THE EMERGING NEW CONSTITUTION IN NEPAL

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Nepal was created in 1768 as a united state. It was from the outset constituted as a monarchy. Its first truly meaningful constitution was only enacted in 1990. The constitution proclaimed Nepal to be a Hindu State.

A Maoist insurgency in protest against the constitution soon erupted and plunged the country into a civil war that lasted for proximately ten years and resulted in about 17,500 casualties.

A 12-point peace plan was concluded in 2005. An interim constitution was thereupon put in place, and a Constitutional Assembly was established to draft a new constitution for the country. The monarchy was abolished with immediate effect. The King was forced to abdicate in 2008. He now lives in Nepal as an ordinary citizen, and his castle has been converted into a museum. Dr. Ram Baran Yadav was sworn in as President under the interim constitution on 23 July 2008.

A Conference on *The Emerging New Constitution in Nepal* was held in Kathmandu.on 5 to 7 May 2011. I was one of 11 "international experts" coming from Australia, Canada, China, India, Spain, South Africa and the United States who were invited to participate in the conference. We were asked to address aspects of the emerging new constitution for Nepal focused on specially selected themes, such as forms of government, federalism, the judiciary, human rights from the perspective of women's issues, and human rights and secularism. I was requested to be a lead-in speaker on four of those issues, namely (a) the judiciary (with emphasis on a constitutional court), (b) human rights and secularism (with emphasis on the right to self-determination of religious communities), (c) federalism (as a means of accommodating ethnic rivalries), and (d) rights to land and natural heritage of indigenous and local communities.

(a) As to the judiciary, I addressed difficulties experienced in South Africa with the German constitutional court system under which only the Constitutional Court has jurisdiction to decide whether or not a particular rule of law is constitutional and which was adopted in South Africa under the interim Constitution of 1994. The disadvantages of that system were is essence twofold:

    (i) Having to interrupt proceedings whenever constitutional issues emerged so as to obtain an official finding of the Constitutional Court was disruptive of the proceedings and extremely time-consuming and costly; and

    (ii) Since only the Constitutional Court could make a ruling on constitutional issues, magistrates and judges of the High Court and Supreme Court of Appeal had no cause for, and could not see the point in, acquainting themselves with the substance and/or implications of the Bill of Rights.

    South Africa consequently abolished that arrangement in its final Constitution of 1996 in exchange for a system under which all courts have jurisdiction to decide constitutional issues, but all findings of unconstitutionality are automatically taken on review by the Constitutional Court.

(b) As far as human rights and secularism is concerned, I could point out that South Africa is not a secular State but a religiously neutral State. That is to say, the State and state-sponsored institutions do not distance themselves from religion, but does not afford special privileges to any particular denomination. It treats all religions equally. The South African Constitution can be described as religious-friendly: It protects freedom of religion, belief and opinion (sec 15); it permits the establishment of parochial educational institutions (see sec 29(3)); it upholds the right to self-determination of religious communities (sec. 31); it makes provision for a Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (sec 181(1)(c) and 185-86; and see Act 19 of 2002); and it laid the foundation for the establishment, through national legislation, of a Pan-South African Language Board charged, inter alia, with promoting and ensuring respect for "Arabic, Hebrew, Sanskrit and other languages used for religious purposes in South Africa" (sec 6(5)(b)(ii). Several judgments of the Constitutional Court have emphasized the importance of religion *for the State*. In one of those judgments, Justice Albie Sachs noted that "[r]eligious bodies play a large part in public life through schools, hospitals and poverty relief programmes", "command ethical behaviour from their members", "promote music, art and theatre", and "conduct a great variety of social activities for their members and the general public." (*Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*, 2006 (1) SA 542, par 93).

(c) Approximately 80% of the Nepalese population is made up of Hindu's, and there are also a fair number of Buddhists and Muslims. There are no less than 91 different language groups in the country. The Constitutional Assembly decided to accommodate the political aspirations of the ethnic, religious and linguistic groups through a federal system of government. Initially, proposals were made for a very large number of federal states/provinces. Those were in due course reduced to 25.

We cautioned against applying a federal state structure to accommodate the interests of ethnic groups and as a means to eliminate group-related rivalries. Regional ethnic homogeneity is almost impossible to orchestrate within a defined territorial divide, and affording political relevance to the ethnic, religious or linguistic identity of a population group is conducive to perpetuating animosity against "the other"; and as we know from experiences in the former Yugoslavia, efforts to establish ethnic, religious or linguistic homogeneity within a defined territory can culminate in a policy of ethnic cleansing and even acts of genocide.

Federalism can be conducive to better municipal services in respect of road construction and maintenance, electricity and water supply, and maintaining a clean and healthy environment within municipal jurisdictions. Nepal is said to be one of the dirtiest countries in the world, perhaps because those in central government have other priorities to attend to. However, defining the borders of federal units should not be based on ethnicity, religion or language; and given the relatively small size of Nepal, 25 federal states/provinces seem unpractical and indefensibly costly.

(d) Given time constraints, I could not deal elaborately with the question of rights of indigenous and local communities to land and the natural heritage of a country. My contribution focused on the 2007 *United Nations Declaration on the Rights of Indigenous Peoples*, which was adopted with only four negative votes, those of

Australia, Canada, New Zealand and the United States of America. Their complaints were largely centered upon the granting, in terms of the Declaration, of quite extensive autonomy to indigenous peoples.

In 1998 the United Nations Special Rapporteur on Freedom of Religion or Belief, Prof Abdelfattah Amor of Tunisia, paid an informal visit to the United States of America ("informal" because the United States refused to invite him to go there in an official capacity) to assess the state of religious freedom in that country. Professor Amor was invited by several institutions from all over the United States (including Emory University in Atlanta, Georgia) to conduct meetings and hear evidence within the confines of his brief. In his report, Prof Amor noted that the state of freedom of religion or belief in the United States was in general satisfactory but did give cause for concern in a few instances, including insensitivity of the United States to the spiritual values of, and places of religious significance to, Native American tribes.

We, evidently, recommended respect for and protection of the rights of local (indigenous) communities with regard to places and practices that constitute part of the natural heritage of the peoples of Nepal.

On 8 May 2011, six of the "international; experts", including myself, had a breakfast meeting with the President of Nepal, Dr. Ram Baran Yadav, and his wife to brief them on the outcome of the deliberations of the previous three days. In my presentation at the breakfast, I emphasized that Nepal cannot simply carbon copy the constitutional arrangements of other States but must draft a constitution that addresses the particular problems and circumstances of Nepal. However, Nepal might find some guidance from the South African experience (a) because South Africa went through the same process in the early 1990's which Nepal has to deal with today, and (b) because circumstances in South Africa, especially the prevalence of group tensions, are comparable to those to be addressed in the emerging constitution. Dr Yadav responded at some lengths to our individual presentations. From what he had to say, it seemed that the federalism option with 25 federal states/provinces represents a compromise in the Constitutional Assembly that is no longer negotiable.

Following the deliberations in Nepal, some of the "international experts" participated, on 9 May 2011, in a one-day international symposium of the Institute of Advanced Legal Studies of Amity University in Uttar Pradesh on the outskirts of Delhi, India on *Religion and Governance in a Secular State*. I delivered a paper on "Sovereignty of Religious Institutions in a Secular State: The South African Experience". The emphasis of my paper was on respect of South African courts for the internal sphere sovereignty of religious institutions. Although the South African Constitution prohibits discrimination by the State, as well as by persons and institutions other that the State (sec 9(4)), and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 prohibits unfair discrimination based on gender in "any … religious practice, which impairs the dignity of women and undermines equality between women and men" (sec 8(d)), it is highly unlikely that courts of law will apply this provision to compel churches who refuse to do so on religious grounds to ordain women as part of their clergy. In a case involving the dismissal of an organ teacher in the Arts Academy of a congregation of the *Nederduitse Gereformeerde Kerk* (the NG Church) on grounds of his involvement in a same-sex relationship, the Equality Court indeed decided that his dismissal amounted to unfair discrimination (*Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park*, 2009 (4) SA 510 (Equality Court, TPD)). The Equality Court based its finding in part on the fact that the responsibilities of the organ teacher were in no

way related to the spiritual mission of the Church (he was not even a member of the NG Church). Judge Basson made it abundantly clear though, albeit by way of *obiter dictum*, that the Court would not have interfered with the decision of the Church if the responsibilities of the employee had been part of the spiritual mission of the Church.