Ethnicity, Identity, Participation and Social Justice

Yash Ghai

1. *Ethnicity and the Restructuring of the State*
The 1990 Constitution of Nepal acknowledged the country to be 'multi-ethnic and multi-lingual'. Yet it described the state as indivisible and sovereign and created a highly centralised government. It declared Hinduism as the official religion and made Nepali (in the Devanagari script) the sole official language. The King, closely associated with a particular religion and social structure, was described as the symbol of the Nepalese nation and the unity of the nation. The Constitution established (or more accurately endorsed) the exclusionary nature of the state, oriented towards the majority religion, the majority language, and the majority culture. The 'first past the post electoral' system restricted the access to, and participation in institutions of the state, of minority, marginalised communities. The hegemony of the high caste elite, in control of major political parties, was to be preserved by prohibition on sectarian and ethnic parties. The people of Nepal were envisaged as a 'collectivity' and the assertion of identity on the basis of religion, caste or language was banned. A principal task of the state was the promotion 'amongst the people of Nepal of the spirit of fraternity and the bond of unity on the basis of liberty and equality'.

Nepal was not unusual in using the state to establish the hegemony of a particular elite or community and to mould the entire population its image (and in this respect the Constitution carried on a much older tradition of state formation in Nepal). However in recent years the legitimacy and fairness of this model of the 'nation state' has come under severe challenge in many parts of the world. The roots of discontent lie in the economic, social and political exclusion of communities and their members. There is a close correlation between poverty and ethnic minorities. Although a powerful case for a more inclusive state system is based on the threat to the culture of minority communities and therefore to their identity, self-respect and social orientation, many ethnic protests and insurgencies are less about the preservation of culture, religion or tradition than about the lack of access to the state and the economy. In this way ethnicity itself becomes a social and political force, a means to mobilise and organise members of the community, as its leaders advance claims for full participation in the affairs of the state through re-designing it.

In the present times, it has become exceedingly hard to resist such claims. They now find support in both moral and legal theories, on bases of justice and self-determination. The international community urges political leaders to agree on measures of self-government or power sharing, putting both government and insurgents under considerable pressure, as a way to resolve internal conflicts. These conflicts are fuelled by a deep sense of grievance and sustained by easy access to arms in international and regional markets. It is difficult today to suppress ethnic sentiments, demands and organisation—paradoxically, the more the attempts to suppress it, the stronger it becomes, with increasing capacity for disruption.

Consequently, in a number of states new norms, emphasising the virtues of diversity, and a re-conceptualisation of the political community and the division and sharing of

sovereignty, have found their way into the constitution. Clear alternatives to the single nation state, based on the political and legal recognition of ethnic or 'national' communities, have emerged. This has drawn attention to different models or approaches through which ethnic claims and conflicts are mediated, some of which are now part of the discourse in Nepal as it enters the phase of negotiations on a new constitution.

II *Different models of the state in multi-ethnic societies*
There is a great variety in the constitutional arrangements of multi-ethnic states. However, for the purposes of discussion, such states can be broadly classified into two categories: (i) states which tend to disregard ethnic differences and to treat all persons as citizens with equal rights and obligations ('the liberal' state); and (ii) states based on the political recognition of ethnic groups as rights-bearing entities ('ethnic-based states'). The latter can be sub-divided into two groups: one in which a majority dominates other communities ('hegemonic state') and the other which is more consensual and aims at power-sharing and proportionality ('consociational state').

In the liberal state, citizenship is the primary concept for a person's relationship to the state and is the basic building block for structures and procedures of state. All citizens, regardless of race, ethnic, religious, gender origins or affiliations have equal rights and obligations. Ethnic or religious communities are not recognised as political or corporate entities; the state is neutral as between them (so that, for example, in a multi-religious country, the state is 'secular', with no religion offered a special status). But through the distinction between the public and the private sphere, diversity is tolerated, even valued, leaving the exercise of the freedom of religion, use of language, enjoyment of culture to the private sphere.

However, to some extent the liberal state is based on the assumption of cultural or 'national' homogeneity. The liberal state has been criticised for its disregard in practice of the values, culture and interests of minorities and reflecting those of the majority community. The traditional answer to this dilemma has been the concept of the 'nation-state' whereby each 'nation' is entitled to its own state. Today this option has been ruled out by the international community (and there are problems with the definition of 'nations').

Some states have tried to meet these criticisms of the liberal state by emphasising multi-culturalism and according political recognition to special minorities (such as indigenous people or other vulnerable or disadvantaged communities). Canada is a good example of this trend as is India, while some other liberal states have tried to deal with the dilemma by the active cultivation by the state of 'civic'/'secular' nationalism, of which France, embroiled in the controversy over the wearing of religious symbols in public schools, is an obvious example. Another example of the liberal state adjusting to multi-ethnicity is a re-examination of electoral systems, redefining the role of elections as the promotion of inter-ethnic integration and fair representation of minorities.

In the ethnic-based state, ethnic groups are fundamental building blocks of the political system and many rights of citizenship can only be exercised through membership of an ethnic group. Citizenship rights are differentiated. Representation and participation are based on ethnic distinctions. Therefore group rights are

frequently more important than individual rights. There is often explicit recognition in the public sphere of cultural differences between communities, blurring the distinction between the public and private.

There are fundamental differences between the hegemonic and consociational state. The primary characteristic of the hegemonic state is the dominance of one community over others, recognising them only if they submit to its rule. There have been numerous examples of this in history (including most imperial and colonial systems). Modern instances are apartheid South Africa where whites subordinated other communities to its control, and Israel today where citizenship of Arabs is tolerated only if they accept Jewish rule as manifested in many aspects of the state. Indigenous people complain that they have to accept the dominant values of the new settlers, able to negotiate only limited spaces in the interstices of the imposed state. Even where political rights are given to the subordinated communities, it is only as junior partners (examples could be Malaysia or the aspirations of indigenous Fijian leadership).

The consociational state repudiates the dominance of one community over others, even if one community is a clear majority—it rejects majoritarian democracy. Instead, it is based on a partnership between all communities who must be represented in the legislature and the executive as such (that is, as distinct and separate groups). The central feature of the consociational state is power sharing. But it goes beyond power sharing to give each community a veto over critical legislative and executive decisions. The principal aspects of the consociational state have been outlined by its leading proponent, Arendt Lijphart, as follows (a) proportionality so that each community is represented in all state organs in proportion to its size of the total population; (b) power sharing in national government through a grand coalition; (c) self-government for communities through federalism or autonomy; and (d) mutual vetoes vested in community representatives.

Switzerland is seen as a pre-eminent example of a consociational state, but the concept has numerous critics. However, it has become popular with minorities and policy makers who have to patch a country together after prolonged, bitter and bloody conflicts. Belgium is a striking example of a modern state which turned its back on liberalism in favour of consociationalism. This approach has been applied in Bosnia-Hercegovina, Kosovo, Macedonia, Northern Ireland, and has been advocated in other conflict situations (e.g., Iraq). It lends itself to the wishes of minority groups if they are concentrated in separate geographical areas, for its has the attraction of self-government. Even if a community is dispersed, a measure of self-government can be achieved through cultural councils—which are an essential component of the Belgian solution.

There are few advocates of the hegemonic state, as it violates most notions of fairness and justice (and is frequently sustained only through major violations of human and group rights). But even the consociational model has problems: who are the communities entitled to a separate status, and how is membership in them to be defined? How stable are these communities? Frequently the approach operates only by imposing identities on people—like creating Bantustans, or treating the Fiji community descended from migrants of Indian origin as Indians when they want to be identified as belonging to Fiji. It assumes a homogeneity of interests among the people of a group, when in fact there might be many different and conflicting

interests. It tends to entrench and rigidify distinctions among people, and hinders political integration across communities or regions. The dominance of the ethnic issues keeps other critical issues off the agenda: social justice, gender equity, economic development, the concerns of trade unions, professionals, the disabled and the disadvantaged, etc. It places the individual at the mercy of the community, restricting her choices—in stark contrast to liberalism which seeks to enhance individual choices. Consociationalism also overlooks many aspects of public policy critical for ethnic accommodation, such as affirmative action, language, and culture. Recent applications of consociationalism have produced many layered and complex structures and decision making systems which had been hard to operate—and which depended on the very factors in whose absence consociationalism was seen to fill the void—the lack of trust and mutual confidence.

Defined in this way, the liberal and the consociational models seem in deep conflict. However, consociationalism is committed to human rights in general, and the most absurd features of it are moderated by the tension with human rights. Liberalism prides itself on its tolerance and the flowering of culture and arts (but in the private domain, although it is inching its way towards some recognition of diversity in the public sphere, providing a productive tension here also with diversity and universalism). Both systems can accommodate federalism or autonomy (although liberalism is weary of federations based on ethnicity). In practice many acceptable systems combine positive elements of both. In a situation of conflicts, with the clash of different paradigms, the solution has often to be found somewhere along the spectrum linking the two.

More specifically, devices for accommodating diversity depend on factors of diversity such as culture, religion, language, history, and region. What is feasible depends on the configuration of ethnicity: the number and size of ethnic groups; the distribution of ethnic groups, whether compact or diffused; and whether differences between ethnic groups are cross cutting or overlapping. These factors are particularly important in Nepal which has a complex picture of ethnic differences as well as overlapping interests.

III *Ethnicity, identity and constitutional reform in Nepal*
Superficially, there seems to be great change in the political situation from that when the 1990 Constitution was negotiated and drafted. There is general acknowledgment of the marginalisation and exclusion of various groups from state, society and economy, and that this factor was responsible for the Maoist insurgency. The mandate from Janaandolan II is interpreted as a new regime of inclusion and social justice, to be introduced through a new constitution adopted by a constituent assembly.

However, whether this mandate will be fulfilled and if so, in what ways, is still unclear. There is deep scepticism about the willingness and the ability of the ruling consortium of 8 political parties to do much about social and political inclusion, led by broadly the same high caste leaders and committees who elaborated the 1990 constitution with its hegemonic and centralist orientation. This scepticism has been reinforced by the way in which the Interim Constitution was negotiated and adopted, which excluded the participation of the marginalised groups. The Interim Constitution itself provides no clear indication of how it would bring about inclusion. Its phraseology about which groups are marginalised varies from article to article, giving

no clear impression of who would benefit from reforms. Apart from the commitment to eliminate the centralised state, it offers little in the way of specific devices for minority inclusion—and the electoral system it incorporates has more to do with the concerns of the party leaders than commitment to inclusive forms of representation. In brief, it is long on promises, exceedingly short on delivery.

Marginalised groups (Dalits, janajatis, Madhesis, and women) are trying to formulate recommendations for the new constitution and already it is clear what their demands will be: fair and effective representation in state institutions, equality, secure citizenship, affirmative action, a secular state, recognition of their culture and languages, making parties democratic and inclusive, and self-government through federal type autonomy. Understandably the elite hitherto in positions of power is uneasy with this agenda, and not only because it would chip away at its privileges. Yet the factors and circumstances underlying this reform agenda are at the heart of Nepal's problems and will not go away. For stability and development, the constitution making process must deal with it. Nepal faces the challenge of squaring the recognition of diversity with the benefits of 'nation state' (community cohesion, common values, willingness to sacrifice for the common good, prospects of democracy, a common public space, the expression and development of culture).

In a word, the constitution making process is about identity in a New Nepal, which emphasises common bonds and interests while being respectful of difference. The new identity cannot be imposed but has to be negotiated. This is why the constitution making process has to be a great deal more participatory and transparent than has been the case so far.

On substance, the constitution must address the specificity of injustices and remedies. It is necessary to move away from a vague and general notion of 'marginalisation' to the specific disadvantages that particular communities face. Nepal has a heady (but potentially productive) mixture of caste, class, region, gender, religion and ethnicity. There are more than 100 ethnic and caste groups, who speak more than 92 languages, and adhere to several religions. Population is unevenly divided between regions, so that there are also social and historical differences determined by topography. But this fragmentation also means that there is no group which can be described as the majority, although there are privileged and disadvantaged groups. International norms are today are as much the relations between communities than with rights of minorities, and the absence of a discernible majority group opens up possibilities of a variety of self-government and power sharing arrangements.

This complexity also suggests that there cannot be solutions based simply on ethnicity. There are more cross cutting than overlapping differences, but even this should not obscure the fact that at on various points, the interests of Dalits, Janajatis, Madhesi and women would conflict. And even among the Bahuns and Chettris there are poor people whose needs must be addressed. So while ethnicity should not be ignored, constitutional reform must be tied, broadly, to social justice. And the debate about federalism, while it cannot be disconnected from ethnicity, should fully canvass and compare the benefits and shortcomings of ethnic based federation and geographically based federation. The purposes and dynamics of these types of federations are quite distinct, with different political implications. The roots of the political and social problems that have caused such suffering to the people of Nepal in

the last decade lie not so much in ethnic differences as in pervasive injustice, massive discrimination and exclusion, and the failure of the state to develop constructively the notion and institutions of a common political community.

There are no easy solutions to what has come to be perceived as the ethnic problems of Nepal. But it would be useful if, with the promised burial of the hegemonic state, some agreement could be reached early as part of the constitution making process on the vision of a New Nepal, for the many constitutional devices (forms of representation, participation, power sharing, integrity of cultures, accountability, and social justice) must fit within the framework of that vision, even if they are a mixture of the liberal state (representing the importance of the common political space) and the multi-national state (representing the vitality of diversity).