Negotiating Multiculturalism in Nepal: Law, Hegemony, Contestation and Paradox

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This country is a garden of four varnas and thirty-six jats… In this pure/true (asil) land of Hindus (Hindusthan), do not abandon the religion of your lineage (ancestors). (Prithivi Narayan Shah, reigned 1743-75)

It is a Hindu Kingdom... It is a sacred land (punyabhumi)...It is the only kingdom where Hindus rule in this Kali Age. (The Ain of 1854)

This law has been made in the light of the scriptures (shastras), tenets of moral conduct (niti), and the experience of the people (lokko anubhav). (The Ain of 1854)

Abstract

Over the past two centuries, the Nepalese state has experimented with several models of (plural) society in order to deal with the profusely diverse ethnic, linguistic, religious and regional groups. The three major periods of recent Nepalese history are each characterized by a different, dominant, official model of society, and each influenced in different ways by transnational processes and laws: a) hierarchical, plural (Hindu) society (1769-1950), which recognized but devalued cultural differences and which sought to make Nepal a 'genuine Hindu' country in contrast to India ruled by Muslims and then Christians; b) non-hierarchical, mono-cultural (Hindu) society (1961-1990), which attempted to 'erase' cultural differences, both as part of 'nation' building process and modernisation which emphasized homogenisation; and c) non-hierarchical, multicultural society, after the restoration of democracy in 1990, influenced to a great extent by the movement for democracy and the international turn towards multiculturalism and broader definition of human rights. At the same time, these three periods are characterized by the continuous political, economic and cultural domination by the hill based, Nepali-speaking, upper caste Hindus (Parbatiyas).

This paper examines these models of society as imagined and articulated by state laws, particularly the key legal 'texts' of the three historical periods. These hegemonic laws are negotiated by the dominated/subjugated groups – through assimilation, reinterpretation, contestation, resistance, sometimes violent, and migration. More recently, they have taken recourse to both state law as well as international human rights laws to negotiate rights and identity. Paradoxically, just as indigenous or traditional law was transformed to 'customary law' by interaction with colonial law, so too the traditionally fluid and hybrid nature of social identity of the groups have become transformed in the process of interaction with both state as well as transnational laws and models, especially those pertaining to rights of indigenous peoples.

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I. Introduction

In the spring of 2006, the short but intense, immense and widespread (second) People's Movement (*janandolan*) led to the restoration of the dissolved parliament and multi-party democracy which paved the way for the Maoists to become members of the interim parliament and the coalition government. An important achievement of the movement was the promise made by the major political parties and mandated by the Interim Constitution, 2007, hastily drafted by the eight parties in power and passed by the parliament, to hold elections for the constituent assembly. Claims are often made by many including politicians, political scientists and analysts, and the ever-growing army of international experts and parachute consultants that the constituent assembly and especially the new constitution framed by it would resolve all of Nepal’s existing problems, and in particular would meet the numerous demands of the Maoists, indigenous nationalities (*janajatis*), Madhesis, Dalits, women, and other minority groups.

Perhaps too much is expected from the constituent assembly whenever it will meet and especially the new constitution whenever it will be drafted – one really wonders whose problems it would solve and whose demands it would meet. But what the constituent assembly will hopefully do is to provide a forum for the long suffering, marginalised, subjugated, excluded *janajatis* madhesis, dalits, women and other minorities to imagine, negotiate and enshrine in the new constitution their visions of a genuine egalitarian, inclusive, democratic, multicultural society. Will these groups have the necessary bargaining power to have their new model of society enshrined in the constitution or will the dominant group, mainly upper caste male Parbates, across the dominant political spectrum, once again impose their vision of society and frame yet another constitution, which like the Constitution of 1990, may soon be thrown into the dustbin of history?

All these call into question the different models of society, plural or mono-cultural, the history and structure of power relations between the dominant ruling Hindu elites and the subjugated groups, the contestations of these dominant models and power relations, the alternatives that are now available – perhaps even feasible – due to changed social, political, economic, and global contexts. Equally important for legal anthropologist is the question whether law, often seen as a 'magic charm' (Franz von Benda-Beckmann), will really solve the problems of unequal power relations and absence of genuine, egalitarian, inclusive multiculturalism.

These questions will be addressed by discussing the history of the relations between the state and ethnic groups in the context of three dominant state models of society as reflected in law and a reflection on the significance of law, especially its hegemonic role and the inevitable negotiations and contestations that it engenders.
I.1. The significance of law

If law is a way of 'imagining the real' and of constructing social reality, as Geertz (1983) famously suggested, then law can also be seen as a means of imagining, visualizing and constructing models of society. My aim in this paper thus is to examine these different models of society as imagined and articulated by law, both state law and, to a lesser extent, various non-state law, such as religious law, customary and traditional law as well as international law, which have influenced and competed with state law and which offer alternative models of society. In other words, I hope to look at these different, competing models of society from the perspective of legal pluralism.

Law not only imagines and articulates models of society, it at the same time gives substance to the models by a) constructing legal identities of individuals and groups by, for example, classifying the population into different categories, such as class, caste, ethnicity, gender, citizens and aliens, etc.; b) prescribing the norms and structure of relationships between the legally constructed categories of the population, e.g., whether they should be segregated or integrated, hierarchical or egalitarian and the kinds of relationships different categories may or may not have with each other; and c) stipulating the rights and obligations of these different categories of the population. Different rights, obligations and statuses are attached to persons and groups classified as strangers or citizens, pure or impure castes, schedule castes or backward class, migrants or indigenous peoples and so on (F. von Benda-Beckmann 1997; Benda-Beckmann and Taale 1992).

Different legal orders construct identity of the population differently and thus the same group of people may be categorized differently by different legal orders and have different statuses, rights and obligations. For example, Hindu law classifies some groups as untouchable castes and prohibits them, for example, from entering some temples or drawing water from wells used by the higher castes whereas state law may be classify them citizens with equal rights and even as scheduled castes or Dalits with special rights, e.g., quotas in educational institutions. Similarly, groups classified as 'tribals' (*jati* or *adivasi*) may be forcefully shifted out of national parks, but the same groups of people reclassified as 'indigenous people' (*janajati*) in accordance with international law and conventions, may claim rights to their traditional homeland. The legal construction of identity of different categories of the population thus is not only a question of identity but has profound consequences for social, economic and political rights and obligations.

Martin Chanock argues that in colonial Africa law "was the cutting edge of colonialism, an instrument of power of the alien state and part of the process of coercion... [but] it also came to be a new way of conceptualising relationships, ... many of which were fought over by those involved in moral terms" (1985:4, quoted in Vincent 1994: 122). His argument is certainly relevant to the Nepalese context, if we understand the term colonialism in a broad sense to mean rule by the Parbatiyas over the numerous subjugated groups – and indeed some ethnic activists claim that there was and is internal colonization of their traditional homelands. Law was certainly an instrument of power and coercion as well as a new or a different way of conceptualising relationships between the dominant and subjugated groups, both of which were contested by the subjugated groups in different ways.

From a legal anthropological perspective, law is not only as a means of regulation and oppression but also of emancipation (Santos 2002). For example, international human rights law can be used by the subjugated peoples to redefine social categories and relationships and
to gain more rights. Further, law is viewed not only in terms of political economy and power but also in cultural terms – that is in terms of the power of law to create meanings and construct social reality (see, e.g., Lazarus-Black and Hirsh 1994, Moore 2005). Power is exercised by controlling the way the world is constructed and understood – and law is a powerful means of conceptualising and categorising the world (Merry 1995).

The power of law as well as its attraction and danger lies in its ability to create and impose social reality, meanings and values, and eventually to make them appear natural and self-evident and thus uncontested – i.e., as doxa in Bourdieu's (1997) term or hegemony in some interpretations of Gramsci (Lazarus-Black and Hirsh 1994). In other words, the dual aspect of law enables the rulers to govern not only by rule of law (e.g., by means of the administration and the judiciary) but equally by rule by law by creating social reality and meanings which are considered self-evident. Rule by law is only possible when the ruled, for whatever reason, accept or pretend to accept partially or fully the construction of reality or meaning imposed by the rulers.

There are however limitations to the hegemonic and doxic aspects of law because just as the exercise of power is always coupled with resistance, as Foucault would argue, so too every dominant legal order co-exists, interacts and competes with other legal orders or laws which offer other constructions of reality and meanings. Thus, from a legal pluralism perspective, any legal order, such as state law, customary law or international law, can never be totally hegemonic or doxic because it is open to contestation by other legal orders, even while some aspects of the construction of social reality may be accepted (see Merry 1994). It is in and through law – whether through existing state law or other legal orders - that the subjugated peoples can offer resistance to law and the meanings it creates and imposes (Merry 1995).

I shall first briefly describe Nepal's social and cultural diversity and the historical context for the rise and dominance of Hinduism and the hill based castes known as Parbatiya. This is followed by a discussion of the three major periods of recent Nepali history and the three models of society as articulated by state law. The paper then discusses the responses of the subjugated or dominated groups, especially ethnic groups, to the state and the dominant models and hegemonic laws, focusing on accommodation, transformation, migration, and resistance. The paper finally touches upon the paradoxes of the current ethnic movement for rights and multiculturalism.

II. Nepal’s cultural diversity and the dominance of Parbatiya culture

Nepal is an extremely diverse country, populated as it is by over 100 ethnic and caste groups, who speak over 106 languages and dialects and practice a variety of religions, mainly

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2 Merry (1994:54) argues: "Instead of an overarching hegemony, there are hegemonies: parts of law that are fundamental and unquestioned, parts which are becoming challenged, parts which authorizes the dominant culture, parts which offer liberation to the subordinate."

3 Merry (1995:16) describes three examples of resistance in and through law: resistance against law, resistance by means of law and resistance which redefines the meaning of law, all of which “reconstitute the sociocultural world in some emancipatory ways".
Hinduism (80.6 percent of the population) but also Buddhism (10.7 percent), Kiranta (3.6 percent), Islam, Christianity and other localised religions. ⁴

Currently one of the most common ways of classifying Nepal's diverse castes, and ethnic, linguistic, religious and regional groups is to cluster them in three major overlapping divisions⁵:

1. The hierarchical caste structured groups (jats) [Hindus] and the predominantly clan or lineage based, ‘egalitarian’ indigenous nationalities (adivasis/janajatis) [non-Hindus], with the exception of the Newars, who are hierarchically structured. (This is the main division especially according to the discourse of the janajatis who constitute 36.4% of the population).

2. The Pahadis, i.e. people of hill origin, and the Madhesis, i.e. people of the plains (Tarai); both categories include castes as well as indigenous nationalities. (This is the main division especially according to the discourse of the Madhesis who make up 28.4% of the population).

3. Pure castes and impure and untouchable castes (Dalits), among both Pahadis and Madhesis. (This is the main division according to the discourse of the Dalits, who constitute 12.8% of the population).

According to the 2001 census, Pahadis constitute 66.2 percent of the population, Madhesis 28.4 percent and others 5.4 percent (See Table 1).⁶ Like the Pahadis, the Madhesi are linguistically, ethnically and religiously heterogeneous. The caste groups (9 in the hills and 43 in the Tarai) comprise 58.6 percent of the population, the ethnic groups (25 in the hills and 19 in the Tarai) 36.4 percent and ‘others’ (including religious groups such as Muslims and Sikhs) 6.2 percent. The exact number of the Dalit population is contested but one estimate is that they constitute 12.8 percent of the population, of which 55 percent are Pahadis (Gurung 2004).⁷

It is important to stress that Nepal is a conglomeration of small caste and ethnic groups, with no single caste or ethnic group forming a majority in terms of population size (Dahal 1995). The largest two groups, both upper caste Parbatiya (Brahmins and Chhetris) make up only 28.5 percent of the population. The other major groups are Magar (7.1%), Tharu (6.8%), Tamang (5.6%), and Newar (5.3%), Kami (3.9%), Yadav (3.9%) and Rai (2.8%). Most of the groups have a population below 100,000 and 23 groups have less than 10,000 members.

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⁴ There has been dramatic increase in the number of people claiming to be Buddhists and Kiranti. For example, in 1991 the percentage of the population claiming to be Kiranti was 1.7 percent; this increased to 3.6 percent in 2001. As Gurung (ibid: 11) notes, “Social demographic data of the last decade clearly evidence a strong tendency towards identity assertion based on ethnicity, language and religion.” The high percentage of Hindus indicates that members of some ethnic groups professed or were labeled as adherents of Hinduism instead of their traditional religion. For example, the adherents of Buddhism and Mundhum (Kiranti) are 11.6 percent and 26.1 percent less than the respective population of the groups that traditionally follow these religions (ibid.).


⁶ This section is based on Gurung (2003b).

⁷ There is no agreement concerning the exact number or Dalit castes or their population. For example, the National Dalit Commission lists 28 Dalit castes, whereas the 2001 Census lists only 16. Some Newar ‘untouchable’ castes insist that they should not be classified as Dalits. Similarly, the data for janajatis, Madhesis, etc. are contested. See Gurung, ibid.
The 2001 census recorded 106 languages and dialects. Of the total population, 79.1 percent use Indo-Aryan languages, 18.4 percent speak Tibeto-Burman languages and three percent speak other languages including Munda and Dravidian. Nepali-speakers constitute less than 50 percent of the population. Significant numbers of many ethnic groups speak Nepali instead of their own language. Many languages or dialects are spoken by small number of people: 58 languages are spoken by less than 10,000 speakers and 28 languages by less than 1,000 speakers.

There are three main reasons for this immense cultural diversity of the population, structured hierarchy and the dominance of Hinduism and Parbatiya groups and culture: i) migration of linguistic, ethnic and religious groups into Nepal, ii) political unification of these groups into the nation-state by the Parbatiyas, and iii) state laws and policies relating to these groups. For over two thousand years numerous groups have been migrating to present-day Nepal. The ethnic groups speaking Tibeto-Burman languages, such as Gurung, Magar, and

**Table 1: Castes and Ethnic, Linguistic and Religious Groups**

<table>
<thead>
<tr>
<th>Major classifications</th>
<th>Major castes/ethnic groups</th>
<th>Language family</th>
<th>Religion</th>
</tr>
</thead>
<tbody>
<tr>
<td>People from the hills and mountains <strong>Pahadi</strong> (66.2%)</td>
<td>Ethnic groups <em>(janajati)</em> (27.4%)</td>
<td>Magar (7.1%), Tamang (5.6%), Newar (5.3%), Rai (2.8%), Gurung,</td>
<td><strong>Tibeto-Burman</strong> (18%): Tamang (5.2%), Newari (3.6%), Magar (3.2%), Rai-Kiranti (2.2%),</td>
</tr>
<tr>
<td></td>
<td><strong>Parbatiya castes</strong> <em>(jat)</em> (38.4%)</td>
<td>Brahmin, Chhetri (including Thakuri) (28.5%), Dalit castes (10%)</td>
<td><strong>Indo-Aryan</strong> (79.1%): Nepali (48.6%),</td>
</tr>
<tr>
<td>People of the plains <strong>Madhesi</strong> (28.5%)</td>
<td><strong>Castes</strong> <em>(jat)</em> (19.5%)</td>
<td>Brahmin, Yadav (3.9%), Kalawar, Dalit castes</td>
<td>Maithili(12.3%), Bojpuri (7.5%), Awadhi, Tharu (5.9%)</td>
</tr>
<tr>
<td></td>
<td><strong>Janajati</strong> (9%)</td>
<td>Tharu (6.8%), Majhi, Danuwar</td>
<td></td>
</tr>
<tr>
<td>Others (5.3%)</td>
<td>Others, including unspecified <em>janajati</em> groups and Dalits</td>
<td>Muslims, Sikhs, Marwaris</td>
<td><strong>Other languages</strong> (Munda, Dravidian, etc.)</td>
</tr>
</tbody>
</table>


Sherpa, migrated at different times from regions across the Himalayas. The Nepali-speaking caste groups, formerly known as *Khas* and now as *Parbatiyas*, migrated in from the west and south over several centuries. In the Terai plains, some ‘indigenous’ groups, such as the Tharu, have probably been around for over two millennia, whereas others such as the Maithili-speakers of the eastern Terai arrived later. These different groups, each with its own language, religion and culture, settled in different parts of Nepal. They established separate but fluid political units, mainly small chiefdoms and principalities, although there were also larger political units such as the Lichhavi and later the Malla kingdoms based in Kathmandu.
Valley, the Khas kingdom in the west, and the various confederations of ethnic groups such as the Magars, Gurungs in central and Limbus in eastern Nepal.

From about the sixteenth century, and in some locations even earlier, many of these political units were gradually conquered by kings claiming to be Hindus, and more specifically Rajputs from India. Beginning from the second half of the eighteenth century, Prithvi Narayan Shah, ruler of the small principality of Gorkha, and his immediate descendants, supported by Brahmmins and Chhetris as well as Magars and Gurungs, conquered and politically amalgamated these different political units into the Gorkha Empire, now known as Nepal. The political ‘unification’ of the numerous principalities and the subsequent process of ‘nation-building’ and the dominance of the Parbatiyas had profound consequences for these diverse ethnic, caste and regional groups, including Hinduisation of Nepal, changes in social relations and in access and control over economic and political resources, especially land and administration (see K. Pradhan 1991).

The Hinduisation process, which had begun in the sixteenth century or even earlier in some localities, intensified after the political unification of Nepal and even more so during the Rana era (1846-1950). The process was continued during the Panchayat regime (1961-1990), and to some extent continued even after the restoration of multi-party democracy in 1990. What is called the Hinduisation of Nepal is actually a part of the process of ‘Parbatiyasition’, that is, the spread and imposition of Parbatiya culture, most significantly their language Nepali (originally known as Khas or Khas Kura), their version of Hinduism, and of course, the caste system.8 The process of Parbatiyasition was and, to some extent continues to be, facilitated by the state, because the majority of the ruling elite since the time of King Prithivi Narayan Shah have been the high caste Parbatiyas, supported to some extent, especially after the Ranas came to power, by the Newar elite of Kathmandu, the majority of them also Hindu.

Over the past two centuries the state as well as the ethnic groups have articulated several models of society. Throughout this period, the ruling elites in Kathmandu have tried to impose their vision of plural society within the framework of their understanding of Hindu society and polity, as reflected in the laws promulgated by different rulers. Following the work of Joanna Pfaff-Czarnecka (1997, 1999; see also Burghart 1996 and Gellner 2001), it is useful to discuss three periods: i) the establishment of the Gorkha Empire to the end of the Rana regime (1769-1950), ii) the Panchayat Period (1961-1990) and iii) the decade following the restoration of democracy in 1990. Prior to 1950, state law, especially the Ain of 1854 and subsequent editions, was based to a large extent on (Hindu) religious law and articulated a hierarchical, plural (Hindu) society. During the Panchayat Regime, state law, at least some sections of it in the Constitution of 1962 and Muluki Ain of 1963, influenced by transnational law and international discourse imagined a non-hierarchical, mono-cultural society. The Constitution of 1990, again influenced by international law and demands of the ethnic groups, articulated a non-hierarchical, plural society. The Interim Constitution 2007, drafted by the eight parties in power and proclaimed by the current parliament, articulates a similar model of society as the 1990 Constitution, albeit with some minor changes, e.g. in languages. However, in the context of everyday interactions between the different communities, especially between Hindus and non-Hindus, the norms based on Hindu law and the old state law are still largely relevant. Dalits for example continue to complain about discriminations.

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8 Even though the Kathmandu Valley itself had long been a center for Hindu (and Buddhist) devotion and pilgrimage, it was the Gorkhali kings who spread Hinduism in its diverse forms across the hills in particular, but before them, Sen kingdoms in the mid-west (e.g. Pulpa) and east (e.g. Vijayapur) were also responsible for spreading Hinduism (Sharma 2004).
in their everyday life and the structures of governance are still largely controlled by upper caste Parbatiyas. At the same time, the leaders of ethnic and other groups (e.g. Dalits and women) draw upon international categories and norms to support their demands for a more egalitarian, plural society.

III. Hierarchy, cultural diversity and Hindu polity (1768 - 1950)

III.1. King Prithvinarayan Shah and his garden of castes and ethnic groups

During this period the primary concern of the ruling Parbatiya elite was to exercise political control over and extract revenue and income for themselves from the newly conquered territories, populated by different ethnic groups (Burghart 1996). At the same time the ruling elite felt the need to integrate the diverse social groups into an overarching legal and social framework, which would help ensure a pure and true land of Hindus (‘asil Hindustan’). Nepal's identity as a pure Hindu land was seen in contrast to that of India (Mughlan) formerly ruled by Muslims and later by the British (Burghart 1996) and thus no longer the land of Hindus.

Towards the end of his life, King Prithvi Narayan Shah (c. 1722-1775) defined his new kingdom as ‘a garden of four varnas and thirty-six jats’ to include all his subjects, Hindu as well as non-Hindu, caste based as well as ethnic. In this context, the term varna refers to people of all castes, and jat in its more general meaning of species refers to all communities, including castes as well as ethnic and religious communities (Sharma 1997; Burghart 1996; Hofer 1979). While some question whether King Prithivi accepted cultural diversity (e.g., Gellner 1997; Bhattachan 1995), there is no doubt that he accepted the reality of the plural, multicultural character of his rapidly expanded kingdom (Sharma 1997). For example, he granted rights to the Limbus of east Nepal to practice their ‘ancient’ customs, including control over their communal land (kipat) and internal rule by their traditional chiefs. It should be pointed out that he tolerated or accepted cultural and legal pluralism partly because he had not yet consolidated his hold over the recently conquered territories and he needed their support (e.g. Limbus' support against Sikkim and Tibet); but his ‘tolerance’ may also be because this was prescribed by at least one interpretation of Hindu theory of kingship and law.

Some scholars (e.g. Derrett 1995 and Lingat 1998) have argued that at least some interpretations of the Hindu theory of kinship and polity did not preclude cultural and legal pluralism (see also Sharma 2004a; Hofer 2004). The kings were instructed not to change the customary laws of the conquered territories. For example, Brahaspati (II.28) states "Customs (dharmas) of countries, castes, families and other (groups) must be maintained intact; otherwise the public would revolt, the subjects would take an aversion to (their king), and the army and the treasury would be destroyed" (cited by Lingat 1998: 200). Lingat (ibid) comments, "[T]he interests of the state must prevail over the rule of dharma when one encounters a custom firmly entrenched... this is a principle of royal policy".11

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9 Surprisingly there is no reference to the Buddhist Tibet or China in the Muluki Ain, though Nepal has long historical relations with them and has fought several wars. Nepal's ‘Other’ has been India.

10 Perhaps it is with this statement in mind that Michaels (1997:89) argues, commenting on the lifting of ban on eating sinu (meat of cattle that had died naturally) in 1810, “Law and customary law are different affairs.”

11 Lingat (1998: 199) further writes that Yajnavalkya (I.342) “recommends that when the king has conquered a country, he maintain intact the customs (acara), the rules of procedures (or the rules followed in transactions: vyavahara) and the and the usages of families (kula–sthiti) just as they are observed there”. Lingat argues that traditionally customary rule prevailed over dharma (law as prescribed by the religious texts). However,
example of what Griffiths (1986) calls weak legal pluralism, i.e., exclusive validity of Hindu (state) law except those customary laws recognized by the state law.]

It could be argued that the model society King Prithivi espoused was that of cultural and legal pluralism within the broad framework of the hierarchical Hindu system. Cultural and legal differences were accepted, but with different communities and castes ranked in a hierarchical order depending on the degree of similarity and difference with the cultural norms and practices of the upper caste Parbates (Nepali-speaking Hindus). This is in accord with Lingat's (1998: 202) comment for India, "Moreover, in a hierarchical society such as the Indian, ... people who practised usages contrary to Good Custom... would occupy an inferior position in the social hierarchy. But they could none the less continue to live under their customs, and the sastras even advised the king, for reasons of wise policy, to take care that they are observed. These customs were not on that account legitimated; they were only tolerated." Nevertheless, it can be said that King Prithivi was more tolerant of cultural and legal diversity and provided greater autonomy to most ethnic groups than his descendants and the Rana Prime Ministers.12

III. 2. The Ranas, the Ain of 1854 and the legal construction of group identity

By the middle of the nineteenth century the kingdom had become more centralised both politically and administratively and the ruling Parbatiya elites not only had gained more control over economic resources, especially land, they also imposed a more homogeneous (Hindu) cultural matrix on the diverse social, cultural and religious groups. The migration of the land-hungry Parbatiya populace in ever-larger numbers, with the blessings of the state, to the territories populated by ethnic groups, help spread Hinduism and Parbatiya culture, along with administrative control by the state. The rulers had already begun issuing royal orders, as early as 1810, ordering ethnic groups to observe Hindu norms. One royal order of 1810 AD addressed to the Gurungs and Lamas living east of the Trishuli River, for example, warned them that fines would be imposed on them if they did not revere Brahmins, if they consumed flesh of dead cattle, or failed to supply skins and hides. On the other hand, another royal order of the same year warned Tamangs and ‘Bhotes’ living in the same area that they would be fined if they performed purificatory rituals after birth or death by themselves and did not use Lamas. In both cases, a Parbatiya (Khatri) was appointed as the local state representative to ensure that state laws were obeyed and fines were collected for violations of the laws (RRS 4, 1972, pp. 42, 44). The era of conquest was getting over, and consolidation required a more culturally – and legally - ‘unified’ kingdom, and so in trying to establish Nepal as a true Hindu land, the rulers were less tolerant of cultural and legal plurality.

As in the case of colonization elsewhere, the Hindu rulers used law as the cutting edge of their alien rule over their subjugated (ethnic) groups (cf. Chanock 1985). Law in the form of royal orders introduced new ways of conceptualising social relationships (e.g., hierarchical, deferential relationship between the egalitarian Gurungs and the Brahmins) and new

customary law was limited to the specific groups and territories where it had been traditionally practiced; such law could not be extended to other groups. At the same time, the authority or influence of the written law or sastras expanded as territory expanded by political power (1998: 203-4). The king is another source of law, which counterbalances the law of dharma. "The actual law in force... is really the offspring of the solution to the new conflict between the two sources of authority" (i.e. dharma of the texts and the law of the king) (1998: 206).

12 Gurungs and Magars were included among the upper elite (tharghar) during his rule (Regmi 1995).
meanings in their food culture (beef as prohibited food). This process of using law was intensified and spread throughout the kingdom, with the promulgation of the National Code or Ain of 1854.

In 1854, eight years after the Jang Bahadur Kunwar (Rana) seized power and had himself appointed Prime Minister, he, or more accurately the figurehead King Surendra, promulgated the first collection of codified and written law, uniformly applicable throughout the kingdom. This corpus of codified law, then known simply as ‘Ain’ (law) and better known now as Muluki Ain (Law of the Land or National Code), was part of the wider process of imposing greater and more direct control over the whole kingdom and the intensification of the process of Hinduisation or Parbatiyasition. It could be argued that the codification of law applicable throughout the kingdom was an attempt to rule not only by the force of arms but also by means of the cultural power of law.

Although the Ain of 1854 did not cite specific Hindu texts, it is widely agreed that it was based primarily on Hindu religious and legal texts, such as Manusmriti, Naradsmriti and Arthasastra (Hofer 2004, Sharma 2004a: xxiii, Khanal 2002) but it did retain some customary laws of different communities, for example those relating to marriage and inheritance (Hofer 2004, Sharma 2004, Burghart 1996: 239). The Ain was a codification, fixed in writing, of the then current interpretation of the Hindu religious texts, royal orders, and customary laws of the different groups. Or as the Ain itself stated,” This law has been made in the light of the scriptures (shastras), tenets of moral conduct (niti), and the experience of the people (lokko anuhbhav)”. The Ain dealt with many topics such as land tenure, inheritance, credit, and court procedures, but many important sections in the second half of the Ain dealt with inter-caste and inter-community relations concerning commensality, sexual relations, contact and so on (Hofer 1979; Sharma 2004; see list of chapter headings in Regmi 2002: 306-10). The Ain articulated a more worked-out vision of plural society within a caste system than Prithivi Narayan Shah’s model. It conceptually integrated all the different linguistic, religious and ethnic groups as well as castes into one overarching national caste hierarchy, generally referred to in the texts as charvarna chhatis jat (Hofer 1979, Sharma 2004). All groups in Nepal came under the following five, ranked categories (Hofer 1979:45; also Sharma 2004:132):

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13 See (Michaels 1997) on legislation relating to ban on cow slaughter and the varied responses of the ethnic groups to this law.
15 Hofer argues that the Ain served many purposes: to re-legitimate the identity of Nepal and to motivate the solidarity of her citizens; it demarcated the country's society against foreign societies and cultures; it aimed at creating a homogeneously constituted society; and it was a means of strengthening Rana rule (Hofer 2004:2).
16 The Ain took into account the realities of desa, kala, calan and vyavahar, i.e., the country or locality, time, custom and practices, an expression used from the 1886 editions of the Ain (Sharma 2004: vii).
17 The first half of the book dealing with land tenure, etc. gives a different model of society, one based on kingship more than on caste. But this different model of society, too frequently ignored in the study of the Ain, will not be pursued here, but see for example Burghart 1996. Surely there must be a reason why the Ain begins with the Chapter on guthi (religious endowment).
1. Wearers of the holy thread (tagadhari) or the twice-born: Brahmin, Thakuri, Chhetri, ascetic sects,
2. Non-enslavable alcohol-drinkers (namasine matwali): Magar, Gurung Sunuwar, and some Newar castes,\(^\text{18}\)
3. Enslavable alcohol-drinkers (masine matwali): Cepang, Hayu, Tharu and the general category of Bhote including Sherpas, the group now known as Tamang and other groups with close Tibetan cultural affiliation, etc.
4. Impure but touchable castes (paninacalne choi chito halnunaparne (castes from whom water could not be accepted but whose contact does not require sprinkling of water): Newar service castes -- butchers, washermen, tanners – Europeans (Mlecch) and Muslims (Mussalman)
5. Untouchable castes (paninacalne choi chito halnuparne (castes from whom water could not be accepted and whose contract requires sprinkling of water for purification): Parbatiya (blacksmiths, tanners, tailors) and Newar (fishermen and scavengers) service castes.

The first category, 'the wearers of the holy thread' (tagadhari), comprised the ruling elite, mainly upper caste Brahmin, Thakuri and Chhetri. The bulk of the ethnic groups, now known as adivasi/janjatis were classified as matwalis (liquor drinkers), and sub-divided into non-enslavable groups such as Gurung, Magar and many Newar upper castes and enslavable groups such as the wide category of Bhote and Tharu. Below them were the impure Newar artisan and service castes as well as foreigners and Muslims from whom water could not be accepted. Ranked lowest in the hierarchy were Parbatiya and Newar service castes, such as Kami, Damai, and Pode. These castes were the untouchables, contact with whom required ritual purification. They are currently known as Dalits.\(^\text{19}\)

There were obvious challenges in trying to force-fit the diverse groups into these categories, particularly because some of the groups were not ‘castes’ under any definition of the term. The first, fourth and fifth categories incorporated the Hindu caste groups proper, with the exception of Europeans and Muslims. The second and third categories (matwalis), on the other hand, were ethnic groups, now known as adivasi/janjatis, who were in general outside the pale of caste hierarchy till then, with the exception of Newars. Some of these groups were classified as ‘enslavable’ and others as not ‘enslavable’. The Newars of Kathmandu Valley were structured internally along the lines of religion (Hindus and Buddhists) and had a complex caste system, which required them to be dispersed among four of the five categories. The five categories, then, represented permutations of the two basic caste and non-caste groups, which were structured and ranked according to the norms of high-caste Parbatiya Hindus.\(^\text{20}\)

The Ain prescribed norms for inter-caste and inter-community relations and behaviour, concerning for example, commensality, sexual relations, and physical contact. Punishments for infringements of laws were lighter for the upper castes than other categories of ‘castes’.

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\(^{18}\) Sharma (2004: 134) lists Rai and Limbu as nonenslaveable whereas Hofer lists them as enslaveable. Although the Newars in general were categorised as matwali, some of their lower castes were classified as the two lowest categories.

\(^{19}\) According to newspaper reports, although the 'untouchable' Newar castes are classified as Dalits by various commissions, they themselves have opted out of this categorisation, arguing that they are first and foremost Newars.

\(^{20}\) The Ain largely ignored the Madhesis; however it did mention the Tharus, Telias and Madhesi Brahmins (who were ranked below the pahadi Thakuris), see Hofer (2004).
Although the Ain recognised and accepted some degree of cultural diversity, it translated cultural differences into hierarchical ‘caste’ categories. For example, the ethnic communities that consumed alcohol were categorised as matwali and ranked lower than most Parbatiyas but higher than the impure and untouchable service castes.

Rights, privileges and obligations were to a great degree linked to ‘jat’ categories. Brahmins, for example, were exempted from capital punishment and providing corvee labour. The Brahmins and other upper castes were the privileged recipients of land grants and controlled most of the fertile land and other economic resources – there were some exceptions such as the Limbus who controlled the ever decreasing communal land (kipat) in eastern Nepal, and several ethnic groups such as the Thakalis who operated the trans-Himalayan trade. Most of the ethnic groups and the lower castes provided the bulk of the labour and services, often forced, as tenants and cultivators, artisans, porters and general labourers.21

The norms, categories and social construction of reality of the Muluki Ain (and Hinduism) were spread throughout the kingdom by state appointed officials (mainly Parbate Hindus) sent to the districts, the migration of Parbates to the homelands of ethnic groups and village headmen of ethnic groups such as the subba among the Limbu, the mahato among the Tharu, and the mukhiya and among several other groups. These village headmen, who doubled as chiefs of their people and as representatives of the state, were responsible for collecting taxes, mobilizing labour for public works, ensuring that state laws were observed by the people living in their jurisdiction and administering justice according to both state law and customary law. In many areas they were also responsible for celebrating the Hindu festival of Dasain. The local chiefs even while trying to protect their cultures and laws were conduits through which alien state laws and different ways of conceptualising relationships were introduced among ethnic groups.

During this period Nepali society was based on legally sanctioned hierarchical structures and exclusion of the lower castes, ethnic communities, non-Nepali linguistic communities, non-Hindus and women from the state administration and land (the main source of income). Hindu religious law and increasingly customary law also supported such inequities and exclusion. The pressure to conform to Hindu norms and laws, at least in public, was so strong that several ethnic groups, especially the elites in close contact with the dominant Parbatiyas, emulated some Hindu norms, for example in their interactions with the castes considered ‘untouchables’, celebrating Hindu festivals, and as in the case of the Gurungs, internal differentiation of their lineage based-community into caste-like status groups.22

### IV. Equality, homogeneity and national (Parbatiya) culture (1961-1990)

The end of the despotic Rana regime in 1951 did not result in major changes as far as the relationships between the ethnic and linguistic groups, Hindus and low castes were concerned. Nepal continued to be ruled by high-caste Parbatiyas, and the laws from the Rana period were essentially retained. Though there was an interim constitution, the Muluki Ain of the Ranas remained in force and this gave rise to a contradictory vision of society. While the Muluki Ain imagined a national caste structured, Hindu society as during the previous period,

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21 For examples, see the writings Regmi (1971, 1976, 1978); for Tamangs, see Holmberg 1996; Holmberg, March and Tamang 1999; for Tharu, see Guneratne 2001.
the Interim Government of Nepal Act, 1951 and the Constitution of 1959, though still insistence that Nepal was a Hindu Kingdom, prohibited the government from discriminating against any citizen in the application of law or appointment to government service on grounds of religion, ethnicity, caste, gender, place of birth and so on (Interim Govt. of Nepal Act 1951, Section 1.16 and the Constitution of Nepal 1959, Section III.4.1.) These laws also bestowed freedom on citizens to practice the religion of their ancestors (their traditional religion) but not to convert others (Const. of Nepal 1959, Section III.5). The Constitution, obviously influenced by transnational law, offered, however slightly, an alternative vision of society, one where the state did not discriminate in the application of law or in appointment to government jobs.

Nevertheless, the ruling elites obviously were interested in enhancing political and cultural national unity within the framework established earlier -- a fact reflected in their policies regarding language and religion. The government attempted to promote Nepali language as the lingua franca and as the only medium of instruction in schools. The first National Educational Planning Commission went as far as to argue in the early 1950s that, “If the younger generation is taught to use Nepali as the basic language then other languages will gradually disappear, and greater national strength and unity will result”. Similarly, the Hindu ruling elite attempted to show the numerical dominance of Hindus in Nepal by classifying even some non-Hindu ethnic groups as Hindus. This is clearly reflected in the instructions given to the enumerators of the 1952-54 Census: “Assign as Hindus the worshippers of the five deities (Ganesh, Shiva, Vishnu, Sun, Devi) such as Bahun, Chetri, Magar, Gharti, Gurung, Sarki, Damai, etc.” (Gurung 1997: 520). It is precisely because of such insensitive policies that language and religion have become the two major issues for the hill ethnic groups. In the Tarai, language is one of the major issues of Madhesi activists who are fighting Pahadi domination.

In 1961, King Mahendra overthrew the elected government of B.P. Koirala and instituted the Panchayat political system, with himself as absolute monarch. During the Panchayat period, the ruling elite, which consisted mainly of high caste Parbatiyas, attempted to implement the ideals of nation-state, that is, to forcibly evolve a nation with a common culture and language. They along with many development experts, foreign as well as Nepali, viewed cultural and linguistic diversity as an impediment not only to nation-building but also to modernisation and development of the country. Consequently, the Nepali state attempted a concerted effort at homogenisation of the diverse cultures into a single national (Parbatiya) culture, with one religion (Hinduism) and one language (Nepali) (Pfaff-Czarnecka 1997).

At the start of the Panchayat regime, due to the dynamics of domestic politics and the perceived need to join the rest of the world, the state sought to replace the hierarchical and plural social order based on the national caste system by a mono-cultural system where all citizens were equal before the law. The state abolished legally sanctioned hierarchy and discrimination based on caste, ethnicity and religion (and gender in some areas). The relevant legal categories in the Constitution of 1962 and the new Muluki Ain of 1963 were no longer caste and ethnicity but citizen (nagarik) (Pfaff-Czarnecka 1999), and as citizens all Nepalis, irrespective of their social identity, could claim equality before law. (However, legally

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23 Gurung 1997
24 See for example, Stacy (1992) and Escobar (1995) on the consequences of modernisation and development on pluralism.
25 The Constitution of Nepal of 1962 states:
I.2 Nepal is an independent, indivisible, and sovereign monarchical Hindu state.
sanctioned discrimination continued in terms of language, religion among others. And gender discrimination continued to be sanctioned by the new Muluki Ain). Further, caste and ethnicity as well as regional identity (as Pahadi or Madhesi) remained socially valid categories and part of 'customary' and local laws, and were the basis of everyday interaction and access to political and economic resources, as they continue to do so even today.

Though ethnic communities as legal categories disappeared from the legal discourse, they did reappear to some extent in the national census as linguistic and religious categories. However, demographic classification in the census was discriminatory, recording as Hindus a large number of people who practiced other faiths. Linguistic classification of the population gave only a rough, and perhaps misleading, data of the ethnic communities because many of them had either given up speaking their mother tongues or were bilingual and classified as Nepali speakers. The law as well as the census thus attempted to ‘erase’ caste and ethnic identities of the population, one to bring about a more egalitarian society and the other to wipe away cultural diversity.26 A national culture, that of Parbatiya culture, was to replace the diverse cultures.

Anthropological research by foreign and Nepali scholars and some government institutions contributed to keeping alive the social reality of social, cultural and legal diversity, despite the official imagination by state law and many institutional donor institutions, of a monocultural, ‘modern’ Nepali (Parbatiya) culture.

The attempts by cultural or ethnic organisations to preserve their space in a culturally homogenising Nepal had begun in the Rana era, often from groups based in India. During the Panchayat period as well, these attempts continued, albeit in a low key. The number of such organisations grew over the years, especially after the 1980s, but the authorities allowed them to function only as long as they did not become overtly political. It was only after the restoration of democracy in 1990 that ethnic, religious and linguistic communities as well as low-caste groups, emboldened by the rights bestowed by the Constitution, and international support, organised themselves to protect their cultures, languages and religions and to voice their demands for an equal and plural society (see Gellner et al. 1997; Gellner n.d.; Lecomte-Tilouine and Dollfus 2003).

III. 10. 2. No discrimination shall be made against any citizen in the application of general laws on grounds of religion, race (varna), sex, or caste (jat) or any of them. 3. There shall be no discrimination against any citizen in respect of appointment to the government service or any other public service only on grounds of religion, race, sex, caste, tribe (jati) and any of them.

III. 14. Every person may profess his own religion as handed down from ancient times and may practice it having regard to the traditions, Provided that no person shall be entitled to convert another person from one religion to another.

[The Constitution of 1959 uses the terms barna(varna), jat-jati [equality section]

26 The Madhesi population posed a sensitive problem for the state and the ruling elites, especially because of Nepal’s economic and political dependence on India and the open border between the two countries. The ideals of nation-state and the demands for modernization and development - as understood then - pushed the government to implement policies that would ensure a common language and culture. However, many Madhesi communities had highly developed languages and cultures which could not be so easily suppressed, especially given the ease of transborder movement of people and ideas and the commonalities of the population on both sides. Close cultural, economic and kinship ties across the border helped the Madhesi population in general to resist assimilation into the dominant national Nepali (Parbatiya) culture. The eradication of malaria, the construction of roads and other infrastructure and the clearing of forests and opening up of new lands made the Tarai plains a magnet for people. In order to forestall the people south of the border from moving into these clearings, the government encouraged a massive movement of the Pahadis into the plains, to live in close proximity with the Madhesi.
V. Equality, pluralism, and cultural dominance (1990-2005)

With the restoration of multi-party democracy in 1990, some efforts were made by the dominant Parbatiya elite, to respond, at least partially, to the demands of the various castes, ethnic, linguistic, regional and religious groups for a genuine pluralistic and egalitarian society. Like the earlier constitutions, the Constitution of 1990 granted equal rights to all citizens before the law and prohibited any form of discrimination based on religion, race (varna), caste (jat) or ethnicity (jati). It also declared Nepal a multiethnic (bahujatiya) and multilingual (bhaubhasik) Hindu, constitutional monarchical kingdom, thereby legally recognising the multicultural nature of the Nepalese society, within a Hindu state. The new Constitution bestowed on the various communities the right to profess and practice their traditional religion (but not to convert), to protect and preserve their culture and language, and to teach their children in their own mother tongue up to the primary level. It also recognised the languages spoken by the different communities as national languages (rastriya bhasa). The Constitution thus articulated a vision of egalitarian, plural society, in contrast to the previous models of hierarchical, plural society (pre-1950) or non-hierarchical monocultural society (Panchayat period).

However, the Constitution circumscribed cultural pluralism and equality by two important qualifications, mainly due to the pressure of Parbatiya Hindus from across the political spectrum: first, by its definition of Nepal as a 'Hindu kingdom' and second, by its declaration of Nepali as the language of the nation (rastra bhasa) and official language. Thus, behind the official model of cultural pluralism and equality, it is possible to discern the dominance of Parbatiya culture (religion and language) over others. The cultural dominance by the Parbatiya was and is made possible by and reinforces the political and economic dominance of the Parbatiya upper castes.

VI. Hegemony, contestation and paradox

VI.1. Hegemony, contestation and change

As Merry (1994) suggests, there is no single overarching hegemony of law but multiple hegemonies; parts of law are uncontested, parts accepted and adapted, parts challenged, and in some cases, parts offer emancipation to the subjugated. Over the past two hundred years, the subjugated groups have responded in different ways – imitation, partial assimilation, migration, and resistance, sometimes violent - to the challenges posed by the dominance and spread of Hinduism and Hindu models of society as articulated by state law. The responses of the subjugated groups to the dominant model of society and state law varied over the three periods in question, depending of the law that they were responding to, domestic political situation and international support. In some cases, especially after 1960, the ethnic groups were responding not only to the state law but also the 'customary/traditional/religious' law of the dominant groups, the upper caste Parbates.

Over time, some parts of the National Code of 1854 were accepted and practiced by many ethnic groups, for example, rules relating to interactions with the untouchable castes, while other norms, such as those relating to prohibition on consuming beef were contested by many groups (e.g. Sherpas) but also accepted by others (Subba 1999; Michaels 1997). Some
groups, e.g. Tamangs, did not seem to have questioned the structure of the national caste hierarchy but rather wanted their status to be raised and to be differentiated from the general category of Bhotes (Hofer 2004), who were despised because of their dietary and marriage practices and were classified as enslavable matwalis. Some ethnic groups, for example, the Magars and Thakalis - and particularly the elite among them who were in close contact with the state and the Parbatias - sought to integrate themselves into the dominant culture by using Brahmin priests, giving up eating beef (at least publicly) celebrating some Hindu festivals, especially Dasain, and speaking Nepali instead of their own mother tongue. Thus, there was an attempt to reduce differences with the dominant Parbatiya community, and at the same time amplify differences with other, closely related ethnic groups (Pfaff-Czarnecka 1997). There was a process of fission and fusion of the various groups, whose identities were fluid (Fisher 2001). Still others, especially the Limbus and Rais migrated to Darjeeling or Sikkim to seek better economic opportunities and to escape state oppression (Subba 1999), or resisted by various means the imposition of Parbatiya culture (e.g. Tamangs, perhaps the most subjugated of the large hill-groups due to their proximity to Kathmandu Valley and Tharus) or even staged a revolt against the Brahman incursion into their homeland (Limbus, who defended the threat to their communal land-holding (kipat)). As a result of all these processes, group identity began to be more fixed and bounded.

During the Panchayat period, there were similar responses by the ethnic groups but to a different model of society articulated by the new state law. Hinduisation and Parbatiyasition continued, while at the same time, many ethnic groups, denied legal existence in a legally defined mono-cultural society attempted to stress their cultural identity by forming cultural and linguistic associations. From the early 1960s, some of these associations led by the local elites attempted to 'reform' their culture in line with the dominant Parbatiya culture, so as not to be considered 'backward' (e.g. Tharus (Guneratne 2001) and Thakalis (Fisher 2001)), but from the 1980s they, especially the more radical younger leaders, began to work towards reviving their own culture, stressing differences from the dominant culture. The elites among the various ethnic groups were more likely to adopt, at least in public, dominant Hindu values or merge themselves as an abstract 'Nepali', and these very people are now the leaders of ethnic movements, stressing their ethnic identity.

The cultural, ethnic and linguistic discontent that had been simmering for decades surfaced during and after the People's Movement (janandalon) in the spring of 1990. The Constitution of 1990, though declaring Nepal a multicultural state, did not satisfy the aspirations of the subjugated groups. Numerous new ethnic, linguistic, religious and caste-based organisations were established while the existing ones became more active. These organisations were involved in two sets of activities: first, in inculcating a sense of cultural self-pride. The emphasis here was on promoting the use of their mother tongues, particularly among the young, and to recover their own histories through research or by reviving or reinventing traditions and customs. Second, in pressurising the state to force changes in policies and laws relating to two areas: One concerning the protection and development of their cultures and languages and the other relating to affirmative action or positive discrimination that would ensure a more equitable share of economic and political resources, for example in education and in government jobs.

There is currently a great disparity between the upper-caste Parbatias and Newars on the one hand and the rest on the other regarding jobs in the civil service, in the education sector, in leadership of political parties, in the development and NGO sector, Human Development
Language became the most visible and emotive issue around which the activists mobilized, within and between communities. While most communities were willing to accept Nepali as the *lingua franca* in the country, they demanded active state support for the development of their own individual languages, insisting on their use in their traditional homelands as the medium of instruction in schools, especially up to the primary level. They also sought the recognition of their languages as the official language in their region, in place of or in addition to Nepali. And finally they objected to the fact that the requirement of proficient Nepali for entry into various government services automatically favoured the Parbatiyas.

The language demands have been partly met in the Interim Constitution 2007 which declares all mother tongues (*matribhasa*) spoken in Nepal as national languages (*rastrabhasa*). However, the Nepali language is to be used for all official government works. Local mother tongues (languages) can be used in local bodies and offices, but records would have to be kept in the language of government works (Nepali).

The other major issue of the ethnic and religious communities is their demand that Nepal should be declared a secular state rather than a Hindu kingdom. In response to this demand the parliament passed a bill declaring Nepal a secular state. We have yet to see whether the new constitution to be framed by the constituent assembly will remove all vestiges of laws that are based on (Hindu) religious law.

There are also demands for a federation of mini-nations within Nepal, or in extreme cases, even separate states or autonomous regions based on ‘nationalities’ (and more recently region and language) in the traditional homelands of the major ethnic and linguistic communities. Though federalism is now considered desirable by many, there is debate whether it should be based on ethnicity or some other basis. Fears are sometimes expressed that these demands for autonomy may lead to sectarian or ethnic violence, or even a balkanisation of Nepal. While such a possibility cannot be ruled out, it appears that a majority of the non-dominant communities would not support balkanisation or ethnic violence. Cultural diversity is accepted and celebrated by most Nepalis. In a letter to the editor of a popular English language newspaper, a member of an ethnic/indigenous community, wrote,

> Nepal is a multi-religious, multi-cultural and multi-linguistic country. And we the peace and justice-loving people of this beautiful country do not want racist attitude and religious violence. We do not want our beautiful country to witness violence that erupted in Ayodhya, India.  

27 Studies have shown that Brahmins and Chettris, and to some extent Newars, have a virtual monopoly of top government jobs, leadership positions of parties, members of parliament, etc. See Pradhan and Shrestha (2005) and references therein. Indeed, all of Nepal's major political parties, as well as the Maoists who claim to support ethnic groups, are dominated by the high-caste Parbatiyas, particularly Brahmins.

28 The Federation of Nationalities (*Janajati*) now espouses a three-language policy.

However it is not only ordinary members of ethnic community who support plural society. Even advocates of ethno-politics and critics of the dominant Parbatiya ruling class accept and celebrate the cultural diversity of Nepal. For example, Krishna Bhattachan, a well-known scholar and ethnic activist, while arguing for ethno-politics, wrote over a decade ago, “Diversity is the beauty of Nepalese social structure” (1995: 144). While diversity at the national level is accepted, the question is whether there will or should be diversity in the autonomous regions (federations).

VI. 2. Legal pluralism and indigenous nationalities

The indigenous nationalities are able to draw upon the Nepali Constitution and other state laws as well as international laws and conventions to demand equality, and cultural, economic and political rights as ‘indigenous nationalities’ (adivasi/janajati). State law as well as international conventions and laws increasingly affect how many communities categorize themselves (and are classified by others, including the state) both to mark their cultural identity and to demand rights from the state on the basis of that identity.

After the UN Declaration of the Year of Indigenous Peoples in 1993 and especially the Declaration in 1994 of the Decade of Indigenous People, ethnic groups, formerly classified as matwali, classified by themselves and were classified by others first as jana jati (nationalities), then as adivasi (indigenous peoples), a term formerly used for peoples of the forest or ‘tribes’. They now classify themselves as adivasi/janajati (indigenous nationalities). These indigenous nationalities, using elements of international law, stress their difference from the dominant Hindu (Parbatiya) community. During a conference in 1994, a federation of 21 ethnic groups known as the Nepal Federation of Nationalities (NEFEN), as well as other groups, renamed themselves as indigenous peoples (adivasi). They defined their ‘indigenousness’ in opposition to Hindus, i.e., as those communities which, among other characteristics (e.g. displacement from their original homelands, deprivation of their traditional rights to natural resources and neglect and humiliation of their cultures and languages by the state), possess their own traditional languages, cultures and non-Hindu religions and which were traditionally egalitarian rather than hierarchical or caste-based before they were conquered by the Hindus. This construction of cultural difference and identity vis-à-vis the dominant Hindu community (and not, it seems, in relation to each other) has not only cultural but also social, political and economic as well as legal significance. As ‘indigenous peoples or nationalities’, and in accordance with international law, they can claim rights to their culture, religion, language, natural resources and self-rule, albeit within the framework of the nation state, federated or otherwise.

Laws promulgated to enable positive discrimination (affirmative action) by the state in favour of various disadvantaged groups (women/ deprived social groups, ethnic groups, etc.) have to first construct the legally relevant categories that are eligible to receive state support. Thus, for example, National Committee for the Development of Ethnic Communities (Janajati) Act of 1997 makes legally relevant various ethnic groups included in the category of janajati, which it defines as “ethnic communities (janajatis) which have their own language and culture, are less socially developed than other communities (jati) and which are listed in Appendix 1 and other communities (samudaya) and groups (jati) which are from time to time so defined by the government”. The Appendix lists 60 communities as janajatis, which more

31 This organisation is now called Nepal Federation of Indigenous Nationalities (NEFIN) and no longer Nepal Federation of Nationalities.
or less correspond to the communities classified as ‘matwalis’ in the earlier laws. (Other laws similarly define and make legally relevant categories such as Dalits (untouchable castes) and mark them out for special state support.)

According to this law (National Committee for the Development of Indigenous Nationalities (Janajati) Act, 1997) indigenous groups are whichever groups the government defines as indigenous. Although the list of indigenous groups (janajatis) that the state defines as indigenous groups corresponds closely to the list prepared by the indigenous nationalities, the state's definition of janajatis avoids defining them in opposition to the dominant ruling group, the Hindus; it also does not mention other characteristics such as being deprived of their traditional homelands and control over natural resources, egalitarian social structure, etc. Consequently the rights that the indigenous groups can claim from the state is limited and not as broad as the rights they can claim based on international law and definition of indigenous peoples. The category of 'indigenous peoples' can thus have different meanings and different complex of rights depending on which law is used. It is not surprising then that the leaders of indigenous nationalities insist that they be categorised not only as janajatis (nationalities or peoples) but also as adivasis (first settlers or indigenous groups) to translate more accurately the term 'indigenous peoples' as defined in international conventions. As adivasi/janajati they can legitimately claim rights that the international law bestows on indigenous peoples. The struggles for identity are closely intertwined with the struggles for cultural, social, economic and political rights.

To put it differently, in negotiating their cultural identity, indigenous nationalities (and one may add religious and linguistic groups) at the same time negotiate rights; which identity and rights they negotiate or are allowed to negotiate depend on specific historical processes of each society, the power relations between the dominant groups and the minority groups, and the past and current state, international and customary and local laws.

VI.3. Paradox

Let me now take up the issue of paradox. Many scholars have noted that in the past, ethnic groups and their cultures were characterized by fluidity and hybridity (see Gellner ****; Fisher 2001) in that their boundaries were not fixed but porous and permeable, they were subject to fusion and fission and both their cultures and social organizations have undergone changes, in response to local, national and international processes.

The first paradox has two parts to it: i) indigenous nationalities construct their identities as though they have remained unchanged throughout their history. They are forced to renounce their present, as it were, to construct their identities and make claims based on their past in order to be recognized as indigenous. At the same time, ii) they have to be modern and use modern means to be recognized as indigenous (Hirtz 2003).

As David Holmberg (1996: x) argues, indigenous nationalities (adivasi/janajati) construct their identities and make claims on the state based on 'indigenous essentialism' (Holmberg 1996: x), i.e., they construct their cultures and identities as unbroken continuity of their traditions and ethnic formations from time immemorial as though their traditions and

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32 Not all castes that are legally categorized Dalits want to be so classified. Recently, the untouchable castes among the Newars have demanded that they not be legally classified as Dalits because it is discriminatory – they want to be treated like any other citizens, and not receive discriminatory treatment, negatively, or for that matter, positively.
identities were not fluid and have not changed over the past and are not even now undergoing changes. This is partly because non-polythetic classification of groups as in the Muluki Ain of 1854 and national census requires fixed boundaries and homogenous, identifiable groups and over time, indigenous nationalities have internalized these classifications and categories, exemplifying the power of hegemonic classifications. Another equally, if not more, important reason is that indigenous peoples have to construct their cultures, communities and identities as fixed, bounded and homogenous because these features resonate with the legal audiences to which they are addressed (Merry 2001). In order to be recognized as indigenous by the state and international bodies such as the UN and claim rights as indigenous peoples, they have to construct their identities in accordance with national and international legal constructions of ‘indigenous peoples’. Legal construction and recognition of some peoples as indigenous, especially in international law and laws of many states, is a modern phenomenon. The irony thus is that indigenous peoples have to be modern and use modern means in order to be recognized as indigenous (Hirtz 2003).

The second paradox relates to demands for territorial autonomy or federation of autonomous regions based on ethnicity, language, geographical region and so on in order to be more ‘inclusive’ and multicultural. If this model of federated multiculturalism is to be adopted, then the paradox is that while Nepal will be multicultural at the national level, it may be mono-cultural at the federation or local levels.

As far as I know and as Lecomte-Tilouine (2004) points out, ethnic groups have not really thought through what they mean by ethnic territorial autonomy, autonomy of the traditional homelands of indigenous nationalities and other groups. But one extreme view is that each autonomous region should be populated only by members of that particular ethnic group; a less extreme view is that people from other ethnic groups and communities may be allowed to live in these regions but they will have to observe the laws and culture of the dominant ethnic group of that region and I have heard it said that they may even have to pay a penalty for living there. Non-natives, if we may use the term, of each region will not be treated as equals; for example, they will have to pay higher taxes and will not have the right to become candidates for elections for and from that region. Both views presuppose a monocultural model of society at the local level, albeit the culture and language of the formerly dominated ethnic groups. It is only at the national or central level that an egalitarian, plural society is visualised.

These models of multiculturalism at the national level and separation at the local levels recall the Dutch model of *verzuiling* (pillarisation) of society along religious and ideological lines which was instituted in order to ensure peaceful coexistence on the basis of non-interaction between the different groups. They also ultimately recall the South African model of apartheid (from the Dutch word meaning separation) and the colonial model of pluralism both of which are based on separation and inequality.

It can be argued that ethnic groups who are demanding territorial autonomy of their traditional homelands, for whatever historical and justifiable reasons – and there are many reasons for them to do so - are at the same time demanding homogenous, monocultural territories, where only their culture, language and law will flourish. In order words, they seem to hark back to the ideology of nation-state – one people, one language, one culture - something that they have been struggling against, in their demand for nations or peoples within a state. Thus paradoxically ethnic groups who demand inclusive multiculturalism at
the national level and exclusive monoculturalism at the regional or local level could be considered anti-multiculturalists.

VI. Conclusion

The constituent assembly, whenever it will be held, will provide ethnic and other marginalized, excluded, subjugated groups with an opportunity to imagine and frame in the new constitution their vision of a truly egalitarian, inclusive, multicultural society and thereby provide an alternative to the existing models of society against which they have struggled hard and long. Whether such a vision will ever be actualized in the everyday life of all Nepalis, regardless of their identities and places of residence, is open to question because the relation between law (constitution) and behaviour is a complex matter because of the existence of other legal orders which interact, complement and compete with state laws, and which offer other visions and models of plural societies. These other models have become so hegemonic, so ingrained in us that even while we struggle against them, contest them we may unconsciously use some versions of them in visioning a different model of society. This fear is not unfounded because the model of multiculturalism offered so far – that of egalitarian, inclusive, multiculturalism at the national level but monocultural or inegalitarian multiculturalism at the regional level – recalls the Panchayat era model of a single national culture (albeit now in its subnational variety) and the pre-1950 model of hierarchical, inegalitarian pluralism. If we do not want the current dominant group to have the last laugh then surely we should envisage a model of egalitarian, inclusive, multicultural society that is applicable not only at the most general level of nation-state/society but to all levels and all regions so that we can negotiate and renegotiate our fluid, multiple identities. Perhaps then we need to be pre-modern and post-modern to imagine more fluid, multiple identities and individuals and groups who interact with each other on the basis of mutual exchange and mutual recognition.
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