

Indigenous People in Pakistan: In Consideration of the Right to Cultural Property and Identity

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Pakistan is host to the different indigenous peoples' groups such as "Koochis," "Rebari," "Bakarwal," "Kehal," "Jogi," "Kabootra," "Sanyasi," and the most famous "Kalash." By providing them with a proper legal mechanism for the fortification of their inherited resources, culture expressions and outdated information under a thorough intellectual

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property framework, Pakistan can preserve the already declining population of indigenous people and create better livelihood opportunities for 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 ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal system. Many international instruments have been in operation to support their endeavors. They make up to 15 percent of the extreme poor population of the world. Hence there is an urgency to develop laws for them.

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1. Introduction

The indigenous peoples' right to preserve and safeguard their cultural property is an inherent feature, as stated in Article 31 of the United Nations Declaration on the Rights of Indigenous Peoples.¹ Cultural identity was not compatible with the demands of people with ethnic origin, because it was developed more Eurocentric.² However, the emerging literature is now focusing on indigenous rights and scholars and jurists are widening the scope of cultural property in order to deal with the problem related to indigenous peoples efficiently.³ Indigenous peoples are separated geographically with distinctive cultures, but they are united against prejudice and discrimination against them. Those people are struggling not only for their identity, but also against the dangers and violations regarding their territories, cultural property and identity.

Pakistan is a birthplace to one of the oldest civilizations-the Indus Valley Civilization as well as a home to the different indigenous peoples groups like Koochis, Rebari, Kehal, Jogi, Kabootra, Bakarwal and the most famous-Kalash tribe.⁴ The constitution of Pakistan provides equal rights to all the citizens of Pakistan. However, there are ethnic minorities and indigenous people who often face discrimination in socio-political and economic life as citizens of state. This research paper will discuss the connection between indigenous peoples' rights to cultural property with special references to the main challenges being faced by Kalash community in Pakistan.

2. Cultural Ethnicities of Indigenous People: An Overview

Indigenous people or varied ethnic tribes are those who are practicing and inheriting their distinctive culture and lifestyle from their ancestors for the people themselves or environment around them.⁵ Their culture and lifestyle can be easily distinguished from the dominant societies. There are around 370 million individuals found over 70 countries which can be identified as indigenous peoples.⁶

The term “indigenous peoples” does not have a universal and commonly accepted definition. However, United Nations (UN), International Labor Organization (ILO) and the World Bank developed their own understanding of this concept. According to the UN, they are the people practicing distinctive traditions and inclined to retain their socio-cultural and political characteristics which are different from the dominant societies in which they live. Because of this unique infrastructure, cultural and social values, these groups of people usually live-in isolation from most of the population.⁷ As many cultural ethnicities and different indigenous groups around the world are coexisting and keeping their individuality intact, it is difficult at times to agree upon one definitive interpretation. It is thus appropriate to term them as self-identified, individualistic and members of a community with historical continuity, cultural background and beliefs.⁸

Indigenous peoples are considered as the most endangered sect of any society due to their lack of interest in modern civilization.⁹ They prefer to stick to their traditional values and culture without adopting modern techniques and norms of the society.¹⁰ These characteristics usually isolate them from the modern social infrastructure which results in the deprivation of their participation in the mainstream progress of the dominant society.¹¹

In almost fifty years of debate, the UN failed to adopt a universal classification of cultural ethnicities or indigenous people. José R. Martínez Cobo once tried to explain the term of “indigenous peoples” as:

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 on 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 system.¹²

However, the indigenous peoples themselves claimed that one definition cannot deal with the vast diversity among the different groups from all around the world. Furthermore, some states are reluctant to use the term “indigenous peoples” because of its possible implications under international law, especially a right of self-sufficiency for all people.¹³

3. Cultural Rights of Indigenous People

Conceptualization of indigenous peoples emerged just after the colonial domination of their territories.¹⁴ Since they were forced to mass migration, mass atrocities and ethnic cleansing, their rights and properties were violated throughout the history.¹⁵ Initially, their cultural rights were not subjected to any protection under any domestic or international legal regime. However, due to the struggles of indigenous peoples with different organizations, their claims were being heard.¹⁶ Indigenous people were paid attention during 1980s and onwards¹⁷ through the inception of “the UN Voluntary Fund for Indigenous Populations (1985)” and the adoption of “the ILO Convention on Indigenous and Tribal Peoples in Independent Countries (1989).”¹⁸ The UN took several initiatives to ensure that indigenous rights, distinct culture, and their way of life should be protected. The initial milestones with regard to indigenous peoples are the establishment of a Working Group on Indigenous Population (WGIP) in 1982. Then, the UN proclaimed ‘1993’ as the International Year of the World’s Indigenous Peoples, two respective International Decades of the World’s Indigenous Peoples (1995-2004 and 2005-2014), and a Permanent Forum on Indigenous Issues in 2000 with the appointment of Special Rapporteur on the Rights of Indigenous Peoples.¹⁹

In addition to the misery of ethnic minorities and indigenous people, on September 13, 2007, the UN General Assembly adopted the “United Nations Declaration on the Rights of Indigenous Peoples.”²⁰ This Declaration is the most comprehensive international human rights instrument for indigenous peoples. Article 33.1 of the Declaration states: “Indigenous peoples have the right to determine their own identity or membership in accordance with their customs

and traditions.”²¹ It recognizes the collective rights of indigenous people on their lands. For example, Article 3 states: “Indigenous peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their “economic, social, and cultural development.” Additionally, Article 26 of the Declaration further strengthens the above stated.

Moreover, the International Labor Conference adopted the ILO Convention No. 169 in 1989 which emphasizes that indigenous people have their rights and states are responsible to protect those rights.²² The ILO Convention No. 169 pays attention to the right to self-identification by indigenous peoples.²³

According to the World Intellectual Property Organization (WIPO), indigenous intellectual property incorporates: “the information, practices, beliefs and philosophy that are unique to each indigenous culture.”²⁴ Ethnic people’s cultural and intellectual heritage includes therefore culture expressions, traditional practices, language, religion and their traditional knowledge, which were developed over a timespan of centuries. The colonist regimes, however, occupied their territories and tried to push back those attributes by imposing their own dominant culture upon the indigenous people’s which resulted in violating the rights and diminishing the peculiarities of indigenous peoples.²⁵

One of the most critical areas which is covered by intellectual property law is art²⁶ including painting, music, photography, literature or performing arts.²⁷ Initially, indigenous people’s art was not regarded as art. Rather, it was referred to as cultural or religious practices which could be exploited without permission of those indigenous groups.²⁸ F. R. Myers argue that, for example in Australia, the art of indigenous peoples and ethnic minorities was exploited ruthlessly in the past without the permission of those peoples.²⁹ The author further argues that in majority of the cases their art was sundered from its original spirit and context.³⁰ Indigenous peoples were struggling against those exploitations which started getting popular attention in 1970s. Finally, the Australian courts had to deal with successive legal battles regarding those manipulations in the 1980s and 1990s.³¹ As a result of all those battles, intellectual property of indigenous art was protected, as well.³²

One area of concern for indigenous peoples is the control over and possession of their indigenous art collection.³³ This problem seems to have universal, worldwide nature because all the ‘groups’ of indigenous people are related to it.³⁴ After colonial domination, the indigenous art was collected by the non-indigenous explorers and

stored in either private collections or the public libraries and museums.³⁵ The IP law regime, however, failed to identify the right of different ethnicities over those collections. Instead, it supported the ownership of non-indigenous collectors upon those indigenous art collections.³⁶

Another concern of indigenous people's right is nature and the natural resources found in their territories.³⁷ It appears, however, that non-indigenous people often violated the right of indigenous peoples to maintain their territories according to their traditions.³⁸ Under colonial regimes, for example, the genetic resources were extracted from the indigenous peoples' lands in the name of research which was later patented without consent or due involvement of the indigenous groups from which it was obtained.³⁹ An example of such an activity is the so-called *San-Hoodia* case. San people live mainly in Botswana, Namibia and South Africa and their Hoodia was well known for its appetite suppressant characteristics used for clinical and medical purposes for many years by a British company without acknowledging that this plant belongs to San people.⁴⁰ After three years of negotiations with the South African government, San people were finally compensated.⁴¹

Although IP law is now developing rapidly and recognizing these rights more assertively, it is not fully giving due credit to indigenous people for their discovery of all the gene resources and their efforts behind it.⁴² Instead, the colonialist would perceive that the indigenous peoples possessed all that knowledge by luck in a primitive and unsophisticated manner.⁴³

Actually, domestic attention towards the indigenous peoples was paid in countries such as Australia, Canada and India, but the international recognition came just after the WIPO started considering the issue of property rights of indigenous peoples.⁴⁴ In particular, the United Nations Educational, Scientific and Cultural Organization (UNESCO) played a significant role in preserving cultural expressions and cultural properties, while the Convention on Biological Diversity (CBD) had been instrumental in dealing with the issues related to the biodiversity and biopiracy.⁴⁵ However, the WIPO remained the prominent figure when it comes to the indigenous IP rights.⁴⁶

In 1998-99, a fact-finding mission was conducted by the WIPO. It was called Intellectual Property Needs and Expectations of Traditional Knowledge which aimed to provide information on global IP issues, including the right of indigenous people and ethnic minorities.⁴⁷ Due to this program, the Intergovernmental

Committee (IGC) on Intellectual Property and Genetic Resources was established in 2000 and the Traditional Knowledge and Folklore was launched in 2001 by the WIPO General Assembly. The Traditional Knowledge and Folklore is a forum for the WIPO member states to discuss the intellectual property issues that arise in the context of the access to genetic resources and benefit-sharing as well as the protection of traditional knowledge and traditional cultural expressions.⁴⁸ The IGC serves as a forum for negotiations, discussions and mutual cooperation and deals with the issues related to the IP and development of international law on traditional knowledge and sustainable development in indigenous and local communities.⁴⁹

4. Indigenous Rights in the Context of Pakistan

M.Q. Zaman noted that the Muslim minority in Pakistan could freely practice their religion and live in accordance with its religious norms. Unfortunately, however, the situation of the minority groups is quite insecure.⁵⁰ Pakistani law does not recognize indigenous people but instead alludes them as tribal people, ethnic or religious minorities.⁵¹ They can be found in different areas of country. The main groups of indigenous peoples in Pakistan are Bakarwal, Jogi, Kabootra, Kalash, Kehal, Koochis, Rebari and Sanyasi.⁵² Pakistan ratified almost all core international human rights treaties. However, their ethnicity and individual status as indigenous group of people is not recognized, which amount to a violation of fundamental rights of the Pakistani citizen, enshrined under its Constitution.⁵³ The Constitution of Pakistan does not acknowledge indigenous peoples explicitly, but rather refers to all ethnic, linguistic and religious minorities as well as indigenous peoples as minorities.⁵⁴

Even though there is lack of recognition of indigenous people in the preamble of the Constitution, it is still possible to extract certain minority's rights and freedoms in other provisions of the Pakistani Constitution. For example, Article 33 declares that parochial, ethnic tribal sectarian or provincial prejudices among the citizens are discouraged. Article 36 (Protection of minorities) states that: "The state shall safeguard legitimate rights and interests of minorities, including their due representation in the Federal and Provincial services." The term "minority" used in Article 36 refers to all factions, including religious, ethnic, and linguistic minority groups.

Article 25 of Pakistani Constitution forbids prejudice towards any person which stipulates that all persons are equals in the eyes of the law and entitled to equitable legal protection. Minority groups are equal residents of Pakistan, according to Articles 20, 21, 22, 26, and 27, and are permitted to practice their faith and attend their religious sites. Article 28 provides: “Any section of citizens having a distinct language, script or culture shall have the right to preserve and promote the same and subject to law, establish institutions for that purpose.” Pakistan has ratified most of the core international human rights treaties and voted in favor of the “United Nations Declaration on the Rights of Indigenous Peoples.” However, their issues are not fully drawn in national discourse. For example, in 2015 report submitted by Pakistan to the Committee on the Elimination of All Forms of Racial Discrimination (CERD), no reference was made to any ethnic minorities or indigenous peoples.⁵⁵ In 2014, finally, the UNESCO delivered a special report on the International Day of the World’s Indigenous People and acknowledged the existence of different indigenous groups in Pakistan.⁵⁶

5. Challenges

A. Culture and Religion

In Pakistan, the primary challenge regarding ethnic minorities and indigenous peoples is the protection of their religion, cultural expressions, hereditary resources and traditional expertise. It is well noted that religion is a foundation of identity for a specific group of people.⁵⁷ For example, as the rituals and practices of the Kalasha religion have their source of the longest survival, Kalasha people have been able to maintain their unique culture and identity for centuries.⁵⁸ Kalash people are also called *Kafirs* (non-believers) because they are the only non-Muslim group living in the Muslim community. They practice polytheistic religion which is often described as an ancient Hinduism combined with animistic beliefs.⁵⁹

Kalasha religion, however, is under continuous threat not only because of the modernization and technological development, but also because of pressure from the religious fundamentalists and people of the society.⁶⁰ In 2014, for example, Pakistani Taliban announced an “armed struggle” against Kalash and Ismaili Muslims) in Chitral Valley.⁶¹ Kalasha children are even forced to study Islam instead of their own religion.⁶² It is usually observed that young minds are strongly

affected by religious teachings, and Islam is indoctrinated which ends up in conversions of non-Muslim young girls and boys.

Another reason for religious protection is their religious practices and beliefs connected with the nature and biodiversity.⁶³ For instance, they believed the springs which is the main source of their water supply to be holy and any kind of unnatural activity will not only cause damage to their religious sentiments but also to their biodiversity.⁶⁴ Certain incidents were reported that suggested the violation of their religious beliefs causing damage to their biodiversity.⁶⁵ However Pakistan still fails to protect indigenous people's rights to practice their religion as well as their biodiversity.⁶⁶

B. Language

One of the main modes of survival is the culture and cultural expressions of any community language.⁶⁷ For indigenous people, their language carry the knowledge and values of their ancestors. In the case of Kalash people, the survival of their culture, cultural expressions and traditional knowledge purely depends on their language.⁶⁸ The United Nations Declaration on the Rights of Indigenous People (UNDRIP) gives much consideration to the preservation of indigenous languages. For example, Article 14 of the Declaration states that indigenous people have right to establish and control educational institutions providing education in their own languages and imposes responsibility on the state for taking effective measures to provide indigenous children who live outside their communities an easy access to education related to their culture and language. Also, Article 28 of the Pakistani Constitution states: "[...] any section of citizens having a distinct language, script or culture shall have the right to preserve and promote the same and subject to law, establish institutions for that purpose." However, the Pakistani government is not giving much attention to the preservation of languages particularly to those which are on the verge of extinction such as the languages of indigenous peoples and ethnic minorities.⁶⁹ Language preservation mainly depends on the transfer of linguistic expressions from one generation to another generation effectively without interruption.⁷⁰ Since there are not enough schools educating Kalasha language, the Kalash children have to study Urdu and English.⁷¹ This may impede chain of transfer of language from one generation to another.⁷² In recent, there are few Kalasha primary schools teaching Kalasha language and culture.⁷³

C. Art

Art is among the main concerns of IP regarding indigenous peoples.⁷⁴ For example, Kalash's folk dances, its music, clothes, traditions and festivals are its identity as a whole. Ironically, their folklore has been utilized for many individual and collective purposes while ignoring the intrinsic value attached with it. Tourism campaign and other activities involve a lot of financial gain to governmental, non-governmental organizations and individual level. Their art and culture were exploited without giving rightful share in the advantages. In the 2015 report submitted to CERD Committee, Pakistan clearly states that: "In order to promote interfaith dialogue and cultural harmony 10 Religious Festivals of Minorities are celebrated officially in Pakistan. These festivals include also Chelum Just for Kalasha people"⁷⁵

6. Recommendations

Negotiations are often better than law for indigenous peoples and ethnic groups.⁷⁶ Protocols are a basis of such negotiations since they permit indigenous peoples to present their own traditions and rules all across the dialogue process in history. The Australian Aboriginal and Torres Strait Islander Cultural Protocols for indigenous peoples are one such example.⁷⁷ These protocols not only acknowledge the peculiar status of the indigenous peoples of Australia, but also their relation with biodiversity, history, culture and customs.⁷⁸ On this pattern, some instrument can be developed to guarantee the rights of Kalasha people in Pakistan.

International law plays a pivotal role in the resolution of indigenous IP issues.⁷⁹ The WIPO has instruments enfolding all the concerned areas of indigenous peoples including their cultural expressions, inherited resources and traditional knowledge.⁸⁰ These instruments not only highlight the issues, but also urge the parties to agree upon terms of negotiations which are of mutual benefit for all the parties involved.⁸¹ For instance, the CBD deals with the issues of cultural ethnicities and indigenous peoples related to the biodiversity and biopiracy.⁸² It proposed mechanism which can be beneficial to recognizing the part of traditional knowledge of indigenous peoples in developing biosciences which depends upon the biodiversity of indigenous peoples and ethnic minorities. The proper implementations of those instruments through national legislation is a gateway to

resolving all the issues discussed above.⁸³

Moreover, national legislation should be implemented for settling the issues of indigenous peoples.⁸⁴ Indigenous people of different cultural ethnicities should be also provided with a chance to participate directly in the legislation process concerning their rights and problems.⁸⁵ If required, national legislature can cooperate with international organizations as well as other countries which are dealing with indigenous peoples and their rights effectively.⁸⁶

Documentation of the traditional knowledge can also be effective in the preservation of traditional knowledge of the indigenous population.⁸⁷ Both codified and non-codified or oral traditional knowledge can be preserved from any possible exploitation or extinction.⁸⁸ On the one hand, India developed a digital library for already existing codified traditional knowledge.⁸⁹ China established a database which is solely dedicated to the preservation of traditional medicine knowledge.⁹⁰

On the other, countries like South Africa and Venezuela initiated projects to preserve oral or non-codified traditional knowledge. South Africa introduced a program named 'Ulwazi' to collect and share customary knowledge and culture expressions of the indigenous population of Durban.⁹¹ Venezuela initiated a project known as 'BioZulua' which documents data of food crops and medicine plants from 24 ethnic groups found in Amazon rainforest.⁹²

7. Conclusion

Kalasha peoples are facing various problems with diverse nature. Their griefs can be lessened not only by legal protection to their cultural and traditional knowledge, but also by empowering those to exercise all the rights related to that knowledge or invention or any cultural expression. However, a lot of problems are still required to fully address for indigenous peoples in Pakistan. One of the urgent needs is international framework and its implementation at national level to stop the violations against their rights and the deprivation of those indigenous groups from their own cultural expressions and properties.

Indigenous peoples bearing distinct cultural identity are entitled to protection against any kind of threat or violation to their genetic resources, cultural expressions, and traditional knowledge. Pakistan accommodate several groups of indigenous peoples such as Kalash. It should take effective measures to prevent

any kind of harmful act to the indigenous peoples. For that purpose, Pakistan can not only ask for cooperation and assistance from the countries which tackled the similar issues efficiently such as Australia, but also deal with those issues constructively by proper implementation. Ethnic minorities and indigenous people are entitled to enjoy their civilization and folk traditions through proper policy frame and equal opportunity in the socio-economic development process.

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