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The Case for Inclusion of ‘Positive Measures’ For Protection of Land Rights of Indigenous Peoples

The Indigenous Lawyers Association (ILAI) submits that positive discrimination is a part of international human rights law under Article 3 of the ICERD. Many national laws from the colonial times codified positive measures relating to prohibition of transfer, sale and mortgage of lands from indigenous peoples to non-indigenous peoples as well as regulating movement and settlement of non-indigenous peoples into the lands/territories of indigenous peoples. In the post independent period, these laws were further strengthened and also the right to free and prior informed consent relating to land rights of indigenous peoples have been codified.

In its “*General Comment No. 26 (2021) on land and economic, social and cultural rights*”, the UN Committee on the ESCR should further elaborate the specific provisions relating to the positive measures on the land rights, especially of the indigenous peoples.

**1. Background and rational for inclusion of positive measures for protection of land rights of indigenous peoples**

***i. Positive discrimination under national and international law***

Positive discrimination, also known as affirmative actions, is a part of international human rights law under Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). Many State parties to the ICESCR have taken executive and legislatives measures to codify positive discrimination to advance the rights of the vulnerable groups.

Positive measures are required as the principle of equality and non-discrimination alone are at times not adequate to address the systemic and the root causes of the violations of the rights of indigenous peoples.

***ii. Positive measure of prohibition of transfer, sale and mortgage of lands from indigenous peoples to non-indigenous peoples from colonial period***

Positive measures predate international human rights law with respect to the protection of land rights of indigenous peoples.

In **South Asia**, the colonial British had enacted the Bengal Eastern Frontier Regulation of 1873[[1]](#footnote-1), the Assam Land and Revenue Regulations of 1886, the Chittagong Hill Tracts Regulation of 1900[[2]](#footnote-2), the Chhota Nagpur Tenancy Act of 1908[[3]](#footnote-3) and the Santhal Parganas Tenancy (Supplementary Provision) Act of 1940[[4]](#footnote-4) prohibiting transfer of lands from the aborigines/indigenous[[5]](#footnote-5) people to non-tribals or “interest” on the lands of indigenous peoples by non-indigenous peoples.

In post independent period, **India** further took measures to strengthen and enforce the laws enacted by the colonial British. India further went on to enact many laws to prohibit sale, transfer or mortgaging of lands from tribals to non-tribals and criminalise grabbing of tribal lands as a criminal offence under the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.[[6]](#footnote-6) Many States/provinces of India enacted State specific laws to codify positive measures for protection of land rights of indigenous peoples.

Pakistan and **Banglades**h also continued with the Chittagong Hill Tracts Regulation of 1900.

Article 8(5)(c) of the 1957 Constitution of **Malaysia**[[7]](#footnote-7) provided positive measures for the protection, well-being or advancement of the aboriginal peoples of the Malay Peninsula (including the reservation of land) to aborigines. Further, the Aboriginal Peoples Act of 1954[[8]](#footnote-8) (revised 1974) ensured the right to land of the aborigines.

Article II Section 22, Article XI Section 5, Article XIV Section 17 and Article XVI Section of the 1987 Constitution[[9]](#footnote-9), the **Philippines** committed that it “*shall protect the rights of indigenous cultural communities to their ancestral lands to ensure their economic, social, and cultural well-being.*” These rights were further ensured and elaborated under the Indigenous Peoples’ Rights Act of 1997 (IPRA).[[10]](#footnote-10)

***iii. Positive measure of regulating movement and settlement of non-indigenous peoples into the lands/territories of indigenous peoples***

The Bengal Eastern Frontier Regulation of 1873 and the Chittagong Hill Tracts Regulation of 1900 regulated the entry of outsiders in the lands and territories of the indigenous peoples by non-indigenous peoples.

In fact, in January 2020, **India** extended the Inner Line Permit under Bengal Eastern Frontier Regulation of 1873 to the State of Manipur for the first time since 1873.[[11]](#footnote-11) Similarly, Section 1o of the IPRA of Philippines made “*unauthorized and unlawful intrusion upon, or use of any portion of the ancestral domain, or any violation of the rights enumerated, shall be punishable*”.

***iv. Positive measure on free, prior and informed consent to protect land rights of indigenous peoples***

A number of States in Asia such as India and the Philippines have enacted laws to ensure the right to free, prior and informed consent of indigenous peoples for any activity undertaken on the lands and territories of indigenous peoples.

**INDIA**

Subsections to Section 4(d)(2) of the *Provisions of the Panchayats (Extension to the Scheduled Areas) Act,* 1996,[[12]](#footnote-12) *inter alia*, codified the right to free and prior informed consent “*before making the acquisition of land in the Scheduled Areas”* i.e. lands of indigenous peoples*.* Similarly, Section 3(2) of the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006[[13]](#footnote-13) prohibits transfer of forest land except for identified purposes and allow diversion of forest land upto one hectare in each case”

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The right to free and prior informed consent is codified under the Indigenous Peoples Rights Act of 1997. Article 3(g) of the IPRA defines “*Free and Prior Informed Consent — as used in this Act shall mean the consensus of all members of the ICCs/IPs to be determined in accordance with their respective customary laws and practices, free from any external manipulation, interference and coercion, and obtained after fully disclosing the intent and scope of the activity, in a language and process understandable to the community*”. The same is enunciated under various provisions of the Act.

**2. ILAI’s suggestions for inclusion under “III. Obligations of State parties under the Covenant” of the draft “General comment No. 26 (2021) on land and economic, social and cultural rights”:**

Considering that a number of State Parties have taken positive measures beyond upholding the principle of ‘equality and non-discrimination’, the ILAI makes the submission to the UN Committee on the ESCR to elaborate further the ‘Positive Measures’ for protection of land rights of indigenous peoples and include the following under “*III. Obligations of State parties under the Covenant”* of the *“General comment No. 26 (2021) on land and economic, social and cultural rights***”**:

**A. Non-discrimination and equality**

After para 17 of the Draft General comment No. 26 (2021) on land and economic, social and cultural rights, the following text currently numbered 17A by the ILAI may be considered for insertion:

***17A. Positive and protective measures are needed for vulnerable groups like indigenous peoples, fisher folk and pastoralists, or landless rural people and women including on enjoyment of land rights. International law including Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination empowers the State Parties to take positive measures to combat racial discrimination. A number of State Parties, especially from South Asia, had national laws from the colonial times codifying positive discrimination in various spheres including the rights of indigenous peoples to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.***

**C. Obligations of States parties under the Covenant as relating to land**

***Obligation to respect***

After para 24 of the Draft General comment No. 26 (2021) on land and economic, social and cultural rights, the following text currently numbered as 24A may be considered for insertion:

***24A. The States should recognise the need for positive and protective measures for protection of the vulnerable groups like indigenous peoples, fisher folk and pastoralists, or landless rural people and women including on enjoyment of land rights. A number of State parties in South Asia had special laws from the colonial period for protection of the land rights of indigenous people relating to prohibition on sale, transfer or mortgage of lands from indigenous peoples to non-indigenous peoples and imposition of the restrictions on the right to freedom of movement and settlement of non-indigenous peoples in the lands and territories of indigenous peoples. In the post independent period, these laws were continued and further strengthened. The right to free, prior and informed consent for undertaking any activity in the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired have also been recognised. Such measures must further be continued and strengthened, and no measures should be undertaken by the State parties to undermine these positive measures.***

**Obligation to protect**

After para 33 of the Draft General comment No. 26 (2021) on land and economic, social and cultural rights, the following text tentatively numbered as 33A may be considered for insertion:

***33A. To fully protect indigenous peoples, State Parties should enact laws for protection of the land rights including prohibition on sale, transfer or mortgage of lands from indigenous peoples to non-indigenous peoples; imposition of restrictions on the right to freedom of movement and settlement of non-indigenous peoples in the lands and territories of indigenous peoples; ensuring the right to free, prior and informed consent for undertaking any activity in the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired; and further criminalising unauthorized and unlawful intrusion/occupation/grabbing of lands of indigenous peoples.***

**Obligation to fulfil**

After para 37 of the Draft General comment No. 26 (2021) on land and economic, social and cultural rights, the following text numbered as 37A may be considered for insertion:

***37A. State parties which have enacted laws ensuring positive measures including prohibition on sale, transfer or mortgage of lands from indigenous peoples to non-indigenous peoples; imposition of restrictions on the right to freedom of movement and settlement of non-indigenous peoples in the lands and territories of indigenous peoples; ensuring the right to free, prior and informed consent for undertaking any activity in the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired and further criminalising unauthorized and unlawful intrusion/occupation/grabbing of lands of indigenous peoples should take effective measures to fully implement these laws.***

1. . The Bengal Eastern Frontier Regulation of 1873 is available at https://www.mha.gov.in/sites/default/files/4\_RTI\_NE\_JPS\_280714.PDF [↑](#footnote-ref-1)
2. . The Chittagong Hill-tracts Regulation, 1900 (REGULATION I OF 1900) is available at http://bdlaws.minlaw.gov.bd/act-1313.html [↑](#footnote-ref-2)
3. . The Chhota Nagpur Tenancy Act of 1908 is available at https://www.indiacode.nic.in/bitstream/123456789/7796/1/the\_chota\_nagpur\_tenancy\_act%2C1908.pdf [↑](#footnote-ref-3)
4. . The Santhal Parganas Tenancy (Supplementary Provision) Act, 1949 is available at https://www.indiacode.nic.in/bitstream/123456789/8120/1/santhal\_parganas\_tenancy\_laws\_full.pdf [↑](#footnote-ref-4)
5. . The terms in these laws used are “indigenous”/aborigines. [↑](#footnote-ref-5)
6. . The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 is available at <https://legislative.gov.in/sites/default/files/A1989-33_2.pdf> [↑](#footnote-ref-6)
7. . The Constitution of Malaysia, 1957 is available at http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/44034/117925/F1077439210/MYS44034.pdf [↑](#footnote-ref-7)
8. . The Aboriginal Peoples Act of 1954 is available at http://www.commonlii.org/my/legis/consol\_act/apa19541974255/ [↑](#footnote-ref-8)
9. . The Constitution of the Republic of the Philippines is available https://www.officialgazette.gov.ph/constitutions/1987-constitution/ [↑](#footnote-ref-9)
10. . Indigenous Peoples’ Rights Act of 1997 is available at <https://www.officialgazette.gov.ph/1997/10/29/republic-act-no-8371/> [↑](#footnote-ref-10)
11. . Inner Line Permit comes into force in Manipur, temporary permit to be issued for 15 days, Indian Express, 1 January 2020 https://indianexpress.com/article/north-east-india/manipur/inner-line-permit-comes-into-force-in-manipur-temporary-permit-to-be-issued-for-15-days/ [↑](#footnote-ref-11)
12. . The Provisions of the Panchayats (Extension to the Scheduled Areas) Act, 1996 is available at https://legislative.gov.in/sites/default/files/A1996-40.pdf [↑](#footnote-ref-12)
13. . The Forest Rights Act, 2006 is available at https://tribal.nic.in/FRA/data/FRARulesBook.pdf [↑](#footnote-ref-13)