

Mr. S. James Anaya

Special Rapporteur on the rights of indigenous peoples

Palais des Nations
CH-1211 Geneva 10
Switzerland,

Re: Urgent Communication concerning violations of the rights of indigenous persons

Esteemed Special Rapporteurs:

The attached communication is respectfully submitted for consideration under your mandates.

We request that you jointly consider this communication and correspond with the government of Nepal about the need to reform and repeal cow-slaughter laws which are discriminatory against indigenous peoples and inhibit their rights to freedom of religion, to the practice of their spiritual ceremonies and which—on a larger scale—threaten the secular nature of the Nepali state.

Respectfully,

Lawyers Association for the Human Rights of Nepalese Indigenous Peoples
Anamnagar-32,
Kathmandu Metropolitan city
Kathmandu, Nepal.
Tel: +977-14770710; Fax: 977-1-4233625
Email: lahurnip.nepal@gmail.com

JUNE 12, 2012

Communication concerning the legal prohibition on cow-slaughter in Nepal which prevents indigenous peoples from the free practice of their cultural and spiritual ceremonies and threatens the secularity of the Nepali state

Submitted to the United Nations Special Rapporteurs on the Rights of Indigenous Peoples, on the Promotion and Protection of the Right to Freedom of Opinion and Expression,

I. Introduction to Nepali Context

1. Indigenous peoples (*Adivasi Janajati* in the Nepali language) are constitutionally and otherwise recognized as distinct peoples in Nepal.¹ For instance, Section 2 of the *Foundation for the Development of Indigenous Nationalities Act 2002* recognizes the collective nature of indigenous peoples and defines them as groups with distinct mother tongues, traditions, customs, identities, social structures, and their own oral or written histories. While the schedule to this law lists 59 indigenous peoples, indigenous organisations observe that a considerable number of indigenous peoples are not recognised and included in the schedule, thus rendering them invisible in the eyes of the law.² Similarly, although Nepal's 2001 census states that indigenous peoples comprise 37.19 percent of the national population of almost 29 million people, indigenous organizations assert that they number in excess of 50 percent of the population.

2. Nepal is party to International Labour Organisation Convention No. 169 ("ILO C. 169"), which entered into force for that country in September 2008. Nepal also affirmatively supported the adoption of the 2007 UN Declaration on the Rights of Indigenous Peoples ("UNDRIP"). Nepal is also party to the International Covenant on Civil and Political Rights ("ICCPR") and the International Convention to Eliminate All Forms of Racial Discrimination ("ICERD"). These instruments, however, remain largely unimplemented in domestic law and practice.

3. This communication is respectfully submitted to the above-listed Special Rapporteurs to raise the issue of the continued prosecution of indigenous peoples under Nepal's law against cow-slaughter—a law deeply rooted and wholly justified by Hindu (and therefore non-secular principles) and one which historically has been used to carry out the State's forced cultural assimilation of indigenous peoples and to forge a homogenous identity for Nepali citizens. We raise this complaint namely under article 8 of UNDRIP that states that "indigenous peoples and individuals have the right to not to be subjected to forced assimilation or destruction of their culture." Further, under Article 1 of UNDRIP and Article 3 of ILO C. 169, indigenous peoples

¹ See Articles 21 and 33.d of 2007 Interim Constitution.

² See also Nepal, 16/01/08, E/C.12/NPL/CO/2, at para. 28 (expressing concern about "the criteria used by the National Foundation for Development of Indigenous Nationalities to recognize officially indigenous nationalities and about the implications of official recognition").

are due the full measure of human rights and fundamental rights promised to all peoples under international human rights law—including the rights to freedom of religion, equality before the law and minority rights to cultural expression as protected respectively in Articles 18, 26 and 27 of ICCPR.

II. The Prohibition on Cow Slaughter in Nepal

A. Consolidation of Nepal as a True *Hindustan*: Origins of the Prohibition on Cow-Slaughter

4. Although Nepal was never colonized by an external power, indigenous peoples and other caste groups in the country were consistently subjected to a strong program of forced cultural assimilation at the behest of the Hindu political and economic elite in the country. Throughout Nepal's history, beginning with the unification of the Nepali state 250 years ago, the Gorkha royalty had a strict agenda to create a homogenous Hindu Kingdom in Nepal and to consolidate their rule over the populations of remote areas of Nepal—areas which bordered on neighboring political and geographical superpowers, India and China. As the Special Rapporteur on Indigenous Peoples, James Anaya noted after his visit to the country in 2009, “the unification of these diverse groups into a single State was achieved at the expense of political and cultural plurality.”³

5. Nepal long prided itself on its reputation as the “true” Hindustan. This reputation depended on an image of Nepal as a homogenous Hindu state; indeed, Nepal was considered to be more true a Hindustan than India precisely because it was not populated with Muslims and other “non-believers.”⁴ Maintaining the purity of the Hindu Kingdom was important for the leaders of Nepal who could not “tolerate the customary law of a country that defiled the realm over which [they] ruled.” Maintaining such purity was, from the beginning, deeply tied to protecting cows throughout Nepal and preventing cow slaughter and beef-eating (common practices amongst many communities especially those in the Eastern Himalayas) which were seen to be practices which defiled the Kingdom.⁵ According to Hindu mythology, the original King of Gorkha, Dravya Shah, was able to take power in 1559 because he protected cows; there is a belief that the goddess Laxmi resides in every cow and that so long as Nepalese rulers were “cow-protectors” no one, including the British, would be able to hurt the nation. Cow-protection was also an important symbol for Rana rulers who sought to legitimize themselves before Brahmans. As such from the earliest history of the country, the ideology of the “State” of Nepal has been practically identified with a ban on cow-slaughter.

6. The first Civil Code of Nepal, the Muluki Ain of 1854 stated: “This kingdom is the only kingdom in the world where cows, women, and Brahmans may not be killed”—trumpeting Nepal as the purest Hindu Kingdom and simultaneously signaling to Nepalese citizens that Hindu religious creeds were to be

³ Anaya report, para.

⁴ The King and The Cow

⁵ Burghart, 1984 (110), quoted in the King and the Cow

the law of the land. The purpose of the Muluki Ain was to “establish a common caste hierarchy and a homogenous legislation, not an easy task in the heterogeneous kingdom of Nepal. [Jang Bhadur Rana] most certainly wanted by this first national law to control remote areas and ethnic groups.”⁶ In order to eradicate perceived “impurities” of cultural practices around the nation and to maintain the reputation of Nepal as the true Hindustan, classical *dharma* ideals were codified into law and then used to erode and destroy *desadharmā* (local customs).⁷ Nepal’s national language (*Khas* Nepali, descendant from Sanskrit), dress and, significantly, animal—the Cow—all adhere to the image of the pure Hindu Kingdom that the Nepali elite exported and profited from.⁸

7. Indeed, the legal Hinduization of Nepal did more than give its leaders a certain religious prestige, it also served as an important tool in consolidating the nation.⁹ For example, in the 1870s, the slaughter of Yaks was also prohibited by law—from all accounts, the reason for this ban has been discerned as being that “the Bhotiya people of the border areas needed to be brought within the *moral kingdom* of Nepal, at least symbolically, and thereby marked as subjects of Gorkha, not of Tibet.”¹⁰ Additionally, there are Shah royal orders dated from the 1600s which called for the coercive confiscation of land and territories for the creation of cow pastures as it was “the King’s duty [to protect the cow], otherwise he would incur guilt (*pratyavaya*).”¹¹ The first Royal Order officially prohibiting cow-slaughter (Rana Bhadur Shah, 1805) stated that the punishments for the crime were death and the confiscation of all of the offender’s property. The codification of Hindu ideals, and most especially the ban on cow slaughter, was therefore “used as a means of promoting national integration and sovereignty over various ethnic groups and remote areas.”¹²

8. Importantly, the prohibition on cow-slaughter was always monitored from the center in Nepal and was therefore often used as a tool for showing the strength of centralization in the nation. When local administration failed to punish people for cow-slaughter the King would issue a Royal Order demanding severe punishments of the individual offenders¹³—in this way the royal power at the center was able to show that they could exercise their strength in all corners of Nepal. Such orders often violated the

⁶ King and the Cow

⁷ Wezler 1985 (81)

⁸ “Visible symbols always played a crucial role in the process of Hinduization. I agree with A.W. Macdonald and Anne Vergati Stahl that ‘Nepal was hinduized not by displaying and informing but by looking and listening, rather than by the dissemination and reception of written messages’ (79)

⁹ The King and the Cow

¹⁰ King and the Cow

¹¹ *Id.*

¹² The King and the Cow

¹³ See, e.g., The Royal Order to Bichari Hiranda Tiwari” March 1806, issues when local administration had failed to punish a low-caste Damai for cow-slaughter in the Far West of Nepal: “Cut off flesh from his back, and put salt and condensed citrus juice on the wounds. Make him eat the flesh himself and kill him.”

fundamental rights of offenders—for example, a Royal Order from 1810 stated that “Persons who commit the heinous crime of slaughtering oxen in Hindu land shall be flayed alive, impaled or hanged upside down until they are dead. Their property shall be confiscated and members of their family enslaved.” In this way, cow-slaughter cases perpetuated bonded labor, slavery and subordination in Nepal and also provided the means for the Hindu elite to consolidate property and territories.

C. Cow Slaughter Prohibition as a tool of Forced Cultural Assimilation

9. As observed by one scholar “the injunction [against cow-slaughter] of the Ain is therefore mainly to protect the life and holiness of the cow for the sake of the king’s Hindu orthodoxy and for the sake of a *common* state ideology.”¹⁴ The Ain assigned each member and ethnic/caste group in Nepal a position in a caste hierarchy which determined each individual’s economic and political rights.¹⁵ As demonstrated above, the prohibition on cow-slaughter served as a cornerstone of the promulgation of Nepal as a Hindu monarchy. A process which was solidified in the 1962 constitution which “declared Nepal as a Hindu State, thereby perpetuating the religious, linguistic and cultural homogenization of the country’s identity.”¹⁶ During his unification campaigns King Mahendra made analogies likening the citizens of Nepal to “all the devotees of Vishnu have an identical subtle substance that unites them within the subtle body of Vishnu in the form of Parbrahma”¹⁷ Nepal’s strength as a nation was hereby strongly linked to the idea that the nation was a unitary body of peoples united under a belief in Hinduism.

10. Despite its promulgation of the Hindustan identity, Nepal was never such a homogenous country—today, 59 castes/ethnic groups are recognized in the country and many do not identify as Hindu. Nonetheless, they have been forced to abandon certain of their own cultural and religious practices to live in accordance with Hindu maxims that are codified in Nepali law in direct violation of international law which forbids the forced assimilation of indigenous peoples into hegemonic cultural identities.¹⁸ Peoples’ desires to be free of this yoked identity led to the social movements which changed Nepal in the 1990s and led to the declaration of a secular state and a transition towards democracy in the early 2000s. The transition towards democracy and secularism are still ongoing in Nepal and the transition cannot be complete until the laws which have been used to preserve the Hindu hegemony in the state are reformed.

11. Even as the punishments for cow-slaughter have become less extreme over time¹⁹, a 1990 amendment to the Muluki Ain still made cow-slaughter punishable by 12 years in prison and this

¹⁴ King and the Cow 91

¹⁵ *The Kham Magar country* (Anne de Sales) in *Understanding the Maoist Movement in Nepal*

¹⁶ SR Report on Nepal 2009

¹⁷ Kham Magar country

¹⁸ UNDRIP Art. 8

¹⁹ With the promulgation of the Muluki Ain in 1854, capital punishment for cow-slaughter was reduced to life imprisonment.

MEOOW 10/31/12 10:35 AM

Comment [1]: Add census date information from *Fatalism and Development*

law—like its predecessors—has been consistently and discriminately used against the indigenous peoples of Nepal. LAHURNIP conducted research on all the cow slaughter cases currently unfolding in Nepal and each defendant is a member of an indigenous community; furthermore, each of the pleaders and judges responsible for the cases are Hindus, and for the most part high-caste Hindus (Brahmin or Chhetri). These cases will be discussed in more detail below.

12. Notably, many indigenous peoples in Nepal eat beef (i.e. the Tamang and *Bhote* whose name actually derives from a derogatory reference to beef-eating Buddhists²⁰) although some communities have given up the practice on account of the strict punishments they faced (i.e. the Gurung²¹)—the fear of enslavement of themselves and their family and the confiscation of their property. These communities should not be forced to adhere to the Hindu dietary restrictions which are antithetical to their traditional practices and the law prohibiting cow slaughter should therefore be repealed in line with Article 8(d) of UNDRIP which requires States to provide effective redress for any form of “forced assimilation or integration.” For other indigenous peoples, the prohibition on cow slaughter inhibits their ceremonial traditions in violation of Article 18 of ICCPR on freedom of religion and articles 9, 11 and 12 of UNDRIP which collectively ensure indigenous peoples’ right to maintain, strengthen and manifest their cultural and religious customs. One example of a community practice which is threatened by the prohibition on cow slaughter is the Kulung’s Tosh Seel ceremony. The Kulung believe that 22 generations ago when there was a major drought, a strong member of their community, Dhanamukh, killed a bull which bellowed as it died. This bellow reverberated such that rain began to fall and the drought ended. Since, the Kulungs annually sacrificed one bull for a good harvest but under the Hindu monarchy, they were forbidden from continuing this practice.²²

D. Discriminatory Implementation of the Current Prohibition on Cow Slaughter

12. As noted above, LAHURNIP carried out a study on the current cow slaughter cases being heard in courts around Nepal. Based on this study, it became apparent that the cow slaughter prohibition continues to be used discriminately against the indigenous peoples of the country at the expense of their ability to continue in their cultural practices. The HRC noted in their General Comment 22 on Article 18, that the limitations permitted on freedom of religion in part (3) are only permitted to the protect public safety, order, health or morals, or the fundamental rights and freedoms of others. It is quite obvious that the prohibition on cow slaughter is not justified by any of these categorically permissible limitations but rather is in place to protect the special place of Hindu beliefs in Nepali society. This is not permissible as the Committee also observed that,

²⁰ Ben Campbell, *The Heavy Loads of Tamang Identity*, NATIONALISM AND ETHNICITY IN NEPAL P. 216.

²¹ John Whelpton, *Political Identity in Nepal: State, Nation and Community*, NATIONALISM AND ETHNICITY IN NEPAL P. 43

²² Bagman Kulung, interview with *Ratna Bahadur Kulung Tosh Nokchho (leader of village for tosh worship in Kulung Community)*

in relation to the restrictions placed on the freedom of religion, based on the concept of public morals, the morals used as a basis must “not [be derived] exclusively from a single tradition.”

13. Furthermore, in Comment 22, the HRC goes on to say that restrictions must be applied in a way which adheres to ICCPR’s article 26 on equality before the law and article 2 on anti-discrimination. As such, “restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner.” The fact that every case filed under the prohibition on cow slaughter is filed against an indigenous person evidences that this particular restriction on a religious practice is indeed applied in a discriminatory manner. In Kathmandu District Court, there are currently 5 cow slaughter cases; the most recent case from June of 2011, resulted also in the detention of the General Secretary of NEFIN, the semi-governmental indigenous peoples’ federation of Nepal, who went to the jailhouse to criticize the detention of four indigenous persons on the charge of cow slaughter.²³ The defendants in this case have been held in prison for over a year now although they still have not been charged and no eye witness has been found to testify that they actually were responsible for the death of the cow.²⁴

14. In Lalitpur District Court, one case was filed under the prohibition on cow slaughter this year. The defendants in this case are members of Bhote and Tamang communities. The District Attorney is pushing for a 12 year sentence for this case although the two defendants and their lawyers claim the cow was already dead when the defendants cut meat from the carcass. The defendants have been held in prison since their arrest although the case has not been decided yet.²⁵ This case resulted in protests around Lalitpur and in the destruction of the houses and property of the defendants accused of cow slaughter.²⁶ The defendants in this case, like those in many others, say that they and their ancestors have long ingested cow meat.²⁷ There are also 5 cases under cow slaughter on record in the Patan District Court; in each of these cases, the defendants are from Tamang communities.

15. Such a distinct pattern in the identity of defendants charged under a single law suggests that the prohibition on cow slaughter is without question enforced in a discriminatory manner. Indigenous peoples are not free to practice their rituals but are rather legally coerced to abide by Hindu precepts. As noted above this violates the UN Declaration on the Rights of Indigenous Peoples as well as the International Covenant on Civil and Political Rights; furthermore, it

²³ <http://www.ekantipur.com/2011/06/26/top-story/cow-slaughter-scandal-nefin-gen-secy-sherpa-held/336333.html>

²⁴ Case no. 2307, Pleader: Nepal Police, Dipak Thapa, Defendants: Chandra Bahadur Burdhathoki (Sindhuli, Jhala, Indra Bahadur Tamang (both indigenous) Attorney General Padam Prasad Acharya (Brahmun Chhetri)

²⁵ Krishna Hari Thapa (pleader, government) vs. Cheddar Bhote, Lal Bahadur Tamang (defendants), Case no. ?? Incident 25th March 2012, evening at 9:30 at Lalitpur Godam chur

²⁶ <http://www.ekantipur.com/2012/03/26/capital/lalitpur-tense-over-cow-slaughter-scandal/351246.html>

²⁷ See, e.g., <http://www.ekantipur.com/2010/05/05/capital/around-a-dozen-cow-slaughterers-detained/313693.html>

violates Nepal's own recent commitment to transitioning from a Hindu monarchy into a secular, democratic republic.

E. Cow Slaughter Prohibition as a violation of Nepal's Secularity

16. This appeal to the international community is made namely because attempts to challenge the validity of the current cow slaughter prohibition in domestic courts have failed. Following the Second Peoples Movement, an interim constitution was promulgated in Nepal which committed the nation to becoming secular and democratic. In the context of this communication, the commitment to secularism is of the utmost importance. The preamble of the interim constitution—which in the wake of the failure to promulgate a new constitution in 2012, remains in force in the country—reads: “the State is to be secular, no longer a Hindu kingdom.” Article 4 of the Interim Constitution states in part 1: “Nepal is an independent, indivisible, sovereign, *secular*, inclusive and fully democratic State.”

17. A law such as the Muluki Ain's prohibition on cow slaughter represents a clear violation of this domestic commitment to secularity, however when the prohibition was challenged on such grounds in front of the Supreme Court of Nepal, the Court upheld the prohibition. In *Advocate Om Prakash Aryal vs. Nepal Government et. Al*, decided on 4 September 2008, a special bench of the Supreme Court held that: “the Cow is not only the symbol of the Hindu religion but also the national animal, as stipulated in the present Interim Constitution which encapsulates secularism. So if the State declares crime against such animals, this does not contradict with the constitution and fundamental rights, nor with secularism.”²⁸ This argument is legally hollow, especially given the deep history of the prohibition on cow slaughter—its tie to the Hindu identity of Nepal and its use as a tool of forced cultural assimilation against the indigenous peoples of the nation.

18. Regardless, as interpreted by the HRC in Comment 22, the justification given for the law by the Special Bench cannot be upheld. Restrictions on religious freedom permitted by article 18(3) must only exist to protect public safety, order, health or morals or the fundamental rights and freedoms of others. The prohibition on cow slaughter—whether the cow is a national animal or not—does not fit within these permissible categories.

III. Conclusion & Requests of Special Rapporteurs

19. On behalf of the indigenous peoples of Nepal and other non-Hindu citizens of the nation, LAHURNIP requests that the Special Rapporteurs take the information provided under their consideration. As domestic attempts to challenge the prohibition on cow slaughter have been unsuccessful, it is necessary that international experts unite in condemning this law as a hangover from the time when Nepal was a Hindu kingdom. As has been expressed in this communication, the law as it stands violates a number of treaties to which Nepal is party.

²⁸ Nepal Kanu Patrika (Law Magazine), 2065 Decision 7999