

Development and Rights of Indigenous Communities: A Comparative Analysis of Sri Lankan Law and International Standards

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Abstract - With the increasing emphasis placed upon the necessity of carrying out developmental activities, the states have a duty to take necessary measures to minimize the harmful effects on the environment as well as the indigenous communities. Indigenous people are recognized as distinct social and cultural groups that share ancestral ties to the land and natural resources which they live in. With the rapid development, indigenous people have become vulnerable of losing their habitats and cultures. Therefore, it is important that rights of these communities are protected. This research aims to ascertain whether the prevailing legal system in Sri Lanka is adequate to protect rights of the indigenous community when compared to international standards regarding development. The study further recognized the loopholes within the Sri Lankan legal framework regarding violation of rights of indigenous people due to developmental activities. The research was carried out using the Black Letter approach and relevant primary and secondary sources and as a comparative analysis between Sri Lankan and International standards. The study concludes that the Sri Lankan legal system is inadequate to address the issues faced by indigenous communities due to developmental activities which violate their rights, and thereby recognizes the importance of adapting from international standards to the Sri Lankan legal system to protect rights of the indigenous community while adhering to sustainable developmental measures.

Keywords— *indigenous people's rights, sustainable development, Rambakan Oya land acquisition project*

I. INTRODUCTION

“Human kind of one generation holds the guardianship and conservation of the natural resources in trust for future generations, a sacred duty to be carried out with the highest level of

accountability” - Shiranee Thilakawardana, J- [Wattegedra Wijebanda vs. Conservation General of Forest and others, (2009)]

Environment plays a significant role for the survival of human beings. Both humans and the environment has an unbreakable balance which is essential for such survival. But, with times changing development has become an inevitable aspect of life of the human beings. In the recent years, these developmental activities have affected the environment in a harmful manner. This has become a major problem throughout the world. When considering about Sri Lankan situation, it can be observed that due to the rapid development at present, the harm done to the environment has been escalated. Several such examples are Uma Oya Hydropower project, Port City project and Central Expressway project.

Harms done to the environment affects directly to the human beings as they are dependent upon nature. Thus, it violates the basic human right to a clean and healthy environment. Every human being has rights which are inherent to them. But, indigenous people have special rights which are related to the environment as they have a spiritual and cultural connection with the environment. Therefore, right to environment of the indigenous community plays a significant role in their culture. However, in Sri Lanka it can be observed that this aspect has not given proper recognition when conducting developmental activities. The most recent example for this lack of recognition is the Rambakanoya – Pollebadda Land Acquisition project.

Therefore, this research aims to perceive whether the existing laws in Sri Lanka are adequate to protect the rights of indigenous communities against adverse developmental activities. The Sri Lankan legal framework is compared with the existing international standards in order to recognize the shortcomings of the Sri Lankan framework to address this issue.

II. METHODOLOGY

The research was carried out as a library research adopting the black letter approach. Black letter approach was adopted because effective access to empirical data was challenging due to prevailing pandemic situation in the country. It was conducted by collecting data through primary resources such as relevant legislations, international conventions and judicial decisions and secondary resources such as research articles, books with critical analysis, journal articles and other electronic resources. This research was carried out as a comparative analysis between Sri Lankan legal framework and the international standards. International standards were selected due to its comprehensiveness and accuracy in addressing the issues of the indigenous community, thus enabling these standards to be adapted in to the Sri Lankan legal framework.

III. VIOLATION OF RIGHTS OF INDIGENOUS COMMUNITIES DUE TO DEVELOPMENTAL ACTIVITIES IN SRI LANKA

Indigenous people are recognized as natives of a State who are culturally distinct. They practice unique traditions and retain social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live in. (United Nations Permanent Forum on Indigenous Issues, 2021) Indigenous communities are spreaded all around the globe. These native or indigenous people who are spreaded around the world are the descendants of people who inhabited a specific geographical region when people of different cultures arrived. These new arrivals later became dominant than the previous inhabitants.

Indigenous Community in Sri Lanka is known as 'Veddas'. According to Mahawamsa, Veddas are the descendants of Vijaya and Kuweni. (Ceylon Government, 1912) But archeological evidence and research findings disagrees with this statement. "The ancestors of Veddas at one time ranged from South Australia to India, when these lands were part of one vast South-eastern Lemurian continent." (Spittel, 1957)

In past, Veddas have been scattered around the Island but now, most of them have blended in with the Sinhalese and Tamil communities. The Veddas are divided into three regional groups (the Bintenne Veddas, the Anuradhapura Veddas, and the Coast Veddas) whose members have little or no contact with one another, although they acknowledge a remote kinship (Road Development Authority,

Ministry of Higher Education and Highways, Government of Sri Lanka for the Asian Development Bank, 2017) At present majority of Veddas live in Eastern Province. 'The towns closest to the Vedda settlements are Maha Oya to the east and Mahiyangana to the west.' (Amarasekara, 2017) By 2017, the estimates of Vedda populations were between 5,000 to 10,000 (Road Development Authority, Ministry of Higher Education and Highways, Government of Sri Lanka for the Asian Development Bank, 2017)

With the development over the years, Veddas have gradually shifted from their original ways of living such as hunting and moved on to economic activities such as cultivation and trade. With this new background Veddas at present are facing various difficulties in order to survive. Of the major difficulties Veddas face at present, the difficulties faced as an impact of the developmental projects takes a prominent place. Some of the development projects which affected immensely to the Vedda Communities are Mahaveli irrigation and agricultural extension project, post Tsunami development projects, post conflict development projects, Rambakan Oya irrigation project and various road development projects. 'As described in the historic context of the Veddas, the Mahaveli development project resulted in fragmentation of the Vedda settlements leading to complete alteration of the culture, traditions, livelihoods and way of life of the resettled communities, mainly in the Dimbulagala and Henanigala areas.' (De Silva and Punchihewa, 2011) "The identity of the Veddas is inextricably linked to the forests and the land, which is integral to the social, livelihood and spiritual life of the community.' (A Joint Civil Society Shadow Report to the United Nations Committee on Economic Social and Cultural Rights, 2017) But, at present the steps taken by State for regulation of lands and forests has had an adverse impact on the Veddas.

The recent acquisition of land in Rambakan Oya forest reserve for private investments has resurfaced the difficulties faced by Veddas due to the Developments within the country. They are once again threatened with losing their lands and livelihood due to the actions of the State. 'The chief of Wannila eththo (Veddas or forest dwellers) and the Center for Environmental Justice filed a petition recently in the Appeal Court of Sri Lanka against the clearing of 500 hectares of land in Pollebedda-Rambakan Oya area.' (Perera, 2021) The petition claims that Mahaweli Development Authority had

begun a project on land to cultivate Maize without conducting an Environmental Impact assessment. 'Petitioners state that the livelihood of the inhabitants largely depends on the forest. They have limited access to health care facilities and largely depend on indigenous medicine prepared from various herbs, honey and other forest produces found in the area. Furthermore, fishing in reservoirs and collect bee honey are some of their traditional sources of income and engaged in traditional livelihoods, such as gathering wood to build their mud houses with thatched roofs.' *Uruwarige Wannila Aththo and others vs Central Environmental Authority and others* (2020)] By restricting and denying of the basic needs of the Vedda Community of the Pollebadda area, the State is violating the basic fundamental rights of the indigenous community.

IV. INTERNATIONAL STANDARDS APPLICABLE TO THE PROTECTION OF RIGHTS OF THE INDIGENOUS COMMUNITIES AGAINST DEVELOPMENTAL ACTIVITIES

The Indigenous and Tribal Peoples Convention, 1989 is an International Labor Organization Convention, which is also known as ILO Convention 169. It is the foremost binding international convention concerning indigenous peoples.

The Article 7 of the Convention discusses the right to participate in the formulation and implementation for national and regional development projects which affects them directly. In this context, the government is required to take measures in cooperation with them to protect and preserve the environment of their territories.

Article 14 requires the government to recognize the ownership and possession of the lands the indigenous people traditionally occupied. Furthermore, adequate procedures are to be established within the national legal system to resolve land claims of them.

In the emergence of necessity for relocation, indigenous people's free and informed consent is required by Article 16. The article further states as soon as the grounds for relocation cease to exist, these peoples shall have the right to return to their traditional lands. When such return is not possible, 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 otherwise they should be compensated properly.

United Nations Declaration on the Rights of Indigenous Peoples was adopted by The General Assembly on the recommendation of the Human Rights Council's resolution 1/2 of 29 June 2006. This recognizes the need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources. (United Nations Declaration on the Rights of Indigenous Peoples, 2007)

The Article 8 of the Declaration recognizes the necessity of the States in providing effective mechanisms for prevention of, and redress for any action which has the aim or effect of dispossessing them of their lands, territories or resources. This right is further emphasized by the Article 10 as follows; 'Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.' When obtaining their free, prior and informed consent, the State shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions (Article 19). In addition to this right the declaration also recognizes the importance of their participation in the decision-making process with regard to matters which would affect their rights, and to maintain and develop their own indigenous decision-making institutions by the Article 18.

Article 26 (1) states that, Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. At the same time, it emphasizes the duty of the States in establishing and implementing an independent, impartial, and transparent process, giving due recognition to indigenous peoples' laws and traditions, to recognize and adjudicate their rights pertaining to their territories and resources, including those which were traditionally owned or otherwise occupied or used (Article 27). The declaration also emphasizes that Indigenous peoples have a right to redress by means of just, and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, in the event of confiscation or occupation of such lands without their free, prior and informed consent (Article 28).

Article 40 provides for the right to engage in prompt decision making through just and fair procedures for the resolution of disputes with States or other parties and for remedies for all infringements of their individual and collective rights.

Several International Courts have also recognized that rights of the indigenous community are not to be violated when carrying out developmental activities. In the case of *Raul Arturo Rincon Ardila vs the Republic of Colombia* held that, Indigenous lands have been protected as public goods with a special protection regime.

The case of *Yanomami vs Brazil* is one of the first reported cases where the Inter-American Commission on Human Rights outlined the doctrine on the right of indigenous peoples to receive special protection aimed at enabling the preservation of their cultural identity. IACHR recommended the State, in line with domestic legislation, to proceed to demarcate the Yanomami Park, to continue adopting preventive and remedial sanitary measures aimed at protecting the life and health of the Yanomami.

In *Saramaka People vs Suriname*, the IACHR after examining the rights of tribal peoples in international law, held that the members of the Saramaka people have a right to use and enjoy the natural resources that lie on and within their traditionally owned territory and that are necessary for their survival. Further it was held that Suriname may restrict this right by granting concessions for the exploration and extraction of natural resources only when such restriction does not deny the Saramaka's survival as a tribal people.

In the case of *Endorois vs Kenya* the African Commission on Human and Peoples Rights held that there was a clear violation of the African Charter on Human and Peoples' Rights, specifically the rights to religious practice, to property, to culture, to the free disposition of natural resources, and to development by the Kenyan government.

In the Canadian case of *Tsilhqot, in Nation v. British Columbia* (26 June 2014, SCC 44, Docket No. 3498662614) the Court required that free, prior, and informed consent of the indigenous people must be obtained before their property can be taken or infringed upon.

Furthermore, the Constitutional Court of Guatemala (December 2013), in the case of *Mataquesuintla v. Guatemala*, held that under ILO Convention 169 the Government was required to obtain the peoples'

consent before it could proceed to permit a mining operation by a private corporation to begin production (Soares, 2013). In this case, 96% of the local people rejected operation of the mine through a public referendum.

Moreover, in many indigenous cultures their land is worshipped as 'Mother Earth' while making it the core of their culture. In their view, lands should neither be torn open and exploited nor be bought, sold or bartered. These views have been adopted by the new constitution of the Ecuador for the first time in history by establishing "Pachamama" (dragon goddess) as a legal entity.

When analyzing these international conventions, declarations and judicial decisions, it is evident that the international community has recognized the importance of protecting the rights of indigenous people against developmental activities.

V. COMPARATIVE ANALYSIS AND LESSONS TO BE LEARNT

When considering about the Sri Lankan situation, it is evident that Indigenous People within Sri Lanka has the minimum rights and protection. Sri Lanka has voted in favor of United Nations Declaration on the Rights of Indigenous People which was adopted in 2007. As Sri Lanka is a dualist country, mere voting in favor of a convention does not make it a part of the common law of the country. Nonetheless, the State has not enacted a specific legislation or mechanism to protect the rights of the indigenous people. 'Wildlife conservation laws and regulations Fauna and Flora Protection Ordinance, Forest Ordinance and National Heritage Wilderness Areas Act have deprived them of hunting grounds and criminalized their livelihood.' (The Rights of Indigenous Peoples, 2017) Section 3 of the Fauna and Flora Protection Ordinance prohibits any person to enter in to Strict Natural reserves, Nature reserves or Jungle corridors and entering to National Parks are allowed only for the purpose of observation. Further it prohibits hunting and collecting any plants within any of these forests. Section 6 and 7 of the Forest Ordinance states that any form of harm done to the forest or any form of hunting within a forest reserve is considered to be an offence. Section 3 of National Heritage Wilderness Areas Act prohibits any person to enter into or remain within any National Heritage Wilderness Area unless it is for an official purpose. Section 4 prohibits any act within such area which could harm the environment. When analyzing these provisions it becomes clear that the indigenous community have

been deprived of their lands as well as their way of living. Other than that, large development projects have forced them to resettlement. These populations are socially isolated and deprived of the basic facilities for survival. This can be recognized as a clear violation of Article 10 of UNDRIP and Article 16 of ILO Convention 169 as they specifically recognize that indigenous people shall not be relocated without the free, prior and informed consent of them and also they should be fairly compensated too. Also Article 19 of UNDRIP and Article 7 of ILO Convention 169 recognize the importance of their participation in the decision-making process with regard to matters which would affect their rights. When considering the Pollebadda situation, it is clear that Vedda community has not been properly informed regarding the development projects and their necessities and rights have not been taken into consideration. There is no free, prior and informed consent as they were not participated in the decision making process while it was clearly visible that such development project would affect the Vedda community to a greater extent.

The Constitution of Sri Lanka recognizes the freedom of movement and choosing one's residence in Sri Lanka under Fundamental Rights [Article 14(h)] Forcing Vedda people out of their lands for development projects will violate this basic fundamental right of those people. Further under Directive principles of State policy expressly states that, "The State shall protect, preserve and improve the environment for the benefit of the community." [Article 27(14)] But when considering the recent events such as the issues in Pollebadda area it is evident that the Development projects do not improve the environment as well as it is not beneficial to the community who are dwelling in that area. Constitution under Article 28(f) recognizes every person within Sri Lanka has a fundamental duty to protect nature and conserve its riches and also 28(e) recognizes that every person should respect the rights and freedoms of others. But according to Article 29 it provides that these provisions do not confer or impose legal rights or obligations and any inconsistency with such provisions shall not be raised in any court or tribunal. Therefore, the protection given to the indigenous community through the above mentioned provisions are limited. But when comparing this with the world, it can be observed that countries such as Ecuador have recognized the environment as a legal entity with its own rights through the constitution. This

inevitably protects the rights of the indigenous people as they are connected with the nature.

Environmental Impact Assessment (EIA) is recognized as a process of identifying the anticipated environmental effects of proposed developments. This can be recognized as a method of making decisions in developmental sector more transparent and also to mitigate negative environmental impact. , the principle of Free, Prior and Informed Consent (FPIC) can be discussed along with EIA. FPIC is recognized as an inherited right of Indigenous People for their lands and resources (Report of the Working Group on Indigenous Populations on its twenty-second session, 2004). This principle is recognized in the case of *Saramaka People vs. Suriname*. It can be presumed that the principle of FPIC is recognized through conducting an EIA. In the context of Sri Lanka National Environmental Amended Act, No. 56 of 1988 introduced the EIA Process in Part IV C entitled Approval for projects. Mainly EIA is done for large scale developmental projects and for the projects which are located in environmental sensitive areas. Not only EIA but Also IEE is also recognized by NEA in order to protect the environment and habitats. *Bulankulama and others vs. Secretary, ministry of Industrial development and others* emphasizes the importance of conducting an EIA before initiating the developmental project. Furthermore, in the case of *Gunarathna vs. Homagama Pradeshiya Saba* emphasises that Public participation and Right to Information as the two Principles of EIA which should also be concerned. Through conducting EIA, the principle of FPIC will also be considered hence the rights of the indigenous community will also be protected. Therefore, in the context of Rabakan Oya, non-conduction of EIA has caused the aforesaid problems to the Vedda community as well as to the environment.

VI. RECOMMENDATIONS

Thus, it is evident that a proper legal framework is to be implemented in order to protect the indigenous community and their basic rights. The above mentioned existing legal framework should be amended to recognize the rights of the indigenous community. Conservation of the environment and sustainable development should be given vital importance to ensure that development is continued while minimizing the harm done to both indigenous community and the environment.

The legislature should recognize the indigenous community as a vulnerable group of people who

needs special protection. Specifically, the constitution should recognize the right to the environment and importance of conserving natural resources. Right to a clean and healthy environment should be acknowledged as a basic fundamental right of every citizen. Environment Impact Assessment should be mandated and a proper screening process should be implemented to ensure that EIA is properly completed when conducting any developmental activity. It should be properly managed to ensure that the harm done to the environment is properly assessed and given solutions to. Legislature such as FFPO, FO and National Heritage Wilderness Areas Act should be amended to recognize the rights of Indigenous people and due recognition and protection of and access to the traditional forest habitats of the Veddas should be provided. Their traditional way of living such as hunting should be allowed to a reasonable limit under restrictions, rather than making it an offence. Thus section 6 and 7 of the FO should be amended accordingly. Section 3 of FFPO and section 3 and 4 of National Heritage Wilderness Areas Act also should be amended so that Vedda community is allowed to enter into their natural habitat rather than chasing them out of it. Further specific legislation should be implemented recognizing the cultural practices and rights of Indigenous people in Sri Lanka. An independent authority should be established in consultation with and participation of the community to guide and coordinate law and policy with a view to safeguard the rights of the Vedda community.

Finally, ILO Convention 169 on indigenous peoples should be ratified and a time-bound plan of action should be implemented to ensure adherence to the convention and realization of rights in the UNDRIP.

VII. CONCLUSION

Indigenous people of Sri Lanka have inhabited the island for several millennia. They have adapted and coped with external and internal stresses which could easily result in vanishing them as a cultural group. One of the most prominent external stresses can be recognized as exponential development and its effect upon their natural habitat. This can be clearly identified in recent land acquisition of Rambakan Oya forest reserve and its repercussions on Vedda community. Due to the lack of proper law enforcement it has become challenging for the Vedda community to secure their rights.

As discussed above the international standards such as ILO convention 169 and the UNDRIP have comprehensively addressed protecting the rights of the indigenous people while conducting developmental activities. When comparing to these international standards it was evident that the Sri Lankan legal framework is inadequate to address the rights of Vedda community. This study recognizes the importance of protecting the rights of indigenous people and recommends amendment of the existing legislature and implementation of a proper legal framework which will safeguard their rights while sustainably developing the country.

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ABBREVIATIONS AND SPECIFIC SYMBOLS

EIA - Environmental Impact Assessment

FFPO – Flora and Fauna Protection Ordinance

FO – Forest Ordinance

FPIC - Free, Prior and Informed Consent

IACHR - Inter-American Commission on Human Rights

ILO – International Labor Organization

NEA - National Environmental Amended Act

UN – United Nations

UNDRIP - United Nations Declaration on the Rights of Indigenous Peoples

ACKNOWLEDGMENT

We would like to extend our heartfelt gratitude to our academic supervisor, Miss Asanka Edirisinghe, for her expertise, guidance, supervision and support throughout these past few months to make this research a success.

Secondly, we would like to thank our parents for advising and encouraging us to get the best outcome from this study. We would not be able to accomplish this study without their tremendous support and cheerfulness to battle the inconveniences that ensued throughout the study.

Finally, we would like to thank our colleagues for their humble support, guidance and encouragement to make this study a success.

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