

Inclusion of Indigenous Peoples' Rights in the Constitution: National Consultation Report Summary 15 - 16 February, 2010

Background

A request by the Indigenous (IP) CA caucus for support from international legal experts on indigenous peoples' rights was made in December 2010. This request was in response to their real concern, shared by a majority of the IP movement, that not enough was being done to secure their rights in the new Constitution. While some issues are included, the committee reports do not address key demands of the indigenous communities such as references to rights to self-determination, recognition of indigenous peoples' ancestral domain/rights to certain land and natural resources, and recognition of indigenous communities' own representatives and rights to consultation and participation. There have been numerous submissions by IP groups and organizations to various CA committees, including those by the Nepal Federation of Indigenous Nationalities (NEFIN), the IP Caucus in the CA, the "Brihat Morcha" (or Mega Front of Indigenous Nationalities) and other indigenous people's organizations. However, the Concept Papers submitted by the thematic committees do not include specific suggestions for protecting IP rights, although a number of Concept Papers included dissenting opinions on indigenous peoples' rights.

In an attempt to address these omissions, the IPs Caucus set a strategy to develop a fast, accurate, and legally framed analysis which, once agreed upon, could be used by IP Caucus members and presented to the CA General Assembly for discussion and to clearly table their positions. Subsequently, the report entitled "Constitution Building in Nepal: Indigenous Peoples' Rights," prepared by two prominent international legal experts on indigenous peoples rights, is intended to be used by the IP Caucus as a reference document to forward their agenda.

Synopsis of the Report

The report analyses two of the key Concept Papers (i.e., Fundamental Rights and Natural Resources) in light of Nepal's obligations under international human rights instruments on indigenous peoples rights (i.e., Indigenous and Tribal Peoples in Independent Countries (ILO C-169) and United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The report focuses analysis on the wider context of implementation of indigenous peoples rights, as required under international law. In addition to general recommendations and conclusions, specific proposals on indigenous peoples' rights for incorporation in the new constitution are suggested.

The study provides an objective analysis of the core international norms for protection and promotion of indigenous peoples' rights, citing ILO C-169 and the UNDRIP. In the process, where deemed appropriate, relevant examples from national laws other countries, both constitutional laws and other laws, are cited. The references include laws that aim to prevent discrimination and enhance participation and inclusion of indigenous peoples and disadvantaged groups in governance and development. The study was designed to assist members of the CA and other advocates of indigenous peoples' rights in Nepal, to strengthen their legal arguments for inclusion of indigenous peoples' rights in the new Constitution of Nepal.

Clear and objective recommendations are made on the following issues:

- Identification of Indigenous peoples
- Indigenous peoples' participation in the Constitution-making process and other decision making
- Nepal's international obligations
- Indigenous peoples' right to self determination
- Cultural Rights
- Judicial Rights
- Rights over Land, Territories and Resources
- Special Measures

- Safeguards against Erosion of Constitutional and Other Measures
- Access to Justice through Constitutional Courts, Ombudsperson, Adivasi-Janajati Rights Commission
- Safeguards for Representation of Numerically Small and Otherwise Disadvantaged Adivasi-Janajati Groups at Federal, State and Local Government Levels
- Qualification of Human Rights and Fundamental Freedoms for the Welfare and/or Protection of the Interests of Adivasi-Janajati peoples.

Specific recommendations are made for actual text on indigenous peoples rights for incorporation in the new Constitution in the following sections:

- Fundamental Rights and Directive Principles
- Fundamental State Principles
- Safeguards against Arbitrary Amendment of Constitutional Provisions that Safeguard the Rights of Indigenous Peoples
- Natural Resources, Economic Rights and Revenue Allocation
- Rights of Minorities and Marginalized Communities

Authors of the report

Devasish Roy: *Dip. Legal Studies (Aust), BA (Hons) (Law)(UK), Barrister-at-Law (London). He is an advocate at the Supreme Court of Bangladesh and is also the traditional Chief of the Chakma in the Chittagong Hill Tracts (CHT) region. He has been involved in advocacy, research, development, environment and human rights work for more than twenty years. He was the co-chairperson of the Global Indigenous Peoples' Caucus at the UN Working Group on the Draft Declaration on the Rights of Indigenous Peoples in 2006-07. In 2008, he was a Minister-of-State in the Interim Non-Party Caretaker Government of Bangladesh in charge of the ministries of Environment & Forests and Chittagong Hill Tracts Affairs. In November 2009, he was elected as the Asia Region Indigenous Member of the UN Permanent Forum on Indigenous Issues for 2011-2013. He is awaiting formal endorsement for this post by the President of the Economic and Social Council of the UN.*

John B. Henriksen: *Master of Law (Norway, 1990). Master of Science (UK, 1998). He is a Sami from Norway and an Attorney-at-Law. He has worked on legal and human rights issues in various organizations, including the Norwegian Ministry of Foreign Affairs and the Office of the UN High Commissioner for Human Rights, and participated in multilateral human rights processes for more than 20 years. Since 2008, he has been a member of the United Nations Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), appointed by the UN Human Rights Council. He was elected as the first Chairperson-Rapporteur of EMRIP and is currently working as an independent adviser on human rights and international policy processes.*