

Major Challenges for Implementing ILO Convention 169 in Nepal

Paper Presented in a Three Day Seminar “Should States Ratify Human Rights Conventions”? Organized by the Center of Advanced Studies, Oslo, Norway

August 18-20, 2009

- Om Gurung, Ph. D.

On 13 September 2007 Nepal voted for the adoption of UN Declaration on the Rights of Indigenous Peoples in the 61st General Assembly of the United Nations. The next day, on 14 September, 2007, the government of Nepal ratified the ILO Convention 169. The main motivation of the ratification of the Convention was political. As we all know, April movement of 2006 gave three major tasks to the government; abolition of monarchy and establishment of democratic republic, election of constituent assembly and building peace in the country. But the continued street agitation of indigenous peoples even after April movement with their uncompromising demands of ethnic autonomy, proportional representation in the constituent assembly on the basis of ethnic population and ratification of ILO Convention 169 and adoption of UNDRIP disrupted the political environment and disturbed the government to fulfill their given tasks. In order to fulfill these tasks by pacifying the agitating groups, the government of Nepal signed a 20 point agreement with indigenous peoples on August 22, 2007. Adoption of UNDRIP and ratification of ILO Convention 169 was among many other important points of the agreement.

The UNDRIP and ILO Convention 169 are internationally recognized legal instruments that guarantee the human rights and fundamental freedoms of indigenous peoples. They are complementary to each other and therefore they need to be implemented in reference to each other. In addition to these two instruments, the government of Nepal has also signed many other international human rights conventions. But the government of Nepal has less than satisfactory track record of implementing these conventions. Because of the ILO Convention 169's distinct approach to recognize IPs status as a partner of implementation, indigenous peoples of Nepal are in a legitimate position to provide support as well as create strong pressure to government for its implementation. As a result, the government of Nepal has just finished drafting the National Action Plan on the Implementation of ILO Convention 169 and submitted it to the Ministry for Local Development which in turn will submit it to the Cabinet for final approval to implement. But even after the final approval of the cabinet, there are a number of challenges that constrain an effective implementation of the Convention. Some of the major challenges are:

1. Dominance of Hindu High Caste' or '*Bahunbaad*': Dominance of Hindu High Caste' or '*Bahunbaad*' as the state ideology and practices which imposes its supremacy over Nepal's diversities on a systematic and institutional basis is one

- of major roadblocks for an effective implementation of Human Rights Conventions. An effective implementation of ILO Convention 169 would require an amendment and/or revision of existing laws that contradict various provisions of ILO Convention 169. In many cases, it also demands to promulgate of new laws. But the state government overwhelmingly dominated by so-called high caste Hindu groups is not ready to change the existing laws so easily. By the peoples' movement of 2006, the regime has changed, but the rulers have remained more or less the same. They come from the same caste, same class, same region and same sex with same feudal mentality who are not only reluctant to implement the conventions but also resist against change. So how to remove the legacy of feudal mind-set of the dominant caste groups for change is a major challenge.
2. Rights to self-determination and ethnic autonomy: Because indigenous peoples of Nepal do not have deep trust to the government for sharing power and implementing international human rights conventions, they demand for their own rule through the transformation of state structure. They demand that the state should be restructured into federal system that recognizes and ensures ethnic and caste equality, linguistic and cultural rights and historical territories of the indigenous peoples with rights to self-determination. Indigenous peoples of Nepal want this to be inscribed in the new constitution. But the restructure of federal state that recognizes ethnicity, language and historical territories ensuring rights to self determination has become a contentious issue in Nepal. The traditional political elites from the so called dominant Hindu high caste communities fear that state restructuring along the line of federalism that recognizes ethnicity, language and geographical territories and rights to self-determination would secede the country, threaten the national integration and break communal harmony. Such conservative notion of the traditional political elites has misled the Nepali peoples. Without ensuring rights of the indigenous peoples who consist of 37.2% of the total population (as per national census report of 2001), democracy in Nepal will simply remain a mirage. So how do we respond to this elite resistance and address this issue in a more convincing and practical way is a serious questions in present day Nepal as the so-called high caste Hindu rulers do not want to share state resources (both political and economic) among various communities and regions.
 3. ILO Convention 169 is concerned more with the rights of indigenous peoples over their traditional lands, forests, water and other natural resources. Because indigenous peoples claim their rights over the land and natural resources, these have become contested issue in Nepal as many other non-indigenous settlers also have settled in the same geo-ecological regions and have used the natural resources for their livelihood. This creates a lot of resource sharing problems with potential of conflict among various indigenous as well as non-indigenous communities. So the question is that how to ensure the rights of the indigenous peoples over their natural resources effectively and what would be appropriate and legitimate mechanisms to solve these problems and resolve the conflict?

4. Lack of Adequate Resources and Effective Mechanism: UN and other international agencies which promote these conventions do not have special funds nor do they have any effective mechanism to supervise and monitor the implementation of these conventions. ILO can only provide technical support, but it does not have its own resources. ILO depends upon other donor agencies for financial resources. Dependency naturally limits efficiency and effectiveness. There are also many donor countries and Norway is one of the major donor countries for the development of Nepal. Two of the mega projects, for example, Khimti Hydroelectric Project and Melamchi Drinking Water Supply Project – have been supported by Norway and other donors. Both projects have affected the life of indigenous Tamang, Majhi, Yolmo and many other communities who inhabit the project areas. Norway has already ratified ILO Convention 169 and has supported Nepal for its implementation. But has Norway ever encouraged the government of Nepal to comply the provisions of ILO Convention 169 while implementing the development projects that affect indigenous peoples of Nepal? UNDP and other donors including DFID, DANIDA, WORLD BANK, ADB have also significant influence in the business of Nepali government and its functionaries. They do have their own policies regarding indigenous peoples. They all can play amicable role to convince the government to comply its commitment towards international human rights instruments including Convention 169 in order to carryout sustainable development and peace. But I do not think that they are so inclusive in practice and have seriously involved indigenous peoples in consultation, participation and benefit sharing of the natural resources and development projects. This raises another resinous question about how to make UN and other international agencies including donor countries community sensitive to the IP rights so that they play politically meaningful role to implement the Conventions.
5. Cunning of Ratification: At present context, the ratification of ILO Convention 169 reflects the paradoxical situation of what Povinelli writes Cunning of Recognition (Povinelli 2002). The government of Nepal has ratified the convention as a strategy to pacify the movement of indigenous peoples who have been demanding for their social, cultural, economic and political rights and agitating in the street. Instead of implementing the ILO convention 169 and fulfilling its commitment, the government of Nepal is now deliberately trying to misinterpret the convention as a source of conflict. Instead of taking the convention as a way for deepening democracy by protecting human rights of indigenous peoples to be equal, the government of Nepal is misinterpreting the convention as a special right of indigenous peoples which will deprive non-indigenous groups' rights. Instead of taking the convention as a tool for national unity by promoting social inclusion, the government of Nepal is misinterpreting the convention as a tool for promotion of ethnic conflict. Instead of taking the convention as a tool for enabling decentralization and autonomy through federalism for New Nepal, the government of Nepal is misinterpreting the convention as an instrument for going back to history and secession. The

researchers supported by the donor also have very similar misunderstanding and misinterpretation of the Convention. For example, the Norwegian researcher commissioned by the Embassy has the same type of misunderstanding and misinterpretation of ILO convention 169 in Nepal. The researcher has overlooked the critical role that the Convention can play to resolve the conflict of diverse groups (e. g. in Guatemala 37 year long conflict was settled through the mediation of ILO Convention 169). Reading this report is rather worrisome - the way the researcher presented the topic from his short field study (see NIBR research report of 2009). This way of tendency and thinking by the dominant Hindu caste groups and misinterpretation by dominant researchers are some of the stumbling blocks for possible steps to implement the conventions effectively in Nepal.

The other side of the coin is that indigenous peoples of Nepal have taken an adoption of UNDRIP and ratification of ILO Convention 169 as an international legal instruments for their participation, consultation, free and prior informed consent, and benefit sharing. They claim their rights over their ancestral and traditional lands and natural resources, their equal share to state resources and easy access to opportunities, their effective and politically meaningful participation in the decision making processes and their equal representation in the national politics and special provisions for education, health and public services.

6. Generating and transforming political will into work for bureaucracy is another visible challenge that have been creating hurdle for effective implementation of the Convention No. 169. As the political will is not in place, the fuddy-duddy bureaucracy is reluctant to duly implement the international commitment the government has ratified. The civil servants who are responsible for implementation often prioritize their personal benefit and benefit to their own kin and clans rather depriving other citizens such as indigenous peoples. Lingering the process, watering down the spirit of the Convention, inadequate resourcing for indigenous peoples program have become fate of the program. Moreover, fear of losing power that the so called high caste Hindu elites have been exercising since the conquest of the Nepal in 1769 A. D. that colonized indigenous peoples and by co-optation of indigenous leaders in ethnic wings of political parties are another level of constraints to the implementation of the Convention 169.
7. Further, No mechanism is in place that specifically deals with the implementation of C. 169. The National Foundation for the Development of Indigenous Nationalities (NFDIN) which is a semi-governmental organization to deal with IPs development affairs is not given mandate to look after the implementation of the Convention and rights of IPs. Nor is there adequate budget provided to NFDIN. The allocated annual budget is barely sufficient to run its office than implementing its programs.

8. Role of Mainstream Media: The role of mainstream media is not supportive to indigenous peoples' issues. More than 90% of the mainstream media is dominated by the so called Hindu high caste groups which often puts indigenous peoples' issues in shadow and provoke that 'indigenous rights' are discriminatory and disintegrative for "the national unity".
9. Non-Support from the mainstream 'Civil Society': In theory, civil society is supposed to be pro-human rights, but in Nepal- civil society which is controlled by the ruling social groups also actively denounce indigenous rights in many ways. With the exception of a few countable civil societies including indigenous peoples' civil societies, almost all civil societies have not been advocating for an implementation ILO Convention 169 in Nepal. They never advocate that the convention can be a practical framework of development in a country like Nepal which is culturally diverse and which is still engulfed by various forms of conflict.