason for not defining the term *'indigenous',* it could be presumed that the framers of the instrument envisaged a strategy to extend the scope of applicability of the instrument. A fixed definition may give a chance to the government to exclude certain groups out of the ambit of the term *'indigenous'* which could lead to denial of justice to a particular community. It stresses the communities to define themselves and establish that they form a part of indigenous community as the framers of the instrument intended not to narrow down its scope.[29] Another reason for not defining the term could be that the adoption process of UNDRIP would have been delayed because the agreement of all the states should have been taken into consideration.[30]

[27] Background Paper, *The Concept of Indigenous Peoples,* WORKSHOP ON DATA COLLECTION AND DISAGGREGATION FOR INDIGENOUS PEOPLES (New York, 19-21 January 2004).
[28] AMAN GUPTA, *supra* n 27, at 3.
[29] Ms. Erica Irene Daes, *Note by the Chairperson-Rapporteur of the Working Group of Indigenous Populations,* (1995) 4, UN Doc. E/CN.4/Sub.2/AC.4/1995.
[30] *"The United Nations debate over defining the term 'indigenous' and other influencing factors"* in H. MINDE, INDIGENOUS PEOPLES: SELF-DETERMINATION, KNOWLEDGE AND INDIGENEITY 49 (Eburon Academic Publishers, Delft, 2008).

The meaning of the adjective *'indigenous'* has a broader scope which refers to native of a place but S. James Anaya refers it to "subset of humanity which has suffered subjugation by colonization or other oppressions."[31] There always arises a conflict when the terms *'indigenous'* and *'tribal'* are represented together. Under the ILO Convention No. 107 and 169 both the categories were given separate stance. The ILO conventions make a distinction between the two terms is the very name of the conventions, No. 107 states *"Indigenous and Tribal Populations Convention, 1957"* and Convention No. 169 states *"Indigenous and Tribal Peoples Convention, 1989"*. The tribal population in Asia and Africa were not considered to be a part of 'indigenous peoples' for the tenacity of the protection of human rights. For protection under the above mentioned conventions they were evidently referred disjointedly until the enforcement of UNDRIP. However, it's a matter of fact that both the tribal and indigenous peoples have similar characteristics and face same kind of difficulties.

But at the present time, *tribal peoples* are also considered as *'indigenous peoples'* for the purpose of the UNDRIP.[32] While the idea of giving a legal definition to the term *'indigenous people'* is rejected but many international forums have advanced to some key features of being indigenous peoples and most recently was in UN Permanent Forum on Indigenous issues. The consideration of peoples in such category is based upon the following characteristics:

"the people of the community must have a self-identification both as indigenous and as people; they must have a common ancestry and continuity from historical times; should possess a strong and special ties with their ancestors and with their ancestral lands before being dominated into colony and with surrounding natural resources, such link makes them culturally distinct from other communities; must have a distinct social, economic and political systems

[31] S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW, 5 (Oxford University Press 1996).
[32] Factsheet, *supra* note 22.

forming a non-dominant group within the current society and must be determined to maintain and reproduce their ancestral environments.[33]"

After assessing the definition given by the international legal texts to the *'indigenous peoples'*, this chapter further assesses the understanding of the term indigenous peoples in the jurisdictions of India and Philippines.

1.3. Definition of Indigenous Peoples in Indian

The term *'indigenous'* is not mentioned in the Constitution of India. The common term used to refer indigenous people in India is *'Adivasi'* which in Hindi language means '*Adi'* means from 'ancient times' and *'vasi'* means 'the residents of a particular place.' Though both the terms have same meaning but India has rejected the term 'indigenous peoples' as it considered it to be "divisive and undermining the unity of Indian Nation."[34] Furthermore, its Indian government's official position that all citizens of India are indigenous.[35] The government recognizes the *adivasis* under the Constitution of India as "Scheduled Tribes". The constitution refers to Scheduled Tribes as those groups, who are considered to be scheduled under Article 342 of the Constitution.[36] The groups gain the indigenous status after being declared by the President of India.[37] The criterion followed for specification of a community, as scheduled tribes are as follows:[38]

a. signs of aboriginal qualities,

b. unique culture,

[33] *Id*.
[34] Das, M.B., Hall, G.H., Kapoor, S. and Nikitin, D. (2011) 'India', *Indigenous Peoples, Poverty, and Development*, (G. Hall & H. Patrinos, eds. Cambridge: Cambridge University Press), 60-67.
[35] G. Hall & H. Partinos, *Indigenous Peoples, Poverty and Development*, WORLD BANK (2010) 205, http://siteresources.worldbank.org/EXTINDPEOPLE/Resources/407801-1271860301656/full_report.pdf (accessed 24 October 2015).
[36] INDIA CONSTI., art. 366, cl. 25.
[37] INDIA CONSTI., art. 342.
[38] Deduction from the various reports for establishing criteria for classifying '*adivasis.'* The Reports of first Backward Classes Commission 1955, Kelkar Committee Report, Lokur Committee for revising SC/ST list 1965.

c. geographic segregation,

d. contact with this group at large, and

e. backwardness.

These criteria are nowhere defined in the Constitution of India but has been well established by the report of different commissions and advisory committees.[39] The government of India till date recognizes and identifies 533 different tribes out of which the 63 tribes are found in the state of Odisha.[40] But there exists many more tribal groups which have very less population and is almost impossible to aggregate these diverse group of people.

In the case of *Action Committee on Issue of Caste Certificate to SC and ST in the State of Maharashtra and Another v. Union of India and Another,* the Supreme Court of India held that "a person belonging to a caste or tribe specified under constitution to be a SC or a ST in relation to State A, cannot claim the privileges and benefits afforded to that caste in State B even if that caste or tribe is specified for the purposes of the constitution to be a SC or a ST in relation to State B. The reason given by the Court is that, a given caste or tribe can be a SC or a ST, only regarding the State or Union Territory for which it is specified.[41]"

1.4. Definition of Indigenous Peoples in Philippines

The Asian Development Bank (ADB) has adopted the following definition of 'indigenous peoples' and uses it in its operation. *"Indigenous peoples should be those regarded as those with a social or cultural identity distinct from the dominant or mainstream society, which makes them vulnerable to being disadvantaged in the process of development."*[42]

[39] *Id.*
[40] Ministry of Tribal Affairs, Government of India, *List of Scheduled Tribe in India,* http://tribal.nic.in/content/list%20of%20scheduled%20tribes%20in%20India.aspx (accessed 18 December 2016).
[41] Action Committee v. Union of India & Another, 1994 SCC (5) 244, para. 1.
[42] ADB (Asian Development Bank), *Policy on Indigenous Peoples.* ADB MANILA (1999).

The definition of *'indigenous peoples'* is based on certain key elements, namely, 'their self-identification, linguistic identity, distinct social cultural economic and political systems, establishing a unique tie with their ancestral land.'[43] From this, two major observations could be made. These observations are as follows:

1. Declining population from populous groups, a small community establishing itself within an area from the time when the territories or borders of a nation was not defined, and
2. Having unique cultural and social identities whose system of political participation is different from that of the mainstream societies and cultures.

Till date, Philippines is the only Asian country to officially use the term 'indigenous peoples' and have duly recognized their rights[44] by enacting the Indigenous Peoples Rights Act (IPRA) 1997. The Act defines 'indigenous peoples' as follows:

"A group of people of homogenous societies identified by self-ascription and ascription by others who have continuously lived as organized community on communally bounded and defined territory, and who have under claims of ownership since time immemorial, occupied, possessed and utilized such territories, sharing common bonds of language, customs, traditions and other distinctive cultural traits, or who have, through resistance to political, social and cultural inroads of colonization, non-indigenous religions and cultures, become historically differentiated from the majority of Filipinos. Indigenous Cultural Communities/ Indigenous Peoples shall likewise include peoples who are regarded as indigenous on account of their descent from the populations which inhabited the country, at the time of conquest or

[43] ASIAN DEVELOPMENT BANK, INDIGENOUS PEOPLES/ETHNIC MINORITIES AND POVERTY REDUCTION- PHILIPPINES, 3 (Asian Development Bank, Manila, Philippines) (2002) available at http://hdl.handle.net/11540/2965 last visited 25th November, 2016.

[44] *Id.*

colonialization, or at the time of inroads of non-indigenous religions and cultures, or the establishment of present state boundaries, who retain some or all of their own social, economic, cultural and political institutions, but who may have been displaced from their traditional domains or who may have resettle outside their ancestral domains."[45]

Features like *'historical community lineage'* and *'unique self-identification'* are inherent in the above mentioned definition. 'Historical community lineage is calculated the occupation over their ancestral lands, collective ancestry with original occupants of land, their generally practiced and their language and their place of residence, whether in their lands of origin or evicted from it.'[46] The concept of 'unique self-identification' related to the uniqueness and antiquity of the their groups. The attachment of indigenous peoples to their lands bind these features together.

Although the rights of indigenous peoples were recognized through enormous efforts but there was still lack of common consent as to who particularly belong to the category of indigenous peoples residing within the territories of Philippines. There was a problem of 'contesting identities'. The two possible reasons for this could be[47]:

i. Absence of up to date cultural mapping within the territory, and
ii. The fragile way in which the identities of such peoples have been framed by the indigenous communities themselves and by the others for political, religious and other reasons.

1.4.1. Drawbacks of the Definition

Although the definition of 'indigenous peoples' by IPRA and ADB seems to be perfectly defining and recognizing them and further providing a wider scope by providing criteria to be

[45] *Id.;* The Indigenous Peoples Rights Act, 1997, chp. II, sec. 3, cl. h.
[46] *Id.* at 45.
[47] *Id.* at 4.

considered as indigenous peoples, but still it has certain drawbacks. One of such drawback being the problem of 'contesting identities' in Philippines. This part elaborates this problem by citing the example of the indigenous peoples inhabiting in the Mindanao.

Such peoples inhabiting in Mindanao region were can be better understood if the indigenous peoples are categorized according to external criteria rather than the concept of self-identification. In the geographical region of Mindanao, there existed a single group of indigenous peoples which are currently divided into two groups known as, 'Moros' and 'Lumads'. This division took place as a result of spreading of Islam within the community. Among the members of the community, those adopted Islam were known as 'Moros' and those who abstained from adopting Islam were known as 'Lumads'. Both the communities share the same folklore and claim common ancestry. 'Lumads' are considered as the original inhabitants of the region as 'Moros' were the ones who got segregated from the original group for adopting Islam. "The community of 'Lumads' are also referred to the non-muslim and non-christian indigenous peoples of Mindanao."[48]

The problem of contesting identities arises when these two major communities are further sub-categorized into different ethnolinguistic groups. There are at least thirteen Muslim groups and eighteen Lumad groups of indigenous peoples in Mindanao.[49] In the indigenous communities residing in Mindanao, the 'ethnic identity' is the fundamental layer among all other socially framed identities; an individual is known by his ethnic connection. Apart from their ethnic identity, their religion plays a key role influencing the structure of such identities. Over years, various indigenous communities have adopted and practiced Islam, many have converted to Christianity, whereas, other Lumads followed their own indigenous beliefs and traditions.

[48] *Id.*
[49] P.G. GOWING, MUSLIM FILIPINOS HERITAGE AND HORIZON, 148 (New Day Publisher), (1979).

The terms 'Muslim' and 'Moro' are used inter-changeably for referring to the peoples who have accepted Islam as their religion. However, the connotation 'Muslim' is generally understood as a universal religious identity, whereas 'Moro' denotes a political identity distinct to the people who followed Islam in Mindanao.[50]

As Islam was central to the development of the thirteen ethnolinguistic Moro groups, the intellectuals of Moro community came out with a new identity by consolidating the ideas of nationalism.[51] This was called 'Bangsamoro'. This was distinctively Islamic which had aim of building a new nation which was triggered by 'Jabida Massacre' of 1968 and their idea of justice was rooted in the Islam religion.[52]

With the advancement in time, the indigenous peoples of Mindanao gained conscious over recognition of their rights. In January 2001, few Lumad leaders held a 'Mindanao Indigenous Peoples Peace Forum'. It produced an agenda that focused on the Government's Armed Forces and the New People's Army and demanded that[53]:

i. their population to be included in the peace negotiations and the government to support the local initiatives,
ii. A law should be passed declaring their land as autonomous,
iii. All the concerned parties shall respect the established territorial boundaries, beliefs and practices,
iv. The government should protect their land from the developmental works such as, mining or any other that induces displacement, and

[50] *Supra* n 48; Macapado A Muslim, *Comprising On Autonomy- Mindanao in Transition*, Accord Issue 6, CONCILIATION RESOURCES, (1999), http://www.c-r.org/accord-article/sustaining-constituency-moro-autonomy-1999 (accessed 28 September 2016).
[51] ERIC U. GUTIERREZ, REBELS, WARLORDS AND ULAMAS, 108 (Institute of Popular Democracy), (2000).
[52] *Id.*
[53] ASIAN DEVELOPMENT BANK, *supra* n 46, at 9.

v. Indigenous Peoples Rights Act of 1997 shall be fully implemented and the local government shall pass ordinances in conformity with it.

The construction of the social identities of the indigenous peoples of Mindanao might seem to be fluctuating according to their territorial adjustments, civil demands and religious thoughts. But one factor appears to be stagnant, i.e. their ethnic identity. The Asian Development bank has believed that "the ethnicity will persist as a central axis of this evolving identity."[54]

1.5. Conclusion

Assessment of the definition of the term *'indigenous peoples'* in this chapter makes it clear that the international community as well as the jurisdiction of India and Philippines have extended their efforts in recognizing the indigenous peoples. Although the rights of the indigenous peoples were recognized in 20th century by the ILO convention no. 107 and 169 but, none of them explained whom to be considered as the 'indigenous peoples.' The first ever definition by an international legal text was provided by UNDRIP in 2007. It provides grounds to be considered as indigenous peoples, yet it could be argued that it failed to recognize all the indigenous groups spread across the world.

In the comparative study of the jurisdictions of India and Philippines, with regard to definition of the term, a stark difference could be found out. Neither India considers the term 'indigenous peoples' nor such a connotation is envisaged in any of its legal texts. Instead it categorizes another segment of peoples called *'adivasis'* who share similar features as that of the indigenous peoples defined by UNDRIP. It protects them under Indian Constitution by classifying them as 'Seheduled Tribes.' Although it recognizes the 533 scheduled tribed, but have not provided any reason for such recognition. Whereas, IPRA of Philippines have well

[54] *Id.* at 5-6.

defined the term ‘indigenous peoples’ which is well in line with the definition provided by UNDRIP. Yet, this faces a challenge of ‘contesting identities.’

It could be concluded after assessing the definition of the term *‘indigenous peoples’* that neither the international community nor the jurisdictions of India and Philippines have provided a perfect definition which would be undisputable.

Chapter 2 – Assessment of The Right to Land of Indigenous Peoples

This chapter assesses the legal protection afforded to the indigenous peoples in the jurisdictions of India and Philippines in one hand and in other hand it analyses their compliance with the relevant international guidelines. For examining in details, this chapter analyses the relevant national and international legal texts dealing with the indigenous rights in general and the right to land in particular.

In order to have a comprehensive analysis of the subject, this chapter analyses the sufferings of indigenous peoples which lead to recognition of their rights in international forum. Thereafter, it analyses the role of international community in safeguarding the right to land of the indigenous peoples. In this part, for assessing the 'right to land' of indigenous peoples under international law, the relevant legal texts of International Labour Organization (ILO) and United Nations (UN) are taken into consideration. Further, the chapter assesses the abovementioned right envisaged in the national legal texts of the jurisdictions of India and Philippines.

The ultimate aim of this chapter is to assess whether the rights enumerated under the international law is implemented in the national legal instruments and further, to assess the status of the indigenous peoples with relation to their land. It aims towards finding out the competency of the current legislation in recognizing the 'right to land' of the indigenous communities.

2.1. Sufferings of Indigenous Peoples in relation to their land: An Overview

A major chunk of displaced population, which includes mainly indigenous peoples, live in the world's most vulnerable ecosystem which are important repositories of unexploited natural resources.[55] On one hand, they live in vulnerable ecosystem. They inhabit in very poor social and economic conditions, resulting in their suffering due lack of basic health and education, leading to high infant mortality, low life expectancy, high illiteracy rate along with large scale unemployment. On the other hand, ironically, presence of abundant resources in their territories adversely affected them. The territories used and occupied by indigenous peoples are often seen as important repositories of unexploited riches. Thus land and resources of the indigenous peoples have often come under the cruel clutches of governments, banks, transnational corporations and entrepreneurs, not for benefitting the project displaced or project affected population, especially local indigenous population, but for the benefit of the industrialized countries under the veil of 'national development.[56]'

However, a fairly vague concept of distinct indigenous rights has its foundations in 16th and 17th century interpretations of international law and was incorporated and further developed in the British Colonial Policy and has had its fullest expression in the case law of United States.[57] The degree to which the indigenous rights are acknowledged , denied or ignored in a particular state always has been determined by the individual state as a matter of domestic jurisdiction. Thus, it can be observed that there is a dearth of customary international legal norms pertaining to the 'right to land' of the indigenous peoples who are displaced by the developmental projects.

[55] ASHIRBANI DUTTA, DEVELOPMENT-INDUCED DISPLACEMENT & HUMAN RIGHTS, 22, (New Delhi; Deep & Deep Publications), (2007)
[56] *Id.*
[57] SHIVANI A. PATEL, STATUS OF ADIVASIS/INDIGENOUS PEOPLES LAND SERIES-1: GUJARAT, 11, (Aakar Books), (2011).

The international institutions such as, UN and ILO have recognized that the establishment and protection of rights of indigenous peoples are essential part of human rights and a legitimate concern of the international community. These two organizations are active in setting and implementing standards designed to ensure respect for existing right of indigenous peoples. Under various international legal instruments, the displaced indigenous population who have faced the brunt of developmental projects, have been granted various rights. These international legal instruments can be used as effective tools for the protection of such displaced population.

2.2. ILO's Involvement in Protection of the 'Right to land' of the Indigenous Peoples

From its formation in 1919, ILO has extended the protection towards the social and economic rights of the indigenous communities whose customs, religious beliefs and traditions segregated them from the other population of the country. As early as in 1921, ILO carried out a series of studies on indigenous workers in the independent countries.[58] A Second Committee of Experts on Indigenous Labour first met in 1951. It encouraged states to extend legislative provisions to all segments of their population, including indigenous communities and called for improving education, vocal training, social security and protection in the field of labour for indigenous peoples.[59]

Finally ILO published an adequately compiled reference book in 1953, entitled, *'Indigenous Peoples: Living and working conditions of Aboriginal Population in Independent Countries'*, which provided a survey on indigenous populations throughout the world and a summery international and national actions taken to aid these groups.[60] This study revealed that the indigenous peoples all over the world have considerable economic backwardness. Inequality

[58] J.K. DAS, HUMAN RIGHTS AND INDIGENOUS PEOPLES 45 (A.P.H. Publishing Corporation, 2001).
[59] *Id.*
[60] *Id.*

of opportunity and the survival of anachronistic economic and land tenure system prevent the indigenous peoples from fully developing themselves and contribute to perpetuating their interior social status. Usually the living standards of the aboriginal populations in independent countries are extremely low or often stagnate in conditions of economic destitution.[61]

ILO adopted Convention No. 107 in 1953 regarding the 'Indigenous and Tribal Populations.'[62] This convention was the first international legal instrument which was specifically created for protecting the 'rights of the indigenous and tribal populations.' It came into force on 2nd June 1959 and India was among the first few countries to ratify it in 1958[63] whereas Philippines did not ratify the convention.

The Revision of the Convention 107 began in 1986 and this was decided after meeting of experts. The result of the codification process was accepted by majority of member states with 128 votes in favour, 1 vote against (Netherlands) and 49 abstentions. As it failed to extend safeguard in certain fields, it required revision. Its provision was revised in the ILO Convention 169.[64]

The ILO Convention 169 was adopted on 27th June, 1989.[65] It considered the provisions envisaged in the legal texts of the ILO Convention 107, ICCPR, ICESCR and other developments taken place since 1957. It adopted propositions regarding partial revision of ILO Convention No. 107, this was incorporated in the 4th idea on the agenda of the session.[66] It recognized the desire of the indigenous communities for establishing control over their own

[61] *Id.*
[62] Indigenous and Tribal Populations Convention, 1957 (No. 107), Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, Jun 02, 1959.

[63] ASHIRBANI DUTTA, *supra* n 59, at 46.
[64] *Id.*
[65] Indigenous and Tribal Peoples Convention, 1989 (No. 169), Convention concerning Indigenous and Tribal Peoples in Independent Countries, Sept 5, 1991.
[66] *Supra* n 64.

institution of governance, administration and management of their land. India has not yet ratified the Convention No. 169.

2.2.1. 2.2.1. ILO Convention No. 107 & ILO Convention No. 169

The 'right to land' of indigenous peoples are mentioned in Part II (Articles 11-14) of the Convention 107. Article 11 of the Convention acknowledges the 'right to land' of indigenous peoples. It states that:

"The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognized.[67]*"*

Further, in the same part, the Convention provides that no person shall be removed from their land other than the exceptional cases such as national security and national economic development.[68] In case the inhabitants are removed from their land due to occurrence of such exceptional cases then *"they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.*[69]*"*

In 1957, the aim of the ILO convention was to adopt general international standards for the protection of indigenous peoples and improve their socio-economic conditions and progress their integration into their national community eradicating discrimination against them. But ILO's recognition of the 'right to land' of the indigenous population in the Convention is very traditional in nature which required to be modernized in this aspect. The modernized facet of

[67] ILO Convention No. 107, *supra* n 63, art. 11.
[68] *Id.* art. 12, cl. (a).
[69] *Id.* art. 12, cl. (b).

the protection of the 'right to land' of the indigenous peoples came up with the adoption of the ILO Convention 169 on 27th June, 1989. It revised the Part II (Article 13-19) which enumerates about the right to land of the indigenous peoples. It recognized the 'right to land' of the indigenous peoples along with respecting their cultural and spiritual values relating to their land. In Article 13 (1) it states that:

"In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.[70]"

It has also extended the scope of the term 'land' which previously was concerned with the 'occupied land[71]', are considered to be inclusive of "territories which covers the total environment of the areas which the people concerned occupy or otherwise use.[72]" It further identified and safeguarded the 'right to land' by obligating the state to take appropriate measures for recognizing such plots of land which are not solely inhabited by the indigenous communities.[73] The State shall adopt adequate procedures in its national legal system for resolving the claims arising out of the land disputes regarding the indigenous communities.[74] In case, the inhabitants are displaced from their land for socio-economic development of the State, then the State shall establish procedure to consult, prior to relocation, with the inhabitants discussing the degree to which their rights shall be prejudiced. The concerned population shall be given an opportunity to partake in the benefit of such acts and can be entitled to receive fair reparation.[75] The process of replacement shall progress only after obtaining the free consent of

[70] ILO Convention No. 169, *supra* n 65.
[71] ILO Convention 107 recognizes only the occupied land. Mention in Article 11.
[72] *Supra* n 70, art. 13, cl. (2).
[73] *Id.* art. 14, cl. (1).
[74] *Id.* art. 14, cl. 3.
[75] *Id.* art. 15, cl. 2.

the indigenous peoples. Further, they shall be entitled to receive full compensation for their loss.[76] The Convention has also incorporated a penal provision to penalize any activity which causes unofficial invasion or use of the land of indigenous communities and the State shall implement positive steps for preventing such offences.

2.3. Assessing The Right to Land of Indigenous Peoples under the UN Framework

The purpose of assessment of the 'right to land' of the indigenous communities under the UN framework, United Nations Declaration on the Right of Indigenous Peoples[77] (UNDRIP) is taken into consideration as it is first of its kind which defined, recognized and protected the indigenous rights.

One of the first instances where the need for the protection of the ties of the indigenous peoples with their land was felt in international community was in the judgment of the case of Mayagna 'Awas Tingni Community v. Nicaragua,' where the court held that *"the close ties of indigenous peoples with their land must be recognized and understood as fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. For indigenous communities, their relationship with their land is not a matter of possession but a material and spiritual element.[78]"*

After the passing of the UNDRIP, the land, water and resources which were possessed by the indigenous peoples are now recognized under the Declaration. The declaration has also extended protection to those who traditionally possessed land but had lost their land to non-

[76] *Id.* art. 16.
[77] United Nations Declaration on the Rights of Indigenous Peoples, Sept 13, 2007.
[78] Mayagna Awas Tingni Community v Nicaragua, Ser. C No. 79, judgment of 31 August 2001, para 141.

indigenous persons or communities. Further, the declaration also provides for reparation for the loss of their land.

UNDRIP restricts the state from forcibly removing the indigenous peoples from their land without any prior consultation resulting in obtaining their free consent. It also provides for a just and fair compensation to be paid to these displaced from their land and if possible an option of returning their land should be provided.[79] The Declaration further affirms in Article 25 that the indigenous peoples have the right to strengthen their spiritual relationship with the land and such rights and responsibilities could be inherited by their future generations.[80]

One of the most important provisions of the Declaration dealing with the 'right to land' of the indigenous communities is Article 26. It states that the indigenous communities possesses the 'right to land' (including the embedded resources) which they traditionally owned, occupied, used or acquired[81] and entrusts a traditional ownership on them[82]. It also states that the States shall give legal recognition to these lands by respecting the traditional customs, traditions and land tenure system of the indigenous peoples.[83]

It also obligates the states to establish and implement a fair and impartial process in recognizing the 'right to land' of indigenous peoples and they should be eigible to take part in such process.[84] Further it obligates the states to ensure the protection of indigenous environment and prevent disposal of hazardous waste materials in the indigenous lands. UNDRIP only allows for military activates to be carried out in such lands in exceptional cases of large scale public interest.[85]

[79] UNDRIP, *supra* n 79, art. 10.
[80] *Id.* art. 25.
[81] *Id.* art. 26, cl. 1.
[82] *Id.* art. 26, cl. 2.
[83] *Id.* art. 26, cl. 3.
[84] *Id.* art. 27.
[85] *Id.* art. 29-30.

After assessing the right to land of indigenous peoples under the ILO conventions and the UN framework, this chapter assesses the legal protection afforded to the right to land of indigenous peoples in the jurisdictions of India and Philippines.

2.4. Assessing the Right to Land of Indigenous Peoples in India

Till date in India, the Land Acquisition Act has been the pioneer legislation which has been the backbone of land acquisition for various developmental projects leading to displacement of millions of people. Even though till date, there have been no national laws in India with regard to acquisition of private or traditionally occupied lands, or reparation to the displaced persons or families. But the constitution provides certain safeguards towards protection of rights of tribals within the territory of India.

2.4.1. Constitutional Safeguard

The Indian Constitution has laid down its mandate for the realization and protection of the rights of tribal and indigenous populations in India, who form the major chunk of the displaced population, i.e. the Fifth and Sixth Schedule of the Indian Constitution. While the Sixth Schedule[86] is applicable to the four states of the North-East India, i.e. Assam, Meghalaya, Tripura and Mizoram, the Fifth Schedule is applicable to the rest of India.[87]

2.4.2. Evolution of Indigenous Rights in India

The constitution of India has paid special attention to tribal after a detailed debate in the constitutional assembly debate. For the protection and recognition of separate administrative processes for tribal, a part in the constitution was envisaged i.e., PART 10. It deals with 'Scheduled and Tribal Areas'. The draft article 190 was numbered as Article 244[88], provides that the provisions of 5th Schedule were applicable in any state other than the state of Assam

[86] INDIA CONST. sch. 6.
[87] Id. at sch. 5.
[88] J.K. DAS, *supra* n 61, at 157.

and the provision of the 6th Schedule were applicable in the state of Assam. Subsequently, Article 244 has undergone many constitutional changes through amendment and Parliamentary legislations.

Separate financial provisions were adopted to the constitution by the virtue of Article 275 (1), which provides for grants in aid from central government for meeting the state government's schemes which are adopted for development and welfare of the scheduled tribes with the prior permission from the central government of India.[89] It was decided that the cost of such developmental schemes can be adopted by the state with prior approval from the central government for improvising the process of administration in such tribal areas.[90]

Thus, there are two types of political processes for the administration of tribal with separate provisions under the Constitution of India, one is under the 5th Schedule and another under the 6th Schedule. The former schedule provides for the establishment for the Tribes Advisory Councils and the later Schedule provides for the establishment for the District Councils. The District Councils are autonomous bodies established to implement the right of self-government. It is both an administrative as well as legislative body. But its law making power is expressly limited by the provisions of the 6th Schedule. The State legislature has and overall superintendence over the District Councils and that the executive authority of the State extends to the self-governing regions. Consequently, the Governor exercises his functions with the aid and advice from the Council of Ministers under the 6th Schedule. The District Council Courts are performing judicial functions according to the direction of the High Court. In respect to the applicability of the Parliamentary law or law enacted by the state legislature, all such laws which are not occupied by the provisions contained in Para. 3 of the 6th Schedule shall *proprio vigor* become operative in the tribal areas. All rules contained in the procedural laws which are

[89] INDIA CONST. art. 271, cl. 1.
[90] *Supra* n 88, at 159.

of universal application and accord with the principle of justice, equity and good conscience are applicable in the trial suits in the District Council Courts. The District Council is however a part of government machinery of the states, so the persons appointed by the District Council are also employees under the state government.[91] Thus, PART X of the Indian Constitution read with 5th and 6th Schedule expressly provides an exclusive attention to the welfare and administration of tribal areas.

Besides this, Article 39(a), (b) and (c) when read along with Article 48A of the Indian Constitution, it expressly recognizes the right of the tribal people to natural resources and community management of these resources. Article 39 (a) imposes constitutional obligations upon the states to secure that all the citizens (including tribal and indigenous communities). Article 39 (b) imposes constitutional obligation upon the state to secure community management of natural resources. Article 39 (c) imposes obligation upon the states to secure equitable distribution of the economy so as to prevent concentration of wealth in particular segment of the society which may lead to common detriment. Besides this, Article 48A also imposes an obligation upon the states, to safeguard and improve the forests and wildlife of the country. Thus, in spite of absence of national legislation in India, other than Land Acquisition Act of 1894 (as amended in 1984) set on colonial vintage, to defend and preserve the rights of the displaced population, the Indian Constitution expressly safeguards the tribal rights and interests by the virtue of Article 39 (a), (b) and (c) read with Article 14 (equality before law), Article 21 read with Article 19 (1) (e), which expressly safeguards the rights of all citizens (including the tribal and indigenous communities) to inhabit in any part within the territory of India along with their Fundamental Rights guaranteed under Part 3 of the Indian Constitution. But often these constitutional rights, especially, the right under Article 19(1) (e), which has

[91] *Id*. at 196.

been subjected to reasonable restriction in the interest of general public[92], are violated under the colour of general or larger 'national interest'. Further, 73rd and 74th Amendment to the Indian Constitution in 1992 and 1993 have also recognized the process of democratic decentralization by creation of Panchayats under Article 243. This essentially empowers the forest dwellers, comprising a bulk of the displaced population, in the management of common pool resources, which recognizes their right to own land and have access to common pool resources.

2.4.3. Other National Legislations affecting the Right to Land of Indigenous Peoples

There are other national legislations in India dealing with land acquisition. The security of the state demands that open spaces should be available to the army for its field firing and artillery practice. This leads to origin of another cause of displacement, which is in the interest of safety of persons likely to be harmed. As a result, the Manoeuvres, Field Firing and Artillery Practice Act, 1938 was enacted. However, the displacement under this Act is a mere dislocation for the period that the army needs it. They may be re-habited thereafter. If in the process any harm is sustained by the person or property, there is statutory provision for compensation.[93] Like other legislations, this Act concentrates power in the hands of the state but with a passing thought to what effect it might have on lives of the displaced people. It is this reluctance to acknowledge the responsibility involved that makes the law suspect.

Again hidden in the folds of the law are the extensive powers given to the state authorities enabling them to take control over the land and related resources. For the purpose of constructing and maintaining railway, the railway administration has been given the authority to construct 'in or upon, across, under or over any land, or any street, hills, valleys, roads,

[92] INDIA CONSTI., art. 19, cl. e.
[93] Usha Ramanathan, *Displacement and the Law*, ECONOMIC TIMES AND POLITICAL WEEKLY (June 15, 1996) 1487.

railways, tramways.' as it thinks proper. This has been tucked to the railways authorities under the Railways Act of 1989.[94]

Similarly, the Airports Authority of India Act was passed in 1994. Under this Act, power of compulsory acquisition of land has been prescribed for the statutory authority and the land acquired for discharge of its functions envisaged in this Act is considered to be for a public utility purpose and the Land Acquisition Act is invoked again for the acquisition.[95] The statement by the state that a purpose is a public purpose is ultimate and conclusive.

2.4.4. Doctrine of Eminent Domain

Similarly, the doctrine of 'eminent domain' asserts the right of the state over land and related resources within its territory, was perceived as a necessary right to be invoked to further the public good. This power was exercised uninterruptedly by the State under the umbrella of the legislation, the Petroleum and Mineral Pipelines (Acquisition of Right of User in Land) Act, 1962 which gave the state unchecked authority to acquire and exercise rights over the land.[96] In this way, under the camouflage of 'national development' and 'public interest', the states continued to acquire and exploit the land and natural resources.

2.4.5. Analysis of the Land Acquisition Act, 1894

The Act of 1894[97] has to be understood and judged in the light of the times it served when the totalitarian state, with the colonial mindset was exploitative in nature. Thus, the Act of 1894 clearly does not serve the new milieu. This is because, firstly, it was not basically meant to help the powerful non democratic government to procure private or occupied or unoccupied land when it wished. But the government, during that time, aimed at acquiring land for extremely

[94] *Id.*
[95] *Id.*
[96] *Id.* at 1488.
[97] The Land Acquisition Act, 1894, No. 1, Acts of Parliament, 1894 (India).

limited purpose. Secondly, in the present welfare regime of the state, the well-being of the people is its guiding spirit, as a result of which, it must intervene in every sphere of life to accord protection and to help the citizen from the cradle to grave. Thirdly, at the time of enactment of the act, as the population to be covered was small, very little land was required for construction of schools, hospitals, factories and roads. But this is unlike the present situation where the population figure has increased to more than ten times and thus the requirement of land acquisition has also increased proportionately. Lastly, at the time of the enactment of the Act, compensation could be regarded as a satisfactory answer, when there was enough land and people could go and settle where they liked. For example, in 1961, after the Rihand Dam Project, the Uttar Pradesh government told the oustees to take whatever land and wherever they wished.[98] This is no longer possible in the present scenario, where there is acute scarcity of land. Thus, in a nutshell it can be summed up:

1. In the present scenario, India's population has increased enormously, occupying almost every inch of land. There is no free land to have.
2. The state has taken on welfare and developmental goals, for which much more land is needed, than for the activities of a *laissez faire* state.
3. Independent India has become a socialist and democratic republic, whereby the government is required to consult people before taking major steps, which never existed in the colonial India.[99]

[98] VASUDHA DHAGAMWAR, THE LAND ACQUISITION ACT: HIGH TIME FOR CHANGES", IN THE "REHABILITATION POLICY AND LAW IN INDIA: A RIGHT TO LIVELIHOOD, 112. (Walter Fernandes and Vijay Paranjpye eds., Indian Social Institute & ECONET, 1997).

[99] VIJAY PARANJPYE, A REVIEW OF THE WORLD BANK'S REHABILITATION DIRECTIVES" IN "REHABILITATION POLICY AND LAW IN INDIA: A RIGHT TO LIVELIHOOD, 234. (Walter Fernandes and Vijay Paranjpye eds., Indian Social Institute and ECONET, 1997).

Main features of the Land Acquisition Act, 1894

The Land Acquisition Act is no longer appropriate or adequate for meeting the objectives of the changed situation. This colonial legislation has sharp and focused purpose to take away privately owned land for public purposes. Payment of compensation is ancillary to the basic aim. Some of the main features of this Act are namely:

1. Land is acquired for public purpose. For this pubic or individual notices are given at various stages.
2. The persons whose lands are acquired have certain rights to raise objections. But the Act confers a limited right to object to land acquisition. This right has to be exercised within one month of receiving the notice under section 4. No specific grounds of objection have been mentioned under Sec. 5-A of the Act.
3. Government can take away the lands for reasons of emergency or urgency with a much shorter notice. For reasons of urgency, a notice for 15 days is given. For reasons of emergency the Collector is required to give 48 hours' notice for vacating a building. There is neither the right nor the time of object when the government exercises these powers. In all these cases the land acquisition is permanent.[100]
4. The compensation is to be calculated in accordance to the market price of the land. The replacement costs are not taken into account.[101]
5. Loss of land is not interpreted to include damage caused to it by air, soil, water pollution or loss of access, etc. The loss is also not accessed according to the number of deprivations, the land dependent communities like tribals and indigenous varieties

[100] Section 17 (2); DR. M.K. RAMESH, "REHABILITATING THE DISPLACED: AN IMPAIRED LEGAL VISION in the reading material INTERNATIONAL AND COMPARATIVE DIMENSIONS OF ENVIRONMENTAL LAW, assembled by Dr. M.K. Ramesh, (December 2004 to June 2005).
[101] Section 11 and 23 to 34.

experience in the process of acquisition.[102] It is only the actual acquisition that is compensated.[103]

6. Loss of work and wages on other people's land or loss of land related work for example making ploughs, carts, etc. are not considered. Even the work of artisans who serve the people living on the land for example, tailors, cobblers, shop keepers, etc. are not taken into account.[104]
7. By virtue of the Land Acquisition (Amendment) Act 1984, the number of agencies that can acquire land has been increased. In the Act of 1894, only the government could acquire land. Now the public sector could acquire it directly, and the private companies can acquire through government.[105]

However, the process of land acquisition under this Act is in several stages. In the first stage, notification expressing the intention to acquire the land is issued. After this, the public functionaries performed certain activities in relation to the land that is to be acquired.[106] In the second stage, objection as to the land acquisition is to be heard from any aggrieved person interested in any land with respect to which notification has been issued under section 4(1) of the Act. Such an objection shall be addressed to the Collector in writing thereafter, he gives report with his recommendations.[107] In the third stage, the government issues order of acquisition.[108] Lastly, the fourth stage includes concluding steps to be taken for completion of the process of land acquisition and award for compensation.[109]

[102] ASHIRBANI DUTTA, *supra* note 58.
[103] *Id.* at 113.
[104] *Id.* at 111-112.
[105] *Id.*
[106] Section 4 and 5 as cited in Dr. M.K. Ramesh, *Rehabilitating the Displaced: An Impaired Legal Vision*, in the reading material of INTERNATIONAL AND COMPARATIVE DIMENSIONS OF ENVIRONMENTAL LAW, (December 2004 to June 2005).
[107] *Id.*, at sec. 5A.
[108] *Id.*, at sec. 6.
[109] *Id.*, at sec 7-16.

Thus, it could be observed from the above mentioned legal procedures itself that the legislations does not safeguard any person from their land being acquired by the government. Once the entailing body has persuaded the collector detailing the necessity of the acquisition, the proceeding can be moved in an unrestricted manner.

Also the issue of aptness of the process of land acquisition is not adequately stated, nor as the land losers are insisted to contribute in the decision making process. The existing legislation induces the persons whose lands are acquired to accept and fall in line with the conclusion reached by the collector. Non participation of the land losers at any stage of the process, was no cause for concern in the view of the undemocratic nature of governance during the British rule. This uni-linear and collector centric paradigm suited the colonial interests. The land losers rarely had the nerve to demur at the revenue administration's decision.

2.4.6. Analysis of Indian Council of Social Research (ICSSR)

According to the study of the Indian Council of Social Research (ICSSR), between 1951 and 1995, at least 5,46,794 people were displaced because of construction of irrigation and mining projects and for setting up industries. Of these, 65% of the people have not been rehabilitated till 1995.[110] The tribal in the state have experienced largescale displacement due to industrial development as well as big dams.

"Kotagada Sanctuary" situated in the tribal dominated Kandhamal district is being opposed by the resident tribal. 53% of the displaced and affected populations were tribal. The government of India announced its proposal to set up a sanctuary spreading over three blocks. In 1981. Subsequently, a noticed was issued in December 1981 for hearing objections but was not served. The same procedure was not repeated in 1985 when the notice was issued but not served

[110] Sudarshan Chhotoroy, *Different State, Same Story*, INDIA TOGETHER, http://www.indiatogether.org/2003/sep/hrt-irrigdisp.htm (accessed 26 September 2016).

until the Supreme Court's direction that came in 1996 and the administration kept people ignorant of it. But when the district administration in the same year, all of a sudden, banned shifting cultivation, cattle grazing and restrictions were imposed on the firewood collection in the proposed sanctuary, and local inhabitants were startled. Thus, the living condition of a major chunk of the population was worsened.[111] The same story has continued in Orissa over a long time in the past where the oustees have not been properly rehabilitated in the case of the projects like Hirakud, Rengali, Upper Kolab, Indravati, Gopalpur, Kashipur, etc. The social scientists, policy makers and activists have pressurized the government for a long time to formulate a policy of displacement. But in spite of coming up policy statements, the government has all along ignored the plight of the displaced, pacifying their discontent only by giving lip sympathy.

Thus, the above study reveals that firstly, there are disarrangements concerning the number of displaced persons and the official sources often underestimate the figure. Secondly, rehabilitation laws and policies of the state are inadequate from qualitative and quantitative point of view. Thirdly, in the absence of serious official rehabilitation measures and initiatives, most tribals and other landless persons, among the displaced people have to opt for the alternative to rehabilitate themselves, often resorting to environmentally destructive practices, such as cutting trees for sale as firewood, becoming wage laborers under timber contractors, migrating to tea estates, urban slums and construction sites to eventually become bonded laborers. As a result, their marginal economic status deteriorated further. Even women and children being the most vulnerable group, suffer the trauma of the development induced displacement to the maximum extent.

[111] Debranjan Sarangal, *Orissa: Struggle Against Sanctuaries*, ECONOMIC AND POLITICAL WEEKLY, http://www.epw.org.in/showArticles.php?root=1999&leaf=03&filename=158&filetyoe=html (accessed 26 September 2016)

Thus, if one tries to view the entire issue from the angle of the displaced and project affected population, these legislative efforts made by the states are definitely welcomed with applause. But they are also not free from the legislative shortcomings, where the state interest still holds the priority. Even though some nominal relief is given to these displaced peoples, but their interests are sidelined. The governments continue to exercise their discretion with unhindered supremacy, rehabilitation action plans are prepared arbitrarily. No time limitation is fixed for completion of rehabilitation proceedings. As a result, the process of displacement and expectation of the people continue to linger leading to a never ending saga. The term 'displaced persons' is not defined adequately, leaving enough space for the administration to alter this definition to suit their own needs. Apart from vesting wide discretionary power upon the state governments, absence of proper and definite guidelines or limitations for exercise of such power gives the authorities ample scope to act arbitrarily. At this juncture, one should make an effort to scrutinize the efforts made by non-governmental organizations in coming up with alternative drafts so as to serve the interest of the displaced victims.

It can be observed from the above assessment that the Constitution of India along with other relevant legislation do not provide for the right to land for indigenous peoples (Schedule Tribes). Instead, the Indian legal texts provide for land acquisition for public purpose resulting is displacement, of which indigenous peoples are mostly the victims.

2.5. Assessment of the Right to Land of Indigenous Peoples in Philippines

This part deals analyses the right to land afforded by the legislations of Philippines. For this purpose, it analyses the process of evolution of the law leading to present enactments. It critically analyses the laws in order to find out the status of the indigenous peoples with respect to their land.

2.5.1. Evolution of Indigenous Rights in Philippines

Before the Spanish colonized the territory of Philippines, there existed indigenous peoples with their traditional customary practices and their own of way of ownership over land. Basically, it would be correct to hold that "the indigenous peoples in Philippines are, to a large extent, a creation of history."[112] The customary laws of different ethnolinguistic groups differed. Among certain groups like Manobo and Hanunuo groups, the land was own collectively by the members constituting the community. Among other groups, the ownership of land was shared with the god, ancestors and the upcoming generations if the community. In groups like Subanon and Kalingas, the ownership over land could only be claimed by their gods named Apo Gumalang for the former and Apo Kabunyan for the later.[113]

The strong bonding of the indigenous peoples with their land and the natural resources embedded in the same land has led to many conflicts between the indigenous communities as some communities violated the territory of other communities.[114] As a result of which these communities have developed their own political and social structure to regulate inter community relationship ranging from mutual cooperation to settlement of disputes. In initial times, the bickering elements were absent such as 'majority minority dichotomy', problems of marginalization and discrimination. These factors emerged at the advent of Spanish colonialization.[115]

The Spanish rule was unsympathetic and forced these communities to live in 'pueblos' by implementing a policy called 'reduccion'.[116] People who denied to move into 'pueblos' were flinched into the locality. These people were called 'remontados' and 'infieles'. Certain groups

[112] W.H. SCOTT, THE DISCOVERY OF THE IGOROTS, (New Day Publishers), (1974).
[113] M.L. Aranal-Sereno & R. Libarios, *Land and Survival*, TRIBAL FORUM 11(13), (1981).
[114] S.K. Tan, *A History of the Philippines*, MANILA STUDIES ASSOCIATION (1997).
[115] ASIAN DEVELOPMENT BANK, *supra* n 56, at 9.
[116] P.J. Serra, *Laying the American Foundations: Daniel Burnham and his plans in the Philippine Islands during 1910s*, 9 (Dr. Ricardo T. Jose ed., 2016).

like 'Igorots of the Cordillera' strongly opposed the colonial imposition. As a result of this, the Spanish Colonizers termed such groups as 'tribus independientes'. "They were also labeled as barbarians and pagans."[117]

With the advancement in colonial legal regime which regulated indigenous peoples' traditional practice and possession of land, the indigenous people deliberately lost their rights over their land. The advancement in the colonial regime was marked with the introduction of the 'Regalian Doctrine'. It declared the land inhabited by the indigenous peoples are the granted lands by the King of Spain. His was entrusted with the duty of collecting taxes and enforced the policies made by the Crown. Thereafter, the King enacted 'Maura Law.' It declared that all the lands belonging to 'pueblo' fall within the category of the protected lands and belonged to the King.[118] Despite the imposition of the colonial norms, the unabsorbed indigenous communities continued to follow their traditional practices relating to the use of their land.

In 1898, by the virtue of the 'Treaty of Paris', the war between America and Spain ended. By proceeding a payment of 20 million dollars, the Philippines became an American Colony.[119] The American rule initially retained the Spanish Regalian Doctrine. Later it passed legislations which entrusted the control of state in public domain. They reasoned it due to the lack to appropriate land registration system during the Spanish colonial rule.

The below mentioned are some of the Acts passed by the American colonial rule in Philippines which regulated the land in public domain are as follows[120]:

[117] *Supra* n 113, at 10.
[118] O.D. Corpuz, *An Economic History of Philippines*, (University of Philippines Press), (1997)
[119] Treaty of Peace Between the United States and Spain, December 10, 1898, *Terms of the Treaty*, http://avalon.law.yale.edu/19th_century/sp1898.asp (accessed 18 February 2016).
[120] *Supra* n 120, at 11.

Land Registration Act, 1902: The provisions of this Act empowers the State for issuing land titles to all the legitimate claimants of the land.

Philippine Commission Act, 1903: This Act mandates that all the lands that are unregistered shall be in the public domain which is regulated by the state.

Mining Law, 1905: it empowered the American colonial government to acquire lands in public domain for the process of extraction of the resources or mining activities.

Public Land Acts of 1913, 1919 and 1925: it classified the lands in Mindanao and other areas as unoccupied and unreserved lands. It paved the path for the corporations and homesteaders to occupy those lands.

The western concept of land use was reflected from the post-colonial administration of Philippines. Its constitution of 1935 contended that "all the agricultural, timber and mineral lands of the public domain, water, minerals, coal, petroleum, all sources of potential energy and other natural resources of the Republic of Philippines are owned by the State."[121] This provision instigated several other legislations that denied indigenous peoples the right over their lands. Some of these controversial provisions were found in the 'Presidential Decree 705'[122] also known as the 'Revised Forestry Reform Code of Philippines.'

'Presidential Decree 705' restricted the ownership of the land among the indigenous peoples. It declared that "none of the lands belonging to the public domain with a slope of 18% or more to be considered as alienable and can be disposed of and any forest land having a slope of 50% shall not be considered as grazing land.[123] *The lands having 18% or more slope and has been declared as alienable and can be disposed of shall be returned for the classification of the*

[121] PHILIPPINE CONST, 1935, art. 1.
[122] PRESIDENTIAL DECREE No. 705 May 19, 1975.
[123] *Id.* chp. III.

forest land to form a part of the reserved forest, and when public requires it, necessary steps can be taken to expropriate, cancel effective titles, reject public land applications or reject occupants thereof."[124] The indigenous peoples inhabiting in Cordillera were the most disadvantaged among other groups as most of their land was situated in mountain slopes which felt under '18% slope rule.'

The reformed Constitution of Philippines, 1987 also reserved the 'Regalian Doctrine' which was introduced by Spanish colonial rule. It declares that *"all lands of the public Domain, water, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife flora and fauna and other natural resources owned by the State."*[125] Although the constitution of 1987 retained the 'Regalian Doctrine,' but at the same time, it has recognized the indigenous communities within its agenda of national unity and development.[126] It has also recognized the religious differences between the indigenous communities and have granted autonomous regions for Muslim population in Mindanao and Cordillera.[127]

But, the mere constitutional provisions fundamentally could not change the situation of the indigenous peoples. The purpose of the constitutional provisions was defeated by implementation of Government policies in the land of indigenous peoples.

The NIPAS Act was implemented in 1992 with an intention to provide safeguard to the endangered or on the verge of getting endangered plants and animals within the territory. Although, its aim was to conserve the biological resources, but it had adverse impact on the livelihood of the indigenous peoples inhabiting in such areas. The Act declares a particular patch of land with endangered plants and animals as National Parks and is entrusted upon the

[124] *Id.* sec. 15.
[125] PHILIPPINE CONSTI. 1987, art. XII, sec. 2.
[126] *Id.* art. II, sec. 22.
[127] *Id.* art. X, sec. 15-19.

control of the State. But the indigenous peoples inhabiting in such area, or nearby places and are dependent upon the forest land for their livelihood has very limited access to it. The provision for the public participation in management of forest lands seems vague. The provision confines public participation in a first level of consultation and has no provision for planning and implementation.[128]

The implementation of the Mining Act in 1995 allowed the control of natural resources within the territory of Philippines to the transnational and local mining corporations. These mining activities have led to massive displacement of indigenous peoples from the mining areas. This also created a problem for rehabilitation of those displaced indigenous communities like 'B'laan' of North Cotabato, 'Aetas' from Central Luzon and some groups in Cagayan Valley.[129]

The massive reforestation activities carried in the Philippines is funded by multilateral financial institutions which are involved in commercial plantations. These programs encroach the lands of the indigenous peoples which decreases their available area for cultivation. And the inhabitants are insisted to plant certain trees in the encroached areas.[130] People are often displaced and provide resistance to such reforestation program but were of no use.

Following the Constitution of 1987, the 'Indigenous Peoples Rights Act' was enacted. It is a groundbreaking legislation that has recognized the rights of the indigenous communities and has changed the course of history in Philippines.

[128] R.D. Rovillos, *Indigenous Perspectives*, in the AETA COMMUNITIES AND THE CONSERVATION OF PRIORITY PROTECTED AREAS SYSTEM PROJECT, (Tebtebba Foundation, III (I)), (2000).
[129] J. Guan & R.B. Guzman, 1999. *IPRA: Legalizing Dispossession,* (IBON Special Release, No. 42), (1999).
[130] K.M. Gaspar, *The Lumad's Struggle in the in the Face of Globalization*, (Alternate Forum for Research in Mindanao), (2000).

2.5.2. Analysis of The 'Indigenous Peoples Rights Act' (IPRA), 1997

This Act[131] was enforced in October 1997 during the tenure of President Fidel V. Ramos. It recognizes the rights of indigenous peoples and addresses their insufficiency as well. Its objective is to alleviate the plight of the indigenous peoples and to correct the past wrongs which led to dispossession of their land and discrimination against them. This legislation was further strengthened in 1998 by implementing Rules and Regulations. A better elaboration with regard to the recognition of the indigenous rights could be made in a fourfold structure constituting 'recognition and protection of their ancestral domain'[132], 'self-governance and empowerment'[133], 'cultural integrity'[134], and 'social justice and human rights.'[135]

For the purpose of the research, chapter III of the Act shall be assessed which deals with the right to ancestral domain. The Act in its Chapter III, provides for the right of the indigenous peoples over their 'ancestral domains' and 'ancestral lands'.

The definition for 'ancestral domains' under the Act reads as *"subject to Section 56[136] hereof, refer to all areas generally belonging to ICCs/IPs comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possessed by ICCs/IPs, by themselves or through their ancestors, communally or individually since time immemorial, continuously to the present except when interrupted by war, force majeure or displacement by force, deceit, stealth or as a consequence of government projects or any other voluntary dealings entered into by government and private individuals/corporations, and which are necessary to ensure their economic, social and cultural welfare. It shall include*

[131] The Indigenous Peoples Rights Act, 1997, (Republic Act No. 8371).
[132] *Id.* chp. III.
[133] *Id.* chp. VI.
[134] *Id.* chp. V.
[135] *Id.* chp. VI.
[136] Article 56 provides for 'Existing Property Rights Regimes.'

ancestral lands, forests, pasture, residential, agricultural, and other lands individually owned whether alienable and disposable or otherwise, hunting grounds, burial grounds, worship areas, bodies of water, mineral and other natural resources, and lands which may no longer be exclusively occupied by ICCs/IPs but from which they traditionally had access to for their subsistence and traditional activities, particularly the home ranges of ICCs/IPs who are still nomadic and/or shifting cultivators.[137]*"*

Further the Act refers 'ancestral lands' to *"the land occupied, possessed and utilized by individuals, families and clans who are members of the ICCs/IPs since time immemorial, by themselves or through their predecessors-in-interest, under claims of individual or traditional group ownership, continuously, to the present except when interrupted by war, force majeure or displacement by force, deceit, stealth, or as a consequence of government projects and other voluntary dealings entered into by government and private individuals/corporations, including, but not limited to, residential lots, rice terraces or paddies, private forests, farms and tree lots.*[138]*"*

The Act also specifies that the indigenous communities bear the responsibility to protect and preserve their ecology. They can have direct access to the management system of their inland waters and air space.[139] The Act states that the ancestral lands includes territories which covered both the physical environment as well as the spiritual and cultural bond with the area.[140] The Act entrusts the indigenous peoples with the traditional ownership of the land which cannot be destroyed or disposed of as it belongs to all the generations of mankind.

[137] IPRA, *supra* n 128, sec. 3, cl. a.
[138] *Id.* sec. 3, cl.b.
[139] *Id.* chp. III, sec. 7, cl. f.
[140] *Id.* chp. III, sec. 4.

The Act also envisages a penal provision which provides that the unauthorized and unlawful intrusion into the ancestral domain violates the indigenous peoples' right to land and shall be punishable under law. It also obligates the states to take necessary measures to stop such intrusions into indigenous lands.[141] The indigenous peoples should be provided with the 'certificate of ancestral domain' which recognizes their native title over their land.[142]

2.6. Conclusion

After assessing the international and national legal texts, it can be observed that there is difference in the protection afforded under the ILO conventions and the UNDRIP. Article 10 of UNDRIP when compared with the analogous provisions of ILO conventions, it seems that UNDRIP provision is much more concrete. ILO Convention NO. 169 states that the indigenous lands can be acquired for public interest whereas, the UNDRIP provision does not provide any exceptional case where the indigenous lands can be acquired. It provides an absolute interest of indigenous peoples over their land which is inseparable from them. From the above assessment, it could be noticed that India ratified ILO Convention No. 107 whereas Philippines ratified ILO Convention No. 169. This can be understood as India's lack of interest in safeguarding the rights of indigenous communities as ILO Convention NO. 169 is the revised and progressing version of ILO Convention No. 107.

From the comparative assessment of the protection of right to land of indigenous peoples in India and Philippines, it seems that the protection afforded in Philippines is nowhere comparable to that of India. Although, India voted in favour of UNDRIP but, as of now, it has not provided exclusively for right to land of indigenous peoples, rather, it provides that any land within the territory can be acquired for public interest. On a pragmatic approach, it can be

[141] *Id.* sec. 10.
[142] *Id.* sec. 11.

understood that it's the State who will determine the public interest. It implies that in India, the State has the absolute power to acquire private or indigenous lands.

On contrary, Philippines has one of the best laws protecting the indigenous rights in general and their 'right to land' in particular. The laws of Philippines comply well with UNDRIP, in fact, its legislations have provided better safeguards than provided under UNDRIP such as the provision for providing the indigenous peoples with 'certificate of ancestral domain' for recognizing their native title over the land.

Chapter 3 – Assessment of The Right to Reparation of Indigenous Peoples

This chapter agrees with the fact that a much research has been done in the field of the 'right to reparation.' For this purpose, this chapter critically examines the remedies afforded by the international legal instrument. Thereafter, it examines the reparation policies in the jurisdiction of India and Philippines. Whether their reparation policies are adequate to repair the loss suffered by indigenous peoples due to loss of their land? If not, then what are the reasons? Whether the national legislations comply with the aims and objectives of UNDRIP?

Throughout the world, it is found that the efforts of the governments to rehabilitate the displaced people is a proper and integrated manner have been far from satisfactory. The relocation of the displaced people has been flawed in many cases due to lack of proper socio-economic planning. Resettlement measures often fail to restore, let alone improve, the social and economic wellbeing of displaced people. Often the resettlement packages provided by the governments hardly covers 20-25% of the displaced population in the true sense of the term. As a result, displacement has always been a curse for the poor and marginalized all over the globe. In almost all resettlement operations, the majorities of displaced persons have landed up with reduced incomes, less land than before, less working opportunities, inferior housing, less access to common property resources such as fuel wood and fodder, grazing land, burial ground, space for woodlot and community pond.[143]

[143] PROF. A.B. OTA, DEVELOPMENT PROJECTS & DISPLACED TRIBALS: AN EMPERICAL STUDY, 12, (SC & ST Research and Training Institute), (2010).

When displaced people get cash compensation for the loss of their land, it is invariably far lower than the cost of replacement of land. Sometimes, this is because of the value of the land is estimated according to outdated tax assessments. At other times, it is because of the inflation in the years between the survey of the land to be occupied and the actual payment. The land compensation received may also be insufficient because corrupted officials or other middlemen skim off a cut for themselves.[144] There is a unanimous view that giving land for land is much better option than cash compensation. But even when replacement land has been given, it is often inadequate for similar reasons, as people do not get decent cash compensation and lack legal title to all land they cultivate due to improper land records.[145]

In such a backdrop, it is crucially important to undertake an empirical study among the displaced tribals in respect of completed projects so that their livelihood restoration status and the factors responsible for non-restoration of their livelihood can be identified. Such a study will have a lot of policy implications too in the sense that it will be extremely helpful to come up with specific recommendations for ensuring effective resettlement and rehabilitation of tribals. It is expected that such a study will be able to identify the critical issues associated with poor rehabilitation and resettlement of the tribals and will help the policy makers to reformulate and modify their strategy for sustainable rehabilitation and resettlement without infringing on the culture of the tribal communities.

This chapter begins with elaborating the idea behind the concept of reparation. Thereafter, it deals with the terminology and the notion of 'reparation.' Further, this chapter questions the effectiveness of the international and national policies for 'reparation of indigenous peoples'

[144] *Id.* at 13.
[145] *Id.*

and examines it in order to portray their effectiveness upon implementation. It seeks to find out the adequacy of legislations in this field.

3.1. Assessing 'Reparations' as a Legal Right

3.1.1. Choice of terminology

This chapter focuses on the aspects of substantive redress which can also be termed as the remedies for the loss caused. The term 'remedies' is much more wide-ranging than the term 'reparations.' The victim's right to kinds of remedies, in this paper the victims are referred to the indigenous peoples who are being victimized by the State governments, includes rights such as 'right to equality', 'access to justice', 'adequate and effective reparation for loss suffered' and 'access to relevant information concerning violations and reparation mechanisms.'[146] The term 'remedies' has a much broader scope than that of the term 'reparations', and it goes afar to examine the description for the justice of indigenous peoples which has occurred in the past and is in present times getting transformed into tangible methods of redressal and also further explores to what extent these forms of redress serve the expectations of the victims.

The term 'reparation' can be considered as a part within the meaning of the term 'remedy' as it appeals in mind of substance rather than procedural aspect but the term 'remedy' and signifies the application of both. The idea of justice develops in situations where reparations are pertinently granted.

Originally the term 'reparation' was superlatively suited for demonstrating the idea explained by the use of a single word for 'making good the loss', but the classical international law reflects to a different segment which is indirectly related to the matter of remedies for

[146] Revised Final Report by Mr. Joinet pursuant to Sub-Commission decision 1996/119, UN doc., *"Question of the impunity of perpetrators of human rights violations including civil and political rights."* E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997, para 26.

abusing the indigenous rights and the means used by the States were very much complex through which the states used to repair the breaches of the international obligations for which they are responsible.[147] It is the term which predominantly belongs to the dialects of obligations of states in their shared relations on the matter of reparations for war damages,[148] which is typically an aspect of state to state communications in international law. The term 'reparation' is not absolutely peripheral to the discourse of international human rights laws. It is commonly used in the United Nations as a concept which is normally referred to the rights to the victims of violations of international human rights norms.

3.1.2. Notion of Reparation

In the discussion relating the indigenous people, "the notion of reparation used in the framework of state responsibility may be adapted to the subject of remedial justice for human rights violation.[149] The measures aimed at restoring justice trough wiping out all the consequences of the harm suffered by the people concerned as the result of a wrong act and by replacing the condition which could have existed if the wrong had not been produced are thus suitable of being considered as reparations.[150] In human rights context, the objective of 'reparation' delivery of justice by rectifying the consequences of the wrongful acts by the States that has happened or is happening to the victims.[151]

3.1.3. Reparation of Indigenous people

Traditional and ancient indigenous laws contemplate the principles of natural justice, equity, impartiality, reasoning, merci, remedy, expeditious decision making, restitution and reparative

[147] D SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW, 7 (2ND EDITION, OXFORD 2005).
[148] 4 I Seidl-Hohenveldern, *'Reparations'*, in ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 178 (R. Bernhardt (ed.) North Holland), (2000).
[149] FEDERICO LENZERINI, REPARATIONS FOR INDIGENOUS PEOPLES IN INTERNATIONAL AND COMPARATIVE LAW: AN INTRODUCTION 13 (Oxford University Press, n.d.).
[150] Factory at Chorzow case, 1928, PCIJ, Series A, No. 17, 47.
[151] FEDERICO LENZERINI, *supra* n 4, at 10.

measures for atrocities committed against the indigenous people. This chapter shall try to ascertain the opportunities that exist for indigenous peoples for accessing effective reparations at national and international level on the basis of relevant state's and UN practices.

The Draft United Nations Declaration on the Rights of Indigenous Peoples,(UNDRIP)[152] was approved by the UN General Assembly in its 61st Session in March 2008, endorses and affirms various indigenous rights. It proclaims that the indigenous peoples have their 'right of self-determination' and are equal as all other peoples and are also free from any form of discrimination in exercising such rights.[153] The declaration also affirms that *"the indigenous peoples have suffered from historic injustices as a result of colonization and disposition of their lands and resources which in fact prevented them from exercising their right to development in accordance with their own needs and interests."*[154] The indigenous peoples possess all the human rights and fundamental freedom enshrined in the 'UN Charter', 'Universal Declaration of Human Rights' (UDHR) and this is also envisaged under Article 1 of the Declaration as it is being enjoyed by the other nationals of a State. The indigenous peoples under the Declaration are granted with other rights which are collective in nature, such as, to live with peace and security and shall securely remain separate from distinct peoples in addition to their right to life, mental and physical integrity and liberty.

The reparation aims at eradicating the consequences of wrongful acts and providing for guarantees for non-repetition of grave human rights breaches. "Indigenous people need not only to have these rights recognized but also to have them concretely implemented." Though practices exist at international level for reparation of indigenous peoples but the application of the relevant customary international law in Asian countries needs to be realized. In this respect,

[152] UN Declaration on the Rights of Indigenous Peoples, of (30 June 2006), 58, UN doc A/HRC/1/L.10.
[153] *Id.* art. 2.
[154] *Id.* Preambular para. 5.

"indigenous peoples wishing to secure and advanced their rights are faced with an uninviting choice: they can take their claims before hostile domestic courts that do not recognize favourable existing international law, or they can advance their claims before more sympathetic but largely toothless international bodies without hope for resulting enforcement of whatever decree they might win.[155]"

Setting aside the fact that recourse to international bodies cannot be relied upon without exhausting the available local remedy, international remedies are barely available for Asian countries with main exception of UN Human Rights Council and Committee against Torture, and only with respect to the countries which have already ratified the optional protocol to ICCPR[156] and the Torture Convention.[157]

3.2. 'Reparation' under International Legal Instruments

The major international instrument dealing with the remedies available for indigenous peoples for loss of their land is UNDRIP. Though it does not recognize the term 'reparation' but it connotes the term 'restitution' which has the same meaning. It stipulates that the state shall provide effective redress through efficient means which includes restitution to the owner of the land.[158] Article 11 (2) provides that:

"States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."

[155] *Supra* n 6, at 302.
[156] Optional Protocol to the International Covenant on Civil and Political Rights, 1996, http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx (accessed 10 December 2015)
[157] Convention against Torture and other Cruel, Inhumane or Degrading treatment or Punishment, 1984, http://www.ohchr.org/EN/ProfessionalInterest/Pages/CAT.aspx (accessed 10 December 2015)
[158] *Supra* n 2, art. 11, cl. 2.

Further, it stipulates that where the restitution is not possible, in that case, just and fair compensation shall be paid for land and resources that they owned from a long past. This has to be done with prior consultation and obtaining their free consent.[159] Article 28 of UNDRIP provides that:

"Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent."

The wordings of the above stated provisions give a very strong sense of the role that restitution plays in protecting the indigenous rights. Another pair of international legal instrument dealing with reparation of indigenous peoples are ILO Convention No. 107 and No. 169. But the sense of reparation is very weak in the connotation of Convention No. 107 as it does not recognize the term 'restitution' or any other similar term. It provides that, the person whose land is acquired shall be provided with land at least equal to the land previously owned. Alternatively, they can be recompensed via money of equal amount. Any other loss occurred in that process shall be compensated.[160] Article 12 (2) of Convention No. 107 provides that:

"When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist and where the populations concerned prefer to

[159] *Id.* art. 28, cl. 2.
[160] *Supra* n 65, art. 12, cl. 2.

have compensation in money or in kind, they shall be so compensated under appropriate guarantees."

Article 16 of Convention No. 169 also contends the same but protects the right in a better way than the previous convention. It stipulates that the in cases where its possible to return the land, then their land shall be returned. If it's not possible then, an agreement can be made for the same.[161] Article 16 (2) of Convention No. 169 provides that:

"When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees."

From the above assessment, it can be observed that the latest international legal instrument i.e., UNDRIP provides in a concrete sense for the right of reparation of the indigenous peoples. Whereas, the ILO Conventions provide a narrower scope. However, I could be observed that the scope of the right to reparation of the indigenous peoples is gaining better recognition.

3.3. Assessment of the Right to Reparation of Indigenous Peoples in India

To understand the reparation policies in India, this part of the chapter examines a union legislation, a State Policy and National Resettlement and Rehabilitation Policy. For this purpose, this part examines the Compensation Provision envisaged in the Land Acquisition Act, 1984, Orissa Rehabilitation and Resettlement Policy and National Policy for Resettlement and Rehabilitation.

[161] *Supra* n 68, art. 16, cl. 2.

The subject of 'Land' is mentioned in the Concurrent List (3rd List) of the Constitution of India. Both the state government as well as the central government are eligible to exercise power over the subject but in case of any conflict the decision of the central government shall prevail over the decision of the state government. Both tiers of the government can acquire lands for 'public purposes.' In 1902, Shri. M. Visvesvarya contended that whose land was submered for irrigational purposes shall be resettled within the operational area of the same irrigational projects.[162] As land is a matter of union as well as state, any matter arising out of 'land' shall be dealt by both the tiers of government.

This part aims to portray the relevant legislations relating to reparation for the displaced and particularly for the indigenous people within the territory of India. Thereafter, analyze them in order to find out their competency.

3.3.1. Analysis of Eligibility for Compensation under Land Acquisition Act, 1984

The 'Land Acquisition Act' of 1984 is considered for analysis as it is the most important piece of legislation dealing with acquisition of land. This Act symbolizes the State's power to acquire private lands. This entrusts the State with authoritative control over land within the national territory. This Act provides for payment of compensation for the acquired land to the title-holders of the land. Although the legislation allows for the payment of the compensation, but it fails to consider the volume of the displaced population and its adverse economic and social impacts. Thus, it can be observed that this legislation does not provide for 'rehabilitation and resettlement.'[163] This legislation fails to return the acquired land to its title-holder. It can be held that once the land is acquired by the government for public purpose, the people are evicted forever from their land.

[162] V. Paranjpye, *High Dams on the Narmada*, 179*(*A Holistic Analysis of River Valley Projects*)*, (1990).
[163] W. Fernandes, *The Land Acquisition (Amendment) Bill, 1998, Rights of Project Affected People Ignored*, ECONOMIC AND POLITICAL WEEKLY 2703, (October 17-24, 1998).

It would be untrue to hold that the Act does not acknowledge the private land holders with their titles over their land. But this Act disregards the occupants of the government lands and makes them ineligible to claim for compensation when they are evicted from their land in which they have been inhabiting since ancient times. For example, the farmers cultivating in the forest land are not eligible to seek compensation upon eviction as the farmer does not possess the legal title of the land.

The Act takes into cognizance the prevalent market rate of the lands acquired for 'public purposes' as the only criteria for estimating the cost of compensation. But a fixed market price of the land barely exits in outskirts of the cities. In such situations, it would be absurd to expect a fair amount of compensation for the aggrieved persons. The Act does not consider the actual resettlement or replacement value of the land. It is up to the discretion of the district collector to estimate the market value of the lands acquired. And generally their estimation price lies much less that the actual compensatory land price. A sense of arbitrariness could be felt when the prices of the lands, houses and gardens are analyzed in monetary terms. Duse to this, there is a wider scope for undervaluation of the immovable properties. This instigates the government officials to exercise corrupted practices in valuating and distributing the pecuniary compensation. The actual cost is beyond the boundary of the compensation provided by the Land Acquisition Act.

For example, almost after 40 years, the displaced persons of Bhakra Nangal Project are still struggling. The compulsory and forceful eviction of persons from their lands makes them feel cheated even if a very genuine compensation is paid to them as reparation cost.[164]

[164] A. Menezes, *Compensation for Project Displacement: A New Approach,* ECONOMIC AND POLITICAL WEEKLY 2466, October 26, 1991).

Due to the abovementioned circumstances, a wider scope for fraud and corruption opens up. The cultivators belonging to the indigenous communities are not made aware of their rights and are often paid less than the market price. In few cases, the persons holding huge chunk of lands manages to get compensation by bribing government officials leaving the others in the same situation helpless. This shows that the system is further corrupted as it is hijacked by few privileged and resourceful minorities.[165]

Executive and Judicial Procedure under Land Acquisition Act, 1984

Under the 'Land Acquisition Act,' the legitimate owner of the land can file a petition objecting the land acquisition carried on by the government before the district Collector within 40 days of the notification for the acquisition of the land. In such case, the Collector is the one who issues the order for land acquisition[166] and himself is the adjudicating officer. This seems obnoxious as the executor of the law is the defender of the same.

3.3.2. Analysis of the Orissa Rehabilitation and Re-Settlement Policy

The Orissa Rehabilitation and Re-settlement Policy was initially the guidelines formulated for Rengali Dam was amended and developed into a rehabilitation package for all medium and major irrigation projects and promulgate through a Government Order on 20th April, 1977.[167] Prior to the present policy, the other Government Orders that followed were:

4 Rehabilitation Policy for the Displaced Persons of the Rengali Multipurpose Project, Resolution No. 18473, dated 20.5.1978;

5 Rehabilitation of the Displaced Persons of Different Major and Medium Water Resources Projects of Orissa, Resolution No. 31888, dated 21.8.1990;

[165] *Id.*
[166] Land Acquisition Act, 1894, sec. 18.
[167] Resolution No. 13169.

6 Rehabilitation Policy for different Irrigation Projects, Resolution No. 13118, dated 15.4.1992 (Govt. of Orissa, 1993).

Finally, in 1994, the Government of Orissa, Department of Water Resources, the main displacing agency , puts all these orders together and formulated a comprehensive policy on resettlement and rehabilitation known as '*The Orissa Resettlement and Rehabilitation of Project Affected Persons Policy, 1994,'* which was promulgated on August 27, 1994.[168] Thereafter, Odisha Rehabilitation Policy, 2006 was implemented and is applicable till date.

Limitations

In spite of these positive features, the *Orissa Rehabilitation Policy,* 2006 has a number of limitations. These are as follows:

- The basic assumption of the Orissa Policy is that it considers displacement as inevitable. The Policy has no provision meant to minimize displacement or a stipulation that a search be made for non-displacing or least displacing alternatives before choosing a people displaying project.
- Till date, the state government has expressed no intention of enacting the policy into a law. So there is no indication of this policy to ultimately formulate into a law.
- This policy does not speak of rehabilitation as a right of the displaced persons. Thus, even when the displaced persons are resettled, it remains a welfare measure, but not a matter of execution of right.
- Another serious shortcoming of this policy is that the mortgage, debt or other encumbrances on the land held by the displaced persons or project affected persons at the time of land acquisition, are deemed to be transfer to the land allotted to them at the

[168] ANIRUDHA DEY, *A Critique of Orissa Rehabilitation Policy*, in the REHABILITATION POLICY AND LAW IN INDIA: A RIGHT TO LIVELIHOOD, 221.

rehabilitation site. This adds on to the misery of the displaced people, as the compensation which is meant for future resettlement gets used up to pay-off these liabilities and little remains for the future.

- The basis of acquiring land under this policy is "The Land Acquisition Act, 1984", whose underlying principles are cash compensation and market value that are relevant only to title holders (ownership of land document holders). This policy does not make adequate attempt to go beyond it. For example, the policy does not spell out any compensation to be paid for the loss of trees.[169] For compensation in respect of "objectionable encroached land", the onus is on the encroacher to prove its undisputed occupation for more than 30 years. Satisfying this requirement and proving this criterion is extremely difficult for those who have enjoyed traditional rights over decades, and in the case of tribal, over generations. Besides this, the unobjectionable encroachers will get only up to one acre of land, if the encroached land is more than one standard acre. Thus, they are not treated at par with the Patta holders and are usually discriminated against.
- At the same time this 2006 policy does not even attempt to define the term 'public purpose'. So the colonial principle of 'eminent domain' continues to be the guiding principle. Though the policy provides for people's participation through the participatory rural appraisal exercise, the committees constituted for various purposes under this policy are dominated by bureaucrats and governmental representatives.[170] As a result, the policy fails to fulfil the popular common expectation of democratic participation of people at all level but continues to satisfy the governmental greed under the colour of the 'doctrine of eminent domain.'

[169] *Id.*
[170] *Supra* n 61, at 159.

- The Policy covers mainly economic aspects. The deprivation of common pool resources of the displaced or project affected persons, loss of their community support base, amenities and services, socio-cultural relationships, institutions, psychological stress and strain, etc. are not taken into consideration.

So the above shortcoming s of the Orissa Policy clearly reveals that this policy is an effort to get funds from the World Bank at one end, and to stop agitation of the displaced people at the other hand by giving them few sops. One has to go far beyond it to make it beneficial for the tribals and other disadvantaged groups in the informal sector. So long as this policy continues to take placement for granted, it will fail to make any remarkable progress.

3.3.3. Quest for Reparation

Samatha v. State of Andhra Pradesh[171]

The applicant in this case is Samatha, a NGO working in the scheduled areas of Andhra Pradesh filed a complaint against the state government for granting mining leases in tribal lands of the scheduled areas to private mining companies. This led Supreme Court of India to give a landmark judgment in July, 1997 which was decided by a three judge bench who ascertained that Borra reserved forest areas which consists of fourteen villages, in which the state government has granted mining leases to several private persons who are non-tribal is a listed area in the Ananthagiri Mandal of Visakhapatanam District of Andhra Pradesh,[172] declared that the state government shall be considered as a legal person since government lands, tribal lands and forest lands in the listed areas cannot be leased out to private companies for mining or other industrial activities. Thus the state government was asked to ban all industries from mining in all scheduled tribal areas. J. Ramaswamy held that: *"the objective of the fifth and sixth schedule of the constitution is not only to prevent the acquisition, holding or disposal of land in the*

[171] Samatha v. State of Andhra Pradesh and Others, 1997 Supp(2) SCR 305.
[172] *Id.* at para 4.

Scheduled Areas by the non-tribals from the tribals or alienation of such land among non-tribals but also to ensure that the tribals remains in possession and enjoyment of their lands in Scheduled areas for their economic empowerment, social status and dignity of their person.[173]"

Recognition that the land located in the scheduled areas cannot be reassigned to anyone who is not a member of the scheduled tribe is a landmark finding of the Supreme Court of India with respect to indigenous rights. Appeals were made but was subsequently rejected. In terms of concrete reparation, in the end the people concerned obtained compensation for the amount of 150,000 INR per acre of wetland leased by the government in place of the originally offered sum of 1,500 INR per acre.[174]

3.4. Assessment of the Right to Reparation of Indigenous Peoples in Philippines

This part of the chapter illustrates the provisions for reparation in the legal texts of Philippines. There after it examines the undermentioned provisions and finds out whether the laws implemented are adequate in properly making good the loss suffered by the displaced indigenous peoples.

3.4.1. Analysis of National Legislations dealing with Reparation

The primary provision dealing with the reparation for loss of their property can be traced from the Philippine Constitution of 1987. In its Article III i.e. Bill of Rights at Section 9, the constitution states that:

"Private property shall not be taken for public use without just compensation.[175]"

[173] *Id.* at para 111.
[174] See International Fund for Agricultural Development (IFAD), *Case Study: The Struggle for the Adivasis in Visakhapatanam District, Andhra Pradesh, Central India to Recover Tribal Lands*, INTERNATIONAL FUND FOR AGRICULTURAL DEVELOPMENT (2003), http://www.ifad.org/ngo/events/2003/tauli.ppt (last accessed 10 December 2015)
[175] PHILIPPINE CONSTI. 1987, art. III, sec. 9.

The Philippine Constitution further protects the rights of the urban and rural poor dwellers holds that their dwelling property shall not be taken in anyway other than in activities carried on in accordance with law. In the case, they are evicted or their dwelling property is demolished, their resettlement should be made after consulting with them and with the community members where they are planned to be resettled. The Constitution in its Chapter XIII under Urban Land Reform and Hosing part at Section 10 states that:

"Urban or rural poor dwellers shall not be evicted nor their dwellings demolished, except in accordance with law and in a just and humane manner. No resettlement of urban or rural dwellers shall be undertaken without adequate consultation with them and the communities where they are to be relocated.[176]*"*

The Constitutional provisions are general in nature and applies to all the nationals of Philippines. But it does not apply to indigenous peoples specifically. Further in 1991, the Republic Act No. 716 was enacted which was cited as *Local Government Code of 1991*[177] strengthened the reparation of victims by restricting the powers of the states to acquire private property. The Act holds that the local government may exercise the power of 'eminent domain' for acquiring lands for the interest of the general public but, this power can only be exercised after making a valid offer to the owner which he subsequently denies. Section 19 of the Act states that:

"A local government unit may, through its chief executive and acting pursuant to an ordinance, exercise the power of eminent domain for public use, or purpose or welfare for the benefit of the poor and the landless, upon payment of just compensation, pursuant to the provisions of the Constitution and pertinent laws: Provided, however, That the power of eminent domain

[176] *Id.* at art. XIII, sec 10.
[177] Local Government Code of 1991 (Republic Act NO. 7160), sec. 1.

may not be exercised unless a valid and definite offer has been previously made to the owner, and such offer was not accepted.[178]*"*

Furthermore, the concept of 'reparation' was strengthened by the enactment of Republic Act No. 7279 and The Act to Facilitate the Acquisition of Right-of-Way, 2000. The primary objective of the Act No. 7291 was uplifting the living situations of the displaced citizens by providing them with well-mannered housing conditions at reasonable cost and providing sufficient employment opportunities.[179] The Act also provides that resettlement areas along with basic services and facilities shall be provided to the homeless or underprivileged by the local wings of the government in association with National Housing Authority, The Housing and Land Use Regulatory Board, the National Mapping Resource Information Authority and the Land Management Bureau.[180]

The Act No. 8974 of 2000 is framed in conformity with Article III, Section 9 of the Philippine Constitution. It states that *"the State shall ensure that the owners of real property acquired for national government infrastructure projects are promptly paid just compensation.*[181]*"* The Act also provides in details for the standards for the assessment of the value of the land which considers the following as the relevant standards- the classification and use for which the property is situated; the developmental cost for improving the land; the value declared by the owners; current selling price of the similar land in the vicinity; shape of land, tax declaration and zonal valuation of land.[182] The Act also states that the government shall develop squatter

[178] *Id*. at sec. 19.
[179] Urban Development and Housing Act of 1992 (Republic Act No. 7279), sec. 2.
[180] *Id.* at sec. 8.
[181] An Act to Facilitate the Acquisition of Right-of-Way of 2000 (Republic Act No. 8974), sec. 1.
[182] *Id.* at sec. 5.

relocation sites through the National Housing Authority in coordination with the local government units.[183]

The above mentioned national legislations provided for reparation of those who have lost their land or their land has been occupied by the State by exercising its power of eminent domain. But the Indigenous Peoples Right Act of 1997 was the first national legislation which recognized and protected the rights of the indigenous peoples. The Act sets conditions for acquiring indigenous lands.

Other relevant legislations important to understand the process of reparation in Philippines is the Executive Order (EO) No. 1035 of 1985. The EO No. 1035 lays down the activities preparatory to acquisition of property,[184] the procedure for acquisition of property[185] and the assistance to be provided to the displaced occupants of the land.[186] The assistance to the displaced occupants include the relocation and financial assistance to those who are affected by property acquisitions with the cooperation of Ministry of Agrarian Reforms and other concerned agencies.[187]

3.4.2. Analyzing Policy for Land Acquisition, Resettlement and Rehabilitation

Other than the national legislations, the Philippines has also a Policy for Land Acquisition, Resettlement and Rehabilitation. The first of its kind was formulated in 1999. The main reason for its formulation was for the National Road Improvement and Management Program. This program was assisted by the World Bank. The Policy of 1999 was adopted with some

[183] *Id.* at sec. 9.
[184] Executive Order No. 1035 of 1985, Title A- Activities Preparatory to Acquisition of Property, sec. 2-5.
[185] *Id.* at Title B- Procedure for Acquisition of Property, sec. 6-8.
[186] *Id.* at Title D- Assistance to Displaced Tenants/Occupants, sec. 17-20.
[187] *Id.* at sec. 17-18.

modifications in order to comply with the laws of financial institutions such as Asian Development Bank (ADB).[188]

There was a need for a second edition of such policy in 2004. The need was a felt for the implementation of 6th Road Project in Philippines. For this purpose, the second edition of the Land Acquisition, Resettlement and Rehabilitation (LARR) Policy was adopted in 2004. This policy was also applied to Japanese Bank International Cooperative (JBIC).[189]

The third edition of the Policy was formulated to strengthen the resettlement plans. This policy safeguards the consistency in the set standards. This policy comprises of principles and objectives of involuntary resettlement policy. It also envisages a legal framework providing for compensation, entitlements and implementation procedures for processing the complaints. Under this policy, the state shall minimize the permanent acquisition of private lands as the bargaining powers of the landlords are weak alternative, it shall find other feasible options to avoid physical and pecuniary displacement. It further provides that the state shall extend utmost care towards the persons who have lost their lands as they might have a traumatic experience.

With the Second National Road Improvement Project, the Land Acquisition, Resettlement, Rehabilitation and Indigenous Peoples (LARRIP) Framework was implemented. It was enforced in conformity with the Article III, Section 9 of the Philippine Constitution of 1987 and is based upon Republic Act No. 8974.[190]

[188] Philippines Second National Roads Improvement Project: Environmental Assessment (Vol. 34) : Land acquisition, resettlement, rehabilitation, and indigenous peoples (LARRIP) policy framework, available at http://documents.worldbank.org/curated/en/220101468095657878/pdf/E14670V340EAP00Box385359B00PUBLIC0.pdf (accessed 10th October 2016).
[189] *Id.*
[190] *Id.*

3.5. Conclusion

The assessment of the right to reparation of the indigenous peoples envisaged in the international legal texts and national legislations of India and Philippines gave a strong sense of the scope of the right. It could be observed that there is a gradual growth in recognition of this right in the international forum. The national legislations of the Philippines have well provided for reparation and along with its national legislation it has also implemented a national rehabilitation policy, ensuring the full realization of the right to reparation. The policy gradually developed over time along with the implementation of development projects.

It's the same in India. There are provisions in the domestic legislations such as Land Acquisition Act, 1894 and this chapter also analyzed a state rehabilitation policy of Odisha but have failed to serve their purpose. The laws are incompetent to safeguard this right. The Land Acquisition Act, 1984 provides compensation for the holders of the land titles only which lefts most of the *adivasis* helpless. The Odisha Rehabilitation Policy seems to be a policy with malicious intention to attract world bank funds as if has not defined 'public purpose' in the policy.

Conclusion & Recommendations

After the complete assessment of the 'right to land' and the 'right to reparation' of the indigenous peoples, it would be correct to hold that enormous efforts are being made to recognize these indigenous rights in the international forum and in the Philippines. But, it won't be correct to hold that similar efforts are being made in India as well. India being one of the member to vote in favour of UNDRIP has failed to implement the provisions of the Declaration in its domestic legislations.

UNDRIP stands as the most competent text for recognizing and protecting these rights of the indigenous peoples. But, on assessment in chapter 1, the definition provided by the Declaration seems to question the identity of the indigenous peoples as the definition lumps indigenous peoples into one group and ignores the vast amount of diversity among them and at the same time, it imposes a uniform identity on them, which may not be historically accurate. There are also positive implications of the definition as it widens the scope of the term 'indigenous peoples' by enumerating eligibility criteria which is helpful to for many communities to gain the indigenous status.

This research undertook the jurisdiction of India and Philippines as both are Asian countries having huge chunk of indigenous population, both voted in favour of UNDRIP and both share and share common colonial past. But the research found out that there is a huge difference in the domestic legislation regarding protection of indigenous rights. None of the Indian legislation or the constitution of India define the term indigenous. Rather, India termed its natives as 'adivasis' and also identifies 533 tribes and classifies them as schedule tribes and affords protection in 5th and 6th Schedule of Constitution. Despite of recognizing 'adivasis' and witnessing displacement of such people due to advancement of developmental projects, India has not framed any specific legislation for securing their land rights. Instead, it can exercise the power of 'eminent domain' to acquire land for public purposes by compensating the owner (the adequacy of the compensation is also not stated). But Philippines recognizes and protects all the indigenous rights. It is the first Asian country to define 'indigenous peoples.' It affords protection to indigenous land rights and their right to reparation in its constitution of 1987 and has also implemented a specific legislation i.e., IPRA, 1997 which recognizes and protects all the indigenous rights and fully complies with the UNDRIP.

The reparation made to the displaced persons in India is according to the provisions of the Land Acquisition Act, 1984. This Act provides that any land can be acquired by the State for public interest but the compensation is paid to the title holders only. The 'land' under this Act do not consider the occupied lands. In this situation, many *adivasis* do not hold their land titles but are living on those lands from ages are not paid any compensation. There is no domestic legislation specifically dealing with rehabilitation, rather India implemented a National Policy for Rehabilitation and Re-settlement, which lacks effectiveness as a law. On contrast, the IPRA, 1997 includes traditionally occupied or used land. It also obligates the state to take measures for recognizing native titles of the indigenous peoples over the traditional occupied land and issue 'certificate of ancestral domain.'

The aim of this research was to find out the status of indigenous peoples in relation to their land or they have an absolute over their land and whether they are entitled to reparation if they are displaced from their land. Another objective was to find out whether the domestic legislation of India and Philippines comply with the international legal instruments. After the completion of the research, through numerous assessments, it can be concluded in nutshell that it has been established in international legal instruments that the indigenous peoples have an absolute right over their land and is inalienable (Article 10 UNDRIP, Article 13 ILO Convention No. 169). The same is also envisaged in Chapter III of IPRA, 1997 but it states that the indigenous land could be acquired for exceptional cases of 'public purpose' and also provides for penal provision for unlawful intrusion. Whereas, India having voted in favour of UNDRIP has not yet implemented any specific legislation to achieve the aims and objective of UNDRIP.

Key Findings-

- After making the entire assessment, it can be presumed that Indian government lacks intention to frame legislations. It can also be presumed that a large-scale is corruption is continuing in India relating to acquiring of indigenous lands for commercial purposes as these development projects fetches revenue to the state and if not regulated well then the money goes to the private individuals and considered as black money. It is possible that for any of these purposes, Indian government is not willing to enact a specific legislation ensuring full enjoyment of indigenous rights.
- Indigenous Peoples' right to land is an absolute and inalienable right under Article 10 of UNDRIP.
- Indigenous Peoples' right to reparation is gradually gaining more status in internal forum whereas, IPRA
- India being a party to ILO convention No. 107 and voted in favour of UNDRIP has not implemented any of its provision regarding right to land and reparation. (It is the obligation upon the government to recognize and protect the indigenous rights which the Indian government has failed to comply over time).
- Indian legislations are authoritarian in nature which gives enormous power to the state to acquire private lands for public purpose. The worst this is that 'public purpose' is not defined in the legislations and Odisha Rehabilitation Policy, 2006.
- Indian government should initiate effective step for framing a specific legislation protecting the rights of indigenous peoples.
- The Indigenous Peoples Rights Act, 1997 provides better protection than any of the above assessed international legal instruments. Example, it obligates the government to ensure effective mechanisms for recognizing the traditionally owned/occupied lands.
- This research further raises question on the adequacy and competency of the provisions of the international frameworks and recommends that the international forum should

come out with concrete provisions which would leave no room for the member states other than to comply with the international norms.

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