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Implementation of the United Nations Declaration on the Rights of Indigenous
Peoples: The role of the Permanent Forum on Indigenous Issues and other
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A Glimpse of Implementation of the UNDRIP focusing to FPIC in Asia

Background

This paper gives a brief overview on the implementation of the UNDRIP focusing to the Free Prior and Informed Consent (FPIC) in Asia. While doing this, I have included some of examples that can be highlighted as positive practices that also give picture of challenges and idea of way forwards to promote the article 42 of the UNDRIP. The paper is divided into three parts Substantive; procedural and Recommendation. Substantive part is related to de-jure and de-facto recognition of identity and rights of Indigenous Peoples in accordance with International human rights instruments including the UNDRIP and ILO Convention No. 169. The procedural part focuses to the implementation of substantive rights, and the third part elaborates challenges and recommendation.

I. Substantive Part

Recognition of Indigenous Peoples

Importantly, all Asian governments supported to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) during voting by the UN General Assembly in 2007. Indigenous Peoples are recognized or at least identified as a distinct people within their respective countries even though; some of the Asian Countries expressed their different understanding to the indigenous during the GA in the process of adopting the UNDRIP. Indigenous peoples are recognized in the Constitution (India, Nepal, Philippines, China etc.), in Law (Cambodia, Taiwan); in Policy (Thailand etc.) and under a Agreement/Treaty (Bangladesh).¹

Indigenous Peoples in Asia are recognized or identified prior to the adoption of the UNDRIP but that does not necessarily due respect the equal dignity and the rights of IPs as prescribed by the International Human Rights Instruments including the ILO Convention No. 169 and the UNDRIP. Certainly, the adoption of the UNDRIP gave an instrumental basis to treat indigenous peoples as a distinct legal entity to some extent.

Recognition of IPs' Institutions and State Institution relating to IPs

Institutional recognition is an essential factor to exercise the rights of IPs including FPIC. There is not uniform practice in recognition of Customary and Representative Institution of IPs in Asia. In Philippines the Sec. 2(c) of the IPRA, 1997 states that the customary institution is recognized, protected and respected by the State. In Indonesia, the Constitution and in more recent

¹ The Indigenous World Report, 2016 IWGIA

legislation, implicitly recognize some rights of peoples referred to as *Masyarkat adat* or *Masyaraka Hokum adat* including Agrarian Reformed Act Act No 27/2007 and Act No. 32/2010 on Environment clearly use the term *Masyrakat Adat* and use the working definition of AMAN.² In Sabah and Sarawak Malaysia, Native Court is recognized with the jurisdiction to deal cases on breach of customary law and customs if all parties are natives. Principally the Native Court deals marriage, divorce and judicial separation, adoption, guardianship or custody of infants, maintenance of dependents and legitimacy, gifts of Succession, testate or interstate and other cases conferred by written law.

In some countries Indigenous Organizations are recognized indirectly under a legal provision. In the context of Nepal, Nepal Federation of Indigenous Nationalities (NEFIN) can be a part of Council of the NFDIN that recommends a Vice-chair of the National Foundation for the Development of Indigenous Nationalities (NFDIN) and member of Executive Council.³ The NFDIN is a semi governmental Organization with mandate of overall development of Indigenous Nationalities. The Indigenous Tribal Council is constitutionally recognized⁴ in India. Specific State institutions are existed to deal rights and development of IPS in many countries including Philippines, Nepal, India etc.

National Human Rights Institution (NHRI)

Besides the recognition of customary institutions, the NHRI uses the UNDRIP as a fundamental tool to monitor and evaluate situation on the rights of IPs. In 2013, the Human Rights Commission of Malaysia (SUHAKAM) commissioned a national inquiry into the land rights of Indigenous Peoples (Orang Asli) and published a comprehensive report.⁵ The Commission forged significant recommendation based on the UNDRIP including FPIC. In 2014, the National Commission on Human Rights, Indonesia (KOMNAS HAM) conducted the first National Inquiry on the abuse of indigenous peoples land rights. The Commission made various recommendations, including improving the licensing system for utilization of natural resources based on the principles of transparency, participation and accountability, including the principle of free, prior and informed consent (FPIC).⁶ Similarly, the NHRI Nepal has established the collective rights Division and the Gender and Social Inclusion Division with mandate of looking collective rights and inclusion. The Commission has made recommendation to implement the UNDRIP, ILO Convention NO. 169 including working on adoption of the National Action Plan on the implementation of the ILO Convention No. 169 *vis a vis* the UNDRIP.

Recognition of Culture and Customary Law

² *Ibid.* P. 262

³ Sec. 7 (1) C and 7(1)L of NFDIN Act, 2007.

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⁵ Published in Malaysia by the National Human Rights Commission in 2013

⁶ Summary of the Inquiry,

<http://www.forestpeoples.org/sites/fpp/files/publication/2016/04/komnas-ham-nationalinquiry-summary-apr2016>. P. 7, pdf

Recognition of customary law and culture is essential element to exercise the right to FPIC. Customary land tenure is safeguarded under various provisions of the ILO Convention No .169 and the UNDRIP. In its decision on *Nor anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769, the High Court of Malaysia came with a finding, that says Customary law is a practice by habit of the people and not the dictate of the written law. All orders dating from the era of Rajah Brooke to current legislation declare in no uncertain terms the right of a native to clear virgin jungle, access the land surrounding the longhouse for cultivation, fishing, hunting and collection of jungle produce. Legislation has neither abolished nor extinguished NCR (Native Customary Rights). On the contrary, legislation has consistently recognized and honoured NCR even though it was not in written form.⁷ In contrary, we can see recognition of customary rights in constitution and law but hard to see in practice. As much as 20 percent of state land in Sarawak is classified as Native Customary Rights Land, but only two percent of this land is surveyed and titled.⁸ In the context of Nepal, no national law recognizes collective land title of IPs but that doesn't refrain private entity to recognize ancestral domain in relation to carry out hydro project i.e. the Tanah Hydro Power which is located in the ancestral land of Margar, recognizes land rights of IPs even they do not have title over their land owned by individuals.

Recognition of Lands Territories and Natural resources

Recognition of Lands, Territories and Natural Resources (LTR) is fundamental factor that determine the exercise of other rights including right to life, security and liberty. There are few countries that have law (Constitutional or Statutory) that recognize indigenous rights over LTR. The Schedule V of the Indian Constitution deals with the administration and control of scheduled areas and scheduled tribes. It restricts the entry and ownership of land and immovable resources in adivasi areas by non-adivasis and outsiders.⁹ Most of the conflict with development activities resulted from disrespect of IPs rights over land territories and natural resources.

II. Procedural Part

Legal Status of UNDRIP

The Sec. 9 of the Treaty Act, 1991 of Nepal, states that the provision of international law is equivalent to the provisions of national law, in case of inconsistency the provision of international law prevails over the provision of the national law. After the ratification of the ILO Convention No. 169 and adoption of the UNDRIP, the government introduced Interim Plan that has policy

⁷ <http://salvaleforeste.it/documentazione/Bian2.pdf> visited 18 January 2017

⁸ <https://www.culturalsurvival.org/publications/cultural-survival-quarterly/native-customary-rights-sarawak> visited 18 January 2017

⁹ Background paper, Ticy Thomas, <http://www.jnu.ac.in/huriter/righttribals.htm>

to implement the provision of UNDRIP¹⁰ for the inclusion of Indigenous Peoples *vis a vis* to restructure of the state. In contrast, after the promulgation of the new Constitution the plan and programs relating to IPs are being altered that lead country to regression.

Right to Information (Informed)

Prior and Full disclosure is another key elements of FPIC. The right to information is constitutionally guaranteed fundamental right in many countries including India¹¹, Nepal¹², Pakistan¹³. In many counties have specific law on right to information that include Pakistan¹⁴, Philippines¹⁵ etc. Despite the fact, access on information to IPs is very limited due to language barrier, administrative complexities and provision of confidentiality of the information. The Environmental laws require Public Hearing and IEE and EIA for which prior information is mandatory. In the context of India, the State Pollution Control Board (SPCB) issues notice in at least two newspapers circulated in the region. One of these newspapers must be in local language. This notice mentioned the date, time and place of public hearing. The public can hand over the written suggestions, views, comments and objections to SPCB within 30 days of releasing such notice. The public is entitled to have access to the executive summary containing salient features of project both in local language and English. They also have access to the EIA report, which can be obtained, from office of district collector or zilla parishad or SPCB office or other departments dealing with the project.¹⁶ The Public hearing Penal formed by SPCB comprises 3 senior leaders from Local Panchayat and rest are government people. The mechanism is not very much IPs friendly and culturally appropriate to them. In very few world bank funded Hydro Power Projects in Nepal, provide information in Indigenous Languages. However, there are lack of good faith consultations, resulting conflict between affected IPs and the Project.

Consultation

Consultation with affected IPs in relation to project activities is legally required. In some Countries it is required in Policy. In the context of Nepal, the National Policy on Land Acquisition, Relocation and Rehabilitation, 2014 8.2.8 (d) Disadvantaged, Indigenous Peoples and Poor, Dalit shall be relocated in the area where their people are living in cluster. Particular attention shall be given to avoid impact to their language, religion, culture, way of life and livelihoods. 8.3.1 Meaningful consultation will be carried out with affected, people, family and stakeholder in the whole project cycle.

¹⁰ First Three Year Interim Plan and 13th Plan

¹¹ Article 19(1) of the Constitution of India

¹² Article 27 of the Constitution of Nepal, 2015

¹³ Article 19 A of the Constitution of Pakistan (18th Amendment)

¹⁴ Right to Information Ordinance 2002

¹⁵ Executive Order No. 2 on Freedom of Information.

¹⁶ <http://www.gktoday.in/blog/public-hearing-process-in-india> visited 18 January 2017

Free Prior and Informed Consent

The IPRA recognizes FPIC as a part and process of exercising right to self-determination. The section 59 of IPRA, 1997 states [A]ll department and other governmental agencies shall henceforth be strictly enjoined from issuing, renewing, or granting any concession, license or lease, or entering into any production-sharing agreement, without prior certification from the NCIP that the area affected does not overlap with any ancestral domain. Such certificate shall only be issued after a field-based investigation is conducted by the Ancestral Domain Office of the area concerned: Provided, That no certificate shall be issued by the NCIP without the free and prior informed and written consent of the ICCs/IPs concerned: Provided, further, That no department, government agency or government-owned or -controlled corporation may issue new concession, license, lease, or production sharing agreement while there is pending application CADT: Provided, finally, That the ICCs/IPs shall have the right to stop or suspend, in accordance with this Act, any project that has not satisfied the requirement of this consultation process.

The IPRA law created the National Commission on Indigenous Peoples (NCIP), an agency with frontline services for the Indigenous Peoples, and it is attached to the Office of the President. The NCIP issues guidelines for the implementation of IPRA, some of which are the NCIP Administrative Orders laying down the FPIC Guidelines of 2002 and 2006.¹⁷ New Guidelines has been introduced by NCIP with some update. Though, there are number of complaints relating to violation of FPIC including weak implementation of the Guidelines, there are significant improvement of respecting the FPIC. On the substantial implementation of the principles and “spirit” of Free and Prior Informed Consent, 41.2% of the case reports claimed that the consent of the communities were freely given. However, 35.4% reported that the consent was given by IPs without sufficient information to arrive at a rational decision.¹⁸ The FPIC Guidelines not only a mere instruction to respect the FPIP but also a cornerstone to assess the exercise of right to self-determination. It also a road map to engage IPs in decision making that ease up to build consensus by narrowing difference between IPs and relevant actors.

In the Case of Dr. Bhaikaji Tiwari Vs. Chaturbhuj Bhatta, the Supreme Court interpreted that State cannot exercise the Principle of Eminent Domain without limitation and in an arbitrary manner. Free Prior and Informed Consent is mandatory prior to appropriating house where a person is residing in it.¹⁹ The article 51(e) (f) of the Constitution of Nepal comprises policy of FPIC in the protection of environment.

There are number of interesting examples how the right to consent was respected in India. The facets of the UNDRIP have expression in Indian legislation such as through the Forest Rights Act (“FRA”) (by way of a circular issued in 2009 by the Ministry of Environment and Forests, Government of India,

¹⁷ Policy Brief, Department of Environment and Natural Resources Climate Change Office Philippines, 2013, P.1

¹⁸ *Ibid.* P. 5

¹⁹ Decision No. 9508, Volume 57, Chaitra, Series 12, 2072

which requires consent for diversion of forests for development projects) and to a lesser extent the Panchayats (Extension to Scheduled Areas) Act ("PESA"),

There are a few interesting examples of courts/tribunals upholding local communities' rights to say no to a project. Notable among these is the Supreme Court of India's precedent setting 2013 decision which cited FRA and PESA to uphold the rights of the Dongria Kondh Indigenous community to say no to Vedanta's mining plans in their traditional territory. As background, it had been more than a decade since the 8,000-odd Dongria Kondh and other adivasi groups began their struggle to save the Niyamgiri hills—the abode of their deity, Niyam Raja—from Vedanta's mining project. In April 2013, the Supreme Court ruled that Vedanta Resources could only mine bauxite from Orissa's Niyamgiri hills with the consent of the Gram Sabhas of the project-affected villages. (Gram Sabha consists of all the adult members of a village or cluster of villages.) All 12 villages where Gram Sabha elections were held voted against bauxite mining in the Niyamgiri hills, effectively vetoing the multi-billion-dollar project. For more information, please see: Amnesty International, India: Landmark Supreme Court ruling a great victory for indigenous rights (April 2013).

Other FPIC-type examples in India

On March 16, 2016 five Adivasi villages in Raigarh, Chhattisgarh, unanimously vetoed the plans of South Eastern Coalfields Limited (SECL), a subsidiary of India's public sector coal mining giant Coal India Limited (CIL), to mine their forests. These villages were Pelma, Jarridih, Sakta, Urba and Maduadumar.

On March 23, 2016 the Kamanda gram sabha of Kalta G.P in Koida Tehsil of Sundargarh district in Odisha unanimously decided not to give its land for the Rungta Mines proposed by the Industrial Infrastructure Development Corporation of Odisha Limited (IDCO).

On May 4, 2016 the National Green Tribunal directed that before clearance can be given the Kashang hydroelectric project (to be built by the State-owned body Himachal Pradesh Power Corporation Ltd. or HPPCL), the proposal be placed for approval before the Lippa village gram sabha in Kinnaur district of Himachal Pradesh. The 1,200 residents of Lippa have been waging a seven-year struggle against the project.

The Role of UN Regional and Country Offices

The UN Regional and Country offices can play a significant role to promote the implementation of the UNDRIP however they have very limited programs and activities that make them almost invisible to Indigenous Peoples and Organizations. Importantly, the article 32 of the UNDRIP, Recommendation of UNPFII, EMRIP, Special Rapporteur and the outcome documents of the World Conference give consistent and coherent roadmap to the UN Regional and Country entities to work on the promotion of implementation of the UNDRIP, but indigenous people are continued marginalized, excluded in their respective plans and programs. For an example, the Governance and Peace-building team at the Bangkok Regional Hub (BRH) works towards strengthening political-democratic

processes and governance systems that takes into account voices and rights of all people for equitable and sustainable development. It also spearheads regional initiatives to address the complex governance challenges in the region, including on sensitive issues such as political participation and access to services for indigenous peoples, and marginalized groups, including sexual and gender minorities.²⁰ However, the program doesn't specifically focused to the implementation of the UNDRIP and FPIC within the program framework. There is no doubt that the role of the regional UN Hub and Country Offices will have significant impact on the implementation of the UNDRIP including FPIC. Importantly, the inclusion and partnership of Indigenous Peoples can promote sustainable development, justice and peace.

It is often hard to distinguish between UN Country office with government office in term of giving due recognition to indigenous peoples, representatives and organizations because they raise a question on their authenticity exactly the way the government take position on the term "Indigenous Peoples" in many countries in Asia.

Challenges

Even it is inadequate, IPs and their rights are recognized or identified in Constitution, laws and policies in Asia. Among others, the fundamental challenge is, we can read this provision in paper but hard to see in practice. Having Constitutional and Legal provisions is not enough that need to be duly implemented.

It is important to create an environment that the right to FPIC /Consent will be implemented or respected without invoking remedial mechanism or protesting in Asia.

Pro forma Consultation, Premeditated representation during Public hearing and Consultation, invisibility of indigenous women, youth and person with disabilities are key challenges of exercising the right to FPIC.

Hardware (Institution) and Software (Laws Policies and budget) are important factor to promote implementation of the UNDRIP which is still lacking in many countries in Asia.

The UN Country Offices and Special Agencies such as Country office of International Labour Organization including its program need further effort to promote the implementation of the UNDRIP and ILO Conventions. In the context of Nepal, A joint UNDAF Steering Committee of the UNCT and the Government of Nepal (GoN) was formed in June 2011 to lead the over all UNDAF Design.²¹ However, there is no representation of IPs nor they were consulted. Even though

²⁰http://www.asiapacific.undp.org/content/rbap/en/home/library/democratic_governance/governance-n-peace-building-annual-report-2015.html

²¹ www.np.undp.org/content/dam/Nepal/docs/legalframework/UNDP_NP_UNDAF%2013-2017.p5

the Output 9.2 in the Log frame stipulates National Plan of Action on ILO Convention No. 169 and implementation of the UNDRIP²² The National Foundation for Development of Indigenous Nationality (NFDIN) a semi governmental agency mandated to over all development of IPs is invisible in the whole process. NFDIN works as a bridge between IPs and government. Meaning to say, there was no connection of IPs with UN Country offices in preparation of UNDAF.

Opportunities

For the effective implementation of the UNDRIP there are Opportunities in place. On the other hand, we can strategize to change the challenges into Opportunity as well.

The principal Opportunity is the adoption of the UNDRIP by all Asian Government as well as recognition of IPs' identity and rights in the Constitution, law and Policy of the respective Country. Indigenous Peoples' Movement and their organizations have been consistently demanding the implementation of the UNDRIP. In this regard, the IPs are demanding for constructive dialogue, collaboration and partnership in development including matters effect to them.

Most of the Asian Governments have mechanisms relating to indigenous peoples affairs and development. Similarly, National Human Rights Institutions (NHRI) are also working on the rights of IPs and the Litigation against violation of IPs' human rights and fundamental freedoms stipulated in the UNDRIP, ILO Convention No, 169, CERD can be brought in front of the Court.

Existence of UN Country Offices, their policy of development i.e. UNDAF, other donor agencies can play a constructive role on the implementation of UNDRIP.

Conclusion /Recommendation

It is a fact, that there are more specific programs and budgets are being allocated with compare to the past. The UNDRIP is frequently referred by government agencies and none-state actors including business entities who are working in the area of IPs and affect to them. The UNDRIP eases up IPs to be more instrumental in their lobby and advocacy. More substantially, the UNDRIP avails to consensus to resolve the issues amicably, relating to aggressive development. Despite the fact, we need further strategic effort to make full realization that the rights enshrined in the UNDRIP is implemented at all levels from International to local/community.

UNPFII together with EMRIP and SRIP can play a significant role on the promotion of UNDRIP including FPIC while dispatching their mandates. In this regard, internal mechanism or at least assigning their experts (UNPFII EMRIP) to look after the respective region and UN Country Offices relating to the implementation, monitoring and facilitating the implementation of UNDRIP an FPIC. This mechanism or Expert Member can create synergy in Regional,

²² Ibid. P. 46

National and Community level among right holders, duty bearers and stakeholders in the effective implementation of the UNDRIP.

In Prima facie, the UN Country Offices including Team should recognize Indigenous Peoples (in line with UNDRIP/ILO Convention No. 169) and ensure their inclusion and participation in review of UNDAF. Participation of government the specific mechanism and institution (i.e. NCIP, NFDIN, Tribal Commission etc.) create some space for IPs to reflect their voice in the formulation plan, implementation and evaluation.

While dispatching their mandates, UNPFII, EMRIP, SRIP and other relevant mechanisms should have periodic meeting to review together with specific IPs national mechanism and NHRIs of the implementation of UNDRIP related recommendation. In such type of meeting, it is important to have presence of representatives of UN Country Team or Staffs of relevant sectors.

Awareness /Orientation Programs to policy makers, implementers, judges/court men, stakeholders and indigenous peoples are important at national and community levels.

Policy and tripartite (IPs, govts. and stake holders) dialogues focusing to specific issues on particular issues as well as problems will promote better understanding and amicable solution.