

Cases examined by the Special Rapporteur (June 2009 – July 2010)

[A/HRC/15/37/Add.1](#), 15 September 2010

XXII. Nepal: Alleged exclusion of indigenous peoples' freely chosen representatives from the process of developing Nepal's new constitution

282. In a letter dated 29 January 2010, the Special Rapporteur on the human rights and fundamental freedoms of indigenous people, James Anaya, called the attention of the Government of Nepal to information received about the alleged exclusion of indigenous peoples' freely chosen representatives from the constitution-making process and the absence of an associated mechanism to secure effective participation by indigenous peoples and obtain their free, prior and informed consent in relation to this process. This communication followed the report of the Special Rapporteur on the situation of the human rights of indigenous people in Nepal, in which he issued a series of recommendations on, among other matters, the constitution-making process and indigenous participation therein (A/HRC/12/34/Add.3, paras. 86-87). The Government of Nepal responded to the Special Rapporteur's communication in a letter dated 11 March 2010.

Allegations received by the Special Rapporteur and transmitted to the Government on 29 January 2010

283. In his communication of 29 January 2010, the Special Rapporteur transmitted to the Government of Nepal information received by him about the alleged exclusion of indigenous peoples' freely chosen representatives in the constitution-making process in Nepal and the absence of an associated mechanism to ensure effective participation of indigenous peoples in the process. He requested that the Government respond to the allegations contained in the communication in light of relevant international standards.

284. According to the information and allegations received:

- a) On 12 February 2009, indigenous people and their organizations filed a writ petition with Nepal's Supreme Court alleging their exclusion from the constitutional reform process in contravention of constitutional norms and Nepal's international treaty obligations. The writ petition formally invoked provisions of International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, the Declaration on the Rights of Indigenous Peoples, and the International Convention on the Elimination of All Forms of Racial Discrimination, particularly article 5(c) which guarantees the right, without discrimination of any kind to participate in elections and to take part in government, and the conduct of public affairs, at any level.

b) After a preliminary hearing on 1 March 2009, a single bench of Justice Min Bahadur Rayamajhi ordered all Government Ministers, the Prime Minister's Office and all Constituent Assembly committees to submit written answers within 15 days. While most of these answers were submitted in March 2009, the Court has twice postponed a hearing on the merits, most recently in October 2009. Thus, the matter remains pending despite its prima facie urgent character. Similarly, a request for an interim order filed at the same time as the writ petition has been ignored and no ruling, preliminary or otherwise, on this urgent request has been issued to date. In the meantime, the Constituent Assembly is proceeding apace with drafting the new constitution without any meaningful participation by indigenous people.

c) In response to the writ petition submitted by indigenous people, the State argued before the Supreme Court that the petitioners' arguments should be dismissed for failure to state a colorable claim. The State further argued that indigenous people are presently adequately represented in the Constituent Assembly irrespective of the manner by which they were selected and the party discipline conditions applied.

d) The State's submission to the Supreme Court was accompanied by a number of affidavits, including one by the Chairperson of the Constituent Assembly. Therein the Chairperson explained that it was not possible to establish a separate committee on indigenous people within the Constituent Assembly. He stated "that full respect has been paid to the issue of the participation of all groups and parties concerned in the committees formed under the 'project' of constitution writing and their related topics and the activities to be undertaken by the committees." [77]

e) However, indigenous people had no say in choosing who would represent them in the Constituent Assembly or in its various committees, since these decisions were reportedly made by political parties without any reference to indigenous peoples' right to participate through their own freely chosen representatives.

f) Moreover, in June 2009 the Chairperson of the Constituent Assembly had already rejected the establishment of a separate committee on indigenous peoples. In addition, the Government failed to propose an effective alternative that could otherwise ensure indigenous peoples' participation in political life and the constitutional reform process.

g) Given the postponement of the case before the Supreme Court, there is a concern that the new Constitution, the reform of which is scheduled to be completed in June 2010 - may be adopted before the court renders a decision. This calls into question the availability of effective remedies by which indigenous people may assert and seek protection for their rights.

h) Furthermore, the recent recommendations of six of the ten thematic committees of the Constituent Assembly fail to address, and even potentially undermine, indigenous peoples' rights. As these reports are forwarded to the Constitution Committee in charge of drafting the new constitution, this might allow for a variety of new constitutional provisions that would substantially undermine indigenous people's rights and integrity. For instance,

reports indicate that the Constituent Assembly's Committee to Protect National Interests recommends that the preamble to the new Constitution states that "*Nepal is a source of Eastern civilization and the land of Shiva.*" This statement, if adopted, fails to acknowledge the pre-existence of indigenous people and their identity, and fails to recognise that Nepal is a multi-ethnic, multi-religious, and pluri-cultural country, rather than a purely Hindu country.

i) The Committee to Protect National Interests also recommends that a provision be included in the new constitution that prohibits any person or organization from providing sensitive information that may jeopardize sovereignty, national integrity, or harmony among various castes and ethnicities to international organizations without prior government authorization. There is fear that, if adopted, this provision could be used to prevent the submission of complaints to international human rights bodies and, in particular, may be used to preclude claims based on indigenous peoples' rights. Additionally, although the Committee refers to the right to self-determination in connection with regional and local governments, it fails to do so in connection with indigenous peoples.

j) Similarly, the Assembly's Committee to Construct the Basis of Social and Cultural Solidarity has adopted recommendations that, if implemented, would effectively curtail the territorial rights of indigenous people by guaranteeing "*access in proportion to their need,*" but not ownership rights. Other recommendations hold that indigenous peoples' access natural resources should be placed under the Directive Principles in the new Constitution, which would purportedly render these rights unenforceable in a court of law. Further, the Assembly's Committee to Construct the Basis of Social and Cultural Solidarity also recommends that the official language of the judicial system of Nepal be Khas Nepali. This would deny indigenous people their right to use their own languages in the judicial system, which in many cases would mean that they are unable to understand and participate in the proceedings.

Response from the Government of 11 March 2010

285. The Government of Nepal responded to the above information and allegations in a letter of 11 March 2010. The following is a summary of the Government's response:

a) The sovereign Constituent Assembly elected in order to draft the new constitution has 601 members, of which 218 are from indigenous communities.

b) In order to complete the constitution drafting, the Constituent Assembly has formed ten thematic committees and three procedural committees, in addition to the principal constitutional committee. The members of the Constituent Assembly visited all villages, municipalities and districts in the country and collected peoples' opinions using questionnaires. On the basis of the public opinion registered by these questionnaires, the thematic committees have already prepared and submitted drafts of provisions, to be encapsulated in the new constitution, related to their respective jurisdiction.

c) The principal constitutional committee shall prepare the final draft of the constitution. There is a separate committee in the Constituent Assembly mandated to address the rights of minorities and it has already submitted its initial report, including draft provisions. There is an informal committee of Constituent Assembly members representing the indigenous communities which is helping in bringing the concerns of indigenous peoples to the fore. Constituent Assembly regulations provide that the Constituent Assembly Chairman may form additional committees as needed. The initial thematic drafts of the new constitution have incorporated various provisions related to the rights of indigenous peoples. The writ petition filed by the indigenous organizations with Nepal's Supreme Court is subjudice.

Observations of the Special Rapporteur

286. The Special Rapporteur thanks the Government of Nepal for its response to his communication of 29 January 2010 and to the allegations contained therein.

287. The Special Rapporteur will continue to closely monitor the situation of the participation of indigenous peoples in the process of drafting the constitution as it continues to develop. For now, the Special Rapporteur would like to reiterate observations and recommendations that were included in his 2009 report on the situation of indigenous people in Nepal (A/HRC/12/34/Add.3).

288. In particular he emphasizes his concern that the means provided for indigenous participation in the constitution-making process do not appear to be devised with the "objective of achieving agreement or consent" on the part of indigenous peoples to the constitutional provisions that directly affect their rights, as required by article 6(2) of the Convention [No. 169] and, in even stronger terms, article 19 of the United Nations Declaration" (para. 57).

289. Furthermore, he reiterates the following recommendations related to the constitutional reform process (paras. 86 and 87):

In order to provide the highest safeguards for the collective and individual rights of the Adivasi Janajati, those rights should be explicitly incorporated into the new constitution in accordance with the international standards to which Nepal has committed.

In addition to existing means of representation in the Constituent Assembly, special mechanisms should be developed for consultations with the Adivasi Janajati, through their own representative institutions, in relation to proposals for new constitutional provisions that affect them.

290. In connection with these recommendations, the Special Rapporteur again takes note of the case brought by indigenous peoples' organizations before the Supreme Court in 2009 and hopes that this case will be satisfactorily resolved.

NOTE

[77] Written Reply of the Chairperson of Constituent Assembly Subhaschandra Nembang, submitted to the Supreme Court of Nepal via the Office of the Attorney General Ramsha Path, (2008/2009) Writ no. 0475, para. 4.