


RGICS Paper No. 27  
1995



**'INDIGENOUS' AND  
'TRIBAL' PEOPLES AND  
THE U.N. AND  
INTERNATIONAL  
AGENCIES**



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*The views expressed in this paper are those of the author and are not necessarily those of the Institute.*

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Suggested citation: B.K.Roy Burman, *'Indigenous' and 'Tribal' Peoples and the U.N. And International Agencies*, RGICS Paper No.27 (New Delhi: Rajiv Gandhi Institute for Contemporary Studies, 1995) [PDF Version: 2010]

## **‘INDIGENOUS’ & ‘TRIBAL’ PEOPLES AND THE U.N. & INTERNATIONAL AGENCIES**

### **Emerging Reality About Tribal Social Category**

Since the nineteenth century, the word “tribe” has been generally used synonymously with the “primitive”. In this historical ethnocentric approach, the industrial or post-industrial West is at one polar end of human social formations and those at the other polar end or close to it constitutes the primitive social formation, the laggards in the evolutionary schema of social organisation, the most backward segment of humanity (Godelier 1977 p. 30). There is also a point of view questioning the appropriateness of such equation (Roy Burman 1979 p. 102- 144). Even Godelier referring to a paper published by Lois Mednik in 1960 in *Current Anthropology* mentions that two sets of characteristic features, negative and positive are designated by the term ‘primitive’. The negative traits include the absence of traits found in western societies (non-literate, non-civilised and arrested in development, non-industrial, non-urban, lacking economic specialisation) or the presence of these traits in a lesser degree (less civilized, low level of technical achievement, simple and small scale traditional tools). In both cases ‘primitive’ societies are understood to be inferior. The positive features on the other hand, are considered to be those absent from civilized society. These include, social relations based primarily on kinship, with all pervasive religion in which cooperation for common goals is frequent and so on (Opcit p. 30).

It is interesting that the crucial positive aspect, namely, organisation of social power as a dimension of a sense of cosmic unity (as distinct from political power rooted in the world view of the ego as a discrete entity — all the time trying to protect the same from the surroundings and to over power the latter) does not find clear mention in this formulation. By referring to kinship and religion in passing, the real import of the systemic difference has been evaded. While Godelier’s approach does not go much beyond evolutionary framework, it contains an important clue which one can pick up without being bound by the epistemological circuit. Analytically and historically, it is possible to envisage that the world-view of communion and reciprocity between man and man and man and nature (rather than that of competition and coercion) can be dissociated from any supposedly pristine and any other sequential forms of social organisation (Roy Burman 1994p. 22-95). A tribe can thus outgrow the primitiveness’ if one can use the term and retain its social boundary as an essential feature of its historical identity (Roy Burman, 1983, 1994 p. 36-37). With this analytical orientation the concept of post-primitive was formulated in the seventies (Roy Burman 1974/1979).

The concept of tribe as post-primitive has important practical implication in the sense that levelling of tribes as lower and higher stages of development with reference to occupation and occupation culture loses its relevance in this perspective. It is the tradition among anthropologists to classify human societies as hunting— gathering, pastoral nomads, settled agriculturists, industrial and so on. The underlying assumption is that the predominant occupation generates specific forms of social relations and its ideological underpinnings and world-view. But this line of thinking does not take care of the relationship with nature and of the total socio-political milieu in which the particular predominant occupation exists. The primal hunting and gathering communities were by and large dependent on unstable convivial and

ingratiating mode of livelihood; today many of them can be found as linked up with predatory mode of livelihood. Similarly early slash and burn agriculturist societies were marked by more stable convivial — ingratiating mode of livelihood; the settled agriculturists were having convivial—custodial mode of livelihood; the peasants involved in market economy moved towards convivial predatory mode of livelihood; the colonial industrial societies generated predatory septal mode of livelihood and today when existence of life on the planet has become problematic, the highly industrialised societies are pushing ahead a predatory demiurgic schizophrenic mode of livelihood with a tendency to bring the whole of humanity within its ambit (Roy Burman 1994 (a) p. 11).

The hunters and gatherers today directly consume only a small portion of the output, the bulk of the same is marketed, sometimes even at the international level. The same is true for pastoral nomads and cultivators. Of late, in parts of India even slash and burn cultivation has been taken to by sophisticated entrepreneurs because of the highly valued pulses and oil-seed that can be grown under this system of cultivation on the infertile hill slopes (Fernandes et al 1988).

As an outcome of these developments all the tribal societies are being internally stratified and a section of educated tribes are emerging from among them. They are subjected to two pressures and pulls. One is the pull of the market, the other is the realisation that they can face the competitive world only by holding on to their heritage and by relentlessly trying to adapt the same to the modern conditions through a process of sublimation and linking up the same with the deeper structure of humanist ethos.

Thus, while at the surface level great changes are taking place among the tribal peoples, at the deeper level they are discovering their commonalty. Historically they were many; existentially they are tending to be one in the contemporary world. The new reality is finding its expression in organisational networks which are tending to bring all tribal and analogous peoples all over the world within their ambit (Roy Burman 1994 p. 7-8).

The changed perception of the tribal as a social category is reflected in two Conventions of ILO.

### **ILO Convention 107 of 1957 and the Indigenous and the Tribals**

As early as 1921, ILO began working among the Amerindians particularly of Latin America. In ILO parlance they were called 'native workers'. After the establishment of the United Nations, following the Second World War, the ILO acted as the lead agency in the Andean Indian Programme – a vast multidisciplinary development programme for the Andean countries of Latin America. For twenty years (1950 to the early 1970s) it was a joint effort along with the other US agencies. One of the fruits of this collaboration was that the ILO decided to adopt with the collaboration of the other UN organisations involved, an international legal instrument for the protection of indigenous and tribal population (Swepston 1990 p. 677).

In 1957, the ILO adopted the Indigenous and tribal populations Convention (No. 107). This Convention first speaks of tribal and semi-tribal populations and then of

indigenous population, as a population of special category analogous to the tribal and semi-tribal populations. Members of tribal and semi-tribal social formations are, according to article (1a) of the Convention “populations whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or by special laws and regulations.” Article 1(1b) speaks of “members of tribal and semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belong, at the time of conquest of colonization and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time with the institutions of the nation to which they belong.” Further para 2 of Article 1 states “for the purpose of this convention, the term “semi-tribal” includes groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated in the national community.”

There are several implications of this formulation, two of which are of particular relevance for the present discourse:

- (i) The tribal and semi-tribal populations are not static entities; they are in the process of losing their distinctive characteristics and in the long run they are to be integrated in the national community. Thus a teleological world-view has been projected in this formulation.
- (ii) Though the “indigenous” population possess attributes of tribal and semi-tribal populations, unlike the latter, they constitute a distinct international entity arising out of the fact that they are victims of conquest or colonisation from outside. Here the word “colonisation” requires to be specially noted. Colonisation is different from colonialism. The latter implies exploitative appropriation of material goods and wealth, the former implies large scale immigration of population from outside on a scale and in a manner as would enable the migrants to establish their hegemonic domination. Obviously this refers to what happened in the Americas, Australia, New Zealand and some of the other islands in the Pacific Ocean.

There is another significant difference in the perception of the tribal and semi-tribal on the one hand and the “indigenous” on the other. In case of the former ‘integration’ which is a politically loaded term has been highlighted. In the case of the latter, though, in a negative manner, the focus is on conformity with social, economic or cultural institutions which really means assimilation. Looked at in a different way, the tribals and the semi-tribals are to find their equation with the ‘national community’ which in the context of its use in the definition means the ‘state’. The indigenous populations on the other hand are destined to be blurred cultural carbon copies of the invaders and encroachers on their land. Till this “noble” goal is achieved, they are indigenous of the respective countries.

### **ILO Convention 169 and Indigenous and Tribal Peoples**

Even though ILO Convention 107 of 1957 contains many positive stipulations in favour of the tribal and indigenous peoples, it caused abhorrence among many because of its ethnocentric bias and patronising attitude. As a result, a new

Convention 169 was adopted in 1989. As stated in Article 1 para 1, this Convention applies to

(a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws and regulations.

b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of the present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Para 2 Article 1 stipulates that self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

Para 3 states that the use of the term ‘peoples’ in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

### **The Coy Girl**

ILO’s perception of the tribal and indigenous peoples in Convention 169 is certainly less loaded with ethno-centric bias. But even then its statement in respect of the tribal peoples is almost that of a coy girl who speaks through her silence, and also it conceives an “indigenous” which looks like the handsome progeny of illicit relation between colonialism and natives. In Convention 107, colonisation was envisaged as the contingent fact and colonialism was out of count, but as will be presently discussed in Convention 169 colonialism has been introduced as history’s paramour for the coming into existence of indigenous peoples.

### **Tribe and State**

In regard to the tribal people, the Convention 169 correctly eschews the concept of stage in the locus of advancement, however defined and focuses on its distinctiveness as a social formation. But then it slumps into silence about the nature of the distinctiveness. It does not tell that tribe is an ontological construct as distinct from the state. Tribal people primarily perceives itself as tied together by moral bond having its root in ontology and not in history as in the case of the state. While tribe has its core an existential quality of extension of self to the surroundings, a specific tribe is a structure with the existential quality of life as the lidger and slices of history as the coating. The silence of the Convention about the essence of the tribe, rooted in ontology, may lead to absurd position. With the same definition as provided in the Convention, the Anglo-Indians in India, for instance, can be said to constitute a tribe.

## **Indigenous Peoples Envisaged in ILO Convention 169 as a Creation of Colonialism without any Essence**

While in ILO Convention 107 indigenous social entities have been explicitly stated to be a special category of tribal and semi-tribal entities with a particular type of history attached to them, in ILO Convention 169 the analogous status with the tribal social category though not stated in the text seems to be implicit.

But the real issue is that in Convention 169 while the tribals have been uniformly described as people, the “indigenous” were just *population* before colonisation or conquests or invasions; they became ‘peoples’ only after the conquests and colonisation. The choice of these two words for two cut-off points of history is not fortuitous. If the indigenous were just *populations* and not *people*, the colonial claim of terra nullius is validated. The interpretation of the treaties that the colonialists had entered into with the Amerindians that is now proffered by Canadian Government for instance, that “these are nothing more than contracts between a sovereign group and its subjects” (Gilbert 1994 p. 13-15) is justified. By implication, the concession that is made through the instrumentality of Convention 169, is that now that the indigenous populations have become peoples through the gracious action of conquest and colonisation by sovereign peoples from other parts of the world, they can negotiate their ‘need rights’ but not power rights with their respective governments as peoples. To add insult to the injury, colonisation has also been projected in the Convention as a catalyst for galvanising the pre-invasion populations into peoples. In Convention 107, “establishment of present state boundaries” was not included as a contingent fact for locating the indigenous peoples. When it is kept in view that the present state boundaries almost all over the world are related to confrontational, accommodative or pre-emptive adjustment among the colonial powers, insertion of this new contingent fact, makes colonialism a respectful, if not a desirable thing.

The mechanism and the strategy through which these ideas conjuring around the concept of ‘indigenous peoples’ got inserted in the ILO Convention of 1989 have been discussed separately (Roy Burman 1992). While the definition of ‘indigenous’ in ILO Convention 107 of 1957 clearly points to their locale in the Americas and island countries in the Pacific Ocean, the definition of the indigenous peoples in ILO Convention 169 of 1989 has performed a diplomatic hat-trick by clubbing the peoples affected by the establishment of present state boundaries with the ‘indigenous’ defined in line with the Convention of 1957. One does not know what transpired in the 18 member committee of Experts set up by the ILO to draft the Convention. Incidentally in the 18 member Expert Committee, India, which has the largest tribal population in the world, was represented by Secretary, All India Organisation of Employers. No Indian Expert could be associated because of the alleged opposition of the Government of India. Neither the ILO’s representative nor any of the scholars associated with ILO and the UN Working Group has elucidated the implication of the insertion of the words the “establishment of present state boundaries” — a contingent fact, determining the locus of the indigenous.

The all round silence raises a nagging question. One cannot refrain from saying that ILO had not taken the normally expected steps to make transparent to the public, the implication of the way they had defined the “indigenous peoples” in Convention 169.

## **UN and the Indigenous Peoples — a Trojan Horse.**

In 1982, some European countries wanted the UN to declare 1992 as Columbus year to celebrate the 500th year of his landing in America. But as this event was a watershed in colonial expansionism and ethnocide of the indigenous peoples of the newly found land, the proposal was rejected at the instance of the erstwhile colonised countries. After this, on the initiative of the West European countries (Sanders 1989 p. 415), the subcommission of Human Rights Commission on Prevention of Discrimination and Protection of Minorities, set up a Working Group on Indigenous Populations in 1982, without defining who the 'indigenous' were. In fact, as Sweptson of ELO observes (1990 p. 695) the term 'indigenous' is a difficult one, implying historical originality'. Further he quotes from the Working Document for the meeting of Experts on the revision of Convention 107 (Geneva 1986) which states that "several countries that have tribal populations which are not considered indigenous have ratified Convention 107; attempts to analyse the historical precedence of different part of the national populations would detract from the need to protect vulnerable groups which in all other respects share many common characteristics, wherever they are found." Against the backdrop of this perception of the ground reality Sweptson by implication distances the ILO approach from the decision in the United Nations to use the term "indigenous" alone. But when one goes through the papers analytically, one feels that a compromise was affected. While ILO continues to use the two terms 'indigenous' and 'tribal' in describing the entities, it made provision in an unobtrusive manner so that 'indigenous' as a trojan horse can be placed anywhere in the world. It is a different matter that authentic indigenous and tribal peoples rarely collaborate in this.

### **Working Definition of indigenous'**

When the Working Group on indigenous populations was set up in 1982 by the subcommission on Human Right Commission of the UN, a working definition developed in 1972, by a Special Rapporteur, Martinez Cobo was being used. It is of importance to note that Cobo was appointed as Special Rapporteur by the UN Subcommission on Prevention of Discrimination and Protection of Minorities in 1971 to report on the problem of discrimination against indigenous populations in the context of international publicity about threats to isolated tribes in America (Sanders 1989 p. 406).

Sanders (1993 p. 7) alleges that Cobo did none of the drafting and the entire work was done by Willemson Diaz, an official of UN. However in the name of Cobo the following definition was given in 1972. "Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of a different culture or ethnic origin arrived there from other parts of the world, overcame them to a non-dominant or colonial situation; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form a part, under a state structure which incorporates mainly the national, social and cultural characteristics of their segments of the population which are predominant1' (UN 1973).



Even more clearly than the ILO definition of indigenous, this definition relates primarily to the pre-invasion peoples of the Americas and of Australia and New Zealand (ICIH 1987 p. 6).

When the Working Group on indigenous populations was constituted in 1982, it was against the backdrop of the Special Rapporteur's definition of 1972 or in other words, logically its mandate was only for indigenous populations/peoples of the Americas, Australia and New Zealand. In 1983, a para, as follows, was added in the name of Cobo to the original definition to cover isolated and marginal populations. "Although they have not suffered conquest or colonisation, isolated or marginal groups existing in the country should also be regarded as covered by the notion of "indigenous populations" for the following reasons: (a) they are the descendents of groups which were in the territory of the country at the time when other groups of different cultures or ethnic origin arrived there, (b) precisely because of their isolation from other segments of the country's populations they have almost preserved intact the customs and traditions of their ancestors which are similar to those characterised as indigenous, (c) they are even if only formally, placed under a state structure—which incorporates national social and cultural characteristics alien to their own" (UN 1983).

The expanded scope of definition removed the colonial subjugation of a country at any time in history as a condition for locating indigenous peoples in that country. This enabled Norway, Sweden and Finland to recognise Sami as indigenous. It is important to note that Samis are found in the adjoining areas of former USSR also. It is difficult to say that there was no political calculus that recognition of the Samis as 'indigenous' in the Scandinavian countries could help in pressurising the then USSR to concede the 'need rights' and 'power rights' of the 'indigenous' peoples in that state. This question arises because if only the human right of the indigenous peoples was the consideration, one could have expected Sweden to recognise the Scania also as an indigenous people in that country. This Danish speaking region was annexed by Sweden in the second half of the 17th century. Breaking the promise of giving them Home Rule, Sweden embarked on a programme of assimilation that banned the local language, government institutions, laws and cultural organisations. Nearly all attempts to organise resistance in Skaneland to "Swedenization" were stifled by the central government until 1989, when the Foundation for the Future of Scania (SSF) was organised to represent Skaneland as a distinct nation both to Sweden and the World (SSF 1990).

While one need not go into the motives of the Scandinavian countries, it is not understood why no human right agencies pressurised the West European countries to recognise peoples like the Basques, Catalans, Cornish and many others as indigenous in their respective countries, even though there are evidences that they aspired for that status. Perhaps by this time irresistible pressure would have been built up but it has been forestalled by reintroducing the contingent fact of being subjected to the operation of colonialism at any point of time in history, for a people to be recognised as indigenous.

Again in the name of Cobo the definition of indigenous was restated as follows "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now

prevailing in those territories or parts of them. They form at present, non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems (UN 1986).

The Independent Commission on International Humanitarian Issues reports that the Special Rapporteur had added that the right to define what and who is 'indigenous' belongs to the indigenous peoples themselves.

The problem about the latest version of the definition is that in his personal communication to the author (dated 12th November 1992), Sri Burger, General Secretary of the UN Working Group on indigenous Population has mentioned the earlier two parts of the working definition and has not made any mention of this. But as the ICIHI came into existence in 1983 as a sequel to a resolution adopted by the UN General Assembly in 1981 it is difficult to ignore an information contained in the report.

In his personal capacity Burger has brought out a book (Burger 1987 p. 170-229) which gives a list of indigenous peoples! Indigenous minorities in countries like Japan and China which were not under colonial rule in the conventional sense of the term. If the last version of the working definition is accepted these cannot come in the list. But it would be incorrect to ascribe any motive to him; he is otherwise frank and forthright in his personal communications. The ICIHI's report also refers to the same peoples as indigenous (Opcit p. 11) even though it gives the latest version of the definition.

Obviously an attempt has been made to dilute the responsibility of the colonisers of Americas and some of the islands in the Pacific region, towards the people earlier described by ILO as indigenous by universalising the concept of 'indigenous'! That the attempt has failed has been attested to by ICIHI (Opcit p. 7). According to it the United Nations Working Group on Indigenous Populations discussed the issue of definition and for all practical purposes deferred the question for the time being.

An interesting aspect of the search for the 'indigenous' is the myopic vision of some European and North American scholars about it. Sanders, who on special invitation of the Chairperson addressed the UN Working Group in 1992 (Sanders 1993(a)), while discussing recognition of the Sami as indigenous by the Scandinavian countries, observes that this was the first time that a state whose majority populations were indigenous recognized that a minority population should be classified as indigenous (Sanders 1992 p. 415). The same expert scoffs at the Asian countries like China and Indonesia when they assert that the majority of population there are indigenous (Opcit 1993). He should explain on what logic the claims of the majority populations of China and Indonesia as being indigenous should be considered as untenable while the majority populations of the Scandinavian countries can be described as indigenous. Besides the position he takes leads to a bizarre situation. If in a country both majority populations and minority populations are indigenous, on what logic would the rights of the indigenous (which would be included in the proposed UN Declaration) be applied to one category of indigenous to the exclusion of another category? If the

rights of the indigenous peoples are to be exercised by the entire population of a country, what is the nature of the entity which is expected to respect these rights?

While the UN Working Group is engaged with remote sensing imageries, Sanders stumbled on a ground truth that in a country 'indigenous' can be perceived in two ways: one in terms of the time frame; the other with reference to the quality of life with or without reference to time frame. While the peoples originally described by ILO as indigenous broadly combine time frame and an earth-bound ethos running through their life-way, there would not be many peoples outside the Americas and Pacific region who can be uncontroversally said to combine these two aspects. There are large number of peoples in Asia and Africa particularly and in some enclaves of Europe as well, the ethos of whose life is analogous to that of the indigenous peoples of the Americas and Oceania, but who are not earlier settlers in their respective habitats than many among the rest of the population. In Asia and South and South East as well as in some case south west and north east ward migration of Tai speaking, Monkhmer speaking, and Malay speaking peoples have been taking place for centuries. But in many cases, the new settlers are more earth-bound, internally non-stratified than the earlier settlers. In terms of quality of life, the new settlers are certainly more indigenous — more rooted in their milieu, than the older ones. But as they do not always combine indigenous ethos with time frame, as in case of the indigenous peoples of Americas and Oceania, it is better to hold on to the ILO perceived dichotomy of indigenous and tribal as social categories analogous to one another but not identical with one another. The UN Working Group's insistence on using the word 'indigenous' alone for discrete social categories will lead to the blind alley as described by Sanders in respect of the Scandinavian countries. Such insistence can cause a legitimate doubt whether the UN Working Group on Indigenous Population which was set up at the insistence of West European countries actually wants the rights of the concerned peoples to be seriously considered by the world community or whether it is following a strategy to divert the attention of the world community through creating an impasse by insisting on a term which has many nuances and particularly when it has a history of use in international politico—legal context which in general perception is not applicable outside that context.

It seems that the more perceptible tribal leaders of India, realise the futility of being bogged down on a particular term without specifying its content. During the first half of 1994 on sponsorship of other media, five conventions of the tribal social and political activists and intellectuals took place in five regions of the country. In each of the conventions, attempts were made to set down the criteria of identification which are more or less in the same wave length as those discussed by the Commissioner for Scheduled Castes and Scheduled Tribes in his first report in 1951.

There is also another significant development. The representative of the Indian Council of Indigenous and Tribal Peoples (now renamed Indian Consortium of Indigenous and Tribal Peoples), the organisation which most closely inter-acted with the UN Working Group, used to remain silent on the question of definition without raising any question, but in 1993 Prof. Ram Dayal Munda, who represented ICITP at Geneva described while speaking on agenda item No. 4 "In the Indian context unless definitionally specified, everyone could be called 'indigenous' after the British colonisers left the country in 1947. Independent India is developing indigenous locomotives, indigenous rockets and so on Non-specification of the term has led to

our government's refusal to equate the Scheduled Tribes with the Working Group intended for indigenous peoples." Consistently during the last seven years. The term "tribal peoples though considered somewhat pejorative among Indo-European speaking countries, is relatively more acceptable in India for this purpose." Proceeding further he said, "we therefore strongly suggest that the expression "indigenous and tribal peoples" form a single segment when it comes to defining the peoples concerned, particularly in the Indian and Asian context."

As noted earlier, the largest number of tribal and indigenous peoples in the world are in India. What was the impact of the suggestion made by the person, considered by the UN Working Group as the leading spokesman of the tribal peoples of India? It was simply ignored in the draft declaration prepared by the Working Group, which incidentally was done after the participants left the scene and its mandate was over. Here one would like to add that not only tribal personalities from India but those from other Asian countries who attend the UN sponsored meeting on indigenous complain that they are not treated with due regard. In a meeting of Asian Tribal activists held in Thailand in May 1993, a formal resolution was passed, in the presence of Sri Burger, recording their grievance.

### **Issues Requiring to be Specially Highlighted**

The Working Group has a double mandate. It is to draft standards to guide state practices in relation to indigenous minorities. This is taking the form of a declaration on the rights of indigenous peoples which will be considered by the sub-commission, the Human Rights Commission, the Economic and Social Council and finally, the General Assembly. Secondly, to aid it in the drafting the Working Group has a mandate to review 'Current Developments' affecting indigenous peoples. This second mandate in particular, attracts indigenous peoples and tribal peoples from all over the world. Each year indigenous representatives tell of their problems with national governments and multinational corporations (Sanders 1993 p. 125).

Till 1992, the tribal participants almost wholly confined their presentation to airing their grievances, some of which were completely uninformed and contrary to actually what local tribal peoples of India were demanding. For instance in 1991, one of the tribal leaders, complained at Geneva that the Governor in the Sixth Scheduled Areas of North East India was vested with so much discretionary power which even the President of India did not enjoy, while actually the tribal peoples in the Sixth Scheduled Areas were demanding that the Governor should not be entirely guided by the State Ministry and should have a modicum of discretionary power in dealing with matters concerning the Sixth Schedule.

The approach of India's permanent Mission also compels comment. The representatives of the Mission hardly ever spoke on the contents of the several draft declarations prepared in consecutive years by the UN Working Group, which would have significant bearing on the world political system. They mostly confined their presentation to three issues : (a) applicability in India of the term 'indigenous' only for the tribals of India to the exclusion of others, (b) refuting the charges made by the tribal participants from India, (c) general statements of constitutional provision and state action in respect of the tribals of India.

As regards inapplicability of the term 'indigenous' for the tribals in India to the exclusion of others, year after year either by directly quoting Prof. Beteille or drawing upon him they have been giving only one argument that through centuries of interaction a cultural continuum has come to prevail in India and that it is difficult to differentiate or to separate the tribals from the rest of the population. One need not debate this position as far as it goes. But issue of identity is not decided only on shared or diacritical cultural traits. There are many other sociological and historical factors, to wit, ethnic stereotypes, trauma of historical experiences, sources of legitimisation in the matter of access to, management and control of endowments of nature. If a part of the sociological understanding of a situation above is repeated year after year, it becomes less and less effective. The climax in this kind of presentation was reached in 1993, when it was stated "India has been a melting pot of races and ethnic groups from the earliest periods of recorded history." Earlier in 1988, on behalf of the Permanent Mission India was described as a 'microcosm of multi-cultural and multi-coloured world.' It is well-known that melting pot of culture and cultural pluralism are polar opposites. Melting pot, particularly, is an American myth, which the social scientists there tried to project for their country for a long time and which has now been exploded. Rather than indulging in abstraction, concrete cases in India and abroad could be cited into greater effect.

Also speaking in general terms about the constitutional provisions and plans and programmes in respect of the tribals year after year progressively diminishes its value. There are many instances where even official sources have brought out authentic tribal grievances. At the same time, there are a large number of cases in India of non-tribals joining the tribals in common struggles. Building up a democratic polity is a process; there are many feudal and colonial legacies which cannot be purged out overnight. If for any reason India's official Mission could not mention all this, Government could have sponsored a delegation of well-informed tribal personalities - there is no dearth of which in the country — to present in perspective the ground reality and the constraints.

### **Rapid overview of the Draft Declaration**

It will be a rewarding exercise to make a comparative study of the consecutive draft declarations since 1988. But one may concentrate for sharper focus on two draft declarations—one which was discussed in 1993 and the other discussed in the last week of July 1994. Before going into the specifics, two general issues may be considered, namely, the use of the term 'people' and affirmation of the concept of right of self-determination.

### **'Peoples' in the Draft**

Though called "working Group on indigenous population", the Working Group has decided to use the term 'people'. Previously in the context of ILO Convention 169, there was a debate as to whether the term "people" or "peoples" would be more suitable. Each has a politico-legal significance; ultimately ILO settled for "people". The UN Working Group has gone for 'peoples'. There is reason to believe that Government of India has some reservation about this term.

Browlie (1988 p. 5) points out that there has been continuing doubt and difficulty over the definition of what is a 'people'. Falk (1988 p. 25) observes that the UN Charter was the first international document to make a mention of 'people'. Subsequently 'people' has been mentioned in the Human Rights Covenants of 1966 (International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights). He interpreted that in both these settings what is really expressed or assumed, is that the governments are the authoritative representatives of peoples. Of late the discourse has gained further momentum. Makinson (1988 p.74.) takes a position based on the perspective of legal positivism which projects people' almost as a historical chimera. But to Mapel and Nordian (1992 p. 306) 'people' represents a way of life-almost a moral transcendency. In this sense, there should not be any difficulty to recognise tribe as people. It is obvious that Nehru's Panchsheel in respect of tribals (1960) is informed by this vision.

### **Tribal People and Self-Determination**

The right to self-determination was originally enshrined as a fundamental political principle in the UN Charter and was subsequently made a binding legal right by the two Human Rights Covenants of 1966. The very first Article of both the Covenants establish in identical words. "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Falk (Opcit p. 26) avers that this has to be interpreted with reference to UN Resolution 1514 adopted in 1960. According to para 6, "any attempt at partial or total disruption of national unity and territorial integrity of the country is incompatible with the purposes and principles of the Charter of the United Nations". In other words, as Falk interprets it, Self-determination for peoples must be reconciled in practice with the existing geopolitical delimitation of the territorial boundaries of sovereign state". According to para 9 "all states uphold the obligation to enforce the charter of the United Nations and the Universal Declaration of Human Rights and Declaration on the basis of equality, non-interference in the internal affairs of all states and respect for the sovereign rights of all peoples and their territorial integrity". Falk interprets this also as an affirmation of the rights of peoples, but as qualified by the fiction that a people and a state are virtually interchangeable ideas". This is in line with the position taken by the Secretary General of UN in 1970. "As an international organisation, the United Nations has never accepted and does not accept, and one does not believe, it will accept the principle of secession of a part of a member state". (U Thant 1970).

In 1974, the UN subcommission on Prevention of Discrimination and Protection of Minorities initiated a study by Hector Gros Espiel, whose report affirms that right of self-determination in the sense of right of secession is confined to "peoples under colonial and alien domination from an external source. A concern for the preservation of 'territorial integrity' is the countervailing and prevailing consideration. In the classical colonial context, the colonized peoples' right to self-determination permits (if not mandates) the option of secession to sovereign independence". (Gros Espiel 1988 p.119).

Report of another study commissioned by UN on the 'developing' content of the concept of self-determination was published in 1981. Its author Cristescu "anchored the concept of self- determination around the fairly particular circumstances of the

past, was decolonisation of Asia, Africa and Oceania. Claims to the assertion or reassertion of complete self-determination, the study suggested, were by right available and available only, to those peoples who were subject to 'alien' subjugation, understood as subjugation by non-contiguous population". (Lam 1990 p. 381).

It is obvious that under the UN system, right of self-determination does not include right of secession. While accepting this interpretation, a group of 20 social scientists issued a statement at Shimla in November 1993 to the effect that "we at the same time feel that in the emerging world moral order, if a state indulges in acts like genocide or liquidation of peoples, the right of secession cannot be denied to the affected peoples even though the UN system may not support it." (Shimla 1993).

Here it is to be noted that Pomerance (1982) considers self-determination is a process, not a particular outcome of that process. According to him in so far as the UN has displayed a bias in favour of the independence outcome as the only proper outcome of the process for the classical colonial situation, it has adopted a corollary against the process itself in other situations where the independence outcome would be unacceptable." This seems to be a double barrelled gun. It can be used against independence aspirations of the colonised peoples. It may also be used for supporting secessionism in independent countries. In any case, to ensure that self-determination as a process articulates with the 'moral quest' for the emergence of a global human community, the UN and ancillary international forums require to be democratised (Roy Burman 1994 (d)). How important this is would be obvious from the very first resolution adopted in the Asian Indigenous Conference held at Cheingmai, Thailand during 18 and 23rd May, 1993. "That the majority of the world's indigenous peoples live in Asia. That the indigenous peoples of Asia never had the chance and the means to fully participate in the consultative meetings regarding the United Nations Programs."

### **Substantive issues in the Two Draft Declarations of 1992 in respect of the Indigenous Peoples**

The Working Group had articulated a draft declaration (E/CN.4/ sub 2/1992/93) for the consideration with wider indigenous participation at Geneva during 19th-30th July, 1993. It was in four parts: part I related to individual and collective human rights and right of self-determination; part II related to cultural rights; part III related to economic rights and part IV related to their partnership right on egalitarian basis in social and economic process of respective countries and to the right to the conservation of their heritages.

It may be mentioned here that in 1966 when the two Rights Covenants were adopted, though many countries were opposed to the inclusion of right of the self-determination in the Covenants, India's representative extended the support to it and stated that if the right meant the right of peoples to decide for themselves in political, social and cultural matters, such a right was recognised in every truly democratic state and that only in totalitarian states and in countries subjected to a colonial regime it did not exist (Laiser 1991). The current allergy to the term in several quarters in India is to be understood in the context of trends towards a hegemonic world order, when there is a feeling that there is need for collective self-determination against manipulative intervention. But for the generation which was directly involved in the

freedom struggle, this lack of self-confidence is shocking. India should extend support to right of 'self-determination' of the tribal peoples and stand by Daes, Chairperson of the UN Working Group in her exposition of the concept (1986 p.96-99). She identifies arenas of self-determination each with a different implication : (i) right of an entity to determine its international status sometimes referred to as external self-determination, (ii) right of a state population to determine the form of government and to participate in the government, sometimes extended to include democratization of majority rule and often called internal self-determination, (iii) the right of a state to maintain its national unity and territorial integrity and to govern its affairs without external interference and without violation of its boundaries, (iv) the right of state and state population to cultural, social and economic development. The right of a minority or an indigenous group or nation mainly within state boundaries to special rights related not only to protection and non-discrimination, but possibly the right to cultural, social, educational and economic autonomy for the preservation of group identities. Indigenous people also want to have property rights to their land added to the above mentioned list of rights related to self-determination. After spelling out the diverse locales and nuances of right of self-determination, the diverse locales and nuances of right of self-determination, Daes observes, "in my opinion the interpretation of the term 'self-determination' specially excludes the right of secession."

If it maintains its deep rooted pluralistic ethos, India does not require an outside intellectual crutch to accept right of self-determination of all the peoples. But if Daes makes the statement in the forum of the Working Group (she made the statement in a different forum) it will provide a juristic ligament which will persuade many other countries to overcome their reservation.

There is nothing in the second part of the declaration related to cultural right, which the Constitution of India does not accept in principle and I suppose, most countries of the world will accept in principle most of the postulates on cultural rights of the tribal and indigenous peoples as expounded in this part of the document. But in practice hardly any country in the world, including USA which now-a-days speaks all the time of multiculturalism goes by it (Roy Burman 1994 (e)). From the documents of the transactions in the annual meets of Geneva, it is seen that spokesmen of the Tribal and Indigenous peoples of several countries including India have charged their respective country governments of transgression of the cultural rights of the concerned peoples, the response of the respective governments are generally evasive. We must realize that a global partnership of tribal and indigenous peoples and others, is emerging for a humanist retrieval of the contemporary world and those of us, who can, should play an active role in this matter.

Part III, related to collective and individual rights of access to and management and control of resources with which the concerned peoples are traditionally or historically associated. This part also highlighted their ecological rights and rights of proper rehabilitation where dislocation was inevitable. Unfortunately in this matter the record of most countries including India and international agencies is far from satisfactory. One of the main reasons is the hiatus between de jure and de facto perception of rights. 'Globalisation' is taking its toll, where it has made massive inroads in many Latin America countries and from this experience it can be predicated that the future will be bleak for the tribal and indigenous peoples in the countries where



globalization process is now entering, unless appropriate countervailing steps are taken.

Part IV, was continuation of part three with particular emphasis on institutional arrangements to operationalise the right of partnership in the political decision-making process, not only at the local level, but also at the international level in so far as the same had bearing on the livelihood and quality of life of the tribal and indigenous peoples. It also dealt with the problems of the transborder tribal peoples. On each of these issues, several authors in India have been writing during the last three decades. But our experience is that till now it has not been possible to initiate meaningful public discourse on these matters. For the affected peoples this is a matter of pervasive bitterness; ebb and flow of darkness of varying intensity in their soul, from which they try to run away through alcoholism, participating in drug trafficking or through collective moral cleansing by participating in or sympathising with acts of violence and insurgency. If one century ago it was the case of Wounded Knee in USA, today there are myriads of cases of wounded soul all over the world.

The second draft declaration which was drawn up by the Working Group in August 1993 (CN4/sub 2/1993/29) which was discussed at Geneva in July 1994 broadly follows the earlier draft with sharper focus particularly on the operational aspects. Two Articles of the second draft will be particularly discussed here.

Article 19 stipulates as follows, “indigenous peoples have the right to participate fully *if they choose* at all levels of decision making in matters which may affect their rights, lives and define through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision making institutions.

This raises an important issue. If the indigenous (tribal peoples) of a country do not choose to participate in the decision in matters which may affect their rights, what will happen? Will the country-governments be free to take decision without their consent? Will it not accentuate confrontational course in many parts of the world? And who will be the gainers? Obviously, the MNC’s and their patron states. That this is a real possibility becomes clear in Article 45.

Article 45 stipulates as follows: “Nothing in this Declaration may be interpreted as implying for any state, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.”

This is significantly different from the earlier draft which stated in Article 4 “Nothing in this Declaration may be interpreted as implying for any state, group or individual any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or the *Declaration on Principles of international law concerning friendly relations and cooperation among states in accordance with the Charter of the United Nations.*” The italics portions have been removed from the new draft. Hence in the name of the indigenous peoples, by unilateral interpretation of the UN Charter, the powers who are capable of doing it, may dispense with international law and that aspect of the UN Charter which guides interstate relations. In clear terms, indigenous rights are proposed to provide alibi for hegemonic intervention without involving

opprobrium under international law and without the requirement of respecting the constraints embedded in the UN Charter.

This makes one to suspect that indigenous right is just the cover, the intention is very different. If this is so, one must admire the subtly drawn up game plan; but it has been overdrawn because this will now raise a more basic issue about the Universal Declaration of Human Rights and the Charter of the United Nations.

### **Indigenous Rights, Universal Declaration of Human Rights and the UN Charter**

Available documents indicate that one of the members of the Working Group had suggested that internationally recognised human rights standards should not be applied to the indigenous peoples. It is good that he has raised the issue.

Kaviraj (1993) traces the language of rights in the West in the process of emergence of what is known as civil society and suggests that the whole apparatus of rights of the political world emerged in Europe in the context of the struggle against monopolising claims and threats of the absolutist state. It follows that other societies which did not have exact or near equivalents to the European absolutist states may not understand its accents so readily. For instance, the very notion of state being foreign to many parts of Africa, legal norms, especially those requiring the registration of land nullified the customary rights. Informed basically by the same perspective, Vincent notes that Kantian universality appears to be little more than a well-disguised attempt to make the values of a particular culture general and documents such as the Universal Declaration of Human Rights passed by the United Nations in 1948 became future proclamations, derived from the moral principles valid in one culture and thrown out into moral void between cultures (Donaldson 1992 p.143).

While broadly agreeing with Kaviraj and Donaldson one can take a slightly different position. The Universal Declaration of Human Rights need not be considered completely futile. It is in dialectical relation with indigenous right-indigenous in the normative sense rooted in the nature of human nature, touched upon at the outset in this paper and discussed in some detail elsewhere (Roy Burman 1994 p. 120), Human individuals enjoy the rights enshrined in the Declaration as social beings; there is a danger that organisational exigencies of community living may lead to erosion of the rights of individuals. But divested of the social milieu, its nature, its locus in the corpus of inter-sodality right at the global level, the individual rights may turn up to be legitimisation of chaotic actions of egos marooned in their dehumanised self. Much of psycho-social and institutional aberrations can be traced to the perfunctory understanding of the universals of human right. Plethora of Covenants, Conventions or proclamations have been promulgated defining diverse categories of collectivities as corrective to the Universal Declaration. But the Declaration itself has not been corrected it appears not without purpose. The global hegemonic powers can flaunt collective rights of smaller entities including the indigenous peoples in a selective manner and at the same time keep the potential challengers of power by raising individual rights issues which are likely to be at a flux in the process of adjustment of inter-collectivity rights at various levels.

It follows from the foregoing analytical appraisal that while Declaration of the Rights of Indigenous and Tribal peoples is a positive move, it must be seen in the context of

a void of universal declaration of inter-collectivity rights. The scope of the welcome realisation among some members of the UN Working Group, that the distinctive judicial customs, traditions, procedures and practices of the indigenous peoples need not be expected to conform to the “internationally recognised human rights standards” should be extended to cover other collectivities also, particularly to countries and nations which were until recently under colonial rule and who suffer from disparities in access, control and management of resources in the world system even today. They must have their right of self-determination about the pathway and time frame for ensuring universal rights of individuals and keeping this in view the Universal Declaration of Human Rights will have to be reformulated as a synthesis of individual rights and collective rights. One way to do it was to start with the Universal Declaration of Human Rights and the Declaration of the Rights of Indigenous and Tribal peoples could have remained in abeyance till this exercise was done. But it may be for the good that the start has been made with attempt to formulate the right of the indigenous and tribal peoples, provided that the goal is not lost sight of and the struggle (yes it will be a struggle) to reformulate the Universal Declaration of Human Rights is carried on.

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