

# **Summary of a Comparative Study of the Prevailing National Laws Concerning Indigenous Nationalities in Nepal and ILO Convention No.169 on Indigenous and Tribal Peoples.**

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## **Introductory**

Nepal is a country of rich ethnic, linguistic, religious, cultural and geographical diversity. These pluralistic features have helped bring together and unite people of different groups, but at the same time, they have served to divide people into different groups with distinct identities. The territory of Nepal is inhabited by people of both Mongoloid and Caucasoid stock. The Caucasoid infiltration into Mongoloid areas, which began in the Nepal or Kathmandu Valley during the Lichhavi times, continued in the Gandaki region during the medieval period and ended in the Kosi region in the modern period. Thus, while this issue continues to be disputed, there is little doubt that various indigenous nationalities (*Adibasi Janajati* in Khas-Nepali) inhabited the territories of present-day Nepal prior to the arrival of the Caucasoid *Khasa* (Gurung 2004).

According to the population census of 2001, the population of indigenous nationalities is 37.19% of the country's total population, while the population of *Khas* (Bahun-Chhetri) is 28%. The indigenous nationalities, despite comprising such a large proportion of the population, have been systematically ignored, marginalized and discriminated against by the policies, laws and activities of the Nepalese State. As a result, many are disadvantaged in political, economic, social, cultural and educational sectors. As an increasing number of studies and research have pointed out, the outcome of this history of exclusion has resulted in a situation where many indigenous nationalities continue to be treated as less than full citizens of the state. In this context a disproportionate number of indigenous nationalities face persistent violation of their human rights.

The special protection or reservation provided in all areas to one caste (Brahmin), one religion (Hindu), one language (Khas-Nepali), one culture (Hindu), one sex (male) and one region (hill) has had dangerous negative impacts on the indigenous nationalities (Bhattachan 2000). The fact that the problems and issues raised by indigenous nationalities have become issues of national concern has been highlighted by the adoption of the 'ethnic/indigenous' platform by the Maoist movement, albeit for their own political purposes. If indigenous nationalities' issues are not addressed in the context of more general issues of social justice, then lasting peace will not be attainable in Nepal. If their demands are not sincerely considered, the present position occupied by the Maoists will be merely replaced by another such group, because sustained oppression, injustice and discrimination will continue to force people into rebellion. Therefore, for permanent peace to prevail, one necessity is that rule-based law must protect all people from human rights

abuses arising from oppression, injustice and discrimination (See the Preamble of the Universal Declaration of Human Rights 1948).

Effective legislation in Nepal can provide an effective framework to help resolve some of problems and issues raised by indigenous nationalities.<sup>1</sup> In this regard, the indigenous nationalities of Nepal and their representative organization, the Nepal Federation of Indigenous Nationalities (NEFIN), have been calling for the ratification by His Majesty's Government of the only binding international legal instrument directly related to indigenous nationalities: the International Labour Organization (ILO) Convention No. 169 on Indigenous and Tribal Peoples (1989). The ILO, as per its mandate, has responded to requests by indigenous nationalities and has been working with the objective that, as a Member State with a large population of indigenous peoples, Nepal should be moving towards ratification of Convention 169. As part of this process, ILO supported LAHURNIP (an organization of lawyers working in the area of the human rights for Nepal's indigenous nationalities) to carry out a comparative legal study on prevailing Nepalese laws concerning indigenous nationalities and ILO Convention No. 169. A summary of this comprehensive study is presented below: The following topics have been dealt with in this summary:

1. The Legal Status of Nepal's Indigenous Nationalities
2. A Brief Introduction to ILO Convention 169
3. A Comparison of the Provisions of ILO Convention 169 and Nepalese Law
4. Implications of Ratification of ILO Convention 169 and Conclusion

### **The Legal Status of Nepal's Indigenous Nationalities**

#### **(a) Indigenous Nationalities and Nepalese Law**

Before the formation of the present Nepalese State, indigenous nationalities had control over their respective 'states' and traditional territories. Many of these states were ruled by local kings, chiefs and leaders. These independent states and territories later became parts of a 'unified' Nepal, under the leadership of the King of Gorkha, Prithivi Narayan Shah. Although present day Nepal started to take shape around 234 years ago, it was only around 186 years ago that its boundaries and actual territory were finally defined. According to Ludwig F. Stiller (1995:29-30), prior to the Sugauli Treaty of March 4, 1816, the area of Greater Nepal included more than 80 states or political units of Baisi, Chaubisi, Mustang north of the Himalaya, Kumaon, Garhwal, Kulur, Hindur, Busahir, Simur, Barha Thakuri, Atharah Thakuri and Kangra west of the Mahakali river, Kirtipur, Patan, Kathmandu and Bhaktapur of the Kathmandu Valley, and Makawanpur, Chaudandi and Bijayapur to the south and east of Kathmandu Valley. Following the Sugauli

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<sup>1</sup> Pradesh Chhetri vs. His Majesty's Government, *Nepal Kanun Patrika* (Nepal Law Journal), 2061 BS.

Treaty there were supposedly more than 50 states or political units encompassed in the Nepalese State. Although the exact figure continues to be disputed, if we take Baisi, Chaubisi and Mustang of the west, Kirtipur, Patan, Kathmandu, Bhaktapur and Makawanpur of central Nepal, and Chaudandi, Bijayapur and Das (Ten) Limbuwan of the east, it can be said that present day Nepal came to be formed following the annexation of around 64 states or political units (IIDS 2059 BS). During the process of formation of the Nepalese State, Prithivi Narayan Shah undertook treaties with various states. For instance, the Limbu rulers were brought within the territory of Nepal following signing of a treaty (Regmi 1978).

Therefore, it is evident that until the beginning of the 19th century, indigenous nationalities enjoyed relative autonomy in their traditional lands and could accordingly freely utilize and allocate power and resources therein. However, this situation came to an end with the Gorkhali invasion during the making of the Nepalese State. Subsequently, a policy of centralization of power, political and economic marginalization and religious and cultural domination was carried out through military repression, with the objective of making a Hindu state and giving priority to Hindu "high" castes. Over the last 235 years, this process has progressively led to the elimination of the existence and identities of indigenous nationalities (Subba et al 2000).

Prithivi Narayan Shah in his book, the *Dibya Upadesh*, called Nepal the true and pure land of Hindus. Accordingly, the policies and laws of the new State were firmly based on the Hindu religion. Hindus were afforded the highest status in society and the premier posts of the State were the exclusive preserve of the *Tharghar* (which included the groups Pande, Pant, Bohara, Aryal, Khanal and Rana). This custom remained intact until the Rana period (Riccardi 1977), when Prithivi Narayan Shah advised his successors to follow the policy of giving the highest state positions to the Hindu castes (Bahun, Chhetri and Thakuri) and posts in the foreign and defense departments to the Pandes and Basnyats (Stiller 1990).

Since the express policy of the Nepalese State was Hinduisation, the indigenous nationalities were progressively alienated from their traditional religions and forced to accept Hinduism. As their traditional religious practices were eroded, their own festivals were displaced by Hindu festivals like Dashain (symbolizing the worship of their rulers) and the Hindu calendar gained increasing dominance. The language of the rulers, *Khaskura*, was renamed as Nepali and became the official language of the nation. In this process, the cultures of indigenous nationalities were increasingly marginalized. In short, the Nepalese State attempted to mould and merge ethnic plurality into Hindu caste based (*varna*) hierarchy, religious plurality into Hinduism and linguistic plurality into the monopoly of the *Khas* language. The indigenous nationalities, despite their social structure based on more egalitarian principles, were subsequently divided into high and low castes (Gurung 2004).

The making of the Nepalese State can be divided into three phases: the Shah and Rana period; the Panchayat period and Multi-party democracy period (Pfaff-Czarnecka 1997:421-429). The Shah (1768-1846) and Rana (1846-1951) period was imperialist in nature and adopted a policy of aggressive Hinduisation and centralization of state power. The Panchayat (1960-1990)

period continued a policy of homogenization, which aimed at molding the diverse groups into Hindu Khas-Nepali speaking castes who followed the culture of the hill high castes (Gurung 2004). In contrast, the Multiparty Democracy (1990 onwards) period has been a period where cultural plurality and ethnic diversity has come to be accepted to a greater extent than before.

The laws of the country that were issued in the name of royal decree orders, seals, *sanad*, *sawal*, *rokka*, *istihar*, as well as customs and traditions, were codified and institutionalized in the *Muluki Ain* (National Legal Code) of 1854. The National Legal Code conformed to the principle of ethnic purity which had its basis in the Hindu *Manusmriti*. Based on this intensely hierarchal and patriarchal Hindu book of conduct, the Code was drafted by two Brahmins, who were awarded 500 *bighas* (around 300 hectares) of land for their efforts.<sup>2</sup> The National Legal Code in effect gave legal sanction to the 'hinduisation' of indigenous nationalities, despite their more egalitarian traditional social structures and brought them under the ambit of Hindu laws and customs, including concepts of ritual purity etc. In other words, the *Muluki Ain* of 1854, based as it was on Hindu jurisprudence, incorporated diverse caste and ethnic groups of Nepal in a holistic framework of national caste hierarchy (Hofer 1979).

#### The Caste Hierarchy of the National Legal Code of 1854

<p><b>1. Wearers of the holy cord (Aristocrat)</b>            Upadhyay Bahun            Rajput (Thakuri)            Jaisi Bahun            Chhetri            Deubhaju*            Madhesi Brahman            Sanyasi            "Lower" Jaisi            Various Newar Castes*</p>	<p><b>4. Impure but touchables</b>            Kasai*            Kusule*            Dhobi (Newar)*            Kulu*            Musulman            Mlechha (European)</p>
<p><b>2. Non-enslavable Alcohol-Drinkers</b>            Gurung*            Sunuwar*            Magar*            Some other Newar castes*</p>	<p><b>5. Untouchables</b>            Kami            Sarki            Kadara            Damai            Gaine            Badi            Pode*            Chyame*</p>
<p><b>3. Enslavable Alcohol-Drinkers</b>            Bhote*            Chepang*            Kumal*            Hayu*            Tharu*            Gharti</p>	

\* Indigenous Nationalities

Source: Hofer (1979:45)

<sup>2</sup> Bhim Bahadur Pande, *Tyas Bakhato Nepal*, Part 5, p. 138.

Given that the National Legal Code of 1854 also provided for varying degrees of punishment for the same offence (according to caste affiliation), the Code was racist in nature protecting the Bahun Chhetris, while persecuting indigenous nationalities, women and *Dalits*. Various cultural practices of the indigenous nationalities were not only considered inferior but were further degenerated by the high caste elite. For example, the food traditionally eaten by indigenous nationalities was presented as inedible and dirty. To show the Hindu Bahun as superior and the indigenous nationalities as lowly, any Bahun marrying with the so-called low caste woman was, according to the National Code, deprived of his entire property and, after being forced to eat pork, was demoted to the alcohol-drinking *matawali* caste. As per the Code even the *Shudra* were demoted in the case of various offences; for example they were fed dog meat and demoted to the Bhote "caste" and those of the east were driven to the west and those of the west to the east.<sup>3</sup> The Bhote thus appear to have been put at the lowest rung of the caste hierarchy. The National Code also provided for indigenous nationalities to be enslaved.

During the Panchayat regime, discriminatory laws continued to have negative consequences for indigenous nationalities, politically, culturally, economically and socially, thus preventing the full enjoyment of indigenous nationalities' human rights. The 1962 Constitution promulgated during the Panchayat regime declared Nepal as a Hindu State for the first time. Attempts were made to end the religious, linguistic and cultural diversity of the country under a policy of one religion – Hindu, one language – Khas-Nepali and one culture – Aryan and the process of cultural homogenization was accelerated.

**(b) Laws related to indigenous nationalities following the reinstatement of multiparty system**

Following the regime change of 1990 and the reinstatement of multiparty democracy the existence and identities of indigenous nationalities were constitutionally recognized. However, their problems and issues were not addressed properly and were seen from a development perspective, rather than a rights-based one. The Hindu perspective and way of thinking of the past was largely continued in prevailing laws and fundamental issues. Although Article 4 of the Constitution of the Kingdom of Nepal accepts Nepal as multiethnic and multilingual state, the Constitution also gives Hinduism primacy of place as the national religion, while the religions of indigenous nationalities are relegated to second class status. Indigenous nationalities, their representative organizations and the umbrella body of these organizations, the Nepal Federation of Indigenous Nationalities (NEFIN), have consistently raised the issue of secularism as one of their main agendas. To use the word 'Hindu' as a characteristic of the Nepalese State was in the past, and continues to be in the present, beneficial to certain groups, but overall has more negative aspects than positive ones (Sharma 2004). The present Nepalese Constitution has not only failed to adequately address indigenous nationalities' issues, but also contains several provisions inimical to the latter. This has resulted in the continued violation of indigenous nationalities'

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<sup>3</sup> The National Legal Code of 1854, *Dharmadhikarko mahal* (Religious officer's section) p. 379.

human rights and fundamental freedoms. The fundamental freedoms provided under Article 12 of the Constitution (such as the freedom of expression, freedom to organize and the freedom to travel within the country) can be restricted<sup>4</sup> for indigenous nationalities on the suspicion that they jeopardize the harmonious relations existing among the peoples of various castes, tribes or communities.

The provisions of Article 11 of the present constitution allow for discrimination on the basis of language and origin. Article 19 provides for the freedom to follow one's traditional (*sanatan*) religion. But since the word '*sanatan*' has not been defined in the appropriate laws (in this case the *Kanun Byakhya Sambhandi Ain* 2010 BS) and given that '*sanatan*' is used by some synonymously with Hindu religion, this has led to lack of clarity about whether the followers of other religions can practice their religion freely or not. This ambiguity is compounded further by the accompanying restrictive provision in the same article, which states that 'no person shall be entitled to convert another person from one religion to another'. The Constitution thus appears to indirectly support the primacy of the Hindu religion.

Article 6(1) of the Constitution defines Khas-Nepali as the language of the nation and other languages as 'national languages', which are prohibited from use at the official level. This has led to linguistic discrimination. Article 112(3) prohibits indigenous nationalities from organizing themselves politically. Nonetheless, the provision of Article 11(2) of the Constitution, as well as Articles 24(2) and 26(10), which provide for the State to bring forth laws to adopt special measures for the development and upliftment of indigenous nationalities, can be regarded as significant and positive for indigenous nationalities.

Apart from constitutional provisions, the Local Self Governance Act 2055 BS accepts that indigenous nationalities have been excluded and stresses the necessity of bringing them into the national mainstream (Preamble, Local Self Governance Act 2055 BS). After the Local Self Governance Act of 2055 BS, a separate law was drafted focusing on indigenous nationalities in the form of the National Foundation for Development of Indigenous Nationalities Act 2058 BS. This Act provides the definition of indigenous nationalities and identifies 59 indigenous nationalities of the country. The National Foundation for Development of Indigenous Nationalities (NFDIN) has been established as the focal point for indigenous nationalities issues and has a mandate to make suggestions to the government for the development and upliftment of these groups.

### **Representation of Indigenous Nationalities in Judicial Administration**

Group	Supreme Court	%	Appellate Court	%	District Court	%
Hindu	17	85	79	84	116	86.7
Newar	3	15	14	14.9	13	9.7
Rai	-	-	1	1.1	2	1.5

<sup>4</sup> Restrictive Provision

Tharu	-	-	-	-	1	0.7
Gurung	-	-	-	-	1	0.7
Tamang	-	-	-	-	1	0.7
Total	20	100	94	100	134	100

Source: *Nyayaparishadko Bulletin* (Bulletin of Judicial Council), Poush 3, 2058 BS.

The above table shows that the 8.6 million indigenous nationalities, comprising 37.19% of the total population (23,151,423) of Nepal, have (if the indigenous nationality Newar are excluded) only 3.6% representation in District Courts, while Bahun Chhetri (with 28% population) enjoy 84% representation. In the Supreme Court the representation of indigenous nationalities (excluding Newar) is zero, while the Bahun Chhetri have 85% representation. This clearly shows the extent of the pro-Hindu state today and the persistence of discriminatory practices against indigenous nationalities. As a result of these deeply entrenched prejudices which are embedded in the legal system, indigenous nationalities continue to face blatant discrimination with regard to justice delivery. This fact is further confirmed by the data below.

### **Judicial Interpretation Regarding Cases of Indigenous Nationalities and *Dalit***

Regarding the protection and promotion of the rights of indigenous nationalities and *Dalit*, judicial interpretation has been 40.51% positive and 59.49% negative for these groups

### **Status of Decisions Involving Indigenous Nationality Justices**

Regarding the cases of indigenous nationalities involving justices from indigenous nationalities, the positive interpretation percentage is 46.15. On the other hand, with regard to cases of indigenous nationalities involving Bahun Chhetri justices, the positive interpretation percentage is 37.5. (The data is based on the report of the GSEA Team 2005).

### **Judgments in Cases Related to Ethnicity, Religion, Language, etc: How Positive, How Negative?**

Subject	Positive Percentage	Negative Percentage
Language	-	100
Religion	30.77	69.23
Special Provision On the Issue of Equality	66.67	33.33
Ethnic/Racial Discrimination	18.18	81.82

Source: Paper on Janajati as Question in Nepalese Law by GSEA Team 2005.

### **Legal Problems and Indigenous Nationalities' Issues**

On the basis of the impact of the provisions of prevailing Nepalese laws on indigenous nationalities, the following problems and issues have been identified<sup>5</sup>:

- (i) Discriminatory laws and decisions
- (ii) Exclusion of indigenous nationalities in judicial administration
- (iii) Double standard between indigenous nationalities and non-indigenous nationalities on legislation and in practice
- (iv) Preferential treatment given to Khas Hindus and to issues related to their identities in laws, policies and in practice at the cost of negatively affecting the non-Hindus
- (v) Absence of full recognition of the human rights and fundamental freedoms of indigenous nationalities
- (vi) Absence of recognition of the customs and customary laws of indigenous nationalities
- (vii) Lack of access to justice for indigenous nationalities
- (viii) Absence of the right to fair hearing given that Khas-Nepali is the language of official use.

### **What is ILO Convention 169?**

The International Labour Organization (ILO) Convention 169 is the only binding international legal instrument protecting the rights of indigenous and tribal peoples. The instrument was adopted in 1989 by an overwhelming majority at the 76<sup>th</sup> Governing Body of the ILO. Convention 169 replaces the earlier Convention 107 on Indigenous and Tribal Populations (1957), which is now regarded as outdated and anachronistic. When the ILO brought forth Convention 107 in 1957, the drafting process did not include the participation of indigenous and tribal peoples. Instead it was based on a 'top-down' approach, characteristic of its time, which prevailed in other international instruments and in development planning in general. Convention 107 was also based on an approach which promoted the assimilation of indigenous and tribal peoples into the 'mainstream' of the country's in which they lived (Swepston 2003). The prevalence of this top-down approach ended in 1982 with the establishment of the Working Group on Indigenous People within the United Nations system. This Working Group initiated the process of representation of indigenous nationalities in international fora; thereafter, calls to amend ILO Convention 107 in favour of a more progressive document gathered momentum. The ILO responded to these developments (despite its tripartite structure comprising the representatives of workers, employers and government, many of whom were did not regard indigenous peoples rights as a priority issue) by bringing forth Convention 169, which was the

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<sup>5</sup> This is based on review of publications and reports of NEFIN and indigenous nationality organizations.

product of extensive consultations with representatives from indigenous and tribal peoples from across the world.

Today, ILO Convention 169 remains the only binding international instrument (i.e. the countries which ratify it have to abide by it) protecting the rights of indigenous and tribal peoples. The Convention is based on the principle that indigenous peoples have the right to control their own development and institutions concerning them, on the principle of recognizing their distinct identities as indigenous peoples (Preamble of the Convention). The approach of this convention and the principles it espouses differ fundamentally from ILO Convention 107 and are in accordance with the demands of indigenous peoples worldwide.

### **ILO Convention 169 is divided into three parts**

#### **First Part**

*General Policy*, under which issues like the identity of indigenous peoples, self-management, government's obligation, fundamental rights, special provisions, consultation, participation and representation, development, customs and customary laws have been included.

#### **Second Part**

*Substantive Issues*, under which issues like land and resources of indigenous peoples, employment, professional training, handicrafts and industries of remote areas, social security and movement of peoples have been included.

#### **Third Part**

*Administration*, which sets out government's obligations to ensure full compliance of the provisions of the Convention.

### **A Comparative Study of the Provisions of ILO Convention 169 and Prevailing Nepalese Laws**

#### **First part**

##### **General Policy**

##### **(a) Indigenous Peoples and Their Identity**

Although the Convention does not actually give a definition of indigenous peoples, it identifies criteria for establishing to whom the Convention applies to and whom the Convention protects. The criteria listed in Article 1 (1(a)(b)) is intended to be wide enough to cover the diversity of indigenous peoples across the world and also to be acceptable to countries which are opposed to the use of the term 'indigenous' to refer to certain sections of their population. Article 1 of the Convention has put forth the following criteria:

**Groups with the following characteristics fall under tribal peoples:**

- (i) Way of life: Those who live completely or partially under their own customs, traditions or rules and regulations
- (ii) Those who owing to their socio-economic and cultural condition appear distinct from other groups.

**Groups with the following characteristics fall under indigenous peoples:**

As above, but also including:

- (i) Those who have lived on their lands from time immemorial, prior to colonization and before the formation of the existing state structure.

As regards the right to decide which groups fall under 'tribal' or 'indigenous' peoples, Article 1(2) of the Convention has put forth self-identification as the fundamental criterion. This is not an ordinary criterion but a fundamental criterion. Although the Article does not state explicitly whether the right to identity is an individual or a collective right, this is regarded as a collective institutional decision taken by respective representative organizations and national governments.

From a legal perspective, indigenous and nationalities have been defined synonymously in Nepalese law; the National Foundation for Development of Indigenous Nationalities Act 2058 BS defines "indigenous/nationalities" as groups or communities with their own mother tongue and tradition, distinct cultural identity, distinct social structure and oral or written history. The Act has listed 59 groups of indigenous nationalities in its schedule. In order to understand clearly the definition given by the Act, one has to look to the definition of the Working Group on the National Foundation for Development of Indigenous Nationalities. The Working Group has explained what is meant by the word 'distinct': groups with an egalitarian social structure distinct and different from the Hindu religion, culture and social structure which based on the principle of caste hierarchy.<sup>6</sup>

A comparative study of ILO Convention 169 and the prevailing Nepalese laws shows that, vis-à-vis the issue of the identity of indigenous nationalities, both have accepted the characterizing bases of traditional lifestyle and distinct social, economic cultural practices, customs and traditions. However, unlike Convention 169, the National Foundation for Development of Indigenous Nationalities Act has not recognized traditional political institutions

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<sup>6</sup> *Prathisthan Sthapana Garne Karyadalko Mul Prativedan* (Main Report of the Working Group on the Establishment of National Foundation for Development of Indigenous Nationalities). Publisher: National Foundation for Development of Indigenous Nationalities, p. 17.

and has not been able to include the issue of indigenous peoples living on their land prior to the formation of the Nepalese State. Also, the Foundation Act does not have self-identification as the defining criterion regarding who is indigenous and who is not. In fact, if we look at Article 25 of the Act, we can see that the right to add or remove groups of indigenous nationalities from the accompanying list lies with the government. Given that the regulations regarding the Foundation are not yet in place, it is difficult to predict how the government will use this right. However looking at the provisions of the Act, the Council (as per Article 15) can form a Working Group and recommend to His Majesty's Government to add or remove groups from the list of indigenous nationalities. While drafting the accompanying regulations to the Act, there is the possibility of including the process of self-identification, whilst staying within the Act's provisions.

## **1. Self-Management**

Prior to the encroachment by the existing State, indigenous nationalities were able to live in relative autonomy, conducting their life-style, language, culture, society, land and natural resources base according to their own customs and customary laws. Accordingly, ILO Convention 169 has recognized the right of indigenous nationalities within the state structure to retain and exercise control over their language, culture, religion, institutions and development activities. The concept of self-management can be best understood by its exercise in a developed form by Denmark. Denmark adopted a policy of providing the right of self-government to Greenlandic Inuit indigenous peoples in 1978 by passing the Greenland Home Rule Act 1978. This has provided Greenlandic Inuit indigenous peoples the right to control their public institutions, development and resources.

With regard to the Nepalese context, Article 18 of the Constitution of the Kingdom of Nepal has given the right to all groups to protect their language, script and culture. The Constitution has also given the right to groups to run schools up to primary level in their own mother tongues. Article 4 of the National Foundation for Development of Indigenous Nationalities Act 2058 BS has defined the Foundation as a 'permanent, autonomous and organized institution'. Article 6 of the Act has put forth as activities, duties and rights of the Foundation the protection, promotion and development of the language, script, culture, ancestral property, traditional skills, etc. of indigenous nationalities and the economic and social development of indigenous nationalities. The Local Governance Act 2055 BS seems to have legally recognized the principle of representation of indigenous nationalities in local bodies.

A comparative study of ILO Convention 169 and the prevailing Nepalese Laws shows that the spirit of the provisions of self-management found in the Convention is not reflected in the current Nepalese legislation. However, the right to protect and develop one's language, script and culture and to retain control over them is found in Article 18 of the Constitution of the Kingdom of Nepal.

## **2. Responsibility of the Government**

According to Article 2(a) of ILO Convention 169, it is the responsibility of governments to involve indigenous peoples in development activities concerning them. In order to protect their rights and avoid negative impact upon their integrity, participation of indigenous nationalities must be carried out in a systematic way. As per Article 2(2) of the Convention, this systematic action involves the following:

- (a) National laws should guarantee that members of indigenous groups have the right to participate on an equal footing with other groups.
- (b) For the complete recognition and respect of socio-cultural identities, customs, traditions and institutions of indigenous peoples, the promotion of their socio-economic and cultural rights should be guaranteed.
- (c) Without negatively impacting upon the lifestyles of indigenous peoples, attempts must be made to narrow the socio-economic gap between them and other developed national groups.

In the Nepalese context, Article 25(4) of the Constitution of the Kingdom of Nepal states that it shall be the responsibility of the State to maintain conditions suitable to the enjoyment of the fruits of democracy through wider participation of the people in the governance of the country and by way of decentralization. Article 26(10) of the Constitution states that the State shall pursue a policy that will help promote the interests of the economically and socially backward nationalities and communities by making special provisions vis-à-vis education, health and employment. It should be noted here that in the English translation of the Constitution the Khas-Nepali word 'janajati' ('nationalities' in English) has been removed from the Article.

Overall the State, as per the prevailing Nepalese laws, has a policy of uplifting indigenous nationalities. However, although there is similarity in spirit between Article 2(c) of ILO Convention 169 and Article 26(10) of the Nepalese Constitution, the systematic action to guarantee the participation of indigenous nationalities found in the Convention is lacking in prevailing Nepalese laws. Another weakness is that the above mentioned constitutional articles fall under directive principles and policies of the State, hence they are not mandatory and there is no constitutional remedy in case of their infringement (Article 24(6)).

### **3. Fundamental Right**

According to Article 3(1) of ILO Convention 169, indigenous peoples have the right, like other groups, to utilize to the fullest extent their human rights and fundamental freedoms unhindered and without being discriminated against. The provisions of the Convention are equally applicable to indigenous men and women. Article 3(1) of the Convention provides for the human rights and fundamental freedoms of indigenous peoples and states that the provisions of the Convention cannot be infringed upon by coercion or force. It is to be noted here that this provision guarantees the use of all the human rights and fundamental freedoms provided for in international instruments ratified by the State, or that the State abides by.

As regards the Nepalese context, issues of human rights and fundamental freedoms have been mentioned in the Constitution and in prevailing laws. They are mentioned under the title of fundamental freedoms in Part 3 of the Constitution of the Kingdom of Nepal 1990. Article 11(1) of the Constitution provides for the right to substantial equality by stating that all citizens shall be equal before the law and that no individual shall be denied the equal protection of the law. Article 11(3) provides for the prohibitory clause that no citizen shall be discriminated against on the basis of religion, race, sex, caste, tribe or ideological conviction or any of these. The Article also provides for positive discrimination for the protection of weak and backward classes. To be noted here is the fact that the type of equality envisioned in Article 11 is predominately 'equality among equals'. There is limited recognition of the need for different courses of action for disadvantaged groups, who are not on an equal footing with other groups in society.

Special Bench

Hon. Justice Mr. Kedar Prasad Giri

Hon. Justice Ms. Sushila Singh Silu

Hon. Justice Mr. Anupraj Sharma

Makhan Babu Gautam

vs.

His Majesty's Government, Secretariat of Council of Ministers

Subject: Request for issuance of necessary orders including Certiorari and Mandamus.

Applicant Gautam called for the annulment of National Foundation for Development of Indigenous Nationalities Act 2058 BS stating that the Act works only for the benefit of indigenous nationalities and is thus contrary to Articles 11(1), 11(2) and 11(3) of the Constitution of the Kingdom of Nepal which state that all are equal before the law, that there cannot be discrimination on the basis of religion, colour, sex, caste and ethnicity, and that all are entitled to equal protection by the law. The applicant also stated that the economically backward class as per the restrictive provision of Article 11(3) does not include indigenous communities and that class denotes the rich and the poor. The Supreme Court in this case has established the following principle - "A single legal provision covering the entire Nepalese kingdom cannot create equality among all classes and bring all Nepalese citizens in the mainstream of national development." "The word class can also include economically and socially backward castes and ethnic groups."

Article 12 of the Constitution of the Kingdom of Nepal provides for the right to freedom, Article 13: press and publication right, Article 14: right to criminal justice, Article 16: right to information, Article 17: right to property and Article 20: the right against exploitation. If the fundamental freedoms under Part 3 of the Constitution are infringed upon, Article 23 provides for the right to constitutional remedy.

Special Bench

Hon. Justice Mr. Gajendra Kesari Bastola

Hon. Justice Mr. Keshav Prasad Upadhyay

Hon. Justice Mr. Krishna Jung Rayamajhi

Case: Certiorari

Balkrishna Neupane

vs.

Council of Ministers

The fundamental freedoms in Article 11(1) of the Constitution of the Kingdom of Nepal provide for equality of all citizens before the law: citizens have been provided with the right to equality and that no one will be denied of the protection of the law. As regards equality, justice means the equal application of law among equals. The equal application of law among unequals and unequal application of law among equals is not just. *Nepal Kanun Patrika* (Nepal Law Journal), 2050 BS, Issue ....., p. 450, Decision No. 4768

Apart from the Constitution, the Civil Rights Act 2012 BS has also provided for various rights which are particularly relevant to indigenous nationalities. Article 6 of the Act provides for equality before the law, Article 4: non-discrimination on the basis of religion, ethnicity or sex, Article 10: right to shelter, Article 12: individual freedom and Article 13: the right that no one shall be forced into work against their will. If these rights are infringed upon, the Act provides for the right to remedy through writs at the Appellate Court.

If we compare ILO Convention 169 with the prevailing Nepalese laws, we can see that theoretically the rights provided in national legislation can also be utilized by indigenous nationalities. However, the way that the rights of indigenous nationalities as a distinct group with special needs have been explicitly and specifically provided for in ILO Convention 169 is not found in the provisions of the prevailing Nepalese laws. The prevailing Nepalese laws have not taken into account the fact that by putting the indigenous nationalities on the same level as other national groups, indigenous nationalities cannot enjoy the fundamental freedoms like other groups (Preamble, ILO Convention 169). Nonetheless, Article 11 of the Nepalese Constitution with its principle of 'special action' does to some extent carry this spirit, which is affirmed by the above mentioned case (Balkrishna Neupane vs. Council of Ministers).

However, the freedoms provided under Article 12 of the Constitution can be curtailed on the suspicion that they undermine the sovereignty, integrity of the country and social harmony. Issues concerning caste/ethnicity seem to have been taken indirectly as the motivating factors for this qualifying provision. Furthermore, Article 112(3) has prohibited indigenous nationalities from organizing themselves politically. This has curtailed the political right of indigenous nationalities to organize themselves on the basis of their identities. According to the interpretation in the cases mentioned below (Gopal Gurung vs. Election Commission and Khagendrajang Gurung vs. Election Commission), opening a political party with the name 'Mongol' or the

maintaining of traditional homeland on the basis of ethnicity is communal and such parties cannot be registered in the Election Commission. On the other hand, a party like Shiva Sena that promotes Hindu religion<sup>7</sup> and Sadbhavana party that advocates regionalism have been registered. This is discriminatory and is not in accordance with the provision that indigenous nationalities can use and benefit from national laws on an equal footing with other groups.

Special Bench

Hon. Justice Mr. Rudra Bahadur Singh

Hon. Justice Mr. Kedar Raj Upadhyay

Hon. Justice Mr. Krishna Jung Rayamajhi

President of Mongol National Organization Gopal Gurung

vs.

Election Commission

Case: Mandamus and Certiorari

In the case the applicant, given that the Election Commission did not register Mongol National Organization as a political party, requested the Court to issue order for registration.

Principal of Precedence: The party's objective states that in order to quickly uplift the Mongol clan a Mongol ministry shall be established, the personnel of which will also comprise of the people of Mongol clan. The party's objective is not to benefit all Nepalese but only Mongols, hence a party formed with such ethnic interest has been denied recognition as a political party by the Constitution of the Kingdom of Nepal. As the Mongol National Organization is communal and it's name, objective, flag and symbol are separatist in nature, the Election Commission's decision not to register the party is in accordance with law. *Nepal Kanun Patrika* (Nepal Law Journal), 2052 BS, Issue 1, Decision No. 5030, p. 19.

Special Bench

Hon. Justice Mr. Surendra Prasad Singh

Hon. Justice Mr. Trilok Pratap Rana

Khagendrajung Gurung

Vs.

Election Commission

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<sup>7</sup> Durban Declaration and Program of Action and Racial Discrimination in Nepal, p. 138.

Case: Mandamus

*Janajati* implies a particular class and the establishment of autonomous regions on the basis of homeland for different language, culture, religion, race and ethnicity is communal in nature. As such, such a political party cannot acquire recognition for election purposes as per the Constitution; such a political party cannot even be registered. That the hearing should be as per the convenience of applicant is not valid. *Nepal Kanun Patrika* (Nepal Law Journal), 2048 BS, Part 33, Issue 2, 3 and 4, Decision No. 4270, p. 114.

#### 4. Special Measures

Article 4 of ILO Convention 169 states that special measures shall be taken for the protection of representative institutions, property, land, culture and related environment of indigenous peoples. When these special measures are taken, they will not be in opposition to the freely expressed consent of indigenous peoples, i.e. special measures should be adopted according to their wishes. Article 5 of the Convention states that the social, cultural, religious and spiritual values and customs of indigenous peoples shall be recognized and protected and that hindrances and obstacles faced by them, both as groups and individuals, shall be taken into account and addressed. In this context, Article 26(2) of the Nepalese Constitution has given recognition to language, religion and culture, which is in consonance with the spirit of the Convention. Article 11(3) of the Nepalese Constitution mentions the issue of 'special measures' in its prohibitory clause. However, in prevailing Nepalese laws, unlike Convention 169, there is no provision that the special measures should be in accordance with the wishes of indigenous peoples. Instead, the special measures are entirely dependant on the wishes of the government. Also, the special measures rather than protecting the concerns of indigenous peoples have their focus on development and on removing economic inequality, which may in the process serve to harm indigenous interests rather than protect them. Furthermore, the fact that these special measures can only be implemented by making appropriate legislation has given rise to technical problems. The Supreme Court's decision in the case below (Pradhesh Chhetri vs. His Majesty's Government) stated that reservation should be implemented by bringing forth appropriate legislation that clearly delineated inequality. This is contrary to Article 5(c) of the ILO Convention.

Special Bench

Hon. Justice Mr. Kedar Prasad Giri

Hon. Justice Ms. Sushila Singh Silu

Hon. Justice Mr. Anupraj Sharma

Subject: Mandamus with Certiorari

Pradesh Chhetri

vs.

His Majesty's Government, Prime Minister's Office and Office of Council of Ministers

Applicant Pradesh Chhetri requested for annulment of the decision by Tribhuvan University Executive Council on 2061/5/18 BS to provide, during admission of students to various faculties in campuses under Tribhuvan University, 10% reservation of seats to *dalit* students, 10% to *janajati* (nationalities) students and 20% reservation of seats to women students, calling it contrary to Article 11(1) of the Constitution. During hearing on the case it was seen that the State had not brought forth legislation to provide for special measures vis-à-vis indigenous, nationalities, women and other backward classes. The longer the delay in bringing the backward classes into the mainstream of national development, the increased the risk of social unrest which will negatively impact on the common aspirations of the Nepalese people. Hence, the government should bring forth as soon as possible, within this financial year, a law that provides a clear basis to delineate those economically, socially or educationally backward or incapable. As the above mentioned reservation cannot be brought without making the necessary laws, it is declared null and void. *Nepal Kanun Patrika* (Nepal Law Journal)

## 5. Consultation, Participation and Representation

ILO Convention 169 has given emphasis on the right of indigenous peoples to maintain through consultation, participation and representation control over decisions, policies and plans that affect them. Consultation, participation and representation are the foundations of the Convention on which all the provisions rest.

According to Article 6(1) of the Convention, the government while implementing the provisions of the Convention should:

- (a) carry out consultation through representative institutions of indigenous peoples by adopting an appropriate process, and
- (b) follow this guiding principle while taking legislative and administrative decisions affecting them.

As per Article 6(1)(b) of the Convention, the State should adopt such mechanisms that provide for the participation of indigenous peoples, at least on par with 'mainstream' social groups, in all decision making levels and in administrative and other bodies that are responsible for making policies and plans. Article 6(2)(c) states that, enough resources for structural development should be provided for the above mentioned objectives. And Article 6(2) maintains that the above principles shall be followed in good faith.

Article 7(1) of the Convention states that in the case of development activities that affect the lifestyle, norms, values, institutions, spiritual values of indigenous peoples and the land they occupy, control and have settled on, indigenous peoples are guaranteed the right to decide their priorities. According to Article 7, indigenous peoples have the right to participate in development activities affecting them, from the level of planning to implementation. These provisions direct

that all issues and activities be undertaken following dialogue in good faith between the government and indigenous peoples (Sweepston, Lee 1998).

There have been some definitive interpretations regarding consultation, participation and representation. The case Central Unitary Workers' Union (CUT) vs. Colombia can be taken as an example in this regard. The case has interpreted that consultation means prior consultation. The Colombian government did not heed this provision while implementing the Urrea Hydroelectric Project, with the result that the project had a serious negative impact on the local Emberra Katio indigenous peoples. This was a violation by the Colombian government of Article 6(1) of ILO Convention 169. After the decision the Colombian government undertook prior consultation with Emberra Katio indigenous peoples and implemented the project, as a result, the Emberra Katio were able to derive appropriate benefits from the project.<sup>8</sup> This makes clear that governments are obliged to create a conducive environment which encourages meaningful contributions from indigenous peoples. For this to take place indigenous peoples have to be assisted in acquiring the necessary skills and capabilities that will help them understand the entire process. In the Colombian case mentioned above, the issue of representation was also elaborated and it was accepted that representation of indigenous peoples means representation that is accountable to indigenous peoples.

Looking at the provisions of the prevailing Nepalese laws, although the preamble of the Nepalese Constitution mentions that the Constitution was drafted after extensive consultation with the people, it was in fact drafted in 1990 by a Constitution Recommendation Committee formed by the King.<sup>9</sup> Article 25(4) of the Constitution states that it is the chief responsibility of the State to maintain conditions suitable to the enjoyment of the fruits of democracy through wider participation of the people in governance of the country and by way of decentralization.

The preamble of the Local Governance Act 2055 BS states that the development process shall be institutionalized by increasing the participation of indigenous nationalities. The Act also provides for the representation of at least one indigenous nationality representative in the councils (Village Council, Town Council & District Council) of local bodies (Article 1(c), 7(a), 76(1)c, 172(2)e).

Likewise, the National Foundation for Development of Nationalities Act 2058 BS has given strong numerical emphasis on the representation of indigenous nationalities. Article 7 of the Act provides for 82 indigenous nationality members out of the total 92 members in the Foundation's council. Article 10 provides for 4 indigenous nationality members out of the total 5 members in the executive committee of the Foundation. Another important aspect of the Act is that its Article 7(1) has, through the Nepal Federation of Indigenous Nationalities, given recognition to the representative organizations of indigenous nationalities.

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<sup>8</sup> [www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&docume...](http://www.ilo.org/ilolex/cgi-lex/pdconv.pl?host=status01&textbase=iloeng&docume...)

<sup>9</sup> Devkota, p. 13.

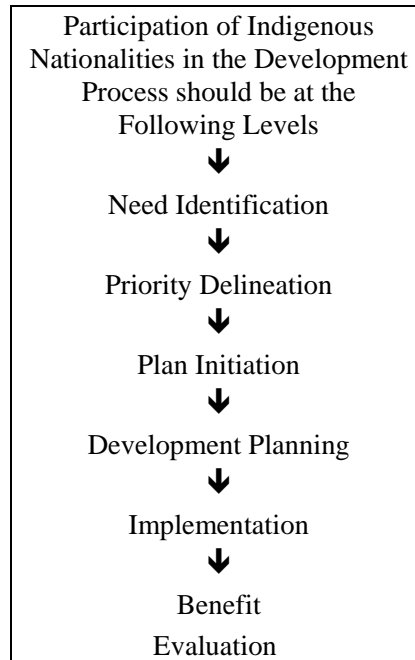
Apart from the National Foundation for Development of Indigenous Nationalities Act, there is no provision for representation of indigenous peoples in accordance with Articles 6 and 7 of ILO Convention 169 in the prevailing Nepalese laws. Although the Local Governance Act in theory talks about the representation of indigenous nationalities, in effect this representations appears only symbolic. There is no accountability to indigenous nationalities in this regard. Furthermore, since their representation is minimal, it cannot have significant relevance in terms of raising the issues of indigenous nationalities. The important components of local bodies are committees and there is no provision of representation of indigenous nationalities in these committees. Although the Local Governance, Act in accordance with the language of the preamble, has accepted the necessity of the participation and representation of indigenous nationalities in development, its provisions lack the spirit of ILO convention 169. The Act is totally silent regarding the issue of consultation.

## **6. Development**

Article 2(2)(c) of ILO Convention 169 states that the government should work to end the socio-economic gap existing between indigenous peoples and other sectors of society. According to Article 7.2 it is the responsibility of the government to improve livelihoods, increase employment, increase access to health and education and undertake the overall development of indigenous peoples with their participation.

In this context, Article 25(3) of the Constitution of the Kingdom of Nepal mentions the elimination of all kinds of socio-economic inequalities. Article 25(2) talks about preventing economic exploitation of any class or individual and about preventing the available resources and means of the country from being concentrated within a limited segment of society.

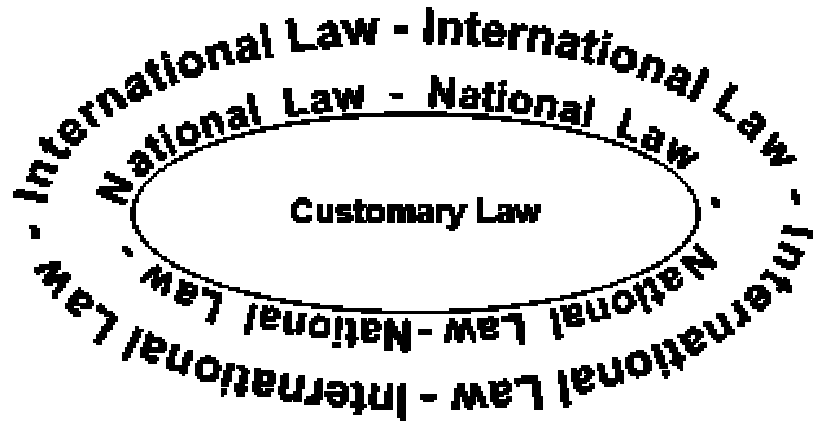
The Local Governance Act 2055 BS calls for the inclusion of indigenous nationalities, in development planning and activities to be initiated and implemented by local bodies in the areas inhabited by indigenous nationalities (Articles 43(5)(c), 111 (6)(c) and 195(c)). Overall, Article 2(2) of ILO Convention 169 appears similar to Article 25(2) of the Nepalese Constitution. There is particular similarity between the Convention and the prevailing Nepalese laws regarding the issue of the existence of socio-economic gap between indigenous nationalities and other national groups. The current Tenth Five-Year Plan also, taking into account the socio-economic gap between indigenous nationalities and other groups and refers to undertaking, with the participation of indigenous nationalities, development activities to raise their economic, social and cultural levels, which will consequently increase their access to resources. The Plan has adopted a policy of modernizing the traditional skills and knowledge of indigenous nationalities. There is agreement between the Convention and prevailing Nepalese laws with regard to the issue that development work should be targeted towards indigenous nationalities and backward groups. There is also agreement regarding the concept that the poorest of the poor and the most marginalized groups should be able to access and use the fruits of development on the basis of equality. There appears convergence between the prevailing Nepalese laws and the Convention to the extent that this issue should be included in the initiation and implementation of plans.



In theory the prevailing Nepalese laws also have included the issue of indigenous nationalities in the initiation and implementation of development planning. However, they have not, as in ILO Convention 169, put forth a clear process of effective participation. Also, although there is mention of indigenous nationalities in development planning, there is no mention about possible negative effects such development may have on these communities or any provisions related to compensation in such cases where there may be a negative impact.

## **7. Customs, Traditions and Customary Laws**

ILO Convention 169 has taken the customs and traditions of indigenous peoples as the fundamental basis of recognition. Advocating the continuity of these customs and traditions, it has given recognition to cultural diversity and to social, environmental and human harmony. The Convention mentions that the customs and traditions of indigenous peoples should be respected, their traditional institutions should be given recognition (Article 2(2)) and that special measures should be adopted for the protection and promotion of such institutions and cultures (Article 4(1)). The Convention stipulates that these customs and traditions should find continuity by remaining within the norms of national and international instruments (Article 9(1)).



Although the Nepalese Constitution has given communities the right to protect and promote their cultures (Article 18) and follow their religions (Article 19), the Constitution by defining Nepal as a Hindu, constitutional monarchical kingdom (Article 4(1)) has accorded the Hindu religion the highest status. This is a continuation of the policy existing since the beginning of the Nepalese State. In this context, it is also necessary to take into consideration the international instruments that Nepal has ratified and acceded to. According to the International Convention on Elimination of All forms of Racial Discrimination (ICERD) 1969 that Nepal has ratified, the provision of 'Hindu State' consists of racial discrimination against indigenous nationalities and non-Hindus (See ICERD, Article 1). It is also against Articles 2 and 18 of the Universal Declaration of Human Rights (UDHR) 1948 and Article 5(6) of the International Covenant on Civil and Political Rights (ICCPR) 1966. In this regard, the Supreme Court of Nepal in a case (Dhrubadev Giri vs. Ramavatar Lal Madawari) stated that the Hindu religion is a national religion protected by the Constitution, and hence cannot be regarded as ordinary. This interpretation effectively means that the provisions of Article 4(1) of the Nepalese Constitution discriminates other religions of the country.

Division Bench

Hon. Justice Mr. Gajendra Kesari Bastola

Hon. Justice Mr. Maheshram Bhakta Mathema

Case: *Guthi* (Religious land)

Mahant Dhrubadev Giri

Vs.

Ramavatar Lal Madawari

Principle of Precedence: Hindu religion is a national religion protected by the Constitution. It cannot be considered as ordinary and simple. It is a concern of the nation. Therefore, it is a concern of all Hindu Nepalese. (19) *Nepal Kanun Patrika* (Nepal Law Journal), 2046 BS, Part 31, Issue 4, p. 440, Decision No. 38048

The ILO Convention 169 has given recognition to the customary laws of indigenous peoples for use in judicial administration (Article 9(2)). The Convention states that in the event of imposing penalties against indigenous peoples, account should be taken of their economic, social and cultural characteristics (Article 10(1)). It also emphasizes that preference should be given to methods of punishment other than confinement in prison (Article 10(2)). The Convention stipulates that there should be effective punishment for any infringement of their rights. It also stipulates that activities during the course of judicial administration should be undertaken in an environment whereby indigenous peoples can understand them, and that the State should provide for an interpreter (Article 12).

The Nepalese Constitution and Nepalese laws like the National Foundation for Development of Indigenous Nationalities Act, Article 10(a) of the section (*mahal*) on incestuous relations rule of virtuous conduct (*adal*) of the National Legal Code (*Muluki Ain*) have to some extent raised the issue of protection and promotion of the culture, history, customs and traditions of indigenous peoples and have provided for some freedoms. But unlike the provisions of Convention 169 they have not clearly mentioned the recognition of the customs and traditions of indigenous peoples. They have not given any place to the customary laws of indigenous peoples in the area of judicial administration. Also, the constitutional provision of Khas-Nepali being the language of official use (Article 6(1)) has created a situation where-by non-Khas-Nepali speaking indigenous peoples are deprived of the right to information and fair trial.

## Part Two

### Substantive Issues

#### 1. Land and Resources

ILO Convention 169 has stated that the government should recognize the importance of the cultural and spiritual relationship between indigenous peoples and their lands and natural resources (Article 13, Article 16). The State should give recognition to the ownership by indigenous peoples of the lands they have traditionally occupied (Article 14) and the government should take measures to safeguard the rights of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities (Article 14(1)). Indigenous peoples shall not be displaced from their lands, without their free and informed consent. They have the right to return to their traditional lands from which they have been displaced and, if such a situation is not possible, with their consent they should be provided appropriate compensation. Appropriate process should be adopted and prior information should be provided to ensure their free and informed consent (Article 16). The State should make arrangements to protect indigenous peoples from unauthorized entry and encroachment into their lands and, in case of such entry and encroachment, should provide for effective punishment (Article 18).

With regard to the Nepalese context, Article 17 of the Nepalese Constitution has stated that all citizens have, subject to existing laws, the right to acquire, own, sell and dispose of property. The State shall not, except in the public interest, acquire or requisition such property and if property has to be acquired or requisitioned by the State in the public interest, the basis of compensation and procedure for giving compensation for such property shall be as prescribed by law.

During the territorial unification of Nepal and thereafter, indigenous peoples have been displaced from the lands they traditionally occupied, used or controlled (See p. 2). The *kipat* lands of indigenous peoples were provided through special laws like *lalmohar*, *sanad* and *sawal*. At present, such *kipat* lands have for all practical purposes been terminated, however, there are provisions for them in existing laws. Article 2(2) a of the Land Act 2021 BS has accepted those who by custom occupy *kipat* land as landowners and *kipat* land itself as under landlord (*jamindari*) tenurial system. 'The land of indigenous peoples *kipat*' according to Article 2(4)h of the Act has been terminated by Land Measurement Act 2019 BS, Pasture Land Nationalization Act 2031 BS and Private Forest Nationalization Act 2013 BS. *Kipat* has been terminated contrary to the legal provision that the right to *kipat* holding was provided for by special Acts and that *kipat* tenure has come down from customs and traditions, hence decisions regarding it should be taken only by bringing forth special Acts related to it. Indigenous peoples have in numerous cases been displaced from their *kipat* lands by devious means. Article 45 of the Land Act 2021 BS provides that for anyone keeping land as collateral while taking a loan, if the income from the land is more than 10% of the total loan, the income could be used for the phase-wise repayment

of the loan. When the entire loan amount was repaid the land could be recovered. This arrangement or facility was however not provided to *kipat* land and thus the land kept as collateral often fell into the hands of non-indigenous peoples. The Land Act wrongfully eliminated *kipat* land by converting it into *raikar* tenure. There was no compensation provided for the loss of *kipat* lands.

Prevailing Nepalese laws have not recognized the lands and resources traditionally used, occupied and controlled by indigenous peoples, and there is no provision for the special protection of such lands and resources. The land used and occupied historically by indigenous peoples has not been registered due to lack of citizenship certificates. Article 7(4) of ILO Convention 169 states that special measures should be adopted for the protection of the environment of areas inhabited by indigenous peoples. Indigenous peoples have the right to participate in the utilization, management and the protection of natural resources (Article 15(1)). Even if the right over land, natural resources and minerals is to reside with the State, at the time the State utilizes such resources, it is the responsibility of the State to consult with, share benefit with and provide appropriate compensation to indigenous peoples dependent on such resources (Article 15(2)).

Looking at most of the laws in Nepal related to natural resources, there are a number of legally sanctioned arrangements for those indigenous peoples dependent on such resources. In other words, in theory the dependence of indigenous peoples on resources seems to have been recognized. Local indigenous peoples who have traditionally earned their livelihood through fishing are allowed to fish following the payment of an annual amount Rs. 50 (Royal Bardiya National Park Regulations 2053 BS, Schedule 1). The right has been provided to Darai, Kumal and Tharu indigenous peoples (Royal Chitwan National park Regulations 2030 BS, Schedule 1). Although it has not been specifically provided for, the provision of transferring religious forest and leasehold forest by taking into account the benefit to dependent groups and the provision of representation of backward classes in the sharing and balanced use of natural resources in protected areas is in accordance, albeit to a limited extent with Article 7.4 of ILO Convention 169. However, provisions of Article 49 of the Forest Act 2049 BS have prohibited livelihood related activities of indigenous peoples in national forests. For example, there is a prohibition on clearing land for cultivation in community forests and severe penalties for its violation. Furthermore, peoples who have traditionally occupied and utilized lands, but do not have the official documentation to prove it, have been displaced by the establishment of community forests.

#### Chepong Family Displaced

Hetauda, 22 Push –A dozen Chepong families were displaced after the District Forest Office three months ago handed over the Chepong settlement of Churedanda, Raksirang VDC–8 to local villagers. After being displaced from the land they had been living on for generations, these Chepongs have been forced to live on the banks of the Rapti river at the foot of Churedanda

(Chure hills) in makeshift shelters made of leaves, Friday, 23 Push 2061 BS, *Annapurna Post* (Daily)

The Pasture Land Nationalization Act 2031 BS nationalized, without providing for any alternative, pasture lands that indigenous peoples dependant on animal husbandry had been using unhindered as pastureland, thus displacing them from their traditional livelihoods. The pasture lands were legally given for the planting of tea, herbs and fruits, thus letting non-indigenous peoples appropriate the lands of indigenous peoples and displace them. The spiritual relationship between indigenous peoples and their lands and resources, as mentioned in ILO Convention 169, has not been recognized in current legislation in Nepal nor has the provision of providing appropriate compensation for being displaced, or of seeking consent prior to displacement, been adhered to.

#### Traditional Occupation of Sherpas Endangered

As a result of the practice of developing and protecting forests as community forests in Nepal, the lack of available pasture land has endangered the Sherpas' traditional occupation of yak-raising. Given the lack of pasture in their own villages, many Sherpas have no choice but to take their yak to Tibet for grazing. This requires that they pay an annual fee of clarified butter (*ghee*), equal to the amount of Rs. 200 per yak, to the Tibetans on whose land they graze *Rajdhani Daily*, Tuesday, 29 Mangsir 2061 BS.

### 9. Employment

Article 20 of ILO Convention 169 states that governments should adopt special measures to provide employment to indigenous peoples and effective protection therein. The government has the responsibility to make efforts to the extent possible to remove discrimination in employment and to protect, to the fullest extent, the rights of workers. In the prevailing Nepalese laws related to employment, there are no separate and effective provisions for indigenous peoples as in the Convention. Nonetheless, Article 26(10) of the Nepalese Constitution provides for the upliftment of backward nationalities (*janajati*) by making special arrangements in employment. The Acts like Labour Act 2048 BS, Labour Regulations 2051 BS, Child Labour (Prohibition) Act 2056 BS, Bonded Labour (Prohibition) Act 2058 BS and Education Act 2028 BS are related to labour and employment. In these Acts, although there are to some extent protective provisions for women and children, there are no separate provisions for indigenous nationalities. During the prime ministership of Sher Bahadur Deuba the government amended the Civil Service Act 2049 BS to provide 10% reservation to indigenous nationalities. The present government has removed this provision through ordinance. In summary, Nepalese laws related to employment do not reflect the spirit of the employment provisions in ILO Convention 169, which recognizes the special vulnerability of indigenous and tribal workers.

### 10. Education and Communication

ILO Convention 169 states that the government should take measures to create an environment for indigenous peoples to acquire education at all levels at least on an equal footing with other national groups (Article 26) and that the needs of indigenous peoples should be addressed and their identity related issues included in the education sector (Article 27(1)). The Convention also states that measures should be taken to protect and promote mother tongues (Article 28(3)). Education should be provided in mother language (Article 28(1)) and recognition should be given to and resources provided for establishing and conducting educational institutions providing education in mother languages (Article 27(3)). The Convention clearly advocates a bilingual policy in education, along with urging the government to adopt measures to remove discrimination in education (Article 31).

Article 18(2) of the Constitution of the Kingdom of Nepal has given communities the right to conduct schools up to the primary level in their own mother tongues, which is in accordance with the provisions of the Convention. However, there is no mention in the Article of providing resources and the limit put on mother tongue education - up to the primary level- is not in accordance with the Convention. Article 6(2) of the Nepalese Constitution has recognized mother tongues other than Khas-Nepali as national languages, however there is no mention of acquiring education in these languages on an equal footing with the Khas-Nepali language. The prohibitory provision of Article 16(d)2 of the Education Act 2028 BS mentions the giving of free education also to *janajati* or nationalities. Rule 10(3) of Scholarship Regulations 2060 BS provides for 10% scholarship to indigenous nationalities. The provision of giving education in mother tongue up to the primary level (Education Act 2028 BS, Article 7(1)) apparently advocates a bilingual policy up to the primary level. Nonetheless, there are no provisions in the prevailing Nepalese laws, as in ILO Convention 169, regarding the removal of discrimination existing in the education sector.

**A Brief Comparative Table of the Provisions of Prevailing Nepalese Laws Related to Indigenous Nationalities and the ILO Convention 169**

Issue/Area	ILO Convention 169	Prevailing Nepalese Laws	Area of Consensus	Area of No Consensus/Issues Not Included in Prevailing Nepalese Laws
Recognition	Article 1(1) puts forth following elements of recognition: <ul style="list-style-type: none"> <li>• Traditional lifestyle</li> <li>• Distinct and different lifestyle, religion, culture, language, etc.</li> <li>• One's own social and political</li> </ul>	Article 2 of present Constitution has given recognition to religion, race and ethnicity.  Article 4 of Constitution has given recognition to Nepal as multilingual, multiethnic Hindu State.	Nepalese Constitution has given recognition to multicultural and multiethnic nation <ul style="list-style-type: none"> <li>• Fundamental components of Recognition</li> <li>- Language</li> <li>- Culture</li> </ul>	<ul style="list-style-type: none"> <li>• No provision of self-identification</li> </ul>

	<p>institution.</p> <ul style="list-style-type: none"> <li>• Living continuously from historical times or before the arrival of others or prior to the formation of the present State</li> </ul> <p>Article 1(2) Self-identification as fundamental component to determine indigenous peoples.</p>	<ul style="list-style-type: none"> <li>• National Foundation for Development of Indigenous Nationalities Act puts forth following criteria for recognition of indigenous nationalities</li> <li>- Own Language</li> <li>- Distinct Culture</li> <li>- Distinct Social Structure</li> <li>- Written or unwritten history</li> </ul>	<ul style="list-style-type: none"> <li>- Lifestyle</li> <li>- Social Structure</li> <li>- Customs &amp; Traditions</li> <li>- Historical Continuity</li> </ul>	
Self-management	<ul style="list-style-type: none"> <li>• According to preamble of ILO Convention 169, full recognition has been given to lifestyle, economic development of indigenous peoples; full recognition has also been given to their desire to use and control issues related to their identity as well as other issues related to them.</li> </ul>	<ul style="list-style-type: none"> <li>• According to Article 26(2) of Constitution, in order to develop harmonious relations between various religions, castes, communities and languages, the State shall adopt a policy of developing languages, literatures and scripts of all, along with developing cultural diversity</li> </ul>	<ul style="list-style-type: none"> <li>• Policy of promoting language, culture and institutions</li> <li>• Policy for economic development of indigenous nationalities</li> </ul>	No provision for indigenous peoples' control over institutions concerning them, issues related to their identity and control over issues related to their lifestyle
Responsibility of Government	<ul style="list-style-type: none"> <li>• Article 2(1): Responsibility of government to protect and guarantee rights of indigenous peoples in a coordinated and procedural manner and to make provisions to respect their integrity.</li> </ul>	<ul style="list-style-type: none"> <li>• Article 25 (4): Main responsibility of government is to provide for utilization of benefits of democracy.</li> <li>• Article 26(10): Policy of government to uplift socially and economically backward</li> </ul>	<ul style="list-style-type: none"> <li>• Policy to eliminate socio-economic gap</li> <li>• Policy of extensive participation</li> <li>• Policy of social and political inclusion</li> <li>• Establishment of appropriate body to carry out activities related to</li> </ul>	<ul style="list-style-type: none"> <li>• No mandatory provision as mentioned in Convention</li> <li>• No provision to utilize on equal footing rights and opportunities provided by national laws and policies</li> </ul>

	<ul style="list-style-type: none"> <li>• Article 2(2): Government should make arrangements for utilization by indigenous peoples of rights, facilities and opportunities provided by national laws and policies on an equal footing with other groups</li> <li>• Government should make provisions for promotion to the fullest extent of socio-economic and cultural rights of indigenous peoples and for elimination of socio-economic gap between indigenous and non-indigenous peoples</li> <li>• Article 33(1): Government should develop appropriate mechanism</li> </ul>	<p>backward nationalities and communities by making special arrangements in education, health and employment</p> <ul style="list-style-type: none"> <li>• Preamble of National Foundation for Development of Indigenous Nationalities Act, 2058 BS: Foundation established for effective upliftment of indigenous nationalities and for their equal participation in the mainstream through socio-economic and cultural development</li> </ul>	<p>development of indigenous peoples</p>	
Fundamental Rights	<ul style="list-style-type: none"> <li>• Article 3(1): Indigenous peoples have right to utilization unhindered and to fullest extent and without discrimination of human rights and fundamental freedoms</li> <li>• Men and women have right of utilization of human rights and fundamental</li> </ul>	<ul style="list-style-type: none"> <li>• Article 11(1): Equal before law and equal protection by law; Article 11(2): Citizens will not be discriminated against in application of general laws; Article 12: right to freedom, freedom of opinion and expression, freedom to assemble</li> </ul>	<ul style="list-style-type: none"> <li>• Recognition of human rights and fundamental freedoms</li> <li>• Policy of non-discrimination</li> </ul>	<ul style="list-style-type: none"> <li>• Indigenous nationalities are not able to utilize their human rights and fundamental freedoms on an equal footing with dominant groups.</li> </ul>

	<p>freedoms on an equal footing</p> <ul style="list-style-type: none"> <li>• Article 3(2): Application of any kind of coercion and force infringing on human rights and fundamental freedoms of indigenous people prohibited</li> </ul>	<p>peacefully and without arms, freedom to form unions and associations, freedom to move throughout the country and reside thereof, freedom to carry out any profession, occupation, industry or trade;</p> <p>Article 13: Press and Publication Right; Article 14: Right regarding criminal justice; Article 16: Right to information; Article 17: Right to property; Article 18: Cultural and Educational Right; Article 19: Right to religion; Article 20: Right against exploitation; Article 23: Right to constitutional remedy</p>		
Special Measures	<ul style="list-style-type: none"> <li>• Article 4: Protection of indigenous peoples, their institutions, property, culture and environment</li> <li>• Utilization of general rights of citizens without discrimination</li> <li>• Article 7(4): Government should by coordinating with indigenous peoples apply special measures</li> </ul>	<ul style="list-style-type: none"> <li>• Article 18(1): Right of communities to protect and promote their language, script and culture</li> <li>• Article 26(2): Policy of State to develop language, script, arts and culture</li> <li>• Special measures to be adopted through laws for protection and development of socio-</li> </ul>	<ul style="list-style-type: none"> <li>• Right to protect and promote language and culture</li> <li>• Provision of special measures</li> </ul>	<ul style="list-style-type: none"> <li>• Indigenous nationalities not specifically mentioned in provision of special measures</li> </ul>

	to protect issues related to them	economically and educationally backward classes		
Consultation	<ul style="list-style-type: none"> <li>• Article 6(1): Government should carry out legislative, administrative and other activities vis-à-vis issues concerning indigenous peoples by consulting with representatives of representative organizations of indigenous peoples</li> <li>• Article 6(2): Consultation should be carried out with sincerity in a procedural and purposeful way</li> </ul>	<ul style="list-style-type: none"> <li>• Government to adopt a policy of uplifting socio-economically backward indigenous nationalities</li> </ul>		<ul style="list-style-type: none"> <li>• No provision for consultation</li> </ul>
Participation and Representation	<ul style="list-style-type: none"> <li>• Article 6(1)(b): Government should guarantee right to participate on an equal footing in all kinds of policy-making, decision making elected bodies, administrative sector and policy-making and planning bodies; For this purpose government should make arrangements in an appropriate manner and carry out facilitation and make available necessary resources</li> </ul>	<ul style="list-style-type: none"> <li>• Article 25(4): Chief responsibility of State to maintain conditions suitable to enjoyment of fruits of democracy through wider participation of people in governance of country by way of decentralization</li> <li>• Local Governance Act 2055 BS: Participation of indigenous nationalities in councils of local bodies</li> </ul>	<ul style="list-style-type: none"> <li>• Policy of participation of indigenous peoples in local bodies</li> <li>• Participation in development process</li> <li>• Article 8 of Bonded Labour (Prohibition) Act, 2058 BS: Participation of Bonded Labourers (<i>Kamaiya</i>) in Rehabilitation and Monitoring Committees</li> </ul>	<ul style="list-style-type: none"> <li>• No provision of prior consultation, participation and representation as in Convention while conducting activities concerning indigenous nationalities</li> </ul>

	<ul style="list-style-type: none"> <li>• Article 7(1): Participation at all levels in all kinds of development activities concerning indigenous peoples</li> </ul>			
Development	<ul style="list-style-type: none"> <li>• Preamble of ILO Convention: ... Recognition given to expectation to control process of economic development .....</li> <li>• Article 2(2)(c): Provision to eliminate socio-economic gap</li> <li>• Article 7(2): Provision of all-round development of life, labour, health, education and other issues of concern</li> <li>• Article 7(1): Right to delineate priorities for development</li> </ul>	<ul style="list-style-type: none"> <li>• Preamble of Constitution: Issues of social, political and economic justice</li> <li>• Article 25(2): Appropriate distribution of resources; Article 25(3): Removal of socio-economic inequality</li> <li>• Article 26(10): Special measure to uplift backward nationalities and communities</li> </ul>		
Customs and Traditions	<ul style="list-style-type: none"> <li>• Preamble of Convention: Recognition to special customs and traditions within standards of national laws; Article 2(2)(b): Recognition to customs, traditions and institutions</li> </ul>	<ul style="list-style-type: none"> <li>• Article 18(1): Right to all communities to promote their culture, language and script</li> <li>• Article 4(1): multiethnic, multilingual ..... state</li> <li>• Article 26(2): Policy to promote language, literature, arts, script and culture</li> <li>• Article 19(1): Right to follow</li> </ul>	<ul style="list-style-type: none"> <li>• Recognition to identity, language, religion, culture, traditional customs</li> </ul>	<ul style="list-style-type: none"> <li>• Absence of special measures for protection and promotion</li> </ul>

		one's religion		
Customary laws	<ul style="list-style-type: none"> <li>• Article 8(1): Recognition and respect should be given to customs and customary laws while applying national laws and policies</li> <li>• Article 8(2): Right to give continuity to customary laws</li> <li>• Article 9(1): Recognition to customary laws in judicial administration</li> <li>• Article 9(2): Customary laws should be given recognition while giving punishment</li> <li>• Article 10(1): While punishing indigenous peoples for any offence their condition should be taken into consideration, they should not be given serious types of punishments and instead of imprisonment should be given alternative punishment</li> <li>• Article 12: Provision of effective punishment in case of infringement of rights of indigenous peoples</li> </ul>	<ul style="list-style-type: none"> <li>• National Legal Code (<i>Muluki Ain</i>) 2020 BS has given recognition to customs and traditions in issues like marriage, incest etc.</li> </ul>	<ul style="list-style-type: none"> <li>• Partial recognition of customs and traditions</li> </ul>	<ul style="list-style-type: none"> <li>• Not full recognition as in Convention</li> <li>• Not given recognition in punishments</li> <li>• Not given recognition in judicial administration</li> </ul>

## **Conclusion**

The conclusion arrived from the comparative study undertaken of the provisions in the prevailing Nepalese laws directly or indirectly related to indigenous peoples and the provisions of the International Labour Organization Convention 169 on indigenous and tribal peoples can be broadly categorized under three headings:

- (a) Areas/Issues of Full Consensus
  - (b) Areas/Issues of Partial Consensus
  - (c) Areas/Issues of No Consensus
- (a) Areas/Issues of Full Consensus**

There are some areas and issues of full consensus between the provisions of ILO Convention 169 and the prevailing Nepalese laws. The Convention has given primacy to recognizing the continuity of indigenous peoples' identities. With regard to the prevailing Nepalese laws, the existence of indigenous nationalities has been constitutionally recognized by its mention in the Nepalese Constitution. Based on this, the National Foundation for Development of Indigenous Nationalities Act 2058 BS was brought forth. The Local Governance Act 2055 BS, as well as the laws and regulations related to resources, have to some extent recognized the existence and special needs of indigenous peoples. The bases of recognition like language, culture, lifestyle, social structure, historical continuity, customs and traditions and other such issues are found both in the Convention and in the prevailing Nepalese laws. The Convention and prevailing Nepalese laws have both included policy issues of economic, social and cultural upliftment, as well as the principle of special measures for the development and upliftment of indigenous peoples.

**(b) Areas/Issues of Partial Consensus**

There is at best only partial consensus between the provisions of ILO Convention 169 and the prevailing Nepalese laws. The issues raised by the Convention have only enjoyed partial recognition by the prevailing Nepalese laws. The issue of 'development' in economic, social and educational sectors to narrow the gap (taking into account the socio-economic gap between the indigenous nationalities and mainstream national groups) has been raised by the Convention and also recognized in prevailing Nepalese laws and policies. However, these issues have been raised with clarity and are mandatory in the Convention, which is not the case in the prevailing Nepalese legislation. Even the provision of access to development on an equal footing with the rest of society is not found in prevailing Nepalese laws. The general topics raised by the Convention vis-à-vis the issue of fundamental rights are also included in the Nepalese Constitution and laws. The difference is that while the Convention has provided for the right to unhindered claim to human

rights and special types of fundamental rights accorded to indigenous peoples by national and international instruments, the prevailing Nepalese laws have directly or indirectly imposed restrictions on many of the human rights, fundamental freedoms of indigenous nationalities. The right to freedom provided by the Nepalese Constitution can be used without restrictions by other groups, but attempts to restrict the use of such freedoms vis-à-vis indigenous nationalities appear as discriminatory. Regarding the plethora of international instruments which Nepal has ratified (many of which have a direct bearing on the human rights and fundamental freedoms of indigenous peoples), the Nepalese government has been reserved in terms of implementing their provisions. Hence, in many cases, those specific provisions have remained ineffective in terms of protecting and promoting the rights of indigenous peoples<sup>10</sup>

The issue that the State should adopt special measures for the development of indigenous nationalities is found in both the Convention and in the prevailing Nepalese laws. Although there is no specific provision regarding special measures for indigenous nationalities in prevailing Nepalese laws, the Supreme Court's interpretation in the case (Makhanbabu Gautam vs. His Majesty's Government) has apparently provided for special measures vis-à-vis indigenous nationalities. With regard to the issue of the customs, traditions and customary laws of indigenous peoples, there is provision for its recognition and continuity in both the Convention and Nepalese laws. However, this is somewhat ambiguous in prevailing Nepalese legislation and there is lack of clarity on affording specific recognition to indigenous nationalities customs, traditions and customary laws in economic, social and administrative sectors and also in judicial administration. Although prevailing Nepalese laws have not given recognition to the relationship between natural resources and indigenous peoples as comprehensively envisaged by the Convention, the Nepalese laws have nonetheless recognized the dependency on resources of a limited number of indigenous nationalities making their living by fishing in rivers, lakes and ponds.

**(c) Areas/Issues of No Consensus**

If we compare the provisions related to indigenous nationalities in the prevailing Nepalese laws and in ILO Convention 169, it can be seen that some fundamental issues are yet to be included in Nepalese laws. In particular, these are the right to self-identification, the right to delineate one's own priorities, the right to consultation, participation and representation, issues of identification, recognition and the rights over land and the guarantee of benefit sharing of national laws, policies and developments. Also of crucial importance are issues of access to justice and the fruits of development on an equal footing with the rest of society and the recognition in judicial administration of customary laws.

And finally,

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<sup>10</sup> See Country and Reservations at [www.unhch.ch](http://www.unhch.ch)

The indigenous nationalities of Nepal, their representative organizations and the federation of these organizations, the Nepal Federation of Indigenous Nationalities (NEFIN), have made the ratification of ILO Convention 169 one of the express agendas of their movement. Likewise, various indigenous nationality organizations like LAHURNIP, Former-MP's from indigenous nationalities Club have been organizing seminars and interactions on ILO Convention 169. A national level conference on this topic organized jointly by NEFIN, National Foundation for Development of Indigenous Nationalities (NFDIN) and International Labour Organization (ILO) Nepal has affirmed the relevance of this Convention. The then Prime Minister Sher Bahadur Deuba announced, on the occasion of the International Day of the World's Indigenous Peoples (August 9, 2005), that the government was making efforts to ratify ILO Convention 169. The government, in various programs and fora organized by indigenous nationalities, has been expressing commitment to ratify the Convention. Likewise, a committee formed under the International Convention on Elimination of All forms of Racial Discrimination (ICERD) 1969 has also recommended to the government to ratify Convention 169. All these facts confirm that the issue of ratification and progressive implementation of ILO Convention 169 is an important component in the ongoing struggle to protect, promote and respect the rights of indigenous nationalities in Nepal.

The Convention has a great potential to act as legislative framework in which, through policy reform and implementation by the government, can help solve some of the problems faced by Nepal's indigenous nationalities. To this effect, concerted efforts in solving their problems will also assist in managing the current conflict raging in the country, as social exclusion is one of the identified root causes of the insurgency. The Nepalese government has already ratified several international instruments which are of direct relevance to indigenous peoples. These include the ICCPR/ICESER, which provide for the right to self-determination and the Convention on Biodiversity, which guarantees indigenous peoples' access to natural resources. In this respect, in ratifying Convention 169, the government will be confirming its commitments under other international instruments of which it is party to. The Convention does not have any retrospective effects; therefore it will not create any complexities for the government in terms of past activities. Thus, ratification of Convention 169 for Nepal is timely, relevant and in accordance with the principles of democracy. It would also affirm, in a climate of disillusionment with the state apparatus, that the Nepalese State is sensitive to the human rights and fundamental freedoms of indigenous peoples. The ratification of ILO Convention 169 would also serve to bolster Nepal's (increasingly tarnished) image in the international arena as a democratic, socially just nation, responsive to the needs and demands of its' people and respectful of their human rights and fundamental freedoms.

*Note: The complete report of this summary was prepared by a study team from LAHURNIP comprising of Dr. Chaitanya Subba, Dr. Bal Bahadur Mukhiya, Advocate Mr. Durga Prasad Subba, Advocate Ms. Shanti Kumari Rai and Advocate Mr. Shankar Limbu.*

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