

# CONSTITUTIONAL POLITICS AND INDIGENOUS PEOPLES IN NEPAL

**Briefing from a monitoring visit to assess IWGIA's support to promoting and  
defending indigenous peoples' rights in the new constitution and beyond**



*Public meeting in connection with a series of conferences held on indigenous peoples' rights in the new constitution,  
Dharan, Eastern Nepal, January 2012*

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## Briefing from a monitoring visit to assess IWGIA's support to promoting and defending indigenous peoples' rights in the new constitution and beyond

Prepared by Christina Nilsson and Sille Stidsen

### 1. Introduction

Indigenous peoples in Nepal, known as *adivasi janajati*, have for centuries experienced systematic discrimination and marginalisation both socially, culturally, politically and economically. The chance to right the historical wrongs came when Nepal embarked upon a constitution drafting and state restructuring process in 2008.

Indigenous peoples engaged in this process right from the beginning and IWGIA<sup>2</sup> has supported these efforts, mainly through support to the Lawyers' Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP) directly and the Indigenous Mega Front indirectly. The support to LAHURNIP was initiated in 2008 and focused on securing indigenous peoples' rights in the new constitution. Since 2013, support has also been provided to LAHURNIP's work with concrete cases of human rights violations committed against indigenous peoples in Nepal.

From 18 to 27 March 2014, a monitoring visit was jointly carried out by IWGIA and an external consultant with the objective of:

- Analysing the project context, but also the political situation more broadly, particularly the situation relating to the constitution drafting process
- Assessing the international community's position on and support to indigenous peoples' rights
- Assessing the project support provided to LAHURNIP
- Getting a solid foundation for future engagement with LAHURNIP and other partners in Nepal

During the visit, the team met with a wide range of stakeholders, including indigenous organisations, activists, intellectuals and supporters, as well as current and former Constituent Assembly members, diplomatic missions, the National Human Rights Commission, the ILO and experts on indigenous issues (see Annex 1)

Apart from meetings in Kathmandu, the team undertook a field visit to Sindhuli to meet with representatives of the Khimti-Dhalkebar Transmission Line Struggle Committee and to Biratnagar to meet with communities who successfully opposed the implementation of a waste management project on their land.

This briefing has been prepared in response to an interest expressed by several of the international actors the team met with, and its aim is to share our assessment of the situation facing indigenous peoples, particularly in relation to the constitution drafting process, but also more broadly.

### 2. Indigenous peoples and the current political situation

#### A new constitution within a year?

The Constitutional Assembly was just about to take its first steps to become operational when the team behind this report visited Nepal in late March 2014. It is mandated to adopt a new Constitution within a year. This ambitious work programme responds to a certain fatigue and general lack of enthusiasm around the whole Constitution-drafting project that is the result of the already long drawn-out process and the failure of the 2008-2012 Constitutional Assembly to deliver what was expected, namely a new Constitution for the country.

The foreign delegations we met with spoke as in one voice, saying that the Constitution had to be adopted within the one-year term. Their argument was that the country needs development, and a prolonged Constitution-drafting process would leave the country in a limbo, unattractive to investors who could otherwise help generate economic development.

Most other people we talked to doubted that the Constitution would be delivered within the one-year timeframe. Some were already frustrated at the prospect of seeing yet another deadline pass without the process being finalized, others were more worried about what would happen *if* a new Constitution was eventually adopted within what they considered a short time. These people argued that if that was to happen, the process was unlikely to be inclusive, and the Constitution thus just as unlikely to represent much else than the status quo. Which again would be unacceptable to large numbers of the country's marginalized peoples, who had expected the historical State-restructuring process to address the structural problems of current-day Nepal. In this scenario, the risks of a renewed upsurge of armed protests would be looming on the horizon, as many pointed out.

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<sup>2</sup> IWGIA is an international organisation dedicated to promoting and defending indigenous peoples' rights ([www.iwgia.org](http://www.iwgia.org))

## Indigenous peoples in Nepal and their political demands

Indigenous peoples constitute at least 40% of the population in Nepal. They gained official recognition by the State with the 1990 Constitution, and the 2002 National Foundation of Indigenous Nationalities Act (the NFDIN Act) provided a list of 59 indigenous communities in the country, which has been widely used for identifying who Nepal's indigenous peoples are.<sup>3</sup> The indigenous movement in the country is relatively young, but even so, their issues and demands are at the heart of the current historical restructuring of the State, and the political debates surrounding it.

Prior to the transition to multiparty democracy in 1990, those who attempted to promote janajati concerns were accused of being 'divisive' and 'anti-national'.<sup>4</sup> But with the new democratic freedoms that were obtained with the 1990 Constitution, Nepal saw an upsurge of ethnic organizations. Ethnic political demands such as linguistic rights, reform of discriminatory provisions such as those related to the declaration of Nepal as a Hindu kingdom, equitable representation in State institutions, collective access to natural resources, self-determination, etc., became part of the political landscape in the country.<sup>5</sup>

From 1996-2006 a Maoist insurgency turned the political landscape in Nepal upside-down. Their struggle against the feudal state structure that built on and kept reinforcing the dominance of a high-caste minority over the highly diverse majority population gained significant support and power in a short period of time. Their demands for some sort of restructuring of the Nepali state, addressing the fundamental exclusion of indigenous (janajati) communities and other excluded groups, became undeniable – at least in public discourse. But as Bennett and Parajuli conclude in the introduction to a 2013 publication on social exclusion in Nepal, moving from an 18<sup>th</sup>-century feudal state to a 21<sup>st</sup>-century secular democracy has been a slow and troublesome process, 'punctured time and again by overt and covert resistance from different interest groups among the ruling elite'.<sup>6</sup> The adoption in 2007 of the ILO Convention on Indigenous and Tribal Peoples Rights – and subsequent slow progress around implementation of its provisions, illustrates this well.

3 This list is contested, and has been criticized for excluding many groups. In response to this, the government formed a task force mandated to review and update the list in 2009. The task force submitted its final report in February 2010, proposing recognition of 81 distinct janajati nationalities. The new list has, however, never been adopted by the Government. According to NEFIN, the janajati proportion of the total population in Nepal is more than 50%.

4 Bennet, Sijapati and Thapa: *Gender and Social Exclusion in Nepal. Update*. Himal Books, 2013. P. 77.

5 See e.g. David N. Gellner, *Democracy in Nepal: Four Models*, Seminar Issue No. 576 (August 2007) (available at: <http://www.uni-bielefeld.de/midea/pdf/darticle3.pdf>), and Lynn Bennet, Bandita Sijapati and Deepak Thapa: *Gender and Social Exclusion in Nepal. Update*. Himal Books, 2013.

6 Lynn Bennett and Dilip Parajuli, 2013: *The Multidimensional Exclusion Index. Making Smaller Social Groups Visible and Providing a Baseline for Tracking Results on Social Inclusion*, p. 6. Himal Books, 2013.

## Social exclusion and structural inequality

Deep-rooted structural inequality and exclusion of large parts of the Nepali population from significant participation in the country's political life, as well as from positions in public and private institutions, is widely recognized as the root-cause of the Maoist insurgency.

A number of recent studies have documented these social and political disparities, and Bennet and Parajuli's thorough analysis of the 2001 census' data on income, health and nutrition, education, and access to influence, clearly shows that the centuries-old hierarchy in the population persists: a small elite consisting primarily of high caste Hindus (Brahmin-Chhettris) continues to dominate the country's political life, just like they are better off economically, as well as education and health-wise. The picture is not simple, as a few janajati groups with a long history of stronger socio-economic and political status than the rest of the country's janajati groups, are actually among the 'highly included' (most importantly the Thakalis and Newars).

The general picture does, however, confirm indigenous organizations' and activists' claims about exclusion and the need to address the underlying structural disparities, as the majority of the janajati groups are categorized as either 'excluded' or 'highly excluded' in the study. Furthermore, it is politically important that the groups identified as either 'excluded' or 'highly excluded' in the Multidimensional Exclusion Index largely correspond with the indigenous movement's own classification of the different levels of development / marginalization characterizing the 59 recognized indigenous groups, namely 1) endangered, 2) highly marginalized, 3) marginalized, 4) disadvantaged, and 5) advanced.<sup>7</sup>

The 2001 census' statistical figures on education illustrate the situation well:

73% of those who had a Bachelor's degree in 2001 were High-caste Hindus, as compared to only 22% belonging to janajati groups – the majority (14 of the 22%) being Newars. Within the janajati groups, only 2.3% of the non-Newar Hill janajatis had a bachelor's degree, and for the Terai janajatis the figure is even lower at 1.1% (the national average being 3.4%). Not surprisingly, this inequality is reflected in the state-bureaucracy, in that only 3.5% of the civil service officers in 2008 belonged to non-Newar janajati groups.<sup>8</sup>

This marginalization, which the janajati or indigenous peoples in the country share with the Dalits and 'other backward castes', can be traced back to the very foundation of the Nepali state. The first national legal code (the *Muluki Ain* of 1854) legitimized a small group of the population's rule over the highly diverse majority, codifying a rigid social system into law, while at the same time sanctioning it religiously as the Hindu caste system. The *Muluki Ain* thus legitimized Brahmin-Chhettri (high caste) rule over the other groups of the country, including a vast number of indigenous peoples, who were ranked lower in the

7 NEFIN 2004, quoted in Lynn Bennet, Bandita Sijapati and Deepak Thapa: *Gender and Social Exclusion in Nepal. Update*. Himal Books, 2013, p. 79.

8 *Ibid.*, p. 84.

Hindu caste hierarchy. The distinct cultures, spiritual traditions, and systems of social organization and governance of the indigenous peoples were not recognized by the Nepali state, and even though subsequent constitutional reforms have formally eliminated most of the state-supported caste-based discrimination, the hierarchy persists till this day, and Nepal's highly diverse population is very far from having equal opportunities.<sup>9</sup>

## Constitutional reform and restructuring of the state

Restructuring of the Nepali State in recognition of its ethnic and cultural diversity is a key issue in the 2006 Comprehensive Peace Agreement that ended the 10-years Maoist insurgency. This immense task was embarked upon by the Constitutional Assembly, which was elected by popular vote in 2008, and mandated to 'form a federal republic to eliminate the "centralized and unitary form of the state" and end discrimination based on "class, caste, language, sex, culture, religion and region."<sup>10</sup>

This framework for the post-conflict state reform process, that was designed to build the foundation for lasting peace, resonates well with indigenous peoples' demands for recognition of their diverse cultures, languages, religions, and social and political systems. Another key demand of the indigenous movement that was well addressed by the 2008 Interim Constitution's provisions for the Constitutional Assembly was the inclusive measures adopted to secure proportional representation of the country's highly diverse population: The first Constitutional Assembly, that served from 2008 to May 2012, was thus the most inclusive ever seen in Nepal, and this in itself represented a huge step forward and imbued a sense of historical change for janajatis and other minorities and their allies. For the first time, they were fairly represented (in numerical terms) at the very centre of power of the State. Of the first Constitutional Assembly's 601 members, 218 were indigenous, equalling 37%. This is quite close to the 59 recognized groups' 40% share of the national population.<sup>11</sup>

The task before them was to contribute to historical transformations of the centuries old discriminatory state-structure that had lost legitimacy with the past decade's wide-spread violence, and the broad popular movement for peace, known as *Jana Andolan II*, that preceded the 2006 Peace Agreement. But while indigenous peoples' influence on the design of the state-restructuring process had been quite successful, the actual work in the first Constitutional Assembly proved to be more challenging. The 218 indigenous representatives were elected via the electoral party system, and thus accountable to their political parties rather than to their communities. And even though all the major political parties, except the *Rastriya Prajatantra*

Party (RPP), supported the federalization of the state in their public discourse (e.g. in their election manifestos), voicing the underlying concerns and demands proved difficult for the indigenous CA members.

In order to maximize their influence under these difficult circumstances, some indigenous CA members decided to cooperate across party lines, and established an Indigenous Peoples' Caucus in late 2008. With technical assistance from, amongst others, LAHURNIP, the Caucus was used as a platform for analysing how the international human rights framework could be used to promote the recognition of indigenous peoples' rights to culture, language, religion, natural resources, etc., as well as their right to self-determination and to meaningful participation in political processes, in the constitution of the 'new Nepal'. The caucus cooperated closely with external national and international experts, and the fact that Nepal had ratified the legally binding ILO Convention No. 169 on Indigenous and Tribal Peoples' Rights in 2007 provided an inspiring framework and a solid foundation for these claims.

Over the course of the first CA's term, the Indigenous Caucus managed to sensitize a large number of indigenous CA members on the potential for applying the international human rights framework to promote the rights of indigenous peoples in Nepal – with the result that the voicing of these issues in the constitutional debates became stronger and stronger. Most importantly, indigenous peoples took a strong stand in the federalism debate, and demanded that the new federal structure should be identity-based.

When the last extension of the first CA's mandate came to an end in May 2012, consensus had been built around an estimated 80 percent of the constitutional text. The question of how exactly to carve out the structure of a new federal Nepal was debated fiercely, and even though the majority of the 601 CA members were in favour of the 10-state federal model proposed by the State Restructuring Commission as a compromise between the 14-state model and the more conservative parties' proposals of 6 or 8 State-structures, it was not adopted.<sup>12</sup> Voting never took place before the CA's term expired, and the historical, highly inclusive, and first-ever democratically-elected Constitutional Assembly in Nepal was thus dissolved, without having been able to promulgate a new constitution. Apparently, the overt resistance in the political parties towards bringing about fundamental changes that would significantly alter the centuries-old concentration of power and resources in the hands of a small national elite halted the process. If they had been willing to call for a vote, the Constitution could have been adopted.

9 Ibid., p. 5-6. See also Harka Gurung's paper *Social inclusion and nation-building in Nepal*, paper presented at the Civil Society Forum Workshop for the Research Programme on Social Inclusion and Nation Building in Nepal, organised by the Social Inclusion Research Fund.

10 Interim Constitution 2008, quoted from Cats-Barril (forthcoming): *Federalism in Nepal*. SPCBN, Draft April 2014, P. 1.

11 Cats-Barril 2013, p. 4. (ILO)

12 The State Restructuring and Power Redistribution Committee that was originally mandated to develop a proposal for the new constitution's provisions on federalism came up with a 14-state model that caused widespread debate. Subsequently a State Restructuring Commission was formed, mandated to review the proposal put forth by the State Restructuring Commission.

## Constitutional Assembly 2: Shrinking space for promoting indigenous peoples' concerns

At the time of this team's visit to Nepal, the Second Constitutional Assembly (CA2), elected in November 2013, was about to start working. The composition of the CA2 is significantly different from that of the first. The Maoists have lost their absolute majority and are now only the third largest party, after the Nepali Congress and the UML. And with only approximately half the number of seats of the second largest party, the UML. Most of the observers the team talked to explain this significant change in the composition of the CA as a consequence of people's frustration with the Maoists' lack of ability to use their majority in the first CA to deliver real changes. The parties who are now back in power are considered conservative and less willing to bring about real change that would increase the structural equality in the country.

Against this backdrop, indigenous activists are concerned about the possibilities of promoting their rights in the new constitution, even more so because the number of indigenous representatives in the new CA has fallen drastically, from 218 in the former CA to 183 in the current CA.<sup>13</sup> And reportedly, a lot of those who did get elected had been under pressure prior to their nomination as party candidates, to make written commitments to abstain from promoting indigenous peoples' issues in the CA2.

The Draft Rules of Procedure of the Second Constitutional Assembly were presented to the public during our visit in late March 2014. The Rules of Procedure has neither provision for establishing an indigenous peoples' caucus within the CA nor a mechanism for having consultations with indigenous peoples. This reinforces indigenous peoples' worries about how the space available for them to promote their views in the constitution-making process is shrinking.

Another contentious issue for indigenous peoples is the 'party whip system', under which individual CA members were obliged to strictly follow their party line and not raise any issues of their own during the constitutional debate of the first CA. When the Draft Rules of Procedure for the second CA were first discussed, it seemed that the party whip system would be upheld – but after pressure from the Maoists, it was later scrapped. Still, the fact that the NC-UML alliance aimed at upholding it, signals a hard stand against dissenting voices and it is expected that they whip system will be indirectly upheld.

During the team's discussions with past and present CA members, with indigenous organizations, and academics working on indigenous issues in Nepal, we heard a common worry about the post-CA2 political scenario in Nepal if a Constitution that fails to tackle the power-sharing and multiple identity-issues in a way that satisfies the country's large numbers of janajatis, Dalits and other excluded groups is adopted. Many warned that such a move might potentially lead to renewed violent conflict.<sup>14</sup>

<sup>13</sup> <http://www.ekantipur.com/np/2070/9/25/full-story/382135.html>

<sup>14</sup> A worry that seems to be shared by a broader group of civil society activ-

## Indigenous peoples' right to participate freely, and through their own representative institutions, in the constitution-drafting process

When the electoral system of the first Constitutional Assembly was designed, indigenous peoples active in the discussions supported the idea of securing their communities' inclusion in the CA through a proportional election system.<sup>15</sup> The proportional election system that was ultimately adopted, and secured a historically high number of indigenous members in the political body that the CA was, obliged political parties to ensure that all population groups in the country were represented on their lists of election candidates in such a way that the overall composition of the country's population was represented proportionally.

However, during the course of the first CA became increasingly clear to indigenous activists and to the indigenous CA members themselves that proportional representation through political parties was not enough to secure indigenous peoples adequate and meaningful participation in the constitution-drafting process. The restrictions on indigenous CA members posed by the political parties they represented hindered their ability to participate freely in the process, and they experienced time and again that their inputs in the process were silenced or deliberately sidelined. Indigenous lawyers raised this point towards both the national judicial system (Supreme Court case in early 2009),<sup>16</sup> and through international mechanisms such as the CERD Committee and the UN Special Rapporteur on the Rights of Indigenous Peoples.<sup>17</sup> They argued that the CA process violated international human rights law, namely:

- ILO Convention No. 169's provision on the government's obligation to "establish means by which [indigenous peoples] can freely participate at all levels of decision making in elective institutions" (art. 6(1)(a))
- The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)'s provision on the right to "participate in the ongoing Constitution making process through their own representatives, freely chosen by themselves in accordance with their own procedures"<sup>18</sup>

The Supreme Court immediately issued a 'show cause order' to the Government of Nepal upon receiving the writ petition, requiring the Government to explain the steps to be taken to

ists and gain increasing articulation, see e.g. República, May 22, 2014: *Numerical strength in CA alone can't ensure legitimacy of new statute*. Available at: [http://www.myrepublica.com/portal/index.php?action=news\\_details&news\\_id=75308](http://www.myrepublica.com/portal/index.php?action=news_details&news_id=75308)

<sup>15</sup> The demand for a proportional election system was part of the 20-point agreement between NEFIN and the Government of Nepal reached in August 2007.

<sup>16</sup> The case was filed by LAHURNIP on behalf of 20 indigenous peoples' organizations.

<sup>17</sup> The UN Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, visited Nepal in 2008 and subsequently published a report on his observations and recommendations to the government of Nepal (A/HRC/12/34/Add.3)

<sup>18</sup> See Cats-Baril (2013), p. 36.

ensure proper representation, and the CERD Committee and the UN Special Rapporteur both came out with official communication confirming that internationally recognized rights were violated, and that the government should take special measures to ensure meaningful participation of indigenous peoples in the constitutional process.<sup>19</sup>

In April 2013, prior to the CA2 election, the Supreme Court finally issued a directive order to amend a series of laws and regulations to allow for direct representation of indigenous peoples in the constitution-making process, in accordance with their own customary practices. The ruling was not complied with.<sup>20</sup>

Nevertheless, the ruling as well as the previous national and international response to LAHURNIP's complaints clearly shows that indigenous peoples' demand to participate meaningfully in the constitution-drafting process is legitimate, and well aligned with international human rights law. The importance of this becomes even more pertinent if we also consider the fact that the Constitution-drafting process was started precisely as a means to overcome the deep-rooted exclusion, inequality and discrimination that so strongly characterized previous systems of governance and state administration in Nepal.

## Elections for local government bodies

There is a strong push for holding elections to the local government structure that has remained in a democratic deficit since the first term of the Village Development Committees and District Development Committees expired in 2002, and elections were given up because of the armed conflict. The Nepali Congress-UML coalition has announced their intention to push through with local-level elections very soon – and seem to get support for this from the international community.

Many of the actors we talked to worried that holding local elections before the new constitution is adopted, would not only derail the constitution drafting process, but also perpetuate the current centralized administrative structure and power relations in the country. The hope is that a new federal structure would re-define the power-relations and the set-up and mandate of future local government bodies.

<sup>19</sup> See Cats-Baril (2013), p. 37-39.

<sup>20</sup> The ruling mentioned the Constituent Assembly Member Election Law, 2064, Constituent Assembly Member Election Regulation, 2064, and Constituent Assembly Regulation, 2065 (IWGIA: The Indigenous World 2014, p. 331). Since the ruling was not complied with, the hope of making the CA2 more inclusive now rests with the nomination of candidates for the remaining 26 CA seats reserved for ethnic and indigenous groups who fail to be represented as a result of the elections, in line with the 20 Point Agreement signed by NEFIN and the Government of Nepal in August 2007. In May 2014, the Supreme Court issued a mandamus order to the Government to appoint the remaining 26 lawmakers in the CA in line with Article 63 (3) (C) of the Interim Constitution, which requires the representation of indigenous groups in the CA who are not represented through elections.

## The federalism debate

Most of the foreign missions visited in Kathmandu were eager to discuss the viability of identity-based federalism. After all, the final hurdle that the CA1 did not manage to resolve was consensus building around which federal structure to adopt. And the debates were heated and accompanied by street violence.

Indigenous intellectuals and activists are deeply frustrated about seeing the issue of identity-based federalism being questioned as the way forward for Nepal. They argue that the national media has played a huge role in projecting ethnicity or identity-based federalism as a carrier of divisiveness and disintegration of the Nepali state - and point out that all the major national newspapers are owned and run by the old elite. They want the sceptics to remember and acknowledge that

- The 'conservative parties' that were voted back in power in the November 2013 elections received their votes from a population that was deeply frustrated by the CA1 not delivering what the Maoists, who held the absolute majority, had committed themselves to.
- The election manifestos of the Nepali Congress and the UML parties who now have the majority in the CA both carried explicit continued commitments to developing a federal State structure on the basis of identity and viability.<sup>21</sup>
- The commitment to restructuring of the State into a new federal structure was a key pillar in all the agreements that formed the road map for Peace-building in Nepal after ten years of armed insurgency, namely the Comprehensive Peace Agreement of 2006, the Interim Constitution of 2008 – and the 20-point Agreement between NEFIN and the Government of Nepal in August 2007.

## 3. Decreased international support to indigenous peoples

In our dialogues with embassies and international organizations in Kathmandu the team heard few examples of current direct cooperation with indigenous peoples' organizations. The indigenous organizations met with talked about how support from the international community has decreased significantly, and they also sensed a backtracking when it comes to political dialogue.

The implications of this changed climate of international support can best be understood if we look back just a few years, and recall how firm the international commitment to address social exclusion and support the transition towards a more inclusive State and society was in the early years of Peace-building and state-restructuring. The joint commitment is clearly formulated in the Basic Operating Guidelines for development work in Nepal signed by a number of development organisations, including the EU, Danida, SDC, DFID and the Embassy of Finland, which

<sup>21</sup> See also Cats-Baril, Federalism Memo, February 2014 (Draft).

were updated and reaffirmed by the signatories in 2007, saying that international aid will 'ensure that our assistance tackles discrimination and social exclusion, most notably based on gender, ethnicity, caste and religion'.<sup>22</sup> This commitment to social inclusion and eradication of discriminatory practices was reflected in a number of donor-funded initiatives in post-war Nepal, including the Norwegian-funded Social Inclusion Research Fund, the World Bank and DFID-funded research into gender- and ethnicity-based exclusion,<sup>23</sup> the large DFID-cooperation with NEFIN, the Danish and Norwegian support to ILO's promotion of Convention No. 169 in the early years after its ratification, etc. The Asian Development Bank acknowledged the necessity of challenging social exclusion too in its strategy for cooperation with Nepal during the first years of transition between war and peace, and explicitly recognized it as a means of generating stability in the country.<sup>24</sup>

The ILO has a particularly strong mandate with regard to promoting indigenous peoples' rights in Nepal, given that Nepal is a signatory to ILO Convention No. 169 - the only internationally binding treaty on indigenous peoples' rights. In our talk with staff at the ILO office in Kathmandu, they strongly regretted the international community's backtracking from previous years' commitment to promoting the rights of indigenous peoples as an important contribution to peace-building in the country, and pointed out that indigenous peoples need international support again for their legitimate demands.

In our discussions with diplomatic missions in Kathmandu the team did not get any explanations for the drying up of funding and support for indigenous peoples that went beyond 'change of priorities' arguments. Some observers talked specifically about DFID's withdrawal of funding for NEFIN's large Janajati Empowerment project in May 2011, in response to NEFIN's continued involvement in organizing street protests and national close-downs (*bandhas*). Many saw this as a turning point that changed the international community's willingness to cooperate with and stand behind indigenous organizations.

Indigenous organizations themselves felt that the decreased donor interest in supporting their activities had also severely limited their access to dialogues with the international community. This happened at a time when their demands for constitutional recognition of their identities were meeting increased opposition, and the debates around the future federal structure of the country were getting heated.<sup>25</sup>

22 The 2007 update of the guidelines also contains an annex on the application of ILO Convention No 169 in Nepal, acknowledging its importance: <http://www.un.org.np/thematicareas/bogs>

23 The first Gender and Social Exclusion Assessment (GSEA) was published under the title *Unequal Citizens: Gender, Caste and Ethnic Exclusion in Nepal* in 2006, funded by DFID and World Bank.

24 Asian Development Bank, Country Strategy and Program: 2005-2009 Nepal, ADB DEVELOPMENT EXPERIENCE: COUNTRY PARTNERSHIP STRATEGY (2009), <http://www.adb.org/documents/nepal-country-strategy-and-program-2005-2009>, p. 7 and p. 18-19.

25 Indigenous peoples' assertion of their rights had become quite strong during the early years of the Constitutional process, and ILO Convention No. 169 was widely quoted. So much so, that some Bahun-Chhettri groups started claiming indigenous status too. The claim finds no resonance whatsoever in the Convention, but is interesting because it says a lot about the

Indigenous peoples' rights were recognized in the early phases of Peace-building through inclusion of marginalized groups' representatives in the Constituent Assembly, and the abolition of the monarchy that had so strongly institutionalized Hinduism as a state-sanctioned religion (thus oppressing indigenous peoples' religious freedom to pursue their own religious practices).<sup>26</sup> But with the politics around translating these rights into specific provisions in a new Constitution becoming increasingly complicated, indigenous activists' frustration has grown. On some occasions, this has caused a few indigenous activists to express themselves publicly in pretty strong and harsh phrases about the relationship between janajatis and the politically dominant Bahun-Chhettris – expanding the distance between the indigenous movement and potential international allies even further.

## 4. Current trends and priorities in indigenous organisations

All the indigenous organisations whom the team met with briefed us about their current priorities and ongoing work, and even though there are differences in the focus areas and exact activities of each organization, a number of common themes emerged during these discussions:

- Project funding to indigenous organisations is decreasing, and the government's control is increasing (more on this below).
- While indigenous organisations each have their specific work focus (women's rights, legal defence, socio-economic development, etc.), all the organizations and individuals the team met with had a strong discourse on the need to promote indigenous peoples' rights. NEFIN, the national umbrella organisation for Nepalese indigenous peoples' organisations, takes the lead when it comes to representing indigenous peoples in the national political debate, and LAHURNIP takes a lead when it comes to defending indigenous peoples in specific cases of violations of their rights. That being said, there is a high level of cooperation around joint protest movements between the indigenous organisations that have a presence in Kathmandu when specific cases of violations of indigenous peoples' rights occur (e.g. in the non-promotion of a police woman, allegedly because of her caste and gender).
- Quite a few national-level indigenous organisations have cooperated around the CA process, both in terms of supporting the IP Caucus, and also as co-petitioners

insecurities around how much the old elite would lose in a re-structured Nepal, and how desperate some segments of the population were to do whatever it took to access expected privileges in the new Structure.

26 Until the abolition of monarchy in 2008 Nepal was the only Hindu kingdom of the world. The King was considered an incarnation of the Hindu God Vishnu, and held a powerful position of combined political and ritual power sanctioned by Hindu mythology.

/ signatories in LAHURNIP's legal work for promoting indigenous peoples' right to direct representation in the CA.

- Indigenous organisations replicate mainstream society's male-dominated power structure: Women do not get the same opportunities as men, and all the indigenous women we met with shared experiences of specific instances of women being side-lined while men got the influential positions within the indigenous organisations. Indigenous women's response to this is to maintain separate spaces in the form of indigenous women's organizations for addressing issues particular to indigenous women. In connection with the CA, some of these indigenous women activists had successfully cooperated with the Nepalese mainstream women's movement, and gotten their issues included in a joint submission to the CA.

As mentioned above, indigenous activists feel particularly challenged by mainstream media's coverage of their struggles. They find that they are generally presented in the (high-caste dominated) media as troublemakers who are opposed to development, and demand too much. Counter-balancing this image is obviously an uphill battle. In this context, it is an interesting development that indigenous media and communication work in a broader sense seems to be taking a stronger hold these years, with the Federation of Nepalese Indigenous Journalists (FONIJ) and The Indigenous Film Archive at the forefront. During our short visit in Nepal, a national newspaper carried an article that covered some of the ongoing indigenous people's struggles against infrastructure development on their lands, written by an indigenous freelance journalist – a welcome example of an emerging more nuanced debate on indigenous rights issues in Nepal.<sup>27</sup>

### Increased government control with indigenous organisations

Some of the indigenous organisations the team met with talked about increasing government control of their work, implemented in the form of bureaucratic hurdles. The team was told that a more rigorous implementation of the Social Welfare Act means that the requirement for getting permission to receive foreign support is strictly implemented and that mandatory renewal of registration on an annual basis is needed.

This generates worries in indigenous organizations, as these procedures come on top of the already decreased willingness of donors to support their work. And the growing bureaucratic hurdles must be seen in the context of the past years' critical debate about foreign funding for civil society movements in Nepal – a concern that has been rising as the political process

has become more complicated, and the space for advocacy is shrinking.<sup>28</sup>

## 5. Current violations of indigenous peoples' rights on the ground

The fact that indigenous peoples experience severe marginalisation and discrimination also makes them highly vulnerable, and particularly exposed to human rights violations. The team was briefed about a number of current or recent cases that LAHURNIP deals with through their legal assistance programme, and the spectrum is broad:

- Rape and killing of indigenous domestic workers
- Religious persecution (e.g. cow slaughter cases)
- Loss of resource rights in connection with expansion of national parks' buffer zones
- Lack of consultation in connection with planning of major infrastructure projects on indigenous lands (hydro power, drinking water, electricity)

Indigenous peoples generally have poor access to justice, due to a multitude of factors such as limited knowledge about the legal system, pressure from influential people / lack of connections to the political elite, poverty, and not least a weakly functioning legal system that let perpetrators of violations against the marginalized enjoy de facto impunity.

Of particular concern is the way in which larger development projects are being carried out. After the peace agreement was signed, a large number of large-scale development projects have been initiated, including road construction, hydropower plants, and high-power transmission lines. Very often these projects are being planned or implemented without properly informing and consulting with the people who will be affected by the projects.<sup>29</sup> When local communities become aware of the plans, and demand to be consulted and compensated for any losses they may face, they are being portrayed as being against development. In the public debate it is generally forgotten, or ignored, that the government repeatedly fails to comply with its obligation to ensure proper consultation with indigenous peoples prior to commencing the projects on their territories. This was brought up strongly in our dialogues with both the National Human Rights Commission and the ILO.

The following case handled by LAHURNIP illustrates the

28 See e.g. a reference to this in the monthly update from April 2014 from the UN Resident Coordinator's Office in Nepal: "During acrimonious debate surrounding passage of the legislation, the UCPN-M particularly singled out one of its most outspoken critics, a political activist, columnist and media-owner, alleging in parliament that he was using donor funds to "derail the peace process". No specific evidence was produced and the allegation was staunchly denied. However, this episode renewed ongoing debate on the vexed issue of international funding for civil society in Nepal, as well as external finance in the media." Available at: [http://www.un.org.np/sites/default/files/Nepal\\_Monthly\\_Update\\_2014-April.pdf](http://www.un.org.np/sites/default/files/Nepal_Monthly_Update_2014-April.pdf)

29 See article in República 21 March 2014: [http://theweek.myrepublica.com/details.php?news\\_id=71337](http://theweek.myrepublica.com/details.php?news_id=71337)

27 Indigenous Peoples are for National Pride Projects, by Dev Kumar Sunuwar, published in República, [http://theweek.myrepublica.com/details.php?news\\_id=71337](http://theweek.myrepublica.com/details.php?news_id=71337)

need for a legal framework in Nepal, which adequately addresses indigenous peoples' right to consultation and participation. The case also illustrates how failure to involve indigenous communities early on in development planning processes result in confrontation and delays. Finally, it draws attention to international safeguard mechanisms, and donors' responsibility to demand that these standards (and the donors' own policies) are adhered to and respected when the Government is funded to implement large-scale development projects.

### **The Khimti-Dhalkebar High-Power Transmission Line<sup>30</sup>**

In 2002, the World Bank-funded Nepal Power Development Project commenced with the Nepal Electricity Authority (NEA) building Nepal's highest capacity electricity transmission line, a 220 kV line extending 75 kilometres between Khimti and Dhalkebar substations.

The project has faced numerous setbacks with the affected residents of Sindhuli District being angered by a lack of project information and consultation about the impacts of the high-capacity power line, disregard for the rights of affected indigenous communities, and inadequate compensation for land acquired for the power line's right of way. People have not received clear information about what activities are permitted under and near the power lines, but are concerned that their agriculture-based livelihoods will be curtailed. Furthermore, commercial banks are refusing to mortgage any land under the right of way. Residents have requested that the NEA and World Bank consider alternatives that would divert the power line away from inhabited areas, particularly homes, schools, and heavily travelled roads, as recommended under the Bank's own environmental, health, and safety guidelines.

In February 2013, the villagers filed a petition to the Supreme Court, and in July to the World Bank's accountability mechanism, the Inspection Panel. In October the Inspection Panel recommended a full investigation of the project. However, it first allowed the World Bank at least six months to implement an action plan that Bank management and the NEA had developed to remedy problems, including information dissemination, consultation, updated resettlement, and action plans and compensation for vulnerable peoples – all elements that should have been in place from the outset.

Affected communities have been protesting the project, not allowing NEA staff to enter the region and commence work, demanding that information be disseminated and consultations be conducted first. Issues came to a head in late January 2014, when an unannounced NEA team escorted by heavily armed security forces entered an affected community. This is the same site where security forces had brutally beaten women protesters in 2012 when they attempted to prevent an NEA team from conducting survey work, leaving two women hospitalised. Despite

ongoing intimidation and death threats from local and district officials, the same officials who are responsible for distributing information about the project, affected communities continue their protests, most recently holding a multiday sit-in in after security forces entered the communities. World Bank officials have yet to provide communities with a commitment that security forces will not be used during project implementation.

## **6. Conclusion and recommendations**

Nepal has yet again entered a crucial historical phase with the second Constitutional Assembly's ambitious commitment to deliver a new constitution before the end of January 2015. Over the course of this year, the foundation for lasting peace needs to be built, through adoption of a new Constitution that spells out clear provisions for social inclusion and power-sharing, as stipulated in the Interim Constitution. If this does not materialize, the country is at serious risk of entering a new era of conflict and unrest. This concern has been expressed not only by indigenous peoples, but is increasingly voiced by other civil society actors too.

Indigenous peoples have engaged actively in the Constitution drafting process and managed to mobilise themselves to an extent which made their key demand – a federal structure based on identity – a central issue. It is clear, however, that those sections of society who are benefitting from the status quo have been successful in portraying indigenous demands as a way of splitting up the country and fuelling ethnic conflict. This is notwithstanding the fact that it was broadly recognized in the years prior to and after the peace process that issues of social exclusion and political marginalization were the root causes of the Maoist insurgency – and that these very issues needed to be dealt with through a fundamental shift away from the centralized state-structure towards a new model of power-sharing that would be inclusive towards all those who have been excluded for too long.

In our dialogue with international actors in Kathmandu we were encouraged by the eagerness to discuss the indigenous movement's position on the federalism debate and other constitutional issues (religious rights, linguistic rights, etc). We also got the impression that direct dialogue between indigenous activists and diplomatic missions is quite limited, probably as a consequence of the drying out of previous years' project cooperation. If there is no project partnership and international organizations and delegations are staffed mainly by non-indigenous persons, information and communication does not flow naturally, and indigenous organizations' access to the foreign delegations becomes more limited.

The Supreme Court as well as international human rights mechanisms have recognized the legitimacy of indigenous peoples' key demand in the Constitution drafting process, namely the right to participate in the process through their own representative institutions. However, neither the Supreme Court orders nor the recommendations from the CERD Committee or the Special Rapporteur on the Rights of

<sup>30</sup> The case is described in more detail here: <http://www.brettonwoodsproject.org/2014/03/disempowered-development/>

Indigenous Peoples have been complied with by the government. At the same time, the federalism debate is blurred, and marked by strong elite interests in keeping the status quo. There is therefore a need for providing indigenous peoples the space and opportunity to clearly explain and demystify their demands.

### **Recommendations to international actors in Nepal:**

- Support public dialogue initiatives on the constitutional process outside of the CA – this is more important than ever now that many significant voices are no longer present inside the CA
- Invite representatives of indigenous organisations to smaller face-to-face dialogue meetings during the course of the Constitution drafting process to discuss the advancement of indigenous peoples' rights in the new Constitution
- Emphasise the importance of reflecting the Interim Constitutions' provisions on social inclusion and power-sharing in the new Constitution in dialogues with the Government of Nepal
- Resume providing direct support to initiatives and programmes carried out by indigenous organisations
- Support the development of more plural, less elite controlled media
- Maintain a dialogue with the Government of Nepal on compliance with international human rights standards when financing development projects that affect indigenous peoples

# ANNEX 1: LIST OF MEETINGS

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## Indigenous organisations

- Lawyers' Association for Human Rights of Nepalese Indigenous Peoples (LAHURNIP)
- Nepal Federation of Indigenous Nationalities (NEFIN)
- National Indigenous Women Federation (NIWF)
- Indigenous Women Legal Awareness Group (INWOLAG)
- National Indigenous Women Forum
- Indigenous Mega Front
- NGO Fonin

## Former and present CA members

- Viswendra Paswan, Dalit Janajati Party
- Gopal Dahit, Tharuhat Terai Party
- Bhanu Ram Tharu, Tharuhat Terai Party
- Bijaya Subba, Federal Socialist Party
- M.S. Thapa, Rastriya Janamukti Party
- Suresh Ale Magar, CPN-Maoist
- Buddha Ratna Manandhar, Nepa Rastriya Party
- Shanti Jirel, CPN-UML
- Kumar Rai, Social Democratic Party
- Dal Kumari Sunuwar, Rastriya Prajatantra Party
- Ang Dawa Sherpa, CPN-Maoist
- Sitaram Tharu, Tharuhat Terai Party

## Diplomatic missions

- Danish Embassy
- EU Delegation
- Norwegian Embassy
- Embassy of Finland
- Swiss Agency for Development and Cooperation

## Other actors

- The National Human Rights Commission
- The National Foundation for Development of Indigenous Nationalities (NFDIN)
- International Labour Organization (ILO)
- CARE Nepal
- Amanda Cats-Baril, lawyer and consultant specializing in indigenous peoples' rights
- Dr. Mukta Lama Tamang, Anthropologist, Tribhuvan University
- Ekraj Chaudhary, Prachin Srijansil and Radio Gurbaba, Bardiya
- Representatives of Khimti-Dhalkebar Transmission Line Struggle Committee, Sindhuli
- Village representatives in Dangraha, Biratnagar