

Ethnicity and the 1990 Constitution

Yash Ghai

I Introduction

The principal purpose of the 1990 Constitution was to establish parliamentary democracy, based on universal franchise, with a constitutional monarchy. At the time there was broad agreement on the restriction of the power of the king, inclusion of a bill of rights and directive principles to guide state policy, the establishment of an independent judiciary with the power to enforce the Constitution as the supreme law of the country, and a number of independent institutions to discharge politically sensitive functions, like elections and the audit of accounts of the state.

There was however, less agreement on how far the constitution should provide for group rights of minorities and marginalised groups, such as reserved seats in the legislature, affirmative action to promote their participation in educational institutions and public services, and the protection of their languages and cultures. Proposals in support of such provisions were made to the commission set up to prepare recommendations for the new constitution. The commission did not accept the proposals because its members feared that their inclusion would promote ill feelings between different communities, threatening national unity. Nor did the commission accept the proposal to declare Nepal a secular state in which the state and religion are separate and all religions are treated equally. However some objectives of social justice and the advancement of the social and economic conditions of marginalised communities were included in the directive principles.

This paper examines the provisions of the 1990 Constitution as they relate to the situation of marginalised communities (principally women, dalits and janajatis). It then analyses the political approach which underlies the constitution and points to some of its weaknesses. Finally, it suggests some possible lessons for the current efforts at a new constitution.

II Values and Goals of the 1990 Constitution

Conceptualisation of the state

The 1990 Constitution, while introducing democracy, committed the state to ‘justice, social, political and economic’ and the promotion ‘amongst the people of Nepal the spirit of fraternity and the bond of unity on the basis of liberty and equality’, did not meaningfully recognise the multi-ethnic and multi-lingual character of the state. It has few provisions for the participation or social inclusion of marginalised communities. It refers to all the people of Nepal as a collectivity, in whom ‘sovereignty’ is vested. The principles proclaimed in the preamble are ‘Adult Franchise, Parliamentary System of Government, Constitutional Monarchy and Multi-Party Democracy’. The state (‘kingdom’) is said to be ‘multi-ethnic, multi-lingual, democratic, independent, indivisible, sovereign, Hindu and a Constitutional Monarchical Kingdom’ (Art. 3). Cow is declared the ‘national animal’. The official language is Nepali (in the Devnagari script).

The character of the state is therefore exclusionary as it is oriented towards the majority religion, the majority language, and thus also towards the majority culture. The unitary nature of Nepal and the centralisation of power accentuates the

consequences of majoritarianism and denies minorities the possibilities of the exercise of the power to determine policies at the local level or to use their language for official purposes.

Citizenship

Citizenship is the basis of rights. Discrimination in the rules about the acquisition or loss of citizenship can therefore affect a person's exercise of rights. It is easier to acquire citizenship through descent from a man than a woman (a child of a Nepali mother does not become a citizen, and a foreign woman married to a Nepali can become a citizen more easily than a foreign man married to a Nepali woman).

Fundamental rights

Equality

The most important principle of human rights is equality of all persons. This is guaranteed in article 11 which prohibits on grounds of 'religion, race, sex, caste, tribe or ideology or any of them'.

The constitution recognises that the formal equality guaranteed in this way may not be sufficient to lift the marginalised groups out of their poverty or exclusion. So this article permits (but does not require) affirmative action to 'protect or promote the interests of women, children, aged or persons who are physically and mentally incapacitated or those who belong to a class which is economically, socially and educationally backward'. Unlike as in India, the forms of special assistance are not specified in the constitution. Typically affirmative action includes reservation of seats in the legislature, the executive or the public service, or favourable treatment in admissions to educational institutions or in securing loans.

There is also special protection of dalits. No person may be discriminated on ground of caste as untouchable or be denied access to any public place or be deprived from the use of public utilities.

And there is a specific provision on gender: there can be no discrimination in respect of remuneration for the same work between man and woman.

Freedom of expression

The freedom of expression is an important political and cultural right. Its exercise serves to develop policies, highlight the deficiencies of the state, advocate changes in the structure or policies of the government, and participate in the culture or traditions of communities.

Other important rights which serve similar purposes and are closely connected to the freedom of expression are the freedom of the press and the freedom to form associations or unions and to assemble or hold processions.

While these rights are protected in the 1990 constitution, they can be restricted on grounds which relate to ethnicity. They can be restricted if any act 'undermines the sovereignty and integrity of the Kingdom or which disturbs the harmonious relations subsisting among the people of different castes or communities...'.

This approach assumes that relations among people of different communities are harmonious (a view from which those who are marginalised may disagree). It could prevent the disadvantaged from making political issue of discrimination against them, or identifying the ‘crimes’ of the privileged against the less privileged, or the advocacy of social reform. Its purpose could thus be interpreted as supporting the status quo by the use of authoritarian means. It could prevent a free, frank and constructive discussion of ethnic relations, and the subordination by one group of others, and thus in the long term harm rather than improve inter-ethnic relations.

Religion, language and culture

The constitution declares Nepal a Hindu state (art. 1). The King must be an ‘adherent of Aryan Culture and Hindu Religion’ (art. 27)—at the same time the King is declared to be the ‘symbol of the Nepalese nation and the unity of the Nepalese people’. Apart from this, the implications of Nepal being a Hindu state are not spelled out. But the dominance of Hindu beliefs and rituals is pervasive.

The freedom of the adherents of all religions to ‘profess and practise’ their own religion is guaranteed (art. 19). However the freedom seems to be qualified, since it relates to belief or practice as ‘coming down to him hereditarily having regard to traditional practices’. This could restrict reform of religious practices. It reinforces another restriction, that no person has the right to convert a person to another religion’, although presumably this does not prohibit a person from changing his or her religion.

Religious denominations are entitled to ‘maintain their independent existence and for that purpose to manage and protect its religious places and trusts’

The constitution makes Nepali the official language (in Devnagari script) (art. 3). This means that all official business must be conducted in Nepali. But other languages are not ignored. The article also declares, ‘All languages spoken as mother tongue in various parts of Nepal are the languages of this nation’, although the implications of being a national language are not stated.

Article 18, which deals with culture and education, gives every community within Nepal the right to ‘conserve and promote its language, script and culture’. It is free to ‘establish schools for providing primary level education to the children in their mother tongue’.

It would seem from the way these rights are formulated that they are to be exercised in the private domain. Nor does the constitution require the state to provide financial or other assistance to these communities to practice or promote their culture. Under the constitution, for example, the state has no obligation to provide for the teaching of local languages.

Therefore the protection of cultural rights is weak, and falls short of generally accepted international norms.

Right against exploitation

Article 20 prohibits 'traffic in human beings, slavery, serfdom or forced labour in any form'. Minor children cannot be employed in any factory, mine or similar hazardous work'. Violations of these rights are punishable by law.

Since members of marginalised communities are particularly vulnerable, this right can be of great benefit to them if it is rigorously implemented.

Directive Principles of the State

Directive Principles are a statement of goals which the state and society should aim at. They are in the form of instructions to the state as to how it should exercise its powers, and are binding on the state. They are to be implemented in stages having regard to 'the means and resources available in the country' (art. 24). However it is not possible for any one to go to court to enforce these goals, and therefore they depend on the commitment of the government to the goals.

Of all the parts of the constitution, directive principles are of the greatest relevance to marginalised communities. The state has to establish a 'a just system in all aspects of national life, including social, economic and political through the protection of life, property and liberty of the general public' (art. 25(1)). It must prevent the concentration of resources 'within a limited section of the society by making arrangements for equitable distribution of economic gains on the basis of social justice, by making such provision as to prevent economic exploitation of any class or individual by another class or individual...' (art. 25(2)). It must eliminate 'all types of economic and social inequalities' (art. 25(3)). Other directive principles require the state to raise the standard of living and welfare of the people, develop basic structures like public education, health, housing and employment on an equitable basis throughout the country.

Various groups are targeted for affirmative action: (a) women ('providing opportunities for maximum participation of women in the task of national development by making special provisions for their education, health and employment' art. 26(7)); (b) children ('by safeguarding them from exploitation of any kind and gradually implement a programme of free education', art. 26 (8)); (c) orphans, helpless women, aged, disabled and incapacitated persons (for their welfare through 'special measures on education, health and social security', art. 26(9)); (d) socially and economically backward tribes and communities ('by making special provisions with regard to their education, health and employment', art. 26(10); and the labour force ('increasing participation...in the management of enterprises by providing it with gradual employment and guarantees to their right to work by ensuring their rights and interests', art. 26(6)).

Another directive principle has implications for the restructuring of the state. Article 25(4) says that the state has the main responsibility 'to bring about conditions for the enjoyment of democracy by providing opportunities for the maximum participation of people in the governance of the country by means of decentralisation of administration...'

Women, children, labour and other marginalised or disadvantaged communities may feel that the state has done little to fulfil its obligations under the directive principles.

Courts cannot directly enforce them (though Indian courts have now taken a positive approach to the implementation of directives in their constitution) and successive governments have shown little political will or commitment to the directive principles.

III Institutions of the State

Perhaps one reason that directive principles have been neglected by the state is its structure and institutions. The Nepali state is highly centralised and allows few opportunities for people's participation. It has to a large extent remained the preserve of former established elites and classes. Political parties have failed to effectively democratise society.

Monarchy

Provisions about the monarchy tend to emphasise and reinforce the Hindu and Aryan aspects of Nepal. If too many Hindu values and rituals are associated with the monarchy, the very symbol of the nation can be seen as divisive and marginalising non-Hindu communities.

In general, a monarchical system bolsters aristocratic and conservative elements in society. When minorities belong to classes which are economically disadvantaged, their own values and customs also suffer because of the influence of 'courtly' class and associates.

Although described as 'constitutional', the King has been given considerable powers. And the present King interpreted provisions about the monarchy in a way that expanded his powers beyond what was originally intended.

Political parties

The 1990 Constitution places considerable emphasis on multi-party democracy (see for example art. 112). Political parties were seen as the principal vehicle for the representation and participation of the people and for the exercise of state power. A tradition seems to have grown in Nepal that political parties play a major, indeed an exclusive, role in national policy making and administration.

The constitution prohibits a political party 'on the basis of religion, community, caste, tribe or regionality' (art. 112(3)). An elaboration of this rule is the prohibition of any party which 'prejudicially restricts' membership on the basis of religion, caste, tribe, language or sex. A party is also prohibited if its 'name, objective, symbol or flag indicates as belonging to any particular religion or being communal or of a nature tending to disintegrate the country' (art. 113(3)). Such is the concern with communal harmony that even the right to move freely in the country and to reside in any part of Nepal can be denied if it 'disturbs harmonious relations subsisting among various castes and communities' (art. 12(2)(4)).

It is possible that these restrictions (along with the restrictions on freedom of speech, assembly and association) could inhibit legitimate political activity, obscure elements of Nepal's diversity that need to be recognised, and force minorities to operate through political parties over which they have little influence. It could also lead to the centralisation of power in parties as a mirror image of the centralisation of power in the state (as mentioned below).

The electoral system

The more important of the two houses of Parliament, the House of Representatives, is elected on the basis of single member constituencies where the results are determined by 'first past the post' system. This means that the candidate who obtains the largest number of votes (even if it is not an overall majority) is elected. Since only one member is elected from a constituency, it often means that minority communities do not get a representative of their own community. This may not be important if the constituency is fairly homogenous, but in multi-ethnic constituencies, this can become a problem. This system of voting is also not very democratic as it is possible for a party to win a majority of seats on the basis of victory in constituencies on a minority of votes.

System of executive

The constitution provides for a parliamentary system of government, which means that the leader of the largest party in the House of Representatives forms the government. The government can also be dismissed by the vote of the majority of the members of the House of Representatives. The principle of majoritarianism allied to the rule of 'winner takes all' greatly disadvantages minorities, leading to their exclusion from power or influence. This is specially the case when the system of elections is, as in Nepal, based on majoritarian voting, with single member constituencies in which the candidate with the largest number of votes wins. Membership of the executive is determined on the basis of parties, not on the basis of ethnicity, gender or region.

The legislature

Parliament consists of two houses, the House of Representatives and the National Assembly, of which the first is more important, being responsible for both forming and dismissing the executive. The members of the House of Representatives are elected on the basis of first past the post system. As mentioned above, such a system has a strong majoritarian bias and is deemed to be unfavourable to minorities and women.

The National Assembly consists of three categories of members, numbering 60. The largest number is appointed by the House of Representatives itself, by the single transferable vote (STV), which should produce some degree of proportionality among the candidates of political parties. But it is the parties that are the critical element in the system.

15 members (3 from each region) are elected by an electoral college made up of chairs and deputy chairs of local authorities, also by STV, and pending election of local authorities by the House of Representatives—thus again increasing the dominance of the House of Representatives on the National Assembly.

10 members are appointed by the King (strictly speaking the government) from 'among distinguished persons who have rendered eminent service in various fields of national life'.

In many countries second chambers are used for representation of minorities or regions. A different form of representation from that in the other house is considered

valuable, if the second chamber is to act as some kind of check on the lower house or if it to create a more representative and participatory legislature. In Nepal the National Assembly largely reproduces party membership (and even the King's appointees are likely to be drawn from well off communities). Such arrangements neither serve the purpose of scrutiny of the lower house nor the representation of or concern for minorities.

The only special form of representation in Parliament is for women. Each party must nominate at least 5% of its candidates from among women. And at least three women must be elected to the National Assembly out of the 35 members elected by the House of Representatives (art. 46(1) (b)). Neither device has proved particularly effective.

Judiciary and public services

Other state institutions are equally unfavourable to minorities (whose members have had less access to education). There is no principle of proportionality which might bring in their members into the public service or other state service. High educational qualifications (art. 101(3) or art. 103) or other tests of 'merit' (as demonstrated in examinations) favour those already well off. It is also unlikely that any women or members of marginalised communities will be on the Constitutional Council (art. 117)—due to qualifications of office holders (ex-officio) who are members of the Council.

IV General comments

As I have mentioned earlier, the commission which was responsible for the initial draft of the constitution received submissions from the public for the recognition of the disadvantages suffered by women, dalits and jana jatis. For the most part it rejected them. It was very concerned about the effects of the constitutional recognition of dalits and jana jatis in the form of special representation, quotas in state services, or easier access to educational institutions, would threaten communal relations and undermine national unity (as is evident in the restrictions it allows on the the freedom of speech, assembly and associations, and the probation of ethnically based political parties. It followed what might be called a 'liberal' approach, based on the belief that the best way to organise, and integrate, society in multi-ethnic states is to treat all individuals equally (through the protection of the rights of the person, not those of the communities), and leave matters of culture to communities themselves, with the state playing a neutral role. Particularly important is the principle of equality and non-discrimination. But 'liberals' recognise that special measures, on a temporary basis for the advancement of the disadvantaged communities, might be necessary for real equality. Following this approach, the commission recommended a number of directive principles. But if this was the philosophy of the commission, it was not consistent, as it effectively entrenched the dominance of caste (Brahmins and Chhettris), religion (Hinduism), and culture (Nepali)—and in this way undermined the basic principle of a liberal society. And the agenda of social reform and justice expressed in the directive principles was not implemented.

This approach has been challenged in a number of states by activists and scholars who argue that it is merely a ploy by those well established to maintain their political, economic and cultural dominance. They argue that the law should recognise cultural and ethnic distinctions both for reasons of social justice and the sustainability of state and society ('unity in diversity'). This recognition can take many forms—special

representation in the legislature, share in state power either in the form of coalitional government or autonomy/federalism, cultural rights of language, religion, and personal laws, and preferential policies for the disadvantaged. The denial of recognition leads to discontent and eventually to conflict and demands for secession.

Thus we are faced with two models of or approaches to the constitutional ordering of multi-ethnic states. Last time constitution makers chose the ‘liberal’ approach, denying diversity. That denial is often offered as the explanation of the terrible conflict that engulfed the country. And this time the demands of the disadvantaged and the marginalised are strongly argued and articulated.

V Lessons from the experience of the 1990 Constitution

The 1990 Constitution had considerable merits and provided a reasonable framework for democratisation. But it aimed at majoritarian democracy rather than social or ethnic justice. Little attempt was made to implement important parts of the constitution, like the directive principles. Few attempts were made to use courts to secure the implementation of constitutional provisions favouring women and other marginalised communities. Collectively they constitute a majority of the population. Yet they remained effectively outside the sphere of politics or state affairs.

What lessons can we draw for the current round of constitution making?

The first is to do with the process of making the constitution. All people, but particularly the marginalised communities, must be allowed to, and must, participate fully in the process, articulate their grievances and lobby for their demands. A good process can be a great public education in democracy and responsibility—without which a constitution cannot easily take root. The promise of the Constituent Assembly as the manifestation of the sovereignty of the people, and not merely the dominance of political parties, must be realised.

The second lesson is that formal equality that a provision of the constitution ensures is not sufficient. There must be real equality, of opportunity and access. That requires pro-active policies and affirmative action on the part of the state, the redistribution of resources, and the empowerment of the disadvantaged. This is particularly the case when the real problem is not legal or political but social. The marginalised communities constitute a majority and have enjoyed the right (and power) of franchise. Yet they have remained marginalised—because they have been socially dominated.

Thirdly, the constitution must impose clear obligations on the state to secure to all their rights, and particularly the rights of education, health, shelter and human security. Many components of directive principles need to be converted into rights. But the enforcement of rights should not be left to private initiatives. There should be clear time table for their implementation by the state and where relevant, the corporate sector. Special institutions, like a constitution implementation commission, should be established to ensure adherence to the time table.

Fourthly, it is not enough to impose obligations on the state. A grandiose bill of rights may remain a mirage unless the institutions of the state, particularly the legislature and the executive, are also rights-friendly. Political parties must become real

instruments of democracy and accountability. Therefore institutions must be so structured that they allow the participation of and respond to the needs and demands of the disadvantaged. A major reason why the reform agenda of the 1990 Constitution was not fulfilled may well be that these institutions became the bastions of the privileged and established elites.