

Indigenous Peoples Discontent with the Constitution of Nepal

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Introduction

The political change of 1990 opened up avenues to indigenous peoples (IPs) and other historically marginalized groups to assert their rights in the monopolized political sphere of Nepal. This was indeed a component of worldwide experience of ethnic convulsion associated with the third wave of democracy (Hachhethu, 2014, pp. 136-37). As Parekh (2000) writes, the “last four decades of the twentieth century witnessed the emergence of a cluster of intellectual and political movements led by such diverse groups as the indigenous peoples, national minorities, ethno-cultural nations, old and new immigrants, feminists, gay men and lesbians, and the greens” (p. 1). In the context of Nepal, IPs is one of the largest social groups in terms of populations deprived of participation in “mainstream” society and the political stream. They represent 35.8% of the total national populations (CBS, 2011). The Constitution of Nepal recognizes the pluralism in Nepal. The preamble of the Constitution states:

By recognizing the multi-ethnic, multi-lingual, multi-religious, multi-cultural and diverse regional characteristics, re-solving to build an egalitarian society founded on the proportional inclusive and participatory principles in order to ensure economic equality, prosperity and social justice, by eliminating discrimination based on class, caste, region, language, religion and gender and all forms of caste[1]based untouchability....

However, still there are gaps in the legal text to materialize the aforementioned commitments. Even, in the Constitution there are contradictory provisions in this regards such as,

protection of *Khas* Nepali language recognizing the “Nepali language in the *Devnagari* script” as the only “official language of Nepal” (Art. 7); promoting the Hindu state, accommodating an “explanation” for secularism that apparently favors the Hindu religion (Art. 4); recognizing the cow as the “national animal”, depriving and criminalizing cultures and traditions other than Hindu (Art. 9.3); defining *Khas Arya* [1] in the Constitution, but providing no definition for other groups (Art. 84.2).

Consequently, on the one hand, it seems that the Constitution of Nepal is recognizing plurality that exists in Nepali society and on the other hand, it still maintains the old version of the state mechanism that gives emphasis to Hindu culture, benefitting the ruling caste groups, Bahun and Chhetri. It is apparent that the Nepali state is promoting the “color-blind” approach that neglects the historical injustices and discriminations against marginalized groups.

This paper critically examines the discontents of IPs aroused after the promulgation of the 2015 Constitution of Nepal.

The Constitution and its discriminatory provisions

The Constitution is the chief law of the land that is expected to address the prevailing issues of the country such as economic, social, cultural, political, and environmental matters and so on. The marginalized section of Nepal raised expectations in the course of writing of the Constitution promulgated in 2015. However, in many respects it failed to address IPs’ aspirations and expectations. Inclusion, identity based federalism, respect of cultural rights etc. were some of the fundamental issues the IPs’ movement has raised.

Federalism

The issues of federalism and its demarcation were the contentious issues during the period of drafting the Constitution. Identity based federalism was the key issue for IPs. However, their voices have been weak because of divisions between the Constituent Assembly (CA) members who were from indigenous ethnic backgrounds. The Indigenous and Tribal Peoples Convention, 1989 (ILO Convention No. 169) provisioned that the “rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized” (Art. 14.1). Being a signatory of the Convention Nepal is obliged to address the aforementioned provision. However, it does not seem that the government of Nepal and the ruling political parties are ready to address it. Because there is no single provision that respects the rights of IPs pertaining to lands and territories. It could have given due account while forging the demarcation of federal units. But the high level commission for delimitation

of federal units did not take this into account and became silent on identity. Even the provision pertaining to the formation of a special, protected or autonomous region (Art. 56.5) has been undermined and has not materialized. Though it was only for “social, cultural protection or economic development” (ibid) not to ensure political rights.

Inclusivity

Inclusion of marginalized communities in decision-making is one of the key aspects to overcome marginalization and discrimination. But the Constitution failed to accommodate a separate policy of inclusion for IPs that recognizes their issues as distinct and specific. Instead, the constitutional provision is ambiguous and vague, accommodating 18 groups and communities in the same basket. Under the provision of right to social justice (Art. 42. 1) it states that,

The socially backward women, Dalit, indigenous people, indigenous nationalities, Madhesi, Tharu, minorities, persons with disabilities, marginalized communities, Muslims, backward classes, gender and sexual minorities, youths, farmers, labourers, oppressed or citizens of backward regions and indigent *Khas Arya* shall have the right to participate in the State bodies on the basis of inclusive principle.

Interestingly it also included the *Khas Arya* which is against the prevailing norms and practices of inclusion and positive discrimination. In the European Union Election Observation Mission’s Election Observation Report of House of Representatives and Provincial Assembly elections held in 2017 it stated that “[t]he design of the PR quota system, which also includes well-represented social groups, such as the *Khas Arya*, among the groups for inclusion, is arguably in contravention of international standards on equality, as affirmative action measures are foreseen only as a means to promote equality” (p. 5). But it was highly criticized by the political parties and the intellectuals from the ruling caste groups.

Language rights

The issue of language is one of the contesting issues in Nepal because of the state’s excessive favor of the *Khas*-Nepali language. “In most democratic states, governments have typically adopted the majority’s language as the one ‘official language’ - i.e. as the language of government, bureaucracy, courts, schools, and so on” (Kymlicka, 2001, p. 78). In the same way, the Constitution of Nepal recognized the “Nepali language in the *Devnagari* script” as the official

language of Nepal (Art. 7.1). That sharply restricts the use of other mother languages spoken in Nepal. However, it recognized all mother tongues spoken in Nepal as the “national language” (Art. 6). Non-use of language brings them to extinction. Kymlicka (2001) claims that “there is strong evidence that languages cannot survive for long in the modern world unless they are used in public life, and so government decisions about official languages are, in effect, decisions about which languages will thrive, and which will die out” (p. 78).

Secularism

The issue of religion is one of the much debate phenomena in Nepal, mostly by IPs and other religious minorities. They have been advocating for secularism in the place of the Hindu state. During the first and second CA terms it has also been on issues heated debate. Despite the reluctance of the political leaders, the heavy pressure of indigenous and other marginalized religious groups compelled the CA members to adopt a provision of secularism (Art.4). However, it included the following ‘explanation’: “the purposes of this Article, “secular” means religious, cultural freedoms, including protection of religion, culture handed down from the time immemorial.” In the original text it included the term “*sanatana dharma*” that apparently backs and promotes the Hindu religion. The term *Sanatan* refers to the name of Hindu gods Shiva, Bishnu, Brahma, Laxmi and Saraswati and it indicates the contemporary Hindu religion supported by Veda, Purana, Tantra, and Idol worship (Nepal Pragma-Pratishthan, 2072 B.S., p. 1225).

Conclusion

Despite the long struggle of IPs in Nepal, their movement is not as strong as Madhesi, a comparatively new movement, and other movements. Basically after the second CA and promulgation of the Constitution, the IPs movement in Nepal experienced a massive set back. The allegation of “cooptation of political parties” can be regarded as accurate, as most of the leaders are divided according to party lines and are loyal to their respective political parties rather than IPs’ issues and institutions. Due to a weak presence and movement, the 2015 Constitution did not succeed in accommodating the issues of IPs, such as the formation of identity based federalism, proportional representations, rights over customary lands and territories, recognition of customary lands and institutions etc. Ultimately, this has caused frustration among the indigenous communities. Thus, securing the rights of IPs requires collective bargaining force. For that, IPs’ organizations should be independent from the political parties

and their ideology that organizes communities under an umbrella of indigenusness and indigenism. Thus, the resistance against the state needs to be fortified enhancing and expanding internal cohesion and integrity among IPs groups.

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