

Ethnicity and Rights: A Guide to the Study of Discriminatory Social Relations in Nepal

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[Prepared by Bipin Adhikari in May 2001 to help stimulate discussions on ethnicity and rights in Nepal in the context of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance to be held at Durban, South Africa, on 31 August-7 September 2001]

People of all ethnic groups must respect one another, in all their diversity of belief, culture and language. Differences within and between ethnic communities should be neither feared nor repressed, but cherished as a precious asset of a nation. Instead of allowing the diversity of ethnicity and culture to become a limiting factor in human exchange and development, they must refocus our understanding, discern in our diversity the potential for mutual enrichment. This should be the voice of modernity, the vision for 21st century.

Tolerance and Diversity

In this context, the declaration titled "Tolerance and Diversity: A Vision for the 21st Century" is a most forward looking declaration on the issue of racism. It is, in essence, a statement of our shared vision for an inclusive, non-racial and non-discriminatory world and an invitation to governments and societies to take stock at the beginning of this new millenium of how we are progressing in achieving these ideals.

The first few sentences of this declaration lay down its central theme: "As a new century begins, we believe each society needs to ask itself certain questions. Is it sufficiently inclusive? Is it non-discriminatory? Are its norms of behaviour based on the principles enshrined in the Universal Declaration of Human Rights? Racism, racial discrimination, xenophobia and all kinds of related intolerance have not gone away. We recognise that they persist in the new century and that their persistence is rooted in fear; fear of what is different, fear of the other, fear of the loss of personal security. And while we recognise that human fear is in itself ineradicable, we maintain that its consequences are not ineradicable."

Like most of the other countries in the world, Nepal is a country of people from different backgrounds, subcultures and traditions. Throughout the history, these people lived together in peace and harmony, and mostly in the best tradition of respect to each other and tolerance of differences. Not only all these people were indigenous, but also the Kings who ruled them were indigenous. It is in this background that Hinduism originated and developed as an ethnic religion common to many of these communities in Nepal. Unlike other universalising religions like Christianity and Islam, Hinduism did not originate with a specific founder. Whereas the origins of Christianity and Islam are recorded in the relatively recent past, Hinduism existed long before recorded history. Hinduism is not a religion that came from abroad. It was as indigenous as the people who followed it. It developed here itself with apparently no universalising agenda. The job of universalisation needed fixed parameters. A religion that developed out of an interaction with many sub-cultural patterns at the face of tough geographical, social and climatic conditions of the hills had no such parameters.

A common religion of all ethnic groups, Hinduism adhered to the belief that there was more than one path to reach God. Because people started from different backgrounds and experiences, the appropriate form of worship for any two communities might not be the same. Again Hinduism did not have a central authority or a single holy book, so each community had a freedom to select suitable rituals, or modify their rituals in interaction with other communities. If one community practiced Hinduism in a particular way, other Hindus would not think that the community had made a mistake or strayed from orthodox doctrine. Absence of the universalising parameters thus led to added flavours to Hindu way of life.

The most important aspect of the Hinduism in Nepal was thus the concept of plurality. Even in modern Nepal, one can easily notice that the Hindu orientation of one community is different from the Hindu orientation of the other community. Some Hindus are more doctrinaire and some more ethnocentric. Some practise Hinduism with bon animism, some practise it with "Jhankrism." No single or monolithic theoretical perspective could orient this trend. As an ethnic religion, Hinduism prospered with variety, and despite a definitive orientation of the ruling elite to a particular direction, at a particular point of time, the Hindu society had its own course of evolution. It is due to this background that there had never been a civil strife, no inter-ethnic frictions of notable nature, and no pervasive discrimination between ethnic communities in the history of Nepal as one can see in other countries in the neighborhood. The Hindu state was a tolerant state to a greater part of the history. It is for this reason that differences persisted in Nepal despite centuries of continued Hindu mode of governance.

Nepal's growth as a Hindu nation should never be confused with Indian model - a historically fundamentalist concept of religion that assumed its present character at the face of repeated aggressions of the sub-continent from Muslims, Christians and others. When the Hindu kings of Nepal promoted Buddhism in Nepal, Tibet and China, they were apparently not promoting an antagonist religion. They were only promoting what they believed as more refurbished notion of Hinduism at that point of time. On the tranquil hills and mountains of Nepal, challenges from the universalising religions were apparently meager. Some attempts were made by Christian missions during the medieval age to propagate Christianity with the approval of the Malla Kings, but they were met with very cold response by the people. Hindu society gave a lot of freedom to its constituent parts; and some sort of local self-government always existed in Nepal. Even the Ranas who had a much deeper centralising tendency had a compulsion to rely on self-government practices in view of the topographic and physiognomic conditions of the country. All were considered Hindu by the Hindu state unless somebody said he was not. The history of Nepal until recently, except for the isolated Christians and Muslims, does not give examples of the communities who said they were not Hindus. Of course, one has to admit that the Bahun-chhetri ethnicity is not the sole indicator of Hindu mode of life. This is an important fact that many sociologists or anthropologists on Nepal have ignored leading to many wrong conclusions about the context of ethnic rights in Nepal.

The very theory that Hinduism (or Buddhism) traveled to Nepal from the neighbouring southern states is a product of those scholars who try to see Nepal through the Indian window. In majority of cases, this is due to lack of indigenous sources and also limited time spent on research. Hinduism is the sum total of all ethnic categories of historical Himvatkhanda. The sum might look closer to one sub-culture or a bit far to the other, but this always happens in case of any type of

system which is an average of different values. The contribution of animists on this "average" was as prominent as those of Jhankrists. It is although very true that with the Malla kings, Nepal including its Madesh constituents started receiving religious inputs from the neighbouring states of the sub-continent. There are evidences that Mithilanchal was always a source of inspiration for the hills, and hills started showing terminal problems after the Madesh, and Mithilanchal beyond Madesh, also came under the influence of other states. It all started with very renowned Malla and Shaha kings who wanted to modernise the Nepalese polity and build the nation with all their aristocratic good faith. The non-Nepalese version of Hinduism thus started penetrating into Nepalese territories by default.

Basic Ethnic Data

Apart from this current of history, the issue of ethnicity must be studied in Nepal in its own terms. Subordinate or deprived groups which came to be created slowly in Nepal were not due to voluntary or involuntary migration, annexation or colonialism. They were created by internal processes in a majority of cases. Race is never perceived in Nepal as a category no matter how strongly one has a tendency to find it. Except for those who came to Nepal during the last six or seven decades or so, from the adjoining territories, Nepalese of all ethnicity may fairly be described as indigenous people. There are certain consequences of subordinate-group status of a number of ethnic groups in the Hindu society, but these consequences are not as those faced by blacks in the United States or Nazi Germany's extermination of 12 million European Jews during World War II. The most extreme way of dealing with a subordinate group known in the world is eliminating the group itself. It never happened in Nepal. Dominant groups never forced any specific subordinate group to leave certain areas or even vacate the country. Expulsion as another extreme consequence of minority-group status is alien to the Nepalese nation.

The system of 'sano-jat' or 'lower caste', which is the most pitiful aspects of Hindu society, is not the exact duplication of segregation system that many Western countries practised until recently. Segregation as referred to the physical separation of two groups of people in residence, workplace, and social functions also never existed in the same sense in the hills of Nepal. Segregation was used to be imposed in Nepal by the dominant group on a subordinate group as in the West. But intergroup contact between sano-jat and others inevitably occurs even in the most remote village of Nepal. None of these preconceived notions fit effectively over here. It is for this reason that various attempts to show the aggravated forms of ethnic problems in the modern Nepalese society has failed.

Similarly, the fact of fusion and assimilation of different ethnic groups does not need proof. But it is a voluntary process which never go together in the whole society and its effects are not same everywhere. The state had never any agenda for it. There were definitely some shared core values, but differences were also as prominent as shared values. No ethnic groups in Nepal have become indistinguishable because the ruling elite dominated in such a way. Regardless of how many religious groups were involved, assimilation never dictated complete conformity to the dominant group. None of the ethnic groups in Nepal either entailed any active effort to shed all their distinguishing actions and beliefs, or gave a complete, unqualified acceptance to the other group. Nepal's plurality is a fact of history. To a great extent, Nepalese society implied mutual respect between the various ethnic groups, a respect that allowed minorities to express their own culture

without suffering prejudice or hostility. That was intrinsically the Hindu mode of social life which the "nakkali" (second or third rate) Hindusthan could not sustain.

In fact, Nepal's ethnic relations appear to be far better than in any comparable society during the Hindu mode of governance before the Ranas. Slavery in the United States, for example, rested on four central conditions: first, that slavery was for life and was inherited; second, that slaves were considered merely property; third, that slaves were denied rights; and fourth, that coercion was used to maintain the system. A slave could not marry or even meet with a free Black. Marriage between slaves was not legally recognised. A slave could not possess weapons or liquor. A slave could not possess property including money, except as allowed by his or her owner. A slave could not testify in court except against another slave. Slavery as enforced through the slave codes, controlled and determined all facets of the lives of the enslaved Americans. It is in this background that struggle to desegregate the schools, civil disobedience, and other movements were carried out. Things were never extreme to that extent in Nepal.

Rights and Wrongs

As a lawyer it is very difficult for this commentator to subscribe to the attempts of many scholars to study in Nepal in Indian template, or try to understand the marginalised ethnic groups of Nepal hills and plains in terms of civil unrest in the US and the other Eastern or Western European countries. The natural question, therefore, is what are the Nepalese issues of ethnicity and rights that we should concentrate on? A thoughtful reader of the legal history of Nepal, especially the history of unified Nepal, can note down some points with much ease. A relatively modest background of Nepal should not, however, be taken to mean that inter-ethnic relations had no problems in it, or there were no majority or minority sensibilities, or Hinduism had no impact of dehumanising feudal, social and economic relations of the day.

At every point of known history of Nepal, there were ruling classes or those who were ruled by them. Like every historical society Nepal also had undergone with this process, and in fact, it continues to go by them even today. There were definitely instances of exploitative economic relations, social classes, political conviction, group sensibilities, gender, communal beliefs, economic interests and sub-cultural traditions often dividing the people. Hinduism, as many other religions of the world, had no mechanisms to deal with these issues. This is a harsh fact of human history, and it is not attributable to the Himvatkhanda alone. Diversity was not seen as liability in the Nepalese historical process, but it was not cherished either. The systems of domination - political, cultural or religious - always had their more muted aspects along with their public dimension. The Hindu state must also have suffered with this phenomenon. Above all, smaller communities were not involved in decision making at the highest level. The ruling elite had a very limited level of social consciousness. They were not able to reveal how good governance and respect for a wide spectrum of the national society interrelated with development and prosperity.

These comments are not enough. The members of a majority of ethnic communities had no representation in the governmental set up at the central level. This seems to be much true after the re-unification of modern Nepal. With the death of King Prthvi Narayan Shaha, who did little to create institutions to govern the newly re-unified territories (despite all his heroic contributions to the nation), the ruling elite started to fight with each other in a bid to capture the power and isolate

others who were contending for it. The Gorkha-model of legal regime was no longer suitable to the vast territories reunified. Members of other communities outside the ruling network experienced unequal treatment in such a bid and had less power over their lives than members of the dominant groups had over theirs. As such, their ability to earn wealth, prestige and power were also limited. The ruling elite, especially during the Rana regime, had arbitrary standards for determining which characteristics were most important in joining the government or the civil and judicial administration, or getting the rewards from the state.

Movement into classes of greater wealth must have been particularly difficult for all communities far from the ruling network, and those who were already prejudiced and discriminated. One can also think of a denial of opportunities and equal entitlements to individuals or groups resulting from the normal operations of the society. That also meant that political participation, such as voting and civil activity, did not exist. Women were a particularly vulnerable Hindu group, for whether the comparisons were within or across social and ethnic groupings, women of all communities suffered. The diversity of beliefs, rituals and experiences that characterised Hindu way of life was also strained. The ethnic relations were never fostered by knowledge, openness, communication, and freedom of thought, conscience and belief, and above all, a theory of rights.

The worst among them was the institution of caste system going beyond the claims of economic division of labour. Whatever may be the beginning, the system had multifarious deterioration with its growth. It started affecting many values and institutions regulating human society. With the Rana system and inception of hereditary prime ministerial regime, the indigenous Hindu sensibilities in law and governance started fading gradually. The system of control over this had become weak. Above all, the Hindu mode of governance not only lacked the practice of human rights, but also the very concept of it. Hinduism had alternative conceptions of human dignity, but it sought to realise that dignity through devices other than human rights. Apparently, these devices started to fail in the absence of institutional arrangements. To fail to recognise these facts of the historical model of governance in Nepal is to obstruct the search for remedies; facing up to it is the first step towards taking positive action.

Helplessness of the Concept of Formal Equality

Nepal is now a constitutional monarchy with most of the political freedoms guaranteed to the people. The system of parliamentary democracy in modern Nepal is supported by popular elections, basic fundamental rights, an independent judiciary, and a number of constitutional functionaries. But these institutions have not been enough to address the issues beforehand. Democratic practices have gradually improved over the years, but some significant barriers to the full realisation of democracy still exist. Among many other things, that is the issue of helplessness of the concept of formal equality and limited partnership of many ethnic groups in the political society. Nepal's liberal political system is yet to be mobilised in favour of many ethnic communities who have equal rights, yet without equal entitlements to begin with. The capacity of these communities to stand on their own foot is suspect for some more years. Securing the full, active, free and meaningful participation of excluded groups in the governmental system means recognising their additional rights in law, policy and practice. A mere concept of formal equality has not helped.

Moreover, it needs to be made clear how the state is going to support their cause of language, culture and religion. We need to ask whether popular sovereignty, political equality and liberty as far as they relate with these communities are enhanced or diminished by the way the Government, Parliament, the Supreme Court and local government units operated over the years. While recent development in technology and communication, coupled with the globalisation of economies have benefited societies in many ways, in some instances they have also contributed to the aggravation of existing inequalities and the generation of new forms of discrimination and intolerance. This is true of Nepal as well.

In the social level, many ethnic communities deserve the right to education along with positive efforts from the state to recruit their educated candidates for jobs, promotions and educational opportunities. They need assistance to share powers, and opportunity for self-government, local decision-making, and accountability. They need a positive environment to influence public opinion, the mass media, interest groups, and political parties. Especially, the national political parties must represent the nation, the ethnic variety in it, and help make popular sovereignty possible. The representatives of the backward or deprived communities must be fielded by these parties during the elections. Candidates from the comparatively advanced communities might find it an embarrassing arrangement, but it will make the country more stronger than before. Additionally, the candidates from all under-represented communities should find representation at all levels of political appointment to fill up senior positions in constitutional bodies, the civil, judicial and military arms, and governmental corporate entities.

All smaller ethnic communities in Nepal need to be assisted by the state to stand with their social or political movements. Social movements can be the political instruments of excluded groups or political outsiders. Movements often help those who are outside the mainstream to gain a hearing from the public and political decision makers. It is the responsibility of the government to devise structural and policy rules that will manage the voice of the underrepresented communities. Maybe the rules when they were devised were neutral. But they were not neutral in their effect. Due to the insensitiveness of the government and major political parties, these rules created ethnically fixed winners and losers because, compared to other possible rules, they benefited the interest of some ethnic groups and harmed the interests of others. Some discrimination is all too familiar. The examinations conducted by the Public Service Commission (PSC) for the recruitment in civil or judicial bureaucracy of the country and political appointments made by the Constitutional Council might be taken as suitable instances. The problem in fact was not with the rules as such, but with these bodies to create a situation in which the outcome does not look biased. If the outcomes of the rules are inherently biased, they must be subjected to change. In this context, change means change by the force of necessary positive laws. The rule of the government change not by magic but because the people and government officials make choices. It is already too late to think of these choices.

These indicators call for serious national debate. While we have built up an impressive array of laws, institutions and independent watchdog groups, the people who suffer most from the denial of their human rights are often unaware of their rights, and beyond the reach of these mechanisms. While outright discrimination has been defeated by our democratic constitutional system, affirmative actions are necessary to win existing inadequacies, reverse situations, and intolerance. Affirmative restrictions for about ten or fifteen years in the case of those ethnic groups, who

already have adequate level of representation in the state system including Bahun-Chhetri and Newar, may be thought of as one of the modules. It is very strange that the majority of communities in Nepal are by far more positive to this cause than anywhere in the region or abroad. But the political elite of the country has not given it a serious thought. Had the subsequent governments after the restoration of democracy in 1990 been serious towards these issues, there would have been no necessity for new laws and institutions to achieve them by restructuring the present arrangements. But the delay, and more than that the insensitivity of the ruling elite and the major political parties, has already given a strong basis for structural change.

World Conference against Racism

The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance to be held at Durban, South Africa, on 31 August-7 September 2001 has created an historic opportunity to all countries including us to think over the matter and work out appropriate solutions for dealing with the problems of ethnicity and law. The preparatory process for the World Conference has provided opportunities for experts, NGOs and Civil Society as well as governments to highlight a wide range of issues and to bring to the fore the multiple forms of intolerance which persist, including discrimination against migrants, indigenous peoples and women. Economic inequality, ignorance, irrational fear of difference, the inability to acknowledge and express regret for great wrongs inflicted in the past: these are among the main wellsprings of racism in the modern world. The possibility should not be missed to work appropriate solutions for dealing with these problems. Among other things, the relevant issues for our presentation are -

- What progress Nepal has made against ethnic discrimination, to reappraise obstacles to further progress and to devise ways to overcome them;
- What are the ways and means that we should consider to better ensure the application of existing standards and the implementation of existing instruments to combat ethnic discrimination;
- What programmes should be launched to increase the level of awareness about the scourges of discrimination and its consequences; and
- How to make the younger generation educated and prepared for a country of tolerance, mutual understanding and appreciation of diversity.

Jurisprudence of Sano-jat

The seriousness of these issues are well known, as are the threats they pose to the democratic and social progress that has been achieved. Compare to the evils that many other countries have, our evils are less cumbersome, and with some homework and political determination we can respond to them, more effectively than many others on the line. The most deprived among the Nepalese in the historical process were "sano-jat" (lower caste) people. The Hindu state had no moral justification for maintaining a society that routinely deprived a group of its rights and privileges. Brought from the other side of the international boarder, with a view to modernise Nepalese society in terms of the prevailing Hindu states in other parts of the region, the jati-system not only subordinated some people in the system of social hierarchy, and discouraged them from attempting to question their lowly status, but also subjected them to many dehumanising conditions.

It is in this sense that the Asian Human Rights Commission (AHRC) repeatedly stated that the World Conference will mean nothing to the outcaste of South Asia if it does not address the caste issue. It stated that caste oppression is a form of racial discrimination on the basis of descent and occupation (as defined by the UN Committee for the Elimination of All Forms of Racial Discrimination). Despite good legislation and superficial projects, the plight of outcaste remains desperate. AHRC also noted that the Indian government used extreme measures to prevent the World Conference from addressing this issue, which it rightly considered to be a shameful and embarrassing blight on the record of the world's largest democracy. Their strategies included sending GONGO'S (government representatives in the guise of NGOs) to participate in every preparatory meeting with an aim to sabotaging discussions, documents and strategies related to caste. It was also said to be exerting diplomatic pressure on other countries to not mention caste and pressure UN to not speak about it. India was also accused of making pacts with other Asian nations to prevent any major discrimination problems being raised; control the UN strategically: take chairing and drafting positions, and adopt anti-NGO rules.

Notwithstanding these attempts, the caste issue has been included in the agenda of the World conference. The laws enacted to outlaw it and bring the lower caste people in the mainstream has not been much effective in Nepal as well. One has to admit that despite the constitutional and legal provisions the problem still remains among ignorant Hindus. Apart from the issues related with law and ethnicity, the issue of caste will cause a hard debate and that debate will be a long one. Seizing the Moment

Like many countries, Nepal has non-discriminatory legislation and even drafted a new constitution to confirm to internationally agreed human rights principles. These instruments failed to make positive changes in the status quo of many marginalised ethnic communities.

Our main business at this stage is, therefore, to look unflinchingly at ourselves and at the flaws in the legal regime we have built. Building inclusive societies, where diversity is seen as an asset and not as a threat, requires much greater effort and collective action by the government, non-governmental organisations, and the international community. To succeed, we must start a process leading to constructive, practical, action oriented strategies. Even some proactive formulations can be considered by way of constitutional amendment. We need a forward-looking document that acknowledges and builds on the past, but does not get lost there. We must be able to redirect public policy, and leave a lasting imprint on the workings of our institutions. Let us seize the moment and make this conference at the start of the new century a major force in bringing into being a culture of human rights of all ethnic groups for the decades that lie ahead.

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Source: www.lawsofnepal.com