

# ILO Convention No. 169

## Implementation Status Report

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**National Human Rights Commission**

Hariharbhawan, Lalitpur, Nepal



**(International Labor Organization Convention Number 169)  
Indigenous and Tribal Peoples Convention, 1989  
Implementation Status Report**



**National Human Rights Commission**  
Hariharbhawan, Lalitpur, Nepal



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# Foreword

Human right is the collective form of all the things that are required to live a human life. This is not limited within the border of any state and is universal and inalienable. All issues of human rights are of equal importance. They are interdependent and indivisible.

In principle, it is the responsibility of the state to respect, protect and fulfill human rights. Each state makes provisions related to human rights in the constitution and other existing laws. A separate implementation mechanism is also put in place to implement these laws for the protection of human rights. State also expresses its commitment towards human rights not just within the country but also at the international level through various treaties and conventions. Among various international conventions ratified by Nepal, Convention no.169 related to indigenous nationalities is one of the important conventions. Nepal ratified this convention on August 22, 2007. In addition to this, Nepal has already become a party to its declaration by casting vote in favor of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP 61/295) to endorse it through the United Nations.

Prior to the endorsement of the Convention no.169, Nepal had already brought National Foundation for Upliftment of *Aadibasi/Janjati* Act 2058 BS (2002 AD) into implementation. Under the Social Justice Section of the Fundamental Rights in the Constitution of Nepal, rights of people to participate in various state structures based on inclusive principle has been mentioned clearly. Besides recognizing rights to education and rights to language and culture as fundamental rights, state's policy has incorporated indigenous nationalities as well.

Although thematic officers on indigenous nationalities were initially assigned in each ministry to oversee implementation of this Convention, this arrangement could not get continuity later. In terms of institutional development, National Foundation for Upliftment of *Aadibasi/Janjati* has already been established and the establishment of a separate Indigenous Nationalities Commission as per the constitutional provision is currently in the process. In addition to this, District Coordination Committees in all 75 districts have been constituted as per the Indigenous Nationalities District Coordination Committee (Formation and Work Operation) Regulation 2072 BS.

Although constitutional, legal and institutional development made by the state for the protection of the human rights of indigenous nationalities is positive aspect; they are not adequate for their effective protection. State has so far failed to implement National Action Plan for the Implementation of the ILO Convention no. 169. The Fourth Human Rights National Action Plan aimed at endorsing a National Action Plan for implementation of Convention no. 169 and reviewing existing laws, and formulating new laws, but there is no tangible progress made yet in this front. Similarly, an objective was set to formulate necessary laws to ensure rights of indigenous nationalities in the Implementation Action Plan (2011-2016) in order to implement the recommendations received from the Universal Periodic Review of Human Rights. This has also not been implemented yet.

National Human Rights Commission has published this report on the Implementation Status of ILO 169 Convention as per the mandate given to it by the constitution to monitor whether international convention and treaties to which Nepal is a party are implemented and make recommendations to implement if any such treaties and conventions are found not implemented.

This is the first of its kind study made to monitor the status of implementation of this Convention after the Commission started making a review of the implementation of various human rights treaties and convention ratified by Nepal.

Honorable Member of the Commission Mohna Ansari deserves special thanks for giving necessary directives in the course of monitoring and investigation carried out by the Commission to study on the implementation of this Convention and for her active role in the preparation of this report. Similarly, all members, secretary and staff group as well as others also deserve sincere thanks for providing necessary suggestions and extending support. Similarly, the Collective Rights Division at the Commission deserves sincere appreciation for playing special role in the preparation of this report. Finally, I have a belief that the issues recommended to the Nepal Government through this report will play vital role in the protection of the human rights of indigenous nationalities.

Anup Raj Sharma  
Chairperson





## Foreword

Globally, there are different words in use to address indigenous nationalities. Some of these words include "aboriginal people" or indigenous nationalities, first people or nations, main inhabitants, sons of the earth and sons of the land. In India, these people are addressed as scheduled tribes, while they are called indigenous nationalities i.e. *Aadibasi/Janajati* in Nepal.

The population of indigenous nationalities stands at 700 million around the world. This accounts for about five percent of the total world population. Some 15 percent of the world's poor are indigenous nationalities. Similarly, one third of the world's poorest people are indigenous nationalities. These people have 7,000 languages and 5,000 cultures-- highest among all. In Nepal, the population of indigenous nationalities is 9.26 million, which accounts for 34.97 percent of the country's total population.

Indigenous nationalities have their own unique identity, culture, language, religion, history and institutional as well as political structures. They have inseparable and spiritual connection with their ancestral land and other resources. Indigenous nationalities are distinct from other communities due to their unique and traditional social structure, knowledge system and special norms and values. In addition to defining indigenous nationalities, National Foundation for Upliftment of *Aadibasi/Janajati* Act 2058 BS (2002 AD) has also scheduled 59 caste groups as indigenous nationalities in Nepal.

The constitution of Nepal has provided rights to indigenous nationalities to participate in various state structures on the basis of inclusive principle. In line with this constitutional provision, various works are currently underway to make

constitutional and legal arrangements. Their institutional development is also underway to protect the rights of indigenous nationalities. In addition to this, Nepal has ratified an international level convention on indigenous nationalities, which is also called ILO 169, on September 1, 2007. Similarly, Nepal is already a state party to the UNDRIP-61/295, which is related to indigenous nationalities.

Nepal is the first among South Asian countries to ratify ILO Convention 169 related to indigenous nationalities. I want to remind all concerned that implementation action plan has not yet been implemented after ratification of this Convention. NHRCN believes that it would be easy to measure the progress on the basis of its indicator if implementation work plan is introduced.

Following the ratification of the convention, several constitutional, legal and institutional arrangements have been made for the protection of the rights of indigenous nationalities. But these achievements or the progress achieved so far are not adequate. Although there are no such issues in the formulation of policy and laws, various problems are seen in their implementation.

The Commission has been relentlessly making its efforts for the respect, protection and effective implementation of human rights. The Commission made the study on the status of the implementation of ILO 169 Convention in line with the mandate given by the constitution to make recommendations to the government if any conventions ratified by Nepal as a state party are not brought into implementation. Implementation of the concept of Free, Prior and Informed Consent (FPIC), rights to self-determination, autonomy and rights to self-governance and implementation of work plan to enforce this Convention are some of the major problems seen in the implementation

of Convention no.169 according to this study. I hope that the recommendations made by the Commission through this report to resolve the problems seen in the implementation of this Convention would play important role in the protection of the human rights of indigenous nationalities.

Finally, I would like to thank all the members of the Commission, secretary and staffs, who went to the field to study the implementation status of this Convention. I would also like to thank expert advocate Shankar Limbu, who provided us valuable suggestions, and all writers, who published various articles and opinion pieces on this issue. In addition to this, my sincere thanks also go to Deputy Director Buddha Narayan Sahani Kewat and Collective Rights Division to bring this report in this form for publication.

Mohna Ansari  
Member



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# Executive Summary

Indigenous nationalities or *Adibasi/Janajati* are present all across the world. However, there is no common word to address them. In some countries, they are called "aboriginal people" instead of calling them indigenous nationalities. Various other terminologies such as main inhabitants, son of the earth, son of the land, caste groups and *Aadibasi* as well as *Janajati* are also used to address them. India has identified them as scheduled tribes, while Nepal has given them legal identity as *Aadibasi/Janajati*. Population of indigenous nationalities in various 90 countries in the world stands over 700 million. This accounts for five percent of the total population of the world. Some 15 percent of the world's poor are indigenous nationalities and these people constitute one third of the poorest of the poor people in the world. They have more than 7,000 languages and 5000 cultures. According to the census conducted in Nepal in 2011, the number of indigenous nationalities in Nepal is 9.26 million. This is 34.97 percent of the total population of the country.

The government constituted a Development Committee after issuing Indigenous Nationalities Development Committee Formation Order 2054 BS as per the Development Committee Act 2013 BS. A list of 61 indigenous nationalities was publicized was published for the first time through the same Committee. On February 7, 2007, the government issued National Foundation for Upliftment of *Aadibasi/Janajati* Act 2058 BS (2002 AD). Section 2 of the Act has defined *Aadibasi/Janajatis*. Altogether 59 communities have been scheduled as *Aadibasi/Janajati* in the schedule of this Act. However, some *Adibasi/Janajati* are yet to be included in the list.



National Human Rights Commission had also recommended the Government of Nepal to ratify the Convention no.169 related to indigenous nationalities (ILO Convention 169) endorsed by International Labor Organization. The Government of Nepal ratified the Convention on August 22, 2007. Shortly after Nepal became party to the Convention, a declaration related to indigenous nationalities UNDRIP 61/295 was endorsed on September 13, 2007. Nepal has become a party of this declaration as well.

It is the mandate of the Commission to make recommendation to the Government of Nepal for implementation of the Conventions it has been party to, if it is found during monitoring that conventions are not brought to implementation. The main objective of this report is to assess the implementation status of Convention no. 169 from past 10 years (since its ratification), analyze it and make recommendations to the Government of Nepal for its implementation.

Various reports received from central, provincial and liaison offices on this issue have been made primary bases of this implementation status report. In addition to this, various materials broadcasted or published by different intergovernmental bodies, national and international non-government organizations have also been made basis of this report.

International Labor Organization issued Indigenous and Tribal Peoples Convention 1989 (Convention No.169), replacing the indigenous nationalities related Indigenous and Tribal Populations Convention, 1957 (Convention Number 107). Separately, the United Nations endorsed a declaration related to indigenous nationalities, UNDRIP-61/295 on September 13, 2007.

Nepal is the first among South Asian countries to ratify ILO Convention 169 related to indigenous nationalities. This decision of the Government of Nepal has stood as a distinct contribution in the field of human rights of indigenous nationalities. It is now the constitutional responsibility of Nepal to implement this convention as a state party.

In view of bringing the ILO Convention 169 into implementation, Government of Nepal had made an arrangement of a focal person in each ministry. But this was not given continuity. In 2015, second report was presented to the ILO as per the convention. Indigenous nationalities District Coordination Committees have been established in all 77 districts. Reservation policy has been implemented in bureaucracy. A reservation policy to provide 33 percent reservation quota to women, 27 percent to indigenous nationalities, 22 percent to *Madhesi*, nine percent to *Dalits*, five percent to those with physical disabilities and four percent to those hailing from backward region is already in place. This reservation policy has been adopted even in security agencies. Various targeted programs have been launched to promote languages, culture, literature and arts of indigenous nationalities and the communities that are on the verge of extinction. Financial subsidy is also being provided for the preservation of cultures of various indigenous communities. Necessary works are being done to preserve languages after the formation of National Language Commission. Government of Nepal has been presenting details of progress made in the field of indigenous nationalities in the United Nations Committee on Elimination of Racial Discrimination through updated reports. Similarly, this issue has been given due space in the Universal Periodic Review.

The Fourth Human Rights National Action Plan entrusted

Ministry of Federal Affairs and Local Development with the responsibility to review existing laws and amend them as necessary or formulate new ones as per the Action Plan prepared and endorsed by the government for the implementation of ILO Convention 169. Similarly, National Action Plan for the implementation of Recommendations received from the Universal Periodic Review of the United Nations (2011-2016) also had an objective to formulate necessary laws to ensure rights of indigenous nationalities.

National Human Rights Commission, ILO's Committee of Experts on the Application of Conventions and Recommendations, UN Special Rapporteur on the Rights of Indigenous Nationalities and the Committee on Elimination of All forms of Discrimination Against Women (CEDAW) also recommended the Government of Nepal to endorse the National Action Plan.

Although the Government of Nepal has made aforementioned positive initiatives for the implementation of the Convention, much works still remain to be done for its effective implementation. It is necessary to guarantee protection of the rights of indigenous nationalities by adopting process that honors the culture of indigenous nationalities concerned or local communities while preparing a plan of development or construction of any physical infrastructure or implementing them as per the concept of FPIC There is also a lack of strong mechanism in place for the effective implementation of FPIC principle.

Women belonging to indigenous nationalities are also facing problems such as discrimination, exclusion and marginalization in various ways due to patriarchal mindset. Children of indigenous nationalities are seen to have faced problem in their learning and communications due to differences in the

language spoken in their home and the Nepali language used at schools. School dropout ratio of the children of indigenous nationalities is on the increasing trend due to poor learning as a result of their inability to communicate properly.

It is certainly a positive thing to make a provision of multi-lingual policy in the Constitution of Nepal, 2015. Yet, the government has failed to introduce program in planned manner and allocate necessary budget for the preservation of the languages that are on the verge of extinction. The issues of using languages of indigenous nationalities in both government and non-government areas have not been guaranteed.

Promotion of traditional healing system, knowledge and skills of indigenous nationalities has not been made. Government has to make necessary initiatives to facilitate contact and cooperation with indigenous nationalities living across national border in various fields such as economic, social, cultural and environmental fields.

NHRCN has provided important suggestions and recommendations to the various concerned parties including the Government of Nepal for the effective implementation of Convention no. 169. As per these suggestions and recommendations, it has recommended the Government of Nepal to guarantee active and independent participation of the representatives of indigenous nationalities while formulating any policy or laws related to them, formulate necessary laws and amend contradictory provisions in the existing laws at the earliest and help implement them equally in all three tiers of the governments including federal, provincial and local government, enforce the concept of free, prior and informed consent and endorse and implement the National Action Plan for the Implementation of the ILO Convention no.169 currently under consideration in the cabinet at the earliest

possible. Similarly, recommendations have been made to the government to develop appropriate structures of Indigenous Nationalities District Coordination Committees in all three tiers of the government, as their current structures are not in line with the new state structures, and make necessary arrangements to conduct national census to ensure that segregated data of all communities of indigenous nationalities in Nepal such as those endangered community and those with physical disabilities are obtained.

## Introduction

### 1.1 Background

Indigenous nationalities are present in all parts of the world. But there is no common terminology to address them. They are addressed differently in different countries in the world. In some countries, they are called "aboriginal people" or indigenous people, first people and nation, main inhabitants, son of the earth, son of the land, tribal groups, indigenous (*Aadibasi*) and nationalities (*Janajatis*).<sup>1</sup> In the context of Nepal, they are legally addressed as *Aadibasi/Janajatis*. National Foundation for Upliftment of *Aadibasi/Janjati* Act 2058BS (2002 AD) has defined them as *Aadibasi/Janjati*. In India, they are addressed as scheduled tribes.

Total population of indigenous nationalities in various 90 countries in the world stands over 700 million. This accounts for five percent of the total population of the world. Some 15 percent of the world's poor are indigenous nationalities. Their population also constitutes one third of the poorest of the poor people in the world.<sup>2</sup> They have the highest number of 7000 languages and 5000 cultures.<sup>3</sup> Since indigenous nationalities have distinctness and variety in their identity, they are provided with

- 1 *Collection of Frequently Asked Questions on ILO Convention on Indigenous Nationalities 1989 and Their Answers, Government of Nepal. Ministry of Federal Affairs and Local Development. P. 10.*
- 2 *United Nations Declaration on the Rights of Indigenous Nationalities: Handbook for National Human Rights Organizations. Asia Pacific Forum, United Nations Office of the High Commissioner for Human Rights. Chapter 1. Background of the Declaration. P. 3.*
- 3 *<http://www.un.org/en/events/indigenousday/> visited 27 March 2018*

distinct identity and collective rights in international laws. However, they also have other individual human rights. According to the census conducted in 2011, total population of indigenous nationalities in Nepal is 9.26 million. This is 34.97 percent of the total population of the country.

The knowledge, social structure, life styles, languages, cultures, philosophy, material and immaterial heritage and worldviews, among other things, of indigenous nationalities have vital role in the diversity of the world. Indigenous nationalities have their own distinct identity, culture, language, religion, history and institutional and political structure. They have inalienable and spiritual connection with their ancestral land and other resources. Indigenous nationalities are different from other communities due to their unique and traditional organization, customary arrangement, knowledge system, distinct worldview and norms and values.

In the context of these initiatives being made on the part of the state, those advocating for the rights of indigenous nationalities have also been raising their demands and voices. Indigenous nationality communities have been demanding separate identity and protection of their collective rights at legal and policy level to address unitary state structure, caste-based discrimination and structural violence.

The government had constituted an Indigenous Nationalities Development Committee after issuing Indigenous Nationalities Development Committee Formation Order 2054 BS (1998 AD) as per the Development Committee Act 2013 BS. A list of 61 indigenous nationalities was publicized was published for the first time through the same Committee. National

Foundation for Upliftment of *Aadibasi/Janjati* Act 2058 BS (2002 AD) was introduced on February 7, 2002. This Act for the first time defined *Aadibasi/Janajaati*. Section 2(a) of the Act defines *Adibasi/Janajati* as a tribe or community as mentioned in the Schedule having its own mother language and traditional rites and customs, distinct cultural identity, distinct social structure and written or unwritten history.

Altogether 59 communities have been scheduled as *Aadibasis/Janajati* in the schedule of this Act. However, some *Adibasi/Janajati* are yet to be included in the list. Government of Nepal through National Foundation for Upliftment of *Aadibasi/Janjati* has given continuity to a study in this regard.

The provisions incorporated in the existing laws were not enough to properly address host of issues and the problems indigenous nationalities had been facing. As organizations and movements for the rights of indigenous nationalities were cautious that these issues should be addressed in peaceful manner, a demand to ratify ILO Convention 169 started in Nepal. Lawyers' Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP), which is fighting for the cause of Nepal's indigenous nationalities in Nepal for the first time prepared a feasibility study report on the ratification of ILO 169 convention after making a thorough study of Nepal's legal system and existing laws.

A national level seminar was organized in 2004 with the then Rajparishad Standing Committee Chairman Parshu Narayan Chaudhary as chief guest and the then director of ILO Laila Tegmo Reddy and representatives of indigenous nationalities as participants. Serious discussions were held for the implementation of ILO 169 Convention in the seminar. Coinciding with the Indigenous Nationalities



Day, the then Government of Nepal on August 9, 2004 had decided to ratify the ILO Convention.

Besides other issues, the government, the Nepal Communist Party (Maoists) and other stakeholders had responsibility to address the issues of indigenous nationalities after the Maoist party came to the peace process through the Comprehensive Peace Accord, 2006. An international conference on Convention no. 169 and Peace Building Conference was organized jointly by Nepal Federation of Indigenous Nationalities and National Foundation for Upliftment of *Aadibasi/Janjati* in Kathmandu in 2005. During the seminar, the then government had expressed commitment to ratify the ILO Convention.<sup>4</sup> National Human Rights Commission had presented a working paper that provided justification for ratifying the convention during the international seminar. National Human Rights Commission had even recommended to the Government of Nepal for ratifying the convention.

International Labor Organization endorsed the Convention related to indigenous and tribal Peoples (ILO 169) in 1989. This convention has remained as main document for indigenous nationalities. Nepal government ratified this convention on August 22, 2007. After Nepal became party to this Convention, UNDRIP was endorsed on September 3, 2007. Nepal has already been a party to this Declaration as well.

## 1.2. Objectives

It is the responsibility of National Human Rights Commission to ensure respect, protection and promotion of human rights through their effective implementation.<sup>5</sup>

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4 *Dr Om Gurung & Sarah Webster (Editors), ILO Convention 169 and Peace Building in Nepal, NEFIN and ILO*

5 *Constitution of Nepal. Article 249*

Receiving complaints, conducting monitoring and investigation and reviewing human rights related laws are among its tasks. It is the responsibility of National Human Rights Commission to make necessary recommendations to the Government of Nepal for the respect, protection and promotion of human rights.

National Human Rights Commission has implemented Strategic Plan (2015-2020) to reach to its targeted goals after identifying its priority issues in order to fulfill its responsibility. This Strategic Plan has set four objectives. In its objective number 2, the Commission has set its objective to ensure rights of poor, marginalized and those excluded groups, while it has set objective to expand access, strengthen effectiveness and ensure institutional development of the Commission in its objective number 4. It has set strategic program to review existing laws and formulate drafts of all necessary new laws in order to achieve progress in terms of ensuring rights of poor, marginalized and backward people as envisioned in the set objectives. The Commission has prepared a program to draft necessary policy and laws to protect and promote language and culture of indigenous nationalities, *Madhesi* and other endangered communities.<sup>6</sup> Works are underway to develop permanent structures of the Commission in order to expand its reach.

Human rights also incorporate the issues of indigenous nationalities. Nepal has already become a party to Convention no.169 and UNDRIP. It becomes the responsibility of the state to bring them into implementation once it becomes party to any conventions. It is the responsibility of National Human Rights Commission

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<sup>6</sup> *Strategic Plan of National Human Rights Commission (2015-2020). P. 47*

to recommend to the government for implementation, if it is found that the state has failed to implement any conventions even after becoming a party to them.<sup>7</sup> In line with the same responsibility, the Commission has prepared this report on the status of the implementation of Convention no.169.

The main objectives behind publicizing the report on the status of the implementation of ILO 169 Convention is to draw attention of the government to effectively protect and promote the rights of indigenous nationalities by revealing the status of the implementation of the Convention on the part of the government. In addition to this, its objective is also to provide information to all stakeholders who keep interest on the issues of indigenous nationalities

### **1.3 Methodology of the Study**

Information, facts, and other details received while carrying out various works for the protection, monitoring, investigation and promotion of human rights have been made the main basis of this report. It is advised to see the schedules for detailed information. Similarly, reports received from the Commission's central, provincial and branch offices are also considered as the basis of this report. Materials broadcast or published by various inter-governmental agencies and national/international organizations are also considered in this report.

Suggestions were taken and consultations were done with the subject experts. Similarly, suggestions were received from the staff members of the Commission. The suggestions received internally and externally have also been made a basis of this report.

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<sup>7</sup> *Constitution of Nepal Article 249(2g)*

Analysis has been made on the situation of various 16 rights of indigenous nationalities in this report. These include issues of general human rights to special human rights.

## 1.4 Limitation of the Study

International Labor Organization endorsed a convention (ILO 169) related to indigenous and tribal people for the first time in 1989. This convention is considered as an important document of the indigenous nationalities. Government of Nepal ratified this convention in 2007. Shortly after Nepal became party to this convention, UNDRIP was endorsed in 2007. Nepal has been a party to this declaration as well.

It is the responsibility of the state concerned to implement the Convention once it becomes a party to it. National Human Rights Commission is entrusted with a responsibility to monitor whether Conventions ratified by Nepal are implemented and make necessary recommendations to the Government of Nepal for their implementation if they are found not implemented.<sup>8</sup> This report is prepared in the course of fulfilling NHRCN's responsibility as stipulated in the Constitution of Nepal and the Act. Only 10 years since the Convention was ratified on August 22, 2007 has been considered as time limitation of this report. The issues raised in the process of drafting new constitution through Constituent Assembly election, constitutional provisions in Nepal's constitution, legal provisions, international norms and values of human rights, United Nations documents, actions taken by the Government of Nepal in response to the recommendations made by National Human Rights Commission and the documents

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<sup>8</sup> *Constitution of Nepal. Article 249 (2) (g)*

and publications made in the course of making such recommendations and study and researches conducted by non-governmental organizations have been made basis of this report. Various programs and budget allocated by the government for development of indigenous nationalities have also been made bases of this report. The role played by this Convention in Nepal's peace process and conflict management has also been briefly discussed in this report.

Broader issues of human rights could not be incorporated in this report since it takes into consideration only those existing policy and legal issues at the national level on the basis of general and special provisions of human rights related to indigenous nationalities made in the convention.

# Indigenous Nationalities and ILO Convention No. 169

## 2.1 Background of ILO Convention No. 169

Keeping in view of unique identity and diversity and different situation, problems and issues of indigenous nationalities, International Labor Organization endorsed a separate Convention on Indigenous and Tribal People, 1989 (Convention no. 169) out of a realization that they need of a separate Convention. Prior to endorsing this Convention, ILO had implemented Indigenous and Tribal Populations Convention, 1957 (No. 107).

Based on the principle of dissolution, the ILO in 1989 endorsed ILO Convention 169 on Indigenous Nationalities, replacing the Indigenous and Tribal Population Convention 1957. In view of the fact that Convention Number 107 was unable to address norms and values being raised by various national and international non-governmental organizations, intellectual community, and human rights activists working for the rights of indigenous nationalities, the ILO in 1971 appointed a member of its Sub-Commission on the protection of the rights of minority groups Jose Martinez Cobo as a special rapporteur to make a comprehensive study on the discrimination made against indigenous nationalities and recommend both national and international measures to abolish these discriminations. The report submitted by Kobo is also known as Martinetz Kobo Study.<sup>9</sup> The ILO unveiled Convention Number 169 after the Kobo report.

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<sup>9</sup> *United Nations Declaration on the Rights of Indigenous Nationalities: Handbook for National Human Rights Organizations. Asia Pacific Forum, United Nations Office of the High Commissioner. p.4*

An Indigenous Nationalities Task Group was formed in the United Nations as per the report submitted by Martinez Kobo. The United Nations also endorsed a declaration on indigenous nationalities (UNDRIP-61/295) on September 13, 2007.

After the Convention 169 received formal shape from International Labor Organization in 1989, Nepal government ratified the convention only on August 22, 2007. Since Nepal ratified the Convention before the UNDRIP-61/295 was endorsed, Nepal became a party to this declaration after signing in and voting in favor of the Declaration with the following statement.

Government had always protected and promoted the rights of indigenous nationalities. Indeed, the country's Interim-Constitution reflected the new Government's commitment to supporting Nepal's indigenous nationalities. Nepal understood that the Declaration (UNDRIP) represented the good intentions of the international community to protect and promote the rights of indigenous nationalities and did not create any new rights.<sup>10</sup>

Former Special Rapporteur Prof. Steven Hyagen has made the following statement on the provisions set out in the Declaration.

Whereas the Declaration reaffirms that indigenous individuals are entitled without discrimination to all human rights recognized in international law, indigenous nationalities also poses collective rights which are indispensable for their existence, well-being and integral

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10 *HYPERLINK* "<https://www.un.org/press/en/2007/ga10612.doc.htm>  
"<https://www.un.org/press/en/2007/ga10612.doc.htm> visited 2nd  
August 2017

development as people.<sup>11</sup>

Although USA, Canada, Australia and New Zealand were against the Declaration, they signed it later. Head of the government of Canada, Australia and New Zealand had even sought public apology with the indigenous nationalities for the injustice made by the state against them in the past. According to various customary international law experts including Professor James Anaya, the Declaration has already received status of international law as per the international legal norms since all countries have recognized it. Just as Universal Declaration on Human Rights has already received a status of a customary international law, UNDRIP has also received status of customary international law. Altogether 23 countries have already endorsed the Convention. Luxemburg, which endorsed the Convention on June 5, 2018, is the latest country to implement the Declaration from June 5, 2019.

This move taken by the Government of Nepal for the protection of the human rights of indigenous nationalities has been recognized as a landmark contribution. In addition to the collective rights of indigenous nationalities, Government of Nepal has already endorsed seven human rights instruments in different dates prior to this Declaration. Government of Nepal has endorsed seven of the total nine important UN Conventions including Convention on Eradication of Racial Discrimination 1969, Convention on Civil and Political Rights 1966, and Convention on Economic, Social and Cultural Rights

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11 *Rodolfo Stavenhagen, Making the Declaration Work, Claire Charters and Rodolfo Stavenhagen (eds.) Making the Declaration Work, The United Nations Declaration on the Rights of Indigenous Peoples, IWGIA, 2009 P. 363*



1966. In its periodic report submitted to the CERD, Nepal has been incorporating details of the progress made on the issue of indigenous nationalities. At the policy level, the issues related to indigenous nationalities are being incorporated since the Eighth Five Year Planning of Nepal.

## **2.2 Introduction to ILO Convention no. 169**

ILO Convention 169 is an important law for the recognition/ identity, protection and promotion of the collective rights of indigenous nationalities. Instead of creating any new rights for indigenous nationalities, this Convention is a collective document that shows that existing legal provisions and provisions in the jurisprudence are applicable in the context of indigenous nationalities as well. It is the constitutional responsibility of Nepal to implement the Convention as a state party to it.<sup>12</sup> According to the provisions in the Clause 9 of Constitution of Nepal, each provision in the Convention is applicable similar to the laws of Nepal and provisions of Convention shall prevail in case they contradict with the provisions in the existing laws. This Convention consists of substantive provisions of rights and procedural provisions for their implementation.

Convention no.107 on Indigenous and Tribal Population Convention introduced in 1957 by International Labor Organization was being criticized heavily for not being friendly to indigenous nationalities. It was maintained that Convention failed to assimilate diversity of indigenous nationalities and adhered the concept of mainstreaming indigenous nationalities instead. However, it was accepted in the convention that indigenous nationalities had pre-

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<sup>12</sup> *Article 51(b3) of Constitution of Nepal 2015*

existing rights over their ancestral land. Following series of discussions, consultations and study, ILO, recognizing the distinct identity of indigenous nationalities and addressing their diversity, introduced Convention no.169 in 1989 in order to address the shortcomings seen in the Convention no. 107 and replaced it with new one.

This Convention has binding effect. This Convention guarantees distinct characteristics or traits and collective rights of indigenous nationalities. It also ensures rights of meaningful participation and consultation with indigenous nationalities in the process of formulating policy and decision-making process on all issues concerning them. This convention incorporates the issues of rights to self-determined development for their own development, selection, formulation, implementation and evaluation of development plans and their rights to take benefits from such development plans. Indigenous nationalities have rights over their ancestral land as well as natural means and resources. Among other things, these include their rights to self-management, rights against any external obstruction to their cultural and spiritual relation, rights against forceful displacement and rights to rehabilitate only after their prior consent and arrangement of proper alternatives.

Indigenous nationalities have rights to FPIC while carrying out any development works. This Convention also guarantees protection of languages, arts and cultures of indigenous nationalities, while recognizing the principle of rights to self-management. Besides allowing them to practice their customary laws and judicial practices in line with international human rights laws and national laws, the Convention also makes some provisions of judicial

privileges to them in case of some criminal charges. For example, there are provisions to adopt some alternative punitive measures instead of keeping in prisons in case of punishment in such cases. It is found that the Convention has played very important role to bring constitutional and legal reforms for the development of equitable and inclusive society in the countries that have ratified ILO 169 Convention. This Convention had vital role to end the 37-year old civil war and reach a peace agreement in Guatemala.

A proposal to endorse Convention no. 169 without any further delay was put in 11 number of the agreement reached between the representatives of government and Nepal Federation of Indigenous Nationalities and Indigenous Nationalities Joint Struggle Committee, Nepal on August 7, 2007.<sup>13</sup> Government of Nepal had expressed commitment to implement the ILO 169 Convention by bringing amendments in existing laws as deemed necessary in the course of its implementation.

This Convention has 9 Chapters and 44 Articles. In its preamble, special contribution made by indigenous nationalities to ensure cultural diversity and ecological and social goodwill across the world has been recalled. Concerns have been expressed over gradual extinction of their traditional laws, system, norms and values and their worldviews. Similarly, it also mentions that indigenous nationalities in different parts of the world were not able to exercise their human rights and fundamental rights as other communities have been exercising.

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<sup>13</sup> *Collection of accords, agreements, understanding, declaration and decisions made so far in the peace process in Nepal. Government of Nepal. Ministry of Peace and Reconstruction. 2071 BS.*

While Article 1 to 12 in part1 consists of general policies, Article 13 to 19 in the Part 2 consists of issues related to land. Article 20 in the Part 3 deals with the provisions of recruitment, and conditions of employment. Similarly, there are provisions related to vocational trainings, handicrafts and rural industries from Article 21 to 23 in part4 and issues related to social security and health are dealt in Article 24 to 25 in part5. Articles 26 to 31 of part 6 deal with education and means of communication, while issues related to contacts and co-operation across borders and administrations are dealt in part7 and 8, respectively. Likewise, other general provisions are put in Article 34 to 35 in part 9 and final provisions are put in Article 36 to 44 in part10.

## Implementation Status of ILO Convention No. 169

### 3.1 Progress Made by the Government on the Implementation of ILO Convention no. 169

The Government of Nepal ratified Convention no.169 on August 22, 2007. After the ratification, a study had been carried out regarding the obligation entailed by the Convention. The study identified the actions to be taken by the government and its obligations. At that time, a focal person had been appointed in each government ministry to oversee matters related to indigenous nationalities and the implementation of the Convention. But this could not get continuity. Besides, an expert committee was formed comprising of joint-secretary of the then Ministry of Local Development as coordinator, member-secretary of Nepal Federation of Indigenous Nationalities (NEFIN) as deputy-coordinator, and representatives of all ministries as members for the purpose of implementation of the Convention. There was provision for representative of International Labor Organization (ILO) to remain as observer member in the committee.

The expert committee, in consultation with representative organizations of indigenous nationalities, experts, concerned ministries of the government and other authorities, prepared National Action Plan for the Implementation of the Convention no. 169. That action plan had been submitted to the then Local Development Minister Ram Chandra Jha.<sup>14</sup> The Action Plan is sub-judice in the cabinet.<sup>15</sup> The second report, in line with

<sup>14</sup> A/HRC/WG.6/23/NPL/1-Page 10

<sup>15</sup> *Ibid*

the Convention, has already been presented at ILO in 2015.<sup>16</sup> The district coordination committees formed as per the Indigenous Nationalities District Coordination Committee (Formation and Operation) Regulation 2072 BS (has been actively working in all of the 75 districts. Reservation policy has been implemented in bureaucracy according to which 33 percent seats are reserved for women, 27 percent for indigenous nationalities, 2 percent for *Madhesis*, 9 percent for *Dalits*, 5 percent for persons with disabilities and 4 percent for backward regions. Likewise, reservation system has been introduced in security bodies as well.

The fourth Human Rights National Action Plan, for the purpose of implementation of the Convention no. 169, assigned the responsibility to Ministry of Local Development and Federal Affairs for formulating action plan for implementing the Convention, getting it approved by the government and reviewing or amending the existing laws or formulating the new ones in line with the convention. But according to the progress report on implementation of National Human Rights Action Plan (2015/16), it has not been implemented yet. Likewise, the National Action Plan on implementation of recommendation received from Universal Periodical Review of Human Rights (2016) has aimed to formulate necessary laws to ensure rights of indigenous nationalities. But, this has also not been implemented yet.

The National Human Rights Commission, ILO's Committee of Experts on the Application of Conventions and Recommendation, UN's Special Rapporteur on the rights of Indigenous People and Committee on

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16 *Ibid*

Elimination of All Forms of Discrimination Against Women (CEDAW) also made recommendations to the Government of Nepal. The indigenous nationalities are also consistently pressuring the government for the same. But yet, the Action Plan has not been adopted.

Programs are in operation targeting promotion of language, culture, literature and arts of indigenous nationalities and the endangered communities. In the process, scientific survey on ethnic language has been concluded in Kathmandu, Lalitpur, Bhaktapur and Kavrepalanchowk districts. Mother tongue literacy and training programs have been completed for 19 different communities including those of Magar, Sunuwar and Chamling communities. Around 1000 people have been trained on this subject.<sup>17</sup>

Financial support has been made available to various organizations and institutions working for protection of culture of various castes and ethnic communities for the protection and development of their language, script, culture, art and culture, films and heritage through various culture promotion programs. The National Language Commission has been constituted and it has been executing the necessary actions.<sup>18</sup> The government of Nepal has been presenting the periodical progress report on indigenous nationalities to the UN Committee on Elimination of Caste-Based Discrimination. Likewise, it has also been provided space in Universal Periodic Review.

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17 *The annual report of the government of Nepal prepared in line with Article 53 of Constitution of Nepal (2015/26), Page 28/29*

18 *Ibid*

### 3.2 Identity of Indigenous Nationalities: Issues and Challenges

Identity of any community lies in their language, culture and their organizations. Also the main basis of identity of indigenous nationalities are the social organizations formed through the language, costumes, scripts, tradition, culture, occupation for livelihood, social etc.

Various efforts have been made, and continue to be made, at the international level to define the indigenous nationalities. But so far no universal definitions have been made. Indigenous nationalities have been voicing their concerns to define who they are by themselves and pressing for dignity of their rights and interests. They have been opposing the attempts from formal channels to define who they are. In this context, Erica-Irene A Dias has stated that "indigenous people have become the victims of the imposed definitions." Martinez Cobo has provided working definition of it in his "Study of the Problem of Discrimination Against Indigenous People" report. This definition seems relevant. His definition is as follows:

"Indigenous communities, people and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as people, in accordance with their own cultural patterns, social institutions and legal systems.<sup>19</sup>

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<sup>19</sup> *Study of the problem of discrimination against indigenous population*



In its publication, International Work Group for Indigenous Affairs (IWGIA) has stated, "a people may be classified as "indigenous" only if it so chooses by perpetuating its own distinctive institutions and identity."<sup>20</sup> ILO Convention no. 169 has also not defined indigenous nationalities. However basis of their identity has been created in Article 1. It has also made a provision that indigenous nationalities themselves may ascertain their identity. Apart from that, it has also stated the basis of identifying indigenous nationalities.

- Tribal people whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.
- People who are regarded as indigenous on account of their descent from the 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 State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
- The Convention also states that self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

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(E/CN.4/sub.2/1986/7).

20 Earni Chris (edit.) *The Concept of Indigenous Peoples in Aisa, A Resource Book, International Work Group for Indigenous Affairs (IWGIA), Printed in Thailand, 2008 P. 37*

India has also not defined indigenous nationalities. However, Constitution has made a mention of "tribes." The Constitution in its Chapter dealing with fundamental rights and duties and Directive principles, policies and obligation of the State has made constitutional provisions regarding the rights of indigenous nationalities. The preamble of the constitution expresses commitment to fundamental rights and human rights. Fundamental rights and duties section (Part 3), right to equality (Article 18) have the provisions to make special arrangement, according to the law, for the development of indigenous nationalities. Under the right to social justice in Article 42, provisions have been made to ensure their participation in state organs on the basis of proportional inclusive principles. Directive principles, policies and obligation of the State under part 4 has adopted the policy in relation to social and cultural rights of indigenous nationalities, protection of their language and their overall development and promotion.

In Nepal, National Foundation for Upliftment of *Adibasi/Janajati* 2058 BS (2002 AD) has defined indigenous nationalities in Chapter (2, a). It states, "*Adibasi/Janajati* means a tribe or community as mentioned in the schedule having its own mother language and traditional rights and customs, distinct cultural identity, distinct social structure and written or unwritten history." The Act has listed, in its Schedule, 59 ethnic communities as *Adibasi/Janajatis*.

But the voice is being raised from various quarters claiming that the list included in the Schedule is not complete. Thus, the government formed a nine-member task force under coordination of Junu Gauchan to investigate the matter and submit the report. After that high-level rescheduling task force formed by the government under the coordination of

Prof. Dr. Om Gurung recommended including 81 castes under indigenous nationalities in the Schedule. Likewise, the task force formed under the coordination of Dr. Dil Bahadur Chhetri recommended that *Khas-Chhetri* also be listed as *Aadibasi* in the Schedule.<sup>21</sup>

### **Issues and problems**

After International Labor Organization brought out Convention no 169 Nepal defined the indigenous nationalities through the legislation called National Foundation for Upliftment of Indigenous Nationalities (NFDIN) Act 2058 BS (2002 AD). The UNDRIP 2007 was adopted only after Nepal legally recognized the indigenous nationalities. The Government of Nepal has also endorsed the declaration. Some efforts were made by the state to protect the rights of indigenous nationalities since the legal arrangement and the Constitution of Nepal also has provisions related to indigenous nationalities. Indigenous nationalities have been included in right to equality and right to social justice under the fundamental rights of the constitution.

Since the identity issue is linked with right to social justice, it seems imperative that the government effectively ensured and implements the inclusion of indigenous nationalities in state organs based on proportional inclusive principle.

As the National Foundation for Upliftment of *Adibasi/Janajati* Act 2058 BS (2002 AD) recognized the distinct identity of indigenous nationalities, the government published the list of minorities for the purpose of local elections and National Assembly elections. In the list

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21 *Indigenous Peoples Bulletin (Number 13, January-February 2071 BS)*, National Foundation for Development of Indigenous Nationalities (page 5).

published in Nepal Gazette dated April 24, 2017 and December 23, 2017, various 98 ethnic castes have been included (for details see Schedule 2). Though both the lists contain the same information, they have been published on different dates for two different elections. In line with Article 306 Article 1 of the constitution and as per the census report of 2011, except the *Dalit* population who are less than 0.5 percent total population, 56 ethnic castes of total 98 ethnic castes are scheduled as minority and 59 as indigenous nationalities, have been put under minority list. Of the total 56 caste groups, 39 ethnic castes are scheduled and 19 of these scheduled groups belong to indigenous community (for details see Schedule 3).

There are several challenges in exercise of equal political, economic, social and cultural rights. The UN Committee on the Elimination of Racial Discrimination (CERD) has recommended to accord recognition to the indigenous nationalities, who are unidentified in its 95<sup>th</sup> session.<sup>22</sup> But as things stand, some indigenous nationalities are yet to be listed and scheduled. Though the Government of Nepal and the Foundation for Upliftment of *Adibasi/Janajati* have conducted researches and studies on this subject several times, the issue has not been concluded yet.

Though after ratification of ILO Convention no 169 and UNDRIP, 2007, Nepal has defined the indigenous nationalities through national legislation and thus accorded legal recognition to such people, by adopting new population concept, has listed the indigenous nationalities already listed according to the law, under the list of minority community.

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22 CERD/NP/CO/17-23

### 3.3 Free, Prior and Informed Consent (FPIC)

Free, Prior and Informed Consent (FPIC) is about ensuring protection of rights of indigenous nationalities or local communities by adopting the process that is compatible with their culture while planning and implementing physical infrastructure projects or other development works. The concept of FPIC was developed on the basis of the norms that proposed projects can have an impact on land, culture, livelihood and other resources of the people living in the respective areas and the indigenous nationalities themselves should have their say and they have the right to forge an agreement accordingly. Though FPIC in the initial days was focused on only indigenous nationalities, growing concerns, researches and studies on this area has made the concept equally relevant to all the people who are connected with the land and forest areas.<sup>23</sup>

This concept was developed because it was found that development works carried out in areas dominated by indigenous nationalities had affected their livelihood, religious, cultural norms, occupation, employment etc. Since the work executed in such a way that affected them would not ensure sustainable development and peace, but create more problems instead, this concept has gained prominence as an alternative to sustainable development.

'Freedom' here refers to the free decision taken without pressure and fear of any party, individual, political parties, groups and stakeholders.

'Prior' refers to the consent to be taken from the community by providing them adequate time before any financial, human, technological and other resources are spent for

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23 *Free, Prior and Informed Consent (FPIC) in Redplus, questionnaire handbook for local facilitators, published by RIKFT (2014), page 2.*

the project operation.

'Informed' means the act of providing adequate, correct, clear and complete and comprehensible information needed for the community in a way they understand to provide consent and make a decision. The objectives of the project, scope, duration, investment of human and financial resources, affected areas, and the process of FPIC comes under the necessary information.

'Consent' refers to the fact that the indigenous people have the right to accept or reject the proposed development projects or those proposed for the implementation. Acceptance and rejection is decided based on the action plan adopted by the community. Projects can be implemented only when the consent is provided.

According to Article 7 (1) of Convention no 169 “the people concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programs for national and regional development which may affect them directly.” Similarly, Article 16 states, “the people concerned shall not be removed from the lands which they occupy.” It further states that if the “relocation of these people is considered necessary as an exceptional measure; such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where

appropriate, which provide the opportunity for effective representation of the people concerned.” It also says “whenever possible, these people shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.”

According to Article 32 (2) of UNDRIP, 2007, “states should consult and cooperate in good faith with the indigenous people through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”

The UN Declaration on Right to Development issued by 17th assembly on December 4, 1986 has reinforced the norms of FPIC in development works.<sup>24</sup> According to this concept, for the development works to be sustainable and beneficial, the local communities have to be involved in the process starting from planning of development projects to implementation, monitoring and evaluation, and they should be able to benefit from such development works.

The 1992 Convention on Biological Diversity has internalized the concept of FPIC. Article 8 (j) of the Convention has provided to “respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such

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24 *Free, Prior and Informed Consent (FPIC) in Redplus, questionnaire handbook for local facilitators, published by RIKFT (2014), page 20.*

knowledge.”

Article 51 (j) 8) of Nepal’s constitution has adopted the policy of “making special arrangements to ensure the rights of indigenous nationalities to lead a dignified life with their respective identities, and making them participate in decision making processes that concern them, and preserving and maintaining the traditional knowledge, skill, experience, culture and social practices of *Adibasi/Janajatis* and local communities.” In the 31<sup>st</sup> review session of the second hearing of Nepal’s Universal Periodic Review, recommendations were made by Mexico, Uganda, Singapore and Norway to amend laws and policies and to create mechanism to protect the rights of indigenous nationalities.

In the 23<sup>rd</sup> periodic report submitted by the Government of Nepal on Convention on Elimination of Racial Discrimination to the UN Committee on the Elimination of Racial Discrimination, the concluding observation of the Committee recommended Nepal to bring into use the concept of FPIC in point number 23, sub-point (c) and (d).<sup>25</sup>

### **Issues and problems**

Constitution of Nepal 2015 in article 51 (j) (8) has adopted a policy of involving the indigenous nationalities in decisions related to them. Likewise, the fourth National Human Rights Action Plan aimed of making action

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25 *Find an adequate negotiated solution to resolve the dispute regarding the rights of indigenous peoples over their traditional land and natural resources, including by revising its legislation on this issue and taking into account ILO Convention No. 169; (D) Obtain the free, prior and informed consent of indigenous peoples prior to the approval of any project affecting the use and development of their traditional lands and resources;*



plan for the welfare of indigenous nationalities but this objective has not been fulfilled yet. The National Action Plan for the implementation of Convention no 169 is under review at the ministry.<sup>26</sup>

The Government of Nepal implemented Action Plan for implementation of the recommendation received from of Universal Periodic Review (2011-2016) and Committee on the Elimination of Racial Discrimination in regard to implementing the concept of FPIC. Under the topic of culture, in point 4, of the Action Plan, programs were made to enact necessary laws, equip *Adibasi/Janajati* Commission (Commission on Indigenous Nationalities) with additional resources and review the status of proportion inclusion for the purpose of promotion and protection of the rights of indigenous nationalities.<sup>27</sup> Among the periodic plan issued by the National Planning Commission, the practice of formulating and implementing programs have found continuity since the first three year interim plan. The subject of indigenous nationalities has found space in fourteenth plan as well.

However, FPIC has not been implemented in any step of planning phase in any of ministry, department, parliament or bureaucratic structure when it comes to formulating plan and programs related with indigenous nationalities. In lack of clear policy and mechanism, FPIC has not been properly implemented in the projects of government of Nepal such as construction of dams and in other development projects. Thus, there is a need for appropriate policies, laws and regulations regarding this.

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26 *National report submitted in accordance with paragraph 5 of the annex to Human Rights Council Resolution 16/21 Nepal. 6 August 2015. A/HRC/WG.6/23/NPL/1 Point Number 42*

27 *Action Plan (page 8)*

### 3.4 Self-determination, Autonomy and Self-Governance

Right to self-determination of the indigenous nationalities should be understood in terms of their rights to hold negotiations on issues related to their representation in the place of their living. They have the right to make decision for their economic, social and cultural development and manage natural resources for their own benefits by themselves. Holding consultation with indigenous nationalities, ensuring their freedom, consent and making them pre-informed are key elements of their right to self-determination.<sup>28</sup>

The right to self-determination is the right collectively exercised by all the members of the nation as indigenous community or group. Thus it should be used, with the right intention, according to the principles of justice, democracy, and respect for human rights, equality, good governance and end of discriminations.<sup>29</sup> Articles 6, 7, 8 and 9 of the Convention have made provisions related to right to self-determination. Likewise, Article (1) of both International Covenant on Civil and Political Rights (1966) and International Covenant on Economic, Social and Cultural Rights (1966) also have the provision on right to self-determination. As per this provision, indigenous nationalities freely determine their political status and work towards their economic, social and cultural developments. The covenants and declarations have internalized the right to self-determination to ensure dignified living of indigenous nationalities.

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28 *Final study on the indigenous people's rights to decision making process. Expert mechanism on indigenous peoples. (A/HRC/EMRIP/2011/2)*

29 *Article 46 (3) UNDRIP*

## **Issues and problems**

During the course of state restructuring process, indigenous nationalities demanded federalism and autonomy based on identity. Article 56 of the Constitution of Nepal has the provisions related to special, protected and autonomous regions. Necessary steps needs to be taken for the effective implementation of these provisions. Likewise, arrangement should be made to enable the indigenous nationalities to forward their agendas at the platforms where decisions that could potentially affect the rights of the indigenous nationalities and to ensure implementation of their rights to their meaningful participation in political, economic, social and cultural issues and such matter should be informed to the National Human Rights Commission as well.

### **3.5 Consultation and Participation**

As per the Article 6 (1a) of the Convention no 169, indigenous nationalities should be consulted 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. Likewise, as per the sub-article 1(b) of the same Article, mechanisms should be put in place by which they can freely participate, 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 programs which concern them. Article 18 and 19 of UNDRIP has also made provisions regarding this matter. According to Article 8 of the Convention no. 169, due regard should be paid to their customs or customary laws while applying national laws and regulations to the

indigenous nationalities. It also states that procedures should be established, whenever necessary, to resolve conflicts that may arise in the application of this principle. Further, this Article prohibits prevention of these people from exercising the rights granted to all citizens and from assuming the corresponding duties as well as it says that indigenous people have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights.

The Constitution of Nepal in its preamble states the issue of proportional inclusive participation. It has also internalized the issue of right to autonomy and self-governance. Equality before law and equal protection of laws have been enshrined in fundamental rights. The constitution has also ensured the right to participate in state organs on basis of principles of proportional inclusion to 12 groups who are deprived of social justice such as indigenous nationalities and *Khas-Arya*. Article 84(2) of the constitution has required the representation of indigenous nationalities, *Tharus* etc. from the political parties in the election of House of Representatives through proportional representation system. Likewise, Article 28 (5) of House of Representatives Election Act, 2017 has made the provisions for six groups (for details see Schedule-4). It has also made the exceptional provision for the political party obtaining less than 10 percent votes to make proportional representation.<sup>30</sup>

The fourth National Human Rights Action Plan 2071-2076 BS (2015-2020 AD) envisages, for the protection of rights of indigenous nationalities, to effectively

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30 *Provincial Election Proportional Election Directive (2018)*

implement the laws or to formulate new laws according to international human rights principles and standards. For the purpose, there are programs to review the existing laws or formulate new laws.

National Judicial Academy of Nepal has said that inclusive judiciary cannot be the subject of dispute. This will empower all the sections of the society and have positive impact in interpretation of existing laws, ensure social justice and promote access to justice.<sup>31</sup> Convention no 169 states that unique society, identity and status of indigenous nationalities should be considered in matters related to resolution of justice. Diversity helps the judiciary to rightly consider identity and culture and address the issues. Likewise, recognizing the customary justice system of indigenous nationalities will also constructively help the judiciary in justice resolution. A study of National Judicial Academy states that inclusive representation in judiciary helps enhance people's trust on judiciary—the ultimate and supreme authority to deliver justice in Nepal.<sup>32</sup>

### **Issues and problems**

The access of indigenous nationalities, especially the marginalized and endangered community, in policy-making level is abysmally low. Policy of reservation has resulted in progress of their access to government services but the participation of endangered castes such as *Raute*, *Surel*, *Kusunda* and *Chepang* in public issues is literally nil. Looking at the political participation of *Surels* who are found only in *Suri* village of *Dolakha* district, for example, does not even have representation at

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31 *Ibid*

32 *Ibid*

the ward level. There is no political representation from this community in this district.<sup>33</sup>

During the constitution making process, the UN Committee on the Elimination of Racial Discrimination made correspondence with the Government of Nepal to ensure meaningful participation of representatives of indigenous nationalities in the constitution making process.<sup>34</sup> Special Rapporteur on the rights of indigenous nationalities also made recommendation to create a mechanism to abide by prior informed consent of the indigenous people.<sup>35</sup> Also, the Supreme Court of Nepal had issued a mandamus to the government to amend the existing laws to ensure meaningful participation of indigenous nationalities in line with international law and conventions to which Nepal is a signatory.<sup>36</sup>

It is fundamental right of the each indigenous community to have the representation of their community. Convention and Declaration have also ensured this. Special Rapporteur James Anaya, in his Report, has stated that decentralization of powers alone won't be adequate in federalism and special measures should be taken to ensure participation of indigenous nationalities in federal, provincial and local levels.<sup>37</sup> There are legal provisions

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33 *Ibid*

34 *Early Warning Letter were Issued by the CERD on 28 September 2009 (Ref: TS/JF), 31 August 2012 (Ref: CERD/EWUAP) and 13 March 2009 (Ref: TS/JF)*

35 *A/HRC/12/34/Add.3, paras. 86-87*

36 *Directive from Lawyers Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP) against Advocate Shankar Limbu and Office of the Prime Minister, Directive Number 8990, NeKap, 2070 BS, part 55, Page 491.*

37 *Human Rights Council Twelfth Session A/HRC/12/34/Add 3 P.24 para 59*

for reservation or quota system in countries like India, Burundi, Venezuela and Columbia.<sup>38</sup> If the state does not prioritize their protection, these communities will be on the verge of being endangered. The reservation system we have is not accessible or visible to them.

Statistics have shown that for long period of time, participation of indigenous community in the state mechanism remained abysmally low. Their representation in three organs of the state (executive, legislative and the judiciary) is very low. The report of National Judicial Academy has stated that from the perspective of inclusion, the structure of judiciary is unequal in terms of ethnicity and castes: "The inclusion status of judicial sector is imbalanced with the composition patterns of national population by gender, caste, ethnic and other social groups. For instance, *Brahmin/Chhetri*, constituting 32.1% of national population account for 77.6% of total judiciary staff, while the representation of *Aadibasi/Janajati* in the judiciary is only 14.5% even if they constitute 36% of total population."<sup>39</sup>

There is 30 percent representation of indigenous nationalities in the government (for detail see Schedule-5). In the legislature there is satisfactory presence under proportional representation system. While *Brahmins* and *Chhetris* comprise 30 percent of total population, they have 53 percent representation in the federal parliament. Around 27 percent of them are hill-based indigenous nationalities and some 7 percent others are indigenous nationalities living in *Terai* plains. Indigenous people

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38 *Ibid.*

39 *Dr. Dinesh P. Pant, Gender Equality and social Inclusion Analysis of the Nepali Judiciary (Research Report) May 2013, National Judicial Academy, Nepal, Hariharbhawan, Lalitpur P. 7*

have 33.5 percent representation in local levels (see Schedule 6). These facts show that the representation of marginalized communities in state structures has not been effectively ensured yet.

The works related to review of existing laws and formulation of new laws as mandated by fourth National Human Rights Action Plan 2071-2076 BS (2015-2020 AD) has not been done yet. In the same Action Plan there is a program to get the action plan prepared for the implementation of ILO Convention Number 169 approved and endorsed by the government. Although the draft of this action plan had been prepared in 2065 BS (2009 AD) itself the Government of Nepal has not approved and endorsed it.

### **3.6 Cultural Rights**

Language and culture mark the identity of the respective caste and ethnicity. When they are lost or become extinct, the identity of such community also gets lost or becomes extinct. This is why it is necessary to promote and enhance language and culture of one's caste and community. Since the development works and projects are carried out without the consent of indigenous nationalities, their culture is being lost. The concept of carrying out development works by preserving the language, culture and tradition of the indigenous nationalities, therefore is being increasingly understood and accepted.

The preamble of the Convention no. 169 has very well recognized the aspirations of indigenous nationalities to keep their language, identity and religion intact and developed. It has also drawn the attention toward the special contribution indigenous nationalities have made



in maintaining social and ecological harmony and cultural diversity. The Convention has regarded self-identity of indigenous nationalities as fundamental standards.<sup>40</sup> Thus, the government needs to respect social and cultural identity, tradition, customs and institutions of indigenous nationalities and promote full implementation of their social, economic and cultural rights.<sup>41</sup> For this, special measures should be taken based on their aspirations.<sup>42</sup>

Articles 5, 8, 9, 14, 15, 31 and 34 of the Declaration have provided for protection of cultural integrity and unique identity of indigenous nationalities. This includes strengthening and keeping the cultural institutions intact, making provisions for becoming the members of those institutions according to the customs, the right to follow and strengthen those customs, right to provide education in their own mother languages, right to keep intact, control and develop the cultural heritage and traditional knowledge, and the right against letting their culture and tradition to wane or become mixed up with other culture and tradition.

Similarly, article 8 (j) of the Convention on Biodiversity states that the customary and traditional knowledge, skills, innovation and practice of indigenous community should be honored and protected for the protection and sustainable use of biological diversity by the states. It further says that such knowledge, innovations and skill should be widely used in consent of the concerned individuals and results in income should also be equally shared and exchanged.

The Human Rights Committee has stated that for cultural

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40 *Article (1) 2 of Convention*

41 *Article (2) 2 (b) of Convention*

42 *Article (4) of Convention*

rights of the indigenous nationalities to be protected, many other rights should be well guaranteed. Such rights include, right to participate in customary activities, right to resources such as land, right to marry and settle down, and right to participate in decision-making process that could potentially impact their cultural rights.<sup>43</sup>

The Constitution of Nepal states that Nepal is multiethnic, multi-lingual and multicultural country.<sup>44</sup> In the fourth paragraph of the preamble of the Constitution, it has committed to internalize these multiplicities and create an equitable society. The Interim Constitution of Nepal 2007 for the first time provisioned 'Nepal is secular, inclusive, federal democratic republic state.'<sup>45</sup> Article (4) of the current constitution also states this fact. People, who have faith in religion have the freedom to profess, protect and exercise their faith.<sup>46</sup> Likewise, every community and every individual has the right to use their own language. Each community has right to participate in their cultural life and right to promote, develop and protect their religion, culture, language, script, heritage etc.<sup>47</sup> The social and cultural objective of the nation has been to eliminate all forms of discrimination, exploitation and injustice based on caste, religion, customs and tradition and thereby to create a civilized and equitable society.<sup>48</sup>

The policy of the state has been to maintain mutual harmony, tolerance and solidarity among them.<sup>49</sup> The

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43 *UN Declaration on the Rights of the Indigenous People, Handbook for National Human Rights Commission (Page 17)*

44 *Article (3), Interim Constitution, 2007*

45 *Article (4) Ibid*

46 *Right to Religious Freedom, Constitution of Nepal (2015), Article, 26*

47 *Article 32, Nepal Constitution*

48 *Article 50, Clause 2 (a), Constitution of Nepal*

49 *Article 51 (a, 2)*

state in its policies of social and cultural transformation has adopted the policy to create the society based on social harmony, to protect and promote historical, archeological and cultural heritage, to promote the participation of the local people in social and cultural activities, to promote development, to eliminate all forms of discrimination, injustice and exploitation and to adopt the policy of multilingualism.<sup>50</sup>

### **Issues and problems**

For long period of time, there had been a demand that the Nepali state, by accepting pluralism, should be declared as secular nation. The Comprehensive Peace Agreement (2006) had also taken the objective of eliminating the existing discrimination based on caste, language, religion and culture. Likewise the government of Nepal and then warring Maoist (Nepal Communist Party (Maoist)) had also agreed to, based on the norms and values of secularism, honor any social, cultural and religious sensitivity, religious places and religious faith of a person.<sup>51</sup>

The objective was taken to resolve the matters of cultural discrimination during the course of conflict management. Likewise, there was an understating that all the agreements made during the constitution making process would also be addressed through the constitution.<sup>52</sup> The provision of secularism that was enshrined in the Interim Constitution has also been institutionalized in the current Constitution of Nepal.

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50 *Article 51 (c)*

51 *CPA (2006), Clause 3,5*

52 *CPA (2006), Clause 7,1,5*

### 3.7 Right to Land, Territories and Natural Resources

The existence and identity of indigenous nationalities are also linked with land, territories and natural resources. Their life and livelihood is based on these resources, this is why their access to these matters has become the subject of their human rights and fundamental freedoms. Besides, this right is linked with their cultural rights as well. The UN Permanent Forum on Indigenous Issues has commented that, "worldwide, land is the foundation of life and culture of indigenous people." This is why the main demand of the international indigenous movements and the institutions of indigenous nationalities has been the protection of their land, territories and natural resources. Most local and international indigenous movements shows that they are evolved from struggle against and in opposition to the efforts to undermine the customary lands and management of resources of the indigenous nationalities, efforts of discrimination, confiscation of their lands, exploitation of their resources without taking consent from them, or displace them from their original land of their residence or the actions or policies directed toward those issues. Thus, without honoring the rights of indigenous nationalities to land, territories and natural resources, the effort to save the unique culture of indigenous nationalities will be in risk.<sup>53</sup>

Convention no. 169, in Articles 13 to 19, has provisions related to land and territories. According to the provision, the government should respect the special importance of cultures and spiritual values of and relationship of the indigenous nationalities with land or territories

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<sup>53</sup> *The UN Declaration on Rights of Indigenous Peoples: Handbook for National Human Rights Commission (page 37)*

and collective aspects of this relationship.<sup>54</sup> The term land here refers to territories, which covers the total environment of the areas which the people concerned occupy or otherwise.<sup>55</sup> Likewise there are provisions related to the recognition of the rights of ownership and possession of the people concerned over the lands which they traditionally occupy, take measures to safeguard the right of the people concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities, particular attention to be paid to the situation of nomadic people and shifting cultivators, adequate procedures should be established within the national legal system to resolve land claims by these people.<sup>56</sup> Other provisions require that rights of the indigenous nationalities to the natural resources pertaining to their lands should be specially safeguarded and these rights include the right of these people to participate in the use, management and conservation of these resources. Likewise, in cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments should establish or maintain procedures through which it will consult these people, with a view to ascertaining whether and to what degree their interests will be prejudiced, before undertaking or permitting any programs for the exploration or exploitation of such resources pertaining to their lands. These people should participate in the benefits of such activities, and receive fair compensation for any damages, which they may sustain as a result of such activities.<sup>57</sup>

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54 *Article 13 (1), ILO Convention 169*

55 *Article 13 (2), Ibid*

56 *Article 14, Ibid*

57 *Article 15, Ibid*

Other provisions state that they should not be removed from the lands, which they occupy. Where the relocation of these people is considered necessary as an exceptional measure, such relocation should take place only with their free and informed consent, where their consent cannot be obtained, such relocation should take place only after following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the people concerned. Whenever possible, these people should have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist. When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these people should be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the people concerned express a preference for compensation in money or in kind, they should be compensated under appropriate guarantees.<sup>58</sup> Persons thus relocated should be fully compensated for any resulting loss or injury. Procedures established by the people concerned for the transmission of land rights among members of these people should be respected. The people concerned should be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.<sup>59</sup> Persons not belonging to these people should be prevented from taking advantage of their customs or of lack of understanding of the laws

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58 *Article 16*

59 *Article 17*

on the part of their members to secure the ownership, possession or use of land belonging to them. Adequate penalties should be established by law for unauthorised intrusion upon, or use of, the lands of indigenous people and government should take measures to prevent such offences.<sup>60</sup> Articles 25, 26, 28, 29 and 32 also dwell on these issues.

### **Issues and problems**

Most forest areas and wildlife reserves are concentrated around ancestral lands of indigenous nationalities. Since land and forests are the integral part of the lifestyle of indigenous nationalities, they have been protecting forests and land for generations. But since the wildlife reserves and hunting camps have been established by incorporating the lands and areas of indigenous nationalities, they have been affected. There are instances of indigenous nationalities being displaced from the place of their origin because of various activities conducted in the name of development works and wildlife activities.

The road-widening project in Kathmandu and Kathmandu-Terai fast track (being constructed by Nepal Army) are a few examples. Complaints and lawsuits have been filed at Supreme Court of Nepal, National Human Rights Commission, UN Human Rights mechanisms and International Labor Organization by citing that these works have affected the settlements, livelihood and identity and forceful displacement of indigenous nationalities such as *Newars* and other local communities claiming that such development works have violated the constitution, existing laws, Convention no 169 and UNDRIP. The NHRC has also recommended the government that it

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60 Article 18

should abide by the interim order of the Supreme Court.

Whether in carrying out activities in the name of hydro power and infrastructure development, or in extraction of forest resources such as fire wood, fodder, water, forest, and herbs, or in cases related to operation of wildlife reserves and big projects (all affecting the lives and livelihood of the indigenous people), the consultation and FPIC with the indigenous people have not been taken according to the laws and procedures. For example, in the Khimti-Dhalkebar electric transmission lines project, the study of the National Human Rights Commission shows that indigenous nationalities living around that area were not consulted during operation of this project. Article 30 of the UNDRIP 2007 states that effective consultation must be held with the representative institutions of the indigenous nationalities, while carrying out military activities in the lands of indigenous nationalities. It also states that except in case the indigenous nationalities have provided their free consent or requested for the consent, the military activities cannot be carried out in the lands and territories of indigenous nationalities.

The rights related to providing complete information, to the indigenous nationalities (from project formulation to execution and monitoring phase) in the development projects conducted in the territories inhabited by indigenous nationalities have not been respected. Neither the rights to know negative and positive aspects of the projects, their meaningful participation, consultation and right to be informed beforehand and right to be consulted have not been followed. This raises disputes and conflicts with the indigenous nationalities after the commencement of the project or few months later. As a result of which,



not only the indigenous nationalities have been displaced from their traditional occupation but the government has also failed to provide them alternative means of livelihood.

Due to the tendency of seeking alternative to the participation of indigenous nationalities or locals in development works, failure in providing reparation for the loss caused due to development works, human rights violation occur and dispute arises.

### **3.8. Access to Justice**

It is the responsibility of the state to provide justice to citizens if they are facing injustice. Besides constitutional and legal arrangements, judicial structures are also made to provide justice. Despite the laws and their implementation structures are in place to provide justice, the Convention and the Declaration indicate that special provisions needs to be made in context of indigenous nationalities. Article 9 of the Convention states that the practices followed traditionally by indigenous nationalities should be followed to regulate offences committed by them as long as they are congruous to national legal system and internationally recognized norms and values of human rights. The officials overseeing such cases or the court should give special consideration to such traditions. Similarly, those dealing with such court cases should take into account economic, social and cultural characteristics of indigenous nationalities and give priority to punishment other than those keeping them in prison according to Article 10. Similarly, it shall be the responsibility of the government to develop a mechanism to resolve the problem if any customs, customary laws and institutions are not compatible with

national and international norms and standard.<sup>61</sup>

### **Issues and Problems**

Representation of indigenous nationalities in judiciary is very low. There are justices only from *Newar* and *Tamang* communities in the Supreme Court that consists of 19 justices including Chief Justice. Of the total 145 judges in High Court and 182 judges in District Court, there are only five justices each from the community of indigenous nationalities in these two tiers of courts (Please see schedule 7 for the representation of indigenous nationalities in judiciary). This shows it is challenging to practically implement the fundamental rights of proportionate representation of indigenous nationalities in each state structure as ensured in the Constitution.

Article 14 (3) (f) of Covenant on Civil and Political Rights 1966 to which Nepal is a party has guaranteed right to have free assistance of an interpreter to the accused of the language that he/she understands for the purpose fair trial. Although some district courts have made provision of translator, lack of adequate translators in these courts is seen a challenge in their access to justice as they are unable to put forth their case due to problem of language. They are also unable to respond properly due to failure to understand language used by court officials and court officials often do not understand the details given by eyewitnesses in their mother tongue. Similarly, effective investigation has not been possible, as lack of translator in police investigation in some instances make it difficult to obtain and document true information.

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<sup>61</sup> *Frequently Asked Questions in Nepal regarding the ILO Convention no. 169, pg 26 and 27. Publisher: Ministry of Federal Affairs and Local Development, Government of Nepal.*

It seems necessary on the part of the policy makers of the state to give consideration to the issues of recognizing customs and customary justice system that are developed and practiced since the time immemorial to run society and their day to day activities.

### **3.9. Women from Indigenous Nationalities**

Women from indigenous nationalities are also facing discrimination. They have also been facing various problems caused by various factors such as patriarchal mind-set, discriminatory structural behavior and gender-based discrimination. All the provisions incorporated in Convention no. 169 are applicable also in case of women of indigenous nationalities.<sup>62</sup> They should also get chance to exercise all measures of human rights and fundamental freedoms without any obstruction or discrimination. The provisions of the Convention apply both to men and women of indigenous nationalities equally without any discrimination.<sup>63</sup> Coercive measures or power cannot be used to violate these rights.<sup>64</sup>

#### **Issues and Problems**

Section 7 (m) of National Foundation for Upliftment of *Aadibasi/Janjati* Act 2058 BS (2002 AD) has mentioned about women of indigenous nationalities. There is a provision in the Constitution itself to ensure one-third representation of women.<sup>65</sup> These provisions are positive. They help to strengthen presence of women in the formulation of laws. On the other hand, there seems to be a problem in the exercise of rights of women, as there is

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62 Article 3 of the ILO Convention No. 169.

63 Article 3(1) of the ILO Convention no. 169

64 Article 3(2) of the ILO Convention no. 169

65 Article 84(8) and 176(9) of Constitution of Nepal

no mention of women of indigenous nationalities at the policy level. Problem is seen in the effective access of women of indigenous nationalities to the budget and other means and resources of the state as compared to women from other communities.

### **3.10 Persons with Disability from Indigenous Nationalities**

Almost 1.94 percentage of the total population of Nepal comprise of persons with disabilities. There is no segregated data of disabled persons from indigenous nationalities. Although National Federation of Indigenous Nationalities (NEFIN) has been demanding for separate data of persons with disabilities from indigenous nationalities, their demand has not been fulfilled yet. Persons with disabilities from indigenous nationalities have been facing multiple discriminations.

The Declaration has provisions to prioritize the needs of the persons with disabilities from indigenous nationalities and guarantee the life devoid of any forms of violence and discrimination.

#### **Issues and Problems**

There has been a problem to address various problems including political, economic and social and the issues of poverty and discrimination faced by persons with disabilities within indigenous nationalities. It seems necessary to ensure proportionate representation of persons with disability from indigenous nationalities in various organizations working for their cause and similar other bodies created by the government.

### 3.11 Status of Linguistic Rights

There are more than 123 languages in Nepal. Although the census conducted in 2011AD listed more than 122 languages, most of the mother tongues of indigenous nationalities are on the verge of extinction. Language does not belong to one community alone. It is the property of the state. This has to be passed on to future generation.<sup>66</sup> Language is not only the means of expression; rather is also basis of identity, treasure of local knowledge and transmitter of culture as well.<sup>67</sup> Things seem to have changed after the abolition of *Panchayati* system and restoration of multi-party democracy in the country. First of all, the Constitution of Nepal 2047 BS (1990 AD) declared Nepal as a multi-lingual country. However, if the provisions made in the Articles 6 (1) and 11(2) stated Nepali language with *Devnagari* script as language of the nation (i.e. *Rastra Bhasha*) as well as the official language, while other mother tongues as national languages. The Constitution of Nepal has recognized more than one language spoken by majority of people in the province concerned as official language besides Nepali language as per the laws of the province concerned. This has paved way for using mother tongue at the province level. However, it is still unclear what would be the issue of mother tongue in government bodies that provide services and facilities and information at the community level. Constitution has guaranteed fundamental rights of communities to use their mother tongue. In media, state-owned *Gorkhapatra* Daily has started new pages in which news and other

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66 *Rights of indigenous people in Nepal: Policy status, challenges and opportunities* Tahal Thami and Gobinda Chhantyal (eds.) LAHURNIP. 2076 BS. P. 113

67 *Ibid*

materials are published in various languages of indigenous nationalities. The National Foundation for Upliftment of *Aadibasi/Janjati*, which is established to promote language and culture of indigenous nationalities, has failed to work adequately for the development of language, culture and economic activities due to allocation of meager budget by the government.

Cultural issues of indigenous nationalities often make news in various mass media. Any language may die if the state does not allow using it or fails to create conducive environment to protect them. Some intellectuals believe that death of language may result into the death of the concerned ethnicity. Threat to ethnic group's language is thus a threat to the cultural and linguistic survival of the group.<sup>68</sup> Therefore, protection of mother tongue is a key and sensitive issue.

### **Issues and Problems**

It is certainly a positive matter to have multi-lingual policy in the Constitution. It is necessary on the part of the state to adopt special measures towards mother tongues that have fallen in shadow on the basis of social justice principle. As suggested by National Linguistic Policy Recommendation Commission in 2050 BS, Nepal does not yet have national level linguistic policy. State has not introduced any planned programs and allocated necessary budget for the protection of languages that are on the verge of extinction. The issue of using mother tongues in government and non-government sector is not guaranteed yet. It is necessary on the part of the state to provide budget and introduce programs equitably to

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<sup>68</sup> *Rannut Mart and Phillipson Robert, Linguistic Human Rights, Walter de Gruyter&Co., D-Berlin, printed in Germany 1995 P. 7*

ensure constitutionally guaranteed fundamental rights of indigenous nationalities to protect their language, culture and civilization.

State should provide concrete assistance to media and other organizations that are established for the protection of language and culture. Several languages of indigenous nationalities in the verge of extinction are in vulnerable state. Many of their language and scripts are already extinct. The works to be done by the state to protect the language and scripts that are on the verge of extinction are limited only in policy. Although it is good to read, these things are limited only in books.

### 3.12 Right to Education

The difference between languages used at home and at schools have created problem among children in their learning and communication both. The school dropout rate often increases as a result of poor learning due to inability of children to communicate properly.<sup>69</sup> The education status of children above six years of age can be divided into three groups, according to the projection of education status made by Central Bureau of Statistics in 2011 AD and National Living Standard Survey:

- a) Those who never attended schools;
- b) Those dropped out from schools; and
- c) Those currently attending schools.

The children, who never attended schools, include *Terai Dalits*, followed by Tamang and other indigenous nationalities. 35 percent children of indigenous

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<sup>69</sup> *Dilli Ram Rimal, The Use of Mother Tongues in Nepal: Policy and Implementation Status. Policy Status, Opportunities and Challenges of the Rights of Indigenous Nationalities. LAHURNIP 2073BS. P. 59*

nationalities from Hill areas have never attended schools, which is equivalent to *Dalit* community (37.2 percent). The percentage of children going to school from the communities that are on the verge of extinction and minority community such as *Kumal*, *Sunuwar*, *Majhi* and *Chepang* is 28.6 percent to 31.3 percent respectively (Central Bureau of Statistics, 2011). This shows that majority of children belonging to indigenous nationalities and the communities that are on the verge of extinction are deprived of education. Not even a single person from the endangered *Surel* community is found to have obtained bachelor's level education. The situation of the rights of education of endangered *Raute* and *Kusunda* community is equally miserable. The government has been providing Rs 500 per month scholarship to children from endangered community with the belief that such incentive could motivate them to go to school. Since the amount for scholarship and day meal expense is not adequate, it is important to increase this amount. It is also necessary to introduce some effective programs and implement them effectively to attract children of indigenous communities' up to higher education.

Overall, some 30 to 40 percent children of indigenous nationalities seem to have attended schools.<sup>70</sup> Failure to provide education in their mother tongues, and inability to conduct teaching learning activities to suit their identity and situation can also be considered as important factors behind children of indigenous nationalities opting not to go to schools despite the fact that financial condition of their family is relatively better and schools are located near their homes. Government has issued Multi-lingual Education Implementation Directives 2062 BS. This

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<sup>70</sup> Central Bureau of Statistics, 2011.



has recognized multi-lingual education based on mother tongues as an integral part of the existing educational system instead of a separate educational system,<sup>71</sup> which is very positive. However, this policy has limited only in paper due to lack of adequate budget, lack of adequate teachers, lack of adequate textbooks, and failure of the concerned government body to distribute the printed textbooks on time.

### **3.13. Economic and Social Development**

In view of the economic status of indigenous nationalities community, *Newar* and *Thakali* are seen as highly advanced group among those in indigenous nationalities. The economic condition of other communities is however very weak. Among them, the condition of endangered group is further weak. Various communities such as *Chepang*, *Raute* and *Kusunda*, who used to cultivate land after deforesting jungle areas, are facing difficulty in their livelihood as the government has banned deforesting any jungle areas.

#### **Issues and Problems**

There is a mandatory provision for the local bodies, district development committees, village development committees and municipalities under Ministry of Local Development to allocate at least 35 percent of their budget for the economic and social development of the targeted groups.<sup>72</sup> However, this has become ineffective since this is not included in Local Government Operation

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71 *Multi-lingual Education Implementation Directives 2062 BS (3.1)*

72 *Lila Adhikari. Initiatives Made for the Protection and Development of Indigenous People: Problems and Suggestions. Policy Status, Opportunities and Challenges of the Rights of Indigenous Nationalities. LAHURNIP 2073BS. P. 360*

Act 2074 BS (2017 AD). There is also a provision to ensure participation of indigenous nationalities in the formulation of local level plans and development as well as in decision-making process as per the provisions made in the Indigenous Nationalities District Coordination Committee.<sup>73</sup> This provision has also remained ineffective. As per the decision of the Government of Nepal, the highly endangered indigenous nationalities groups such as *Raute* and *Chepang* are being given monthly livelihood allowance.<sup>74</sup> Similarly, *National Foundation for Upliftment of Aadibasi/Janjati* was been established for the overall development of indigenous nationalities such as their economic, social, cultural and linguistic development. Although this is the only government body mandated exclusively to work for the cause of indigenous nationalities, who constitute 38 percent of the country's total population, the budget allocated by the government to this body is highly inadequate. In each fiscal year, the Foundation's Council endorses an agenda to provide adequate budget and sends it to the government, but the government does not seem to have increased its budget. In the fiscal year 2016/17, the Foundation was given Rs 94.42 million budget. This amount is less than 0.0002 percent per person in view of the ratio of the population of indigenous nationalities in the country. Similarly, the budget was reduced to Rs 75.61 million in the fiscal year 2017/18. Worse still, Rs 59.12 million of the total allocated budgets was directly sent to local governments. Since the budget is sent to local government without clear policy and directives, indigenous nationalities are unable to reap benefit from the budget, as local governments often spend

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73 *Ibid.* p. 361

74 *Ibid.*

this budget for other purposes. Various organizations of indigenous nationalities at the local level including the National Foundation for Upliftment of *Aadibasi/Janjati* have received a number of complaints that even this limited budget allocated by the government failed to reach to them.<sup>75</sup>

Although some positive policy and legal arrangements have been made, overall development of indigenous nationalities is possible only through their economic, social, cultural and spiritual development. Their development is not possible through livelihood allowance alone unless their rights to land, rights to resources, and protection of their unique life style, skills, knowledge and technology are protected. It is necessary to have their meaningful collective participation in all stages of development works including in feasibility study to implementation to monitoring activities. Issues ranging from adherence to the principle of FPIC to sharing of dividend are equally necessary.

Linguists maintain that teaching and learning activities can be made effective and qualitative if children learn in their mother tongues in classes.<sup>76</sup> It is necessary on the part of the government to allocate adequate budget, provide adequate teachers and prepare textbooks that are friendly to the cultures, society and spirituality of indigenous nationalities for education in mother tongues in line with the existing multi-lingual education policy.

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75 *Based on the discussions held with the officials of Foundation for the Upliftment of Indigenous Nationalities*

76 *Dilli Ram Rimal. The Use of Mother Tongues in Nepal: Policy and Implementation Status. Policy Status, Opportunities and Challenges of the Rights of Indigenous Nationalities. LAHURNIP 2073BS. P. 61*

### 3.14 Right to Health

The indigenous concept of health extends beyond physical and mental wellbeing of an individual to the spiritual balance and wellbeing of the community as a whole and articulates physical, mental, spiritual and emotional elements and communal point view, according to United Nations Economic and Social Council.<sup>77</sup>

In the context of Nepal, cultural issues (practices of witch doctors, religious and spiritual medicines and healing methods) linked with health continue to exist.<sup>78</sup> It has been mentioned in the strategy of the Fourteenth Periodic Plan of the Government of Nepal to provide free of cost health service and basic education to those poor, marginalized and those on the verge of extinction to address these issues.<sup>79</sup> However, the policy is silent regarding the budget and programs in line with the strategy. Three fiscal years have already concluded, but there has not been any tangible program as mentioned in the policy. The sickle disease among *Tharu* women was found serious in the monitoring conducted by National Human Rights Commission.

The situation of the protection of the rights of endangered communities and women and children of these communities within indigenous nationalities is highly vulnerable. Indigenous nationalities are deprived of health facility as traditional methods of healing are gradually forgotten and modern medicine facilities are not cheap and widely available to them. Elderly people, pregnant

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77 UN Department of Economic and Social Affairs 2009:156-157.

78 ChaitayaSubba, Prof. Dr. BishwambharPyakurel and others, *A Study on the Socio-Economic Status of Indigenous Peoples in Nepal*, LAHURNIP, 2014 P. 141.

79 14th Periodic Plan. National Planning Commission. P. 160. Point Number 3.5

women and children of these communities need to have access to health facilities.

### **Issues and Problems**

Indigenous nationalities have their own traditional healing method. These kinds of knowledge and skills are transferred since many generations. However, these traditional methods are not duly recognized and promoted in Nepal. State policy is focused only on implementing modern medical treatment system. It is necessary to give consideration to conduct further study on healing methods adopted by indigenous nationalities, and promote their indigenous knowledge and skills of treatment. It seems equally urgent to implement the health and education related policies incorporated in the fourteenth periodic plan with the participation, cooperation and ownership of the communities concerned by introducing programs and allocating necessary budget to them.

### **3.15 Right to Profession and Employment**

Traditional professions of indigenous nationalities are either facing extinction or are passing through crisis. As for instance, *Raute* used to make wooden pots, wooden wardrobes, and various other household utensils and exchange them with goods with other communities. *Kumal* community used to make clay pots for their livelihoods. *Majhi*, *Bote*, *Mallah* of *Terai/Madhes* and *Kewat*, who made their livings through fishing and boating, are facing difficulties in their survival, as people from other communities are gradually prevailing in these professions these days. Similarly, indigenous nationalities are facing crisis, as FPIC principle is not properly implemented while developing dam-related projects. Besides these groups,

professions of various other indigenous nationalities groups have also fallen in crisis.

Each indigenous community has its distinct knowledge, skills and technology. These knowledge and skills are integral parts of their cultural, social and spiritual lifestyle. Today's science has also given important recognition to their knowledge of unique management and sustainable use and conservation of natural resources. So, the Convention no.169 has incorporated these issues in the rights to profession and employment. Fish and biodiversity are depleted in the river system after fishermen, who traditionally made their living through fishing, were displaced. The knowledge of herbal treatment methods of indigenous nationalities is facing extinction after they were displaced from traditional forest after these forest areas were converted into community forest, national parks and protected areas. It is necessary to obtain patent rights of *Yarsagumba*, which is linked to medicinal value and cultural importance of indigenous nationalities in Nepal. The value and price of *Yarsagumba* is more than that of gold. Patent right of *Kinama*, a popular food of indigenous nationalities made of soybeans to keep it safe for long, is found to have been taken by some other countries. Countries, where people use this method of cooking, get certain benefits. There seems to be indifference from the part of state to generate employment for indigenous nationalities.

The access of indigenous nationalities to public service is very weak. A huge number of people belonging to indigenous nationalities are living abroad in the course of foreign employment. State has not been able to generate employment opportunities and instill willpower among

those people that anything can be done in Nepal itself. The policy of reservation has been able to attract only limited people. In particular, citizens of the endangered and marginalized communities have not been able to take benefit from reservation provisions.

### **Issues and Problems**

The Three Year Plan, which incorporated separate policy and programs for indigenous nationalities with the objective to bring amendments in laws in line with Convention no. 169 and design programs in line with its Declaration, was introduced with conclusions that adequate attention was not given to the use and modification of the traditional skills and technology of the indigenous nationalities and that there was no equitable access of indigenous nationalities to the services and facilities provided by the state and that lack of adequate budget allocation had made it difficult to carry out targeted programs.<sup>80</sup> Not only is the title of indigenous nationalities removed in the latest periodic plan, but the provisions related to employments that were kept in previous periodic plans are also removed without bringing them into implementation. As a result, the traditional skills, knowledge and technology of indigenous nationalities are gradually disappearing. This has caused economic loss not only to the indigenous nationalities but also to the entire country. Other countries on the basis of the knowledge and cultural rights of indigenous nationalities have issued patent rights in the world market and they have been receiving royalty from them.

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80 *Government of Nepal. National Planning Commission. Three Year Plan. 2067/068-2069/070 BS. P. 279*

### 3.16 Contacts and Co-operation Across Borders

As per the Article 32 of Part 7 of the Convention, government should adopt various appropriate measures, including by means of international agreements, to facilitate contacts and co-operation between indigenous nationalities and tribal people across borders, including activities in the economic, social, cultural, spiritual and environment fields.

Various indigenous nationalities groups such as *Tharu, Limbu, Santhal, Rajbanshi, Meche, Uraband Mandal* seems to have cultural, social and economic relations with the country across the border i.e. India. Similarly, indigenous nationalities in hilly region have relations with the northern neighbor China. The provision related to this seems to have been implemented in *Rasuwaghadi* areas in *Rusuwa* district that borders with China. All goods that are imported via *Rasuwagadhi* Custom Point are brought through the land route of *Kerung*. Only drivers hailing from *Rasuwa* are eligible to import goods from *Kerung* to *Rasuwagadhi*. Since China has issued entry passes to people living in *Rasuwa* district, this can be considered as positive thing in view of cross-border contacts and cooperation. The cross-border movement to India for the indigenous nationalities living in the Southern part of Nepal is relatively easier. However, there are some difficulties for indigenous nationalities living in hilly region since they require visa to travel to China to meet their relatives.

### 3.17 National Human Rights Commission, Nepal

It is the responsibility of NHRCN to respect, protect and promote human rights, and ensure their effective



implementation.<sup>81</sup> NHRCN receives complaints, conducts monitoring and investigation into them and review laws related to human rights for this purpose. It provides necessary suggestions and makes recommendations to the Government of Nepal through Office of Prime Minister and Council of Ministers for the respect, protection and promotion of human rights. In order to accomplish the mandated tasks as per the Constitution of Nepal, various regulations including National Human Rights Act 2068 BS (2012 AD) have been adopted.

Since it is entrusted with the responsibility to respect, protect and ensure effective implementation of overall human rights, NHRCN has been playing its active role on the issues related to indigenous nationalities in addition to other issues of human rights. Similarly, NHRCN has also been playing role through various protection and promotion activities for effective implementation of Convention no. 169, which is ratified by Nepal.

In 2007 AD, NHRCN organized a workshop on the rights of indigenous nationalities and the convention. Representatives of various organizations of indigenous nationalities as well as others urged the government through the workshop to ratify the Convention no. 169. As such, Nepal ratified Convention no. 169 in September 2007 AD. Since then, it has been working to promote implementation of the Convention by also making review of the report of the state party on Convention no. 169.<sup>82</sup>

National Human Rights Commission has been providing information on the human rights of indigenous nationalities in Nepal in the report to be presented to the Working Group

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81 *Constitution of Nepal. Article 249*

82 *United Nations Declaration on Human Rights of Indigenous Nationalities: A Handbook for National Human Rights Institutions. p. 88*

on Universal Periodic Review (UPR), at the UN Human Rights Council. Similarly, it has also been conducting monitoring and investigation into the complaints received on issues related to indigenous nationalities. Among other things, it has also been providing education on the rights of indigenous nationalities through various promotional activities such as interactions, discussions, seminars, workshops, trainings and seminars.

In order to make access easy and effective for indigenous nationalities, regional offices of NHRCN have been established outside Kathmandu Valley since insurgency period. The regional offices, which were established in *Biratnagar, Janakpur, Pokhara, Nepalgunj* and *Dhangadhi*, are now established as provincial offices. In addition to these, liaison offices were also established in *Khotang, Janakpur, Butwal, Jumla* and *Rolpa* (not in operation currently) districts. These liaison offices were later converted into sub-regional offices. Currently, its liaison office *Khotang* serves as a branch office of Province 1 Office in *Biratnagar*, the liaison office in *Jumla* as branch office of Province 6 Office in *Surkhet* and its liaison office in *Nepalgunj* as branch office of Province 5 Office in *Butwal*.

The offices of NHRCN from the central office to provincial offices to branch offices have been working to protect and promote human rights of indigenous nationalities through co-operation and coordination with the human rights defenders, journalists and various organizations working for the field of their rights. A provision of focal officers on the issues of indigenous nationalities has been made as it has been done at Collective Rights Division of the Commission at its Central Office.

### 3.17.1 Role of National Human Rights Commission for the Protection of Collective Rights

#### a) *Khimti-Dhalkebar 220 KV Transmission Line Project and Collective Rights*

National Human Rights Commission on February 24, 2016 received a complaint on behalf of Khimti-Dhalkebar 220 KV Power Transmission Line Victims Struggle Committee for the protection of human rights of indigenous nationalities and local communities as there was high possibility of violation of their rights to land, rights to participation, rights to FPIC, rights to self-determination, rights to development, rights to life, rights to religion and culture, rights to property and rights to live with dignity in *Ratanchura* VDC Ward Number 1 and 2, *Bhadrakali* VDC Ward Number 1, 2 and 3, *Ranichuri* VDC Ward Number 1, *Kamalamai* Municipality Ward Number 7, *Bukadanda* Ward Number 4, *Sano Karkare* VDC Ward Number 10 and *MaisthanKarkare* in Sindhuli District due to *Khimti-Dhalkebar 220 KV Power Transmission Line Project*.

In response to the complaint, a correspondence was made to Ministry of Energy, *Singha Durbar, Kathmandu*, on January 22, 2016. Similarly, a high-level team comprising of honorable commissioner of the Commission had conducted monitoring works. At the initiative of the Commission, a discussion meeting was also held between the representatives of *Khimti-Dhalkebar 220 KV Transmission Line Project*, Ministry of Physical Planning and Works and the Transmission Line Victims Struggle Committee on March 3 and 4 2016 which then established coordination. The recommendation made by the Commission on that complaint is as follows:

## **Recommendations of the Commission**

A meeting of the NHRCN held on April 1, 2015 had recommended to the Government of Nepal to include the names of those not put in the list of those entitled to compensation for the acquisition of their land by the government, provide compensation to those missing in the list or those yet to receive compensation, ensure that electricity pillars do not fall in the premise of temples, religious shrines and schools or adopt alternative measures if the pillars fall in their premises, immediately expedite construction of feeder roads as per the decision made by the Ministry of Physical Planning and Works on September 5, 2012 and simultaneously expedite the works of installing remaining seven disputed electricity pillars as per the existing laws.

### **(b) *Kathmandu-Terai* Fast Track and Collective Rights**

A complaint was registered with the NHRCN on September 26, 2016 to ensure that *Kathmandu-Terai* Fast Track project in *Bungmati* area in *Lalitpur* district is not expedited without FPIC of indigenous nationalities and local communities, protect their historical identity and religious as well as cultural heritages, make plans to ensure that no one is displaced, construct alternative by passes and link roads outside the settlement areas and provide appropriate compensation if it is deemed necessary to displace some people. Monitoring works were conducted on different dates after the complaint was registered with the Commission to protect collective rights of indigenous nationalities and local communities.

### **(c) *Dhorpatan* Hunting Reserve and Collective Rights**

A complaint was filed at the Commission on April 28, 2013 stating that rights of indigenous nationalities and local

communities over land and the natural resources was not ensured, principle of FPIC was not adhered and the issues of their rights to participation in development process was violated while expanding the area of Dhorpatan Hunting Reserve in various VDCs of *Baglung*, *Rukum*, *Rolpa* and *Myagdi* districts. Alleging that the expansion drive violated the collective rights guaranteed by the Convention no.169 and UNDRIPS, 2007 to indigenous nationalities since the move threatened to displace them due to encroachment of their land, the complaint letter sought initiatives of the Commission to protect their human rights. The NHRCN conducted monitoring activities to assess the effects of the expansion and the situation of human rights there.

**(d) Major Works Carried Out by the NHRCN on Issues Relating to Indigenous Nationalities**

S. No.	Monitoring Date	Issue	Place
1	January 8, 2016	Monitoring conducted in areas inundated in <i>Durbung</i> VDC due to <i>Budhi Gandaki</i> Reservoir Hydropower Project	Gorkha district
2	March 3-4, 2016	In response to the complaint received at the Commission, discussion program was held at the Commission's meeting hall with the participation of the representatives of the <i>Khimti-Dhalkebar</i> 220 KV Power Transmission Line Project and the Ministry concerned.	NHRCN
3	April 28-29, 2016	Status monitoring after the Commission's decision on <i>Khimti-Dhalkebar</i> 220 KV Power Transmission Line	<i>Sindhuli</i> District

4	July 4, 2016	ILO Convention 169 and Human Rights Discussion Program	<i>Lalitpur</i> District
5	August 8, 2016	Discussion program on the draft of ILO Convention no. 169 National Action Plan	NHRCN
6	May 29-30, 2016	Monitoring of human rights situation of the victims of <i>Dhorpatan</i> Wild Life Reserve	Dhorpatan Wild Life Reserve
7	January 16-23, 2017	Monitoring of human rights situation of the endangered <i>Hayu</i> indigenous nationality	<i>Ramechhap</i> and <i>Sindhuli</i> Districts
8	February 19-26, 2017	Monitoring of human rights situation of endangered <i>Surel</i> indigenous nationality	<i>Dolakha</i> District
9	June 27-29, 2017	Monitoring of the human rights situation of marginalized <i>Tharu</i> indigenous nationality	<i>Banke</i> District
10	August 11, 2017	Interaction program on the situation of human rights of indigenous nationalities	NHRCN
11	November 17-19, 2017	Monitoring of the incident of two Bote children-- <i>Hema Bote</i> and <i>Buddha Bote</i> -- left in a lurch	<i>Palpa</i> District
12	June 27, 2018	Discussion program on the draft report on the ten-year implementation status of ILO Convention 1989 (169) related to indigenous nationalities	NHRCN
13	October 4, 2018	Discussion program on the draft report on the ten-year implementation status of ILO Convention 1989 (ILO Convention Number 169) related to indigenous nationalities	<i>Lalitpur</i> District

## International Human Rights Mechanisms

### 4.1 International Human Rights Mechanisms

United Nations is an effective multilateral body for the protection of the rights of indigenous nationalities. It works for the protection and promotion of overall human rights. Various mechanisms have been developed within this body. United Nations Human Rights Council, which was established much later, is also a mechanism within it. Other additional mechanisms have also been established within the Council in order to help it carry out its works effectively. Important among them include Universal Periodic Review, Advisory Committee and Complaint Procedures. An Experts' Mechanism has also been established regarding indigenous people. Similarly, separate treaty committees have been formed for each treaty/convention as a treaty bodies. Economic and Social Council has also established a permanent forum related to indigenous nationalities. Since details about it has been explained below, they are not elaborated further here. Thus, all bodies in the course of fulfilling their mandated tasks on human rights have also been working for the cause of human rights of indigenous nationalities in one way or the other. Important functions are as follows.

#### 4.1.1. Committee on Elimination of Racial Discrimination (CERD)

United Nations established Committee on the Elimination of Racial Discrimination in order to monitor

the implementation status of the convention on the elimination of all forms of racial discrimination. This is also called a treaty body. This is the first UN human right convention ratified by Nepal. It is the responsibility of Nepal to implement the convention after its ratification. Government of Nepal has been submitting a report on the implementation status of the convention before this Committee on periodic basis. Progress made on the issues of indigenous nationalities has also been provided in this report. After studying the 17th to 23rd reports submitted by Nepal, the Committee in its concluding observation in its 95th session on May 11, 2018 lauded Nepal's decision to ratify ILO Convention no. 169. However, recommendations have been made on various six points under number 23 of the concluding observation. These include identifying those not yet identified as indigenous nationalities and ensure that they are put in the national laws, ensuring their participation in state mechanisms as per Article 42 of the Constitution of Nepal, guaranteeing that the principle of FPIC is properly implemented, establishing all necessary mechanisms including legal mechanisms when there arises a situation that indigenous nationalities must be displaced from their permanent residence and providing appropriate compensation and security to make arrangement of alternative housing.

#### **4.1.2. The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)**

The Human Rights Council established this mechanism in 2007. This was established as a subsidiary mechanism through a resolution number 6/36. Its mandates have been revised through the resolution number 33/25 made in September 2016. There is a provision to keep seven experts



in this mechanism. The issue of gender equality is also taken into consideration in this body. Its annual meeting is held generally in July each year. As per the provisions made in the UNDRIP, its main mandate is to provide necessary assistance to the Council to protect, promote and fulfill human rights of indigenous nationalities and provide assistance to member states as per their request. This has so far conducted studies on the rights to education, rights to participation in decision-making process, role of language and culture in the promotion and protection of identity and access to justice of indigenous nationalities.<sup>83</sup>

#### **4.1.3. Special Rapporteur on the Rights of Indigenous Peoples (SRIP)**

The Office of the High Commissioner for Human Rights appointed Special Rapporteurs in 2001 according to the thematic special work procedure. Currently, Human Rights Council has been appointing these Special Rapporteurs. Mandates of Rapporteurs include studying effective methods and means to respond to obstacles seen in the effective and full protection of human rights of indigenous nationalities, identifying, exchanging and promoting best practices, taking first-hand information from the sources concerned about the so-called violations of human rights and fundamental freedoms and receiving complaints, making request for the same as necessary, exchanging information, and ensuring that human rights are not violated, recommending necessary measures for remedy in case of violation of human rights.

Special Rapporteur Prof. James Anaya had said that he was encouraged by the move of Nepal to ratify ILO

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<sup>83</sup> See <https://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx>

Convention no.169 and support to UNDRIP while presenting report after his visit to Nepal in the UN Human Rights Council. In this context, various recommendations including formulating new laws and amending existing ones by the government and concerned ministries, ensuring rights to self-determination in new structures, autonomous rule, rights to land and natural resources and rights to make self-determination on their own issues and formulating constitution and laws recognizing customs and customary laws of indigenous nationalities have been made.<sup>84</sup>

#### **4.1.4. United Nations Permanent Forum on Indigenous Issues (UNPFII)**

This forum is advisory body of Economic and Social Council. It has mandates to hold discussions on issues related to economic and social development, culture, environment, education, and human rights of indigenous nationalities. Among other things, this forum also has mandate to promote coordination of activities on issues related to indigenous nationalities across the UN system.

#### **4.1.5. UN Commission on the Status of Women**

In recent years, the UN Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) and UN Commission on the Status of the Women have been raising the issues of distinct identity of indigenous nationalities women and multiple and intersectional discrimination they have been facing. Violence against women and obstruction in quality education, health and their proportionate access in public services continue to exist. UN Commission on Status of Women on March

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*84 Human Rights Council twelfth Session A/HRC/12/34/Add 3 para*

23, 2018 has recommended government to protect and protect the rights of indigenous nationalities as stated in UNDRIP.<sup>85</sup>

#### **4.1.6. The Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW)**

This Committee is a mechanism to study implementation status of the UN Convention on Elimination of All Forms of Discrimination Against Women. A total of 23 independent experts from around the world are in the Committee. This Committee receives report from all countries that are party to this convention and makes study on those reports. In its concluding observation, after studying the country report, the Committee suggests various measures to eliminate discrimination against women and it also makes other general recommendations. This Committee in its 49th session has recommended developing structures necessary to increase access of children to education in all areas including urban and rural areas in line with the universal quality of education and giving special consideration to indigenous nationalities, *Dalits*, and deprived communities.<sup>86</sup>

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85 *The Commission on Status of Women, sixty-second session, Advance unedited version 23 March, 2018 p. 15-16 para.tt.*

86 *CEDAW/C/NPL/CO/4-5 Page 7 Para 28.a*

## Recommendations

It seems necessary on the part of the NHRCN to make following recommendations for the implementation of the human rights provisions mentioned in various human rights conventions Nepal is party to, ILO Convention no. 169, and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

### 5.1 Government of Nepal

- Guarantee independent and active participation of indigenous nationalities in the formulation of policies and laws related to indigenous nationalities.
- Formulate necessary laws and amend contradictory provisions in the existing laws since Nepal has already become party to ILO Convention no. 169, UNDRIP2007 and to make necessary arrangements for the implementation by federal, provincial and local level in uniform manner.
- Recommend developing appropriate structures and mechanisms to implement the provisions of Convention no. 169, UNDRIP and the principle of FPIC in order to guarantee protection of the rights of indigenous nationalities by adopting a process suitable to the culture of local community while formulating plans to carry out development works and develop physical infrastructures.
- Endorse the National Action Plan for the Implementation of the ILO Convention Number No 169 at the earliest and bring this into implementation.

- Develop appropriate structures in line with new federal structures, as District Coordination Committees established in 75 districts as per the Indigenous Nationalities District Coordination Committee (Organization and Operation) Work Procedure 2072 BS are not in line with new federal set up.
- Implement the concept of autonomous, protected and special zone as stipulated in the Article 56 of the Constitution of Nepal at the earliest.
- Formulate special programs for the preservation of language and culture of indigenous nationalities and endangered groups and implement them with meaningful participation of women and local community for their economic, social, cultural and educational development.
- Make a review of existing laws on land, forest and wildlife protection to ensure that they protect the rights of indigenous nationalities and make necessary arrangement to protect the rights of self-management and co-management of indigenous nationalities while establishing and operating wildlife reserve and hunting reserves.
- Make necessary arrangement to provide segregated data of all communities of indigenous nationalities including those endangered groups and those with disabilities when Central Bureau of Statistics conducts fresh national census.
- Formulate special laws for endangered groups, women and people with disabilities of indigenous nationalities to ensure their effective access to

government services.

- Make necessary arrangement to ensure that federal, provincial and local level government allocate gender-friendly budget proportionate to the population of indigenous nationalities.
- Conducting necessary investigation and research to identify and add the list of indigenous nationalities who are not included in the Schedule of the National Foundation for Upliftment of *Aadibasi/Janjati* Act, 2058 BS (2002 AD)
- Make appointments in constitutional organs and bodies on the basis of inclusive principle adopted in Article 283 of the Constitution of Nepal.

## **5.2 Civil Society**

Play positive role by providing necessary advice and suggestions to the Government of Nepal, NHRCN and other concerned agencies for effective implementation of the Convention no. 169 and UNDRIP 2007 for respect, protection and promotion of human rights of the indigenous nationalities.

## Schedule-1

### List of Indigenous Nationalities scheduled by National Foundation for Upliftment of Aadibasi/Janjati Act 2058 BS (2002 AD)

Serial No.	Names of Indigenous Nationalities	Serial No.	Names of indigenous nationalities
1	Kisan	2	Kumal
3	Kushbadiya	4	Kusunda
5	Gangaai	6	Gurung
7	Chepang	8	Chhantyal
9	Chairotan	10	Jirel
11	Jhangad	12	Dolpo
13	Tangwe	14	Tajpuriya
15	Tamang	16	Tin Gaunle/Thakali
17	Tapkegola	18	Thakali
19	Thami	20	Tharu
21	Thudam	22	Danuwar
23	Darai	24	Dura
25	Dhanuk (Rajbanshi)	26	Dhimal
27	Newar	28	Pahari
29	Phree	30	Bankariya
31	Baramo	32	Barhagaaunle
33	Bote	34	Bhujel
35	Majhi	36	Magar
37	Mugali	38	MapalarliThakali
39	Yakkha	40	Meche
41	Raute	42	Rai
43	Rajhi	44	Rajbanshi
45	Limbu	46	Larke
47	Lhopa	48	Lepcha
49	Walung	50	Lhomi(Shingsawa)
51	Sherpa	52	Byasi
53	Siyar	54	Satar(Santhal)
55	Surel	56	Sunwar
57	Hyolmo	58	Hayu

## Classification of scheduled indigenous nationalities

List of classification of indigenous nationalities of Nepal on the basis of official Human Development Index (Literacy rate, cemented home, land ownership, profession, language, population and status of education above bachelor's level or above) 2058 BS

*Endorsed by Federal Council on February 1, 2004*

### a) Endangered group

- |                |              |          |
|----------------|--------------|----------|
| 1) Kusunda     | 2) Bankariya | 3) Raute |
| 4) Surel       | 5) Hayu      | 6) Raji  |
| 7) Kisan       | 8) Lepcha    | 9) Meche |
| 10) Kushbadiya |              |          |

### b) Highly Marginalized Groups

- |                  |             |                      |
|------------------|-------------|----------------------|
| 1) Majhi         | 2) Siyar    | 3) Lhomi (Shingsawa) |
| 4) Thudam        | 5) Dhanuk   | 6) Chepang           |
| 7) Satar Santhal | 8) Thami    | 9) Jhangad           |
| 10) Bote         | 11) Danuwar | 12) Baramu           |

### c) Marginalized groups

- |               |               |              |
|---------------|---------------|--------------|
| 1) Sunuwar    | 2) Tharu      | 3) Tamang    |
| 4) Bhujel     | 5) Kumal      | 6) Rajbanshi |
| 7) Gangai     | 8) Dhimal     | 9) Bhoté     |
| 10) Darai     | 11) Tajpuriya | 12) Pahari   |
| 13) Tokpegola | 14) Dolpo     | 15) Phree    |
| 16) Mugal     | 17) Larke     | 18) Lhopa    |
| 19) Dura      | 20) Balung    |              |

### d) Deprived from any facilities

- |              |                 |                     |
|--------------|-----------------|---------------------|
| 1) Gurung    | 2) Magar        | 3) Rai              |
| 4) Limbu     | 5) Chhaintrotén | 6) Tabi             |
| 7) Tingaunle | 8) Barha Gaunle | 9) Marphali Thakali |
| 10) Sherpa   | 11) Yakkha      | 12) Chhantyal       |
| 13) Jirel    | 14) Byasi       | 15) Hyolmo          |

### e) Advanced group

- |          |            |
|----------|------------|
| 1) Newar | 2) Thakali |
|----------|------------|



## Schedule-2

### List of scheduled minorities published in Nepal Gazette for election purposes

1	Kalwar	128232	0.48	50	Thakali	13215	0.05
2	Kanoo	125184	0.47	51	Kori	12276	0.05
3	Kumal	121196	0.46	52	Chhantyal	11810	0.04
4	Gharti/Bhujel	117758	0.45	53	Hyalmo	10752	0.04
5	Hajam/Thakur	115242	0.44	54	Bote	10397	0.04
6	Rajbanshi	112946	0.43	55	Rajbhar	9542	0.04
7	Sherpa	109079	0.43	56	Bramhu/ Baramo	8140	0.03
8	Dhobi	104865	0.41	57	Panjabi/Shikh	7176	0.03
9	Tatma/Tatwa	101421	0.40	58	Nachhiring	7154	0.03
10	Lohar	100921	0.38	59	Yamphu	6933	0.03
11	Khatwe	93115	0.38	60	Gaina	6791	0.03
12	Sudhi	84115	0.35	61	Chamling	6668	0.03
13	Danuwar	83869	0.32	62	Aathpahariya	5977	0.02
14	Haluwai	83727	0.32	63	Jirel	5774	0.02
15	Majhi		0.32	64	Dura	5394	0.02

16	Barai	80597	0.30	65	Sarbariya	4906	0.02
17	Bin	75195	0.28	66	Meche	4867	0.02
18	Nuniya	70540	0.27	67	Bantawa	4604	0.02
19	Chepang/Raja	68399	0.26	68	Raji	4235	0.02
20	Sonar	64335	0.24	69	Dolpi	4107	0.02
21	Kamhar	62399	0.24	70	Halkhor	4003	0.02
22	Sunuwar	55712	0.21	71	Byasi/Souka	3895	0.01
23	Bantar/Sardar	55104	0.21	72	Amaat	3830	0.01
24	Kahar	55159	0.20	73	Thulung	3535	0.01
25	Satar/Santhal	51735	0.20	74	Lepcha	3445	0.01
26	Marwari	51443	0.19	75	Patharkatta/ Kushbadiya	3182	0.01
27	Kayastha	44304	0.17	76	Mewahangwala	3100	0.01
28	Rajput	41972	0.16	77	Bahing	3096	0.01
29	Badi	38603	0.15	78	Natuwa	3062	0.01
30	Jhangad/Dhadar	37424	0.14	79	Hayu	2925	0.01
31	Gangai	36988	0.14	80	Dhankar/ Dharikar	2681	0.01
32	Lodh	32837	0.12	81	Lhopa	2624	0.01

33	Badhai	28932	0.11	82	Munda	2350	0.01
34	Thami	28671	0.11	83	Dev	2147	0.01
35	Kulung	28613	0.11	84	Dhandi	1982	0.01
36	Bangali	26582	0.10	85	Kamar	1787	0.01
37	Gaderi/Bhediyatar	26375	0.10	86	Kisan	1739	0.01
38	Dhimal	26298	0.10	87	Sangpang	1681	0.01
39	Yakkha	24336	0.09	88	Koche	1635	0.01
40	Ghale	22881	0.09	89	Lhomi	1614	0.01
41	Tajpuriya	19213	0.07	90	Kharling	1571	0.01
42	Khawas	18513	0.07	91	Topkegola	1523	0.01
43	Darai	16789	0.06	92	Chidimar	1254	0.00
44	Mali	14995	0.06	93	Walung	1249	0.00
45	Dhuniya	14846	0.06	94	Lohorung	1153	0.00
46	Pahari	13615	0.05	95	Kalar	1077	0.00
47	Rajbodh	13422	0.05	96	Raute	618	0.00
48	Bhote	13397	0.05	97	Nurad	278	0.00
49	Dom	13268	0.05	98	Kusunda	273	0.00

### Schedule-3

Indigenous nationalities scheduled in the list of minority from among various indigenous nationalities groups

1) Kumal	2) Gharti/Bhujuel	3) Rajbanshi	4) Sherpa
5) Danuwar	6) Majhi	7) Chepang	8) Sunuwar
9) Satar/Santhyai	10) Jhangad	11) Gangai	12) Thami
13) Kulung	14) Dhimal	15) Yakkha	16) Ghale
17) Tajpuriya	18) Khawas	19) Darai	20) Pahari
21) Bhote	22) Thakali	23) Chhantyal	24) Hyolmo
25) Bote	26) Baramo	27) Nachhiring	28) Yamphu
29) Chamling	30) Aathpahariya	31) Jirel	32) Dura
33) Meche	34) Bantawa	35) Raji	36) Dolpo
37) ByasiSouka	38) Thulung	39) Lepcha	40) Patharkatta/Kushbadiya
41) Mewahang	42) Bahing	43) Haayu	44) Lhopa
45) Munda	46) Kisan	47) Sangpang	48) Koche
49) Lhomi	50) Khaling	51) Topkegola	52) Walung
53) Lohorong	54) Raute	55) Kusunda	56) Bin

## Schedule-4

### Bases of inclusion to be candidates of House of Representatives for closed list

S.No	Community to be represented	Percentage
1	Dalits	13.8
2	Indigenous nationalities	28.7
3	Khas/Aarya	31.2
4	Madhesi	15.3
5	Tharu	6.6
6	Muslim	4.4

## Schedule-5

### Representation of indigenous nationalities in cabinet

Representation of Indigenous Nationalities in Cabinet of Nepal				
<a href="https://www.opmcm.gov.np/cabinet">https://www.opmcm.gov.np/cabinet</a> , 4/12/2018 2:01:36 PM				
S. No.	Position	Total	Indigenous Nationalities	Percent
1	Right Hon. Prime Minister	1	0	0.00
2	Hon. Minister	18	5	27.78
3	State Ministers	4	2	50.00
	<b>Total</b>	<b>23</b>	<b>7</b>	<b>30.43</b>

## Schedule-6

### Indigenous nationalities as well as other community elected in the local level election

Result of Local Election Phase I and II						
Representation by Social Groups						
Position	Bahun/ Chhetri	Dalit	Janajati	Madheshi	Muslim	Grand Total
Gaun Palika Chair	210	2	167	18	4	401
Gaun Palika Vice-Chair	210	9	165	15	2	401
Nagar Palika Mayer	140	3	65	6	1	215
Nagar Palika Vice-Mayer	138	8	61	4	1	212
Ward Chair	2996	103	2186	191	61	5537
Dalit Women Member		5302				5302
Women Member	2852	83	2295	200	39	5469
Member	5200	533	4598	441	165	10937
<b>Grand Total</b>	<b>11746</b>	<b>6042</b>	<b>9538</b>	<b>875</b>	<b>273</b>	<b>28474</b>
<b>Percent</b>	<b>41.3</b>	<b>21.2</b>	<b>33.5</b>	<b>3.1</b>	<b>1.0</b>	<b>100</b>

## Schedule 7

### Representation of Indigenous Nationalities in Judiciary

Ethnic Composition of Justices of Supreme Court			
SN	Caste	No	%
1	Bahun Chhetri	14	73.68
2	Newar	3	15.79
3	Tamang	1	5.26
4	Madheshi	1	5.26
	Total	19	
Source: <a href="http://supremecourt.gov.np/web/justices">http://supremecourt.gov.np/web/justices</a> , 4/18/2018 10:22:07 AM			

<b>Ethnic Composition of Judges of High Court</b>			
SN	Caste	No	%
1	Bahun Chhetri	114	78.62
2	Dalit	3	2.07
3	Gurung	2	1.38
4	Magar	1	0.69
5	Newar	10	6.90
6	Rai	1	0.69
7	Tharu	2	1.38
8	Madheshi	8	5.52
9	Muslim	4	2.76
	Total	145	

*Source: Judicial Council Bulletin, May 17, 2017. Volume 14 Issue Number 14*

<b>Ethnic Composition of District Judges</b>			
SN	Caste	No	%
1	Bahun Chhetri	182	91.00
2	Limbu	2	1.00
3	Gurung	1	0.50
4	Magar	1	0.50
5	Newar	8	4.00
6	Rai	2	1.00
7	Madheshi	3	1.50
8	Muslim	1	0.50
	Total	200	

*Source: Judicial Council Bulletin, May 17, 2017. Volume 14 Issue Number 14*

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Interaction Program on Human Rights Situation of IPs.



NHRC Team During Monitoring



NHRC Team During Monitoring



Hon'ble Member Mohna Ansari - During Monitoring



NHRC Team During Monitoring



NHRC Team During Monitoring