

नेपालमा आदिवासी अधिकार

नीतिगत अवस्था, चुनौती र अवसरहरू

सम्पादन सल्लाहकार

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

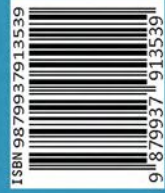
सम्पादक

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गोबिन्द छन्त्याल

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

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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 विरलै 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 भन्न 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 काठमाडौँमा 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 टर्क्याइन्छ । 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 लाहुर्निप कृतज्ञ छ । त्यसै गरी नेपाल आदिवासी जनजाति महासंघ, राष्ट्रिय आदिवासी जनजाति महिला महासंघलाई पनि धन्यवाद साथै सो कार्यक्रममा गरिमामय 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 लाहुर्निप आभारी छ । साथै यस पुस्तक प्रकाशनमा प्रत्यक्ष तथा परोक्ष रूपमा योगदान गर्ने सबैप्रति हामी आभार व्यक्त गर्दछौं ।

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अध्यक्ष

विषय सूची/Content

संक्षेपीकरण / Abbreviation

प्रकाशकीय

लैंगिक समानता, संस्कृति र भाषा

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Ensuring Indigenous Peoples' Rights in Policies on Forest, Water and other Natural Resources: Issues, Challenges and Way Forward

Dr. Krishna B. Bhattachan

Background

In Nepal and elsewhere in the world, forest, water and other natural resources are the most important component of lands and territories, and resources and very much a part and parcel of collective way of life of indigenous peoples. Delinking indigenous peoples with forest, water and other resources have immediate

effects, such as loss of livelihood, food insecurity and resettlement, to a long term effects, such as loss of collective identity and, in some cases, extinction of indigenous peoples. Distinct collective identity, self-determination, autonomy, self-rule, customary laws, mother tongues, indigenous knowledge, indigenous education and health, livelihood etc. revolve around it. It is a fact that indigenous peoples have special relationship with forest, water and other natural resources and hence, are its custodian. It is in this context, Roger Plant aptly writes, "The land and territorial claims of indigenous peoples may be rooted far back in history, way before the establishment of the modern nation-state. Their demands are usually underpinned by the notion that indigenous peoples have special claims to the land, first because their unique relationship with the land and environment is necessary for their survival as culturally distinct peoples, and second because their rights over lands and resources may never have been ceded to the state."²⁴⁸ If we look back recent past, the Tharus lived their own way of life in dense tropical forest in the Terai region of Nepal. They were immune to malaria but it deterred outsiders (Baij or Bajiya in the Tharu language) to settle in their forest. After malaria eradication program implemented in 1950, gradually attracted outsiders to encroach in and control their over land and resources, ultimately detaching them from forest and other resources, and resulting Tharu bonded laborers called Kamaiyas and Kamlaris. It

248 Roger Plant (1994) Land Rights and Minorities. The UK: Minority Rights Group (MRG), P. 8.

is in such context, "The distinction between claims based on need and claims based on historical rights is of obvious importance,"²⁴⁹ as noted by Plant.

According to an UNDRIP manual produced by Asia Indigenous Peoples Pact (AIPP), the multi-dimensional relationship of indigenous peoples to land include land is the basis of livelihood, the social and cultural dimension of the relationship to land include spiritual dimension, communal and intergenerational.²⁵⁰ In the manual it is said that history and identity are written in the landscape because "...if rapid changes occur in the land use or land tenure systems of indigenous communities, or if indigenous communities lose access to and rights over land and resources, the indigenous communities will themselves change rapidly and in many ways."²⁵¹

This paper is about policies relating to forest, water and other resources. Let me clarify first the meaning of the word "policy". It is so flexible that it has been defined and used in different ways in different countries and within the country also on different occasions. According to Wikkipedia, "A policy is a deliberate system of principles to guide decisions and achieve rational outcomes. A policy is a statement

249 Roger Plant (1994) Land Rights and Minorities. The UK: Minority Rights Group (MRG), P.8.

250 AIPP (2010) Training Manual on the United Nations Declaration on the Rights of indigenous Peoples. A Community training Manual, Chiangmai: Asia Indigenous peoples Pact (AIPP), P. 68 & 70.

251 Ibid, P. 70.

of intent, and is implemented as a procedure or protocol."²⁵² The Webster's dictionary has noted four interconnected definitions of 'policy'. These are: (a) "A definite course or method of action selected (by government, institution, group or individual) from among alternatives and in the light of given conditions to guide and, usually, to determine present and future decisions"; (b) "A specific decision or set of decisions designed to carry out such a course of action"; (c) "Such a specific decision or set of decisions together with the related actions designed to implement them", and (d) "A projected programme consisting of desired objectives and the means to achieve them."²⁵³ In this paper, therefore, I have used the term "policy", based on these both and other definitions, basically, to refer to two sides of the coin of "policy": one side is that policies are made, and the other side is that these made policies are implemented. However, there are variation in policies based on expanded regulation, incentive, market, capacity development, suppression, inducement, and promotion.²⁵⁴

Any policy indeed needs clarity in goals, targets, and time bound plan of action for effective implementation of the decision made. In this case, goals to fulfil international obligations and full respect of indigenous peoples' collective rights. Targets include indigenous

252 <https://en.wikipedia.org/wiki/Policy>

253 <http://www.fao.org/wairdocs/ilri/x5547e/x5547e05.htm>.

254 http://www.environ.go.jp/en/earth/ecoasia/APEIS/Meeting/_notes/RCC4/05_ProgressReportRISPO_IGES11-25.pdf.

peoples in general and concerned indigenous peoples who are or would be affected directly or indirectly by those policies. Time bound action plan relating to provisions on forest, water and resources stated in UNDRIP and ILO C. No. 169 is equally essential.

Policies related to forest, water and resources are scattered in the Constitution, policies formulated by the Ministries, legislations enacted by the Parliament and periodic planning developed by the National Planning Commission. Details of each of them are as follows:

Policies stated in the Constitution: Concerning policies of the state, Article 51 of the Constitution of Nepal, 2015, the State shall pursue 13 policies, including policies relating to protection, promotion and use of natural resources. In Article 51 (g) policies relating to forest, water and other natural resources are as follows:

- "(1) to 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 inter-generational equity, and make equitable distribution of fruits, according priority and preferential right to the local communities,
- (2) to make multi-purpose development of water resources, while according priority to domestic investment based on public

participation,

(3) to ensure reliable supply of energy in an affordable and easy manner, and make proper use of energy, for the fulfilment of the basic needs of citizens, by generating and developing renewable energy,

(4) to develop sustainable and reliable irrigation by making control of water-induced disasters, and river management,

(5) to conserve, promote, and make sustainable use of, forests, wildlife, birds, vegetation and bio-diversity, by mitigating possible risks to environment from industrial and physical development, while raising awareness of general public about environment cleanliness,

(6) to maintain the forest area in necessary lands for ecological balance,

(7) to adopt appropriate measures to abolish or mitigate existing or possible adverse environmental impacts on the nature, environment or biological diversity,

(8) 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.

(9) to make advance warning, preparedness, rescue, relief and rehabilitation in order to

mitigate risks from natural disasters."²⁵⁵

According to Article 51 (j) concerning policies relating to on social justice and inclusion, "(8) to make the indigenous nationalities participate in decisions concerning that community by making special provisions for opportunities and benefits in order to ensure the right of these nationalities to live with dignity, along with their identity, and protect and promote traditional knowledge, skill, culture, social tradition and experience of the indigenous nationalities and local communities,"²⁵⁶

In Article 51 (j) of the Constitution of Nepal, 2015 about policies relating to social justice and inclusion, sub-article 8 is policy relating to indigenous peoples, which states, "(8) to make the indigenous nationalities participate in decisions concerning that community by making special provisions for opportunities and benefits in order to ensure the right of these nationalities to live with dignity, along with their identity, and protect and promote traditional knowledge, skill, culture, social tradition and experience of the indigenous nationalities and local

²⁵⁵ http://www.nepalembassy-germany.com/pdfs/Constitution_full_english.pdf.

²⁵⁶ http://www.nepalembassy-germany.com/pdfs/Constitution_full_english.pdf.

However the problems with these policies of the state is mentioned in Article 55 of the Constitution thus: "Questions not to be raised in court: No question shall be raised in any court as to whether any matter contained in this Part has been implemented or not." It clearly indicates that those policies which are favorable to those who are in power and decision making are free to implement in a meaningful way. On the contrary, those who are powerless and are not in decision making, should wait for indefinite period unless they could exert organized pressure to the Government and the main political parties for its effective implementation.

Policies developed by the ministries: The Ministry of Forest and Soil Conservation (MoFSC) has developed policies on forest. These are: (i) National Biodiversity Strategy and Action Plan, 2014-2020, (ii) National Forest Policy, 2015, (iii) National Wetlands Policy, 2013, (iv) National Rangeland Policy, 2012, (v) Forestry Sector Gender and Social Inclusion Strategy, 2008, and (v) Herbs and Non-Timber Forest Products Development Policy, 2004.²⁵⁷ Also, the Ministry of Energy (MoE) has developed energy policies. These are: (i) the hydropower development policy, 2001, (ii) National Water Plan, and (iii) Water resources strategy.

257 For detail cf. a paper by Dhananjaya Lamichane in this book.

Operational policies stated by the national planning commission: National Planning Commission (NPC) has stated operational policies relating to forest, water and other resources in the 13th Periodic Plan and the Concept Paper of the 14th Periodic Plan. The 13th Periodic Plan (2013-2016) has a separate plan for forest and land-protection. The main strategic and operational policy mentioned are to "maintain at least 40% of the total land as forest area," and "Protect resources, sustainable management and best use of forest area."²⁵⁸ Similarly, in the Concept paper of the 14th periodic plan (2017-2020), the Government's interest on forest is concerned mainly with timber, firewood, non-timber forest products, and its role in agriculture and irrigation."²⁵⁹

Laws and regulations with policy implications: The MoFaSC in its official website list 11 treaties/agreements under the Ministry and it includes CBD but not ILO C No. 169 and UNDRIP.²⁶⁰

Laws and regulations are part of the policies. Existing laws are neither compatible with the Constitution of Nepal, 2015 nor with international laws of which Nepal is a party. More than 360 new laws are in the process of legislation, existing laws and regulations are as follows:

258 NPC (2013) The 13th Periodic Plan (2013-2016), National Planning Commission.

259 NPC (2016) Concept paper of the 14th periodic plan (2017-2020), National Planning Commission, P. 76.

260 <http://www.mfsc.gov.np/content.php?id=299>

Policies on forests and natural resources that are enforced are: the Forest Act, 2049, Forest Regulation, 2051, National Park and Wildlife Protection Act, 2029, Wildlife Reservation Regulation, 2034, and Buffer Zone Management Regulation, 2052.

Policies on environment that are enforce are the Environment Protection Act, 2053, Environment Protection Regulation, 2054, National Wetland Policy, 2059, Land and Watershed Protection Act, 2039, Jalchar Thek Niyam, 2019, Jalchar Samrachyan Ain, 2017, Natural Disaster Relief Act, 2039, National Nature Protection Fund Act, 2039, and Ancient Monument Protection Act, 2013.

Polices on land are equally related to policies on natural resources. Policies on land that are enforced are: the Land Related Act, 2021, Land Related Regulation, 2021, Land (Naap Janch) Act, 2019, Act, 2034, Land Acquisition Regulation, 2026, Land Acquisition Regulation, 2016, Malpot Act. 2034, *Malpot* Regulation, 2036.

Other policies related to natural resources that are enforced are: Compensation Act, 2019, Public Road Act, 2031, Consumer Protection Act, 2054, Local Autonomous Rule Act, 2055, Local Autonomous Rule Regulation, 2056, and provisions of natural resources in the Constitution of Nepal, 2015.

The MoFSC and MoE should review and revise its Policy on indigenous peoples to make it consistent

with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), including in particular its provisions on Free Prior and Informed Consent. This is indeed an urgent matter.

Multi Stakeholder Forestry Program, in its report on Synthesised Forestry Sector Gender Equality and Social Inclusion (GESI) Policy Briefs, has provided a summary of policies, strategies, Acts, regulations, directives and guidelines and their emphasis on gender, inclusion and poverty relating to forest, which is as follows:

Summary of Policies, Strategies, Acts, Regulations, Directives and Guidelines and their emphasis on gender, inclusion and poverty

SN	NAME OF DOCUMENT	OUTLINED PROVISION
1.	MPFS 1989	Special attention to women, poor and landless while developing new policies plans and programmes. It recommends 33% women representation in executive committee of forest user groups. In addition to not mentioning mechanisms to ensure organisational mainstreaming of GESI in the ministry, departments and offices, the master plan is also silent about maintaining and managing GESI disaggregated data.
2.	Forest Act 1993, Regulation 1995	Silent on GESI, but provision for poor and marginalised groups.
3.	Forestry Sector Policy	Gives priority to disadvantaged groups, and assisting the poor and landless in accessing forest resource based livelihood options. Silent on GESI disaggregation in accessing benefits.
4.	Community Forestry Programme Guidelines	Has provisions for compulsory participation of women and men in programme appraisal phase, ensure their interests and roles, specifically to reduce women's workload.

5.	Revised CF Guidelines, 2009	Recognises barriers faced by poor, women and other socially excluded groups, provides mandatory affirmative action provisions aimed at inclusive membership, decision-making and equitable access to benefits.
5.	GESI Strategy	GESI Strategy 2008 clearly outlines provisions and envisages an organisational structure for effective implementation of GESI mainstreaming in the forestry sector. Four change areas were proposed.
5.	HRD Strategy	The HRM/D strategy for the Ministry is gender sensitive and promotional for women as it recommends affirmative action for women in regard to recruitment, transfer and promotion, and gender friendly office environments with provisions for maternity and paternity leaves.
6.	Buffer Zone Management Rule 1996	Provision for mandatory women representation in the executive committee.
7.	Buffer Zone Management Guideline	Provision for mandatory women representation in the executive committee.

8.	Collaborative Forest Management Directives	Includes promotion of GESI as one out of its four objectives.
9.	Nepal Biodiversity Strategy 2002	Gives special emphasis to women's participation in biodiversity conservation and management of natural resources. Also provides for a national biodiversity development fund to support women centered local knowledge and practices. Silent on gender differentiated roles and responsibilities, and existing mechanisms to reduce conservation vulnerabilities
10.	Ninth Periodic Plan	Highlights poverty alleviation and employment generation through forestry sector development.
11.	10th Five Year Plan (2002-2007) Poverty Reduction Strategy Paper (PRSP)	The goals and targets related to poverty alleviation by creating employment opportunities for the poor, women and backward section through participatory development programs.
12.	Three Year Interim Plan (2007/08-2009/10)	Sets out the strategy to adopt an inclusive development process and implement targeted programs to address "prevailing discriminatory practices" and to ensure "participation of excluded groups." The Plan identifies "the inclusion of excluded groups, areas and gender" as a priority. The TYIP also emphasizes the need for social justice, and acknowledges the need to ensure women's access to decision making.
13.	Three Year Plan 2010-2013)	Recognizes "issues of exclusion" based on various dimensions as the root cause of "conflict" and prescribes mainstreaming gender and social inclusion in all sectoral policies, plans and programmes.

Source: MSHP, 2014, P. 4-5

The main problems, relating to indigenous peoples' rights, in all these Government policies spelled out in policy documents, Constitution, Acts, regulations, plans, directives and guidelines are that the Government formulated and implemented these policies-

- by completely ignoring the state's obligation of international laws and commitments, namely UNDRIP and ILO C. 169,
- without indigenous peoples' full, effective and meaningful participation at all levels, including decision making,
- without taking free, prior and informed consent of indigenous peoples, and
- by treating indigenous peoples as a stakeholders or excluded groups, but not as the rights holders.

Formulation or decision of the policies is one half of a coin but implementation is the other half.

Implementation of policies stated in the Constitution: The Constitution of Nepal, 2015, including its policies on natural resources, including forest and water, were not drafted and finalized by taking free, prior and informed consent (FPIC) of indigenous peoples, and also as the Constitution was promulgated amidst controversy showing barrels of the gun and strong protests from the Madhesi and indigenous peoples, including the Tharus, it has not yet been implemented, except in formation of Council of Ministers, election of President, Vice

President, Speaker and Deputy Speakers of the House, appointment of Supreme Court Justices, and ambassadors. A commission is working on making recommendation for restructuring of local bodies and the main political parties are debating on the need of local bodies' elections.

As the Article 52 of the Constitution states, "obligations of the State: It shall be the obligation of the State to make Nepal a prosperous and affluent country by protecting and promoting fundamental rights and human rights, pursuing directive principles of the State and 44 gradually implementing policies of the State, while keeping intact the freedom, sovereignty, territorial integrity and independence of Nepal" and Article 55 clearly states, "No question shall be raised in any court as to whether any matter contained in this Part has been implemented or not", it hard to believe that any of these nine policies would ever be implemented effectively. Whatever policies of the state are sated in the Constitution, the makers of the Constitutions have no intention of implementing it and they have got immunity for doing so. As these policies on natural resources are interconnected with other Constitutional provisions, including the structure of the state, such policies would not be fair and just as per international standards of human rights as long as the existing Constitution is not rewritten complying with international laws that Nepal is a party to.

Implementation status of other policies: As there

is no compliance of UNDRIP and ILO C. 169 in Nepal government's policies related to forest, water and other resources, its implementation is very poor. As far as implementation of the Government policies related to forest, water and other resources are concerned, all existing policies that are predatory to and/or against indigenous peoples' human rights, are fully implemented but there is indeed no policy has been formulated to fully, effectively and meaningfully implement UNDRIP and ILO C. 169. In Nepal, most of the aggressive development works are done by Nepal Government with financial and technical support of various bi-lateral and multilateral aid agencies but both are not serious about its implementation. For example, talking about implementation of World bank's policies on indigenous peoples, Sasha Chavkin reports “there was often no intent on the part of the governments to comply — and there was often no intent on the part of the bank’s management to enforce,” said Navin Rai, a former World Bank official who oversaw the bank’s protections for indigenous peoples from 2000 to 2012. “That was how the game was played.”²⁶¹

Critical issues

Both from the perspectives of indigenous peoples' rights and the ground reality of everyday lives of indigenous peoples, the most critical issues relating to Nepal's policies on forest, water and other resources

261 <https://www.yahoo.com/news/world-bank-breaks-promise-protect-040100433.html?ref=gs>

नेपालमा आदिवासी अधिकार : नीतिगत अवस्था, चुनौती र अवसरहरू ● ३२६
are as follows:

Make policies related to forest, water and other resources fully compatible with UNDRIP, ILO C. 169 and the Outcome Document: As a part of the implementation of the implementation of the new Constitution based on federalism, the Government is in the process of amending existing laws and making new legislations on forest, water, and other resources, Nepal as a party to international laws and commitments, and as per Article 9 of the Nepal Treaty Act, 1991²⁶², it is the obligation of the Government to fully comply with UNDRIP, ILO C. 169 and the Outcome Document. UNDRIP central Articles 25 and 26 on resources, Articles 8 and 10 relating to dispossession from resources, Article 27 relating to customary laws regulating rights to resources, article 28 on the right to redress for past injustices, Article 20 on the right to means of subsistence, Article 29 on the recognition of indigenous peoples' conservation and protection of the environment, Articles 18 and 19 on resources and the right to self-determination needs to be ensured.²⁶³ Also, Articles 7, 13, 14, 15, 16, 17 relating to natural resources, including forest, water and pasture also needs to be ensured.

262 <http://www.lawcommission.gov.np/en/documents/2015/08/treaty-act-2047-1990.pdf>

263 AIPP (2010) Training Manual on the United Nations Declaration on the Rights of indigenous Peoples. A Community training Manual. Chiangmai: Asia Indigenous peoples Pact (AIPP), P. 85-88.

Gross violation of human rights relating to forest, water and other resources: The state has been grossly violating indigenous peoples' rights relating to forest, water and other resources by not complying with and implementing UNDRIP and ILO C. 169 in meaningful ways. Constitutional and legal provisions and policies are not compatible with these international standards of human rights.

Constitutional and legal recognition collective rights of indigenous peoples relating to forest, water and other resources: The state, the government and the main political parties, namely, the Nepali Congress and the Communist Party of Nepal-Unified Marxists Leninist outright reject collective rights of indigenous peoples, such as self-determination, autonomy, self-rule, land, territories and resources and customary laws. Another main political party Unified Communist Party of Nepal-Maoist are in theory for collective rights of indigenous peoples but in practice they align with the NC and CPN-UML on these issues.

Dispossession from forest, water and other resources: Systematic dispossession of land and territories, in general, and of forest, water and other resources, in particular, of indigenous peoples began after territorial unification of Nepal in 1768, heightened during the autocratic partyless Panchayat rule from 1960 to 1990, and continue unabated, though in changing forms. During 104 years of autocratic

Rana rule that ended in 1950, *Birta* and *Jagir* land tenure system were used for such dispossession; during 30 years of autocratic partyless Panchayat political system invented by King Mahendra in 1960, indigenous peoples' lands, territories and resources, especially forest, water and other resources were dispossessed by enacting laws. *Kipat*, i.e. communal land tenure system of indigenous peoples, specially the Limbus, were abolished. Legislations relating to nationalisation of forest, community forest, collaborative forest, national parks, wildlife reserves, protected areas, wetlands, hydropower etc. not only dispossessed indigenous peoples from their ancestral lands, territories and resources but they were turned into refugees or strangers in their own lands. More recently, road expansion projects implemented by the Government has been dispossessing indigenous Newars from their lands in the Kathmandu Valley. According to UNDRIP and ILO C. 169, it is required to give ownership and control over forest, water and resources to concerned indigenous peoples.

Livelihood problems: Due to dispossession from lands, territories and resources, specially forest and water, indigenous peoples, be it forest peoples like nomadic Rautes and the Tharus, and shifting cultivators like Chepangs, be it mountain pastoralists like Dolpo, be it like pastoralist and agriculturalist like the Gurungs and Magars, almost all are suffering

from livelihood problems.²⁶⁴,²⁶⁵ They cannot collect or produce foods from the forest and water that used to be in their collective possession in the past. Livelihood problems of indigenous peoples need to be solved.

Rehabilitation, resettlement and compensation:

Due to dispossession of land, territories and resources, many indigenous peoples, and also because of natural disasters such as floods, landslides and earthquakes, and aggressive development such as national parks, protected areas, community forest, and roads, indigenous peoples are displaced from their ancestral lands. Resettlements bring chain reactions of problems which indigenous peoples are neither prepared nor could adopt. Often the Government's and aid agencies' rehabilitation, resettlement programs, compensation destroy indigenous peoples way of life, including their culture.

Gender equity and equality: For indigenous women,

264 Krishna B. Bhattachan (2005) *Tribals and Forest in Nepal: Whether Tribals or Animals and the Dominant Groups Have Right to Live?* in Dhaulagiri Journal of Sociology and Anthropology, Volume I, Kathmandu: Tribhuvan University, Department of Sociology/Anthropology, Mahendra Multiple Campus, Baglung, P. Pp. 42-66.

265 Krishna B. Bhattachan (2015) *Post shifting cultivation: Struggles for livelihood and food security among Tharu people displaced by the Chitwan National Park in Nepal* in Shifting Cultivation, Livelihood and Food Security New and Old Challenges for Indigenous peoples in Asia (Chrstian Erni, ed.), Bangkok: FAO, IWGIA and AIPP, P. 291-326.

gender equity and equality within indigenous peoples and also within women is an important critical issue. Indigenous women's distinct identity and needs are ignored in both formulation and implementation of policies relating to forest, water and other resources.

Redress for past injustices: In the past, forest, water and resources traditionally owned or occupied or used by indigenous peoples have been confiscated, taken, occupied, used or damaged without taking free, prior and informed consent. In such cases, these indigenous peoples have the right to redress by restitution or just, fair and equitable compensation.

Rising and/or emerging conflicts relating to forest, water and other resources: Conflicts between the state and indigenous peoples and also between indigenous peoples and others are growing and new conflicts are emerging. For example, local level conflicts are seen in hydropower projects, electricity transmission lines, irrigation, national parks, wildlife reserve, hunting grounds, and protected areas. The Lawyers' Association for the Human Rights of Nepalese Indigenous Peoples (LAHURNIP) has been taking up at least 35 legal cases of such conflicts. Most of these conflicts are on natural resources with particular focus on FPIC, compensation and benefit sharing.

Challenges

From indigenous peoples' rights perspective, there are

many challenges in formulating and implementing policies related to forest, water and other resources that fully comply with international standards of human rights, i.e. UNDRIP and ILO C. No. 169. The main challenges are as follows:

Elimination of Bahunbad ("Brahmanism"): The main predatory policy of the state that has been adopted since the completion of territorial unification of Nepal in 1768 is the Bahunbad (Brahmanism)²⁶⁶, i.e. a hegemony of one caste (Bahun-Chettri), one language (Khas Nepali), one religion (Hindu), one culture (Hindu), one gender (male), and one region (the Hill) (see Bista 1991). Be it the Divya Upadesh of King Prithvinaraya Shah, or the first ever written National Code of Nepal (Muluki Ain), or all the written Constitutions promulgated, and laws and regulations legislated from, or policies, plans and programs implemented, from 1947 to the present are all guided by Bahunbad. Actually the spirit of Bahunbad is same in the National Code of 1854 and the Constitution of Nepal, 2015. Both are racist, both establish Khas Araya supremacy and hegemony, both treat indigenous peoples, Dalits, Madhesi, Muslims, women, disables, LGBTI as inferior second class citizens, both deny collective rights of indigenous peoples, including self-determination, autonomy, self-rule and customary laws. Brahmanism is nothing but

266 cf. Dor Bahadur Bista (1991) *Fatalism and Development. Nepal's Struggle for Modernisation*, Calcutta: Orient Longman.

internal colonisation by the Bahun-Chhetris against more than 100 caste and ethnic groups, including 59 officially and legally recognised indigenous peoples.

Effective and meaningful implementation of UNDRIP and ILO C. No. 169: Nepal is a party to ILO C. No. 169 and UNDRIP since 2007 but so far its implementation has been none. There are many provisions in the both relating to forest, water and other natural resources. Nepal Government had prepared a draft national plan of action for effective implementation of ILO C. 169 but it was never approved by the cabinet and it has been gathering dust in a drawer of the government. So far we have seen no effort made by the Government for effective implementation of UNDRIP and also the Outcome Document.

Generate political and bureaucratic commitment to revise existing and emerging policies to make it compatible with UNDRIP and ILO C. No. 169: Both political leaders and bureaucrats are mostly the Hill male Bahun-Chhetris. They are very much infected by Brahmanism and patriarchy. Hence, they are against distinct identity, collective rights, self-determination, autonomy, self-rule, customary laws, and FPIC and other rights. Since the fall of the monarchy, three main political parties, namely the NC, the CPN-UML and the CPN-Maoist make all political decisions and as bureaucracy has been highly politicized they follow the suit. Hence, both political leaders of these three

main political parties who make policy decisions and the bureaucrats who have a duty to implement their decisions lack political will to revise existing policies and laws to make it compatible with UNDRIP and ILO C. No. 169. It is precisely because of this, it is for sure that none of the new policies and laws being created would be compatible with UNDRIP and ILO C. No. 169.

Full, effective, meaningful participation of indigenous peoples in policy formulation and implementation: Indigenous peoples of Nepal have been demanding for proportional representation, based on the caste and ethnicity, gender and region and its population size, at all levels of decision making. According to Article 5 of UNDRIP, "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State." Further, according to Article 27, "States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate

in this process." In practice, all the related ministries in particular and the Government in general, have not complied with this provision of participation of indigenous peoples. Indigenous peoples have no participation in decision making and implementation of the decisions made by the ministries.

Establish FPIC mechanism: According to Article 19 of UNDRIP, "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." The Ministries related to natural resources, including forest, water and energy, have neither established FPIC mechanism nor taken consent of indigenous peoples in those all those legal and administrative works, including policies, plans, programs and activities formulated and implemented by these ministries, that directly or indirectly affects indigenous peoples. It should be noted here that during the making of the new Constitution by the elected constituent assembly, ICERD committee had issued early warnings on 13th of March²⁶⁷ and 28th of September²⁶⁸ of 2009 to establish FPIC mechanism in the constituent assembly and take consent of indigenous peoples but it was never ever complied by the state.

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<http://www.ohchr.org/Documents/HRBodies/CERD/EarlyWarning/Nepal130309.pdf>

[org/Documents/HRBodies/CERD/EarlyWarning/Nepal130309.pdf](http://www.ohchr.org/Documents/HRBodies/CERD/EarlyWarning/Nepal130309.pdf)

268<http://www.ohchr.org/Documents/HRBodies/CERD/EarlyWarning/Nepal28092009.pdf>

Treating indigenous peoples as stakeholders rather than right holders and local communities rather than indigenous peoples

Mention of indigenous peoples in all policy documents: Though indigenous peoples' have close ties and special relations with forests, water and other resources, surprisingly, there has been no mention of indigenous peoples in the policies of the state, the Government, Ministries on forest, water and other resources.

Focus and priority on traditional livelihood of indigenous peoples: There are many indigenous peoples who are depending primarily on forest and other natural resources. Rautes still continue to live in the forest as nomads. Many indigenous peoples such as Chepangs, Bankaria, and Tharus rely mostly on forest and other natural resources for their livelihood. Due to predatory state policy against shifting cultivation, many indigenous peoples are finding problems in making their livelihood.

Focus on collective rights based approach: In Nepal, be it state, market, so called mainstream civil society, and international aid agencies, or be it the Ministry of Forest and Soil Conservation and Ministry of Energy, adopt welfare and/or rights based approach "Rights based approach" is considered to be better than welfare approach but the "rights based approach" adopted by

the Government and international aid agencies, but such rights based is confined only to individual rights, but not collective rights of indigenous peoples.

Treat indigenous peoples as stakeholders and local community members than the rights holders:

Both the state and international aid agencies treat indigenous peoples as stakeholders and local community members. They fail to treat indigenous peoples as rights holders.

Constitutional and legal recognition of customary laws and institutions of indigenous peoples:

Policies on forest, water and other resources do not recognize indigenous peoples' customary laws and institutions.

Putting indigenous peoples at the center: Both the state and the international aid agencies and multilateral financial institutions put forest and water, carbon, market and money at the center. They fail to put indigenous peoples at the center of forest, water and other resources. Therefore, non-indigenous peoples are concerned more with making money from forest, water and other resources resulting in aggressive development against indigenous peoples' way of life.

Equitable benefit sharing: Whatever benefits are generated from forest, water and other resources, indigenous peoples do not get equitable shares.

Identity of indigenous women: Indigenous women belong to both women and indigenous peoples. However, when policies formulated and implemented for women and/or gender exclude indigenous women along with Madhesi, Muslim and Dalit women. Also, policies on indigenous peoples also exclude indigenous women. Hence it is a challenge to accept, respect and include distinct identity of indigenous women in all gender and/or women on the one hand and indigenous peoples on the other related policies.

Way forward

In order to fulfill aspirations of Nepal's indigenous peoples and also Nepal's obligation of effective and meaningful implementation of international laws and commitments, including UNDRIP, ILO C. 169 and the Outcome Document, Nepal Government, in general and the concerned Ministries, specifically the MoFSC and MoE in particular, National Human Rights Commission, the Court, the Legislature-Parliament, Media, and international aid agencies should do the following in short, medium and long terms:

SHORT TERM

Nepal government and the ministries

Make federal, provincial and local bodies' laws relating to forest, water and other resources compatible with UNDRIP and ILO C. No. 169: According to a news of October 19, 2015, the government started preparations to draft 138 new laws and amend 135

existing ones to implement new Constitution.²⁶⁹ So far, no mechanism for taking free, prior and informed consent (FPIC) with indigenous peoples have been established and no FPIC has been taken with them. As the Constitution is based mainly on individual rights, not on collective rights, Constitutional provisions itself are not compatible with UNDRIP and ILO C. 169. As the Treaty Act of 1991 has a clear provision that says that when there should be any conflict between national laws and international laws that Nepal is a part to, the latter prevails. Hence, The concerned Ministries, in this case, the Ministry of Forest, the Ministry of Water Resources, the Ministry of Energy, and the Ministry of Law and Justice should make the draft laws fully compatible with UNDRIP, ILO C. 169, the Outcome Document, and CBD 8(j). The following activities should be in place in doing so:

- Participation and representation of indigenous peoples (indigenous lawyers with expertise on UNDRIP and ILO C. 169) in drafting committees;
- Establish FPIC mechanism in the Ministry of Forest and Soil Conservation, the Ministry of Energy, and other relevant ministries.
- Take PFIC with indigenous peoples through their representative organisations chosen by their own customary processes.
- Draft laws making it fully compatible with UNDRIP, ILO C. No. 169 and the outcome

²⁶⁹ <https://thehimalayantimes.com/kathmandu/preparations-on-to-draft-138-new-laws/>

document.

- Legal recognition of customary laws and institutions.

Revise and update the Gender Equality and Social Inclusion (GESI) Policy, including sector briefs, with separate policy on indigenous peoples as per international standards of human rights, specially UNDRIP and ILO C. 169: As existing Gender Equality and Social Inclusion (GESI) Policy, including that of the forest sector, clearly lay out policies related to gender but not of indigenous women, and of indigenous peoples as per international standards of human rights, more specifically UNDRIP and ILO C. 169, there is an urgent need to revise and update it accordingly.

The courts

Make decisions compatible with UNDRIP and ILO C. 169: The decisions made or verdicts given by the Supreme Court of Nepal, the Appellate Court, District Courts, and other courts on cases relating to forest, water and other resources should be made fully compatible with international laws relating to indigenous peoples, specially UNDRIP and ILO C. 169.

National Human Rights Commission

Study and monitor the Constitution of Nepal and policies related to forest water and other resources from indigenous peoples' rights perspective: National

Human Rights Commission should study and monitor the Constitution of Nepal, 2015, and policies related to forest, water and other resources to find out to what extent the Preamble, Articles and Sub-articles and annexes are compatible or incompatible with UNDRIP, ILO C. 169 and CBD 8(j) and recommend the Government to make it compatible with these international laws.

International aid agencies

Conditionality relating to compliance of UNDRIP and ILO C. 169: International aid agencies should put conditionality related to complying with UNDRIP, ILO C. 169 and CBD 8(J) in both bilateral and multilateral aid.

Media

Give enough space to news and views on indigenous peoples' rights: Both print and electronic, private and the Government owned media should give due space to news and views on indigenous peoples' rights relating to forest, water and other resources.

MEDIUM TERM

Nepal government and international aid agencies

Establish FPIC Mechanism: The concerned ministries, in this case, the Ministry of Forest, the Ministry of Water Resources, the Ministry of Energy, and the Ministry of Law and Justice and international aid agencies, including the World Bank, UNDP, should carry out consultation with indigenous peoples

and take consent, it is necessary to establish FPIC mechanism within each of these ministries.

Political parties, legislature-parliament and the Nepal government

Rewriting or total amendment of the Constitution of Nepal, 2015: In order to make the Constitution of Nepal compatible with UNDRIP and ILO C. 169, simple amendment here and there is not sufficient; instead there is a need for substantial change, which essentially means rewriting, beginning from preamble to Articles and Sub-articles to Annexes. As the Constitution has been written by putting individual rights at the center with unity in diversity or melting pot perspective by rejecting collective rights of indigenous peoples and also of the group rights of the Madhesi and Dalits, there is a need to rewrite the Constitution that takes time for acceptance, negotiation, drafting and passing the new Constitution. Unless, it is done violence, armed struggles, bloodshed, political instability etc. will keep rising.

Concerned ministries

Formulate guidelines on various themes: (1) forest, (2) water, (3) national parks, (4) protected areas, (5) Hunting grounds, (6) wetlands, (7) buffer zones; (8) hydropower projects, (9) electricity transmission lines, (10) electricity transmission lines, (11) mining, (12) carbon trade, (13) climate change, (14) benefit sharing, and resettlement, based on indigenous peoples' rights, and (15) indigenous women.

LONG TERM

The state, the government and the political parties

Constitutional and legal recognition of autonomy and self-rule over land, territories and resources: The state and the government should work on Constitutional and legal recognition of autonomy and self-rule over land, territories and resources.

Establish both, a task force to study on, and a mechanism to redress and/or compensate for, past injustices: Establish both a task force to study and a mechanism to redress and/or compensate for past injustices done against indigenous peoples by the state through confiscation, taking, occupying, using or damaging forest, water and other resources traditionally owed and used by indigenous peoples.

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