

A. Introduction

This joint submission by 35 indigenous peoples' organisations (Annex I) in Nepal focuses on the collective rights of indigenous peoples, particularly the thematic areas of participation in decision-making, land, territories, and natural resources, development, language and cultural rights, women, disabled peoples and recommendations.

B. METHODOLOGY

1. This report has been prepared collectively by IPOs. Meetings and consultations were carried out at different levels to identify the thematic priority areas based on the recommendations of the first UPR cycle review of Nepal in 2011. The first hand information is based on the experience of indigenous communities. The secondary data is based on the reports of various governmental agencies, publications (*Kanoon Patrikas*) of the Supreme Court, newspaper reports and case studies.

C. INDIGENOUS PEOPLES IN NEPAL

2. Indigenous Peoples (*Adivasi Janajati*) constitute 40% of the total population and are recognized in the Constitution, laws and policies. 59 Adivasi Janajati are legally enlisted under the National Foundation for the Development of Indigenous Nationalities Act (NFDIN) 2002. However, there are a number of groups who are yet to be enlisted.
3. Due to the institutionalized Hindu caste hierarchical system, which sustains the concept of pure and impure, indigenous peoples (IPs) have for centuries been subjugated, excluded, marginalized and discriminated against. 14 Adivasi Janajatis are classified as disadvantaged groups; 19 as marginalized; 12 as highly marginalized and 9 as endangered groups.¹
4. IPs were recognized only after the political change in 1990. In the Comprehensive Peace Agreement of (2006) it was clearly articulated that to end discrimination based on ethnicity, language, religion, cultural and regional the problems of indigenous peoples will be address by undertaking a progressive, democratic and inclusive state restructuring (3.3). This has been institutionalized in the Interim Constitution, 2007.

D. NORMATIC FRAMEWORK OF THE STATE

5. Nepal is party to various human rights treaties and declarations that includes ICCPR, ICESCR, CRC, CERD, CEDAW, CAT, ILO Convention No. 169, UNDRIP etc. Article 33(M) of the Interim Constitution states that state shall implement effectively the international treaties that Nepal is party to. Section 9 of the Nepal Treaty Act, 1991 states that the international law has a higher status than the national law. In case of inconsistency, international law prevails over the national law.
6. At least nine Agreements have been concluded between indigenous peoples' organizations and the Government of Nepal relating to peace building, reconciliation, progressive restructuring of the nation, constitution making and social justice. These Agreements aim at easing up the constitution writing process and resolve the existing problems amicably. They further reflect the will of Indigenous people and provide the basic principle for the new constitution of the Secular, Inclusive Federal, Democratic Republic of Nepal.

¹ https://www.google.com/?GWS_rd=ssl#q=negin

E. IMPLEMENTATION STATUS OF THE RECOMMENDATIONS FROM THE FIRST REVIEW CYCLE

1. Constitution making process (Recommendation 106.1,106.2 and 107.28)

a. Ensure full participation of indigenous peoples in accordance with international human rights

7. The Interim Constitution of Nepal, 2007 (hereinafter the Constitution) guarantees the fundamental rights of IPs to participate at the all-state organs, including the Constituent Assembly (CA), on the basis of proportional representation.² It also guarantees the basic right of the people of Nepal to write their own Constitution through the CA.³ In addition to elected members, 26 members to the CA are appointed by the Council of Ministers directly in consensus with indigenous people and civil society.⁴ The allocation of the 26 seats is meant to ensure inclusion, direct representation and participation of indigenous peoples in the Constitution writing process. However, the 26 seats were awarded to the cadres of political parties, thereby leaving no room for independent, meaningful and accountable representation of indigenous peoples.
8. In the first CA (2008-2012), 218 (37%) members were from IP communities, which is very close to indigenous peoples' 40% share of the national population. The number of indigenous peoples' representatives in the second CA (2013 to present) has fallen drastically to 183⁵ and reportedly, a lot of those who did get elected had been under pressure prior to their nomination as the party candidates to make written commitments to abstain from promoting indigenous peoples' issues in the CA.⁶ The indigenous CA members thus represent their respective political parties rather than indigenous peoples. Consequently, there is no space and mechanism in place for Indigenous peoples to participate in the discussion on the agendas that directly affect them in the constitution making process.
9. The issue has been taken up by various national and international human rights mechanisms. In 2009, the UN Special Rapporteur on the Rights of Indigenous Peoples recommended to establish a special mechanism in consultation with Adivasi Janajatis through their own representative institutions in relation to proposals for the provisions of the new constitution that affect to them.⁷ Under its mandate of early warning, the CERD in 2009, 2012 and 2013 recommended the Government of Nepal to ensure indigenous peoples' active and meaningful participation in the CA. It further urged to avoid irreparable harm to indigenous peoples due to their inadequate representation in the CA.⁸ In the case of LAHURNIP et.al. Vs. Government of Nepal, the Supreme Court issued an order of Mandamus against the government and asked to ensure an effective and meaningful participation in the CA, by reforming existing laws and policies, in accordance with the CERD, ICCPR, ILO Convention No.169 and UNDRIP.⁹ There is no representation from 20 indigenous groups in the current CA. And, it was not

² Article 21 Of the Interim Constitution, 2007

³ Preamble of the Interim Constitution, 2007

⁴ Article 63(c) of the Interim Constitution, 2007

⁵ <http://www.ekantipur.com/np/2070/9/25/full-story/382135.htm>

⁶ Christina Nilsson and Sille Stidsen, Constitutional Politics and Indigenous Peoples in Nepal,

http://www.iwgia.org/iwgia_files_publications_files/0686_Constitutional_Politics_and_Indigenous_Peoples_in_Nepal.pdf

⁷ A/HRC/12/34/Add.3, 20 July 2009

⁸ CERD has issued letters from 2009 to 2013.

⁹ LAHURNIP et.al. Vs. Government of Nepal, Supreme Court 2070, Nepal Kanoon Patrika Additional volume, DN8990 P.491

allowed to form a IPs' CACAUS, like in the first CA for organized effort to ensure IPs rights in the new constitution.¹⁰

10. Despite several appeals and memorandums submitted by IPs, the government has not complied with and respected the provisions of international human rights instruments and recommendations as well as decisions of the Supreme Court.

b. Inclusive and progressive restructuring of the Nation

11. The progressive restructuring of the nation is a constitutional commitment to end existing problems relating to class, ethnicity and gender.¹¹ Article 4 of the Constitution declares that Nepal will be a secular, inclusive and federal democratic republican state. Article 138(1a) states that autonomous provinces with full authority would be designed in accordance with the desires of Indigenous Peoples. The CA Thematic Committee on the State Restructure came up with the concept of federal states based on identity and viability, which meant to address the issue of power and resource sharing. The State Restructure Commission confirmed the proposal of the CA Thematic Committee on the State Restructure. However, the ruling and Hindu orthodox parties want to denounce the concept of comprehensive state restructuring with their two-third majority in the second CA.
12. Although the Constitution guarantees the right of IPs and other marginalized groups to participate in the state restructure on the basis of the principle of proportional representation, the recent appointment to the National Human Rights Commission (NHRC) is highly exclusionary. Out of five commissioners one is woman and the rest are Hindu high caste group. There is no representation of IPs. The exclusion is inconsistent with article 131(2) of the Constitution that says to diversify the appointment of the Commission. Prior to the approval of the commissioners' appointment, a complaint to ensure inclusion of IPs was submitted to the Constitutional Council, Parliamentary Hearing Special Committee. However no action was taken to correct the error. A case has been filed in the Supreme Court and it is still pending. The commission doesn't have specific mechanism to deal IPs human rights violation. It does not have specific program on IPs. Similarly, there is no IP representation in the Public Service Commission, Commission (PSC) for the Investigation of Abused of Authority (CIAA) and the National Information Commission.

2. Review of existing laws (Recommendation 19,20,56,62,89,91,92 and 93)

13. The recommendation made in the first cycle of UPR to review existing laws for effective eradication of racial discrimination prevailing against IPs and other marginalized groups have not been complied with yet. The National Action Plan to Implementation of ILO Convention No. 169 has, for example, been stranded in the Ministry of Council for 7 years. Article 154 of the Interim Constitution talks about the establishment of an Indigenous Peoples Commission. And, the National Foundation for Development of Indigenous Nationalities (NFDIN) does not have the mandate to monitor the human rights violations committed against indigenous peoples.

3. Peaceful coexistence and freedom of religion (Based on the Recommendation)

¹⁰ <http://www.indigenousvoice.com/indigenous-peoples-agendas-are-in-shadow-in-constitution-writing-process.html>

¹¹ Preamble of the Interim Constitution, 2007

14. Constitutionally, Nepal was declared a secular country in 2007. Prior to that, the country was a Hindu state for 250 years. IPs, who are distinct from Hindus, were forced to adopt the Hindu religion and caste system.
15. The first codified civil code (Muluki Ain) 1854 criminalized cow slaughter with the provision of life imprisonment, replacing the earlier provision of capital punishment. Currently, cow slaughter is a crime punishable with imprisonment of 12 years.¹² Notably, many IPs in Nepal eat beef and use beef in cultural activities and rituals. In 2013 and 2014 alone, at least 38 indigenous persons are either serving imprisonment or facing prosecution charges of cow slaughter.¹³
16. While the quadruped chapter of Muluki Ain contradicts with the constitutional provision of secularism¹⁴ and the fundamental right to practice own religion¹⁵, the Special Bench of the Supreme Court declared the provision of cow slaughter as constitutional on two grounds: (1) the article 7(2) of the Constitution that considers a cow an national animal; and (2) the cow is a sacred animal of Hindus.¹⁶ In September 2014, the Bench of Justice Govindakumar Upadhya¹⁷ in the Supreme Court issued an Order that the Writ against the provision of cow slaughter may damage the dignity of Hindus.¹⁸ The Supreme Court thereby indirectly closed the door of the Supreme Court to bring future cases against the provision of cow slaughter.
17. De-facto discrimination against IPs on the ground of religion still prevails. On 25 May 2013, the police intervened in a rally organized on the occasion of Buddha Jayanti (Buddha's birthday) in Surkhet district. The rally was heading to the Kakre Bihar, which is the shrine and historical pilgrimage site of Buddhists. People wanted to install an idol of Buddha for which they had the permission from relevant government agencies. 52 people, including Monks, were seriously injured due to indiscriminate baton charge of the police to stop them from installing the idol. Currently, the government is constructing a Hindu temple in Kakre Bihar.

4. Civil, political, economic, educational and cultural rights (Recommendation 40,116)

18. Because of unequal distribution of resources and access to opportunities IPs continue to face severe problems of poverty. According to the national census and National Living Standard Survey data, among Hill IPs, nearly one-fourth (24.6%) are living under the poverty line.¹⁹ Similarly, about 40% of the Kumal, Sunuwar, Majhi and Chepang cluster are living below the poverty line. In contrast, only 10% of Hill Bahun are living below the poverty line. The state's commitments to ensure the Economic, Social and Cultural Rights (ESCR) thus remain mere commitments as no major steps have been taken to eradicate poverty. One of the major barriers to the advancement of the economic situation of IPs is that they do not have rights over communal lands, forests, pastures lands and other resources. The Kipat system (collective

12 No.11 of the Chapter of Quadruped under the Civil Code (Muluki Ain) 1963

13 These cases were reported to LAHURNIP for legal assistance in 2013 and 2014

14 Article 4 of the Interim Constitution, 2007

15 Article 23 of the Interim Constitution, 2007

16 Omprakash Aryal Vs. Prime Minister, Nepal Kanoon Patrika, 2008 volume 9 decision number 8009 p. 1063

17 Justice Upadhya belongs to a Hindu high caste group.

18 Tekam Gharti Vs. Minister of Law and Justice, 2014: The petitioner filed the Writ as an indigenous person and as lawyer demanding to strike down the chapter of quadruped in Muluki Ain on the basis of the provision of secularism of the Constitution and the articles 9 and 18 of the UDHR. Further, compensation was requested for those who are serving imprisonment and facing prosecution.

19 Chaitanya Subba, Bishwamber Pyakurel, Tunga Shiromani Bastola, Mohan Khajum Subba, Nirmal Kumar Raut and Baburam Karki, (2014) A Study on the Socio-Economic Status of Indigenous Peoples in Nepal, Kathmandu, Lawyers' Association for Human Rights of Nepalese Indigenous Peoples, P.27.

lands and land tenure system), which was recognized by various Treaties²⁰ and Agreements, have not been respected.

19. The recommendations of the CERD (2004) and CESCR (E/c.12/NPL/Co/3) to produce disaggregated data based on ethnicity and indigenous identity has yet to be implemented. Due to the lack of disaggregated data, it is challenging to analyze and reform services and facilities provided by the government agencies in a way that ensures that IPs and other excluded groups have adequate access to these services and facilities.
20. The situation of freed Kamaiyas (bonded labour) remains miserable. They are facing lack of housing, livelihood, education, and health care. The freed Kamayas who were not provided shelters are remained complete homeless.²¹ In this regard, the government has failed to implement the recommendation(E/c.12/NPL/Q/3) of the CESCR. No effort has been made to stop Kamaiyas to return to the same condition of the bonded labour.

6. Land, territories and natural resources (Recommendation 106.49 and 106.43)

21. IPs have the right to their special cultural and spiritual relationship with their lands, waters, and natural resources, and to pass these rights to future generations. They have the right to own and develop these lands and resources, in accordance with their traditions and customary laws. Indigenous peoples also have the right to be compensated when their lands, territories or natural resources have been confiscated, occupied, or damaged without their free, prior, and informed consent.²²
22. In Nepal, these collective rights are routinely violated. IPs' land is being confiscated at an alarming rate, particularly in connection with large-scale infrastructure and energy projects. The right to free, prior, and informed consent with regards to such projects is not respected, and environmental and social impact assessments are seldom conducted or made public. IPs are rarely compensated for land that is confiscated or damaged, and when compensation is issued, it often falls below market value of the land. IPs are subsequently losing the ability to manage their territories. When IPs peacefully protest against the violations of their rights and demand proper information and consultation processes they are portrayed as being against develop and in some case criminalized.
23. In 2007, the Nepal Electricity Authority begun work on the 220 KV Khimti-Dhalkebar Transmission Line funded by the World Bank. The project was designed without any consultation with the local people in the Sindhuli area. Most of the families in the area belong to marginalized groups such as Tamang, Magar and Dalit. The project violated not only the local community's right to free, prior and informed consent but also the Bank's safeguard policies. The route chosen for the transmission line would pass through schools, homes, agricultural land and historical sites in the district and would displace already impoverished families. Both in 2012 and 2013, armed police forces were deployed to the project site. In November 2012, for example, 250 armed police officers and 5-6 project officials came to

²⁰ The 1774 Treaty between Limbus and State recognizes rights over territories, soils and subsoil minerals as well as unconditional right to self-governance.

²¹ <http://idsn.org/key-issues/caste-based-slavery/dalit-women-in-nepal/>

²² ILO C. 169 and UNDRIP

project site and began surveying. Women who tried to enter the project site were violently beaten with sticks, boots and fists. 10 women were severely injured.²³

24. IPs are also severely affected by protected areas such as national parks and hunting reserves. The establishment of protected areas on indigenous territories without the consent and engagement of the communities whose ancestral lands have been included in the areas has resulted in dispossession, displacement and resettlement, the violation of their rights and the loss of access to natural resources on which the communities depend for their livelihood and spirituality.
25. The Dhorpatan Hunting Reserve covers areas that have been inhabited by the Magar people since before the formation of the Nepali state. The reserve was established in 1987 despite protests from the locals. In an April 2013 memorandum submitted to the government following its decision to mobilize the army, 80 Magar community representatives recounted how the reserve was providing entertainment to the elite at the expense of the local communities. They were—and continue to be—denied access to the natural resources in the reserve, harassed, fined, and imprisoned on various charges and their homes have been demolished.²⁴
26. When the Makalu Barun Park was established in 1992 the people, who belong to Rai, Sherpa and Bhotia communities, directly affected by the park were assured by the government that the conservation project would not hamper their livelihoods and culture, that the army would not be mobilized, and that the revenue from the park would be used for community development. In the following years, however, the locals' access to resources was gradually curtailed. Their traditional farming practices such as swidden agriculture was banned. They were told they could not carry out any community development work without the permission of the park authorities. When the locals decided to collect money from each household and start a micro hydropower project to bring electricity to their village, the park did not grant them permission. People started getting arrested, beaten and penalized for using forest resources. Understandably, the locals are worried that deploying the army in the area will further persecute them. They have submitted a memorandum asking the government to retract its unilateral decision, but have received no guarantee that their voices will be heard.²⁵

5. Education (Recommendation 106.53, 108.34)

Educational disparity is rampant in Nepal and there are no effective and special initiatives to promote equal opportunities to education for the marginalized communities, including IPs and Dalits. The gross enrolment rate of Hill Brahmin in higher secondary level is 145.1 whereas it is 69.7 for Hill indigenous peoples.²⁶ IPs have the highest proportion (27.7%) of dropout due to poor academic progress (failure in exams/tests) compared to all other groups.²⁷ The main reason is the dominance of Khas-Nepali language in the schools and lack of an inclusive education policy. The Government has, on the other hand, been investing millions of rupees in Sanskrit University to promote and protect the Sanskrit language that only benefits to High caste Bahun and Chetri. The initiation of multi-lingual education

²³ LAHURNIP has submitted a complaint to the NHRC against attack on villagers in 2013. NHRC conducted fact finding mission based on the communication. LAHURNIP (2014) *The Glimpses of Indigenous Peoples' Human Rights Violation in Nepal*, Kathmandu: LAHURNIP, P. 99-100.

²⁴ Lawyers' Association of Human Rights of Nepalese Indigenous Peoples (LAHURNIP) (2014): *The Glimpses of Indigenous Peoples' Human Rights Violation in Nepal; The Record: Good Intentions Gone Wrong* (<http://recordnepal.com/wire/good-intentions-gone-wrong>)

²⁵ Ibid

²⁶ Chaitanya Subba, Bishwamber Pyakurel, Tunga Shiromani Bastola, Mohan Khajum Subba, Nirmal Kumar Raut and Baburam Karki, (2014) *A Study on the Socio-Economic Status of Indigenous Peoples in Nepal*, Kathmandu, Lawyers' Association for Human Rights of Nepalese Indigenous Peoples, P.112

²⁷ Ibid, P.125-26

(education in mother tongue at primary level) is not effective and there is lack of adequate budget and policies. Even the constitutional provision on basic education in mother tongue is ambiguous as there is no clear division of roles and responsibilities of the state to implement it in practice. Failure to create adequate quotas for teachers and produce skillful teachers is another weaknesses of the government for the development of mother tongue education in Nepal. It was found that the government does not have proper foundation and budget management for the development of mother tongue education. There is dearth of textbooks in mother tongues. Due to the lack of understanding the medium language of education (Khas Nepali), there is high rate of IPs children drop out from School.²⁸ The School Sector Reform Plan (2009-2015) aims to transform around 7,500 schools into multilingual schools. The Curriculum Development Centre has so far only developed curricula and textbooks in 19 of the 125 languages listed in Nepal.²⁹

6. Indigenous women (Recommendations 106.2, 106.4, 106.10, 106.28, 106.22, 106.29, 106.46, 106.13, 106.14, 106.21)

27. Indigenous women form a major section of the society but continue to face multiple forms of discrimination. The state's commitments to the international community to end violence against women are not intended to promote and protect the rights of indigenous women. Indigenous women have been fighting for their distinct identity among the women section in the constitution³⁰, so that they could enhance their participation in decision making rather than include them in a basket of women as a whole, which is counterproductive because the women quotas are very often captured by women belonging to Bahun and Chhetri groups.

7. Persons with disabilities (Recommendation 106.46 and 106.10)

28. Persons with disabilities from an indigenous background are particularly vulnerable. Prevalence of higher physical disability was found among Tharu (49.6 percent), the Sherpa, Bhujel, Bhote and Thakali cluster (47.7percent).³¹ Many of the indigenous persons with disabilities are facing challenges in acquiring identification cards and access to resource. Participation in decision making is also poor. The Federation of disabilities has, for example, ensured participation of 33 percent women in the executive committee but all are from Bahun/Chhetris) of women but is not taking account of inclusion of other marginalized communities. The state's commitment to end discrimination against peoples with disabilities is thus not materialized into practice.

F. RECOMMENDATIONS TO THE GOVERNMENT OF NEPAL

R.1: Without further delay, implement the recommendation of the UN Special Rapporteur on the Rights of Indigenous Peoples and the CERD to establish a special mechanism in the Constituent Assembly for an effective and meaningful participation of IPs, while taking decisions, in particularly state restructure and other matters that directly affect them.

²⁸ <http://www.nagariknews.com/society/nation/story/35084.html> visited 2015

²⁹ <http://www.thehimalayantimes.com/fullTodays.php?headline=Education+in+mother+tongue+still+a+challenge&NewsID=321582>

³⁰ Advocate Indira Shrish Magar and Advocate Sharda Khewa Subba () Rajyako samabeshi niti tatha karykramko byabastha ra upalabdhihar (State's inclusion policy and program precision and achievements), Nepal: Indigenous Women's Legal Awareness Group (INWOLAG).

³¹ Chaitanya Subba, Bishwamber Pyakurel, Tunga Shiromani Bastola, Mohan Khajum Subba, Nirmal Kumar Raut and Baburam Karki, (2014) A Study on the Socio-Economic Status of Indigenous Peoples in Nepal, Kathmandu, Lawyers' Association for Human Rights of Nepalese Indigenous Peoples, P.112.

- R.2: Implement the decision of the Supreme Court of Nepal to have an appropriate provision for effective and meaningful participation in the Constituent Assembly in consultation with indigenous peoples, respecting the International Human Rights Instruments including ILO Convention No 169, CERD, CCPR and UNDRIP.
- R.3: Without further delay, ensure representation of indigenous peoples who are not represented in the current Constituent Assembly as directed by the Supreme Court through its decision (Decision No. 07-WO-0476, Date: 12 May 2014) interpreting article 63(c) of the Interim Constitution, 2007 that allocates 26 seats for unrepresented indigenous peoples and Civil Society.
- R.4: Adopt the National Action Plan to implement the ILO Convention No. 169 and reform the existing laws and regulations that are inconsistent with the ILO Convention No. 169, UNDRIP and other international instruments to eliminate discrimination against indigenous peoples and ensure equality. Ensure that the new constitution comprises the provisions and spirit of the ILO Convention, No. 169 and UNDRIP for respect of the rights of indigenous peoples.
- R.5: Ensure de-facto inclusion of indigenous peoples in all state organs including NHRC, Commission for the Investigation of Abused of Authority (CIAA), and Information Commission. Establish the Indigenous Peoples Commission to deal gross human rights violation against IPs.
- R.6: Repeal the provision of the Cow Slaughter in Muluki Ain which is based on the Hindu superiority in accordance with the constitutional provision of secular state and article 1, 2, 5(vii) and 5(e) of the CERD; article 27 of the CCPR, article 3 and 5 of the ILO Convention No. 169 and article 8 and 12 of the UNDRIP.
- R.7: Respect indigenous peoples' right to exercise their religion, beliefs and culture as well as eliminate religious assimilation including obliterating name of indigenous peoples' sacred and religious sites.
- R.8: Recognize indigenous peoples' rights over communal land, forest, pastures lands and other resources in accordance with the ILO Convention. No. 169 and UNDRIP. Ensure indigenous peoples' participation in the land reform process.
- R.9: Respect and protect the right to determine priorities of development and the right to free prior and informed consent in relation to development activities taking place in the indigenous territories.
- R.10: Introduce a national multilingual policy and allocate sufficient budget and teachers for multilingual education in a timely manner.
- R.11: Institute special measures to address the multiple forms of discrimination against indigenous women and to ensure substantive equality;
- R.12: Undertake a thorough review of national laws to end discrimination against indigenous women, ensuring their meaningful participation;
- R.13: Make gender mainstreaming programs and activities compatible with UNDRIP and increase participation of indigenous women at all levels;

R.14: Amend the excising laws relating to National Parks/Reserves in line with the ILO. Convention No.169 and UNDRIP. And, ensure self-management, if not co-management in the protected areas.

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