

High-Level National Policy Dialogue on the Rights of Indigenous Peoples of Nepal

Kathmandu, January 6-7, 2017

Main Conclusions¹ and Way Forward

Cross-Cutting Issues

- Demand meaningful amendment of the Constitution of Nepal 2015 to fully recognize the rights of indigenous peoples of Nepal² under the international law (in particular the ILO Convention No. 169; the UNDRIP); meaningful amendment to avoid any dilution of the provisions pertaining to the federalism, secularism, language rights, proportional representation, rights to lands, territories and natural resources, intellectual property rights, etc.; [Prof. Hachhethu] Upgrade the status of proportional inclusion by including it within the *Fundamental Rights & Duties* (Part 3); at present it is part of the *Directive Principles* (Part 4); the participating Members of Parliament have expressed their commitment to raise these issues during the forthcoming discussions on the constitutional amendment.
- Demand effective and immediate implementation of the Constitution of Nepal, 2015 provisions which are not currently under debate/revision (e.g., education in indigenous language).
- Demand from the State (Nepal Government) full compliance with the ILO Convention No. 169 (1989) [Nepal is one of 22 countries that have ratified it in 2007 and is therefore under obligation]³ and full implementation of the UNDRIP. The National Planning Commission 13th Plan (2013) proposed, under the State Restructuring Policy, the amendments of legal and policy provisions which are inconsistent with the ILO Convention 169.⁴
- Demand the full and effective representation of indigenous peoples of Nepal in all the constitutional bodies, commissions. The NPC in its 13th Plan proposed a legal and policy framework for inclusive consultations and participation. Following the requirements of the ILO Convention No. 169 and the provisions of the UNDRIP, ensure the full and effective representation of indigenous peoples of Nepal in all the constitutional bodies, commissions (indigenous (Adibasi Janapati Commission)⁵, the Tharu Commission, the national women commission⁶, national inclusion commission⁷ and policy-level mechanisms (Ministry of Women, Children and Social Welfare is revising the Social Welfare Act, 1992 and the National Culture Policy, 2011); the indigenous peoples representative institutions should identify and choose their representatives to these bodies, commissions and mechanisms; currently, indigenous peoples are represented by a “token” representative. The NPC proposed in its 13th Plan a program for institutional strengthening of the indigenous peoples representative institutions.

¹ Main Conclusions drawn from the deliberations on the Six Themes, 16 Comprehensive Papers, Break Out Group discussions and the floors deliberations

² Honorable Mohana Ansari, NHRC Commissioner recognizes the various challenges in the implementation of the 2015 Constitution.

³ Lila Adhikary Ministry of Federal Affairs and Local Development (the focal ministry for indigenous peoples) confirms that Nepal has yet to a national implementation plan for implementation of the ILO Convention No. 169 and has not amended laws that contradict the Convention. She also confirms lack of political will as well as lack of disaggregated data on indigenous peoples

⁴ NPC Thirteenth Plan 3-Year (FY 2070/71 – 2072/73)

⁵ Article 261

⁶ Article 252

⁷ Article 258

- Demand that the indigenous peoples focused constitutional commissions be fully empowered, independent and resourced.
- Demand to create a single Ministry (Ministry for Indigenous Affairs) to implement “One-Window” / Agency model⁸; currently, numerous sectoral ministries have mandate; the Ministry of Federal Affairs and Local Development is the “presumed” focal ministry but language under the Ministry of Education; the cultural policy (and marginalized communities) under the Ministry of Culture, Tourism and Civil Aviation⁹; water resources under the Ministry of Energy, forests under the Ministry of Forest and Soil Conservation, land under the Ministry of Land Reform and Management, etc.
- Demand to subscribe to the principle of recognizing the rights of indigenous peoples of Nepal, the rights to FPIC and to the lands, territories and resources; currently, the State subscribe to the principle of nominal/ token representation and consultations instead of the FPIC and the State focuses the livelihood programs instead of recognizing the traditional and customary rights to lands and natural resources.
- Forward the Outcome of this high-level policy dialogue on the rights of indigenous peoples to the respective government ministries, the UN Agencies¹⁰ – including the MDBs; the NHRC and the NFDIN have specifically requested for the outcome document; follow up on the implementation of the Outcome document.

Theme 1: Business and Human Rights, FPIC and State Restructuring

- Review and revise the recently submitted report of the Local Bodies, Special and Protected Areas Delineation Commission; it was prepared without consultations with indigenous peoples and in contravention of the State’s legal obligations; review the provincial boundaries in a way that excluded groups could get due share in the newly created political space, at the provincial level. [Prof. Hachhethu]: Restructuring Nepal state in the form of secularism, pluralism, inclusion and federalism, yet to achieve or unaccomplished goal.”
- Demand that the Ministry of Energy obligates the developers for enforcement of the provisions of the ILO Convention No.169 for energy development projects (currently, it asks the developers “to review this document during the course of Environmental Impact Assessment (EIA) and Initial Environmental Examination (IEE).”¹¹
- Demand that the rights the FPIC of indigenous peoples is upheld by express mention in laws and policies.
- Demand that the principle of benefit sharing is fully applied in energy projects (following principles of 2010 Nagoya Protocol related to the Convention on Biological Diversity 1992 that ensures the traditional knowledge associated with indigenous peoples genetic resources). Benefit sharing should include other forests, pasture, natural resources; The Ministry of Forest representative stated that the Ministry is working on transferring the revenue generated from the Yarsa Gumba collection to the local communities
- Draft and prepare the Guidelines for the cultural, environmental and social impact assessment for programs that affect indigenous peoples.

⁸ Lila Adhikary Ministry of Federal Affairs and Local Development proposes such a “single shopping model” for indigenous issues

⁹ Bharat Mani Subedi Ministry of Culture, Tourism and Civil Aviation

¹⁰ Raja Devasish Roy will meet with the UNDP Country Director

¹¹ Sagar Raj Goutam Senior Divisional Engineer, Ministry of Energy

Theme 2: Gender Equality, Culture and Language

- Specific to Women: Address the specific issues related to indigenous women; currently, indigenous women issues fall through the crack in the State and donor systems; they are “invisible in the laws and policies of the government;” they suffer from double discrimination (as indigenous and as women); the indigenous peoples commission does not disaggregate women issues from those of men and the women commission does not differentiate indigenous women issues.
- Specific to Language: Invest in and promote bilingual and multilingual education (indigenous, national and English) language. Following the provisions of the Interim Constitution, the NPC in its 13th Plan proposed a trilingual education policy for the school level. The 2015 Constitution recognizes the status of all languages spoken as mother tongues the language of the Nation; Develop a linguistic map; Teaching in indigenous languages continue to face challenges; in 2011 Census, 123 languages spoken there are more languages – not all indigenous language (Hindi, Mandarin; the TU Department of Linguistics has carried out sociolinguistic survey; no teaching materials, teachers; carry out an assessment of indigenous languages for developing bilingual curriculum and teaching (number of speakers, written language or not, grammar materials)¹²; The NPC in its current 14th Plan¹³ has proposed a number of specific policies and programs related numerically small indigenous peoples including to preserve and promote their languages and culture and to improve access to primary healthcare.
- Specific to Culture: The Ministry of Women, Children and Social Welfare is revising the National Culture Policy, 2011 – representation of indigenous peoples; the Ministry is also carrying out inventory of the tangible and intangible cultural heritage; The Ministry is also revising the Social Welfare Act, 1992 -- there should be a review of the representation of indigenous women
- Intellectual Property Rights (IPR): Draft laws and policies to protect and patent the intellectual property rights of indigenous peoples.

Theme 3: Collective Rights and Indigenous Peoples Rights in Law, (Emerging) Bill and Constitution

- Carry out a comprehensive review for law and policy reform to make them fully consistent with the ILO 169 and the 2007 UNDRIP – in particular the Right to autonomy and self-rule, the proportional inclusive and participatory principles are some of the basic foundations of the Constitutions of Nepal.¹⁴
- Enact the enabling laws to implement the rights recognized in the 2015 Constitution in full consultation with indigenous peoples; enact as per the provisions of the Constitution and as per the ILO Convention 169, the 2007 UNDRIP and the UN WICP Outcome Document 2016. either new laws or amend the existing laws. A Bill of the Indigenous Nationalities Commission is being currently tabled in the Parliament; it will draft national policies and programs and carry out monitoring of the implementation.
- Set up, as per the provision of the Constitution, the special, protected or autonomous regions for special, cultural protection or economic development. The Constitution makes provision for

¹² Dilliram Rimal, Ministry of Education

¹³ The NPC 14th Plan (FY 2073/74 – 2075/76)

¹⁴ Toyenath Adhikary, Ministry of Law, Justice and Parliamentary Affairs

special, protected or autonomous regions for special, cultural protection or economic development. The Local Bodies, Special and Protected Areas Delineation Commission did not however consult adequately indigenous peoples and did not propose any special and protected areas. [Prof. Hachhethu] Identity-based federalism: recognition of social identity as a political constituency; the constitution rejects ethnicity as political constituency.]

- Disclose the various draft Bills [under the 2015 Constitution] for public information, consultations and revisions.
- Strengthen the institutional mechanisms for indigenous peoples in Nepal (such as NFDIN) and local bodies
- Provide legal aid to indigenous peoples to protect the rights of indigenous peoples in Nepal. Follow up with the Nepal Bar Association¹⁵ and its committee on indigenous peoples have expressed a commitment to extend legal assistance to the indigenous peoples in their legal fight with the state.

Theme 4: Land Rights, Protected Areas and Climate Change

- Recognize the collective rights of indigenous peoples to forest, and natural resources land make the federal, provincial and local policies related to forests, water and other resources fully compatible with the 1989 ILO Convention 169, the 2007 UNDRIP and the 2016 UN WCIP Outcome Document. The NPC, in its 13th Plan proposed to give priority to indigenous peoples to provide increased access to indigenous peoples to water, lands, forests and minerals and to give priority in the management of the natural resources but these provisions are not underlined in its 14th Plan (there is a subtle but clear deemphasis of indigenous peoples focus in its 14th Plan.
- Specific to Lands¹⁶: Recognize collective rights of indigenous peoples to public lands (forests, pastures, rivers, mountains). Subscription to the Doctrine of terra nullius and Eminent Domain in the history of Nepal led to the Alienation of the traditional and customary lands of indigenous peoples; land belongs to the indigenous peoples and state (traditional *Kipat* lands and *Raikar* lands); today, based on the Regalian Doctrine¹⁷, Nepal's land is state land; indigenous peoples become landless squatters in their own traditional land (Tharu Kamaiya). Identify indigenous peoples traditional land areas; Acquisition of indigenous peoples lands should be based only the principle of the FPIC. Prepare a comprehensive land use planning taking into consideration of the indigenous peoples perspective (sacred water and mountain yak grazing, herb collection, spiritual forests, sacred water and mountain).
- Enact integrated federal land act. There is no land act yet under the new constitution. The representative of the Ministry of Land Reform proposes to enact new land laws under the 2015 Constitution and consistent with the ILO Convention 169; the law should recognize the rights of Raute to forests, the rights of Sherpas and Gurung to yak pastures. The State should abide by the international legal obligations under the ILO Convention 169. The State should consider the issue of compensation of the indigenous lands alienated.
- Specific to Forest¹⁸: The 2015 Constitution asks for protection, promotion and sustainable use of natural resources; it asks for equitable distribution of benefits as per the priority and preferential rights of local communities as well as the inter-generational equity. The National

¹⁵ Sher Bahadur KC, Chair, Nepal Bar Association

¹⁶ Leelanath Dahal, Ministry of Land Reform and Management

¹⁷ The Regalian Doctrine dictates that all lands of the public domain belong to the State, that the State is the source of any asserted right to ownership of land and charged with the conservation of such patrimony.

¹⁸ Toya Nath Adhikary, Ministry of Forest and Soil Conservation

Forest Policy 2015 provides increased access to indigenous peoples to biodiversity; new Forest Bill is being drafted. The Ministry of Forest representative proposes that “traditional rights should be taken into consideration, and admits that there are several gaps between words and action. The policies are not supplemented by necessary legal, institutional and administrative arrangements.” Currently, the State provides access to indigenous peoples to forests and public lands for livelihoods without recognizing their due rights.

- Demand the full application of FPIC in all lands, forests and natural resources as well as carbon rights related mechanisms and processes.
- Develop meaningful indicators recognizing the indigenous peoples issues in the implementation of policies and programs.

Theme 5: Mechanisms for Coordination and Dialogue between Indigenous Peoples and Government [State]

- Under the UNDRIP (2007), the indigenous peoples of Nepal can exercise the rights, including (a) the right to self-determination; (b) the right to autonomy or self-government; (c) the right to FPIC; (d) rights to lands, territories and resources; (e) right to the recognition, observance and enforcement of treaties, agreements, and other constructive arrangements
- Under the ILO Convention No.169, the indigenous peoples of Nepal can claim rights, including (a) ownership and possession rights over traditionally and otherwise used and occupied lands; (b) safeguards against alienation of and/or dispossession from land; (c) freedom to observe social, cultural, religious and spiritual values free from any form of discrimination; (d) right to consultation and participation; (f) right to education in the indigenous language
- Draft and finalize, in consultations, the agreed upon criteria/ “definition of” indigenous peoples of Nepal.¹⁹

Theme 6: Indigenous Peoples and the 2030 Agenda [for Sustainable Development]²⁰, incorporating the indigenous voice in the Sustainable Development Goal National Reviews for 2017

- Under the (UN) Outcome Document of the World Conference on Indigenous Peoples (A/RES/69/2) (2014), the indigenous peoples of Nepal can reiterate their rights, including those under the UNDRIP and in particular, (a) legislative and administrative measures affecting IPs with FPIC [including the constitution drafting]; (b) adoption of the National Action Plan by the Government (for legislative, policy and administrative measures, including in context of UNDRIP and Agenda 2030; (c) data disaggregation and appropriate holistic indicators for indigenous peoples well-being, including for baseline surveys, census and for monitoring.

¹⁹ Lila Adhikary Ministry of Federal Affairs and Local Development writes that there is no agreed upon definition of indigenous peoples of Nepal. Similarly, Toyenath Adhikary, Ministry of Law, Justice and Parliamentary Affairs and Dhananjaya Lamichhane of the Ministry of Forest and Soil Conservation express lack of any official definition of indigenous peoples. There are working definitions. 1993 Conference on the Rights of Indigenous Peoples of Nepal proposed a set of criteria for identifying indigenous peoples of Nepal. The National Foundation for Upliftment of Adibasi/Janajati (Indigenous Peoples) Act, 2002 defined and identified 59 indigenous peoples. Raja Devasish Roy has compiled a set of criteria for identifying indigenous peoples.

²⁰ The 2030 Agenda recommends incorporation “of indigenous issues into [NAP] national action plans to implement the 2030 Agenda and ensure the plans are consistent with the provisions of the [UNDRIP] UN Declaration on the Rights of Indigenous Peoples

- Propose further elaboration and adoption of a Nepal National Action Plan on the Rights of Indigenous Peoples²¹ [NAP] based on the existing draft of a National Action Plan for ILO Convention 169, which is presently being reviewed by the Ministry of Federal Affairs (MOFALD). This should happen in full consultations with indigenous peoples and their representative institutions; and there should be a review of the representation of indigenous women in this process.
- Develop or revise existing indigenous peoples policy/gender and inclusion policy of individual UN agency on national level and develop policy implementation guidelines and performance indicators to make these fully compatible with UNDRIP; including mechanisms to ensure Free, Prior and Informed Consent (FPIC) of indigenous peoples in all its initiatives as well as carrying out indigenous auditing of UN agencies
- Establish a separate permanent unit on indigenous peoples' rights/gender and inclusion issues within relevant UN agencies as well as a cross-cutting working group within the UN Country Team to focus on the rights of indigenous peoples and to ensure UN system's policy of engagement with indigenous peoples;
- Encourage the UN Country Team to implement the UN System-wide Action Plan (SWAP) on the Rights of Indigenous Peoples in Nepal and ensure inclusion of indigenous issues in the UN system's work in Nepal in dialogue with indigenous peoples.
- Propose to the National Planning Commission with the support of the UN Country Team to ensure that the rights of indigenous peoples are addressed in the UN Development Assistance Framework (UNDAF) 2018-2022 and to ensure indigenous peoples' are consulted in the UNDAF preparation, implementation and review to obtain their free, prior and informed consent in line with the UN Declaration on the Rights of Indigenous Peoples, article 19 and other international instruments relevant to indigenous peoples.
- Propose to the National Planning Commission with the support of the UN Country Team to give due consideration to all the rights of indigenous peoples in fulfilling the commitments undertaken in the 2030 Agenda for Sustainable Development and in the elaboration of national programs²², including 1) that disaggregated data is gathered according to indigenous identifiers across the Sustainable Development Goals, 2) that indigenous-relevant indicators from the global indicator list are integrated in the national indicators²³, 3) that Nepal's national voluntary national review to the High Level Political Forum 2017 draw on contributions from indigenous peoples and 4) that indigenous peoples are given a platform to participate actively in the implementation, follow-up and review of the 2030 Agenda.

²¹ Government of Nepal incorporated the aspects of indigenous peoples development beginning with the 8th Plan.

²² Language consistent with the UN Third Committee 2016 Resolution on the Rights of Indigenous Peoples adopted in December 2016

²³ Indigenous peoples' have in particular called for including indicators 1.4.2/5.a.1 on secure land rights by type of tenure, 2.3.2 on income of small-scale food producers by indigenous status, 4.5.1 on indigenous peoples' access to education and 10.3 1/16.b.1 on experience of discrimination (United Nations Statistical Commission (E/CN.3/2016/2/Rev.1))