

Legal Foundations of Federalism in Nepal

Avishek Gazmere *

Abstract

A federal structure not only receptive to recognize the diversity but also to institutionalize an economically mobile mechanism of a torn economy like that of Nepal is to be devised. The certainty in electoral law could procure inclusion “within” economically guided federal constituencies, inclusive of the notion of positive discrimination. For, apart from representation in every aspect and protection from persecution in the name of culture, law would not be able to pursue any greater purpose. So enrichment and development of culture is solely a group interest and it begins where the protective purpose of law would end. Thus, legal reasoning seriously requires recognizing bases of Federality.

* LL.B 2nd year Kathmandu School of Law

BACKGROUND

Heterogeneity in culture and community has historical implications of existence. Nepal is one society which expresses the above statement and diversity has proliferated over time. The feudalistic structure sustained the diversity of people in the form of the caste system in Nepal. Other races like the Mongols ended to profuse and construct a quantitatively high multiplicity of castes and ethnicities in Nepal. Roughly, there is also a clear distinction between the people of the plains and the hills.

The projected population for the year 2006 was 25.8 million and more than 100 caste/ethnicities are enumerated by the census of 2001. The whole geographical expanse of this country has been divided into three regions of Terai, Hill and Mountainous regions. There are five development regions, Far-Western, Mid-Western, Western, Central and Eastern regions.¹

For a long time, Nepal focused on the physical planning and the bureaucratic network aspects to achieve decentralization. Doing so, the central political machinery maintained a good political and economic control over the country.²

From the period of unification, a centralized system of administration with a hardly questioned centripetal accountability of the capital-Kathmandu was challenged in the popular dissent of 2063. Though there were attempts to decentralize power in the past, it was still maintained in unitary-centrifugal line of authority.

Popular movement in Nepal in 2063 when struck embarked to-“change the system, we believe”. Certainty in rigid exclusion and the insufficiency in laws were reasonable enough to question the unacceptable rationale behind their supremacy. Certainty of discrimination was perceived and fought back. In 2063, popular needs provoked off the flare of uncertainty in law, for the Constitution of 1990 was repealed. Transitional legal development did attempt to certain non-discrimination, on the basis of sex, caste, religion, origin, language or ideology³. But the rate of material progress is discouraging compared to the legal matter already devised.

A brief account of this society’s norms would prove efficacious to explain for the recently realized need of federality.

¹ Nepal in Figures 2006-Central Bureau of Statistics, Govt. of Nepal

² Dr. Alok K. Bohara- Nepal Needs Federalism to Achieve Much Needed Political Decentralization or Devolution. (Nepalnews.com- site surfed on 1st January,2008)

³ Interim Constitution of Nepal, 2063 Article-13

Social injustice erupts from exclusion. And this has been exemplified explicitly in Nepal, as of the clutch on power and economy, by minorities, held through a composition of politically superior positions in the social structure.

The social class “psychology” excluded in the past a large chunk of the population from developing out of their socially motivated limitations. This has had a pernicious effect on the contrived underdevelopment of people ‘lowly classed’ in the social structure. The higher classes are however highly advantaged in educational, political and economical aspects.

Hence, an unavoidable need has surfaced to set action through law guaranteeing freedom from all forms of negative discrimination to uplift the disadvantaged and to promote co-operation. And “Certainty in Law” is the only means remaining on our discretion to accomplish it. So the Constituent Assembly election is “compensation” in consequence to the damage caused after centuries of exclusion. The transitional phase is a crackdown on the old and the rejuvenation of a new. If the new is not achieved it would cause an inexorable chain of disaster, I perceive.

Firstly, it is necessary to understand the difference between regional variation and regional inequality. Among different regions, due to natural qualities or resource variance different identifying characters cause to develop and divide labor, which would be normal in the path of development. And this is only called regional variation. But, if a region in comparison to another region cannot mobilize and use its resources and comparative advantages then it will give birth to inter-region inequality. Our concern now is not regional variation but regional inequality.⁴

Conclusively, a Federal Structure in Nepal is the struggle for recognition of identity and its subsequent inclusive representation within the same social structure. It is a struggle to “establish” identity within, rather than to “separate” from the whole.

PROBLEM IDENTIFICATION: THE RESURRECTION OF IDENTITY IN CRISIS

There is a huge debate concerning the basis of Federality. Identity is to be recognized, through representation and simultaneously the balanced access

⁴ DR. BABURAM BHATTRAI, *RAJNAITIK ARTHASASTRAKO AKHIJHYAL BATA*, Chapter: Nepal ma Chettriya Asamanta: Jilla-gat Tulanatmak Adhyan (A prespective from the window of Politico-Economy, Chapter: Nepal’s regional Inequality- A district level comparative study), Jana Dhowni prkasan, Kathmandu p208-209

to resources must be refurbished, or else an economically mobile mechanism can never be institutionalized. Neither of the factors can be compromised for the other. A single sided basis to decide federality would only jeopardize the poor economy, of a country like Nepal. This concurrence has to be upheld and must be made fluid to the extreme possible. Constitutionally placed laws are the beginning of the “certainty in law” we intend to establish.

When a state structure is framed on the basis of ethnicity, they would also be freed from religious, lingual, cultural oppression, therefore it must be considered as the primary basis of federality. In this way Limbuan, Khambuan, Magarat, Tamuwan, Tamwasaling, Tharuwan, Newa; when these prospective states are made, it would justly solve all types of oppression of all ethnicities⁵.

However, it would be difficult to guarantee that, this uniformity of language, culture or religion of one ethnicity, would not infringe the similar rights of another group. Nepal is not only “nationally diverse”, also “regionally”. In each constituency (prospective ethnic states) a wide array of ethnicities and sub ethnicities would be present. Neither majorities can overshadow the needs of minorities in a constituency nor can perfect states belonging to one ethnicity be made. Stagnation would again occur on an ethnicity based integration procedure.

There are more than hundred ethnicities and with over a hundred linguistic groups, in this land. It is simply intriguing to imagine in what way possibly, can we profuse such a diverse whole. Many ethnicities are found to be speaking the same language, and only linguistic features differentiate sub-ethnicities. It is assumed that such differences if overlooked could prove to be volatile. Not to forget we find groups who heavily guard their sub-ethnic interests too. This is not wrong. After all, all the groups want is their culture and identity to be protected. But, law must avoid conflict with its supremacy which I perceive is possible to attain.

Therefore, a person may belong to one ethnicity but has learnt to speak the linguistic variation belonging to another group while owns property in another region and works for a living in yet another region. How can masses of such character be integrated? There would be accolades, if without conflicting interests one could devise such a method for Nepal, to do so! Sadly this is not the order of the day.

⁵ BHAWANI BARAL, YASTO HUNUPARCHA RAJYA KO SAMRACHANA, Swayta Shasan Sarokar Manch, Nepal p112

In Belgium, a mechanism is in operation to inclusively recognize differences in language and communal belonging at the same time. Belgium is a federal state made up of communities and regions⁶. There are three communities- French, Flemish and German⁷. There is another division on the basis of region- Walloon, Brussels and Flemish⁸. And another division on the basis of linguistic regions- French speaking, Dutch speaking and bilingual region of Brussels-capital French and German speaking region⁹.

In Belgium people have been integrated as there are far fewer ethnic groups, compared to Nepal. A similar federal structure for integration in Nepal as such, would be impossible to implement. The number of ethnicities primarily would raise innumerable controversies.

DIVISION INTO A 100 STATES!

Firstly, Nepal cannot be divided into 100 states. Even if it were, then the inhabitants of one state would not entirely belong to one ethnicity. Could we marginalize the minorities in a region while recognizing the majorities? Population of ethnicities is distributed in small figures in all parts of the country. As a result there would be no absolute majority of a population so as to demarcate a state solely belonging to one ethnicity. On top of that not to mention, the complexity of sub-ethnicities which always follow?

ENSURING REPRESENTATION

Secondly, the more important concern is to ensure representation.

Majoritarian electoral designs are not, in the abstract, a better choice for a polity than are forms of Proportional Representation. In fact, the exclusion of [ethnicities or] a political party through, for example, the restrictive first-past-the-post design may lead to a small [ethnicities' or] party's frustration with the institutions of democracy and push excluded [ethnicities or] parties to adopt more extreme positions. Thus in turn, may threaten democracy.¹⁰

⁶ The Constitution of Belgium- Article 1

⁷ Id. at Article 2

⁸ Id. at Article 3

⁹ Id. at Article 4

¹⁰ Cindy Skach, The newest separation of powers: Semi-presidentialism, *International Journal of Constitutional Law*, Vol. 5, No. 1, January 2007, p 106

REGIONAL SOLUTIONS OF REGIONAL PROBLEMS

Thirdly, representation has to happen “regionally” rather than from the whole nation’s population. The Constituent Assembly elections are to create ownership in law, which directly emphasizes the absorption of state power outwardly through representation of all ethnicities in all regions to emancipate all oppressed classes. The notion of “Regional solutions of regional problems” simultaneously, through a ‘symmetrical federality’, latently pursues a higher need to devolutionize power presently centralized. This is the most significant notion of the period. Devolution would lose its meaning, if the central power of Kathmandu still has the opportunity to remain intact.

Hence, if a particular ethnicity in a region is to be represented then it must be in ratio to its population present in that region. Thereon, difficulties of representation more specifically, would become regional than national. All ethnicities must be represented in all federal units according to their presence, to a minimal of at least one seat i.e. if the population of an ethnic group is low. Federality is to free regions from compliances of the center, and a symmetrical structure conjures to lead us towards it.

EQUALITY

Fourthly, equality before law and equal protection by law is the whole rationale behind Inclusivity in Nepal.

Perhaps an account of a Kirant individual could polish the idea of Inclusion. If a kirant individual eats a cow, an act which is not punished by law, if the cow was found dead rather than killed for consumption. However, in the police station, when he is questioned for the act, the linguistic difference in his answer makes his innocence for the earlier act of eating a dead cow sound the latter of eating a killed cow. Due to a lingual difference he is convicted of a term of 20 years of imprisonment. Such conditions are to be prevented.

Inclusivity, invests linguistic differences to be recognized and protected. In the above example, it would amount to necessary knowledge of police officers and judges about linguistic differences which would have to be taken into consideration by them in their judgments. Or translators of language should be made available¹¹. Clearly, non-recognition of identity impedes a person from exercising his/her cultural right of language and law is to hold any violator liable. This could save a person’s right to justice from being violated.

¹¹ Human Trafficking and Transportation (Control) Act, 2064, Article 11

So, culture is an individually enjoyed right though it requires the existence of a group to exercise it. It is right '*in personam*' than right '*in rem*'. Meaning recognition and protection in the form of rights, would be instrumental just enough to retain from concerned persons or authorities, restitution or compensation. Obligating the whole world for the same cultural right may be "*right in rem*" which is impossible to obtain.

The purpose of law is to recognize and protect such interests of identity from being violated. And this purpose of law ends, at the point where the will and responsibility of the ethnic groups to enrich and protect their culture on their own, begins.

REALITY- MORE REASONS TO DEVOLUTIONIZE

Nonetheless infringements on fundamentally guaranteed cultural rights¹² do not cease, and this further consolidates our concern to propagate devolution of power.

On 29th Poush, 2064, Post offices, Nepal Telecom offices, Electricity offices and Water supply offices within Dharan Municipality and within the area in the District of Sunshari were directed from 'above' to remove boards which had the name of offices written in the Siringiya script of Limbu language. A historical revelation depicts, Kings in the past or of the present [or other powers] have always remained devoted to their language of the Khas or belonging to the Aryan origin; Nepali in the devanagiri script.¹³ If the above incident is the continuation of history, then it would not be difficult for the population to grasp and point out the irrelevancy of the Interim Constitution of Nepal, 2063. If the government itself encroaches upon the fundamental rights of the citizens, then who is to provide protection, envisioned by law. Still the constitution is above the government and it must abide to it. Kirants cannot be forced to use Nepali language. They have the constitutional right to speak the language they choose to. No language is superior to the other.

This clearly enlightens us of our past, present and which further strengthens our conviction to devolutionize power. Such basic rights if ignored, then upsurges of communal segregation probably would attempt to establish identity "separate" than identity "within". Denial of rights can give us a reason to fear secession.

¹² Interim constitution of Nepal, 2063, Article 13

¹³ Arjun Babu Mabusang, Limbu bhasa ma bandez, Kantipur Publications, 11th Magh, 2064 p 7

WHAT DO WE SPEAK IN?

Sixthly, if three people speak Chinese, French and Italian which are three different languages, how would they then communicate? Either a common language could be spoken or else translators would have to be hired. Similarly, communities could speak and protect their languages but when it comes to political, economic, social or cultural interactions, which language “could” they commonly use? Can one community impose the other to speak their own language?

Apart from the need for a common language, the official language to be used regionally for legal matters further aggravates complexity. “Nepali” is the most commonly spoken and understood language. If it were declared as ‘lingua franca’ then certainly language would never again enrage disputes. The recognition of Nepali language as a ‘lingua franca’ for all is perhaps the last alternative to get loose from the trap, as the inevitable solution. Simultaneously, paralleled regional consensus should be employed to let the people decide democratically, which official language they would prefer in their region.

CONCLUSION: ECONOMIC DETERMINISM OF FEDERALITY WITHIN REALMS OF NATIONALITY AND REPRESENTATION WITHIN FEDERALITY

Law would have to recognize the huge diversity of group identity nationally but ensure representation regionally. One strong reason for such an arrangement would be scattered presence of groups in all regions of Nepal. As a matter of fact, nationalism will always supersede, i.e. a person will always be a Nepali first, and then belong to a certain group. This is because the constituencies’ power would only be purposive to the extent of representing groups than recognizing nationality which is pre-determined; voting rights. Constituencies’ constitutions in congruence with the national constitution could generate more ownership of the law. It would consolidate the faith of the masses in diverse representation within a constituency. National unity will reach summit, for diversity will be encompassed within a constituency but expressed nationally.

If devolution occurs and power is enjoyed by a constituency, contingency on the center would prospectively be on a gradual decrease and an economically sound regional mechanism becomes pertinent. With solutions of representation and culture already secured, what remains to be addressed is economic determinism of the regions. And this economic determinism of Federality of Nepal would already be inclusive of identity.