

नेपालमा आदिवासी अधिकार

नीतिगत अवस्था, चुनौती र अवसरहरू

सम्पादन सल्लाहकार

शान्ति कुमारी राई दिनेश कुमार घले
शंकर लिम्बू भिम राई
अमृत योन्जन-तामाङ

सम्पादक
टहल थामी
गोविन्द छन्त्याल

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Indigenous Peoples Rights in Nepal: Policy Status, Challenges and Opportunities

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Shankar Limbu, Bhim Rai, and Amrit Yonjan-Tamang.

Edited by Tahal Thami/Gobinda Chhantyal

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Abbreviation

AD	Anno Domini
ADB	Asian Development Bank
AGRBS Sharing	Access to Genetic Resources and Benefit
AIPP	Asia Indigenous Peoples Pact
CA	Constituent Assembly
CBD	Convention on Biological Diversity
CBR	Community Based Rehabilitation
CBS	Central Bureau of Statistics
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women
CERD	Convention on the Elimination of All Forms of Racial Discrimination
COP	Conference of the Parties
CPN	Communist Party of Nepal
CRC	Convention on the Rights of the Child
CSR	Corporate Social Responsibility
CSRDSP	Committee for State Restructuring and Division of State Power

DDC	District Development Committee
DFID	Department for International Development
EA	Electricity Act
EIA	Environment Impact Assessment
FPIC	Free, Prior and Informed consent
GI	Governance Index
GL	Generation License
GoN	Government of Nepal
GSI	Gender and Social Inclusion
HDI	Human Development Index
HLSRRC	High Level State Restructuring Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICIMOD	International Centre for Integrated Mountain Development
IEE	Initial Environmental Examination
IFAD	International Fund for Agricultural Development
IFC	International Finance Corporation
ILO	International Labour Organisation
INC	Indigenous and Nationalities Commission
IPPs	Independent Power Producers
IPs	Indigenous Peoples
IWGIA	International Work Group for Indigenous Affairs
LAHURNIP	Lawyers' Association for Human Rights of Nepalese Indigenous Peoples
LGBTI	Lesbian, Gay, Bisexual, Transgender & Intersex
LTR	Lands, Territories and Resources
MAT	Mutually Agreed Terms
MoAD	Ministry of Agricultural Development
MoFSC	Ministry of Forest and Soil Conservation
MoFSC	Ministry of Forests and Soil Conservation
MoLJPA	Ministry of Law, Justice & Parliamentary Affairs

MoPE	Ministry of Population and Environment
MW	Mega Watt
NBSAP	National Biodiversity Strategy and Action Plan
NC	Nepali Congress
NEFIN	Nepal Federation of Indigenous Nationalities
NESAC	Nepal South Asia Centre
NFDIN	National Foundation for Development of Indigenous Nationalities
NPC	National Planning Commission
NTFPs	Non-Timber Forest Products
PES	Payment for Ecosystem Services
PI	Poverty Index
SL	Survey License
SOM/P	Standard Operating Manual/Procedures
SRHLRC	State Restructuring High Level Recommendation Commission
UCPN (Maoist)	Unified Communist Party of Nepal (Maoist)
UML	Unified Marxist Leninist
UN	United Nations
UNCED	United Nations Conference on Environment and Development
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNPFII	United Nations Permanent Forum on Indigenous Affairs
VDC	Village Development Committee
WB	World Bank
WRA	Water Resource Act
WSSD	World Summit on Sustainable Development

प्रकाशकीय

संविधानसभामार्फत संविधान निर्माणलाई लोकतन्त्रको उत्कृष्ट नमूना मानिन्छ। इतिहासमा यस्ता अवसर बिरलै आउँछ। नेपालको सन्दर्भमा पनि नेपाली जनताको लामो संघर्षपछि यो अवसर जुरेको हो। तर जसरी संविधानसभाले आम जनता तथा समुदायहरूको अधिकारका आवाजहरूको सम्बोधन गर्नुपर्थ्यो, त्यो हुन सकेन। संविधानसभाबाट बनेको संविधानमासमेत आदिवासीलगायतका समुदायहरूको अधिकार सुनिश्चित हुन नसक्दा असन्तुष्टिहरू भन बढेका छन्। त्यसको समाधान बेलैमा निकाल्न नसके देश भयंकर दुर्घटनामा पर्न सक्छ। त्यसरी संवैधानिक अधिकारबाट वन्चित एक समूह हो आदिवासी। ती समूहहरूको अधिकारका सम्बन्धमा संविधानमा भएका व्यवस्था र उनीहरूले चाहेको अधिकारका सम्बन्धमा गत पुष २२-२३, २०७३ (6-7 Januray 2017)मा काठमाडौंमा बृहत् सम्मेलनमा छलफल भएको थियो। सो कार्यक्रमको आयोजना गर्न पाउँदा लाहुरिप गर्व महशूस गर्दछ।

सो कार्यक्रम आयोजनामा विभिन्न व्यक्ति, व्यक्तित्व तथा संघसंस्थाहरूको अमूल्य सहयोग लाहुरिपलाई मिलेको थियो। यसरी सहयोग तथा सल्लाह सुझाव दिनुहुने डा. कृष्ण भट्टचन र डा. नवीन राईप्रति हामी आभारी छौं। त्यसैगरी United Nations Permanent Forum on Indigenous Issues (UNPFII) का उपाध्यक्ष Mr. Raja Devasish Roy, सोही निकायकी सचिवालयबाट पाल्नु भएकी Ms. Julia Raavad, र International Work Group for Indigenous Affairs (IWGIA) बाट कार्यक्रममा सहभागी बन्न आउनु भएका Mr. Christian Erniप्रति लाहुरिप आभारी छ। त्यस्तै कार्यक्रमलाई सफल पारिदिन सहयोग गर्नुहुने अमृत योन्जन तामाङ, यशोकान्ती भट्टचन, डम्बर लोहोरुङ, डम्बर तेम्बे र नारायण निडलेखुप्रति पनि धन्यवाद व्यक्त गरिन्छ।

सो कार्यक्रम सफलतापूर्वक सम्पन्न गर्नका लागि महत्वपूर्ण सहयोगका United Nations Permanent Forum on Indigenous Issues (UNPFII), International Work Group for Indigenous Affairs (IWGIA), International Fund for Agricultural Development (IFAD), United Nations Development Programme (UNDP) लाई पनि धन्यवाद टक्रयाइन्छ । साथै कार्यक्रमा उपस्थित भई कार्यक्रमको शोभा बढाई दिनु भएकोमा राष्ट्रिय मानवअधिकार आयोगका अध्यक्ष माननीय अनुपराज शर्मा, आदिवासी जनजाति उत्थान राष्ट्रिय प्रतिष्ठानका उपाध्यक्ष चन्द्रबहादुर गुरुङ र सदस्यसचिव गोविन्द माझीप्रति लाहूर्निप कृतज्ञ छ । त्यसै गरी नेपाल आदिवासी जनजाति महासंघ, राष्ट्रिय आदिवासी जनजाति महिला महासंघलाई पनि धन्यवाद साथै सो कार्यक्रममा गरिमाय उपस्थितिका लागि माननीय सांसदहरू, विभिन्न संघसंस्थाका प्रतिनिधिहरू, बुद्धिजीविहरू, राजनीतिक दलका प्रतिनिधिहरू, विभिन्न राजदूतावासका प्रतिनिधिहरू, व्यापारिक क्षेत्रका प्रतिनिधिहरू, सरकारी निकायका प्रतिनिधिहरू, संयुक्त राष्ट्रसंघलगायत अन्तर्राष्ट्रिय निकायका प्रतिनिधिहरू र सामाजिक अभियन्ताहरूप्रति हार्दिक धन्यवाद ज्ञापन गरिन्छ ।

यस पुस्तकमा सो कार्यक्रममा प्रस्तुत कार्यपत्रहरू समावेश गरिएका छन् । कार्यक्रममा कार्यपत्र प्रस्तुत गरिदिनुहुने विभिन्न मन्त्रालयका प्रतिनिधि-कर्मचारीहरू तथा बुद्धिजीविहरूप्रति पनि लाहूर्निप आभारी छ । साथै यस पुस्तक प्रकाशनमा प्रत्यक्ष तथा परोक्ष रूपमा योगदान गर्ने सबैप्रति हामी आभार व्यक्त गर्दछौं ।

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Policies Related to the Electricity Development in Nepal

Sagar Raj Goutam

Introduction

The share of energy consumption, according to fuel type, is dominated by fuel wood that accounts for about 70% and electricity accounts for about 3% while energy consumption through petroleum products account for about 13%. The domestic electricity supply system of Nepal is small, and hydropower contributes in the order of 88.33% of the total installed electric power generating capacity

of the country. However, Nepal still holds the power position of that of one of the highest potential but lowest consumption. The total installed generating capacity in the country including the private as well as others is about 925MW. Out of which about 867MW of electricity is from hydropower. Hydropower facilities are mostly run-of-river and account for 84% of total installed capacity. Despite high level of susceptibility of run-of-river to high rates of spillage they represent the least-cost development plan and hence are the most adopted. Among the total installed capacity, more than 1/3 of the installed capacities have been established through the participation of private sector.

The power development started in Nepal with the development of Pharping Hydropower Project in 1911 A.D. and has been in the development stage ever since. Though the development started much earlier, pace of development of the sector had been much slower. It was only during the 1990s that the far reaching policy changes were introduced in Nepal which led to the opening up of the power sector to domestic and foreign private sectors. Enactment of Electricity Act, 1992 and Electricity Regulations, 1993 marked the entry of independent power producers (IPPs) in Nepal's Power Sector through non-recourse financing. Different acts and policies have been adopted for the development as well as management of the hydropower projects. Despite a decade-long conflict and subsequent continuous political transition being the main barrier for the

development of hydropower projects in post 1990 era, the result of the economic liberalisation policy adopted in the electricity sector is becoming visible now. As a result the contribution of the private sector in the electricity industry is going to be increased substantially within five years. This is evident from the fact that around 3340MW of hydropower projects are at various stages of construction. Likewise about 5651MW capacity of projects are in advanced stage and are seeking for generation license (GL) from Ministry of Energy in order to enter into construction phase. Similarly about 5863MW of hydropower projects are being studied under the survey license (SL) [1].

Policies

While the policies adopted were framed to encourage and mobilise private sector in development of hydropower sector, several of those policies address mechanisms to involve local communities in the development process of electricity sector. Some of the major ones are described subsequently:

Water Resources Act [2]: The Water Resources Act (WRA), 1992 states the ownership of water resource vested to state of Nepal. With this authority vested to the state, the utilisation of water resources has to be carried out through licenses with some exceptions. Likewise for the collective benefit, development of resources can be done through Water User's Association. This acts also prioritises the use of water resources according to its utilisation. If the government or a licensee implements construction

work relating to the development and utilisation of water resources, the government or licensee may prohibit the use of the premises, whether a house or land. The government allows using, developing and expanding services to national, international company and individual by entering into a contract. The government or the licensee, however, has to pay compensation as prescribed to the concerned person for the damage or loss caused by the prohibition.

Electricity Act [2]: The Electricity Act (EA), 1992 is concerned with developing electric power and providing standard and safe electricity services to the people. This Act has the same provisions about land acquisition and prohibition on using the premises of construction area as are stated in the Water Resources Act. The same procedure is also applied in paying compensation. The EA requires permission (License) by submitting prior application from individual or organised institution (Legal Person) who want to survey, produce, expand or distribute electricity requiring submission of economic, technical and environmental study report inter alia other requirements determined by existing laws policies. The duration of the permission varies subject wise: five years for survey and for 50 years for producing, expanding and distribution. Furthermore provisioning for royalty is one of the important aspects of this Act. As far as public involvement during the development of hydropower project is concerned, this act has a provision that mandates Department of Electricity Development to issue Public Notice and seek advice/ comments/ grievances etc from concerned stakeholders in connection to construction of the project. Any genuine concerns can be addressed through setting condition while issuing Generation

License.

Environment Protection Act and Rules [2]: The Environment Protection Act and its rules, 1997 have been framed in order to achieve sustainable development from inseparable inter-relationship between the economic development and environment protection. This act allows systematic environmental studies of hydropower projects including the processes of public involvement. Two levels of study are envisaged through this instrument—Initial Environment Examination (IEE) and Environment Impact Assessment (EIA)—depending on the nature of the project. Without approval of this study a project cannot be implemented. For energy related projects, the approval of IEE lies with Ministry of Energy and approval of EIA lies with Ministry of Population and Environment.

According to these instruments, environment is dealt within three categories—physical, biological and socioeconomic & cultural. Under the socioeconomic and cultural aspect, the project is looked at the social and cultural level. Where this instrument does not categorically cover the aspect of indigenous peoples, it definitely provides a window for all the local communities that need to be dealt during environment study. There are several level of public engagement at the IEE and EIA study level.

For IEE study of any hydropower project, expert/focused consultation is carried out at the local level. To make sure that the public is well aware of the

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project and to be familiar with their views, comments, suggestions and other concerns, 15 days public notice is published in a national newspaper followed by pasting of such notices in the public places at local level. On receiving the feedbacks, they are suitably incorporated and related solutions are devised in the IEE report. The draft report is then shared at the local level. A very important point to be noted is that the recommendation of Village Development Committee /Municipality is required for the approval of the IEE. This allocation of the power to such local institutions is to ensure that the local level approval is the initial requirement for any project to move forward.

The same public consultation process of IEE is adopted at EIA process. In addition to this, when draft EIA report is prepared, the content of the report like issues identification; determining their significance and rating those as potential impacts; mitigation measures; environment measurement plan etc. are shared through the public hearing at the local level. The views of the affected communities/people are collected and fine-tuned solutions are devised. The document is then opened to public for 30 days by Ministry of Population and Environment (MoPE) before taking decision on it.

After ILO Convention No.169 came into effect in 2007 a provision has been made in the IEE/EIA to review this document as well during the course of EIA/IEE study in order to internalise the provisions made in

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ILO Convention No.169. During the course of time the process of preparing and the content of IEEs and EIAs have been evolved. Department of Electricity Development over the time has published several manuals including “Manual for Public Involvement in the EIA Process of Hydropower Projects” in order to streamline the EIA/IEE process giving much needed emphasis on the public involvement in the development process. The Manual is to ensure the involvement of the public in the EIA process of the hydropower projects so as to meet up their requirements. The Public Involvement represents the involvement of all the people residing in the project areas.

Hydroelectricity Development Policy, 2001 [2]: Attracting and encouraging national and international investors for the development of hydropower projects through establishing transparent process is one of the key features of this policy. In addition, management of appropriate benefit to the local level, sharing of risk associated, measures to reduce environmental impact and rehabilitation of displaced family are some of the other features of this policy. This policy has also quantified environmental water release required at the downstream of the headwork. The royalty to be provided by developer to the government has also been increased through this policy. However, Electricity Act needs to be revised in order to make that provision to take effect fully. While this policy has provisioned 1% of royalty for VDC from the government’s royalty for the expansion of rural electrification, according to the Local Self-governance Regulation, 1999, 50% of royalty is being distributed to district development committee for the development activities of the related

VDC and the district where the project is located.

Constitution of Nepal [3]: The Constitution of Nepal, in relation to development and management of natural resources, embraces policy to (i) protect, promote, and make environmental friendly and sustainable use of, natural resources available in the country, in consonance with national interest and adopting the concept of intergenerational equity, and make equitable distribution of benefits, according priority and preferential right to the local communities, (ii) to make multi-purpose development of water resources, while according priority to domestic investment based on public participation, (iii) to ensure reliable supply of energy in an affordable and easy manner, and make proper use of energy, for the fulfillment of the basic needs of citizens, by generating and developing renewable energy, (iv) to adopt appropriate measures to abolish or mitigate existing or possible adverse environmental impacts on the nature, environment or biological diversity, (v) to pursue the principles of environmentally sustainable development such as the principles of polluter pays, of precaution in environmental protection and of prior informed consent. Similarly National Natural Resource and Fiscal Commission has been envisaged in the Constitution to (i) prepare basis for natural resource use, revenue distribution, modality formulation; (ii) prepare basis for share of investment and return; (iii) study/ research for Dispute resolution; (iv) study and research work about environmental impact assessment required in the course of distribution of natural resources.

With the three level of governance (power) at federal, state and local along with the concurrent power, the

Constitution has stated the jurisdiction, in principle, of each level related to natural resources, water resources, hydro-electricity and transmission line projects. The Constitution has embraced a policy to provide equitable distribution of benefits derived from the use of natural resources or development and certain portions of such benefits shall be distributed, pursuant to law, in forms of royalty, services or goods to the project affected regions and local communities.

Action plan on National Energy Crisis Mitigation and Electricity Development Decade [4]: The Government of Nepal has put in place a policy entitled “Action Plan on National Energy Crisis Mitigation and Electricity Development Decade, 2016” to encourage the development of 10,000MW of hydropower capacity over a 10 year period so as to fulfill the electricity demand of the country. This initiative is expected to assist in the optimal usage of an available hydropower resource, to create employment and to aid in the development of Nepal. The Action Plan covers the major aspects of the hydropower development such as electricity sector reforms, planning guidelines for the development of the hydropower projects, land acquisition and safeguards as well as financial arrangements and procurement for the development of power projects. The Action Plan has incorporated the “right of way” compensation mechanism so that the hurdles regarding the land acquisition can be minimised and also incorporates the safeguard of the people stating that 10% equity share shall be given

to the community/people affected by the project. Likewise, this plan also provisioned community support program to be inbuilt in IEE and EIA reports of the hydropower projects with cost allocation. According to this provision, 0.75% of total cost of the project of size up to 100MW and 0.5% of the total cost of the project of size greater than 100MW has to be allocated for community support program in addition to the cost of mitigation measures envisaged in IEE/EIA report. This provision will allow further engagement with the affected community in order to uplift and address their concerns.

Challenges and way ahead

The electricity industry will have to deal with different challenges in order to grow and achieve its aim of generating 10,000MW of electricity in 10 years. The challenge this sector faces spreads across political, legal, technical and environment spectrum at all the governance level. While the allocation of authority and responsibility amongst federal, state and local government is based upon the nature and the size of the project/activity related to development and management of water resources, the Constitution envisages formulating the basis of sharing through appropriate law. In the present context, while local governance entities like VDCs and municipalities have the responsibility to recommend implementation of particular project, the challenge for such local level institution is to use such authority effectively. The present EIA/IEE processes that are being practiced

since last two decades need to be updated based on the learning that has been made so far.

Constitution being in place, an overarching policy formulation on water resources is the next step which will pave way for enactment and formulation of respective acts and rules in the context of allocation/sharing of power for the various uses of water resources across three different level of governance. Furthermore, it is also important to document the best practices and learning of public involvement in the process of EIAs/IEEs and their implementation which can be very useful in formulating new policies, acts and regulations along with the related guidelines/manuals.

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