

Indigenous Women of Asia and Access to Justice

Submission to the UN Human Rights UN Expert Mechanism on the Rights of Indigenous Peoples

I. Introduction

1. In line with the call of the UN Expert Mechanism on the Rights of Indigenous Peoples to submit information related to its study on access to justice in the promotion and protection of the rights of indigenous peoples, with a focus on restorative justice and indigenous juridical systems, as well as information on access to justice for indigenous women, children and youth and persons with disabilities, the Asia Indigenous Peoples Pact (AIPP) humbly submits this contribution to the study.

2. The Asia Indigenous Peoples Pact (AIPP) is a regional alliance of indigenous peoples organization in Asia with 39 members in 14 countries. It is committed to the cause of promoting indigenous peoples' rights and human rights in general, and indigenous women's rights in particular.

3. In its work with its members and partners, particularly through its Human Rights Campaigns and Policy Advocacy Programme and the Indigenous Women Programme, AIPP has come across the reporting of violations of indigenous women's rights mainly by virtue of their being indigenous peoples and as women.

II. Situation of Indigenous Women in Asia

4. Southeast Asia is home to the most diverse population of indigenous peoples in the world. Since a systematically disaggregated data on ethnicity and gender of indigenous peoples in the region is not available, AIPP has estimated a low 94 million to a high of 200 million based on information¹ from various sources. A safe estimate is that indigenous women make up 50% of this population. Indigenous peoples' territories are in mountains, plains, river basins, forests and coastal areas.

5. The human rights of indigenous women, and their access to justice and remedies, are closely linked to their identity as indigenous peoples. Most of human rights violations faced by indigenous peoples are connected to their right to their land, territory and resources. These cases include politically motivated killings, extra judicial killings, militarization of the ancestral territories, forced eviction, harassment, threats and intimidation, vilification as insurgents or supporters of insurgents, forced recruitment to paramilitary groups, sexual violence including rape, abandonment of impregnated women by state forces, among others. Indigenous women, as human rights defenders, and/or members of communities, may be targeted and/or severely impacted. Indigenous women are very active in opposing projects that will destroy their lands, resources and territories. They have high stakes to protect because they are the main subsistence producers deeply dependent on the lands, waters and natural resources in their territories.

6. Their daily activities are intricately linked to their role of ensuring daily food on the table. They till the lands for the production of food, and they gather wild foods - mainly for their own family subsistence. In some areas, petty cash crop production is practiced and also the sale of surplus non-timber forest products for cash. When access, use, control, management and ownership of these resources, individually or in community with others, are denied, the impact on indigenous women is more felt because of their family subsistence role. Often, they are arrested for entering a national park to do their traditional farming. They are denied access to the forest to gather their traditional food or to worship in the spirit forest. Their male leaders are arrested and they are left to both be the food producers and leaders. When their communities resist the entry of destructive projects like mines, they are all considered insurgents and their communities militarised. They are then subject to gender-based violence of which there are limited remedies.

6. Many indigenous peoples are not legally recognized as indigenous peoples with inherent collective rights in Southeast Asia. In numerous countries, they are excluded in law-making processes and generally marginalized in the formal justice systems. Remedies and mechanisms to address judiciable issues are not accessible to them. In this sense, both indigenous men and women are marginalized. The formal justice system, remedies, and processes that may address issues related to access to justice use the national language which many indigenous peoples, especially indigenous women, are not functionally literate in. There are very limited institutions of formal legal services and institutions where indigenous peoples may have their cases fairly adjudicated. Indigenous justice systems are in the majority male dominated and have no space for women's voices or participation. The formal justice system and the traditional justice systems often do not have an interface nor does the formal justice system recognize customary legal systems. The formal justice system is sometimes dysfunctional and/or weak, making it more inaccessible to indigenous peoples. As indigenous peoples, indigenous women are subject to all the conditions that their own peoples suffer.

7. It is clear that indigenous peoples, and consequently, indigenous women, in Southeast Asia are systematically deprived of their right to freely determine and pursue their economic, social and cultural development. It is also obvious that they are disproportionately negatively impacted by corporate and national development projects.

8. Given these difficulties in accessing formal justice systems, indigenous women have nowhere to turn to except the customary informal justice systems, even when these same systems may be biased against them. Without the necessary safeguards, indigenous women remain extremely vulnerable and in many areas in the region face little prospect of receiving justice for any violations of their human rights. The major cause of this vulnerability is the non-recognition of indigenous peoples as peoples with collective rights, coupled with the limited political representation of and participation by indigenous peoples in general and indigenous women in particular in Asia. This is topped by the failure of states to fulfil their obligations to raise the level of awareness of their citizens to their human rights and fundamental freedoms. In the commissioned study of the United Nations Development Programme that assessed the extent to which governance institutions in the Asia Pacific provide space to overcome the systematic exclusion of disadvantaged groups seeking to participate in decisions affecting them, the finding on *Who* are excluded explained that: "women and indigenous peoples suffer most from exclusion and discrimination in governance processes across the region."¹

9. The international standard that indigenous peoples rights must adhere to is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This international human rights instrument sets forth the rights indigenous peoples must enjoy that are guaranteed under international law and sets the minimum standard for guaranteeing the collective rights of indigenous peoples. It is an affirmation of collective rights that have long been exercised by indigenous peoples. It is not a new set of rights granted by states; rather, it is recognition of inherent rights and defines the obligations of states to respect these rights.

10. Throughout Asia, indigenous women suffer from the loss of land, territories and natural resources due to widespread development aggression, particularly economic land concessions, dams, plantations and mines. Development projects have caused the destruction of women's traditional and cultural practices, and their means of subsistence which, in turn, has led to their impoverishment and marginalization.

III. Restorative justice and indigenous juridical systems: access to justice in the customary Naga system²

11. Among the Naga communities in Manipur, Northeast India, only men can inherit the ancestral property. It is also only the men who participate in the decision making process, thus the death of a father can leave a hole in more ways than one could imagine among the women family survivors. The heir is duty bound to take care of the family from whom he inherits materials assets as well as socio-cultural responsibilities like the performance of the necessary burial rituals. In earlier times, he was also bound to avenge death if a family member was killed. In one case, a husband died intestate leaving eighteen parcels of ancestral properties including paddy fields and farms, which according to Naga customary practice would have been under the control of the wife. Under Naga custom law, the husband's heir is a nephew because he had no sons. In this particular case, the heir immediately started claiming the properties without the wife's consent nor shouldering the responsibilities that the heir is supposed to take up.

12. Under Naga custom law, when a property is to be sold, it is first to the nearest of kin within the clan. Where the nearest kin cannot or refuses to buy, it is offered to the more distant relatives and finally outside the clan. In this particular case, an uncle who is the cousin of the deceased agreed to buy a field that was being offered for sale. Negotiations on this sale were made between the heir and the uncle without the participation of neither the widow nor her daughters. Part of the sale of the property was to support the studies of the daughters. In the meantime that the sale was not closed, an aunt lent money for the school expenses of a daughter who had to study in another state. This loan was to be paid back when money from the property sold will be available.

13. The sale was never consummated as the heir changed his mind. The family tried to settle the case among closest relatives including the heir's two younger brothers, the uncle buyer and his son. This level of negotiations did not work out because the heir insisted that he never gave his permission for the sale of the property. The forum for redress at this point is at the clan level. The clan heard both sides and decided that the wife could sell off the field. The heir held on to his feudal belief that the women (the wife and her three daughters) had no right over the properties as is the traditional practice. With the clan's decision, the uncle started tending the paddy field but the heir also started working on the field. As a result, an injunction was placed on both sides by the clan. The heir refused to honour the clan decision and was expelled from the clan. This did not deter him from going against the decision of the clan insisting on his legal rights.

14. The next level of redress is the traditional court at Ato Longphang³ which affirmed the decision of the clan deciding in favour of the family of the deceased (all women).

15. The legal heir appealed this decision to the apex court, the traditional juridical body equivalent to the Supreme Court, of Tangkhul Naga Long (TNL). The apex court overturned the Ato Longphang's judgment on the ground that women had no right over ancestral property.

16. The next level of redress was at the presidential level. A request for a Presidential Review was filed for the President of TNL to review the case. He was obliged to give his opinion/judgment within six months. Six months passed but a call never came. Later on it was found that the President did not even open the case file. Through the personal intervention of a common friend, a meeting with the President was arranged. The President agreed to look into the petition and soon he came out with his order overturning the decision of the apex court of TNL and directing the heir to release the property for sale. Thus finally the field was sold to the uncle.

17. The case took more than five years to be resolved. The money received was not much but it was victory for the family, especially the daughters who were feeling the impact of the patriarchal traditions against their own personal development and self-determination. To them, it was a victory for all the women placed in a situation like them. The case has set a precedent in many ways. It was unheard of for a woman to go to the traditional court. The wife often cried so dejectedly whenever they were getting ready to attend court. She found it shameful to be glared at inside the courtroom. Men would watch from the doors and peep from the windows. It was a bitter time for the family.

18. Inheritance is a scourge for women in patriarchal patrilineal indigenous societies which often puts widows and her children, especially daughters at extreme disadvantage, even to the extent of deprivation. Often the beneficiaries of the patrilineal system would insist on claiming their traditional entitlements. The women, on the other hand, internalised their lack of entitlement. In this particular case, during the duration of the case, no single woman could give advice. All the women that the litigants met seemed to have accepted that women did not have any right over landed properties. All help came from men. This case shows the need to build awareness of both indigenous women and men, and the whole community, on human rights for all in order to combat gender biases in the traditional and customary systems including inheritance laws, and redress the prolonged bureaucratic and administrative processing. There is also the need to examine how the traditional juridical system use progressive precedents to ensure that there is no retrogression in future decisions.

IV. Justice through compensation: community processes⁴

19. In November 2012, a man in the neighbouring community raped a Magar woman in Rolpa, Nepal. The perpetrator belonged to the 'upper caste' Chhetri community. Following the incident, the woman vice chair of the Magar Women's Upliftment Society called a meeting to discuss the rape case. The meeting had participation of local representatives of all major political parties, community leaders, police and other active members of the community. During the meeting, Naumali used the information regarding laws, international human rights instruments, national policies and mechanisms relating to the rights of women that were part of the training manual given out during the training on women's rights given by the Asia Indigenous Peoples Pact and Nepal Indigenous Women's Forum in 2011. She held the training manual in her hand and pointed out the specific laws that protected the rights of women.

20. Naumali proposed a compensation of NRS 50,000 (500 USD) to be paid to the victim by the perpetrator, and an apology to the woman in front of the community. All the participants of the meeting agreed to this proposal and the case was then settled at the local level. Above all, the victim was satisfied with the collective decision led by Naumali. It avoided the long and bureaucratic hassles of the Nepali police and court system.

21. Timely and accessible redress is characteristic of community-initiated justice processes. The capacity of indigenous women to initiate these processes is enhanced by their knowledge of women's rights. Crimes are often seen as a crime against the community and thus the need for a collective decision by the community. The rape of the individual woman is not seen as only against her person but also an affront to the community. The apology is not only for the survivor but also for the community. The presence of a strong women's organization and leaders who are aware of women's rights greatly help in providing redress to women victims of violence. The sense of justice may often be culture bound because the compensation may be considered token but the important process is the community participating and taking the decision, and thus building ownership of the process, the decision and its consequences. That is more important for a woman victim than being

subject to further victimization in the state police and court processes and restores the dignity of the survivor.

V. Seeking justice has no end: Kor Doum Tey Village Souy women of Cambodia

22. In Kor Doum Tey Village, Tro Peang Chor Commune, O'ral District, Kompong Speu Province, ancestral home of Souy indigenous peoples, more than half of its population of 244, are women. The Souy have a low population and can be considered an endangered people. The HLH Group Limited company started to clear the lands of the villagers in 2009 within a 10,000 hectare concession they were granted inside the Phnom Aural Wildlife Sanctuary in the district, part of the Souy's ancestral domain. In 2010, the Souy villagers started openly protesting the encroachment of HLH Group into their ancestral domain claiming that the loss of their lands to the company and the clearing done therein will lead to their extinction as a people.

23. Through the years, the villagers with their women leaders, have fought the government and company by building their own capacity and mobilizing all possible allies in their struggle. They contacted the ILO Office in Phnom Penh, and supportive NGOs, for advice, and to provide them information on national and international laws relevant to their rights as indigenous peoples. They also held peaceful ceremonies that called for spiritual blessings and to guard them from harm as they struggled to protect their ancestral lands, including their places of worship. They also networked with other indigenous organisations, continuously engaged local and higher authorities even if they were often bluffed. Despite threats from the police, and pronouncements that all investments had the imprimatur of the Prime Minister and that protesting these was seditious, the villagers persisted in their efforts forcing the provincial and district officials to find a solution. Their advocacy campaign, many of those who were in the forefront were women, was successful. They were able to get the government to establish clear borders between company land and community land in 2013.

24. In Cambodia, the favourable resolution of this case is one of a few success stories. The elements of success for this access to justice campaign are: community unity, knowledge of the law, networking to build wide base of support, community solidarity, and the intrinsic desire to continue to exist as a people.

¹ Towards Inclusive Governance: Promoting the Participation of Disadvantaged Groups in Asia-Pacific, UNDP Regional Center Bangkok, 2007. Accessed 13 June 2012 at http://asia-pacific.undp.org/practices/governance/documents/Towards_Inclusive_Governance-200805.pdf

² Taken from "HerStory of Empowerment, Leadership and Justice", <http://www.aippnet.org/index.php/publication-sp-2697/indigenous-women/1402-indigenous-women-programme-publishes-herstory>

³ The Tangkhul Naga Long, i.e., the highest traditional body of Tangkhul people is divided into Ato Longphang (Northern region), Aze Longphang (Southern region), Zingsho Longphang (Eastern region) and Zingtun Longphang (western region) for administrative purposes.

⁴ Taken from "HerStory of Empowerment, Leadership and Justice", <http://www.aippnet.org/index.php/publication-sp-2697/indigenous-women/1402-indigenous-women-programme-publishes-herstory>