

Between Demos and Ethnos: The Nepal Constitution and Indigenous Rights

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Abstract

This article examines the contested reception of the Convention concerning Indigenous and Tribal Peoples in Independent Countries (“ILO Convention 169”) in Nepal, particularly in the context of current constitutional reform and post-conflict economic development. Compelling evidence suggests that exclusionary political institutions, laws and structures have been the major cause of exclusion in contemporary Nepal. While Nepal is home to a range of different ethnic, language, religious and caste-based groups, the Adivasi Janajati (around 37 per cent of the population) consider themselves indigenous peoples. With such a sizeable minority, Nepal was the first and so far only Asian country to ratify the ILO Indigenous and Tribal Peoples Convention 169, which has considerable significance in a context of state restructuring and the accommodation of indigenous rights. The form of recognition of indigenous rights in the constitutional drafting process has created much heat, particularly over questions of autonomy and federalism, control over natural resources and land and quotas for political representation, but with less light concerning political consensus. The ILO Convention 169 has figured prominently in this process with various interpretations by different actors. Reconciling international meanings of this treaty with national interpretations used for political purposes in Nepal foregrounds a paradox existing between liberalism (in the form of rights and freedoms) and equality (democracy). Through a range of disciplinary methods, this article analyses the background to indigenous demands, the political and legal contestation over the interpretation of ILO 169 and the specific case of natural resources.

Keywords

Nepal; constitution; indigenous rights; ILO Convention 169; politics

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1. Introduction

Since 2006, Nepal's political transformation has often been qualified with adjectives such as "profound" and "remarkable".¹ Most recently, it has become common place to describe Nepal as at a political "cross-road", encountering not one but several social and political transitions. The complexity of transition is underscored by some observers who highlight how diverse indigenous groups, women and marginalised regions demands have precipitated due to the "genie of social inclusion" that "came out of the bottle after 1996, when the CPN (Maoist) initiated its armed insurgency".² The Comprehensive Peace Agreement (CPA) in 2006 therefore marked a fundamental shift from an emphasis upon state reforming to that of state restructuring to accommodate the excluded.³

The crowning embodiment of demands for inclusion and restructuring has been the drafting of a new constitution following a period of lengthy political transition. The drafting process overlaps with a period of significant change in the post-2006 political landscape characterised by a shift from demands related to social inclusion to those emphasising ethnic and regional autonomy. Proposals are emerging for the Constitution that imply redrawing state jurisdictions and creating regional administrations within a federal system that aims to accommodate the country's immense ethnic diversity.⁴ It is not uncommon for societies diverse in group identities to walk a tight rope between accommodating and actions that exacerbate group differences.⁵ The federal system proposals are contested as to whether they can underpin a sustainable peace and reconciliation. The erosion of political consensus amongst political parties appears to be a major obstacle to finalising a constitutional arrangement.

In 2007, following its ratification, the Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169) has become integral to recognising and promoting indigenous nationalities in this broader framework of state transformation and democratisation of Nepal. Contested interpretations over its import for constitutional design now show up significant political fault lines.

¹ See OHCHR, *Report of the United Nations High Commissioner for Human rights on the human rights situation and the activities of her office, including technical cooperation in Nepal* (U.N. Doc. A/HRC/10/53, 2009).

² K. B. Bhattachan, 'Discourse on Social Exclusion and Inclusion in Nepal', in SIRF (ed.), *Identity and Society: Social Exclusion and Inclusion in Nepal* (Mandala Book Point, Kathmandu 2009).

³ *Ibid.*

⁴ See P. Sharma, N. Khanal and S. Tharu, *Towards a Federal Nepal: An Assessment of Proposed Models* (Himal Books, Lalitpur, 2009).

⁵ See N. Butenshon and A. Føllesdal, 'Minority and group rights to accommodate difference: approaches and applications', 13 *International Journal on Minority and Group Rights* (2007) p. 131 and S. Choudhry (ed.), *Constitutional Design for Divided Societies. Integration or Accommodation?* (Oxford University Press, Oxford, 2008).

This article aims to chart the reception of the ILO Convention 169 in Nepal, particularly in the fragile context of constitutional reform and post-conflict economic development. The spotlight is especially placed on the relationship between disputes over legal interpretation and the pace and practicalities of treaty implementation.

This article begins by reviewing the background to indigenous demands (section 2), examines the contestation over the interpretation of ILO 169 and the recognition of indigenous socio-economic and political rights (section 3) and provides an in-depth case study on one flashpoint, control over natural resources (section 4). The methodology draws from a series of interviews with key stakeholders, materials from the constitutional drafting process and international legal methods.

2. Background to Indigenous Demands: From Social Exclusion to the “Genie of Group Rights”

This section briefly highlights some of the underlying structural reasons for social and political mobilisation of indigenous rights in Nepal. An influential heuristic lens for viewing conflict in Nepal concerns “social exclusion”. Battarchan provides a comprehensive overview, as do others,⁶ in capturing the multi-dimensional nature of discrimination and disadvantage encountered by Nepal’s indigenous groups.⁷ Taking a sweeping historical view reveals, for example, that the foundations for exclusion were laid following the Gorkali invasion in 19th century. From this point, the process of Nepalese state formation became increasingly synonymous with Hinduism and the creation of a Hindu state and monarchy. The policies and laws of the new state were cast within Hinduism. One manifestation was the award of the high level positions in the state to the “high castes” (Bahun, Chhetri and Thakuri), which continues to resonate in contemporary Nepal. Lawoti, for example, cites compelling evidence that exclusionary political institutions and structures have been the major cause of the marginalisation of approximately 85 per cent of the population.⁸ This is manifested in exclusion from Parliament, cabinet, administration and judiciary, amongst other structures. The judiciary, for example, is still heavily disproportionately biased towards high caste representation.⁹

⁶ E.g., M. Lawoti (ed.), *Towards a Democratic Nepal: Inclusive Political Institutions for a Multicultural Society* (Sage, Los Angeles, 2005)

⁷ Bhattachan, *supra* note 2.

⁸ Lawoti, *supra* note 6.

⁹ In the Supreme Court, Bahun Chhetri has 85 per cent representation whilst only 28 per cent of the population, and the indigenous representation is even lower in the District Courts (if the Newar group are not counted), *see* in S. Limbu, *Summary of a Comparative Study of the Prevailing*

The corner stone for Hindu domination was the *Muluki Ain* (National Legal Code of 1854), described as conforming to the principle of ethnic purity, intensely hierarchical and patriarchal enforcing the “hinduisation” of indigenous groups.¹⁰ Historically embedded patterns of exclusion remain in contemporary Nepal’s laws and policies. Until recently, there were over 25 discriminatory laws in the previous Constitution and 40 legal provisions in common laws having direct consequence for indigenous marriage and criminal punishments, amongst other aspects.¹¹ Neither customary law nor indigenous land rights were given recognition and place name changes all reflect bias towards Hinduism. Indigenous cultures, identities and livelihoods have been downgraded and subordinate to “high castes” dictate. Human rights violations related to this unequal system, for indigenous peoples and beyond, have been identified as the drivers of conflict and high levels of structural inequalities and discrimination.¹²

Another powerful dynamic concerns the high “democratic deficit” in Nepal. Decision-making processes, have been historically narrowly based, exclusive and non-transparent, a trend that continues today in Nepal.¹³ State (over-)centralisation and lack of horizontal accountability from oversight bodies are particular deficits. One manifestation is executive domination, which tends to heighten the political stakes in capturing it. In the era of democracy, political contest has been characterised as highly volatile, with a large turnover in political office and increasingly violent struggles for deepening democratisation. These multi-level dynamics explain why the previous war of insurgency in Nepal cannot be distilled down to one single cause. Certainly, caste and ethnicity were not necessarily the determining factors. The deep well of anger at the embedded social and economic inequalities,¹⁴ the increasing role of a free media in making more visible the poor governance decisions at the centre, and, not least, a rapidly increasing population, with school leavers unable to enter employment, all contributed to the popular uprising. But because the pace and scope of mobilisation was as fast as it was broad is also testimony to the ability of Maoist ideology to tap into these deep frustrations. The significance for indigenous rights is that mobilisation for the latter are inseparable from broader struggles over democratisation in Nepal.

During the decade long war of insurrection the Maoists consistent objective was to end the feudal system and abolish the monarchy. Indeed, at least since 1974 the Maoists have been articulating some of these demands in direct

Laws Concerning Indigenous Nationalities in Nepal and ILO Convention No. 169 on Indigenous and Tribal Peoples (LAHURNIP, Kathmandu, 2009).

¹⁰ *Ibid.*

¹¹ Lawoti, *supra* note 6.

¹² They also linked this strongly to impunity, see OHCHR, *supra* note 1.

¹³ J. Whelpton, *A History of Nepal* (Cambridge University Press, Cambridge, 2005).

¹⁴ A. Karki and B. Bhattarai (ed.), *Whose War, Economic and Socio-Cultural Impacts of Nepal’s Maoist-Government Conflict* (NGO Federation of Nepal, Kathmandu, 2003) p. xiii.

association with indigenous peoples (henceforth, “IP”) demands. From 1990, with the end of the *Panchayat* system¹⁵ and the beginnings of state recognition of ethnic and cultural diversity, new found democratic spaces were increasingly used by IPs to articulate a specifically ethnic agenda. Ethnic associations began to form and there were increasingly vocal demands for the creation of an *ad hoc* committee to move to create a permanent structure to voice the concerns of *Janajati* to government. The Maoists increasingly added IP struggles to their class analysis of systemic exclusion in Nepal. By 1996, a Charter of 40 points of demands was raised by the Maoist movement. At least five of these were related to specific ethnic demands: “ethnic autonomy”, “end ethnic oppression”, “equality of languages”, “secular state”, and “regional devolution”.¹⁶

In 1997 a Maoist Politburo meeting decided on the right to self-determination for ethnic organisations. At this stage, land and resource rights, however, were not included. Gurung suggests that while many areas of convergence exist between the Maoist agenda and IPs this does not mean any virtual conjunction existed.¹⁷ By February 2001, there was an emphasis given to ethnic and regional fronts as the organisational basis of the New People’s Government. In 2003, all Maoist demands concerning mother tongue education, demands in some local areas regarding working language, were not met by government. Most radical of all was the call for ethnic autonomy. By 2003, Maoists declared the Magyar region autonomous. This demand for ethnic autonomy appears to be the default mode amongst IP groups, with even the Nepal Foundation for Development of Indigenous Nationalities (NFDIN) – which considers itself as a state-aligned bridge between government and IPs – taking this position. However, there is fierce debate concerning the extent of the autonomy, and how it will take place within the existing state framework.¹⁸ More recently, following the Comprehensive Peace Agreement in 2006, and the popular uprising known as Janandolan II, IP demands were finally given real bite for a number of reasons.

First, the IP groups had launched a two day *bandh* (civil protest) in June 2007 with demands for proportional representation and self determination, which ratcheted up the political stakes. Significantly, Maoists sat in the interim government and were pressured to respond to these demands. One early concession was to enact the Civil Service Act concerning reservation. Second, indigenous communities had been agitating and mobilising around a 20 point list of demands. Agreement was reached between the largest IP organisation, Nepal Federation of

¹⁵ System of rule introduced by the King prior in an era where multi-party democracy was illegal.

¹⁶ P. Sharma, in H. Gurung, ‘Social Exclusion and Maoist Insurgency’ (National Dialogue Conference on ILO Convention 169 on Indigenous and Tribal Peoples 2005).

¹⁷ *Ibid.*

¹⁸ Sharma, *et al. supra* note 4.

Indigenous Nationalities (NEFIN) and the government after ten rounds of talks. Key aspects included, for example, guarantees on proportional representation of IPs in political parties, and at least, for all 59 indigenous groups in the Constitutional Assembly (CA); local language use in local bodies; and a State Restructuring Commission to look at federalism. Of particular relevance for the article is two additional points:

- Arrangements will be made to immediately pass the proposal to ratify and adopt ILO Convention 169.
- Appropriate steps will be immediately taken to complete the necessary legal process for adopting the UN Declaration on the Rights of Indigenous Peoples.¹⁹

These demands were accepted, and with backing from the Maoists, culminated in the ratification of ILO Convention 169 by Parliament on 22 August 2007. A major milestone in the struggle for IP rights had finally been reached. But how would it be implemented?

3. ILO Convention 169 in Nepal

ILO Convention 169 is a wide ranging convention adopted by member states in Geneva in 1989 and intended to respect, protect and promote the rights of IPs.²⁰ Implicit to it are a number of core principles. First is the understanding that IP rights are best protected by their participation at all levels of decision-making (Article 6). Second, is the principle of exercising control over development (Article 7). This control concerns consultation in design or consideration of any plans that will have potential impact on these communities. But, perhaps more radically, enabling transfer of ownership and management of natural resources, land and services, such as education and health, to these communities is a specific objective (stated across several of the articles). When these principles are also underpinned by an additional emphasis upon “self-determination”, recognised in the UN Declaration, a number of complex legal and political implications are not difficult to envisage. Many of the implications inherent to ILO 169 suggest it

¹⁹ See ‘Agreement between Government and Janajati’, <www.nefin.org.np/nefin/20-point-agreement>, accessed 19 November 2008. Formally, the Declaration cannot be adopted like a treaty but it is certainly possible for the government to agree to implement the obligations contained in the Declaration, particularly as it is structured like a treaty.

²⁰ For an overview and background, see L. Swepston, ‘A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989’, 15 *Oklahoma City University Law Review* (1990) p. 677.

may be one reason why there are such a low number of states to ratify it (currently 21 worldwide) although there are competing explanations.²¹

At the same time, the Convention possesses characteristics beyond a possible challenge to sovereignty and status quo political arrangements. It has been noted that ILO 169's "flexibility and the enduring problems of interpretation"²² poses fundamental problems for political and legal implementation. The upshot of the flexibility, intended as it was to accommodate a range of very diverse country situations, is that the obligations of ratifying governments may be watered down or even obscured.²³ The Convention's flexibility, or strategic ambiguity, is obviously intended to deal with diverse country situations and attract ratifications. Indeed, one way of reading the treaty is to see that it provides space for governments to choose policies situated between minimalist and maximalist positions, with states carrying a greater burden of justification for policies that tend towards the anaemic end of the spectrum. However the text entails a lack of clarity on special indigenous land and self-determination rights and a system of management.²⁴ Land rights remain the central problem of ILO 169 and IP rights to natural resources are inextricably tied to the rights to lands and territories.²⁵ Politicisation precedes any actual consensus on laws and rights. Thus, it is not clear whether the ILO Convention advances that consensus or rather situates pre-existing claims and counter-claims.

²¹) As of August 2010, 21 states have ratified the Convention, 15 of which are in Latin America, 3 in Europe, 1 in Oceania (Fiji), 1 in Africa (Central African Republic) and 1 in Asia, Nepal itself. See <www.ilo.org/global/Themes/Equality_and_Discrimination/Indigenousandtribalpeoples/lang-en/index.htm>, accessed August 2010. Low levels of ratification in Asia and Africa are also explainable due to disagreements over whether there are indigenous peoples, a debate that is partly changing: see F. Viljoen, 'Reflections on the legal protection of indigenous peoples' rights in Africa', in S. Dersso (ed.), *Perspectives on the rights of minorities and indigenous peoples in Africa* (Pretoria University Law Press, Pretoria, 2010) p. 75 and K. Ahmed, 'Defining "Indigenous" in Bangladesh: International Law in Domestic Context', 17 *International Journal on Minority and Group Rights* (2010) p. 47. Moreover, amongst those countries with a long history of the recognition of indigenous peoples, a majority have ratified. One should also note that ILO Conventions generally have poorer levels of ratification in comparison to international human rights treaties.

²²) T. Joona, 'The Political Recognition and Ratification of ILO Convention No. 169 in Finland, with some comparison to Sweden and Norway', 23 *Nordic Journal of Human Rights* (2005) p. 305, at p. 306.

²³) *Ibid.*, p. 311.

²⁴) Joona, *ibid.*, notes, for example, how in her review of 169 in three Nordic countries (Norway, Finland and Sweden) political interpretation and establishment of new political bodies pre-existed any resolution of the basic legal questions and rights. See also J. Henriksen, *The Finnmark Act (Norway), A Case Study* (ILO, Geneva, 2008).

²⁵) R. Devasish and J. Henriksen, 'Inclusion of Indigenous Peoples' Rights in the New Constitution of Nepal', 2010, p. 12, <www.ilo.org/wcmsp5/groups/public/—ed_norm/—normes/documents/publication/wcms_123847.pdf>, accessed August 2010.

3.1. *Implementation and Interpretation in Nepal*

This is not to say that any of the provisions are insurmountable but rather require clarification, deliberation and negotiation. Understanding the possibilities for ILO 169 outside of both the political and legal processes impacting it would reflect a serious limitation of analysis. With the 2008 Constituent Assembly elections, for example, given the poor record of political parties in tackling social exclusion and specific IP grievances, it is not surprising that the Maoists won high levels of support. With political will and commitment, a pre-requisite for implementation of ILO 169, to what extent would the post-election context offer an enabling environment for this?

According to the ILO time-frame, following ratification a year is given to prepare to enter it into force. This is then followed by another year within which to report on progress in implementation. The Nepal state report should have been completed in 2009 but remains delayed at the time of writing. A process has been put in place, however, that surrounds both Nepal's draft National Action Plan on Convention 169 and the progress report.²⁶ The Plan's original draft was very detailed in range of ILO related policy and legal measures. The Plan flags up, for example, "marginalisation", "structural and policy constraints" and the need for "affirmative action" with several areas spelt out where Nepalese policies and legislation should align with ILO 169.

However, the ILO Office in Nepal mentioned that one of the stumbling blocks to the government's acceptance of the Plan concerned the time and target bound measures on issues such as transfer of land and water resources to IP communities. In the current version these targets have been omitted. Furthermore, the obvious need to finalise the issues of the Constitution and commensurate jurisdictional responsibilities are also reasons cited for the delay.²⁷ Other practical issues identified were the lack of political will of some of the parties; turn over in staff of ministries; lack of knowledge on 169; and lack of data.²⁸ Obstacles relate also to the different interpretations of ILO 169 that speak to the core issues of political transition in Nepal and how interpretations are inflected around political agendas. Thus, there is currently a clear disconnect between the high level political commitments to the ILO Convention and UN Declaration and the extent to which these commitments are being concretised and filtered down through the bureaucracy and political elite.

²⁶ The Task Force has involved 23 representatives from line ministries: Mukta (2009) [Full reference to be added] and Interview with Dr. C. Subba, lead author of progress report on ILO 169 Nepal, 03/03/2010. Although the Task Force on 169 agreed the draft National Plan, this had stalled pending cabinet discussion.

²⁷ Subba, *supra* note 26.

²⁸ *Ibid.*

Moreover, the different interpretations of ILO 169 are striking once one begins to scratch beneath the surface. During two periods of field work by one of the authors in 2009 and 2010, it was evident that whilst hard work is being undertaken by ILO amongst others in order to create consensus on 169 there remains a lack of common understanding. At one end, across a broad spectrum of interviewees, IP actors interviewed generally regarded 169 as a constructive tool for dialogue, engagement and social transformation. It was cited as the basis for solving many problems the country faced, namely, related to ethnic and cultural exclusion. At the other end, some of the views expressed by certain state actors, namely, high ranking bureaucrats, tended to regard 169 as at a vanguard of measures that threatened to unhinge Nepal state and society, to plunge it into disintegration and undermine state sovereignty. One high ranking bureaucrat whose office is very relevant to 169 captured the scepticism directed at it:

I asked government to think twice before ratification. Being honest, it is very challenging. Signing it is simple but bringing it into force is very complex. It is like we are discussing sharing the pie before the pie is even made.

Such an unambiguous statement raises a question as to whether there are genuine concerns over political and legal implications of implementation of 169. However, it can be also explainable as a typical view from a respondent who belong to the elite caste; sentiments that reflect a rear guard defence of elite groups who stand to lose positions and privileges.

Seen from the point of view of a leading IP coalition:

Past experience has not been pleasant. We must work hard to convince the Constituent Assembly [referring to IPs now forming a large quota of representatives for the first time and encountering opposition there]). Government has not been willing previously, so we started to agitate and then the government agreed to ratify 169. So now experience tells us that government will not easily implement it. Even now there is this sense. So a balance of approaches is needed (i.e. constructive negotiation but also agitation).

The sense from this perspective is of an obstinate state reluctant to implement 169. During field work in early 2010 one of the IP consultants acting as main author for the ILO report suggested that “most of government officials don’t know the meaning of the spirit of 169 [...] [T]hey react [negatively] to activist pressure rather than trying to increase understanding between government and activists.”²⁹

²⁹) Subba, *supra* note 26.

3.2. *Politics or Capacity?*

Each quotation captures opposite ends of the spectrum of views of 169. However, it is difficult to disentangle ILO 169 from identity politics. Moreover, in suggesting there is a generally wide gulf in interpretation should not obscure areas of overlap and mutual efforts such as the Task Force on the Action Plan. This indicates that lack of bureaucratic capacity may also be a contributing factor. Some IPs noted that bureaucrats were trained to deal with policy implementation in traditional ways, whereas 169 implied new approaches and issues. Others suggested that there was a major challenge to be met in terms of both government awareness of 169 and the commensurate finances required to respond adequately to it.³⁰

However, highly contentious issues illustrate the gap in agreement and implementation of 169. NFDIN indicated that whilst the state does generally accept policy change on 169, they were also perceived in some quarters to be resisting it. In this, the co-ordinating capacity of the Task Force was deemed critical and a major challenge to co-ordinate all the various ministries involved. A fundamental issue also appears to be the motivation for state ratification, taking place as this did during a period of shifting political rule, and the lack of consensus even within the state therefore concerning the legitimacy of 169.

A critical dimension to the larger political accommodation of indigenous rights, however, is the varying level of political will exhibited by political parties, and, indeed, the prime minister and his office. The Special Rapporteur on Indigenous Peoples Rights has argued for example that indigenous groups are not fully participating in the Constitution process, itself representing a contravention of ILO Convention 169.³¹ Indigenous representatives must be elected from among candidates chosen by political parties, which are dominated by non-indigenous groups.³² One key question here is whether IPs representing political parties – and subject to the party manifesto – can simultaneously represent IPs and whether following the ILO Governing Body processes include true representation of communities affected. Additionally, there is no procedure for participation by “representative institutions” of indigenous peoples in the

³⁰ This issue of finances was also flagged by Ministry of Local Development (MLD), who expressed firm commitment to implementation of ILO 169 but saw major challenges. Costing of Task Force activities, for example, at least at the preliminary stage was placed at USD 700,000 and at the time of interview these resources had not been allocated. MLD also defended the slow pace of change citing inherent risks in moving to quickly in a context of great misunderstanding on 169.

³¹ J. Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people: Addendum – Report on the situation of indigeneous peoples in Nepal* (2009) U.N. Doc. A/HRC/12/34/Add.3.

³² See for further discussion of this point the article in this issue by Vollan; Kåre Vollan, ‘Group Representation and the System of Representation in the Constituent Assembly and Future Parliaments of Nepal’, 18(3) *International Journal on Minority and Group Rights* (2011) 343-369.

Constitution-making process. This is required by Article 6 of ILO Convention 169 in cases where their interests are “affected”.

This lack of participation is possibly affecting the emerging outcomes in constitutional drafting process.³³ The bill of rights currently devotes little attention to the rights of indigenous peoples. While extensive rights are listed for women, children and Dalits, the rights of indigenous peoples are limited to culture, language and participation³⁴ (Article 27). There may be objective grounds for this textual disjuncture, but the outcome seems surprising given that Nepal has ratified treaties on the rights of all four groups.³⁵

In the case of federalism it is difficult to say. On one hand, the Committee on the Restructuring of the State and Distribution of State Power has recommended 14 federal units and included autonomous areas for certain indigenous groups.³⁶ Moreover, this body has publicly resisted attempts to create a super-province for the other large minority, the Madhesi, on the grounds that indigenous peoples would be heavily out-numbered. This approach tilts heavily towards a recognition of ethnic interests rather economic efficiency in the federal design.³⁷ On the other hand the bulk of the focus in the report and draft constitutional text on federal arrangements is on local-provincial-central powers with little attention to the rights and responsibilities of autonomous areas. While these are meant to be addressed by provincial governments, it leaves some doubt as to whether they will play a significant role. Moreover, this Committee’s report registered the highest number votes of dissents (23) but discontent has been expressed across the spectrum from parties concerned with the lack of economic focus in the design through to concerns over order design by Madhesi parties and some indigenous groups.³⁸ These tensions are also evident in the area of land and natural resources, which is taken up in the next section of the article.

Furthermore, whether there is acceptance of the Action Plan and indeed continuing proactive engagement with ILO Convention 169 from the highest political level is not a foregone conclusion and appears at times to be ambiguously dealt with by even CPN.³⁹ Prime Minister Prachanda’s forced resignation

³³ See *Concluding observations of the Committee on the Elimination of Racial Discrimination: Nepal* U.N. Doc. CERD/C/304/Add.108 (2009). See also Devasish and Henriksen (2010), *supra* note 25, commissioned at the behest of ILO in Nepal based on concerns expressed by IP groups that their rights are not sufficiently being incorporated in the constitutional process.

³⁴ “To participate in the state structure and public service on the basis of inclusiveness and proportionality”.

³⁵ *I.e.* CEDAW, CRC, CERD and ILO Convention 169.

³⁶ See Report on Concept Paper

³⁷ For a similar opinion, see ‘Constitutional Complexities and Transitional Planning’, *Martin Chautari Policy Brief*, No. 3, April 2010.

³⁸ *Ibid.*

³⁹ During former Prime Minister Prachanda’s state visit to Oslo in 2009, for example, at a public presentation, one of the authors was able to put a question directly concerning the government’s commitment to 169. The question unambiguously asked was when Prachanda, his cabinet and the

precipitated the Maoist party's loss of political control of the government. This led to a UML-led coalition but with increasing log-jam on key political issues, and opposition from CPN (Maoist) to Prime Minister Madhav Kumar Nepal, which resulted in the latter's resignation in June 2010. The country continues to lack political consensus on the fundamental issues, not least, agreement on the new Constitution and where now to take ILO Convention 169.

4. Governing Land and Natural Resources

4.1. Contestation

A fundamental issue that sharply surfaces conflicts over indigenous rights concerns interpretation of ILO Convention 169 in regards to natural resources. In a study of the treaty in the context of hydro-electric projects in Nepal,⁴⁰ representatives from the Directorate of Electricity Development and Department of Energy were interviewed and saw a fundamental need for discourse to distinguish between *ownership* and *utilisation* of resources.⁴¹ The Director General saw it as a mistaken interpretation of the Convention to regard it as only about ownership. This sentiment was regarded as undermining state capacity and hence also the broader public interest. Above all, the fear conveyed that local community demands for a stake in projects would scare investors away was a common refrain from the Nepal Congress party members also interviewed. The Electricity Directorate representative spoke about some of the practical concerns in implementation, which he dealt with on numerous occasions because the issue of ownership of resources came up in the name of ILO Convention 169. The main worry was that demands for local equity would increase the costs and scare investors away, and, furthermore, such claims were unfair as these resources should eventually pass to ownership of the state for the public good:

Rights to local people are fine. But they should not kill the project. Ownership and utilisation has become mixed up and if we don't understand this clearly, it will generate conflict.

Prime Minister's office would accept the Action Plan on 169. In reply, rather surprisingly, Prachanda stated that 169 had not been ratified by his government but by the previous government. How do we interpret these comments? A degree of misunderstanding of the question and reply cannot be discounted. However, the overall impression made by this author was to interpret Prachanda as replying somewhat negatively on the topic of 169. The author interpreted this reaction as an attempt by Prachanda to distance the current government from implementation of the Action Plan and hence 169.

⁴⁰ See NIBR project entitled 'Accommodating or Exacerbating Difference? The Politics of ILO Convention 169 and shifting group identity in Nepal', <en.nibr.no/research/utvikl/>, project pages.

⁴¹ Interviews with S. R. Lacoul, Department of Electricity Development, Director General (8 February 2009) and S. Koirala, Secretary, Energy Department (2 March 2010).

In this context, ILO Convention 169 was regarded as creating conflict. IPs spoken with did recognise that dialogue should take place on this issue. But, they also highlighted that nonetheless the underlying problem was the context of neglect of IP communities, who had been excluded historically from any benefits and still see rights trampled on.⁴²

NDFIN cited the problem as one of Nepal having borrowed a model of development from India's colonial era. As an example, the NFDIN chair had visited the Suma Kosi area 25 years ago. While the project was on the national electricity grid, the area itself was in darkness, and local people got no benefits. To this day, they are still deprived of electricity. While IPs agreed that investor's needed security, the underlying objective of indigenous ownership was necessary. Thus, what was required were alternative models to be found regarding how to attract investment while giving ownership to the community. The ILO Convention should thus be seen as a way to assist in clarification and problem solving. According to NFDIN, the possible solutions depend on the scale of the project. Big projects should be benefited from; but medium and small scale projects should be out-right owned or controlled locally.

A state secretary to the Electricity Directorate saw the existing laws as adequate. This was in direct contrast to IPs who did not see any evidence of ILO Convention 169 in existing laws and also regarded government as not serious about these issues because the "bureaucracy is not loyal to us". An outspoken energy non-governmental organisation representative, of high caste origin, heavily criticised the government's energy policy from a different perspective. While agreeing that ILO Convention 169 had a role to play if it mobilised debate on water resources, it was also suggested that any talk of equity and benefit to local communities was impossible given the corrupt and dubious basis of award of contracts to companies principally concerned with export of electricity to India rather than for domestic consumption. Whether the treaty would alter such practices was an open question and one also deemed by this respondent to alienate non-IPs because of the group based designation of indigenous rights.

The only political party interviewees to even mention the issue of local community consent and who did so approvingly – an important dimension protecting indigenous rights to energy development – were from the CPN-Maoist party. One politburo and CA member⁴³ phrased access rights in terms of "priority" rather than ownership rights but emphasised the benefits to local communities and especially their participation and consent as absolute prerequisites before any project is allowed to commence.

⁴² P. Jones, *Helping or Hindering Reconciliation? Implementing ILO Convention 169 in the Context of Hydro-Electric Power in Nepal* (NIBR Working Paper Series, Oslo, 2010).

⁴³ Interview with Mr. Lokendra Bista Magar, CA member, CPN, 2 March 2010.

This clearly distinguishes the CPN-Maoist position from the other big political parties. Another CA member, also sitting on the CA Committee on Natural Resources, Economic Rights and Revenue Sharing typically stated views that “rights” of entitlement for IPs should instead be qualified as “priority rights”, namely based on needs of local communities affected. These views echoed those of several “high caste” interviewees who rejected group rights and any federal structure based upon ethnicity and caste. Allowing group rights would, these respondents alleged, precipitate agitation by local IP communities who mistakenly believe they had “full rights”.

4.2. *Legal Interpretation*

Divining the true legal meaning of ILO Convention 169 on this topic is not without difficulty. Swepston notes that the drafting of Article 15 on natural resources triggered one of the most “polemic” debates amongst states, unions, employers and indigenous representatives.⁴⁴ If we take the text of the Article in isolation, it is clear that it seeks to strike a balance between competing interests. This makes extreme positions difficult to maintain unless they can be justified by the purpose or other articles in the Convention or subsequent state practice on indigenous rights.⁴⁵

Article 15(1) of the Convention provides that rights of indigenous peoples to natural resources associated with their lands “shall be specially safeguarded”. Unlike land rights in the preceding article,⁴⁶ these rights are spelt out in largely procedural terms despite opposition by indigenous groups.⁴⁷ This is partly explainable by the legal realities in most states.⁴⁸ While land ownership is usually fragmented across a country, natural resources are commonly the subject of state ownership. Water resources in Nepal are declared for example a public resource under the 1992 Water Resources Law. Accordingly, the second part of Article 15(1) defines the key right as one of “participation” in the “use, management and conservation of these resources”. Article 15(2) provides correlative duties on the government to establish consultative procedures before resources are exploited while compensation is to be paid for “damages” as a result of such activities. The exception to this process-orientation is one clause in Article 15(2) that provides

⁴⁴ Swepston, *supra* note 20, 703.

⁴⁵ See Vienna Convention on the Law of Treaties, Article 31.

⁴⁶ Article 14 provides in part that “[t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized”. However, Ulfstein notes that if the natural resources are on the land, rather than being under or associated with the land, then the rights in Article 14 not 15 would apply: G. Ulfstein, ‘Indigenous Peoples’ Right to Land’, 8 *Max Planck Yearbook of United Nations Law* (2004) p. 1.

⁴⁷ A. Yupsanis, ‘ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989-2009: An Overview’, 79 *Nordic Journal of International Law* (2010) p. 433.

⁴⁸ Swepston, *supra* note 20.

for a weak substantive right; indigenous peoples “shall wherever possible participate in the benefits of such activities”.

At first glance, the claims of indigenous groups in Nepal that ILO Convention 169 grants ownership rights over natural resources, or at least a negative ownership right of veto power over development, stretches the text of Article 15. However, the assertion is potentially justified in two ways. The first is other articles of the Convention. Article 13 of the Convention requires States to respect the special “relationship” between indigenous peoples and their “lands and territories”, which includes the “total environments of the areas”. This clause partly displaces the customary argument for primacy of the state over the control of natural resources: *i.e.* exploitation is to benefit the whole population. Thus, in Article 13, states have recognised that indigenous peoples occupy a particular position in relation to natural resources which may require differentiated treatment. However, it is difficult to argue that this amounts to ownership although it may strengthen claims for much higher levels of participation or consent.

Article 6(2) of ILO Convention 169 further provides that the aim of participation is to achieve “agreement or consent”. This places fairly robust requirements on the process. An ILO expert committee has interpreted Article 6(2) as meaning “genuine dialogue between the parties” that must demonstrate a “sincere desire to reach a consensus”.⁴⁹ The UN Special Rapporteur has framed the obligation in the following way in Nepal:

[S]till lacking are consultation mechanisms in relation to the extraction of natural resources in the traditional territories of the Adivasi Janajati [...]. [T]he Adivasi Janajati must be consulted in good faith, with the objective of achieving their free and informed prior consent to the aspects of the management schemes or projects that affect them directly.

Second, the 2007 UN Declaration on the Rights of Indigenous Peoples is groundbreaking on natural resources, amongst other areas. Three sub-paragraphs are of high relevance:

26(1) Indigenous peoples have the right to the lands, territories and *resources* which they have traditionally owned, occupied or otherwise used or acquired.

26(2) Indigenous peoples have the *right to own*, use, develop and control the lands, territories and *resources* that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

29(1) Indigenous peoples have the right to the conservation and protection of the environment and the *productive capacity* of their lands or territories and *resources*.

⁴⁹ *Report of the Committee Set Up to Examine the Representation Alleging Non-Observance by Colombia of the Indigenous and Tribal Peoples Convention*, 1989 (No. 169), made under Article 24 of the ILO Constitution by the Central Unitary Worker's Union (CUT), Document GB. 276/17/1, GB. 282/14/3, Geneva 14 November 2001, para. 90.

The UN Declaration thus departs from ILO Convention 169 by placing lands, territories and natural resources on the same plateau and granting substantive and procedural rights over each. These broad rights are partly limited through the wording of Article 26(1). This appears to require indigenous peoples to have exercised traditional ownership or use over natural resources. This proviso that may partially or fully limit the scope of the rights over sub-surface mineral resources but it is unlikely that it exclude surface water resources.

The Declaration potentially represents a potent interpretive tool for ILO Convention, in particular over the substantive right in Article 15(2) to share in the benefits of natural resource exploitation. Even though it is a soft law instrument, the Declaration achieved close to overwhelming support in the General Assembly: 143 states voted in favour, 11 abstained and 4 voted against. Since then, two abstainers and the four opponents have endorsed the resolution.⁵⁰ While some states explicitly stated that the Declaration is not legally binding, the Declaration carries weight in considering the customary law status of various indigenous rights and interpreting existing treaties such as ILO Convention 169. Moreover, Nepal has reacted to the Declaration as if it was a treaty with a promise to implement it domestically.

From a legal perspective, ILO Convention 169 therefore imposes clear procedural restrictions on Nepal and arguably an increasing degree of substantive protections for indigenous peoples. While the degree of these substantive protections are the subject of contestation in Nepal, which is natural given the legal ambiguity and political implications, it is clear that even the milder process rights are far from being realised, in most hydropower projects for example.

4.3. *Draft Constitution*

This pattern is reflected in the proposal for the draft of the Constitution from the Committee on Natural Resources.⁵¹ As foreshadowed, the language of priority rights is adopted. The preamble is to include the following constitutional objective: “To ensure prior use rights to the indigenous, ethnic and other communities in natural resources and their use.” The operative part of the Constitution is to include a state duty to “protect and promote natural resource, and to provide equitable distribution of benefits to the local communities *prioritizing their rights* in the sustainable use of natural resources”.⁵² This formulation comes close to a textual reading of the weak substantive right in Article 15(2) of ILO Convention 169 and clearly avoids any hint of ownership. In other words, IPs are to benefit

⁵⁰ Colombia, Samoa, Australia, Canada, USA and New Zealand respectively.

⁵¹ Report of the Preliminary Draft of the Constitution (with Concept Paper), 2066.

⁵² Article 11 (emphasis added).

in the development of natural resources but the eminent domain of the state remains, as is emphasised in the Committee's commentary.

What is particularly striking about the report is that the process rights in ILO Convention 169 are completely absent. There is no procedure or formula outlined in the Committee's text on how IPs and other communities will come to consent or agreement on the distribution of the benefits, let alone the design of the development project. Moreover, the jewel in the committee's report, the innovative proposal to create an independent and powerful Natural Resources Commission to adjudicate disputes, does not extend to disputes between IPs and the authorities. Rather it is disagreements between the three levels of government. While IPS may constitute the majority in some local governments this is not always the case and they will never constitute the majority in a province.⁵³ Again, we see that a yawning gulf between political commitment and actor discourse on one hand and concrete negotiated outcomes in practice on the other. Thus, IPs face a problem of winning the battle but losing the war. Success on federalism (with ethnic-based provinces) may be undermined by a lack of control over natural resources, which would be key to sustaining the poorer ethnic-based provinces in which IPs are disproportionately represented.

5. Conclusion

The power of indigenous rights discourse is apparent in terms of its ability to mobilise international and national support in Nepal, as elsewhere. Whether for identity based models of federalism, and/or local access to benefits of natural resource projects, a critical area for investigation is the extent to which indigenous and non-indigenous are increasingly identifying along ethnic, caste or religious lines. Although beyond the scope of the article, how jostling for economic and political power, of which ILO Convention 169 is such a powerful expression, may be increasing and altering boundaries within and between groups is therefore a key question.⁵⁴ Indeed, walking a tight rope between the fulfilment of indigenous rights "ethnos" while preserving a "demos" of and for the people appears to suggest something of a paradox in contemporary Nepal. Such a tight-rope walk has, for Nepal, been closely correlated in this article according to identity of the respondent. In addition, however, a leading indigenous rights expert rightly alludes to Nepal's vast ethnic complexity in suggesting that if ILO 169 can be successful it would undoubtedly be "one of the greatest social experiments of all time".⁵⁵

⁵³) Sharma, *et al. supra* note 4.

⁵⁴) *Supra* note 40.

⁵⁵) A. Eide, comment to seminar on 'Federalism, Human rights and New Democracies: the case of Nepal in comparative perspective', University of Oslo, March, 2010.

While the odds do appear to be complicated, what is clearer is that we are still to see implementation of ILO 169 and indeed explicit incorporation of IP rights in the new Constitution, suggesting there is still a lack of real accommodation in Nepal. However, if handled in an appropriate manner, accommodation of IP rights – with political consensus a pre-requisite – might also become a *positive* force in Nepal's democratisation. The struggle for indigenous rights, like freedoms associated with rights in general, challenges the lines of inclusion-exclusion that had been drawn by a previously "high" caste defined "demos".

At the same time, the freedoms associated with rights, while providing a positive force for democratic struggle also depend upon "the democratic logics of equivalence", namely, the "demos" for their exercise.⁵⁶ It is imperative that inclusionary policies, while entirely necessary for political stability, do not contribute to hardening group boundaries.⁵⁷ It also means a calculated risk by indigenous groups that maximalist claims will gradually push progress forward rather than alienating non-indigenous groups. In relation, efforts to create unity in diversity require accommodating indigenous rights also in "universal" mechanisms such as the institutionalised political parties and state institutions and other activities that can bind Nepal together. These are necessary conditions for a politically stable multi-cultural federal state to flourish in Nepal.

⁵⁶) See C. Mouffe, *The Democratic Paradox* (Verso, New York 2000) p. 10.

⁵⁷) A. Aasland and M. Haug, *Social Exclusion in Nepal* (NIBR Working Paper Series, Oslo 2008).