

INCLUSION OF INDIGENOUS PEOPLES' RIGHTS IN THE NEW CONSTITUTION OF NEPAL

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11 February 2010 (Rev)

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I. INTRODUCTION

The present study is undertaken by *Raja Devasish Roy*¹ and *John B. Henriksen*,² as external legal consultants for the International Labour Office (ILO). The co-authors were commissioned by the ILO to prepare a study on indigenous peoples' rights in the context of the constitutional reform in Nepal, in light of the provisions of the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No. 169) and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

Although, the study is commissioned by the International Labour Office, the views expressed in this study do not necessarily reflect the position of the ILO. The co-authors take sole responsibility for the substantive content of the study.

The study aims at providing a brief analysis of core international norms for the protection and promotion of indigenous peoples' rights. In the process, where deemed appropriate, relevant examples from national laws of a number of 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 provides an overview of international and national laws that seek to protect and promote the rights of indigenous peoples, and that may be invoked and otherwise utilized in the ongoing process of constitution-making in Nepal. It is also hoped that the study will help members of the Constituent Assembly and other advocates of indigenous peoples' rights in Nepal, in strengthening their legal arguments for the adequate inclusion of indigenous peoples' rights in the new Constitution of Nepal.

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1.1. The Indigenous Peoples of Nepal

Adivasi Janajati is a widely accepted categorization of those culturally distinct groups whose ancestors inhabited parts of present-day Nepal before the arrival of the Hindus, centuries ago, and who have been excluded from the dominant social and religious hierarchy, and political process. The groups collectively called Adivasi Janajati are identified, both by the Government of Nepal, and by the groups themselves, as “*indigenous peoples*” or indigenous “*nationalities*” distinct from the rest of Nepal’s population.³

The National Foundation for Development of Indigenous Nationalities Act of Nepal (2002) describes *Adivasi Janajati*, that is, indigenous peoples or nationalities of Nepal, as those ethnic groups or communities that “*have their own mother tongue and traditional customs, distinct cultural identity, distinct social structure and written or oral history of their own.*” The Government of Nepal officially lists 59 groups as *Adivasi Janajati*, distributed throughout the mountains, hills and lowland regions.⁴

The United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples is of the view that the *Adivasi Janajati* groups are aptly considered indigenous peoples, given not just their self-identification as such, but also the history of subjugation they have suffered within the pattern of encroachment by others, along with the human rights problems related to their distinct group identities that they commonly face.⁵ The Special Rapporteur concludes that *Adivasi Janajati* groups are indigenous peoples in a *sui generis* sense, with a status that is separate from that of the rest of Nepali society.

The official list of indigenous peoples in Nepal is, however, contested; the *UN Committee on Economic, Social and Cultural Rights* has expressed concern about the “lack of clarification about the criteria” used by the Government indigenous development agency to recognize indigenous peoples, and the implications of this recognition.⁶ Furthermore, the aforesaid Special Rapporteur informed the UN Human Rights Council that he had found indications that there are several groups that share the history, characteristics and common human rights problems of the Adivasi Janajati, but that are not on the official list, including the Kulung, Bahing and Yamphu.

³ The United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Report on the Situation of Indigenous Peoples in Nepal*, UN Document A/HRC/12/34/Add.3, 20 July 2009, paragraphs 11-16.

⁴ The *Adivasi Janajati* constitutes 37.9% of the total population, according to Government of Nepal Census Report of 2001.

⁵ Ibid.

⁶ UNCESCR, UN Document E/C.12/NPL/Co/2, Paragraph 28.

The co-authors are of the view that it is important that the official list is re-examined, by applying the statement of coverage of the ILO Convention No. 169 (article 1), in order to avoid a situation where legitimate indigenous groups may be excluded from the concerned list and thereby are not able to assert their rights as indigenous peoples.

The statement of coverage of ILO Convention No. 169 - article 1 (1) (b) - identifies “indigenous peoples” as being “*peoples in independent countries who are regarded as indigenous on account of their descent from populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present states boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.*” Furthermore, article 1 (2) of the Convention establishes that self-identification as indigenous shall be regarded as a fundamental criterion for determining the groups to which the provisions of the Convention apply. Nepal has ratified the ILO Convention.

II. INTERNATIONAL HUMAN RIGHTS

The present study deals with rights specific to indigenous peoples and will elaborate on these rights by distinguishing between the following four categories of human rights: (1) human rights of general applicability; (2) minority rights; (3) indigenous peoples’ rights; and (4) rights of peoples.

2.1. Human Rights Norms of General Applicability

International human rights are traditionally categorized as civil, political, economic, social and cultural rights. Every individual, including any person belonging to an indigenous group, is entitled to human rights norms of general applicability, set out in the Universal Declaration of Human Rights and subsequent human rights treaties.

International human rights bodies and mechanisms have taken the position that many general human rights principles and norms are to be interpreted and applied with regard to the specific historical, cultural, social and economic circumstances of indigenous peoples.⁷

2.2. Minority Rights

The specific rights of persons belonging to national or ethnic, religious or linguistic minorities are formulated as the rights of individuals to preserve and develop their separate identity within the

⁷ Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, UN Document A/HRC/9/9, 11 August 2008, paragraph 20.

process of integration.⁸ Minority rights are reflected in the *UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, ICCPR article 27, article 30 of the Convention on the Rights of the Child, and numerous regional instruments.

Minority rights can also be asserted by persons belonging to indigenous peoples. Jurisprudence developed by the UN Human Rights Committee under ICCPR article 27 affirms that minority rights are also applicable to persons belonging to indigenous peoples.

2.3. Indigenous Peoples' Rights

The rights of indigenous peoples are not limited to general human rights and minority rights. The rights specific to indigenous peoples, as found in the ILO Convention No. 169 and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) are mostly formulated as collective rights. These rights are regarded as minimum standards for the survival, dignity and well-being of indigenous peoples. Historic injustice is an important normative justification for international standards concerning indigenous peoples' rights, including the colonization of indigenous peoples and dispossession of their lands, territories and resources, and denial of their right to development in accordance with their own needs and interests. The provisions of the ILO Convention and the UNDRIP seek to allocate certain authority to indigenous peoples in order to enable them to make their own decisions in matters relating to their internal and local affairs.⁹ The usefulness of a clear-cut distinction between the rights of minorities and indigenous peoples, and whether the distinction has global relevance, has been debated internationally for several decades. Contemporary international human rights law distinguishes between these two categories of rights, and indigenous peoples and minorities often organize themselves and their societies separately and tend to assert different objectives. A major difference between minority rights and indigenous rights is that international instruments specifically acknowledge indigenous peoples' rights to lands, whereas minority rights instruments generally do not contain such rights.

2.4. Peoples' Rights

The right of peoples to self-determination, as provided in common article 1 of the two International Covenants of 1966, is formulated as a pure collective human right.¹⁰ The right of indigenous peoples to self-determination is today acknowledged under international human rights law, including in the UN Declaration on the Rights of indigenous Peoples (UNDRIP).

⁸ Asbjørn Eide & Erica Irene Daes, Working Paper on the Relationship and Distinction Between the Rights of Persons belonging to Minorities and Those of Indigenous Peoples, UN Document E/CN.4/Sub.2/2000/10, 19 July 2000, paragraph 23

⁹ Ibid, paragraph 8.

¹⁰ The International Covenant on Civil and Political Rights & The International Covenant on Economic, Social and Cultural Rights

The right to self-determination highlights the principle legal distinction between the rights of minorities and indigenous peoples in contemporary international law. In exercising their right to self-determination, indigenous peoples are entitled to self-government or autonomy in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions. Although, some minorities enjoy various forms of self-government, either de facto or pursuant to constitutional arrangements or national legislation, only indigenous peoples are currently recognized to possess a right to political identity and self-government as a matter of international law.

III. NEPAL'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS

Nepal has ratified most of the major international human rights conventions,¹¹ as well as the ILO Convention No. 169. Under the Nepal Treaties Act, 2047 (1990), in case of divergence between the provisions of Nepalese law and provisions of an international treaty to which the country is a party, the provision of the treaty shall apply.

International human rights instruments, in particular ILO Convention No. 169 and UNDRIP, establish a solid normative framework for legislative and policy reforms aimed at enhancing the promotion and protection of indigenous peoples' rights. The UNDRIP is an important normative instrument in this context, and reflects the existing international consensus on the scope and content of indigenous peoples' rights. Nepal voted in favor of its adoption in the UN General Assembly in September 2007; an international public commitment of its support and recognition of indigenous peoples' rights both nationally and globally.

The three UN mandate-holders specifically mandated to monitor and address indigenous peoples' rights and issues - the *UN Special Rapporteur on the Situation of Human rights and Fundamental Freedoms of Indigenous Peoples* (Special Rapporteur), the *UN Human Rights Council's Expert Mechanism on the Rights of Indigenous Peoples* (EMRIP), and the *UN Permanent Forum on Indigenous Issues* (UNPFII) - have all taken the position that the status of UNDRIP goes beyond that of an ordinary declaration adopted by the UN General Assembly.

¹¹ Including the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

The three aforesaid UN mandates are of the view that although the UNDRIP is not binding in the same way as a treaty, it is nevertheless compatible with and expands upon legally binding human rights norms and international jurisprudence developed by international supervisory bodies and mechanisms.¹² It is generally agreed that UNDRIP is firmly based on existing legally binding human rights norms, general principles of international law and customary international law.

The UN Committee on the Elimination of Racial Discrimination (CERD), which is mandated to monitor the implementation of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), has on several occasions noted the role of the UNDRIP as a normative framework for States' obligations towards indigenous peoples. The CERD has several times suggested that the UNDRIP should be used as a guide to interpret the State party's obligations under ICERD as far as it relates to indigenous peoples.¹³

A similar view on the status of the UNDRIP was taken by the Supreme Court of Belize, in a case on indigenous peoples' land rights.¹⁴ The Supreme Court concluded that although, unlike resolutions of the UN Security Council, General Assembly resolutions are not ordinarily binding on member states, where these resolutions or declarations contain principles of general international law, states are not expected to disregard them. The Court emphasized that the UNDRIP was adopted by an overwhelming number of 143 states in favor with only four States against, with eleven abstentions. As far as the obligations of Belize are concerned with respect to respecting and protecting the rights affirmed in the UNDRIP, the Chief Justice of the Supreme Court stated that "it is of some signal importance, in my view, that Belize voted in favor of this Declaration." The Chief Justice went on to say that article 26 of the UNDRIP (land rights) is of special relevance and reflects a general principle of international law on indigenous peoples and their rights to lands and resources.

¹² (a) Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, S. James Anaya, UN Document A/HRC/9/9, 11 August 2008; (b) Study on Lessons Learned and Challenges to achieve the implementation of the Right of Indigenous Peoples to Education, Prepared by the UN Expert Mechanism on the Rights of Indigenous Peoples, UN Document A/HRC/12/33, 31 August 2009; (c) UN Permanent Forum on Indigenous Issues (UNPFII), *Report of the eighth session (18-29 May 2009), Annex, General comment on Article 42 of the UN Declaration on the Rights of Indigenous Peoples*, para 6 & 7, UN Document E/2009/43, E/C.19/2009/14, Economic and Social Council, Official Records, Supplement No. 23.

¹³ CERD/C/ECU/CO/19; CERD/C/NIC/CO/14; CERD/C/FJI/CO/17; CERD/C/USA/CO/6, Annual report of the UN High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General, the rights of indigenous peoples, UN Document A/HRC/10/51, 14 January 2009, para 16.

¹⁴ The Supreme Court of Belize (2007), Consolidated Claims: Claim No. 171 of 2007, and Claim No. 172 of 2007, paragraph 131.

This ruling brings greater clarity and depth to the significance and impact of the Declaration in national application. The UNDRIP reaffirms and applies existing human rights standards to the specific historical, cultural, economic and social circumstances of indigenous peoples: Interpreted in conjunction with other international instruments, the UNDRIP, provides an authoritative normative framework for the full and effective protection and implementation of the rights of indigenous peoples.

The implementation of the UNDRIP will in some cases require constitutional reforms, adoption of new laws or amendment of existing domestic legislation. Article 38 of the UNDRIP establishes a duty upon States to take appropriate measures, including legislative measures, in consultation and cooperation with indigenous peoples, to achieve the ends of the Declaration. Such initiatives have already been taken in some countries, including Bolivia and Ecuador.

IV. HUMAN RIGHTS - INDIGENOUS PEOPLES IN NEPAL

Following his mission to Nepal in 2008, *the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples* concluded that, despite significant improvements, the Adivasi Janajati continue to confront discriminatory social and political arrangements that originated in the past, and whose current manifestations impede their effective control over their lives and undermine their cultural identities.”¹⁵

The Special Rapporteur highlighted that indigenous peoples have suffered gradual loss of traditional lands and access to life-sustaining natural resources, and that across the country, they rank low in all human development indicators. The Special Rapporteur concluded that most Adivasi Janajati communities live in conditions of poverty that, on the whole, are double or even greater the national poverty level and that adequate healthcare among indigenous peoples is lacking, as are opportunities for education.¹⁶

As pointed out by Professor Yash Ghai, Nepal is undergoing multiple transitions: transition from monarchy to republic; transition from authoritarianism to democracy and human rights; transition from hegemonic to a participatory system of governance; transition from a state wholly pervaded

¹⁵ The UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Report on the Situation of Indigenous Peoples in Nepal*, UN Document A/HRC/12/34/Add.3, 20 July 2009, paragraph 26.

¹⁶ Ibid.

by one religion to secularism; and transition from a centralized unitary system to decentralization and autonomy.¹⁷

The co-authors are of the view that a number of these transition or processes have the potential to significantly contribute towards strengthening the rights and status of indigenous peoples, provided indigenous peoples are ensured full and effective participation in these processes and their rights under international human rights law are respected.¹⁸ In this regard, the ongoing constitutional reform process is crucial, as the Constitution will be the cornerstone for all future legislation and exercise of public authority. It is therefore of paramount importance that indigenous peoples are included in the process and their rights recognized and incorporated in the new Constitution.

V. IMPLEMENTATION OF INDIGENOUS PEOPLES' RIGHTS

The diversity of indigenous peoples and their specific circumstances in different countries vary from country to country. This includes historical circumstances and the demographic situation. It is therefore not possible to prescribe a uniform approach to implementation of the ILO Convention No. 169 and UNDRIP. This is also acknowledged in the respective instruments.

Article 34 of the ILO Convention No.169 establishes that the Convention shall be applied in a flexible manner, having regard to the conditions characteristic of each country. This does not mean that State authorities are allowed to act any way they like in applying the Convention. The implementation has to be compatible with the underlying principles of the various provisions and relevant jurisprudence.

The UNDRIP specifies the need to develop measures of implementation in consultation and cooperation with indigenous peoples. Article 38 of UNDRIP establishes that States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of the Declaration. This requirement should be viewed in light of several other provisions, including article 18, which affirms that indigenous peoples have the right to participate in decision-making in matters which would affect their rights, and article 23 which establishes that indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development.

¹⁷ Yash Ghai, *Constitution, Interim Constitution and Draft Constitution: Vision of Nepali Nation: A Commentary on the Place of Minorities and Indigenous Communities in Nepal*.

The co-authors are of the view that implementation of indigenous peoples' rights, and other human rights, play an important role in the resolution of historic conflicts and the prevention of future conflicts. This requires the development of a culture of human rights, as it were, where respect for human rights is regarded as a necessary and positive element of democracy and the rule of law.

VI. THE NEW CONSTITUTION - INDIGENOUS DEMANDS

The most immediate concerns of indigenous peoples in Nepal is to ensure that their rights are recognized in the new Constitution, which is due to be submitted by May 2010. As far as the co-authors understand, the following are the key demands of indigenous peoples in this regard: (1) realization of a secular, federal state system; (2) recognition of indigenous peoples' right to self-determination, ethnic and linguistic autonomy; (3) affirmative action; and (4) guarantees for proportionate representation for indigenous peoples.

VII. REVIEW OF KEY COMMITTEE REPORTS

The co-authors have reviewed reports from two of the Constituent Assembly (CA) Committees, considered as being the most relevant in the context of indigenous peoples' rights. These are the *Committee on Natural Resources, Economic Rights and Revenue Allocation*, and the *Committee on Fundamental Rights and Directive Principles*. The co-authors feel that the recommendations made by the two aforesaid committees do not adequately account for Nepal's international human rights obligations towards its indigenous peoples.

7.1. Committee on Natural Resources, Economic Rights and Revenue Allocation

The Concept Paper and Report of the Preliminary Draft of the CA Committee on Natural Resources, Economic Rights and Revenue Allocation address topics of fundamental importance to indigenous peoples and their rights under international human rights law.¹⁹ The present review is limited to indigenous rights to land and resources, as the co-authors perceive these rights as being of crucial importance to indigenous peoples and their survival.

7.1.1. Natural Resources

The Committee on Natural Resources, Economic Rights and Revenue Allocation (the Committee) proposes that a provision on indigenous peoples' right to natural resources be included in the

¹⁹ Constituent Assembly Committee on Natural Resources, Economic Rights and Revenue Allocation, *report of the Preliminary Draft of the Constitution (with Concept Paper)*, 2066, dated 27 November 2009.

preamble of the Constitution, with the objective “to ensure prior use rights to the indigenous, ethnic and other communities in natural resources and their use.”

The survival of indigenous peoples - as distinct peoples – largely depends on the sustainable utilization of their traditional lands and natural resources in a manner and mode appropriate to their specific circumstances. Indigenous peoples have a very special relationship with their lands, territories and natural resources. The relationship with the land and all living things is often the core of indigenous societies.²⁰ It is essential to acknowledge the deep and special relationship between indigenous peoples and their lands as basic to their existence and central to all their beliefs, customs, traditions and culture. For indigenous peoples the land is not merely a possession and a means of production. Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.²¹

It is difficult to separate the concept of indigenous peoples' relationship with their lands, territories and natural resources from that of their cultural values and differences. In recognition of this, article 13 (1) of ILO Convention No. 169 emphasizes that in applying the provisions of the Convention, the State shall respect the special importance for the cultures and spiritual values of the indigenous peoples concerned, and of their relationship with their lands and territories.

The Committee suggests that the State should retain sovereignty over natural resources under the principle of Eminent Domain, to enable it to utilize such resources for public benefit. This may be problematic unless qualified, as Eminent Domain principles may sometimes override the rights of indigenous peoples. Therefore, even in situations where the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, following the provisions of ILO Convention 169 (Article 15 (2)), the State is obliged to establish procedures through which it shall effectively consult the indigenous peoples concerned, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to indigenous peoples lands.

The recognition of indigenous peoples' rights to natural resources is inextricably tied to the right to lands and territories. Therefore, ILO Convention No. 169 establishes a basic principle that holds that indigenous peoples have the rights to the natural resources pertaining to their lands,

²⁰ Erica-Irene A. Daes, “*Indigenous Peoples’ Rights to Land and Natural Resources*”, Minorities, Peoples and Self-Determination, (eds) Nazila Ghanea and Alexandra Xanthaki (2005).

²¹ *Study of the Problem of Discrimination against Indigenous Populations*, by Sub-Commission Expert/Member Jose R. Martinez Cobo, UN document E/CN.4/Sub.2/1986/7 and Add. 1-4. UN Document: E/CN.4/Sub.2/1994/2, Paragraphs 196 – 197.

and to participate in the use, management and conservation of these resources.²² This is clearly established under article 15 (1) of ILO Convention No. 169.

Nepal is legally required to establish *special safeguards* for indigenous peoples' rights to the natural resources pertaining to their lands. This includes the right of indigenous peoples to participate in the use, management and conservation of these resources. Special safeguards are not only important in relation to the State party's possible infringements of indigenous peoples' rights, but also in relation to possible competing interests from third parties. In relation to possible conflicting rights and interests between indigenous peoples and others, it is important to bear in mind that indigenous people do acquire and retain rights of a proprietary nature in relation to other people, and that respect for those rights is required.

ILO Convention article 15 (2) affirms that indigenous peoples shall whenever possible participate in the benefits of utilization of such resources, and shall receive fair compensation for any damages which they may sustain as a result of such activities. This benefit-sharing can take a variety of forms, including specific agreements with individual communities and peoples or redistribution of taxes and revenues to specific communities or for specific indigenous peoples' development purposes.²³

In view of the above legal analysis, and to secure greater compliance with Nepal's international obligations, the co-authors recommend that rights of indigenous peoples to lands and resources should be incorporated explicitly into the new Constitution, including their right to use such lands and resources. Such a provision, or provisions, deserve a more prominent place in the new Constitution than its preamble, and should also be included in the operative sections of the new Constitution and formulated to be fully compatible with Nepal's international obligations.

7.1.2. *Right to Property*

The Committee proposes that a provision on the right to property be included in the new Constitution; formulated as a right of *every citizen*, subject to existing laws, to acquire, sell and otherwise dispose of property. Property is affirmed as an international human right. The Universal Declaration of Human Rights affirms that everyone has the right to own property alone as well as in association with others, and that no one shall be arbitrarily deprived of his property.

²² ILO (2009), *Indigenous & Tribal Peoples' Rights in Practice*, A Guide to ILO Convention No. 169, page 107.

²³ *Ibid*, page 108.

The Committee proposes that “every citizen” shall have the right to property. In the context of indigenous peoples’ right to property (lands and resources), the proposal from the Committee does not meet international legal standards, as the proposal is limited to *individual* property rights only, and does not address the collective aspects of indigenous peoples’ property rights.

Indigenous peoples’ rights to lands and resources under contemporary international law, including the ILO Convention No. 169, are affirmed as collective rights, to which the indigenous people concerned is entitled. Moreover, the concept of indigenous territories, under article 13 of the Convention, is deemed to cover “the total environment of the areas which the peoples concerned occupy or otherwise use.”

The collective character of indigenous land and resource rights – or territorial rights – are clearly reflected in article 14 of the ILO Convention and the provisions of the UNDRIP (articles 25 – 30). Article 14 (1) of the ILO Convention obliges Nepal to recognize and protect indigenous peoples’ rights of *ownership and possession* of their traditional lands. In addition, Nepal is obliged, in accordance with the aforesaid provisions, to take specific measures to safeguard the right of indigenous peoples to *use* lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. In this respect, particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect, who often use such lands for their activities.

State parties to the ILO Convention are moreover obliged to take steps to identify the lands which the indigenous peoples concerned traditionally occupy, and guarantee effective protection of their rights of ownership and possession.

It is therefore recommended that the new Constitution specifically recognize both the individual and collective land rights of the indigenous peoples, and that they encompass the areas that they traditionally occupy or use, and lands, territories and resources they may have “otherwise acquired” (including non-traditional means).²⁴

7.2. Committee on Fundamental Rights and Directive Principles

The specific proposal related to the *indigenous peoples* (Adivasi Janajati) of the CA Committee for Fundamental Rights and Directive Principles (Committee for Fundamental Rights) is limited to recognition of “*their right to identity, to the protection, promotion and development of their*

²⁴ Articles 25-28, UNDRIP.

language and culture, and to special privileges with priority for their empowerment and development, and to benefits thereof.”²⁵

The Committee for Fundamental Rights clarifies that this provision has been proposed “*in order to ensure the right of every Adivasi Janajati community to special privileges with priority for their empowerment and development, and to benefits thereof while provisioning for such rights as to their identity, to protection, promotion and development of their language and culture, cultural heritage, inventions, arts, literature, to benefits of the use of original and traditional knowledge, skill, and practice, to protection and development of their knowledge and skill regarding seeds and saplings, medicines, animals and vegetation, to adoption and development of cultural heritages, to participation in the process of making decision concerning the Adivasi, to be well informed, to receive just compensation against negative environmental, economic, social, cultural or spiritual effects.*”

In the view of the co-authors, the justification and interpretative comment does not correspond with the content of the proposed provision. The rights to which the Committee refers to in its interpretative comment are much broader than the proposed provision as currently drafted, and legal interpretation of the proposal will not encompass these aspects. The text of the provision needs to be made broader in order to correspond with and include in its scope the special privileges, benefits and compensation specifics in the interpretative comment.

The proposed provision, based on legal interpretation, recognizes the following rights of indigenous peoples: (1) the right to self-identity; this is a fundamentally important right, recognized in both the ILO Convention No. 169 and UNDRIP. The UNDRIP recognizes indigenous peoples right to be different, to consider themselves different, and to be respected as such (2nd preambular paragraph); (2) The right to the protection, promotion and development of their language and culture: This is also is a fundamentally important right for indigenous peoples and their survival as distinct peoples, duly recognized under international human rights law and jurisprudence. The Committee also identifies “special privileges” with priority for their empowerment and development, and to benefits thereof, as “a right.” In the view of the co-authors, “special privileges” may only be justified if it is regarded as an entitlement to remedy a disadvantage in realizing rights. The co-authors suggest that the more appropriate concept would be affirmative action through special measures, often also called “positive discrimination” or “protective discrimination”. *Special measures* are an acceptable part of the peremptory international norm of Equal Rights and Non-Discrimination, but they should not be treated as a

²⁵ CA Committee for Fundamental Rights and Directive principles, *A Report on Thematic Concept Paper and Preliminary Draft, 2006 (2009-10 AD)*, date 2066.7.22

“special privilege” or “special rights”. It is recognized that the enjoyment of certain human rights, e.g. indigenous peoples’ cultural rights under ICCPR article 27, may require positive legal measures of protection and measures to ensure effective enjoyment of the right. As long as such measures are aimed at correcting conditions that prevent or impair the equal enjoyment of certain human rights, e.g. the rights guaranteed under ICCPR article 27, they may constitute a legitimate differentiation under international human rights law, provided that they are based on a reasonable and objective criteria.

The co-authors are of the view that, in order for the new Constitution to fully guarantee the rights of indigenous peoples under international law, the indigenous peoples of Nepal need to be explicitly recognized as such. Provisions on indigenous peoples’ rights should be crafted in a language of peoples’ rights, i.e. collective rights. Constitutional provisions formulated on the basis of individual human rights are unable to fully capture or guarantee the rights of indigenous peoples under international human rights law, with particular relevance to the collective dimensions of indigenous peoples’ rights.

The Chapter on Fundamental Rights in the new Constitution should recognize that indigenous peoples, individually and collectively, are entitled without discrimination to all human rights recognized in international human rights law, and that collective rights are indispensable for their existence, well-being and integral development as peoples.

The co-authors are of the view that indigenous peoples’ right to self-determination, including their right to autonomy or self-government, should be recognized in the Chapter on Fundamental Rights (UNDRIP articles 3 and 4). As an integral part of their right to self-determination, indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State (UNDRIP, article 5). This is also fully in accordance with the two human rights covenants of 1966 (ICCPR & ICESCR) that Nepal is party to.

VIII. CONSTITUTIONAL & LEGAL SAFEGUARDS - OTHER COUNTRIES

National constitutions and other legislative provisions (organic laws and ordinary legislation) vary in the way they seek to recognize indigenous peoples’ rights and otherwise safeguard and protect the rights of indigenous peoples, minorities groups and disadvantaged groups. Organic laws are not an express part of the constitution but derive their authority from, and expand upon matters

addressed by it. Depending upon the country and the context, these *organic* or *enabling* laws enjoy differing degrees of status in different jurisdictions.

The following are a few examples of good practices drawn from constitutions of different countries concerning safeguards on the rights of indigenous peoples, and in a few cases, that of minorities and disadvantaged groups. The co-authors suggest that some of these may be emulated in Nepal as contextual and relevant.

The co-authors are aware that Nepal is to have a federal system, a change from the unitary system that it had previously before the changeover. Some of the examples given below are from federal systems (India, Pakistan, Malaysia, Russia), while others are from unitary systems (Finland, Norway, Bangladesh). The co-authors, believe that the examples from the unitary systems are relevant, as even in a federal system, the relationship between local governments and the state governments are, in essence, in the nature of the relationship between a state and a federal government in a federal system. Some of the examples come from what are known as *common law* traditions, like India, Pakistan and Bangladesh, while others – e.g. Norway, Finland – are from civil law jurisdictions. Nevertheless, in most respects, these distinctions are not significant. What is important is the underlying intention: to recognize and accord recognition of the separate identity, culture and rights of indigenous peoples living in these countries.

TABLE ON RELEVANT CONSTITUTIONAL PROVISIONS IN OTHER COUNTRIES²⁶

Subject Matter	Constitutional Provision	Remarks
<i>Cultural Identity, Cultural and Linguistic Autonomy</i>	1) Constitution of Finland, Section 121 (4)	1) The Constitution of Finland guarantees linguistic and cultural autonomy for the indigenous Sami people, within a defined Sami homeland area.
	2) Constitution of Norway, Section 110 (a)	2) The Constitution of Norway establishes guarantees for the indigenous Sami people; it establishes that it is the obligation of the State to protect and develop Sami language, culture and society.
	3) Constitution of India, Articles 29(1), 31(1), 371A, 371G.	3) The Constitution of India recognizes safeguards whereby the federal legislature may not

²⁶ For further details about constitutional provisions and other legal provisions in other countries related to the protection of indigenous peoples' rights, please consult Addendum, dated 11 February 2010.

		legislate on religious and social practices, customary law and ownership of land in Nagaland and Mizoram states without the consent of the Legislative Assemblies of the aforesaid states (articles 371A and 371G). The Indian Constitution also recognizes the right of all citizens to conserve their language, script and culture, and the right of minorities to establish and administer educational institutions of their choice {articles 29(1), 31(1)}.
<i>Political/Administrative Autonomy/Self-Government</i>	4) Constitution of Russia, Sections 3 and 18 5) Constitution of India, 6th Schedule, article 164(1). 6) Constitution of the Philippines, Article X, Sections 1,15-19.	4) The Constitution of Russia recognizes local self-government as a constitutional right; but not limited to indigenous peoples. 5) The Constitution of India recognizes the rights of different indigenous peoples ("scheduled tribes") in several states in Northeast India to establish <i>Autonomous District Councils</i> and <i>Autonomous Regional Councils</i> (6th Schedule). It also provides for appointment of an indigenous legislator as a minister for <i>Tribal Welfare in some states</i> {article 164(1)}. 6) The Constitution of the Philippines provides that there will be autonomous regions in the Cordilleras and in Muslim Mindanao.
<i>Specific References to International Human Rights Obligations of the State</i>	7) Constitution of Russia, Section 69 8) Constitution of Norway, Section 110 (c)	7) The Russian Constitution guarantees the rights of the indigenous peoples according to the universally recognized principles and norms of international law and international treaties and agreements of the Russian Federation. 8) The Constitution of Norway states that it is the responsibility of the authorities of the State to respect and ensure human Rights, and that specific provisions for the implementation of international treaties shall be determined by law.

<i>Consultations/Negotiations on Matters Affecting Indigenous Peoples</i>	9) Constitutional Devolution, Finland	9) The Sami Parliament Act, which was adopted to implement the constitutional amendment related to the indigenous Sami people, establishes the Sami Parliament, defines the geographical area for the autonomy which is guaranteed under the Constitution, and establishes an obligation for authorities to <i>negotiate</i> on all extensive and important questions that can directly or distinctly influence the position of the Sami as an indigenous people.
	10) Constitutional Devolution, Bangladesh	10) The CHT Regional Council Act, 1998 and the Hill District Council Acts, 1989 – passed in accordance with the constitutional mandate of <i>advancement of backward section of citizens</i> – obliges the Government of Bangladesh to consult the CHT Regional Council and the Hill District Councils on legislation for the concerned region/district, and provides for framing of rules by the aforesaid councils.
	11) Constitutional Devolution, Norway	11) The Sami Act, adopted to implement the Norway's constitutional obligations towards the Sami people is the legal basis for the creation of the Sami Parliament. The Government and the Sami Parliament has entered into a formal agreement on procedures for consultations between State authorities and the Sami Parliament. The agreement is based on the Norway's constitutional obligations towards the Sami, and ILO Convention No. 169.
	12) Constitution of India, 5th Schedule	12) In <i>Scheduled Areas</i> in several states of peninsular India, the provincial Governor legislates in consultation with the <i>Tribes Advisory Council</i> composed of indigenous members of the Federal and State legislative assemblies.

<i>Guarantees against Erosion of Safeguards</i>	13) Constitution of India, Articles 371A, 371G 14) Constitution of Pakistan, Article 247(6)	13) No acts of the federal parliament of India concerning the <i>religious or social practices</i> of the Nagas and Mizos, <i>their customary laws and procedure, administration of civil and criminal justice</i> involving their customary law, and <i>ownership and transfer of land and its resources</i>, are to apply to the states of Nagaland and Mizoram, unless agreed upon by the legislative assembly of the state concerned. 14) The constitutional recognition of a <i>Tribal Area</i> may not be removed without prior consultation by the President with the views of the people of the area concerned, as represented in the tribal <i>Jirga</i>.
<i>Qualification of Fundamental Rights to Safeguard Indigenous Interests</i>	15) Constitution of India, Article 19(5) 16) Constitution of Pakistan, Article 15 17) Constitution of Bangladesh, Article 36	15) The constitutional <i>Freedom of Movement</i> of citizens may be regulated in order to protect the interest of any Scheduled Tribe. 16) The constitutional <i>Freedom of Movement</i> of citizens may be subjected to “reasonable restrictions imposed by law in the public interest”. 17) The constitutional <i>Freedom of Movement</i> of citizens may be subjected to “reasonable restrictions imposed by law in the public interest”.
<i>Legislative Autonomy</i>	18) Constitution of India, Article 371A, 371G 19) Constitution of India, 6th Schedule	18) The state Legislative Assemblies must provide consent before the Federal legislature can legislate on certain specified subjects of the tribes. 19) Autonomous District & Regional Councils in Northeast India may legislate on a number of subjects.
<i>Reservation in Legislative Bodies</i>	20) Constitution of India, Articles 330 and 332, respectively	20) The state may reserve seats for indigenous people

		("Scheduled Castes" and "Scheduled Tribes") in the Lower House of the Federal Legislature and in the State Legislatures
<i>Reservation for Government Jobs</i>	21) Constitution of India, Article 16(4A) 22) Constitution of Bangladesh, Article 29(3)	21) The State may reserve governmental posts in favour of the "Scheduled Castes" and "Scheduled Tribes" 22) The State may reserve governmental posts in favour of "backward section of citizens"
<i>Land & Resources</i>	23) Constitution of India, Articles 371A, 371G 24) Constitution of India, 6 th Schedule	23) The Federal Government may not legislate on Land Law in Nagaland & Mizoram states, without the consent of the concerned State Legislative Assembly 24) The Federal and State Governments may not lease out or transfer land without the concurrence of the Autonomous District or Regional Council

IX. CONSTITUTIONAL REFORM - INDIGENOUS PARTICIPATION

International human rights standards require that Nepal ensure that indigenous peoples are able to effectively participate in the constitutional-drafting process, through their own representatives. This has recently been highlighted by two authoritative UN human rights mandates.

The UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples has emphasized the need to include indigenous peoples in the constitution-making process in Nepal. The Special Rapporteur is of the view that in addition to existing means of representation in the Constituent Assembly, special mechanisms should be developed for consultations with the Adivasi Janajati, through their own representative institutions, in relation to proposals for new constitutional provisions that affect them.²⁷

²⁷ The UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Report on the Situation of Indigenous Peoples in Nepal*, UN Document A/HRC/12/34/Add. 3, 20 July 2009, paragraph 87.

In an early warning letter to Nepal, dated 13 March 2009, the UN Committee on the Elimination of All Forms of Racial Discrimination (CERD), highlights the importance of ensuring indigenous peoples participation in the ongoing constitution-making process. CERD expresses concerns about the fact that indigenous peoples may only formally participate in the constitution-drafting process if they are chosen by political parties and act in strict conformity with the manifestos of those parties. The Committee recommends that mechanism be established to ensure indigenous peoples free prior and informed consent in relation to the constitutional preparation process, and that an indigenous peoples' thematic committee be set up to guarantee the representation and participation of indigenous peoples in political life.²⁸

The ILO Convention No. 169 and the UNDRIP require that indigenous peoples are able to effectively participate in decision-making processes which may affect their rights or interests (see chapter 10.2) The main objective of these provisions is to ensure that indigenous peoples can effectively participate at all levels of decision-making in political, legislative and administrative bodies and processes which may affect them directly.

Article 6 of the ILO Convention establishes that authorities shall consult indigenous peoples through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly. ILO case law clarifies that article 6 of the Convention also applies in relation to constitutional reform processes.²⁹

The Convention does not impose a specific model of what a representative indigenous institution should involve. In relation to indigenous peoples' participation in the ongoing constitution-making process in Nepal, one of the main questions is whether indigenous individuals chosen by political parties are to be regarded truly representatives of the indigenous peoples concerned.

The co-authors are not in a position to have a definitive opinion on this matter due to lack of knowledge of the process of selection of representatives and internal dynamics in indigenous communities in Nepal.

The co-authors are of the view that ILO case law under article 6 of the ILO Convention provides authoritative guidance to the issue of indigenous peoples' participation in the constitution-drafting process. The ILO's Governing Body is of the view that *"if an appropriate consultation process is*

²⁸ CERD, Letter to the Permanent UN Representative of Nepal, Geneva, dated 13 March 2009.

²⁹ ILO Governing Body, 289th session, March 2004, Representation under article 24 of the ILO Constitution, Mexico, GB.289/17/3. The case was about consultations on constitutional reform.

*not developed with the indigenous and tribal institutions or organizations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention.”*³⁰ The Governing Body also emphasizes that the Convention requires that the representation should be the result of a process carried out by the indigenous peoples themselves.³¹

X. KEY INTERNATIONAL HUMAN RIGHTS NORMS

10.1. Indigenous Peoples’ Right to Self-Determination

The adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) concluded the debate as to whether the right to self-determination applies to indigenous peoples. Article 3 of the UNDRIP, which is based on common article 1 (1) of the two human rights covenants of 1966,³² acknowledges that indigenous peoples have the right to self-determination, and that by virtue of that right they freely determine their own political status, and freely pursue their economic, social and cultural development. The UNDRIP also clarifies that the acknowledgement of indigenous peoples’ right to self-determination should not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial or political unity of sovereign and independent States (UNDRIP article 46 (1)).

Other relevant provisions are: UNDRIP Article 4 addresses the internal aspects of the right to self-determination and states that *“indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.”*

Article 5 of the UNDRIP clarifies that indigenous peoples’ exercise of their right to autonomy does not limit their rights to fully participate in the mainstream political life of the State. Article 5 recognizes that indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the state.

³⁰ Ibid.

³¹ Ibid.

³² International Covenant on Civil and Political Rights & International Covenant on Economic, Social and Cultural Rights.

The co-authors suggest that there are different approaches to implementing the right to self-determination, and parallel tracks may be explored to determine what may be the most appropriate responses in specific situations.

10.2. Indigenous Peoples' Right to Participate in Decision-Making

International human rights norms require that indigenous peoples are able to effectively participate in decision-making processes which may affect their rights or interests. This requirement applies not only to decision-making within the framework of domestic or municipal processes but also to decision-making within the international realm.

Contemporary international human rights standards distinguish between indigenous peoples' right to make their own independent decisions on matters relating to their internal and local affairs, and their right to participate in external decision-making processes – where others are making decision that may affect them.

The UN Declaration on the Rights of Indigenous Peoples (UNDRIP) distinguishes between indigenous peoples' rights within the realm of their right to self-determination, and their rights in the larger political order of the state. The Declaration affirms indigenous peoples' right to develop and maintain their own decision-making institutions, parallel to their right to participate in external decision-making processes which affect their rights (articles 5 and 18).

UNDRIP article 18 establishes that: *"Indigenous have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."*

In addition to articles 5 and 18, the UNDRIP contains a large number of other provisions concerning indigenous peoples right to participate in decision-making, approximately 21 articles affirming indigenous peoples' right to participate in decision-making, in one or the other form.³³

This underscores that indigenous peoples' right to participate in decision-making is a core principle and right under contemporary international human rights standards. The right is formulated in various ways, including as a right to participate; as an obligation for States to seek free, prior and informed consent from indigenous peoples under certain circumstances; as an obligation to reach an agreement with indigenous peoples; as a requirement of free agreement

³³ See UNDRIP articles 5, 10, 11, 12, 14, 15, 17, 18, 19, 22, 23, 26, 27, 28, 30, 31, 32, 36, 38, 40, 41.

from indigenous peoples; as an obligation to take measure in conjunction with indigenous peoples; as an obligation to undertake certain activities in consultation and cooperation with indigenous peoples; and as an obligation for States to pay due respect to indigenous customs in decision-making processes.

Article 6 (1) (a) of ILO Convention No. 169 obliges governments to consult indigenous peoples, through appropriate procedures and through their genuine representatives, whenever considering legislative or administrative measures which may affect them directly. Article 6 (1) (b) requires that indigenous peoples “can freely participate... at all levels of decision-making”. This applies to decision making at all levels within the state; national, regional and municipal levels.

The establishment of processes of consultations with indigenous peoples is clearly the most important way of ensuring effective indigenous peoples' participation in decision-making. Article 6 (2) requires that consultations are carried out 'in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent' to the proposed measure. Although, the obligation to consult under the provisions of the ILO Convention is interpreted as not requiring that an agreement is reached with indigenous peoples, article 6 (2) nonetheless requires that there shall be a good faith process of consultations, with the '*objective of achieving agreement or consent*' to the proposed measure(s).

In addition to provisions establishing an obligation to consult indigenous peoples in matters which affect them, ILO Convention No. 169 also contains numerous other elements of the concept of participation, including right to '*participation*' (articles 2, 5, 6, 7, 15, 22, 23); right to be '*consulted*' (articles 6, 15, 17, 22, 27, 28); obligation to '*cooperate*' with indigenous peoples (articles 7, 20, 22, 25, 27, 33); right for indigenous peoples to '*decide their own priorities*' (article 7); obligation *not* to take measures contrary to the freely-expressed wishes of indigenous peoples (article 4); obligation to seek '*agreement or consent*' from indigenous peoples (article 6); obligation to seek '*free and informed consent*' from indigenous peoples (article 16); right to '*exercise control*' (article 7); right to '*effective representation*' (articles 6, 16).

The UN Human Rights Committee's case law under article 27 of the International Covenant on Civil and Political Rights (ICCPR) also establishes that States are obliged to consult indigenous peoples in situations where measures may affect their right to culture, language or religion.³⁴

³⁴ Article 27 of ICCPR: In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

10.3. Indigenous Peoples' Rights to Land and Resources

A number of international instruments, including UNDRIP and ILO Convention 169, addresses the right of indigenous peoples over land, territories and the natural resources thereon. Article 25 of UNDRIP recognizes the right of indigenous peoples 'to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard'. Thus this article emphasizes a non-material aspect of indigenous peoples' relationship with their lands and territories, including coastal and other water bodies, which they own in accordance with their traditions, *and* those that may be in occupation of, through ways other than traditional occupation. There is also an inter-generational and sustainability context to such recognition, which talks about 'future generations'. Similarly, ILO Convention 169 (article 13) provides special importance to 'cultures and spiritual values' and 'collective aspects' of the peoples' relationship to their lands, and also interprets the term in a wide manner to include 'the total environment of the areas'.

Article 26 of UNDRIP emphasizes upon indigenous peoples' right to 'own, use, develop and control' lands, territories and resources. Such right extends not only to lands (including territories and resources) possessed according to traditional ownership or occupation, but also to lands, etc. acquired by them through non-traditional means. The state is obliged to provide legal recognition and protection to the aforesaid rights, and the recognition must respect the 'customs, traditions and land tenure systems of the indigenous peoples concerned'.

Article 27 of UNDRIP obliges the state to 'recognize and adjudicate the rights of indigenous peoples' pertaining to their lands, territories and resources (again, including those that are traditionally and otherwise owned or occupied). The article goes on to qualify the process in which such recognition and adjudication must take place: that it must be in 'conjunction with the indigenous peoples concerned', that is must be 'fair, independent, impartial, open and transparent'. Article 28 of UNDRIP addresses the issue of lands, territories and lands taken, used or damaged without the free, prior and informed consent of indigenous peoples. Here the article the matter of redress, with restitution being the preferred alternative and compensation being the less preferable alternative. The nature of compensation again, is qualified, with 'lands, territories and resources equal in quality, size and legal status' being the preferred form of compensation, and with monetary compensation or 'other appropriate redress' being the less preferable mode of compensation.

Various aspects of the rights mentioned in articles 26 and 27 of UNDRIP also occur in Article 14 of ILO Convention 169, including lands 'not exclusively occupied by [indigenous peoples], but to which they traditionally had access', including those used by nomadic peoples and shifting cultivators. Likewise, article 16 of ILO Convention 169 provides safeguards against arbitrary relocation, with options of return to their original lands and different modes of compensation. Article 17 of ILO Convention 169 provides safeguards against alienation of indigenous peoples' lands, including alienation resulting from the 'lack of understanding of laws' of the indigenous peoples concerned.

Article 29 of UNDRIP addresses the environmental, conservational and health aspects of indigenous peoples' land rights. In particular, it provides a responsibility on states to ensure that hazardous material are not stored in indigenous peoples' lands and territories without their free, prior and informed consent. Article 15 of ILO Convention 169 similarly addresses the conservation aspects of lands and territories of indigenous peoples, and also provides safeguards where mineral and other sub-surface resources are exploited so that the concerned indigenous peoples' right to *consultation, participation, benefit-sharing and compensation* are taken into account.

Article 30 of UNDRIP recognizes the right of indigenous peoples to provide or withhold consent to the conduct of 'military activities' on their lands or territories, unless justified by a 'relevant public interest'. In addition to UNDRIP and ILO Convention 169, a number of provisions of the Convention on Biological Diversity (articles 8j and 10c) provide recognition to the rights of indigenous and local communities over biological diversity and genetic resources.

10.4 Affirmative Action

Affirmative action is one of the means whereby the state undertakes special measures³⁵ to provide *substantive equality* to disadvantaged sections of its citizens when the regularly practiced *procedurally* and *formally* 'equal' measures do not amount to fair conduct and equal treatment, with the expected results, on account of the differing historical and current contexts, backgrounds and situations of such groups. Affirmative action derives its origins to the fundamental right to equality and the absolute prohibition against discrimination, which are now regarded as peremptory norms or principles of international law that are universal and *non-derogable*, otherwise called *jus cogens* (Latin for "compelling law"). The UNDRIP provides a number of

³⁵ Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination states that "[special] measures taken for the sole purpose of securing the adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination...."

provisions that seek to provide affirmative action for indigenous peoples and individuals, some of which are discussed below.

Education in the mother tongue and in a culturally appropriate manner, including for indigenous children living outside their communities, is an example of affirmative action provided by UNDRIP (article 14). Other affirmative action provisions of UNDRIP include measures on *reflection of indigenous cultures, traditions, histories* in education and public information (article 15), measures on *reflection of indigenous cultural diversity in media* (article 16), measures on *protection of indigenous children against economic exploitation* (article 17), special measures on the *improvement of economic and social conditions* of indigenous peoples (article 21), particular attention and measures on indigenous elders, women, youth, children and persons with disabilities (article 22), necessary steps on *physical and mental health* (article 24), *effective measures to maintain contacts with their own people and other peoples* across international borders (article 36), and so forth.

The ILO Convention 169 also contains several measures to ensure that the historical and current circumstances of indigenous peoples do not have the effect of depriving indigenous peoples of the right to equal treatment. The Convention has several provisions on *Land and Natural Resources*, including on traditional ownership and use and transmission of rights (articles 13-17), on *Recruitment & Conditions of Employment* (article 20), on *Vocational Training* (articles 21-23), on *Social Security & Health* (articles 24, 25), *Education & Means of Communication* (articles 26-31), etc. In addition to the ILO Convention 169, affirmative action measures are also contained in other international human rights instruments, including the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of Discrimination against Women, the Convention on the Rights of the Child, and the Declaration on the Rights of Disabled Persons, among others. Customary law is also often a form of law in which the indigenous peoples can freely exercise their self-determination without undue dependence on a formal legislative body in which their participation is often marginal.³⁶

10.5. Traditional Institutions and Customary Law

The presence, functionality and continuing relevance of traditional institutions and customary laws of indigenous peoples are very often a distinguishing feature of indigenous peoples. This is acknowledged, among others, in the ILO Convention 169, the Cobo-definition, and in the National

³⁶ For a strong argument on the continuing relevance of customary law for indigenous peoples in Asia, see Raja Devasish Roy, *Traditional Customary Laws and Indigenous Peoples in Asia*, Minority Rights Group International, London, March, 2005.

Foundation for Development of Indigenous Nationalities Act of Nepal (2002). In Indonesia, the indigenous peoples are known as *Myasarakat Adat*, whose literal meaning is “customary law people”. Customary law is often a most effective tool that indigenous peoples possess, which, especially when combined with state support and acknowledgment, allows them to interface with the outside world from a position of strength; for it is only the indigenous peoples concerned who can give a definitive opinion about the contents of such law. Similarly, traditional institutions continue to be relevant for many indigenous peoples and their communities due to a number of reasons. Firstly, elected leaders are often dependent, unlike traditional leaders, upon election campaign funds of interest groups and non-indigenous trade lobbies (as few indigenous people are wealthy enough to finance election campaigns). Secondly, election-oriented representation is often dependent upon mainstream political parties dominated by non-indigenous interest and lobby groups.³⁷ Thirdly, traditional institutions can often allow representation from all ethnic groups and sub-groups that state elective structures often miss out.

UNDRIP contains several provisions on customary law and traditional institutions, but with a clear proviso that these laws must be “in accordance with international human rights standards”.³⁸ Some indigenous peoples may even have an entire *juridical system* functioning, encompassing legislative, judicial and procedural functions, as acknowledged by UNDRIP.³⁹ The right of indigenous peoples to *maintain and strengthen their institutions*,⁴⁰ to *practice and revitalize their cultural traditions and customs*,⁴¹ to *manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies*,⁴² among others, is mentioned in UNDRIP. Similarly, ILO Convention 169 contains several provisions on customary law and traditional institutions, including provisions that call for giving due regard to indigenous peoples’ customs or customary laws ‘in applying national laws and regulations to the peoples concerned’.⁴³ Moreover, indigenous peoples’ right to ‘retain their own customs and institutions’,⁴⁴ and to have their penal matters respected (where they are compatible with national and international human rights standards)⁴⁵, is acknowledged in the Convention.

³⁷ See, for example, Kathrin Wessendorf (ed), *Challenges Politics: Indigenous Peoples Experiences with, Political Parties and Elections*, International Work Group for Indigenous Affairs (IWGIA), Document No. 104, Copenhagen, 2001.

³⁸ Article 34, UNDRIP.

³⁹ Article 34, UNDRIP.

⁴⁰ Article 5, UNDRIP.

⁴¹ Article 11, UNDRIP.

⁴² Article 12, UNDRIP.

⁴³ Article 8(1), ILO Convention 169

⁴⁴ Article 8(2), ILO Convention 169

⁴⁵ Article 9, ILO Convention 169

10.6. Cultural and Linguistic Rights

It is recognized that cultural rights are an integral part of human rights and, like other rights, are universal, indivisible and interdependent. The full promotion of and respect for cultural rights is essential for the maintenance of human dignity and positive social interaction between individuals and communities.

Respect for cultural integrity is a fundamental human rights norm. The UN Human Rights Committee, which is the treaty body mandated to monitor the implementation of the International Covenant on Civil and Political Rights (ICCPR), has established a broad interpretation of the international norm of cultural integrity in the context of indigenous peoples; understanding the norm to encompass all aspects of indigenous culture, including rights to lands, resources and traditional livelihoods.⁴⁶

The UN Committee on the Elimination of Racial Discrimination (CERD), the treaty body mandated to monitor the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), interprets the norm of non-discrimination as to protect aspects of indigenous cultural identity and language, economic and social development, effective participation in decision-making, and rights over lands and resources.⁴⁷

The UN Committee on Economic, Social and Cultural Rights, which is mandated to monitor the implementation of the International Covenant on Economic, Social and Cultural Rights (ICESCR), has concluded that States are obliged to take measures to guarantee that the exercise of the right to take part in cultural life takes due account of the values of cultural life, which may be strongly communal or which can only be expressed and enjoyed as a community by indigenous peoples. The Committee highlights that the strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. The Committee concludes that States parties to the ICESCR must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise

⁴⁶ UN Human Rights Committee, General Comment No. 23 (1994) on ICCPR Article 27

⁴⁷ UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 23 on Indigenous Peoples.

inhabited or used without their free and informed consent, take steps to return these lands and territories.⁴⁸

XI. CONCLUSIONS AND RECOMMENDATIONS

Identification of Indigenous Peoples

1. In light of the fact that the official list of indigenous peoples in Nepal is believed to not include some indigenous peoples, it should be re-examined by the Government, in close cooperation and consultation with indigenous peoples, to more accurately reflect the current reality.
2. The re-examination should be carried out by applying the statement of coverage of the ILO Convention No. 169 (article 1), and completed as soon as possible, in order to avoid a situation where legitimate indigenous groups may be excluded from asserting their rights as indigenous peoples in Nepal.

Indigenous Peoples' Participation in the Constitution-making Process and Other Decision-making

3. International human rights law requires that indigenous peoples are able to effectively participate in decision-making processes that may affect their rights or interests.
4. Indigenous peoples have the right to full and effective participation in the constitution-drafting process, through appropriate procedures and through their representative institutions, in accordance with Nepal's international obligations.
5. It is for indigenous peoples themselves to decide whether the existing representation in the Constituent Assembly constitutes true and adequate representation of their views and interests. If additional mechanisms for consultations are deemed necessary, in order to ensure full and effective indigenous peoples' participation in the process, State authorities should seek agreement with, or obtain the consent of, indigenous peoples to possible additional mechanisms.

Nepal's International Obligations

6. Nepal has ratified most of the major international human rights conventions or other treaties, including the International Convention on the Elimination of All Forms of Racial Discrimination, the International Covenant on Civil and Political, the International

⁴⁸ UN Committee on Economic, Social and Cultural Rights, General Comment No. 21, Right to Cultural Life, paragraph 36.

Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. Nepal also voted in favour of the adoption of the UN Declaration on the Rights of Indigenous Peoples in the UN General Assembly in September 2007.

7. The implementation of indigenous peoples' rights, and other human rights, plays an important role in the resolution of historic conflicts and the prevention of future conflicts.
8. In the light of Nepal's international obligations to protect the collective and individual rights of indigenous peoples, the constitutional reform process should result in adequate constitutional guarantees for these rights. Article 38 of the UNDRIP establishes a duty upon States to take appropriate measures, *including legislative measures*, in consultation and cooperation with indigenous peoples, to achieve the ends of the Declaration. Due consideration should be given to the adoption of the UNDRIP as national law.
9. The UN Declaration on the Rights of Indigenous Peoples, as the most recent and comprehensive international instrument on the rights of indigenous peoples, should serve as a normative framework for Nepal's obligations towards indigenous peoples. The Declaration should be used as an authoritative normative guide to interpret Nepal's obligations towards indigenous peoples under the various human rights treaties ratified by Nepal.

Indigenous Peoples' Right to Self-Determination

10. Indigenous peoples' right to self-determination, as affirmed in the UN Declaration on the Rights of Indigenous Peoples, should be explicitly incorporated into the new Constitution.
11. The UN Declaration on the Rights of Indigenous Peoples acknowledges that indigenous peoples have the right to self-determination, and that by virtue of that right they freely determine their own political status, and freely pursue their economic, social and cultural development. It also affirms that, in exercising their right to self-determination, indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.
12. The recognition and implementation of indigenous peoples' right to self-determination is fully compatible with the principle of respect for the territorial integrity of the State. The UNDRIP clarifies, in accordance with general principles of international law, that the acknowledgement of indigenous peoples' right to self-determination should not be

construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial or political unity of sovereign and independent States.

13. Self-determination should be understood in its broadest sense, and as a process rather than a predefined outcome. At its core, the right to self-determination means that indigenous peoples should be in control over their own destinies and that the institutions of governance should be devised accordingly. Self-determination should be viewed as an ongoing process which ensures the continuance of indigenous peoples' participation in decision-making and control over their own destinies.

Cultural Rights

14. Indigenous peoples have the right to maintain and strengthen their distinct cultural institutions, and freely pursue their own cultural development, while retaining their right to participate fully, if they so choose, in the cultural life of the State. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
15. Contemporary international human rights law establishes a broad interpretation of the norm of cultural integrity in the context of indigenous peoples; understanding the norm to encompass all aspects of indigenous culture, including rights to lands, resources and traditional livelihoods.
16. The new Constitution should provide adequate safeguards for indigenous individuals and peoples' right to enjoy their own culture, to profess and practice their religion and to use their own language.

Juridical Rights

17. Indigenous peoples have the right to maintain and strengthen their juridical systems, including their legislative, judicial, penal and procedural systems involving their traditional and other customs, practices, usages and practices. This should include the rights to maintain traditional indigenous courts and other arbitral or dispute resolution bodies and mechanisms, and to ensure that the state judicial and penal systems take into account indigenous penal, mediation, rehabilitation, restitution and arbitration systems and practices into account, where appropriate.

Rights over Land, Territories and Resources

18. Indigenous peoples' rights over the lands and territories owned, occupied or used by them through traditional or other means, along with the natural resources thereon, including mineral and other sub-surface resources, should be acknowledged. In accordance with the Principle of Permanent Sovereignty over their Natural Resources, these should not be alienated, transferred or otherwise used, without their prior, informed consent.

Special Measures

19. The new Constitution should acknowledge and prescribe special measures on Health, Education, Training, Employment and other Social Welfare Services, Access to Information, Access to Justice, representation at all levels, among others, in the spirit of affirmative action as espoused under the peremptory principle of international law on Equal Rights and Non-Discrimination. In particular, there should be reserved seats for Adivasi-Janajati groups for (i) admission into educational institutions; and (ii) governmental jobs, at least until their situation improves significantly.

Safeguards against Erosion of Constitutional & Other Measures

20. Safeguards that will prevent the erosion of constitutional and other measures on indigenous peoples' rights should be an integral part of the constitution. This should combine the requirement of a minimum number of votes in the legislative bodies, with the prior, informed consent of the indigenous peoples, including their elected representatives and traditional leaders.

Access to Justice through Constitutional Courts, Ombudsperson, Adivasi-Janajati Rights Commission

21. Measures should be incorporated in the Constitution to ensure that indigenous peoples and individuals have easy access to the regular institutions of justice such as the courts of law), but also through other institutions and processes such as ombudspersons, and Human Rights and Adivasi-Janajati Commissions, Equal Opportunities Commissions, etc.

Safeguards for Representation of Numerically Small and Otherwise Disadvantaged Adivasi-Janajati Groups at Federal, State and Local Government Levels

22. There are numerous Adivasi-Janajati groups, who, because of their small numbers, and/or their situation of socio-economic disadvantage, will be unable to represent themselves in federal, state and local government institutions. The constitution should provide for reserved seats for such groups.

Qualification of Human Rights and Fundamental Freedoms for the Welfare and/or Protection of the Interests of Adivasi-Janajati Peoples

23. Some of the basic human rights or fundamental rights should be qualified in that the same may be regulated for the welfare and/or protection of the interest of Adivasi-janajati peoples. This could include the *Freedom of Movement, Right to Acquire Property* and so forth. This would allow, through organic laws or other enabling legal provisions, to prevent arbitrary alienation of indigenous peoples lands, territories and the resources thereon (including sub-soil resources).

SPECIFIC PROPOSALS ON INDIGENOUS PEOPLES' RIGHTS FOR INCORPORATION IN THE NEW CONSTITUTION

The co-authors recommend the following text for incorporation in the new Constitution:

Section on Fundamental Rights and Directive Principles:

- a) *The Republic of Nepal guarantees the free exercise of the rights of indigenous peoples (Adivasi Janajati), individually and collectively, according to its international obligations, including international treaties of the Republic and universally recognized principles and norms of international law.*
- b) *The Indigenous peoples of Nepal have the right to self-determination according to international law; by virtue of this right they freely pursue their economic, social and cultural development, and to dispose, for their own benefit, their natural resources. In exercising their right to self-determination, indigenous peoples have the right to autonomy in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions, in accordance with law.*
- c) *Indigenous peoples have the right to establish, maintain and strengthen their political, legal, economic, social and cultural institutions, while retaining their right to participate fully in the political, economic, social and cultural life of the State.*
- d) *Indigenous peoples have the right to maintain their juridical systems, and to freely practice their customary laws, practices and usages, in accordance with national and international human rights standards."*

- e) *Indigenous peoples have the right to effectively participate in decision-making within the State, to at least the same extent as other sectors of the population, at all levels of decision-making, in elective institutions and administrative and other bodies responsible for policies and programmes that concern them.*

Section on Fundamental State Principles:

- f) *The Republic of Nepal acknowledges the colonization, discrimination, exclusion and political, social and economic marginalization perpetrated upon its indigenous peoples over the centuries and is committed to taking effective special measures to free the indigenous peoples from all forms of exploitation and to enable them to freely exercise and enjoy all human rights and fundamental freedoms guaranteed under this constitution, in accordance with international human rights standards.*

Safeguards against Arbitrary Amendment of Constitutional Provisions that Safeguard the Rights of Indigenous Peoples:

- a) *The provisions of this Constitution that seek to safeguard the rights of indigenous peoples, including articles, shall not be repealed or amended unless and until such repeal or amendment proposals are not only approved by the required ____ majority of votes in parliament, but also by a plebiscite in which the majority of the members of the concerned people also support such repeal or amendment.*

Section on Natural Resources, Economic Rights and Revenue Allocation:

- a) *Indigenous peoples' right to their lands and territories shall be acknowledged, respected and allowed to be freely exercised. Such right may be based on statutory law or the concerned people's oral or other laws, customs, practices and usages, and include rights to own, possess, occupy and use. The concept of lands and territories shall cover the total environment of the aforesaid areas, including the surface and sub-surface natural resources thereon and therein. Such lands, territories and natural resources may be those that they occupy or otherwise use without occupying them.*
- b) *The ownership, occupation, possession and use of lands, territories and natural resources by indigenous peoples shall be protected through special measures that prevent land alienation and exploitation without the free, prior and informed consent of the legitimate representatives of the peoples concerned. In particular, the State shall take special measures to prevent land alienation of indigenous peoples on account of their*

lack of understanding of laws or on account of taking of advantage of their customs by others.

- c) Disputes involving the alienation or undue exploitation and use of lands, territories and natural resources of indigenous peoples without their free, prior and informed consent shall be resolved in an expeditious manner, with due respect to the laws, customs, practices and usages of the peoples concerned, and by courts, tribunals, commissions or other bodies in which indigenous peoples have a substantive role.*
- d) Indigenous peoples shall not be forcibly removed or relocated from the lands that they occupy. Where relocation or removal of these peoples is considered necessary as an exceptional measure, such removal or relocation shall only take place with their free, prior and informed consent. In such cases, the option of return to their original lands shall always remain. When such return is not possible, the relocated peoples shall be provided, in all possible cases, with lands of quantity, quality and legal status that is at least equal to that of the lands previously occupied by them. Only when such alternative lands are not possible to be provided should the alternative of monetary compensation be considered.*

Section on the Rights of Minorities and Marginalized Communities:

- a) The State shall effectively establish conditions enabling the indigenous peoples to secure and develop their language, culture, livelihoods and their societies, and create favourable conditions for maintaining and developing local indigenous communities.*
- b) Indigenous peoples, individually and collectively, including indigenous children and women, have the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, and to use their own language.*
- c) Indigenous peoples and individuals shall be ensured protection against all discrimination, and the State shall, when necessary for the implementation of the rights of indigenous peoples, pursuant to international human rights standards, adopt special positive measures with respect to such rights.*
- d) In states and districts in which several indigenous peoples live, the minority and marginalized indigenous peoples shall be ensured special representation in all decision-making levels, including at village, local, district and state levels.*

- e) *The State shall ensure that indigenous peoples, whose numbers or whose situation of social, economic and political marginalization prevents them from being represented in the state or federal legislative bodies, be provided opportunities of being represented through special measures, in consultation with the peoples concerned.*

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