



*The*  
**FEDERALISM**  
*Debate in Nepal*

Post Peace Agreement  
Constitution Making in Nepal

Volume II



Post Peace Agreement Constitution Making in Nepal

---

Volume II

*The*  
**FEDERALISM**  
*Debate in Nepal*

*Edited by*

Budhi Karki

Rohan Edrisinha

*Published by*

United Nations Development Programme (UNDP)

Support to Participatory Constitution Building in Nepal (SPCBN)

2014



*Empowered lives.  
Resilient nations.*

**United Nations Development Programme (UNDP)  
Support to Participatory Constitution Building in Nepal (SPCBN)**

UNDP is the UN's global development network, advocating for change and connecting countries to knowledge, experience and resources to help people build a better life.

**United Nations Development Programme**

UN House, Pulchowk, GPO Box: 107  
Kathmandu, Nepal  
Phone: +977 1 5523200  
Fax: +977 1 5523991, 5523986

ISBN : 978 9937 8942 1 0

© UNDP, Nepal 2014

*Book Cover: The painting on the cover page art is taken from 'A Federal Life', a joint publication of UNDP/ SPCBN and Kathmandu University, School of Art. The publication was the culmination of an initiative in which 22 artists came together for a workshop on the concept of and debate on federalism in Nepal and then were invited to depict their perspective on the subject through art. The painting on the cover art titled "Emblem" is created by Supriya Manandhar.*

**DISCLAIMER:**

The views expressed in the book are those of the authors and do not necessarily represent the views of UNDP/ SPCBN.

# PREFACE

A new Constitution for a new Nepal drafted and adopted by an elected and inclusive Constituent Assembly (CA) is a key element of the Comprehensive Peace Agreement (CPA) of November 2006 that ended a decade long Maoist insurgency. Elections were held under the Interim Constitution of 2007 and inclusive 601 member CA that also functioned as a Legislature Parliament was elected. It included 197 women and representatives from Nepal's marginalized groups and diverse population. The CPA and the Interim Constitution mandated the CA to draft and adopt a constitution that eliminated the centralized, unitary state and introduce instead progressive state restructuring, inclusion and the empowerment of Nepal's excluded communities.

The constitution making process of 2008-12 failed to draft and adopt a new constitution but did produce significant achievements. There is today in Nepal, broad agreement that Nepal should be a federal, secular and inclusive democratic republic. There has been a widespread public debate on complex constitutional issues and the various thematic committees of the former CA produced impressive reports on the main constitutional issues. The issues where consensus proved difficult included the basis for the demarcation of provinces (the balance between identity and viability) in a federal Nepal; the design of the electoral system and whether Nepal should adopt a presidential system, continue with the Parliamentary executive model, or explore a semi-presidential compromise.

The collapse of the Constituent Assembly in May 2012 created a crisis that was not anticipated by the framers of the Interim Constitution. The CA elected in 2008 was expected to continue in office until the adoption of a new constitution and there were therefore no provisions for a second CA election. After months of uncertainty a political consensus was reached by the main political parties in the country that an election for a new CA under the aegis of aspecial council of ministers chaired by the Chief Justice, was the way to resolve the constitutional crisis. Since there was no Legislature Parliament to amend the constitution, a provision that gave the President the power to issue orders to remove difficulties was used to give legal effect to the political consensus to conduct elections. Nepal went to the polls on 19 November 2013 to elect a new CA to resume the important task of constitution making.

This two volume publication seeks to describe and analyse the remarkable and ambitious participatory constitution making process in Nepal and its challenges both with respect to process and substance. It also seeks to critically examine the difficult issues that have prevented Nepal to date from reaching agreement on the substance of the new constitution. Authors were identified so as to capture the range of views and opinions on a variety of constitutional issues that have featured in the national debate on constitutional reform. We hope that the collection of essays will contribute to a more informed debate that will in turn, lead to a successful conclusion to the process.

# INTRODUCTION TO VOLUME TWO

The second volume of the post-Comprehensive Peace Agreement (CPA) constitution-making process of Nepal is solely dedicated to federalism, as it was undoubtedly the major contentious issue that ultimately led to the demise of the first Constituent Assembly without producing a new constitution. The issue remains the same as for the second Constituent Assembly – how to divide Nepal into federal units and how to share power between the centre and the federal units.

In Chapter 1 of this volume, Budhi Karki discusses how the major Nepali political forces agreed to the broader agenda of state restructuring to achieve specific objectives but how this agenda has been narrowed down to some aspects of federalism alone over the course of time. This chapter tries to debunk some of the myths and misconceptions about federalism promoted by some self-proclaimed ‘federalists’ and ‘anti-federalists’, which have made the complex path of restructuring the state even more difficult. Chapter 1 also examines some weakness, gaps and contradictions in the discourse on federalism in Nepal and some reasons for the failure to restructure Nepal as a federal state.

In Chapter 2, Seira Tamang argues that the debate on federalism is illustrative of the overall weak and limited nature of the discourse on rights in Nepal and of how the main actors in this debate have failed to clarify key points of discussion and lacked detailed engagement with different arguments. This chapter highlights the weaknesses of various interventions, the inattention to detail by central actors, and the overall context of a narrowed and disjunctive view of rights, which has prevented a broader understanding of rights, impacting on all citizens.

Although there is agreement that identity and capability are the main principles for federalising Nepal, how to apply them in doing so is highly contentious. Politicians, academics, civil society and the general public are all divided on this issue, mainly into two camps: those who want to put identity at the core of the federalisation process and those who think capability should be the primary

factor. Chapters 3, 4 and 5 present different perspective on this crucial question. In Chapter 3, Krishna Hachhethu explains why identity should receive prominence in constituting the federal units and examines the extent to which concern shown by those favouring capability as the primary factor can be adjusted in designing federal units without overly compromising the identity factor. He also examines the political complexity involved in balancing identity and development. In Chapter 4, Bipulendra Chakravarty explores the meaning of identity and how it is constructed. He discusses the complexity of the issue of identity in Nepal and how to address this issue through ethno federalism. In Chapter 5, Pitamber Sharma discusses the historical context of state restructuring, the congruence of ethnicity and class, and the contemporary spatial picture of ethnicity to highlight why ethnicity cannot be ignored in Nepal's federalisation. Sharma presents a critical review of the federalisation exercises undertaken during the tenure of the first Constituent Assembly and sets out his approach to balancing identity and capability while federalising Nepal.

In Chapter 6, Balkrishna Mabuhand explores how the issue of accommodation of diversity through autonomous regions and federal units was raised and discussed during the first Constituent Assembly. He discusses the accommodation of diversity in two neighbouring countries and draws an analogy between Nepal and Ethiopia. The author also discusses the autonomous regions proposed by the first Constituent Assembly's State Restructuring and Distribution of State Powers Committee by measuring population size and geographic location.

The distribution of powers between different layers of the government lies at the core of any federal system. This determines how centralised or decentralised any federal system is. The distribution of powers is discussed in Chapters 7 and 8. In Chapter 7, Mohan Lal Acharya reviews and discusses the various types of competencies of the different layers of government in a federal system and their importance. He explores some comparative best practices of power distribution in federal countries and examines the lists of competencies proposed by the first Constituent Assembly's State Restructuring and Distribution of State Powers Committee, as well as by the High Level State Restructuring Commission, along with other relevant committees' proposals. Acharya also suggests a review of the list of competencies and residuary powers to ensure a balance between self and shared rule under federalism. In Chapter 8, Jayampathy Wickramaratne, focuses on the critical importance of clearly delineating the division of powers in Nepal's federal state. He offers a close analysis of the relevant work of the Constituent Assembly, and harnesses both theory and practice to formulate a detailed proposal for the allocation of competencies in the future Nepali state.

Sheri Meyerhoffer's contribution, in Chapter 9, examines the role of non-dominant populations in the development of Canada's federal system and explains how Canada has applied a group rights framework in its management



of identity politics. Her paper discusses in detail Canada's experience in pursuing substantive equality, drawing on the interplay between the central government and Canada's French-speaking communities and indigenous populations.

Irantzu Pinillos Urrea, in Chapter 10, engages the theme of managing diversity in federal states by exploring the historical relations between Spain's Basque and Catalanian regions and the country's central government. The chapter describes Spain's strategies for managing linguistic diversity and the implications of the country's arrangements for self-rule. Citing Spain's experience, Urrea emphasises the importance of establishing a collective and inclusive Nepali identity.

In Chapter 11, Marcus Brand summarises the historical context in which the debate on federalism in Nepal emerged after the decade-long armed conflict that ended in 2006. This chapter also outlines the debates within the Constituent Assembly and describes the model that was ultimately proposed by the Constituent Assembly's State Restructuring Committee, which would have devolved substantial powers to sub-national units.

In Chapter 12, Rohan Edrisinha focuses on some of the issues that have created apprehension and misunderstanding about the federal idea in the South Asian context. His paper deals with aspects of the debate on federalism in Nepal, India and South Africa.

# NOTES ON CONTRIBUTORS

1. **Budhi Karki** is a lawyer specialising in constitutional law. He holds LL.M. degrees in constitutional law from Tribhuvan University and Washington University in St. Louis School of Law. He has co-authored and co-edited *The Future of the Nepalese Constitution* (2005) and is the co-editor of the two-volume *Post Peace Agreement Constitution Making in Nepal* (2014). He has been associated with the UNDP's Support to Participatory Constitution Building in Nepal project since 2008.
2. **Seira Tamang** holds a Ph.D. in International Relations and has research interests encompassing gender, global political economy, and citizenship. She is the author of several articles published in various journals including *Citizenship Studies and Feminist Review*, as well as in edited volumes. Having held post-doctoral research positions in the US and in Japan, Dr Tamang is currently chairperson of the research and policy institute, Martin Chautari, in Kathmandu.
3. **Dr Krishna Hachhethu** is Professor of Political Science at Tribhuvan University. He is author of one dozen books, including *Party Building in Nepal* (2002), *Nepal in Transition* (2008), *State Building in Nepal* (2009), and has contributed to more than five dozen articles in books and journals published in Nepal and abroad. He was visiting scholar to Oxford University in 2005. He is former member of High Level Commission of State Restructuring of Nepal. Professor Hachhethu is also the country coordinator of South Asia Democracy Study network.
4. **Bipulendra Chakravartty** holds a master's degree & a Bachelor of Law (B.L.) from Tribhuvan University Nepal. He is a senior advocate and a social worker. He served as a member of Press Council and a member of the Central Executive Committees of Nepal Bar Association. He served as a member of the Senate Purwanchal University and served as a member of Judicial Enquiry Commission which was constituted by the then King on June 28 1994 to investigate into the May 16 1993 Das Dhunga Jeep accident in which General Secretary of Communist Party (UML) and another leader of the party were killed. He appeared as an amicus curie at Supreme Court of Nepal in several important constitutional cases.

5. **Pitamber Sharma** holds a Ph.D. in City and Regional Planning from Cornell University, USA. He taught in the Department of Geography, Tribhuvan University for over two decades, and worked as a Regional Planner at the International Centre for Integrated Mountain Development (ICIMOD). He was Vice-Chair of the National Planning Commission in 2008. His publications include *Urbanization in Nepal* (1989), *Tourism as Development* (2000), *Market Towns in the Hindu-Kush Himalayas* (2002), *Unravelling the Mosaic: Spatial Aspects of Ethnicity in Nepal* (2008), and *Some Aspects of Nepal's Social Demography, Census 2011 Update* (2014).
6. **Balkrishna Mabuhang** is an Associate Professor at Central Department of Population Studies, Tribhuvan University Kathmandu Nepal. He has been involved in research work for the last two decades. He served as a General Secretary of Nepal Federation of Nationalities (NEFEN) from 1998 to 2000 AD. He has written several articles in national as well as international publications relating to Indigenous Nationalities (Janajati) and has been academically engaged with state structuring and identity based federalism based discourse for the last one decade.
7. **Mohan Lal Acharya** is a lawyer specialising in international law and Human Rights and has been working for UNDP's Support to Participatory Constitution Building in Nepal project as Senior Legal Officer since December 2008. He holds an LL.M. in international law and has worked in the areas of international law and human rights in various national and international organisations including the National Human Rights Commission of Nepal, International Rescue Committee and Nepal Bar Association.
8. **Jayampathy Wickramaratne** is a President's Counsel in Sri Lanka and has also served with the Sri Lankan government in various capacities as Senior Adviser to the Ministry of Constitutional Affairs and member of the Sri Lankan Law Commission. He holds a Ph.D. in Human rights and a Master of Public Administration from University of Peradeniya, Sri Lanka. His areas of expertise include Constitutional law, Human Rights, Administrative and Criminal law.
9. **Marcus Brand** holds a Ph.D. in constitutional law from the University of Vienna, and an LL.M. from the European University Institute in Florence. He served the UNDP's Support to Participatory Constitution Building in Nepal project from December 2008 to February 2011 and was in charge of the programme related to 'Transition to Federalism and State Restructuring.' He has also worked for the UN and other intergovernmental organisations in post-conflict or democratic transition contexts such as Kosovo, Macedonia, Tunisia, and Myanmar.
10. **Sheri Meyerhoffer** holds a Bachelor of Arts in Political Science (Hon. '82) and a Juris Doctor ('85) from the University of Saskatchewan. She is a Canadian lawyer with technical expertise in the areas of law reform, governance and capacity building. She has worked in Canada, Russia, Cuba, China, Jamaica, and Nepal. Sheri is currently Head of Mission for the International Institute for Democracy and Electoral Assistance,

Nepal program which is focused on supporting that country's process to draft and implement its new constitution. From 2007-2011 she held the position of Canadian Project Director for a Canadian government funded partnership project between the Canadian Bar Association and the Nepal Bar Association titled Developing Democracy in Nepal.

11. **Irantzu Pinillos Urra** is originally from Navarre (Nafarroa) in Spain and holds two postgraduate degrees in International Relations and in Peace Studies from CIDOB Foundation and the Autonomous University of Barcelona respectively. She also earned a European Master's Degree in Human Rights and Democratisation from the European Inter-University Centre for Human Rights and Democratisation. Irantzu began her professional career working with NGOs in Barcelona and thereafter moved to Nepal, where she worked for several years both with INGOs and UN organizations. She is currently working as a Human Rights Officer with the United Nations Mission in South Sudan.
12. **Rohan Edrisinha** is the Constitutional Advisor to UNDP, Nepal, and the International Project Manager of its Support to Participatory Constitution Building in Nepal project (SPCBN). He obtained an LL.B. (Hons.) from the University of Colombo, and an LL.M. (University of California, Berkeley). He taught at the Faculty of Law, University of Colombo from 1986 to 2010. He taught at the Faculty of Law, University of Witwatersrand, South Africa in 1995 and was a Visiting Fellow at Harvard University, 2004/2005 and a Saul Rae Visiting Fellow at the University of Toronto, in 2009. He was a founder Director and Head, Legal and Constitutional Unit, Centre for Policy Alternatives, (CPA), Colombo, from 1997 to 2010.

# ACRONYMS

<b>AD</b>	Autonomous District
<b>ADB</b>	Asian Development Bank
<b>AR</b>	Autonomous Regions
<b>ARC</b>	Administrative Restructuring Commission
<b>BS</b>	Bikram Sambat
<b>CA</b>	Constituent Assembly
<b>CA/LP</b>	Constituent Assembly/Legislature Parliament
<b>CBC</b>	Canadian Broadcasting Corporation
<b>CBS</b>	Central Bureau of Statistics
<b>CC</b>	Constitutional Committee
<b>CCCPO</b>	Committee on Collection and Coordination of Public Opinions
<b>CCD</b>	Centre for Constitutional Dialogue
<b>CCDRM</b>	Committee on Capacity Development and Resources Management
<b>CCR</b>	Committee on Civic Relations
<b>CDBCSS</b>	Committee on Determination of Bases for Cultural and Social Solidarity
<b>CDFG</b>	Committee on Determination of Form of Governance
<b>CDFLO</b>	Committee on Determination of the Form of the Legislative Organs
<b>CDNRFPR</b>	Committee on Division of Natural Resources, Financial Powers and Revenue
<b>CDO</b>	Chief District Officer
<b>CDSCB</b>	Committee on Determination of Structure of Constitutional Bodies
<b>CEDAW</b>	Committee on the Elimination of Discrimination against Women
<b>CFRDP</b>	Committee on Fundamental Rights and Directive Principles
<b>CHHEM</b>	Caste Hill Hindu Elite Males
<b>CJS</b>	Committee on Judicial System
<b>CKRC</b>	Constitution of Kenya Review Commission
<b>CLAF</b>	Constitutional Lawyers' Forum
<b>CPA</b>	Comprehensive Peace Accord
<b>CPN ML</b>	Communist Party of Nepal (Marxist Leninist)

<b>CPN U</b>	Communist Party of Nepal (United)
<b>CPN UML</b>	Communist Party of Nepal (Unified Marxist Leninist)
<b>CPNI</b>	Committee for Protection of National Interests
<b>CPNM</b>	Communist Party of Nepal (Maoist)
<b>CPNM</b>	Communist Party of Nepal (Maoist)
<b>CPRMMC</b>	Committee for Protection of Rights of Minority and Marginalised Communities
<b>CRC</b>	Committee on the Rights of the Child
<b>CRC</b>	Constitution Recommendation Commission
<b>CRSDSP</b>	Committee for Restructuring of the State and Distribution of State Powers
<b>DANIDA</b>	Danish International Development Agency
<b>DC</b>	District Councils
<b>DDC</b>	District Development Committee
<b>DFID</b>	Department for International Development
<b>ECN</b>	Election Commission of Nepal
<b>FLJSC</b>	Federal Legislature Special Judicial Committee
<b>FPTP</b>	First-Past-The-Post
<b>GON</b>	Government of Nepal
<b>GOSC</b>	Gaps and Overlaps Study Committee
<b>HLSRC</b>	High Level State Restructuring Commission
<b>HLTF</b>	High Level Task Force
<b>HMGN</b>	His Majesty's Government of Nepal
<b>IC</b>	Interim Constitution
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICERD</b>	International Convention on the Elimination of All Forms of Racial Discrimination
<b>ICJ</b>	International Commission of Jurists
<b>ICSER</b>	International Covenant on Economic, Social and Cultural Rights
<b>IIDEA</b>	International Institute for Democracy and Electoral Assistance
<b>ILO</b>	International Labour Organisation
<b>IN</b>	Indigenous Nationalities
<b>IP</b>	Indigenous Peoples
<b>LAHURNIP</b>	Lawyers' Association for Human Rights of Nepalese Indigenous Peoples
<b>LANCAU</b>	Lawyers National Campaign for the Elimination of Caste Discrimination
<b>LLSJC</b>	Local Legislative Special Judicial Committee
<b>LP</b>	Legislature Parliament
<b>LSGA</b>	Local Self-Government Act
<b>MJF</b>	Madhesi Janadhikar Forum

<b>MMPR</b>	Mixed-Member Proportional Representation
<b>NAVIN</b>	National Association of Villages in Nepal
<b>NBA</b>	Nepal Bar Association
<b>NC</b>	Nepali Congress
<b>NCARD</b>	National Coalition Against Racial Discrimination
<b>NEFIN</b>	Nepal Federation of Indigenous Nationalities
<b>NFDIN</b>	National Foundation for Development of Indigenous Nationalities
<b>NGO</b>	Non-Governmental Organization
<b>NPC</b>	National Planning Commission
<b>OBC</b>	Other Backward Class
<b>PIL</b>	Public Interest Litigation
<b>PLA</b>	Peoples Liberation Army
<b>PLSJC</b>	Provincial Legislature Special Judicial Committee
<b>PPI</b>	Population Pressure Index
<b>PR</b>	Proportional Representation
<b>RC</b>	Regional Councils
<b>RPP</b>	Rastriya Prajatantra Party
<b>RPPN</b>	Rastriya Prajatantra Party Nepal
<b>SDSA/N</b>	State of Democracy in South Asia/Nepal Chapter
<b>SP</b>	Sadbhavana Party
<b>SPA</b>	Seven Party Alliance
<b>SPCBN</b>	Support to Participatory Constitution Building in Nepal
<b>TAC</b>	Tribes Advisory Council
<b>THRDA</b>	Tarai Human Rights Defenders Alliance
<b>TMDP</b>	Terai Madhes Democratic Party
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UDMF</b>	United Democratic Madhesi Front
<b>UNDAF</b>	United Nations Development Assistance Framework
<b>UNDRIP</b>	United Nations Declaration on the Rights of Indigenous Peoples
<b>UNHCR</b>	United Nations High Commissioner for Refugees
<b>UNMIN</b>	United Nations Mission in Nepal
<b>USAID</b>	United States Agency for International Development
<b>VDC</b>	Village Development Committee

# CONTENTS

<b>PREFACE .....</b>	<b>i</b>
<b>INTRODUCTION TO VOLUME II .....</b>	<b>iii</b>
<b>NOTES ON CONTRIBUTORS .....</b>	<b>vi</b>
<b>ACRONYMS .....</b>	<b>ix</b>
<b>CHAPTER 1:</b> State Restructuring and Federalism Discourse in Nepal - <i>Budhi Karki</i> .....	<b>1</b>
<b>CHAPTER 2:</b> Nepal's transition and the weak and limiting public debates on rights - <i>Seira Tamang</i> .....	<b>23</b>
<b>CHAPTER 3:</b> Balancing Identity and Viability Restructuring Nepal into a Viable Federal State - <i>Krishna Hachhethu</i> .....	<b>35</b>
<b>CHAPTER 4:</b> Balancing Identity and Viability: Restructuring Nepal in a Workable Federal State - <i>Bipulendra Chakravarty</i> .....	<b>55</b>
<b>CHAPTER 5:</b> State Restructuring in Nepal: Context, Rationale and Possibilities - <i>Pitamber Sharma</i> .....	<b>77</b>
<b>CHAPTER 6:</b> Autonomous Regions: Ethno-Demographic Analysis A Question of Accommodation of Diversity - <i>Balkrishna Mabuhang</i> .....	<b>127</b>



<b>CHAPTER 7:</b>	An Overview of Vertical Power Sharing in a Federal Setup: A comparative analysis with reference to the works of the first Constituent Assembly of Nepal - <i>Mohan Lal Acharya</i> .....	159
<b>CHAPTER 8:</b>	Proposed Allocation of Competencies between Levels of Government in Nepal - <i>Jayampathy Wickramaratne</i> .....	189
<b>CHAPTER 9:</b>	Federalism and Decentralised Governance: Preparing for the Transition to Federalism and Implementation of Nepal's New Constitution - <i>Marcus Brand</i> .....	227
<b>CHAPTER 10:</b>	Politics of Recognition Canadian Federalism: Linking Communities to form a Unified Nation - <i>Sheri Meyerhoffer</i> .....	275
<b>CHAPTER 11:</b>	The Accommodation of the Principle of Unity in Diversity in the Context of Spain and Nepal: Idealism or Reality? - <i>Irantzu Pinillos Urra</i> .....	309
<b>CHAPTER 12:</b>	The Federalism Debate in South Asia: Lessons for Nepal - <i>Rohan Edrisinha</i> .....	337
<b>APPENDIX-I</b> .....		358
<b>END NOTES</b> .....		362



# CHAPTER 1

## STATE RESTRUCTURING AND FEDERALISM DISCOURSE IN NEPAL

- BUDHI KARKI



## INTRODUCTION

State restructuring does not have a single, widely-accepted definition and can mean different things in different countries and to different people. State restructuring should be seen in light of the existing state structure and the reasons for changing it. In Nepal, the existing state structure is a centralised, unitary one and the main reason for changing it is to resolve issues related to class, caste, region and gender. The 12 Point Understanding of 2005, which together with the Comprehensive Peace Agreement laid the foundations for the Interim Constitution 2007, adds political, economic, social and cultural issues to the list of issues in the Preamble of the Interim Constitution to be resolved through state restructuring. This understanding also envisages state restructuring as a tool for realising full and inclusive democracy in Nepal. All of the political and constitutional documents after the 12 Point Understanding are consistent on the reasons for abandoning the existing structure and restructuring the state, although some documents are more elaborative than others.

The main purpose of the Interim Constitution 2007 is to make Nepal a fully inclusive democracy by writing a new constitution through a Constituent Assembly directly elected by the Nepali people and restructuring the state so as to eliminate all problems based on class, caste, language, culture and region. The widespread movement in the Madhes as soon as the Interim Constitution was promulgated in 2007 forced the first amendment to it and 'federalism' was introduced. Since then, the Nepali discourse on state restructuring, which is the most crucial and extensive national project to date and one that cuts across every dimension of the state, has been narrowly defined to encompass only some dimensions of federalism and there is a general perception that state restructuring is synonymous with federalism. This chapter argues that the state restructuring discourse took a wrong turn at that point and that state restructuring is much broader than federalism. It also explores some other misconceptions and contradictions in the federalism and state restructuring discourse that made this crucial national agenda too complex to be executed resulting in the dissolution of the first Constituent Assembly in 2012 without producing a new constitution.

## STATE RESTRUCTURING

Different terms have been used by scholars to describe the process of restructuring the state including 'state restructuring', 'state rebuilding', and 'state reconstruction'. Generally speaking, state restructuring refers to the reorganisation of the existing state structure of any given country to achieve certain objectives. The purpose of state restructuring is multi-faceted. In most instances, restructuring is pursued to create a more logical organisation in which the state can perform its mandate and fulfil its responsibilities more efficiently and effectively (Young, nd). It can also be pursued to reconfigure the relationship between the state, the society and its people or to reconcile the changing dynamics between them. State restructuring may also be a tool for democratising a country or making the state more inclusive. In some situations, it has been used to resolve internal conflict, ethnic or otherwise, including civil war or as part of a post-colonial independence process. State restructuring can also be an effective tool for curing the malaise of a 'weak state'<sup>1</sup> or a 'failed state'<sup>2</sup>. In some countries the restructuring of the state can be an endogenous process, the result of a general consensus between the internal stakeholders, in other countries external factors and actors, such as the international community, may play a greater role.

The demand to change an existing state structure and adopt a new one has led to civil war in some countries. Civil wars have also been ended by an agreement to restructure the state in a way that addresses the root causes of the conflict. In some countries, the process of state restructuring is embarked on to end an armed insurgency against the state and ensured that state power is shared among all. State restructuring may also be used to prevent secession and has been relatively successful in achieving this goal in some countries, but not in others.

The experiences of a number of countries that have been through the state restructuring process suggests that state restructuring is more likely to succeed in achieving its objectives when the local context is kept in view throughout the process. The experience and knowledge of other countries that have been through a similar process can be helpful in identifying and understanding the issues, but not in addressing them. On the contrary, borrowing solutions from other countries can be counterproductive. For successful state restructuring, the objectives should be realistic and clearly set out and there should be general consensus among all stakeholders on the core principles on which the state restructuring will be based. According to Richard Young, those undertaking state restructuring should identify the strategic aims or purposes of such restructuring; distinguish clearly the problems that the restructuring seeks to fix; consider all vital stakeholders to be affected by the restructuring; and encourage the participation of those directly affected, along with others, while restructuring the state (Young, n.d.).

## **FEDERALISM**

The modern concept of federalism was applied in forming the United States of America in the last part of the 18<sup>th</sup> Century with the promulgation of the United States Constitution without using the word ‘federal’ or ‘federalism’. Federalism received scholarly attention much later and the comparative study of federalism is relatively new. In a pioneering book on comparative federalism, the British scholar Kenneth Wheare presents the notion of federalism as very much based on United States Constitution and its conception of federalism. According to him, the United States Constitution establishes an association of states organised in a way that power is divided between a ‘general government’ that is in certain matters independent of the governments of the associated states and ‘state governments’ that are in certain matters independent of the general government (Wheare, 1980: 2). His definition puts the power sharing between the general government and state governments through a constitution at the core of federalism. Defining federalism as a combination of self-rule and shared rule, Daniel Elazar says that “in the broadest sense, the federal principle involves the linking of individuals, groups, and polities in a lasting, but limited, union in such a way as to provide for the energetic pursuit of common ends while maintaining the respective integrities of all parties” (Elazar, 1987: 5–6). This was elaborated on by Ronald Watts as a “combination of regional self-rule for some purposes and shared-rule for others within a single political system so that neither is subordinate to the other” (Watts, 2008: 1).

## **THE FEDERALISM DEBATE IN NEPAL: A BRIEF HISTORY**

Although the Interim Constitution 2007 guarantees federalism through its first amendment, as far back as the 1950s a regional party called the Tarai Congress demanded a Tarai Autonomous Region in a federal set up. However, federalism did not gain wide public support, even in the Tarai, and the idea faded from public consciousness soon after. Since the restoration of democracy in 1990, Nepal saw the rise of ethnicity as a socio-political identity among Nepal’s various groups and the demand for inclusive democracy, including federalism, by ethnic groups slowly gained ground. After the People’s Movement of 1990 (Jana Andolan I), out of 44 political parties registered with the Election Commission, 3 included federalism in their manifestos as their political agenda. The Nepal Rastriya Jana Party favoured federalism based on ethnicity, the Sadvanaban Party was for autonomy in the Tarai region, and Nepal Rastriya Jana Mukti Morcha favoured administrative federalism (Bhattachan, 2003). Although federalism was not specifically mentioned, some of the issues raised by the United People’s Front Nepal, the predecessor of the Communist Party Nepal (Maoist) (CPN [Maoist]), in its 40-point demand, which was submitted by Dr Baburam Bhattarai to the Sher Bahadur Deuba-led Government on 4 February 1996 just before declaring the

‘people’s war’, were related to identity, power sharing and decentralisation. This document also contained a demand for self-governance to regions with ethnic dominance (Demand 20), equality for all languages and dialects spoken in Nepal and the right to education in the mother tongue up to higher levels (Demand 22) (Sharma & Pokhrel, 2004: 139–42). One of the points also demanded regional autonomy for backward areas to end discrimination between the hills and the Tarai (Demand 25). Empowering and equipping local government was also mentioned (Demand 22).

Federalism became a subject of scholarly debate in conferences<sup>3</sup> and a few articles and books were also written on the subject (e.g., Baral, 2004; Tamang, 2005; Lawoti, 2005; & Mulyankan Monthly) before it formally received its place in the Interim Constitution. However, federalism was not a system that appealed to most major political forces and, until recently, was considered a radical and unchartered course (Sharma, 2006). When the then CPN (Maoist) entered into negotiations with the government for the second time in April 2003, it proposed that the essence of the new constitution should be to guarantee ethnic and regional autonomy for suppressed caste/ethnic groups, Madhesis and ignored regions, with the right to self-determination (Sharma & Pokhrel, 2004: 158). The Madhes uprising, which took place immediately after the Interim Constitution was promulgated in 2007, led to the first amendment in April 2007, which guaranteed a federal structure for Nepal. After this amendment, federalism has become the common agenda of almost all major political parties in Nepal and the only political party in the former Constituent Assembly that unequivocally opposed federalism was the Rastriya Jana Morcha led by Chitra Bahadur KC.

## **FEDERALISM IN PARTY MANIFESTOS – CONSTITUENT ASSEMBLY I**

Federalism was mentioned in various forms in almost all of the manifestos of political parties in the first Constituent Assembly elections. Some parties took the centralised and unitary structure as the root cause of the problems faced by Nepal and proposed federalism as the solution (CPN [Maoist], Nepal Communist Party [Marxist-Leninist], Madeshi Jana Adhikar Forum, and Tarai-Madesh Loktantrik Party). Others accepted federalism as the popular demand of time, including the Nepali Congress and Nepal Communist Party (Unified Marxist-Leninist), among others.

Describing the phrase ‘federal democratic republic’ as the essence of new constitution, the CPN (Maoist) professed that the main task in the formation of a new Nepal was to end the centralised unitary state structure and restructure it as a federal state. The CPN (Maoist) party was more explicit on federalism in its manifesto than other parties. The Nepali Congress and Nepal Communist Party (Unified Marxist-Leninist), the second- and third-largest parties in the first Constituent Assembly, also included federalism in their manifestos. The



manifestos of the Madeshi Jana Adhikar Forum and Tarai-Madesh Loktantrik Party, the fourth- and fifth-largest parties when the first Constituent Assembly was elected and the main proponents of federalism, largely focused on the Tarai/Madesh in their quest for federalism, rather than dealing with the issue from a national perspective. Even the smaller parties with only one or two representatives in the Constituent Assembly accepted federalism as their political agenda.

Although almost all of the parties in Constituent Assembly agreed that the federal structure was the right structure, they differed substantially on the criteria for federalising Nepal. Only one party in the first Constituent Assembly, Rastriya Jana Morcha, with four members, argued that federalism, a system that has been 'rejected worldwide', was not an appropriate system for a small and underdeveloped country like Nepal.

## **EMERGENCE OF STATE RESTRUCTURING AGENDA IN NEPAL**

Nepal is a unique case in terms of the way state restructuring was put forward as a political agenda. State restructuring was one of the major issues that brought together the different political forces with their fundamentally different political ideologies, but which were all fighting against the royal regime and the takeover by King Gyanendra on 1 February 2005. The seven major mainstream political parties (Nepali Congress, Communist Party of Nepal [Unified Marxist-Leninist], Nepali Congress [Democratic], Janamorcha Nepal, Nepal Majdur Kisan Party, Nepal Sadbhavana Party [Anandi Devi] and United Left Front, Nepal) were jointly engaged in a peaceful movement against the royal takeover with the objective to restore democracy. At the same time, the CPN (Maoist) party was engaged in an armed insurgency against the state with the objective to establish a communist regime and transform Nepal into a people's republic. Both of these political forces felt that they would be unable to defeat the royal regime without joining hands.

The first step towards them joining hands came with the Common Understanding and Commitment of the Seven Parties on Joint People's Movement signed on 8 May 2005. In this document, the seven political parties formed an alliance to prepare a congenial atmosphere for the CPN (Maoist) to enter a peaceful political process and to launch a united people's movement against the King. The seven parties agreed that there had been substantial progress on democratisation, rule of law and decentralisation, but that there were substantial gaps in terms of inclusive democracy and in bringing about social and economic transformation in a way that women, ethnic people, Dalits, Madhesis, people from backward regions, and the poor would feel the change. Acknowledging their past mistakes and assuring the people that these mistakes would not be repeated, the parties expressed their commitment to preserve the gains of the 1990 People's Movement and to bring democracy and development to greater heights. As one of the tools for realising these commitments, the parties agreed to restructure the state to

make it more participatory, representative and inclusive so that Nepal's social, cultural, geographical, ethnic and linguistic diversity would be properly reflected in the state (for the full text of the Common Understanding see Khanal 2008). This was the first political document in which all major mainstream political parties in Nepal agreed to 'state restructuring.'

The Common Understanding and Commitment led to the 12 Point Understanding between the Seven Party Alliance and the CPN (Maoist), which was signed in New Delhi on 22 November 2005. In this understanding, the Seven Party Alliance went one step forward from their demand for the restoration of democracy and the CPN (Maoist) took several steps back from their position to establish a people's republic and accepted the necessity of:

...implementing the concept of full democracy through a forward looking restructuring of the state to resolved the problems related to all sectors including class, caste, gender, religion, political, economic, social and cultural [...].

**(12 Point Understanding, 2005: Preamble)**

The 12 Point Understanding proved crucial in making the second people's movement (Jana Andolan II). Jana Andolan II, which was launched in April 2006, toppled the monarchy and led to restoration of the House of Representatives through a Royal Proclamation on 24 April 2006 (HMGN, 2006). The restored House of Representative made a historic proclamation on 18 May 2006 (by suspending, amending and adding substantial provisions to the 1990 Constitution) in which the House pledged to:

...fulfill the mandate given by the Nepalese people through the People's Movement to establish inclusive governance [...] and restructuring the state by framing a constitution through a Constituent Assembly pursuant to the roadmap of the Seven Political Parties and the 12 Point Understanding between them and the CPN (Maoist).

**(Government of Nepal, 2006)**

After the restoration of the House of Representative a Seven Party Alliance government was formed and the government and CPN (Maoist) signed an 8 Point Agreement on 16 June 2006, which prepared the way for the Comprehensive Peace Agreement and in which state restructuring was featured. On 8 November 2006, the leaders of the Seven Party Alliance and the CPN (Maoist) held a crucial meeting and made significant decisions on the key features of the Comprehensive Peace Agreement and the Interim Constitution 2007, one of which would be the structure of the state. Three decisions were made regarding the structure of the state: a) in order to end class, ethnic, linguistic, gender, cultural, religious and regional discrimination, the centralised and unitary structure of state shall be ended and the state shall be restructured as an inclusive, democratic and progressive

one; b) a high level commission shall be formed to offer recommendations on the restructuring the state; and c) a constituent assembly shall make the final decision regarding the restructuring the state (Section 10, Meeting of the Top Leaders of the Seven Political Parties and CPN [Maoist] on 8 November, 2006).

The Seven Party Alliance government and the CPN (Maoist) signed a Comprehensive Peace Agreement on 21 November 2006 to formally end the decade-long armed conflict in which they pledged the "...forward looking restructuring of the state to resolve existing problems based on class, caste, region and gender [in the country]" (Preamble, Comprehensive Peace Agreement. In this agreement, both parties agreed to:

...carry out an inclusive, democratic and progressive restructuring of the State by eliminating the current centralised and unitary form of the State in order to address problems related to women, Dalit, indigenous ethnic [adivasi janajati] people, Madhesi, oppressed, neglected and minority communities and backward regions by ending discrimination based on class, caste, language, gender, culture, religion and region.

**(Comprehensive Peace Agreement, 2006: Section 3.5)**

Again, in the Interim Constitution 2007, the political parties expressed their commitment to the progressive restructuring of the state to resolve the existing problems of the country relating to class, caste, region and gender (Preamble, Interim Constitution 2007) and eliminate the centralised and unitary form of the state and make it inclusive (Article 138, Interim Constitution 2007, before the first amendment). Other provisions related to state restructuring were similar to those decided by the top leaders of Seven Party Alliance and the CPN (Maoist) on 8 November 2006.

Looking back to 8 May 2005, when the Seven Party Alliance signed the 6 Point Common Understanding and Commitment on Joint People's Movement, they simply agreed to "...restructure the state in such a way to make it more participatory, representative and inclusive" to reflect "Nepal's social, cultural, geographical, ethnic and linguistic diversity" without giving details. The 12 Point Understanding went a little further by acknowledging the fact that the purpose of progressive state restructuring is not only to manage diversity, but also to implement the "concept of full democracy" and to resolve related problems for "all sectors including class, caste, gender, region, political, political, economic, social and cultural". The decisions made by the meeting of the top leaders of the seven parties and the CPN (Maoist) on 8 November 2006 went further and declared an intention to end the "centralised and unitary structure" of the state. The Comprehensive Peace Agreement acknowledged that the root cause of Nepal's problems was the centralised and unitary structure; this was again reiterated in the Interim Constitution 2007. However, what is interesting is that,

although these documents expressed the intention to end the centralised and unitary structure of the state, they did not mention federalism. However, there is no prize for guessing that federalism was at the back of their minds.

Why federalism was not spelt out in these documents is difficult to ascertain. However, it is clear that all political forces were reluctant to spell it out. Even though the demand for federalism originated in the Madhes, one of the main political force in the Madhes and a member of the Seven Party Alliance, the Nepal Sadbhavana Party (Anandi Devi), also did not insist on including the word 'federalism' in the Interim Constitution.

As soon as the Interim Constitution was promulgated, there were widespread protests against it in the Madhes as it did not mention federalism. The Madhesi Jana Adhikar Forum, led by Upendra Yadav, burnt a copy of the newly promulgated constitution and started the Madhes Movement, which engulfed the region for three weeks, This protest forced the major political parties to amend the Interim Constitution within three months of its promulgation by enlarging the "progressive restructuring of the state" to "progressive restructuring the state including federal system" (Article 138, as amended). Furthermore, the Fifth Amendment to the Interim Constitution on 12 July 2008 was crucial in terms of state restructuring which added the following provision:

Accepting the aspirations for the autonomous regions of Madhesi people, indigenous ethnic groups and the people of backward regions, Nepal shall be a federal democratic republic. The provinces shall be autonomous with full rights. The Constituent Assembly shall determine the number, boundaries, names and structures of the autonomous provinces and the distribution of powers and resources, while maintaining the sovereignty, unity and integrity of Nepal.

#### **Interim Constitution, 2007**

Nepal is quite unique in that all major political parties agreed, with relative ease, to abandon the age-old centralised and unitary structure in such a short period (from May 2005 to July 2008), moving from a vague commitment to explicitly agreeing to "restructuring the state progressively including a federal system with autonomous regions". However, unfortunately, since then, there is a general understanding in Nepali discourse that state restructuring is federalism and federalism is state restructuring, and nothing more.

## **OBJECTIVES OF STATE RESTRUCTURING**

### **Ending the centralised and unitary structure**

State restructuring and federalism are not synonymous. State restructuring is a broad concept that cuts across every dimension of a state, whereas federalism

is more about reorganising some dimensions of the state. It can be said that federalism is all about state restructuring, but state restructuring is not only federalism.

In the Nepali context, looking at the provisions related to state restructuring in the numerous political and constitutional documents, it becomes clear that state restructuring is much broader than federalism. The Interim Constitution has a separate part on the Structure of State and Local Governance (Part 17, Interim Constitution 2007), which includes federalism. One of the 14 committees of the first Constituent Assembly was the Committee for Restructuring of the State and Distribution of State Powers. One of the key provisions of the Interim Constitution refers to the progressive restructuring of the state, which includes federal system (Article 138, [1]).

Almost all political and constitutional documents that touch upon state restructuring have one thing in common: they agree that the state should be progressively restructured by abandoning the centralised and unitary state structure to bring an end to discrimination based on class, caste, language, gender, culture, religion and region by eliminating the centralised and unitary state (Article 138, Interim Constitution, 2007) and to address problems related to women, Dalits, adibasi-janajatis, Madhesis, oppressed and minority communities, and other disadvantaged groups (Article 33[d], Interim Constitution 2007).

As discussed earlier, ending the unitary structure of the state implies a federal structure. However, it should be remembered that adopting a federal structure does not automatically guarantee the end of the centralised nature of the structure. Centralisation and decentralisation do not have much to do with the system being either unitary or federal. A federal system can have a centralised character and a unitary system can have a decentralised character. There are several federal systems in the world that are far more centralised than many of the unitary systems. So the need in Nepal is not only to end the unitary, but also the centralised character of the state, which cannot be achieved merely by establishing a federal system.

### **Ending discrimination**

Another major objective of state restructuring is to end discrimination based on class, caste, language, gender, religion and region. These bases for discrimination underlie both the unitary structure of the state as well as its centralised character. One of the reasons that the unitary state had to be abandoned was because it was not able to effectively address identity-related issues (connected to caste/ethnic origin, language, culture and religion). However, while it is agreed that a federal structure is more able to address these issues, it does not address them completely. Federalism, if devised properly, can effectively address regional discrimination; however, other forms of discrimination, such as class and gender

discrimination, are not related to a federal system. To achieve these objectives holistically, state restructuring should cover all dimensions of the state and include political restructuring, fiscal restructuring, restructuring the distribution of benefits of natural resources and, last but not the least, social restructuring.

### **Political restructuring**

Political restructuring is about dividing the country into workable units, naming them and distributing political power among the several tiers of government. It also covers the restructuring of the electoral system, not only of shared institutions such as the houses of the federal parliament, the head of the government and the state, but also the legislature and the executive of the other tiers of government.

Restructuring the electoral system is important to ensure the identity, representation and access of different groups. In a country as diverse as Nepal, a simple mixed electoral system (first past the post and proportional representation) is not sufficient. The electoral system has to be restructured more innovatively and imaginatively in such a way that all social groups' identity, representation and access to the state structure is guaranteed.

### **Fiscal restructuring**

Fiscal restructuring is about the distribution of finances among the different tiers of government. It basically includes the distribution of taxing, spending and borrowing powers; this is called fiscal federalism and is the life blood of any federal system. Along with political power, the fiscal power of any federal system is what determines how centralised or decentralised the federal system is. The political restructuring of the state (formation and naming of constituent units) does not ensure the political autonomy of the constituent units in the absence of sufficient fiscal power. The viability of the federal system depends on the fiscal distribution between the centre and the other tiers of governments. Provinces must have the fiscal ability to discharge their constitutional responsibilities and maintain autonomy.

One of the major aims of state restructuring is to address the disparities created by caste/ethnic, class and regional discrimination. However, disparities created by caste/ethnic discrimination cannot be eliminated merely by acknowledging the identity of different caste/ethnic groups and making it the sole basis of federalisation. Identity may empower the communities and give them political autonomy, but without resources and financial capability, identity does not eliminate disparities. Hence, fiscal restructuring is vital in making a federal system successful.

Nepal's main resources are natural resources. Some of these resources, such as forests, natural herbs, rivers and fertile land, are easily exploitable, whereas

minerals are more difficult to exploit. Nepal's natural resources are unequally distributed throughout the country, with some regions being richer than others in natural resources. People's lives and livelihoods have a direct relationship with the natural resources that are closed to them. The state's policy and role are very important to amplify the benefits people can obtain from natural resources. The state must ensure that the people who live close to natural resource receive maximum benefit from them, while at the same time preserving and protecting these resources. The state also has to make sure that the benefits of these resources are distributed to those who are far from such resources. One of the weaknesses of Nepal's centralised and unitary system is the inability to do so. Hence, maximising the benefits of natural resources and distributing them equitably throughout the country is one of the major objectives of state restructuring in Nepal.

### **Social restructuring**

Social restructuring is the most important aspect of state restructuring. The state restructuring process is only complete when every dimension of the state restructure reflects the society in all its diversity. Only when the diversity of the country is properly reflected in the state structure and people are able to live with equality and dignity can it be said that the dividends of state restructuring have reached their primary beneficiaries. One of the major weaknesses of the centralised and unitary structure is its exclusionary character. In Nepal's centralised state, the state structure was monopolised by elites from only a few groups. Accordingly, one of the major components of state restructuring is social inclusion. Social inclusion can bring the benefits of state restructuring deep down to the grassroots level (Article 138 [1], Interim Constitution 2007).

### **Creation of a democratic federal system**

Finally, achieving full democracy is the end goal of state restructuring. Article 138 (1) of the Interim Constitution 2007 maintains that the progressive restructuring of the state includes the creation of a 'democratic federal system'. This means that no fundamental norms of democracy should be compromised while restructuring the state.

## **GAPS IN NEPALI DISCOURSE ON STATE RESTRUCTURING**

This section examines the weaknesses, gaps and contradictions in the discourse on federalism since 2007.

### **Restructuring is not equal to federalism**

When Nepal's major political forces agreed to restructure the state they set ambitious objectives without realising the complexities involved. At the time of the 12 Point Understanding, Comprehensive Peace Agreement and the Interim Constitution 2007, the political leaders were not clear on how they would restructure the state. There was never any inter party or intra party discussions on this issue. Only after the Madhes movement in early 2007 was it clear that the state structure would be a federal one.

Since then, there has been a lack of objective and informed academic debate on all dimensions of the issue. The debate on state restructuring was initiated mainly among academics and only later picked up by the political parties. Since federalism received the constitutional guarantee in the first amendment, the debate on state restructuring in Nepal has been narrowed down to 'federalism', leaving aside other aspects of restructuring. There is a common belief that state restructuring is finished when the country is federalised.

### **Powers of federal units**

One of the objectives of federalism in Nepal is to eliminate disparities caused by class, caste, region and gender. However, while federalism can be a mechanism for eliminating some disparities caused by caste and region, it does not ensure inclusion or democracy. The limited debate on federalism has not covered these wider issues. In most countries that are transitioning from a unitary structure to a federal one, the crux of the debate is on what powers or competencies each level of government will have. However, this has not been the case in Nepal. The list of competencies was agreed with ease and the main contentious issue has been the name, number and boundaries of the provinces. Looking at the list of competencies, the result will be a federal system in which the centre is relatively powerful and the provinces weak. Surprisingly, the proponents of federalism seem to be unconcerned by this fact.

### **Federalism as an 'ism'**

Normally any word with 'ism' in the end denotes an ideology, doctrine or theory such as socialism, liberalism or nationalism; or a set of doctrine, belief or myth such as Hinduism, Buddhism or Judaism. One thing common about these concepts is: they may mean different things to different people. Another feature of such 'ism' is: they polarize people in one way or another and it is more so in the second type of 'ism.' Federalism is different than the great 'isms' of modern political theories such as socialism, liberalism, or nationalism in two important respects: first, unlike them which originated in Europe after the French Revolution, federalism was invented by the framers of the U.S. Constitution in



Philadelphia in 1787; and second, instead of becoming the province of political theorists, it was until recently left to be studied largely by those who examined the actual institutions of government.

'Federalism' in Nepal is largely understood or taken not as a system but an ideology or an 'ism' in a wrong way. Large parts of the debate on it have been focused on its normative aspect. In other words, federalism is debated in Nepal more as an 'ism' than a system. Professor Ronald Watts distinguishes 'federalism' from a 'federal political system'. He defines 'federalism' as a normative principle that refers to the advocacy of a multi-tiered government combining elements of shared rule and regional self-rule, compared to a 'federal political system', which he defines as a descriptive term applying to a particular form of political organisation (Watts, 2008, p 8). There are scholars who argue that the term 'federalism' does not qualify to be an 'ism' and see it more as a system: a system that addresses some issues more effectively than a unitary system. However, in Nepal, federalism is still debated as an 'ism' rather than a system.

There are self-proclaimed 'federalists' and 'anti federalists'. Federalism is taken as a faith or doctrine, similar to 'Hinduism' or 'communism', and there is a sharp division between those who subscribe to this doctrine and those who do not. The debate on federalism is still largely focused on whether or not Nepal should go for federalism or not. In any public discourse on any aspect of federalism or the federal system, the debate ultimately and automatically turns into this very question. Very little objective and meaningful discussion has taken place on the federal political system yet. For some people being a 'federalist' means being progressive and modern and they see federalism as the solution to all of the country's problems. For others being 'anti-federalist' is being 'nationalist' and they see federalism as an agenda driven by the foreign interests.

### **Beyond identity: Seeing the bigger picture of federalism**

Some 'federalists' believe that federalism based on identity alone is the solution; some go even further and claim that, if not based on single identity, federalism is meaningless and unacceptable. These people believe that the root cause of all ills in Nepal is the domination of a particular caste group (e.g., the Brahmin/Chhetris) over others throughout history and the only way to break this hegemony is federalism based on a single identity. However, this is only partially true. It is more accurate to say that the state structure was monopolised by the elites who mainly belonged to these communities. The common men from these communities were also equally victimised of the centralised unitary state structure as the people from the other communities. The proponents of federalism based on a single identity are not seeing the bigger picture of federalism beyond the boundaries of their own constituencies and think that there is nothing positive to take from the previous system. On the other hand there are some 'anti federalists'

who do not want to see the inadequacies of the old centralised unitary structure in managing Nepal's diversity (which is a significant strength of the country, but has been made a weakness) and believe that some modest changes to the 1990 Constitution would suffice to move ahead.

### **Unrealistic aspirations and fears**

Federalism has sparked contradictory aspirations and fears in Nepal: Some believe that it will be a panacea for all of Nepal's ills; others fear that it will open a 'Pandora's Box' with more and more groups demanding autonomy which may even lead to secession. Both of these outcomes are unlikely. However, rather than managing these aspirations and fears, the leaders of the political parties and certain caste/ethnic groups, and even academics, have fuelled them to serve their own interests.

### **Lack of common notion of federalism**

In the course of the federalism debate, the opponents of federalism seem to have been mostly consistent in their arguments. However, the same consistency is lacking among proponents of federalism. The opponents of federalism, across the spectrum, share a common notion of nation building – one that was propounded long ago and had been supported by the state right from the beginning of Nepal's unification. In contrast, the proponents of federalism have not yet developed any common idea of federalism, apart strongly opposing the state structure. Those advocating for federalism should develop a common, realistic notion of nation building among themselves to have a chance at making federalism a reality.

### **Lack of debate on capability of provinces**

The debate on a federal system has also been limited only to its political dimension. The debate on the the federal system, both inside the Constituent Assembly (mainly in the Committee for Restructuring the State and Distribution of State Powers and the Constitutional Committee and its subcommittees) and outside, was overwhelmed by issues related to the name, number and boundaries of the provinces. Ultimately, after four years of work, the Constituent Assembly was dissolved in May 2012 without producing a new constitution, because the political parties could not agree on these issues. The parties and their leaders were obsessed with this issue because they were interested in breaking down one centre and making multiple centres with shared political power. If political power sharing becomes the core interest of the stakeholders while restructuring, it is a problem as their intention to share political power usually does not extend much beyond the political elites. However, state restructuring goes far beyond

power sharing. It cuts across of almost all dimensions of the state and, if carefully devised and effectively implemented, it can extend right down to the grassroots and transform the lives of the common people.

To take the dividends of state restructuring down to the grassroots level, the capability of provinces becomes a crucial factor. The capability of a province is mostly about resources. It covers the availability of natural resources in the provinces and the capacity of provinces to generate and spend revenue (fiscal federalism). There has not been much debate either on fiscal federalism or the capability of provinces to discharge their constitutional responsibilities and bring the dividends of state restructuring to the grassroots. Although, the State Restructuring Committee had set identity and viability as the bases of federalisation, while in devising federalism the majority favoured a 14-province model and capability was, to larger extent, ignored. The list of competencies proposed by the State Restructuring Committee was approved with minimal discussion and, based on this list, the proposed federal system would be a centralised one. However, this fact does not seem to bother the proponents of federalism.

### **Shared rule dimension**

As discussed earlier, federalism is a combination of shared rule and regional self-rule. However, the discourse in Nepal has been more focused on self-rule and the shared rule dimension has been completely ignored. Shared rule is as important in a federal system as regional self-rule. With the focus of discussion on the number, name and boundaries of the provinces, the proponents of federalism seem to be interested only in their own constituencies. Neglecting the importance of shared rule goes against the very core of federalism.

Some other demands of the proponents of federalism also go against the core principles of federalism. For example, a substantial part of the Madhesi political force is in favour of a single Madhes province. If the major objective of abandoning the unitary structure and adopting a federal one is to manage diversity and if the provinces are the main tools for exercising self-rule, a single Madhes province goes against this as the Madhes is diverse in terms of language and culture. The Madhesi parties show little interest in the federal structure as a whole, focusing only on their region in the federal structure.

### **Constitution is the beginning of the federalisation process**

The Nepali discourse on federalism is obsessed with the structural aspects of federalism, i.e., with promulgating a federal constitution. However, a new constitution is not the end, but merely the beginning, of the federalisation process. Putting everything in the constitution without giving serious consideration to its

implementation creates problem. Experiences in other federal countries suggest that the federalisation process is more important than the federal structure in achieving the objectives of federalism. A constitution may have heavy structures related to federalism, but if the process is not smooth, then the objectives cannot be achieved. On the contrary, the constitution may not have heavy structures related to federalism, but the process may lead federalism to another level. The process is more important than the structure because the process is driven by the country's political, social, cultural and economic forces. According to William Livingston, the essential nature of federalism is to be sought, not in the shadings of legal and constitutional terminology, but in the forces – economic, social, political, cultural – that have made the outward forms of federalism necessary (Livingston, 1956). In this respect, federalism is the dependent variable, so to speak, its creation usually necessitated by the underlying nature of the society and its continuation dependent on the ability of the country's diverse forces to agree on the value of maintaining the federal mode of governance (Kincaid, 2011).

An important factor that determines the federalisation process is not the constitutional arrangements, but the willingness of the political actors to move the process forward. Daniel Elazar states that the elements of the federal process include a sense of partnership among the parties to the federal compact manifested through negotiated cooperation on issues and programmes and based on a commitment to open bargaining between all parties in such a way as to strive for consensus or, failing that, an accommodation that protects the fundamental integrity of all partners (Elazar, 1987: 67). Michael Burgess calls it the 'federal spirit', which suggests the existence of a particular mind-set, a political predisposition to negotiate and bargain among equals, suggesting above all a willingness to compromise over fundamental questions concerning the process of state formation or reformation (Burgess, 2013: 3).

## **SOME REASONS FOR THE FAILURE TO RESTRUCTURE THE STATE**

### **Failure to set the principles for restructuring in advance**

It would also have been easier to resolve the issues involved in state restructuring and federalism if the major political forces had agreed on the principles for state restructuring before they started the constitution-making process – as South Africa did. More than half of the 34 Constitutional Principles adopted by South Africa prior to drafting the constitution were related to state restructuring (Constitution of the Republic of South Africa, Schedule 4).

### **Reluctance to take expert support**

Federalism is a relative new area for Nepali politicians, as well as for others. As a result, there is not sufficient local knowledge and expertise on the topic and

Nepali politicians have been reluctant to avail themselves of whatever expertise is available outside the political arena. There is suspicion of international experts among the dominant political leaders. Writing a federal constitution through an elected Constituent Assembly is an extremely complex process. It needs not only a deep knowledge of the issues, but also the skills to reconcile groups with opposing claims to come to a negotiated agreement. Nepali politicians lacked such knowledge and skills and their reluctance to take expert support was in part responsible for the collapse of the constitution-making process.

### **Last minute involvement of top leaders on issues**

Although the Constituent Assembly through the Committee for Restructuring the State and Distribution of State Powers started work as soon as the constitution-making process started, the senior leaders of the major political parties did not engage in discussions on issues related to federalism until the end of the tenure of the Constituent Assembly. The Constituent Assembly committees were not led by any senior leaders from the major political parties and most of the members were mid-level leaders who lacked influence in their respective parties. Only after the High Level State Restructuring Commission submitted its report to the government almost at the end of the fourth year of the Constituent Assembly's term did the top political leaders started engaging on these issues. However, by then the issues were too big and the time too short and they could not come to agreement before the term of the Constituent Assembly expired.

## **CONCLUSION AND WAY FORWARD**

A federal constitution for Nepal does not have any alternatives. It was accepted politically and constitutionally, albeit reluctantly, by the major political forces as a tool for correcting the ills of old centralised unitary system. Although it would have been better if there was wider discussion before the decision was made to accept federalism, that phase is now over. The issues involved in state restructuring and federalism would also have been easier to resolve if the major political forces had agreed on the principles for state restructuring before they started the constitution-making process. However, the political parties still have an opportunity to set these principles before they set to proceed the task of restructuring Nepal into a federal structure

Abandoning an established state structure and adopting a new one is a complex task and comes with serious risks. The need to achieve important objectives, sometime even ones that are opposed to each other, makes it even more complex. The geopolitical situation of the country adds to the complexity, taking it to a new level. However, these risks can be minimised if state restructuring is carefully

designed. Retreating from federalism at this late stage may cost the country more than adopting it – and the risks involved may be more serious. As addressing the issues related to the identity and prosperity of all people are the main objectives of state restructuring, identity and capability must both be considered as the main bases of federalisation. It is certain that a federal structure that does not touch upon the core issues related to identity will not be acceptable and one that does not deliver development will not work. Striking a balance between these two aims is a challenge, but is not impossible to achieve.

It should be acknowledged that in the past the state was discriminatory, which means that some groups did not receive a fair deal from the state. Those who have been monopolising power want to hold it and those who have not held it so far want to get it. However, the real solution is not to structure the state in such a way that those who were previously outside the power structure replace the entire group of people who have monopolised it so far. State restructuring should not intend to reward those communities that have been ignored and punish those that have benefited. Expanding the recognition, representation, access and opportunities of all in the state structure does not automatically mean limiting the rights of some. Promoting all communities, cultures and languages, without denouncing any is the right approach. The state should be designed in a way that benefits all.

The debate on federalism has not moved from the positioning phase to the negotiation phase. There has not been any systematic effort from either the opponents or proponents of federalism to ‘woo’ the other. Designing a federal structure and abandoning the unitary one is an effort to reconcile contradictions. Both the supporters of federalism and its opponents, if they play their roles genuinely, must be seen as playing an indispensable role in devising federalism. The concerns of those opposed to federalism can strengthen the ultimate form of federalism.

The best approach would be to make a minimal workable federal structure to begin with, set short and medium-term goals to be achieved in 5, 10 and 15-year phases, and then slowly accelerate the federalisation process towards achieving these goals. This might be considered a long time in the view of a person's lifetime, but in the life of a country 10–15 years is not very long. The dividends of state restructuring take time to be realised and state restructuring should be given sufficient time to deliver. The process should not be overburdened by unreasonable expectations. Equally important is investing in developing the ‘federal spirit’ through political party reform and debate among political leaders, members of civil society and the members of the bureaucracy, who are the important stakeholders in the federalisation process in Nepal. Had the parties taken this approach as soon as the constitution making process had started, federal Nepal would be a few years old today.

## REFERENCES

- Baral, B. (2004). *Yesto Hunuparcha Rajya ko Samrachna*. Kathmandu: Bijayapur Prakashan Samiti.
- Bhattachan, K. (2003). Expected model and process of inclusive democracy in Nepal. Paper presented at the international seminar on *The Agenda of Transformation: Inclusion in Nepali democracy*, organised by the Social Science Baha, 24–26 April 2003, Kathmandu, Nepal. Retrieved October 23, 2013, from [http://www.nepalresearch.de/publications/bhattachan\\_inclusive\\_democracy.pdf](http://www.nepalresearch.de/publications/bhattachan_inclusive_democracy.pdf).
- Burgess, M. (2013). *In search of the federal spirit: New theoretical and empirical perspectives*. Oxford: Oxford University Press.
- Chomsky, N. (2006). *Failed states: The abuse of power and the assault on Democracy*. New York: Henry Holt and Company: 38.
- Comprehensive Peace Agreement concluded between the Government of Nepal and the Communist Party of Nepal (Maoist) (November 21, 2006)*, [pdf]. Unofficial translation. Retrieved October 23, 2013, from [http://www.mofa.gov.np/uploads/files/document/Comprehensive\\_Peace\\_Agreement\\_concluded\\_between\\_the\\_Government\\_of\\_Nepal\\_and\\_Communist\\_Party\\_of\\_Nepal\\_\(Maoist\)\\_November\\_21\\_2006\\_23.doc](http://www.mofa.gov.np/uploads/files/document/Comprehensive_Peace_Agreement_concluded_between_the_Government_of_Nepal_and_Communist_Party_of_Nepal_(Maoist)_November_21_2006_23.doc).
- Constitution of the Republic of South Africa, 1996*. Republic of South Africa. Retrieved October 23, 2013, from <http://www.gov.za/documents/constitution/1996/a108-96.pdf>.
- Elazar, D.J. (1987). *Exploring federalism*. Tuscaloosa, AL: University of Alabama Press.
- Government of Nepal (2006) *May 18, 2006 Proclamation of the House of Representative of Nepal*, (Preamble) [pdf]. Unofficial translation by Aspect. Retrieved 23 October 2013, from [http://www.aspect.org.np/uploads/resdoc/document/4\)May\\_18,\\_2006\\_Proclamation\\_of\\_the\\_House\\_of\\_Representatives.pdf](http://www.aspect.org.np/uploads/resdoc/document/4)May_18,_2006_Proclamation_of_the_House_of_Representatives.pdf).
- Heir, A. & Robinson, N. (Eds.) (2007). *State- building theory and practice*. London: Routledge.
- His Majesty's Government of Nepal (HMGN). (2006). *Proclamation to the Nation from His Majesty King Gyanendra on 24 April 2006* [pdf]. Retrieved October 23, 2013, from [http://www.un.org.np/unmin-archive/downloads/keydocs/2006-04-24-Proclamation\\_of\\_HM\\_King.pdf](http://www.un.org.np/unmin-archive/downloads/keydocs/2006-04-24-Proclamation_of_HM_King.pdf).
- Khanal, K. (2008). *Sankramankalin Rajniti ra Sambidhansabha Chunaav*. Kathmandu: Friends for Peace: 105–110.
- Kincaid, J. (2011). 'Introduction: Federalism as mode of governance.' In Kincaid, J. (Ed.) *Federalism. Volume 1: Historical and theoretical foundations of federalism*. Los Angeles: Sage Publications: XXXII.
- Lawoti, M. (2003). Paper presented at the international seminar on *The Agenda of Transformation: Inclusion in Nepali democracy*, organised by the Social Science Baha, 24–26 April 2003, Kathmandu, Nepal. Retrieved October 23, 2013, from [http://www.himalassociation.org/baha/baha\\_conf\\_mahendralawoti.htm](http://www.himalassociation.org/baha/baha_conf_mahendralawoti.htm).
- Lawoti, M. (2005). *Towards a democratic Nepal: Inclusive political institutions for a multicultural society*. New Delhi: Sage Publications.
- Livingston, W. (1956). *Federalism and Constitutional Change*. Oxford: Clarendon Press.
- Prah, K.K. (2004). *African wars and ethnic conflicts: Rebuilding failed states*. Africa Regional Background Paper: Human Development Report 2004, UNDP. Retrieved October 23, 2013, from [http://hdr.undp.org/en/reports/global/hdr2004/papers/HDR2004\\_Kwesi\\_Kwaa\\_Prah.pdf](http://hdr.undp.org/en/reports/global/hdr2004/papers/HDR2004_Kwesi_Kwaa_Prah.pdf).
- Sharma, S. & Pokhrel, S. (2004). *Shanti Warta, Bigat ka Anuwab ra Vawishya ka Chunautiharu*. Kathmandu: National Peace Campaign.
- Sharma, J. (2006). *Nepal, struggle for existence*. Kathmandu: Communications Inc.
- Tamang, S. (Ed.) (2005). *Nepalko Sandarbhamo Rajyako Punarsamrachana*. Kathmandu: Samana Prakashan.
- 12 Point Understanding reached between the Seven Party Alliance and Communist Party of Nepal (Maoist)*. ( 22 November 2005). Retrieved October 23, 2013 from <http://un.org.np/unmin-archive/downloads/keydocs/12-point-understanding-22-Nov-2005.pdf>.

Watts, R.L. (2008). *Comparing federal systems*. Montréal: Published for the School of Policy Studies Queen's University by McGill-Queen's University Press.

Wheare, K.C. (1980). *Federal government*. Westport, Conn: Greenwood Press.

Young, R (n.d.) *A brief guide: Twelve considerations important to state restructuring* [pdf]. Retrieved October 23, 2013, from [http://www.ipspr.sc.edu/publication/FINAL A Brief Guide - Twelve Considerations.pdf](http://www.ipspr.sc.edu/publication/FINAL_A_Brief_Guide_-_Twelve_Considerations.pdf).



## CHAPTER 2

# NEPAL'S TRANSITION AND THE WEAK AND LIMITING PUBLIC DEBATES ON RIGHTS

- SEIRA TAMANG



## **INTRODUCTION**

Nepal is undergoing a prolonged and difficult transition after ten years of conflict and a people's movement that restored democracy in 2006. While Nepal's nationally-owned and led peace process has been much heralded, this has been, and continues to be, a period of poor governance, weak rule of law and a struggling economy. Major political parties have focused on securing charge of the government and not the completion of the peace process – including the writing of a new constitution via the constituent assembly (CA). Citizens, however, have sought to secure their rights in a new social contract.

Central to the debates on rights during the post 2006 transitional period has been the idea of federalism. It is clear that the defining issue in national politics for the coming period will be the implementation of federalism, the nature of which is politically contested and led to the dissolution of the CA in 2012 without producing a constitution. It is in this context that this paper argues that the debates on federalism is illustrative of the overall weak and limited nature of the discourse on rights in Nepal. There has been a failure to clarify key points of discussion, and a lack of detailed engagement with different arguments. This paper highlights the weaknesses of various interventions, inattention to detail by central actors and an overall context of a narrowed and disjunctured view of rights that have prevented a larger understanding of rights which impacts all citizens.

## **BACKGROUND**

Federalism in Nepal has been a central focus for Nepal since 2006. Academic, development and policy literature point to the manner in which federalism in Nepal is not simply about the decentralization of power (International Crisis Group, 2011). Given the Nepali state has historically been an exclusionary state run by high caste, Hindu, hill men, federalism has become seen as an instrument to end exclusion of all kinds and obtain equal rights as citizens. For the historically marginalised, federalism is seen as the answer to overcoming oppression by the ruling communities and meeting their political aspirations (Lawoti, 2005). Ethnic federalism (or single identity federalism)- in the dominant terminology – has been contentious but of great appeal especially given the

lack of success of prior decentralisation efforts. Indeed, in the current political climate, calls for decentralization as a means to empower the local is seen by many Janajatis (indigenous nationalities) and Madhesis (people from the plains area bordering India) as a means to thwart the agenda of federalism. A history of failed decentralization – by design and intent by elites in power as opposed to “stalled devolution” explanations found elsewhere – is a central reference point for these excluded groups.

It is important to note that while the Comprehensive Peace Agreement does not use the word “federalism”, the spirit of Article 3.5 is such that that the “inclusive democratic and progressive restructuring of the state” is not just about improving service delivery but is also envisioned as an instrument to end exclusion of all kinds. Article 3.5 commits the Government of Nepal to:

carry out an inclusive democratic and progressive restructuring of the state by eliminating the current centralised unitary form of the State in order to address problems related to women, Dalit, indigenous ethnic people, Madhesi, oppressed, neglected and minority communities and backward regions by ending discrimination on class, caste, language, gender, culture, religion and region.

Although weakly conceptualised, it is this federal vision that is integrally linked to a larger notion of a new political agreement and the structuring of rights for citizens. However, it was not until January 2007 that the then Prime Minister G.P. Koirala committed to making federalism a part of the new constitution in order to halt the Madhesi uprising. The CA declared Nepal to be a federal republic on 28 May 2008 at the first session of the CA.

Since then in terms of background, it is important to note that the rise of identity politics, especially following the Madhes Movement of 2007, has led to formerly fluid identities taking rigid forms. This has been a period of increasing political, ethnic and regional polarization. This is reflected in The Citizen Survey 2013 jointly undertaken by the State of Democracy in South Asia Nepal Chapter (SDSA/N) and the International Institute for Democracy and Electoral Assistance (IDEA) completed in June 2013 (IDEA, 2013). Compared to the last two surveys conducted by the same organizations in 2004 and 2007, this survey shows a substantial decrease in the proportion of respondents preferring a mixed identity (as opposed to choosing either national identity or regional or ethnic identity as their preferred identity). This shrinking of the “middle ground” indicates a potentially dangerous polarization in society. In this context it is unsurprising that public debates on federalism have been emotionally charged.

## **STATE INITIATIVES**

The CA was to provide the political fora from which to resolve these and other important political debates. The draft report produced by the Committee on Restructuring of the State and Distribution of Power proposed a three-tiered system of federal, province and local levels, with special structures. Overall 14 provinces, along with capitals, were proposed.<sup>1</sup> While the committee claimed that the divisions occurred according to identity and capacity, the draft report was criticised for the fact that the proposed provinces were based on ethnic as opposed to economic bases. The draft completed in January 2010 reflected, and perpetuated, the weak level of public debate on federalism.

Part of this stemmed from the fact that contrary to early proposals, experts were only invited on an ad hoc basis. No separate committee of constitutional experts was formed to assist in the writing of the constitution (Adhikari, 2012). As constitutional expert Purna Man Shakya has pointed out, this left CA members and secretariat staff without access inside the CA to constitutional advice or independent mediators available for negotiation in party differences over technical issues (Shakya, n.d.).

With issues on the restructuring of the state left unresolved, the State Restructuring Commission promised in the CPA was formed in November 2011. However, the Commission was also unable to bring clarity to the federal debates. Reflecting the heavily politicised climate of the country, two reports were actually submitted in 2012 by the commission. The majority supported plan divided the country into 11 provinces along ethnic lines while the other divided the country largely on north/south lines with two southern provinces for the Tarai and the rest based on economic considerations. That the draft produced by the CA has formed the base of demands from janajati communities was made clear in the protests of the Commission's majority report for not making provisions for "Sherpa" and "Jadan" as in the CA document (Sharma, Bhadra & Kharel, 2012). Important to note was that actual commitment to eliciting real input to the debates via the State Restructuring Commission was questioned from the start by the appointment to the Commission of historian Ramesh Dhungel, well-known for his anti-federalism stance.

## **NON-STATE INTERVENTIONS**

External to the CA and the State Restructuring Commission, there were various fora available to CA members for debate and information foremost being the contribution made by the Center for Constitutional Development (CCD), an initiative by the UN Development Programme's (UNDP) Support to Participatory Constitution Building in Nepal (SPCBN) project. CCD was a resource centre established to support Nepal's constitution making process by providing

training opportunities, expert advice, information, and dialogue space, as well as promoting public awareness. It provided, among other things, workshops on thematic issues associated with constitution building to CA members, civil society, and other relevant stakeholders. Interventions such as joint workshops and seminars with the Women's caucus and the janajati caucus were fruitful as were the opportunities to learn from international experts from an array of countries as well as national professionals.

However, interviews with CCD staff revealed that most of the CA members who attended the different programs were lower middle, and lower rung political party members. Those with the political stature to impact the contents of the constitution did not participate in any meaningful manner. Furthermore, as became obvious from the nature of the question and answer sessions, even with translation, the level of comprehension of the presentations was quite limited. Indeed after most presentations there were calls from attending CA members to the speaker for suggestions of what Nepal should do. The format presumed high levels of capacity from the audience – i.e. of analytically abstracting from comparative cases to Nepal's federal challenge - and a willingness to participate in an interactive critical debate. Varying backgrounds and education levels from an education system based on rote and not critical learning, obviously formed challenges to maximizing the potential of this fora.

Other international actors were also active in providing learning opportunities, both inside and outside the country. Also involved were non-governmental organizations (NGOs) who conducted programs for CA members, highlighting specific issues of interest. The actual results of these inputs are hard to gauge. However, the attendance at national programs and especially the frequent international trips by CA members and political leaders were criticised in the Nepali public sphere for taking time away from the writing of the constitution and the resolving of key contentious issues. CA members and CA secretariat officials interviewed in 2010 had stated that one of the factors contributing to the low attendance figures in the CA for the first two years (which was 63 percent and numbered 62 percent for the whole four year period) (Martin Chautari, 2013) – were programs organised by donors and NGOs (Martin Chautari, 2010). Importantly, analyses have shown that most of the top leaders were absent during the four year period of the Constituent Assembly, including during the initial two years of the mandate in which the various thematic committees wrote different components of the draft constitution (Martin Chautari, 2013).

In the larger public sphere, other dynamics were visible. The 1990 democratic freedoms enabled the rapid growth of NGOs in Nepal, and Nepal has strong associational groups. Initially focused on service delivery, NGOs – now predominantly identified and self-identifying as civil society organizations – have also turned to more political endeavours such as awareness-raising, public education and social mobilization. Criticisms of the elite, high-caste, male,

unaccountable Kathmandu-cantered nature of NGOs - a result of early and continuing donor funding to the English-speaking and readily accessible – started in the mid-1990s. More recently NGOs as civil society have become fragmented along identity lines and many mainstream NGOs are seen as elite, male, high-caste and pahadi (hill) organizations.

In this milieu, advocacy from NGOs run by excluded groups has also contributed to the dominance of “romanticised” notions of federalism and “ethnic provinces.” As one political analyst stated, “Now federalism has become the solution to everything (Personal communication 5 September, 2013).” It is clear that the assumption of especially Madhesi and janajati groups is that they will become empowered once federal provinces are established. The emphasis has been on the attaining of “political rights.” However, there appears to be a lack of detailed plans and strategies. There is concomitantly a reluctance to engage with substantive arguments such as fiscal viability and the need to ensure fundamental rights of all within the provinces regardless of ethnicity, caste, religion etc.

The lack of engagement by janjatis and Madhesis on the above issues has not been helpful in clarifying definitions of federalism or in dealing with the rising backlash against federalism and resistance to the end of a unitary state. The 2013 CA election results saw a reversal of fortune for the major parties (the Nepali Congress and the Nepal Communist Party of Nepal (Unified Marxist-Leninist) secured the most votes with the Unified Communist Party of Nepal (Maoist), the largest party in the first CA, coming in third and the Madhesi parties losing unexpected ground. Analyst Dipendra Jha has attributed these results as a failure to articulate goals, clarify stances and address fears (Jha, 2013). There is evident a rising backlash against federalism with opponents to federalism focusing on the possibility of the disintegration of the nation and the fear that “new minorities” within provinces will become second-class citizens.

Fears of the latter have importantly been voiced by Dalits as well as high-caste elites. Indeed Dalit concerns on federalism have been marginalised in these overall debates, and little attention has been paid to the different currents of thoughts within the Dalit movement. Dalit discourses on federalism range from anti-federalism stances (mostly from left perspectives); to supporting federalism with special rights for Dalits, and a support for federalism with some form of governance unit - with differing opinions on a separate province, a non-territorial structure or some governance unit at the sub-province/local level (SAMATA, 2069 B.S.).

The lack of engagement with these various concerns and debates is all the more puzzling given the relatively large presence of intellectuals in the janajati movement relative to Madhesis and certainly Dalits. It is however representative of the general lack of attention to the details of the structuring of rights. This is exemplified by the overall dearth of public debate and attention to various drafts generated by the CA.

## MISSING THE DETAILS

There was extensive media coverage of the drafts produced by the thematic committees of the CA as they were completed and made public. However, there has been a general inattention to detail by the excluded groups of the various drafts produced by the Constituent Assembly Thematic Committees beyond those that most obviously relate to issues of rights, inclusion and identity.

Thus apart from the draft produced by the Committee on Restructuring of the State and Distribution of Power mentioned above, the Committee on Protection of Rights of Minorities and Marginalised Communities received much scrutiny. Starting from the title of the Committee, debates cantered on definitions of minorities, marginalised, endangered, extremely marginalised, indigenous, “special rights,” or “special arrangements,” etc. The federation of janajati NGOs, the Nepal Federation of Indigenous Nationalities (NEFIN) had submitted a paper to the Committee which stated, among other things, that basic janajati issues were not included, such as right to self-determination, rights over land and natural resources, and that the definitions used were not acceptable – including the separating of adivasi and janajati, and the use of minority” and “marginalised (Martin Chautari, 2009).”<sup>14</sup>

However, in the restructuring of the relationship between members of the historically marginalised groups, the other drafts produced by the committees collectively pose challenges for important rights, inclusion and identity issues. To give a few examples, even if state restructuring occurred on the basis of ethnicity as demanded by majority ethnic/Madhesi groups, it is clear that federalism has been conceptualised as a form of decentralization. The local is a constitutionally stipulated unit of government, but appears in the draft as a subsidiary to the provinces. While the provinces have representation at the centre, exactly what powers the house in which these provinces are represented would have is unclear. This is important as the draft reveals that the centre would have a lot of power over the provinces. For example, the Provincial Chief (appointed and removed by the President at his/her pleasure) is to be the representative of the province at the central level, with power to approve bills passed by the provincial Legislature among other powers. While he/she is to function on the advice or consent of the provincial Council of Ministers which holds executive power, there is a clause inserted that states that “this shall not be required while exercising powers on the recommendation, in accordance to the constitution and the law.” Further, there has been no mention of how fiscal federalism – without which federalism cannot be a reality – will be implemented. This is especially significant given Nepal’s historical dependence on foreign aid and the fact that the CA drafts state the need for the central government’s approval before foreign aid can be given to the provinces. Without access to economic resources the provinces will remain dependent on the centre.



To recall, this is of central importance as the demand for federalism stems from the critique of the centralised state and the lack of meaningful devolution of power and authority to local bodies. The 1999 Local Self Government Act was seen as positive step forward but the dissolution of local bodies in 2002 has limited its impact. Central ministries continue to determine types and levels of public goods to citizens and monopolise the collection of national revenue and total public expenditure. The dominance of central bodies and their line agencies, as well as overall economic dependence on central transfers, has limited the effectiveness of decentralization as a whole and participatory governance at the local level. Despite this history and lived reality, the stress on political rights in the public domain has not been matched with attention to the larger structures that will frame rights in the CA drafts. This is made most evident in the discourse emanating from the draft on fundamental rights, and is part and parcel of how silos of “rights” have emerged in post-1990 Nepal.

## **SILOS OF RIGHTS**

The Committee on Fundamental Rights and Directive Principles was tasked with identifying fundamental rights, provisions for their enforcement and bases for sanctions against them; as well as citizenship rights; directive principles; and policies of the state and provisions regarding the special protection of the rights and interests of excluded groups and regions. The Committee's draft report listed 31 fundamental rights, compared to the 21 in the Interim Constitution, 2007. While there are some very progressive rights listed, some appeared to be difficult to implement, such as the right to free education, health and employment. This runs larger risks in the long term in terms of offering the government excuses for the non-implementation and enforcement of other basic fundamental rights. Issues of the measures provided for the enforcement of these rights, their definition and limitations have been raised from various sources, including the International Commission of Jurists (ICJ). These include aligning definitions with already existing international norms (including those concerning torture and preventive detention); revising the limitations put on fundamental rights and the weak enforcement of rights including access to adequate judicial remedies where fundamental rights are violated.

More specifically as an ICJ report notes (ICJ, 2010), the most fundamental rights of Nepalis have not been secured. For example, if the current provisions were constitutionally enshrined, Nepali citizens would have only partial or, in most cases, no right to the following: the unconditional right to life and the right against arbitrary deprivation of life; the right to 'security of the person' and the right against arbitrary detention; the right to be brought immediately before a judge upon arrest regardless of the reason for the arrest; the unrestricted right to

legal counsel; the right against enforced disappearance and the unrestricted right to have access to family members upon detention; the right against torture or other cruel or inhuman 'punishment;' the right against forced or coercive labour and the right to substantive - not merely 'formal' - equality.

It is notable that restrictions have been put on such fundamental rights as freedom of expression, assembly, and association with caveats that allow the government to decide via law what are vaguely defined notions of threats to "harmony," "the interest of the general public," "law and order" "public purpose" and other caveats. The ICJ report notes that international law applicable to Nepal requires that any such restrictions be precisely prescribed for reasons accepted under international law and strictly and demonstrably necessary in a democratic society. However, in the Committee's draft report, instead of recognizing human beings as agents equal in dignity, and human rights as those aspects of dignity that are inherent, power is given to the State to "gift" (and therefore also take away) these rights.

Given the recent history of disappearances, rape, extrajudicial killings and torture during the conflict and the Madhes movement, the absence of outcry over this particular draft report was particularly puzzling. Indeed, illegal arrest and torture continues to be widespread in the Madhes, yet attracts little political attention (THRDA, 2012). Janajati activists burnt the Committee's draft on the grounds that it didn't include their demands, but did not vocalise other complaints about the drafts contents.

However, it is clear that the problems with the Committee on Fundamental Rights' draft report needs to be approached from a broader human rights angle. Under that draft of the fundamental rights concept paper, janajati (or for that matter women/Dalit/Madhesi) activists asking for their rights can be arrested for disrupting "social harmony" (through the future "making of laws"), tortured (without any explicit constitutional or, at the moment, legislative protection), held under "preventive detention" for "threats" to "law and order" and denied access to legal counsel and review by the judiciary within 24 hours of their arrest, with accompanying restrictions on access to information by family members.

The manner in which each of the excluded groups have focused on narrow agendas and not other fundamental human rights issues that would have a major impact on them reflects larger tendencies in Nepal to regiment strictly differentiated realms of actions – "human rights," "women's rights," "janajati rights" and so on. This is part of a history, since 1990, of discrete spheres of work undertaken by NGOs in Nepal. Thus for example, Maina Sunwar's case of disappearance, rape and murder has been highlighted mainly by human rights activists and not by women or Dalit activists. Similarly, while the majority of suspected Maoist men killed by the state in the Doramba massacre of 2003 were Tamang, there has been a conspicuous silence from ethnic organizations. Only "human rights"

organizations, narrowly defined, have consistently been raising this issue.

Donor funding to NGOs has clearly played a part in the defining of mutually exclusive spheres. Funding to strictly political human rights organizations began in earnest during the armed conflict in Nepal. Attention to historical grievances of the socially excluded – as one of the key causes of the Maoist conflict – led to increased funding of organizations targeting socio-economic rights of marginalised peoples towards the end of the conflict and especially in the post-conflict period. Indeed, the Office for the High Commission for Human Rights (OHCHR) in Nepal began shifting from its initial emphasis on political rights to highlight socio-economic issues from 2008 onwards (OHCHR, 2008-2009). Thus the funding of women, Madhesi, Dalit and janajati “interests” and issues in the constitution-making process encouraged insular and narrow understandings of rights dis-embedded from other human rights. In turn, this division between the political and socio-economic rights in the Nepali public sphere has occluded analyses of the many structural factors that, for example, made Maina Sunwar, as a poor Dalit girl in rural Nepal, particularly vulnerable during the conflict. Overall, there has been a sharp divide between a concern with human rights in terms of political rights and human rights in terms of socio-economic rights.

## **CONCLUSION**

The debates on rights in the New Nepal during the transition period have centered on federalism and ethnic federalism in particular, at levels not conducive to provide a positive context for the decisions on federalism. These debates have taken place at the cost of a wider understanding of the human rights implicated by the debates as well as the marginalization of issues relating to women, caste, class and social justice.

The dominance of the binary logic implicit in the language of inclusion and exclusion in Nepal has added to a “winner takes all” competitive understanding of rights, inclusion and identity, again not contributing to a positive context for debates. Theorists have pointed out that the use of the concept of exclusion recognises that people are included or excluded in relation to some variable such that the question of inclusion is best conceptualised as a sort of sliding scale rather than as a binary function, such that inclusion and exclusion are the extreme poles of a continuum of relations of inclusion/exclusion (O’Reilly, 2005).

Debates so far in the public sphere since the second CA elections held in November 2013 have focused on the extent to which the second CA is bound to the decisions already passed by the first CA – as stipulated in an agreement signed in March 2013 by the major parties to facilitate the holding of the elections. At stake are the progressive gains made for social justice and the historically marginalised

spearheaded by the Maoist party. Beyond these concerns, it is unclear how much progress can be made in resolving rights especially as it relates to federalism. The actors are the same and the issues continue to be framed in the same language and overarching framework, with little attempt to pave common principles and values on which to base negotiations.

It is clear that without changes in the larger frameworks in which rights are being structured and attention to the terminology and details by which rights are being specified and concretised, the building of democratic multi-cultural citizenship in Nepal based on the understanding and the guaranteeing of human rights will be challenging.

## REFERENCES

- Adhikari, B. (2012). *The Status of Constitution Building in Nepal*. Kathmandu: Nepal Constitutional Foundation.
- IDEA & SDSAN/N (2013). The Citizen Survey 2013: Nepal in Transition. Nepal Democracy Survey: Round III. June. Retrieved September, 23, 2013 from [http://www.idea.int/asia\\_pacific/nepal/upload/Citizen-Survey-Report-2013.pdf](http://www.idea.int/asia_pacific/nepal/upload/Citizen-Survey-Report-2013.pdf).
- International Crisis Group (2011). Identity Politics and Federalism. Asia Report 199, 13 January. Retrieved September 23, 2013 from <http://www.crisisgroup.org/en/regions/asia/south-asia/nepal/199-nepal-identity-politics-and-federalism.aspx>.
- Martin Chautari (2009). Update on the Constituent Assembly. October, p.7. Retrieved September 24, 2013 from [http://himalaya.socanth.cam.ac.uk/collections/journals/mcpb/pdf/MC\\_PolicyBrief\\_02\\_ENG.pdf](http://himalaya.socanth.cam.ac.uk/collections/journals/mcpb/pdf/MC_PolicyBrief_02_ENG.pdf).
- Martin Chautari. (2010). Attendance and participation in the Constituent Assembly. September, p.11. Retrieved September 24, 2013 from [http://www.martinchautari.org.np/files/policypaper4\\_eng.pdf](http://www.martinchautari.org.np/files/policypaper4_eng.pdf).
- Martin Chautari. (2013). The debilitating dynamics of Nepal's Constituent Assembly (2008-2012). March, p.2. Retrieved September 23, 2013 from [http://martinchautari.org.np/files/BriefingPaper8\\_EngVer.pdf](http://martinchautari.org.np/files/BriefingPaper8_EngVer.pdf).
- Jha, D. (2013, December 11). Down but not out. *Kathmandu Post*, p. 6.
- Lawoti, M. (2005). *Towards a Democratic Nepal: Inclusive Political Institutions for a Multi-Cultural Society*. New Delhi: Sage Publications.
- O'Reilly, D. (2005). Social Inclusion: A philosophical anthropology. *Politics*, 25(2): 80-88. Retrieved September 23, 2013 from <http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9256.2005.00232.x/abstract>.
- Shakya, P.M. (n.d.). Challenges and Prospects of Federalism. Retrieved September 23, 2013 from <http://reliance.com.np/relian/wp-content/uploads/2013/07/Challenges-and-Prospects-of-Federalism-in-Nepal.pdf>.
- Sharma, B. & Kharel, P. (2012, February 1). State Restructuring: SRC fails to offer a way out. *Kathmandu Post*: 1.
- SAMATA. (2009 B.S.). Federalism and Dalit Governance: Dalit Friendly Federal System. SAMATA Policy paper-4.
- International Commission of Jurists (2010). Nepal's Fundamental Rights Committee's Draft Provisions Regarding Equality Rights and Economic, Social and Cultural Rights: An Assessment and Some Recommended Changes. April. Retrieved 12 November, 2013 from [http://www.icjcanada.org/en/documents/rpt\\_2010-04-09a.pdf](http://www.icjcanada.org/en/documents/rpt_2010-04-09a.pdf).
- Terai Human Rights Defenders Alliance (2012). The Trend of Illegal Arrest and Torture in Madhes. Monthly Human Rights Monitoring Report. July.

# CHAPTER 3

## BALANCING IDENTITY AND VIABILITY

RESTRUCTURING NEPAL  
INTO A VIABLE FEDERAL STATE

- KRISHNA HACHHETHU



'Identity with capability' is the High Level State Restructuring Commission's (HLSRC) response to a criticism that the Committee for State Restructuring and Distribution of State Power (CSRDSP) – a committee of the Constitution Assembly (CA) that was assigned to craft a federal Nepal – did not strike a proper balance between identity and capability while proposing 14 provinces<sup>1</sup> for a federal Nepal. All the 43 members of the CSRDSP unanimously decided to constitute federal units primarily on the basis of five elements of identity<sup>2</sup> while also taking into consideration of four factors of capability.<sup>3</sup> Contention on federal design, particularly on the name, number and delineation of provinces, is surfaced with a complain that capability factor was overlooked. Against this background, the HLSRC was formed with a limited mandate to review the CSRDSP's draft proposal, taking into account divergences of opinions expressed within and outside the CA but retaining both identity and capability as bases of constituting federal units. While reviewing on the proposed 14 provinces by applying 29 indicators of capability,<sup>4</sup> the HLSRC suggested removing 4 provinces, which are lowest in ranking (see Maps I and II in Appendix I: 358, 359), and reallocating this territory into other proposed neighbouring provinces. Hence, it recommended a federal Nepal constituted of 10 provinces.<sup>5</sup> But, Nepali society and politics has been further sharply divided between ones who want to keep identity as the core and others who argue to place capability as the topmost important factor for constituting federal units. Consequently, the failure of political parties to reconcile claims and counter-claims on the proposed federal design of Nepal eventually led to expire the CA in May 2012 without giving birth to a new constitution. So the agenda of restructuring the Nepali state in federal form remains incomplete owing to a conflict between two approaches: the identity approach and the development approach.

This paper is organised in three parts. The first part explains why identity receives prominence in constituting federal units. The second part focuses on arguments for the development approach to federalism and also deals with a question: to what extent the concerns shown by development approach can be adjusted in designing federal units? The third part examines the political complexity of balancing identity and development. Of course, some sort of balance between these two elements is imperative for translating the federal agenda into a constitutional reality. For blending identity and capability, the prevailing political context and equation may drive political parties in different directions than those

suggested by experts and activists representing either the identity approach or the development approach.

## IDENTITY APPROACH

In a multicultural country like Nepal, ethnicity has always been at the centre of the federalism debate historically<sup>6</sup> and remains central in contemporary discourse. In addition to those who champion a federal Nepal, federalism's opponents are also preoccupied with ethnicity issues. The argument put forth is that Nepal cannot afford federalism because it is home to more than one hundred caste/ethnic and linguistic groups. Following the declaration of Nepal as a federal country in January 2007, however, all debates for and against federalism have become redundant. But there is still contention on other aspects and details of federalism, particularly on the extent to which ethnicity is pertinent to design a federal Nepal. The CSRDSP clearly adopted identity as the primary factor for constituting federal units. This fact is well reflected not only in naming of provinces but also in the demarcation of provincial boundaries designed in such a way so that the targeted group in any one unit constitutes a majority or the largest group of the given provincial territory. The HLSRC – though it has been credited for entertaining the capability factor (on this ground it suggested to reduce the number of provinces) and also lessening ethnic contents of federal Nepal (by recommending to take out the provision of *agradhikar* [preferential rights] for the targeted group to the post of chief executive of the province for the first two tenures) – upheld the principles adopted by the CSRDSP so far giving greater weight to the identity factor in constituting federal units is concerned. Above all, when designing the territorial boundaries of proposed provinces, the HLSRC gave more emphasis to making the provinces demographically convenient to the targeted group (means drawing the boundary of province in a way that the targeted group constitutes as the largest population). There are many explanations for why both the CSRDSP and the HLSRC decided to give prominence to ethnic criteria when making proposals for the new federal Nepal.

For one, making identity the prime factor in determining federal units in Nepal is in conformity to international practices. Generally, ethnicity (based on language or tribe or culture or religion or region) was taken as the sole basis for constituting federal units in most multiethnic states, i.e. Switzerland (Mischler, 2006; Fleiner, 2006), Belgium (Poirier, 2006), Spain (Requeijo, 2006), India (Bhargava, 2006), Pakistan (Khan, 2001), Iraq (Kumar et al, 2010), Ethiopia (Fiseha, 2006; Galadima, 2010), Nigeria (Suberu, 2006), and others. The fact that sub-national units in federal India, Nepal's neighbor, were constituted primarily on the basis of linguistic identity is a major source of inspiration for those championing identity-based federalism in Nepal. Nepal, as a multiethnic, multilingual and multicultural country, is now in a process of following in the footsteps of many



multicultural federal countries of the world as per its restructuring project to move the country from a unitary/centralised to a federal government. Nepal is part of the global phenomenon of ethnic upheavals that accompany the third wave of democracy. Out of 110 major armed conflicts recorded in period between 1989-1999 (it was time of third wave of democracy), 103 took place within existing states, mostly focused around identity issues (Reilly, 2001:2) The intertwine of ethnicity and democracy in Nepal in the post 1990 period, has been noted by a scholar, “if the period 1960 to 1990 was one of nation-building, the 17 years since then has been a time of ethnicity-building” (Gellner, 2007: 1823). The rise of ethnicity in the country has had a tremendous influence in writings about federal Nepal by native scholars (Neupane, 2000; Bhattachan, 2003; Yadav, 2003; Baral, 2004; Gupta, 2005; Lawoti, 2005; Jha, 2006; Mabuhang, 2007; Khanal, 2007; Manandhar, et al, 2009; Hachhethu, 2010; Tamang, 2011; Shrestha, 2011).

Secondly, the idea of transforming Nepal into a federal state is a byproduct of janajati (ethnic groups) movement and Madhes (peoples of plains origin) upheavals. State and traditional political parties have been receptive, but were not the catalysts of societal pressure for restructuring the state in the form of an inclusive and federal democracy. Of the three broad ethnic groups of Nepal – Khas-Arya, janajati and Madhesi – the latter two groups are victims of the State designed and enforced traditional model of national integration, which has taken the form of assimilation into the fold of the Khas-Arya's culture. Nepal has long practiced a homogeneous and monolithic way of nation-building, providing protection to one language (Nepali), one caste group (hill Bahun-Chhetri), and one religion (Hindu) and ignoring the reality of the diversified and pluralistic character of Nepali society. In reacting to the old model of nation-building as “ethnicity destroying”, critics argued that such an “empire model” of national integration (Pfaff-Czarnecka, 1997: 421) led to the production of a State that “functioned as an ethnicity-based exploitative state” (Riaz & Basu, 2010: 80). This eventually led to an increase in economic disparity among different social groups. The hill high castes Brahmin-Chhetri have long been in a privileged position in Nepal. Other groups, i.e. janajati, Madhesi and Dalit, are generally marginalised. The legacy of history is well reflected in the unequal distribution of socioeconomic resources in the country and in the disproportionate representation of high caste groups within the political power structure of the country.

Nepali society is largely organised in stratified hierarchical order in which Brahmin and Chhetri place at the top, janajati in the middle and Dalit at the lowest position. The superior position of hill high castes correspondences to their better of position in human development index whereas the janajati and Madhesi (except Newar and plains high castes respectively) fall into the category of excluded and marginalised groups. Hill castes (Brahim/Chhetri) figure much lower on the poverty index (18%) than the national average of 31%, whereas for the percentage of other groups under the poverty line is much higher. The

dominant and marginalised paradigm between hill high castes and other social groups is also well reflected in the distribution of political power structure of the country. The hill high castes constitute only 30% of the total population of the country but their dominance in the state power is 66%. The scenario is just the opposite as far as other groups are concerned with the exception of Newar (among janajatis) and some high caste people from the Madhesis (Bahun, Bhumihar, Kayastha and Rajput). Due to this repressive history, janajatis and Madhesis have mobilised behind a federal agenda, aiming to reverse the past record of transforming diversity into inequality. These groups believe that their quest for transforming social identity into political power can best be served by identity-based federalism.

Third, placing identity at the centre of state-restructuring acknowledges that politics of identity means a transformation of social identity into political power. At one point in the aftermath of the April 2006 mass uprising known as the *Jana Andolan II*, the Nepal State (government and political parties in particular), with its new goal of achieving inclusive democracy, was receptive to pressure for recognizing ethnicity as a basis for political power. This is well reflected by several provisions of the Interim Constitution 2007, including: (a) declaration of Nepal as a secular state; (b) recognition of all languages existing in Nepal as national languages; (c) reservation of 45% in the civil service for underprivileged sections of society; (d) affirmative action for marginalised groups; (e) declaration of Nepal as a federal state; and (f) provision of proportional representation of social groups in proportion to size of their own population for the election of the CA. The purpose of transforming Nepal into a federal state is, as outlined in Article 138 of the Interim Constitution 2007, to end discrimination based on caste/ethnicity, language, culture, religion, region and others (gender and class). The very logic of making a federal Nepal is to achieve an inclusive polity which would, consequentially, signify an end of the hill high caste's domination and an opportunity for inclusion of those which have long been excluded (i.e. Janjati, Madhesi and Dalits) from the power structure of the country. To undo Nepal's unitary and centralised system of governance is tantamount to bringing a profound change in the existing power equation among Nepal's social groups. Identity-based federalism is potentially an effective means to promote inclusive democracy. It suggests to recognise ethnic identity while giving name of province and also in territorial demarcation of a province in a way that the targeted ethnic group (for instance Tamang in Tamshaling province) constitutes as the largest group of the province. Becoming a largest group has its own implication in formation of caste/ethnic based political power equation of a particular province.

The fourth explanation for why the CSRDSP and the HLSRC both gave priority to ethnic identity for state-restructuring, is the inclusive representative system adopted for the CA elections<sup>7</sup> that contributed to a power shift in regards to social makes up of political power structure. Unlike the hill high castes domination in the parliament in the 1990s, the janajati and Madhesi constituted 62% of

the 601 CA members and, furthermore, constituted 70% of the 43 members of CSRDSP. Since the caste/ethnic based political equation in the CA was in favor of the committed federalists, janajati and Madhesi, their influence in the CA had produced the clear preference of identity as the basis for constituting federal units. Furthermore, at the time when the CSRDSP was operating, the UML's official position was also in favor of identity-based federalism, which further imputed the Maoist and Madhes based parties' persuasion in making identity as the prime bases of constituting federal units. At the time the CSRDSP's work was in progress, the fame of ethnic federalism reached its peak. For ethnic activists, ethnic federalism has the potential to serve their interests and demands i.e. creation of provinces based on historical homelands of ethnic groups, ethnic autonomy along with cultural rights, the right to self-determination, priority rights on jal (water), jamin (land) and jungle (forest), and preferential rights in provincial political and administrative structure. Timing had its own influence in modifying the demand of ethnic federalism into identity based federalism. The later model is different from former one as it (identity based federalism) does not subscribe preferential political rights nor does it recommend priority right on natural resources to any particular ethnic group. The CSRDSP entertained some attributes of ethnic federalism, i.e. ethnic name of provinces, autonomous regions for smaller ethnic minorities, reinvention of cultural territory while delineating provinces' boundary and others. But unlike what traditional ethnic federalism prescribes, neither the CSRDSP nor the HLSRC recognised the ethnic groups as political or legal constituencies deserving to claim prime political rights (i.e. first rights in natural resources and preferential rights in provincial administrative). Provisions recommended, for example, recognizing Nepali (mother tongue of Khas-Arya) as one of the official languages and medium of education in all provinces, an electoral system that ensures proportional representation in provincial assemblies in proportion to size of population of caste/ethnic groups, and representation in the upper house of the national legislature on the basis of territory, as opposed to an ethnic basis, suggest non-ethnic characteristics in functional attributes of the proposed federal Nepal. As such, it seems that the federal designs, proposed by CSRDSP and HLSRC, are ethnic in appearance but non-ethnic in essence.

## **DEVELOPMENT APPROACH**

On the main question presented in this paper, regarding the criteria to be used while designing the new federal Nepal, the development approach certainly has its own merits but many who buy into this approach take it on face-value just to counter the idea of identity-based federalism. Critics disown the CSRDSP and HLSRC's proposed federal design on two major grounds. One, at a theoretical level, they equate ethnicity building with nation weakening. So, the prevalence of ethnic identity in constituting federal units is propagated as an evil design

that may eventually have a negative impact on social harmony and the territorial integrity of Nepal. These critics argue that it is inappropriate to talk about ethnic or identity-based federalism in Nepal on account of the demography of provinces proposed by the CSRDSP and the HLSRC. The target group of many provinces proposed in the hills (i.e. Limbu in Limbuwan, Rai in Kirat, Newar in Newa, Gurung in Tamuwan, Magar in Magarat) constitutes approximately one third of the total population of the respective provinces. Of course the native peoples have become minorities in their own historical land due to the impact of internal migration, but the idea of putting all other groups into one basket vis-à-vis the targeted group is not well taken by others than people belonging to hill castes. Unlike many Indian states formed on a linguistic basis, in which each target group comprises the majority group (for instance, Bengali speakers in West Bengal), most of the provinces proposed by the CSRDSP and the HLSRC are multicultural in caste/ethnic composition. On this grounds, critics challenge the idea of giving the provinces ethnic names, for example “Limbuwan” for the homeland of the Limbus, as these critics question the sense of ownership that will develop in the province for groups other than the targeted one; groups who, collectively, will in fact constitute a majority of the total population of the province. Critics therefore suggest that the provinces should be named on bases other than ethnic identity, i.e. administrative and regional identity with names derived from physical geography (i.e. mountain, hill and tarai), rivers (i.e. Mechi, Koshi, Karnali etc), religious places (i.e. Janakpur, Lumbini etc), or high mountains (Sagarmatha, Dhaulagiri, Machhapuchhe etc.) – which are familiar among the Nepali people across caste/ethnicity. There are, however, many other examples of federal States which have given their federal units ethnic names to heterogeneous province– for instance, four of nine provinces of Ethiopia and 14 out of 36 provinces of Nigeria are ethnically heterogeneous (Turton, 2006: 6-7) – to respect historical land of the native people.

The second challenge that development approach advocates pose to the CSRDSP and HLSRC's proposed federal design is the economic viability of provinces suggested. Lapse of economic contents in identity-based federalism is intrinsic. The CSRDSP took “capability” as one of the bases for constituting federal units only in rhetoric. The HLSRC, though it did consider the economic aspects of federalizing Nepal, upheld identity as the prime basis. In relation to the economic contents of federal Nepal, advocates of identity-based federalism have two extreme statements: 1) there should be prime rights to indigenous and local peoples on natural resources, i.e. jal (water), jamin (land) and jungle (forest); and 2) economic capability will be developed over time as per federal practices and does not have to be an in-built guarantee at the time of formation of provinces. Critics, therefore, argue that some provinces proposed by the CSRDSP and the HLSRC are not economically viable. Taking into account the asymmetric nature of the provinces proposed by the CSRDSP and the HLSRC, critics argue that there will be two categories of provinces: food surplus provinces (proposed for plains

area) and food deficit provinces (proposed in hills); as well as revenue surplus provinces (proposed for plains area and Newa) and revenue deficit provinces (others).

The development approach to federalizing Nepal is grounded in putting the capability factor at the centre when it comes to constituting federal units. Capability of provinces is associated with a preference for non-ethnic names of provinces; for a smaller number of provinces; and with the recommendation for north-south based territorial delineation of provinces. In essence, the development approach stands for an administrative or territorial federalism. In an administrative or a territorial federalism, provinces are crafted on the basis of physical geography and/or on the basis of existing administrative territorial division of the country. Administratively, Nepal is currently divided into 5 development regions, 14 zones and 75 districts. The territory of each of the 5 development regions and 14 zones, except Karnali, is constituted vertically by combining all three ecological areas (mountain, hill and tarai) of Nepal. Ecologist Bohara and geographer Sharma's proposal of a four tier federal Nepal and an economist Acharya's design of a three tier federal structure, with four provinces suggested by Bohara (2008), five provinces including one Rara territory recommended by Acharya (2007) and six provinces prescribed by Sharma (2009), all intend to retain the concept of five development regions but with small revisions. The logic of the development approach can be explained by the following accounts.

For one, unlike the identity approach which takes federalism as a means to manage ethnic diversity, the development approach considers the proposed provinces as political economy units to serve economic development. The concept of five development regions has been introduced since the early 1970s, aiming to create balanced development between the East and West and among the mountain, hill and tarai. The development approach inherits this centric planning concept for designing a federal Nepal. Secondly, the proponents of the development approach argue that the delineation of provincial territories that combine mountain, hill and tarai will strengthen the federal units. Mountain and hills are rich for natural resources including herbs, forest resources, and water resources; whereas the tarai is equipped with fertile agriculture land and the necessary infrastructure for industrial development. Putting together such a diverse economic belt into a single political structure imputes economic strength to the proposed political units. Furthermore, Sharma (2007) points out that interdependence between hill and tarai regions exists in three core areas: ecology (environmental degradation in the hill region has impacts on the tarai); demography (migration from hill to tarai); and, economy (trade balance is in favour of the tarai). A third explanation for the development approach sees federalism as a system that potentially produces more conflicts than resolutions to conflicts. Potential conflict among the provinces over the sharing of natural resources is highlighted (Bohara, 2008) and the argument is put forth that carving the provinces in a divided line between hill and tarai invites further inter-provincial conflicts over natural resources. So,

proponents of the development approach justify the logic behind north-south orientation of provinces by claiming that it will reduce potential conflicts among the provinces on the issue of natural resources. Finally, arguments in favor of the development approach claim that the smaller the number of provinces, the higher the possibility of making the federal units self-reliant. Three out of four provinces suggested by Bohara, and three out of five provinces designed by Acharya, and four out of six provinces prescribed by Sharma are units with food surplus (Sharma, 2009).

Critics of the development approach highlight its deficiencies in different aspects. One, the outcome of the four-decade long experiment of the north-south based development planning is just the opposite of its stated goal: balanced regional developments between east and west and among mountain, hills and tarai has not been realised. This structure has rather led to regional economic inequality and disparity. Caste/ethnic and area-based data of the Human Development Index, Gender Empowerment Index, Governance Index and Poverty Index (see Annex II) all show that urban dwellers, inhabitants of eastern, central and western regions and people belonging to hill high caste are in better of position. Among those who are in disadvantaged positions are rural dwellers, mountain and tarai people, inhabitants of mid and far west regions and people belonging to Janjati, Madhesi, Dalits and Muslim groups. So, a question arises here as to the validity of the justification provided for retaining north-south based territorial units in the form of provinces in federal Nepal.

Secondly, the development approach gives greater weight to the revenue factor for measuring viability of provinces to be formed for federal Nepal. As currently divided, out of the total national revenue, 85% is generated from 7 districts and the remaining 15% from 68 districts. Forty-five (60%) of Nepal's 75 districts are unable to finance their total expenditure. Such asymmetric picture of revenue collection and expenditure in the present administrative units is highlighted by those who see a bleak picture for a federalised Nepal. If the present state of revenue and expenditure is considered as a determining factor, neither of the proposed competing models – identity based or territorial based federalism – speaks to the future viability of federal Nepal. Even three of four provinces federal Nepal suggested by Bohara, four of five provinces designed by Acharya and four of six provinces prescribed by Sharma fall into the category of revenue deficit federal units (Sharma, 2009). To see the picture at a macro level from another perspective, districts belonging to eastern, central and western regions generate revenue to the scale that is sufficient to meet general expenditure of respective districts. By implication, provinces recommended in these three present development regions by the HLSRC, i.e. Limbuwan, Kirat, Tamshaling, Newa, Narayani, Tamuwan, eastern tarai or Madhes and greater parts of Magarat are capable to meet the cost of the general expenditure of their respective provinces. Of two provinces suggested in the preset set up of mid-west and far-west regions, West Tarai or Tharuwan belongs to the same category and only

one out of 10 provinces proposed by the HLSRC, that is Khas-Karnali, does not generate the revenue to the scale required to meet its general expenditure. So far as development expenditure is concerned; the country itself is dependent on foreign aid to cover two-thirds of its cost and so provinces could not be an exception. Expecting full-fledged economic viability and self-sustainability is not realistic at this time.

The development approach also undervalues a factor of ethnic identity despite the fact that ethnic mobilization is a catalyst for transforming Nepal from a unitary to a federal state. Ethnic “political space” is granted only in the third tier of the federal Nepal designed by Bohara, Acharya and Sharma. Bohara suggested a total of 12 ethnic enclaves in his proposed four-province federal Nepal; Sharma, in his recommendation of 6 provinces, proposed 19 districts, nine of which are ethnic clusters; and Acharya's five provinces federal design included 12 ethnic regions. Such ethnic spaces, created on the basis of traditional homeland and/or dense settlement of ethnic peoples, are envisaged as electoral constituencies for provincial assemblies (Bohara, 2008) as well as the national assembly (Acharya, 2007). Ethnic autonomy is narrowed down to a collective right on cultural affairs only. Bohara states, "Ethnic enclaves can enjoy some forms of carefully crafted socioeconomic and cultural autonomy (schooling, language rights and cultural practices) without jeopardizing the ethnic harmony and territorial integrity of the nation" (Bohara, 2008). Bias against ethnicity is so deep that Bohara and Sharma, despite their acknowledgment of the logic of forming a third tier in Nepal's federation to address ethnic groups' aspirations, did not think that these ethnic spaces deserve to get ethnic name.

## **BLENDING IDENTITY AND CAPABILITY**

The identity approach and the development approach are opposites in many respects. Theoretically speaking the identity approach recognises social identity as political power whereas the development approach denies it. Those who give value to ethnicity see federalism as a system appropriate for management of social diversity. Social inclusion, to end caste/ethnic based deprivation and discrimination, is—in this framing—the ultimate goal to be achieved from federalization. But the development approach gives emphasis to the prosperity of individual citizens, and sees federalization as a process to promote economic development. For the advocates of the identity approach, a meaningful nation-building project in a multicultural society is possible only with a strong ethnicity component but the development approach takes ethnicity-building as tantamount to nation weakening. Such a theoretical divide is manifested in divergence of opinions on several key issues related to federal design in Nepal. These issues have been discussed above but will be summarised here. First, the identity approach pursues ethnic name of provinces but the development

approach suggests non-ethnic name. Second, the identity approach prefers to create many provinces (CSRDSP posed a limitation that a social group having one percent in total population of the country deserves to get province) since it widens the possibility of transforming social identity of minority groups into political power. The development approach, on the other hand, stands for a smaller number of provinces with an argument of making provinces economically viable. Comparative experiences show that "...having less than six units tends to lead to excessive internal rivalries ... most stable federations have between 10 and 25 constituent units" (Watts, 2011: 28). This has a clear message to Nepal which justifies the CSRDSP's proposal of 14 provinces and HLSRC's recommendation of 10 provinces. Third, the tricky question is delimitation of provincial boundaries and its implications in constituting political power among the social groups. The identity approach opts for caste/ethnic based human geography, which inevitably suggests redrawing the territory of the present administrative units: districts, zones and regions. The development approach largely seeks retention of present administrative boundaries in its persuasion for making north-south based provinces. Caste/ethnic based demographic composition of the province matters in linking it with the mixed electoral system that seats allocated to PR component is distributed in proportion to size of population of caste/ethnic groups. For an ethnic group, the higher the number of its population in a province, the greater the chances to be dominant in provincial political power structure.

Choosing the identity versus the development approach gives two different pictures so far as implications for the territorial delimitation of provinces and the composition of socio-political power at provincial level is concerned. The territorial division of Nepal into 75 districts, 14 zones and 5 development regions was made in with a different purpose: to serve the interests of the ruling castes. Results of all elections, both local and general, held before the April 2008 CA election proved it. The hill high castes, though they constitute only 30% in national population of the country, had 56-63 % representation in previous parliaments. They constituted more than two-thirds among the Presidents of 75 District Development Committees. Retention of the present administrative territory in designing federal units could mean not only the preservation but also the extension of the hill castes domination in the political power structure of the country. For instance, in the recent proposal made separately by the NC and the UML for 7 provinces, the hill high castes constitute the majority or the largest groups in all five hill centric provinces. Such a numerical advantage converts into political power as it is allowed by representation system under PR component of the mixed electoral system. It is, therefore, understood that why the Khas-Arya advocates for retention of the present five development regions as five provinces with the same names. Territorial delineation of provinces as suggested by the identity approach gives a different picture. With an aim to making the provinces demographically convenient to the targeted group, the CSRDSP changed the territory of the present 29 districts. Revisit to CSRDSP's



work of redrawing of 29 districts' territory by the HLSRRC found error in 500 VDCs. Reallocation of these error VDCs to concerned provinces as per standards set by the CSRDSP – territorial contiguity of settlement pattern of the targeted group – brought a change in demographic composition of provinces<sup>8</sup> (see Annex I). Making provinces demographically convenient to the targeted groups through reinvention of cultural territory helps to fulfill ethnic aspirations for transforming social identity into political power. Creating a political space at the provincial level in a way favourable to minority groups (i.e. Limbu, Rai, Tamang, Newar, Gurung, Magar, Tharu etc., each fall under broader janajati group and Madhesi) would help to balance out the historic domination of hill high castes in national politics. In gist, identity-based federalism paves the way for the redistribution of political power among the social groups against the traditional domination of the hill high castes.

So far as the question of blending identity and capability is concerned, it is stated above that the development approach tends to incorporate ethnicity only at the third tier of government. Acknowledgment of identity in the development approach has been expressed at a political level, rather than at an academic one. A proposal of six province federal Nepal, entertained as dissenting opinion by CSRDSP, is defended with an argument that provinces should be constituted on the basis of ethnic proximity and geographical contiguity. This formula is adopted in the 7 provinces federal model, suggested separately by the NC and the UML. Framing provinces on the basis of ethnic proximity and geographical contiguity means that if two or more than two distinct identity groups, living in one particular geographical area, are close to each other in terms of culture and social habit they can be adjusted into one province. But this is problematic. Unlike hill castes (Brahmin, Chhetri and Dalit) who share a common race (Aryan), religion (Hindu), language (Nepali), tradition and lifestyle, janajatis are not a cohesive group. Each janajati has their own language, different culture and separate historical homeland.

So, having concluded that the development approach fails to accommodate the concerns of the identity approach, the question is: does the identity approach address the concerns of the development approach? An extreme opinion held by identity-approach advocates is that economic development becomes a crucial factor only at the operational phase and not at the time of formation of federal units. One concern of the development approach is about creating asymmetric federal units and those which are extremely underdeveloped will not be viable. This concern can be addressed from five different but interrelated perspectives. One, the **resource perspective**: it is widely acknowledged that provinces proposed in the tarai are economically viable even at the formative phase and provinces proposed in hills are rich in natural resources which mean these are potentially viable as well. Alberta, a province of Canada, is one example of a poor province with rich natural resources that could turn into a prosperous province in future

(Watts, 2011). Two, the **existence perspective**: provinces of federal Nepal will be unequal, some will be relatively developed and others underdeveloped. But one cannot deny the political relevance of the existence of poor provinces. No doubt one or two provinces proposed in mid and far-west hill will live as federal units with food deficiency and revenue deficiency. But we cannot deny the value of these areas to be existed as distinct political units, provinces. Three, the **equalization perspective**: capability of provinces to be formed in underdeveloped areas, i.e. mid and far-west hills, can be enhanced over the years by a system of economic equalization, an indispensable part of a federal system. It is a mechanism for reducing the financial gap between developed and underdeveloped provinces. The centre extracts more revenues from a developed province and distributes more resources to least developed provinces. Perhaps this is the reason why architects of identity-based federalism defended their recommendation for a provision for centralised revenue collection system. Four, the **interdependence perspective**: the development approach is too ambitious in seeking self-reliant provinces. Federalism is a system that promotes interdependence among the provinces. In one way or another, provinces are dependent on each other. Some provinces may be rich in one particular area (i.e. Tamshaling on hydropower potentiality) and others in different sector (i.e. Newa in human resource and capital mobilization). Exchanges of skills, resources, and productions among the provinces will produce a system of interdependence among the federal units. Besides, the CSRDSP has a directive provision that inter-province relations should be guided by the principles of mutual cooperation, coordination and coexistence. It, indeed, speaks for a system of inter-provincial loans and grants. Five, the **conflict resolution perspective**: conflict among the provinces on shared natural resources cannot be denied. So the concerned thematic committees of the CA suggested a number of conflict resolution mechanisms, i.e. inter-provincial council, natural resource commission, national fiscal commission and others.

Nepal is formally declared as a federal state in large measure on account of the janajati movement and Madhes uprisings. But the federal agenda has been pushed back for the time being as an impact of the rise of Bahun/Chhetri “ethnicity”. Discourse began in line with pro- and anti-federalism that was later converted into committed versus reluctant federalist discourse. Since the demand of ethnic autonomy preceded the federal idea, the question of identity and inclusion has obviously prevailed from the very beginning but it is increasingly challenged by proponents of the development approach. Three of the largest social groups of the country – janajati, Madhesi and Khas-Arya – are split on the question of Nepali federalism; the first two groups stand together for maximizing the ethnic and regional contents whereas the later opts to de-ethnicise the federalism process in Nepal. At the time that the CA mandated deadline was approaching on 27 May 2012, this social polarization intensified to the extent of inviting the possibility of ethnic violence.

Since the logic of transforming Nepal into a federal state is explained with a national mission of achieving inclusive democracy that obviously seeks an end to the hill high castes' domination of state power. It is therefore natural that hill high caste groups would be anti-federalism but they seem adjusting to the changing situation; it is natural for this group to seek to minimise the damage of their own group interest, which explains their preference for north-south based provinces. The real objective of the recent mobilization of Bahun/Chhetri ethnicity is to make the Nepali federalism non-ethnic in its attributes and thereby uphold their dominant position even in the federal Nepal. Of course the interest of dominating group contradicts with the very idea of inclusive democracy but the voice of hill castes, which (including hill Dalit) constitute 38% of the national population, should not be underestimated; and they are against ethnic federalism. The strength of the hill castes goes beyond its population; the hill high castes are in dominant positions in institutions that produce knowledge (universities), in places that disseminate information and public opinion (media), and in the leadership of major political parties that hold state power. Implication of placing the dominant castes in strategic areas to federal design is understandable. Hill Bahuns are at the top in leadership of major political parties. So transformation of Nepal into a federal state has become a difficult journey, as briefly pointed out below.

Party leaders failed to preempt the federal agenda unless the Madhes uprising of January 2007 compelled them to respond positively; they locked up the CSRDSP's report for almost one year; and they eventually hijacked the CA's mandate to formulate and promulgate a new constitution. Among the political parties, Madhes-based parties were founded with a federalist agenda. The CPN-Maoist advanced its position, which was initially a proposal for autonomous regions (resembling the Chinese model), into favoring federalism with a multiparty competitive system. Most political parties, including the NC and UML were dragged into the federal idea later. The limitation of reluctant federalists' is well manifested in the NC's (the second largest party in the CA) position. This party has constantly taken illiberal positions on identity questions. The UML (the third largest party of the CA) has changed camps, from a party being formally sympathetic to ethnic contents in federal design in the first half of the 4 year tenure CA into a party opposing the identity issue in the latter half of the CA. Besides, the top leaders of the UCPN (Maoist) have reportedly given their consent several times to the model of administrative or territorial federalism, jointly pursued by the NC and UML, nevertheless this party, being a champion of ethnic federalism, has constantly taken a formal position for identity-based federalism. Polarization among the political forces appeared sharply in the CA. New political forces emerged since the CA elections, for example the Maoist, Madhesi and Indigenous Peoples Caucus, formally took a common position in favor of identity-based federalism but the traditional political parties, like the NC and the UML in particular, pushed for territorial federalism.

## CONCLUSION

The question of designing federal Nepal will eventually be decided by negotiation among the political parties. Nevertheless the polarization of Nepali society and politics between those who buy into the development approach and others that adhere to the identity approach, requires that a sensible blending of identity and capability is realised. The rule of negotiation calls for the search and identification of a middle ground between two extreme positions. Political dealings on the Madhes case could be a good reference. Demand of 'one Madhes, one province' – a formal position taken by Madhes-based parties – clashes with proposals to make many provinces in Madhes on the ground of its linguistic diversity. It, indeed, conflicts with the position taken by architects of the development approach who argue for north-south based provinces in line with the present territory of five development regions. Such a tricky problem is handled by the CSRDSP and HLSRC with recommendations to make two provinces in Mahesh. Such a decision was made taking into account the prevailing political equation, i.e. the strategic significance of the Madhes-based parties in game of government making and unmaking under hung parliament; the alliance formed between Madhesi and janajatis for constituting federal units on the basis of ethnic and regional identity; and the NC and UML parties and Khas-Arya's preference for creating the smallest number of provinces for a federal Nepal. Disagreement at the political level only appears on the ground that the two-province Madhes proposal does not follow the logic of providing an outlet to India for hill based provinces via a small corridor in Madhes. Here, the NC and the UML do not follow the line suggested by academics of the development approach. Academics like Sharma, Bohara and Achary stand for a full-fledged north-south based provinces whereas some political parties like NC and UML argue for having a small corridor to touch the boundary of hill based provinces with India's border.

In hindsight, it is clear that achievements were made on several issues. Taking identity as well as capability as bases for constituting federal units itself is an outcome of a compromise, nevertheless the earlier decision to make identity the prime basis for federalization was contested later. On the naming of province, a proposal for giving two names to disputed provinces (a combination of both ethnic and non-ethnic name) was floated as a compromise. The UML's new proposal of seven provinces, constituted on the basis of multiple identities as claimed by the party, has ethnic content in name of provinces. As far as the number of provinces to be made is concerned, a political understanding, made on 15 May 2012 by top leaders of major political parties, for 11 provinces shows a prospect. It is worthwhile to mention here that the HLSRC recommended 10 provinces as a middle ground between the 14 province proposal (put forth by the CSRDSP) and the 6 to 7 province proposal (supported by the NC and UML). Territorial delineation of provinces on the basis of caste/ethnicity based human geography or physical geography remains a tricky question. Making of north-

south based provinces in line with the present territory of five development regions, suggested by academics of the development approach, is unlikely to happen. Because political parties including NC and UML are looking for an outlet to India via small territories in the Madhes for those provinces formed in hill. The idea of ethnic federalism, if not identity-based federalism, is also rejected. There has been a political understanding in making provinces as multiethnic in functional attributes that citizens living in provinces would have equal rights without any discriminatory provisions.

## REFERENCES

- Acharya, R.C. (2007). "A Model for Political Restructuring and Electoral System of Federal Nepal: Building on the Strength of Ethnic Diversities and Regional Complementarities" (an unpublished paper).
- Baral, B. (2004). *State Restructuring As it should be* (in Nepali). Kathmandu: SwayattaSasanSarokar Mach.
- Bhattachan, K. B. (2003). "Minority Rights: Country Report-Nepal". (A report under publication).
- Bhargava, R. (2006). The Evolution and Distinctiveness of India's Linguistic Federalism. In Turton, D. (Ed.). *Ethnic Federalism*. Oxford: James Currey Ltd.
- Bohara, A. (2008). "Comparative Federal Structure: A workable Political-Economy Approach for a New Nepal" (an unpublished paper).
- CBS. (2002). *Population Census 2001*, Kathmandu: Central Bureau of Statistics.
- Election Commission (2008). *Result of the 2008 Constituent Assembly Election*. Kathmandu: Election Commission.
- Fiseha, A. (2006). Theory versus Practice in the Implementation of Ethiopia's Ethnic Federalism. In Turton, D. (Ed.) *Ethnic Federalism*. Oxford: James Currey Ltd.
- Fleiner, T. et al. (2003). Federalism, Decentralization and Conflict Management in Multicultural Societies .In Blendenbacher, R. &Koller, A. (Eds.) *Federalism in a Changing World*.London: McGill-Queen's University Press. London: McGill-Queen's University Press.
- Galadima, H. S. (2010). Nigeria: A Developing Federation under Strains. *Indian Journal of Federal Studies*. V.1. 59-74.
- Gellner, D. N. (2007). "Caste, Ethnicity and Inequality in Nepal".*Economic and Political Weekly*. XLII:20.
- Gupta, J. (2005). *Madhes: Social Structure and Discrimination* (in Nepali). Kathmandu: CPMHR. *Interim Constitution of Nepal 2007*.
- Jha, A. N. (2006). *State Restructuring on the Basis of Federalism* (in Nepali). In Tamang, S. (Ed). State Restructuring in the Context of Nepal (in Nepali). Kathmandu: SamanaPrakashan.
- Khan, H. (2001). *Constitutional and Political History of Pakistan*. Oxford: Oxford University Press.
- Khanal, K. (2007).Federal State Structure: Principle and Practice (in Nepali). In Khanal, K. (Ed.) *Federal System in Nepal: Challenges and Opportunities* (in Nepali). Kathmandu: National Peace Campaign.
- Kumer, S. et al. (2010). Federalism in Iraq: The Unbearable Heaviness of Thinking Federally. *Indian Journal of Federal Studies*.V.2.
- Lawati, M. (2005). *Towards a Democratic Nepal: Inclusive Political Institutions for a Multicultural Society*. Kathmandu: Mandala Book Point.
- Mabuhang, B. K. (2007). Federal System for Restructuring the State: Caste/Ethnic Perspective. (in Nepali). In Khanal, K. (Ed.). *Federal System in Nepal: Challenges and Opportunities* (in Nepali) Kathmandu: National Peace Campaign.
- Manandhar, M. S. & Sharma, P. (2009). *Bases of Federalism and Delineation* (in Nepali). Kathmandu: National Coalition against Racial Discrimination.
- Michler, P. (2006). Federalism and Regional Development: A Swill Perspective. In Augustinllago, S. & Montes, R.N. (Eds.) *Federalism and Multiculturalism*. Manila: Centre for Local and Regional Governance.

- Neupane, G. (2000). *Question of Caste/Ethnicity in Nepal* (in Nepali). Kathmandu: Centre for Development Studies.
- Pfaff-Czarnecka, J. (1997). Vestiges and Visions: Cultural Change in the Process of Nation-Building in Nepal. In GellnerJonna, D. N., Pfaff-Czarnecka, J. & Whelpton, J. (Eds.), *Nationalism and Ethnicity in a Hindu Kingdom: The Politics of Culture in Contemporary Nepal*. Amsterdam: Harwood academic publishers.
- Poirier, J. (2006). Conflict Management and Federalism in Belgium. In Augustinllago, S. & Montes, R. N. (Eds.), *Federalism and Multiculturalism*. Manila: Centre for Local and Regional Governance.
- Reilly, B. (2001). *Democracy in Divided Societies: Electoral Engineering for Conflict Management*. Cambridge: Cambridge University Press.
- Requeijo, F. (2006). Culturally Diverse Democracies? The Case of the Spanish Estado de las Autonomías. In Augustinllago, S. & Montes, R. N. (Eds.), *Federalism and Multiculturalism*. Manila: Centre for Local and Regional Governance.
- Report of State Restructuring High Level Recommendation Committee 2012.*
- Report of Preliminary Draft Prepared by Committee for State Restructuring and Division of State Power. 2010.*
- Ali, R. & Basu, S. (2010). *Paradise Lost? State Failure in Nepal*. New Delhi: Adarsh Enterprises.
- Sharma, P. et al. (2009). *Towards a Federal Nepal: An Assessment of Proposed Models*. Kathmandu: Himal Books.
- Shrestha, R. (2011). *World Federal Countries, Constituent Assembly and Guideline for Nepal* (in Nepali). Kathmandu: Centre for Federal Studies.
- Suberu, R. (2006). Federalism and the Management of Ethnic Conflict: The Nigerian Experience. In Turton, D. (Ed.). *Ethnic Federalism*. Oxford: James Currey Ltd.
- Tamang, P. R. (2011). *Ethnic Autonomy and Federalism* (in Nepali). Kathmandu: Chandra Kala Rai.
- Thurer, D. (2003). Federalism and Foreign Relations. In Blendenbacher, R. & Koller, A. (Eds.) *Federalism in a Changing World*. London: McGill-Queen's University Press: 26-32.
- Turton, D. (2006). Introduction. In Turton, D. (Ed.) *Ethnic Federalism*. Oxford: James Currey Ltd.
- UNDP. (2009). *Nepal: Human Development Report 2008*. Kathmandu: UNDP/Nepal.
- Watts, R. (2011). *Federalism and Constitution of Nepal*. Kathmandu: Forum of Federations.
- Yadav, U. (2003). *Nepali Mass Movement and Question of Madhes Liberation* (in Hindi). Biratnagar: MPRE.

## ANNEX - I

**Caste/Ethnic Distribution 14 and 10 Provinces Federal Nepal**  
**Caste and Ethnicity %**

S. N.	Name of province	14 provinces model		10 province model	
		1 <sup>st</sup> largest group	2 <sup>nd</sup> largest group	1 <sup>st</sup> largest group	2 <sup>nd</sup> largest group
1	Limbuwan	Hill high caste (28)	Limbu (27)	Limbu (27)	Hill high caste (27)
2	Kirat	Rai (34)	Hill high caste (29)	Rai (35)	Hill high caste (27)
3	Sherpa	Sherpa (36)	Hill high caste (14)	X	X
4	Mithila-Bhojpura-Koch Madhesh	Madheshi (72)	Hill high caste (12)	Madheshi (72)	Hill high caste (13)
5	Sunkoshi	Hill high caste (37)	Tamang (14)	X	X
6	Tamsaling	Tamang (44)	Hill high caste (29)	Tamang (35)	Hill high caste (30)
7	Newa	Hill high caste (38)	Newa (36)	Hill high caste (37)	Newa (36)
8	Narayani	Hill high caste (43)	Magar (10)	Hill high caste (45)	Magar (11)
9	Tamuwan	Hill high caste (35)	Gurung (32)	Hill high caste (33)	Gurung (32)
10	Magarat	Hill high caste (40)	Magar (34)	Magar (35)	Hill high caste (35)
11	Lumbini-Awadh-Tharuwan	Hill high caste (27)	Tharu (26)	Tharu (27)	Hill high caste (25)
12	Jadan	Hill high caste (55)	Sherpa (19)	X	X
13	Karmali	Hill high caste (62)	Dalit (19)	Hill high caste (60)	Dalit (19)
14	Khaptad	Hill high caste (75)	Dalit (20)		

## ANNEX -II

**Development Index: Human Empowerment Index (HEI), Gender Development Index (GDI) and Poverty Index (PI), Governance Index (GI)**

Area	HDI (National: 509)	GEI (National: 496)	PII (National: 31 %)	GI
<b>Rural/Urban</b>				
Urban	630	527	10	X
Rural	482	474	35	X
<b>Ecological</b>				
Mountain	436	468	33	X
hill	543	515	34	X
Tarai	494	469	28	X
<b>Development regions</b>				
East	526	516	29	X
Central	531	511	27	X
West	516	488	27	X
Mid-west	452	431	45	X
Far-west	461	456	41	X
<b>Caste/Ethnicity</b>				
Hill high caste	514 - 612	X	18	66
Madheshi	450	X	21	11
Janjati#	494	X	35 - 44	7
Muslim	401	X	41	X
Dalit	424	X	45	X

# Excluding Newar which has a share of 15 % in GI.



# CHAPTER 4

## BALANCING IDENTITY AND VIABILITY: RESTRUCTURING NEPAL IN A WORKABLE FEDERAL STATE

- BIPULENDRA CHAKRAVARTTY



## INTRODUCTION

The words ‘identity’ and ‘viability’ are vague and have been defined, explained, and theorised in a myriad of ways. The scope of this paper is limited to balancing identity and viability in the context of Nepal’s restructuring to a federal state. The issue of identity has been a perennial feature of Nepal for thousands of years. Wars have been fought on the issue of identity, and the hegemony of some identities has subjugated and influenced others.

## CONCEPTUALISING IDENTITY

According to the Oxford English Dictionary, “Various suggestions have been offered as to the formation of the word ‘identity.’ Need was evidently felt of a noun of condition or quality from *idem* (Latin) to express the notion of ‘sameness’, side by side with those of ‘likeness’ and ‘oneness’ expressed by *similitas* and *unitas*: hence the form of the suffix. But *idem* had no combining stem. Some have thought that *ident* was taken from the Latin adverb *identidem* ‘over and over again repeatedly’. Connection with which appears to be suggested by Du Cange’s explanation of *identitas* as ‘quaevis action repetita’. Meyer Lubke suggests that in the formation there was present some association between *idem* and *idens* ‘that being’ whence *identitas* is like *entitas*. But assimilation to *entitas* may have been merely to avoid the solecism of ‘idemitas’ or *identitas*. However originated *ident* (i) – become the combining stem of *idem* and the series *unitas*, *unicus*, *unificus*, *unificare* was paralleled by *identities*, *identicus*, *identificus*, and *identificare*” (OED, 1980: 1368).

The Oxford English Dictionary defines the word as:

- 1) The quality or condition of being the same in substance, composition, nature, properties or in particular qualities under consideration; absolute or essential sameness; oneness.
- 2) The sameness of a person or thing at all times or in all circumstances; the condition or fact that a person or thing is itself and not something else; individuality, personality.

With the coming of the seventeenth century, immigrants from the British Isles began to settle in significant numbers in North America. Over the course of time

their original English language passed through several modifications. A school of American English usage sprouted in English philology. Noah Webster, the most celebrated pioneer of this school, published a small dictionary of the American language in 1806, which later became the globally popular Webster's New World Dictionary of the American Language.

*Webster's* defines identity as:

- 1) The condition or fact of being the same or exactly alike; sameness; oneness (group united by identity of interests).
- 2) The condition or fact of being the same as a person or thing described or claimed.
- 3) The condition of being the same as a person or thing described or claimed.

Whether the root of the word 'identity' is Sanskrit, Latin, or French, and whether the etymological interpretation of the word in British and American English dictionaries is the same or not, it has become a generic term that varies over time and space, acquiring many connotations.

What does it mean when one asserts his or her identity? Does one have only a single identity or several? Identity based on politics, religion, or gender largely remains constant, whereas other types of identity, such as age or education, change throughout one's lifetime. In our normal lives, we see ourselves as members of a variety of groups.

As Sen (2006) points out in *Identity and Violence: The Illusion of Destiny*, a person may have many identities at one time. The same individual can be without contradiction a Nepali citizen of Indian origin with Bengali ancestry, a Hindu, a liberal, a woman, and a believer in gay and lesbian rights. Each of these collectivities to which this person simultaneously belongs gives her a particular identity. None is the person's only identity. We are all driven by many limiting identities emanating from caste, ethnicity, language, religion, gender, and nationality. These identities tend to determine our politics and worldviews. The world, as a result, becomes a site of identity conflict, ethnocentrism, racism, casteism, and parochialism. These are the symptoms of a culture that restricts and limits the human mind. Because there cannot be an abstract humanity, it seems impossible to live without identities. We all have our historical memories, local traditions, languages, and cultural specificities. We are situated in time and space. And social identities are unlikely to escape us. What is however possible is the ability to experience these identities as fluid and inclusive, to engage in a process of creative and dialogic assimilation. It is indeed possible not to be limited by segmented identities. By not dwelling on the notion of being identical to one's self but rather shifting our attention to that of sharing an identity with others of a particular group (which is the form that social identity very often takes), the

complexity increases further. Indeed, many contemporary political and social issues revolve around conflicting claims of disparate identities involving different groups, since the conception of identity influences in many different ways our thoughts and actions.

A sense of identity can be a source not merely of pride and joy but also of strength and confidence. The idea of identity receives extensive admiration, whether from the popular advice to 'love your neighbour' or the great theories of social capital and of communitarian self-definition. And yet identity can also kill—and kill without inhibition. A strong, and exclusive, sense of belonging to one group can in many cases carry with it the perception of distance and divergence from other groups. Internal group solidarity can help to feed external group discord. We may suddenly be informed that we are not just Nepali but specifically Madhesi or Pahadi. Our sense of identity can make a significant contribution to the strength and warmth of our relations with others; it can enhance bonds and help to take us beyond our self-centred lives. Much literature has explored 'social capital', and illustrated how an identity with others in a social community can make the lives of everyone in that community better. A sense of belonging to a community is thus seen as a resource akin to capital. That understanding is important, but it has to be supplemented by the further recognition that a sense of identity can firmly exclude many people at the same time that it embraces others. Those well assimilated communities in which inhabitants intuitively do absolutely wonderful things for each other can be the same communities in which that very solidarity is the reason immigrants are harassed and even murdered. Despite the considerable empirical evidence that ethnocentrism need not go with xenophobia (Cashdan, n.d.), in many prominent cases ethnic, religious, racial or other selective loyalties have been used in an exaggerated form to lead to violence. The violence associated with identity conflicts seems to repeat itself around the world with increasing persistence.

If identity based thinking can be amenable to such brutal manipulation, where can the remedy be found? It can hardly come from subduing or choking the invocation of identity in general. For one thing, identity can be a source of richness and warmth as well as of violence and terror, and it would make little sense to treat identity as a general evil. Rather we have to draw on the understanding that the force of a bellicose identity can be challenged by the power of competing identities. These can, of course, include the broad commonality of our shared humanity, but also many other identities that everyone has simultaneously. This leads to other ways of classifying people, which can restrain the exploitation of a specifically aggressive use of one particular categorisation. Along with recognising the plurality of our identities and their many implications, there is a critically important need to see the role of choices in determining the cogency and relevance of particular identities that are inescapably diverse.

Most communitarian thinkers think that a dominant communal identity is only a matter of self-realisation, not of choice. It is however hard to believe that a person really has no choice in deciding what importance to attach to the various groups to which she belongs, and that she must just discover her identities as if they were a natural phenomenon (Sen, 2006). Identity is one's source of meaning and experience. As Calhoun writes, "We know of no people without names, no languages or cultures in which some manner of distinctions between self and other, we and they, are not made . . . Self-knowledge—always a construction no matter how much it feels like a discovery—is never altogether separable from claims to be known in specific ways by others" (Calhoun, 1994).

When it comes to identity, as it refers to social actors, the construction of meaning on the basis of a cultural attribute or a related set of cultural attributes is given priority over other sources of meaning. For a given individual, or for a collective actor, there may be a plurality of identities. Yet such a plurality is a source of stress and contradiction in both self-representation and social action. This is because identity must be distinguished from what traditionally sociologists have called roles and role-sets. Roles (for example, to be an employee, mother, neighbour, socialist militant, union member, basketball player, churchgoer, and smoker, at the same time) are defined by norms structured by the institutions and organisations of society. Their relative weight in influencing people's behaviour depends upon negotiations and arrangements between individuals and institutions and organisations. Identities are sources of meaning for the actors themselves, and by themselves, constructed through a process of individuation (Giddens, 1991).

Although, as I will argue below, identities can also originate from dominant institutions, they become identities only when and if social actors internalise them and construct their meaning around this internalisation. To be sure, some self-definitions can also coincide with social roles, for instance when being a father is the most important self-definition from the point of view of the actor. Yet identities are stronger sources of meaning than roles because of the process of self-construction and individuation that they involve. In simple terms, identities organise the meaning, while roles organise the functions. I define meaning as the symbolic identification by a social actor of the purpose of his action. I also propose the idea that in the network society, for most social actors, meaning is organised around a primary identity (that is an identity that frames the others), which is self-sustaining across time and space. While this approach is close to Erikson's formulation of identity, my focus here will be primarily on collective, rather than individual, identity. However, individualism (which is different from individual identity) may also be a form of 'collective identity', as analysed in Lasch's *Culture of Narcissism*.

It is easy to agree on the fact that, from a sociological perspective, all identities are constructed. The real issue is how, from what, by whom, and for what. The construction of identities uses building materials from history, geography, biology,

productive and reproductive institutions, collective memory, personal fantasies, power apparatuses, and religious revelations. But individuals, social groups, and societies process these materials and rearrange their meaning according to social determinations and cultural projects that are rooted in their social structure and space-time framework. I propose as a hypothesis that, in general terms, who constructs collective identity, and for what, largely determines the symbolic content of this identity and its meaning for those identifying with it or placing themselves outside of it. Because the social construction of identity always takes place in a context marked by power relationships, I propose a distinction between three forms and origins of identity building:

1. **Legitimising identity**—introduced by the dominant institutions of society to extend and rationalise their domination vis-à-vis social actors, a theme that is at the heart of Sennett's theory of authority and domination and which also fits with various theories of nationalism (Anderson, 1983).
2. **Resistance identity**—generated by those actors who are in positions or conditions devalued or stigmatised by the logic of domination, thus building trenches of resistance and survival on the basis of principles different from, or opposed to, those permeating the institutions of society, as Calhoun proposes when explaining the emergence of identity politics (Calhoun, 1994).
3. **Project identity**—when social actors, on the basis of whatever cultural materials are available to them, build a new identity that redefines their position in society and by so doing seek the transformation of overall social structure. This is the case, for instance, when feminism moves out of the trenches of resistance of women's identity and women's rights to challenge patriarchy, thus the patriarchal family and thus the entire structure of production, reproduction, sexuality, and personality on which societies have been historically based.

Naturally, identities that start as resistance may induce projects and may along the course of history become dominant in the institutions of society, thus becoming legitimising identities to rationalise their domination. Indeed, the dynamics of identities along this sequence shows that from the point of view of social theory no identity can be an essence, and no identity has per se progressive or regressive value outside its historical context. A different and very important matter is the benefits of each identity for the people who belong to it. In my view, each type of identity-building process leads to a different outcome in constituting society. Legitimising identity generates a civil society—that is, a set of organisations and institutions—as well as a series of structured and organised social actors that reproduce, albeit sometimes conflictingly, the identity that rationalises the sources of structural domination. This statement may come as a surprise to some readers since civil society generally suggests a positive connotation of

democratic social change. However, this is the original conception of civil society as formulated by Gramsci, the intellectual father of this ambiguous concept.

Indeed in Gramsci's conception, civil society is formed by a series of 'apparatuses', such as churches, unions, parties, cooperatives, civic associations, and so on, which on the one hand prolong the dynamics of the state, but on the other hand are deeply rooted among people. It is precisely this dual character of civil society that makes it a privileged terrain of political change by making it possible to seize the state without launching a direct violent assault. The conquest of the state by the forces of change (let's say the forces of socialism, in Gramsci's ideology) present in civil society is made possible exactly because of the continuity between civil society's institutions and the power apparatuses of the state, organised around a similar identity (citizenship, democracy, the politicisation of social change, the confinement of power to the state and its ramifications, and the like). Where Gramsci and de Tocqueville see democracy and civility, Foucault and Sennett, and before them Horkheimer and Marcuse, see internalised domination and legitimation of an over-imposed, undifferentiated normalising identity.

The second type of identity-building, identity for resistance, leads to the formation of communes, or communities in Etzioni's formulation (Etzioni 1993). This may be the most important type of identity-building in our society. It constructs forms of collective resistance against otherwise unbearable oppression, usually on the basis of identities that were apparently clearly defined by history, geography, or biology, making it easier to essentialise the boundaries of resistance. For instance, ethnically based nationalism, as Scheff proposes, often "arises out of a sense of alienation, on the one hand, and resentment against unfair exclusion, whether political, economic or social" (Scheff, 1994).

Religious fundamentalism, territorial communities, nationalist self-affirmation, or even the pride of self-denigration, inverting the terms of oppressive discourse (as in the 'queer culture' of some tendencies in the gay movement), are all expressions of what I name the exclusion of the excluders by the excluded. That is, the building of defensive identity in the terms of dominant institutions or ideologies, reversing the value judgment while reinforcing the boundary. In such a case, the issue arises of the reciprocal communicability between these excluded and exclusionary identities. The answer to this question, which can only be empirical and historical, determines whether societies remain as societies or else fragment into a constellation of tribes, sometimes euphemistically renamed communities. The third process of constructing identity, that is project identity, produces subjects, as defined by Alain Touraine: "I name subject the desire of being an individual, of creating a personal history, of giving meaning to the whole realm of experiences of individual life. . . . The transformation of individuals into subjects results from the necessary combination of two affirmations: that of individuals against communities, and that of individuals against the market" (Touraine, 1995).



Subjects are not individuals even if they are made by and in individuals. They are the collective social actors through which individuals reach holistic meaning in their experience (Castells, 1997). In this case, the building of identity is a project of a different life, perhaps on the basis of an oppressed identity but expanding toward the transformation of society as the prolongation of this project, as in a post-patriarchal society, liberating women, men, and children through the realisation of women's identity. Or, from a different perspective, the final reconciliation of all human beings as believers, brothers and sisters under the guidance of God's law, be it Allah's or Jesus', as a result of the religious conversion of godless, anti-family, materialist societies otherwise unable to fulfil human needs and God's design.

How and by whom different types of identities are constructed and with what outcomes cannot be addressed in general, abstract terms: it is a matter of social context. Identity politics, as Zaretsky writes, "must be situated historically" (Zaretsky, 1994). Thus, our discussion must refer to a specific context—the rise of the network society. The dynamics of identity in this context can be better understood by contrasting it with Giddens's characterisation of identity in 'late modernity', a historical period that is an era reaching its end (by which it is not meant to suggest that we are in some way reaching the 'end of history' as posited in some postmodern vagaries). In a powerful theorisation, Giddens states that, "self-identity is not a distinctive trait possessed by the individual. It is the self as reflexively understood by the person in terms of her/his biography." Indeed, "to be a human being is to know both what one is doing and why one is doing it. . . . In the context of post-traditional order, the self becomes a reflexive project" (Giddens, 1991).

How does the self-become a reflexive project? Just like the child who grew up with a pack of wolves, whose reflexive life-style was not of humans but of the wolves with whom he identified. So we see that our identity is embedded in us not by nature but nurture. Who are we? We all agree we are humans and within this general category we have our own civilisational, racial, ethnic, linguistic, and gender identities.

To say that identities are socially constructed requires a definition of both subject and predicate. We take it that an 'identity' here refers to a social category, such as Madhesi, homosexual, Catholic, and so forth, and in particular to a social category that a member either takes special pride in or views as more-or-less unchangeable and socially consequential. Social categories are labels given to groups of people and are distinguished by two main features: 1) rules of membership that decide who is and is not a member of the category and 2) content, that is, sets of characteristics, such as beliefs, desires, moral commitments, and physical attributes thought to be typical of members of the category, or behaviours expected or obliged of members in certain situations (roles). We would also include in content the social valuation of members of

this category relative to others (contestation over which is often called ‘identity politics’) (Fearon & Laiten, 2000).

The category ‘professor’, for example, has rules of membership defined by a credentialing process and the requirement that one be employed as a professor, and a content that includes a host of norms for proper behaviour. Ethnic identities are defined mainly by descent and content typically composed of cultural attributes, such as religion, language, customs, and shared historical myths.

What does it mean then to say that identities are socially constructed? Firstly, we understand the claim to be that social categories, their membership rules, content, and valuation are the products of human action and speech, and that as a result they can and do change over time. With the somewhat murky term *identities* translated as the more concrete term *social categories*, this hardly seems an exceptional claim. It even verges on tautology. How could social categories be something other than socially constructed? The answer, implicit in much constructivist work, is that people often believe, mistakenly, that certain social categories are natural, inevitable, and unchanging facts about the social world. They believe that particular social categories are fixed by human nature rather than by social convention and practice. Beliefs in the naturalness of a social category might be rooted in beliefs about alleged implications of biology (for example, gender, sexuality, and ethnicity) or about theology and morality. Such beliefs regarding a social category might be termed everyday primordialism. Much constructivist labour has been devoted to undermining everyday primordialist assumptions by showing how the content and membership rules of taken-for-granted categories like man-woman or heterosexual-homosexual have changed over time.

## **IDENTITY AND ETHNICITY: THE QUEST FOR HARMONY**

The birth of the French idea of a civic state marks a distinct turning point in shaping ethnic relationships in the nation state. At the time of the French Revolution in 1789, only about half the citizens of France could speak French and only 12–13% could speak it fairly well. Against this reality, the people of France formed a nation state based on the idea that it would comprise equal citizens in an indivisible republic, where the ethnic communities could practice their customs and religion in private but had to assimilate as individuals into the French body politic (Smith, 1994). The French found liberty, equality, and fraternity to be the basis of solving their social, political, and ethnic problems. Since then, this ideal of civic state over racial and ethnic divisions has produced intellectual support and political influence across the globe as a standard political practice.

Erikson argues that there are two principal reasons to disavow racial and ethnic political configurations. First, there are no fixed boundaries of ethnicity. Second,

there is often greater variation in the distribution of hereditary physical traits (Eriksen, 1994). Early in the nineteenth century, John Stuart Mill poignantly observed that, “[w]hen a people are ripe for free institutions, there is a still more vital consideration. Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow feeling, especially if they read and speak different languages, the united public opinion necessary to the working of representative government cannot exist” (Mill, 1862). Free institutions and democratic government can function effectively only when the nationalities (ethnic communities) evolve a strong sense of harmony or assimilate. Mill further writes, “Experience proves that it is possible for one nationality to merge and be absorbed in another; and when it was originally an inferior and more backward portion of the human race, the absorption is greatly to its advantage . . . Whatever really tends to the admixture of nationalities, and the blending of their attributes and peculiarities in a common union, is a benefit to the human race.” Thus, we can conclude that an ethnic state is not the solution to the problem of justice. Solutions to the justice problem, including the problem of untouchability associated with the caste system, can be addressed only under a liberal democratic system, where constitutionalism and the rule of law govern the country.

A modern nation-state has come into existence through the commitment to political readiness of diverse groups, including ethnic groups, to live together in harmony. Ethnic groups are not the only categories or sub-categories in any society. Every society consists of different categories: religious, class, gender, ethnic, and professional among others. Most of these categories are made up of a number of sub-categories. For example, practitioners of a single religion might further be distinguished in terms of divergent tribal or ethnic affiliations. The process of distinction continues unless a person is identified with individual autonomy. Anthropologist Clifford Geertz describes the modern nation state as a product of the search for an identity and a demand that the identity be publicly acknowledged as having import, a social assertion of the self as being somebody in the world (Geertz, 1996).

Max Weber finds ethnicity unsuitable for a rigorous analysis in a political concept of a nation state (quoted in Hutchison & Smith, 1996). Weber found “the whole conception of ethnic construction so complex and vague that it might be good to abandon it altogether” (quoted in Stone, 1995). Cornell and Hartmann write that Max Weber agreed that ethnicity would decline with the rationalisation of human action, which is the hallmark of modernity. Ethnicity, in contrast, was a communal relationship. It was based not on the rational calculation of interest but on subjective feelings among group members. As rationalisation progresses, communal relationships will lose importance. Only where rationality is not widespread, and modernisation has yet to take root, will communal relationships likely continue. Ethnicity could hardly be expected to survive the great tidal wave of bureaucratic rationality (Cornell & Hartman, 1998).

## IDENTITY IN THE CONTEXT OF NEPAL

### Caste and ethnicity

There are 125 caste and ethnic groups reported in the census 2011.

The ten largest ethnic groups of Nepal are as follows -

Caste and ethnic groups	Total population	Percentage
Chhetri	4,398,053	16.6%
Brahman – Hill	3,226,903	12.2%
Magar	1,887,733	7.1%
Tharu	1,737,470	6.6%
Tamang	1,539,830	5.8%
Newar	1,321,933	5.0%
Kami	1,258,554	4.8%;
Muslim	1,164,255	4.4%
Yadav	1,054,458	4.0%
Rai	620,004	2.3%

### Mother tongue

There are 123 languages reported in the 2011 census that are spoken as a first language. The ten most spoken languages are as follows -

Languages spoken	Total population	Percentage
Nepali	11,826,953	44.6%
Maithili	3,092,530	11.7%
Bhojpuri	1,584,958	6.0%
Tharu	1,529,875	5.8%
Tamang	1,353,311	5.1%
Newar	846,557	3.2%
Bajjika	793,418	3.0%
Magar	788,530	3.0%
Doteli	787,827	3.0%
Urdu	691,546	2.6%

With 125 ethnic and caste groups, how feasible would it be to have an ethno-federal state in which territorial governance units are intentionally associated with specific ethnic categories? The main purpose of this proposed system is to promote state survival (from a human security point of view) and not collapse. But a look at history is important here for some perspective on the present condition, for what we are is shaped by history. I remember as a child in school that most students were the first in their family to receive an education. Until then the Ranas had banned education and only a handful of elites were allowed to go to school. Things were different for me since my father was a doctor: I had more opportunities to learn at home because my parents were educated. But others were not so lucky. Even today many parents of school-going children have never had any schooling and are illiterate.

The issue of identity is multifaceted. The census of 2011, as already mentioned, shows the existence of 125 caste and ethnic groups and 123 native languages spoken in Nepal. Identity is located within particular caste and ethnic groups though they are in reality different. Identity is more than an ethnic issue; historicity, continuity, and geography are also the part of it.

There is a history of unconcealed and often legal discrimination in Nepal. The Muluki Ain of 1854, Nepal's civil and criminal legal code until the collapse of the Rana regime in 1951, legitimately separated the population into distinctive *jats* (meaning "kinds" and encompassing both castes and ethnic groups). The code incorporated all groups under a stringent caste hierarchy and apportioned differential laws and punishments for all of them. It systematically regulated social interaction, authorising, for example, only certain economic activities for each group and proscribing commensality and sexual relations.

Stereotypes and prejudices are still widespread within Nepali society. Individual experiences of discrimination and exclusion diverge vastly but most are often profoundly personal. Members of hill ethnic groups, who are economically relatively strong, such as Gurungs, Rais, or Limbus, may face mostly symbolic exclusion. Stereotypes such as that of the hill groups being quarrelsome drunkards, ever quick to draw their *khukuris*, fit for serving in the army but not for education and qualified employment, may not injure but do insult. Discrimination is even more noticeable for other groups. A plains-origin Madhesi applying for a citizenship certificate, for example, may wait for weeks or months because a civil servant wants to make sure he is not Indian, while his neighbour who looks satisfactorily 'Nepali' receives his certificate the next day. Political and economic opportunities clearly vary by caste and ethnicity. Hill Brahmins in particular are enormously overrepresented in politics and administration. For example, five out of the eight different prime ministers since 1990 were Brahmins, two were Chhetri, and one a Thakuri. There are big variations within ethnic groups and Madhesis, but some of the poorest communities fall within these broad categories (invariably worst off, of course, are both hill and Madhesi Dalits). It

is unclear how prejudices, political and administrative underrepresentation, and economic disadvantages are connected. An established line of argument long held the ethnic groups responsible for their own underdevelopment, blaming low economic status on non-Hindu practices such as drinking alcohol. Ethnic activists identify discrimination by the upper caste groups in politics and administration as a major factor.

Opposition to the state by ethnic and regional groups is not new. Between 1770 and 1979 there were at least 25 ethnic and regional-based mobilisations against the state; most happened among ethnic Limbus and Rais in the eastern hills (Lawoti, 2007: 32). Throughout the nineteenth century and up until the 1950s, the eastern hills saw a number of Limbu rebellions. These had their roots in the forfeiture of land to upper caste migrants and state efforts to revoke provisions for local autonomy. Ensuing fierce resistance and given the tactical location of Limbuwan at a sensitive border, the early Nepali state had granted far-reaching autonomy to Limbu headmen in a 1774 royal decree. Under the *thekka thiti* (A system of land tenure), a system of land tax collection on a contractual basis in some hill districts (Regmi, 1978: 867) (1820–1951), they controlled the communally held and legally inalienable *kipat* land, a form of communal land tenure, prevalent among some groups of mongoloid origin, such as the Limbus of pallo kirat (eastern kirat region of Nepal (Regmi: 860) collected taxes from clansmen and tenants living on it, and were permitted to keep militias and dispense justice (Sagant, 1996: 319–335). These provisions differed from the tenurial relations that had earlier linked Limbu rulers to other small kingdoms whose over-lordship had largely been nominal.

The state set out to destroy this autonomy almost as soon as it was established. A central strategy was to encourage Hindu caste groups to migrate into the eastern hills and to change *kipat* land into *raikar*, *state landlordism*, *land on which taxes are collected and appropriated directly or through intermediaries by the state* (Regmi, 1978, pp 864). The latter category could not only be bought and sold freely, but was also administered directly by the central state. Economically more powerful and better connected in the administration, the migrants expanded their landholdings at the expense of the Limbus. Largely tied to *kipat* land, the authority of the Limbu headmen weakened as land tenure was changed. This provoked considerable and often violent resistance. With Hindu migrants widely alleged to be responsible for the loss of land and autonomy, most Limbu struggle was unambiguously anti-Hindu and often concentrated against Brahmins and Chhetris living in the eastern hills (Caplan, 2000). During 1950, for example, when Limbus and Rais played an important role in the anti-Rana movement, the eastern hills observed widespread riots against Brahmins and Chhetris and the killing and displacing of many (Subba, 1999: 112).

The 1950s also saw the first regionalist mobilisation in the Madhes. The Nepal Tarai Congress (NTC), established in 1951, demanded an autonomous Madhes state, Hindi as administrative language, and more jobs in government for people

of Madhes origin. In 1956, the introduction of Nepali as the exclusive medium of instruction in schools triggered dissent across the Madhes. But the movement remained relatively restricted to elites. Most were eventually unwilling to abandon their immediate economic and political interests by breaking with central party affiliations, and the NTC suffered a crushing defeat in the 1959 general elections. From the 1960s onward, organised ethnic and regional resistance weakened in the face of adroit co-option of elites by King Mahendra. Under the party-less panchayat system of government, the state recognised its citizens as equal and encouraged a homogenous culture (Pfaff-Czarnecka, 1997). This culture was essentially that of hill-origin high-caste Hindus, but positions of authority were relatively open to minorities as long as they integrated. Adopting Hindu high-caste practices, ranging from observing Hindu rituals to eating habits, was an important strategy for individual and collective upward mobility (Pfaff-Czarnecka, 1997). This in effect truncated ethnic movements, but the sentiment and grievances persisted among significant parts of the population, particularly in the eastern hills.

The marriage of ethnic elites and the state ended in the 1970s when the latter's failure to deliver on development and the continuing capture of the administration by high-caste elites became apparent (Pfaff-Czarnecka, 1997). The end of the panchayat system and the formation of parliamentary democracy in 1990 opened the door for the expression of ethnic demands. The new constitution formally recognised ethnic, religious, and linguistic variety. But national identity was basically unchanged. Nepal remained a unitary Hindu monarchy with Nepali as the only official language. (The constitution allowed but did not guarantee primary education in languages other than Nepali.) Despite considerable formal institutional reforms, the state remained patronage based, and the overrepresentation of high-caste elites became even more prominent.<sup>1</sup>

The number of ethnic organisations grew exponentially in the 1990s, with estimates ranging from 150 to several hundred. The Nepal Federation of Nationalities (NEFEN), founded in 1990 by eight groups, emerged as the most prominent organisation and key interlocutor for government and donors. The janajati movement drew heavily on the global discourse on indigenous rights (*janajati* being a neologism for non Hindu-caste communities in Nepal). In 2003, NEFEN changed its name to Nepal Federation of Indigenous Nationalities (NEFIN). Different from most ethnic organisations during the panchayat era, the new movements demanded language rights, decentralisation, political autonomy for ethnic groups, and proportional representation in state bodies (Pfaff-Czarnecka, 1997). Ethnic or regionally based political parties were still banned, but two evaded the restriction. The Nepal Sadbhavana Party and Rashtriya Janamukti Party, both advocating a federal Nepal, contested the general elections in 1991, 1994, and 1999. They had minimal electoral success, with the Nepal Sadbhavana winning a maximum of 4.1% and the Rashtriya Janamukti a maximum of 1.07% of votes (Lawoti, 2005: 69). While this may indicate the electorate's lack of enthusiasm

for their agendas, they also came up against strong ethnic competition in their areas of focus. In eastern Nepal, the RJP received up to 12% of votes in the 1994 elections (Krämer, 1996: 272–275). Progress on addressing ethnic demands was limited. At a time when there was considerable focus on individual rights, activists tried to address their grievances through legal channels. Results were mixed. For example, in June 1999 after efforts in Kathmandu to introduce Newari as an official language and in Dhanusa to recognise Maithili, the Supreme Court declared illegal the use of anything other than Nepali as an official language in local government bodies (Malagodi: 253). In another ruling, the Supreme Court declared as unconstitutional a legal provision exempting Hindu temples from the ban on caste discrimination. However, there was considerable resistance from the justice ministry, which claimed that some temples should be considered private places (Malagodi, 2013: 249–251).

The passage of the Nepal Federation for the Development of Indigenous Nationalities (NFDIN) Act in 2002 marked an important moment for ethnic activism in Nepal. The act recognises *adibasi janajati* (indigenous nationalities) as a legal category, establishes the criteria a group has to fulfil to qualify, and lists 59 officially recognised *janajati* groups (Middleton and Shneidermand 2008). Particularly in the eastern hills there had been a small militant fringe to the *janajati* movement early on. In 1992, Gopal Khambu founded the Khambuwan Rashtriya Morcha (KRM) to launch an armed struggle for an autonomous Khambuwan state. The KRM's armed activity remained largely confined to burning down Sanskrit schools. But its existence is indicative of some activists' appetite for a more assertive approach, which embarrassed the otherwise largely middle-class movement and provided an opening for the Maoists. Violent resistance to the Government emerged in 1996 when the Communist Party of Nepal (Maoist), CPN(M), launched their insurgency.<sup>2</sup> The Maoist policies and programs included ethnic aspirations even before the start of the war. In July 1995 the party endorsed ethnic autonomy.<sup>3</sup> Their 40-point demand called for the end of ethnic oppression in general and for a secular state, the equality of languages, and regional autonomy in particular. In February 1997, the central committee systematised the policy on nationalities by endorsing national and regional autonomy with the right to self-determination.<sup>4</sup>

In 2000 the party established a central level ethnic department, led by Dev Gurung, which included different ethnic fronts. The boundaries of the nine autonomous regions in the Maoists' people's government were drawn according to ethnic criteria (Ogura, 2008). The incorporation of identity politics into a class-based Marxist organisation is less of an ideological stretch than it might appear; it has prominent precedents. Primarily formulated by senior leader Baburam Bhattarai, the Maoists' approach to the 'national question' is explicitly Leninist. 'Oppressed nations' need autonomy and the right to self-determination, understood to entail the right to secede, overcome semi-feudal and semi-colonial exploitation, progress to capitalism and prepare the conditions for socialist revolution.



Bhattarai links the emergence of the 'question of nationalities' in Nepal to its semi-feudal structure and semi-colonial dependency and resulting regional exploitation. But the ultimate aim is the dissolution of national identities in a classless and stateless society. Ethnic movements therefore are natural allies to be supported and brought into the unity-front of the Maoist movement. According to a common interpretation, the Maoists had no choice but to adopt ethnic demands, and tapping into these grievances mobilised widespread support. This is only partly true. The Maoists' ethnic agenda played a relatively minor role in their heartland in mid-western Nepal. The area is dominated by ethnic Kham-Magars. Many people from this group did join the insurgents, but ethnic considerations seem to have played only a minor role. Communist networks rather than ethnic activism had long been influential (de Sales, 2003: 345–346). Only two smaller Magar organisations allied themselves with the Maoists; the more influential, middle-class dominated Magar activists kept their distance. The two groups close to the Maoists were the Magarant Liberation Front and the Magar National Liberation Front (Lecomte-Tilouine, 2004).

In contrast, in the eastern hills, the Maoists relied heavily on alliances with existing networks of ethnic activists. Their main ally was Gopal Khambu's KRM. The KRM started affiliating itself to varying degrees with the Maoists from 1997. Its own small militia subsequently joined the Solu-Salleri Brigade of the People's Liberation Army. The relationship was difficult from the start. Despite incorporating ethnic demands into their ideological framework, the Maoists' class-based analysis clashed with the outlook of activists for whom ethnic or regional identity was valuable in its own right. Tensions resulted from the Maoists' reluctance to include non-communist ethnic activists in decision-making bodies. Anxious about being used, Gopal Khambu insisted they be included. Faced with Maoist foot-dragging, he disassociated himself several times. Only after he set up the Kirat Workers Party in 2002, a decoy organisation, did the Maoists bring him into the Revolutionary People's Council in July 2003, although not into the more important politburo.

Similarly, in the eastern and central Madhes, backing for the Maoists was based on their support for regional autonomy. The area was of strategic importance to the insurgents from the beginning of the war, which explains their willingness to accommodate local demands. But here as well the Maoists soon ran into difficulties with supporters motivated by a regional agenda. Many of the Maoists' early leaders in the eastern and central Madhes were middle-caste Yadavs, who heavily relied on their own caste networks for organisational expansion. Rather than social transformation, the support of this powerful landholding group rested on their aspirations for regional autonomy (Hatelbakk, 2007). Indeed, Maoist attempts to challenge the dominance of landlords and entrenched caste hierarchies in the Madhes put local leaders in an awkward position. Discontent with the low priority of Madhes autonomy in the Maoist movement and the limited role of Madhesis in the upper ranks of the party and People's Liberation

Army rose. From 2004, many key Madhesi leaders and the cadres linked to them left to form their own groups with a focus on autonomy. These leaders were to drive much of the movement for political recognition from 2006 to 2008. As a result, Maoist influence in the Madhes weakened significantly.

The tension between fundamental ideological contradictions and dependence on locally influential groups of activists remains apparent today. Whether ethnic and regional leaders still see the Maoists as a potential alliance partner depends on the latter's unambiguous commitment to federalism.

### **FEDERALISM TO ETHNO-FEDERALISM**

The scholarly debate on ethno-federalism as a suitable institutional tool to govern multi-ethnic societies is characterised by diametrically opposed positions. On the one hand, ethno-federalism is viewed as being able to accommodate ethnic groups and their needs for self-determination through the devolution of power. On the other hand, it is believed to promote violent secessionism through exactly the same factors that are meant to appease ethnic groups.

For a definition of a federation, I rely on Bednar, who focuses on a structural understanding of federalism. First, a federation consists of territorial subunits, which are the primary political divisions. Second, these regions are electorally independent. Third, the central government and the regions have mutually exclusive powers. (It is important to note here that Bednar's definition maintains that a federation is not necessarily a democracy.) Finally, if one of the three criteria does not apply, we speak of quasi-federations (Bednar, 2009).

This definition of a federation does not include any provisions related to the territorial distribution of ethnic minorities, which a definition of an ethno-federation must incorporate. Hence, I rely on the suggestion of Christin and Hug, who propose that an ethno-federation is "a federal system where regional borders follow as closely as possible settlement patterns of minorities" (Christin & Hug, 2006). Yet, on closer inspection this definition is difficult to apply since it is inherently tricky to estimate what "as closely as possible" means. This definition can be refined by emphasising that a country or region can be ethno-federal to a degree and that this degree increases with a higher territorial congruence of regional and ethnic boundaries.

These considerations raise the question of to what the term ethnicity refers. The literature on ethnicity distinguishes between primordialist approaches and instrumentalist or constructivist approaches. Primordialists maintain that identities are fixed and that an individual has only one identity (Geertz, 1973). Constructivists, in contrast, suggest that identities are fluid, or respectively, that individuals have several ethnic identities that can be 'activated' depending on social, economic, and political processes. This distinction of course describes the

extreme ends of a scale, but compromises between these opposite standpoints are possible. I position myself on the constructivist side since I consider ethnicity a category that may be based on real as well as imagined common descent (Anderson, 1983). This means that ethnic groups may define themselves by observable characteristics such as physical features and behaviour (culture, religion, etc.), but also with regard to their ideas and beliefs of a shared past. This belief, however, may be susceptible to social and political influence.

## **VIABILITY OF IDENTITY POLITICS AND FEDERALISM**

Viability is of the utmost importance no matter which form of governance exists. A peaceful nation exists only when the basic needs of its citizens are fulfilled. Frederick Engels's eulogy for Karl Marx is illuminating when discussing the issue of viability:

Marx discovered the law of development of human history: the simple fact, hitherto concealed by an overgrowth of ideology, that mankind must first of all eat, drink, have shelter and clothing, before it can pursue politics, science, art, religion, etc.; that therefore the production of the immediate material means, and consequently the degree of economic development attained by a given people or during a given epoch, form the foundation upon which the state institutions, the legal conceptions, art, and even the ideas on religion, of the people concerned have been evolved, and in the light of which they must, therefore, be explained, instead of vice versa, as had hitherto been the case.

(Adams & Sydie, 2001)

In Nepal, economic inequality between the haves and the have-nots is great and it cuts across ethnic groups. Poverty is not confined to a single ethnic group. In nations with ethnically concentrated groupings, interregional inequality creates a favourable environment for ethnic conflict. Nepal is a nation with daunting interregional inequalities with the four highest income-generating districts responsible for 81% of gross national income, while the 63 poorer districts cumulatively generate only 6%. Such vast disparities between resources and abilities invariably serve as a key challenge for any type of federalism in the country, whether ethnic or not. This regional inequality, however, seems to be only partly ethnic. To a large extent the differences are based on geographic remoteness and limited accessibility, hampering investments and growth. Thus, inequalities are not ethnically concentrated, ameliorating ethnic tension and conflict. If prime rights were to be introduced into all provinces in Nepal, and if its systemic discriminatory implications were to generate a movement of ethnic groups from one province to the other, these regional inequalities could

quickly become ethnic. In other words, if the Limbuwan province favours Limbus through prime rights, and Limbuwan becomes more ethnically homogenous from migrating ethnic groups, it could easily create a situation whereby provincial inequalities become ethnicised. Resultantly, certain ethnic groups would be disadvantaged based on their province's economic viability. Thus, prime rights could have serious long-term implications for the demographic map of Nepal and consequently jeopardise peace and stability.

Fiscal transfers from national level to regional level are important and serve as a conflict mitigating mechanism because the central government is delegated the task of controlling and distributing monetary resources equally across provincial borders, as opposed to giving provinces the task of collecting tax themselves, which often leads to vast inequalities across regions. However, it is important to understand that issues of fiscal redistribution are not a priority in the political discourse. This is mainly because the discourse on federalism has not been conducted in a scientific manner, but is instead a heated debate about ethnic discrimination and autonomy. The actual feasibility of federalism has taken a backseat to the principle of self-governance for ethnic groups. Despite this, in the foreseen fiscal structure, fiscal transfers from national government to provincial government will initially have to be carried out. The intention is to decrease these fiscal transfers as the administrative and financial capabilities of the respective provinces increase and reach sufficient standards to take control of taxation and allocation of revenue. In other words, fiscal transfers are not intended to be the long-term *modus operandi*, but rather a necessary step in granting provinces full autonomy over fiscal collection and appropriation. Ultimately, such a setup serves to decrease the prospects for peace and stability, as it is likely to exaggerate regional inequalities in the medium to long term. This is particularly the case for Nepal, where provinces are at unequal stages of being able to handle fiscal issues, and where the prospects for provincial revenue vary drastically from province to province.

## CONCLUSION

If one were to ask a daily wage labourer which was more important to him, his identity, that is, his ethnicity, or his class identity, I assume it would be the latter. As the contemporary saying goes, "Freedom's just another word for nothing left to lose". In Nepal, federalism has been talked about at length and within these talks varied opinions have developed on what form of federalism the nation must adopt. Ethno-federalism has been a popular solution, and various provinces based on the names of the dominant ethnic groups have been proposed (though all ethnic groups will have an equal role and rights in the provinces despite this). Many may think, 'What's in a name?' A name is symbolic and people might feel that naming a territory after an ethnic group is of little significance. But I personally think that in Nepal, with so many diverse ethnic groups and languages, this

could be the foundation of future conflicts. So balancing identities and viability is more important than balancing identity and viability for restructuring Nepal in a workable federal state. Petty politics and plenty polytricks played by pygmy-politicians must not fragment the fraternity of federalism. Federalism should be allowed to bloom with its beauty and bounty and become rooted in the soil and soul of the country and its people.

## REFERENCES

- Adams, B. & Sydie, R. (2001). *Sociological theory*. Thousand Oaks, California: Pine Forge Press.
- Anderson, B. (1983). *Imagined communities: Reactions on the origin and spread of nationalism*. Second Edition. London: Verso.
- Bednar, J. (2009). *The robust federalism: principles of design*. New York: Cambridge University Press.
- Bhattarai, B. (2004). "The question of building a new type of state." *The Worker*, 9.
- Calhoun, C. (Ed.) (1994). *Social theory and the politics of identity*. Oxford: Blackwell Publishers.
- Caplan, L. (1970). *Land and social change in east Nepal: A study of Hindu-tribal relations*. Oxon: Routledge, 2004.
- Caplan, L. (1991). "From tribe to peasant? The Limbus and the Nepalese state." *Journal of Peasant Studies*, Vol 18, No 2: 305–321.
- Castells, M. (1997). *The power of identity*. Oxford: Wiley Blackwell.
- Christin, T. & Hug, S. (2006). "Federalism, the geographic location of groups and conflicts." Paper presented at the Annual Meeting of the American Political Science Association, August 31–September 3, 2006, Philadelphia.
- Compact Edition of the Oxford English Dictionary, The (1991). New York: Oxford University Press.
- Cornell, S. & Hartmann, D. (1998). *Ethnicity and Race: Making Identities in a Changing World*. Pine Forge Press/A Sage Publication Company.
- Cox, T. (1989). "Langtang Tibetans and Hindu norms as political language: A critical perspective on Sanskritisation theory." *Contributions to Nepalese Studies*, Vol 16, No 1: 11–20.
- De Sales, A. (2003). The Kham Magar country: Between ethnic claims and Maoism. In Gellner (Ed.) *Resistance and the State: Nepalese Experiences*. New Delhi: Social Science Press.
- Eriksen, T. (1996). Ethnicity, race, class, and nation. In Hutchinson and Smith (Eds.) *Ethnicity*. New York: Oxford University Press.
- Etzioni, A. (1993). *The spirit of community: Rights, responsibilities, and the communitarian agenda*. New York: Crown.
- Fearon, J. & Laitin, D. (2000). *Violence and the social construction of ethnic identity*. The IO Foundation and Massachusetts Institute of Technology.
- Gaige, F. (1975). *Regionalism and national unity in Nepal*. Berkeley: University of California Press.
- Geertz, C. (1973). *The interpretation of cultures*. New York: Basic Books.
- Geertz, C. (1996). Primordial ties. In Hutchinson & Smith (Eds.) *Ethnicity*. New York: Oxford University Press.
- Gellner, E. (1983). *Nations and nationalism*. Ithaca: Cornell University Press.
- Giddens, A. (1991). *Modernity and self-identity: self and society in the late modern age*. Cambridge: Polity Press.
- Gunaratne, A. (2002). *Many tongues, one people: The making of Tharu identity in Nepal*. Ithaca: Cornell University Press.
- Hatlebakk, M. (2007). *Economic and social structures that may explain the recent conflicts in the Tarai of Nepal*. Bergen, Norway: Chr. Michelsen Institute.
- His Majesty's Government of Nepal (1990). *The Constitution of the Kingdom of Nepal 2047 (1990): English Translation*. Kathmandu: Law Books Management Board, Ministry of Law and Justice, Article 113, Section 3.

- Hoftun, M., Raeper, W. & Whelpton, J. (1999). *People, politics and ideology: Democracy and social change in Nepal*. Kathmandu: Mandala.
- Horowitz, D. (1985). *Ethnic groups in conflict*. Berkeley: University of California Press.
- Hutchinson, J. & Smith, A. (1994) *Nationalism*. New York: Oxford University Press.
- Karki, A. & Seddon, D. (Eds.) (2003) *The people's war in Nepal: Left perspectives*. New Delhi: Adroit Publishers.
- Krämer, K. (1996). *Ethnizität und nationale integration in Nepal: Eine untersuchung zur politisierung der ethnischen gruppen im modernen Nepal*. Stuttgart: Franz Steiner Verlag.
- Lasch, C. (1980). *The culture of narcissism*. London: Abacus.
- Lawoti, M. (2005). *Towards a democratic Nepal: Inclusive political institutions for a multicultural society*. New Delhi: Sage Publications.
- Lawoti, M. (2007). *Contentious politics and democratisation in Nepal*. New Delhi: Sage Publications.
- Lecomte-Tilouine, M. (2004). "Ethnic demands within Maoism: Questions of Magar territorial autonomy, nationality and class." In Hutt, *Himalayan 'people's war': Nepal's maoist rebellion*. London: Hurst and Company.
- Lenin, V. (1968). *National liberation, socialism and imperialism: Selected writings*. New York: International Publishers.
- Malagodi, M. (2013). *Constitutional nationalism and legal exclusion in Nepal (1990–2007)*. Delhi: Oxford University Press.
- Merriam Webster's New World Dictionary of the American Language (2nd Ed.) (1980). Springfield, MA: Simon and Schuster.
- Middleton, T. & Shneiderman, S. (2008). "Reservations, federalism and the politics of recognition in Nepal." *Economic and Political Weekly*, May 10.
- Mill, J.S. (1862). *Considerations on representative government*. New York: Harper and Brothers.
- Ogura, K. (2008). Maoist people's government, 2001–05: The power in wartime. In Gellner and Hachhethu (Eds.) *Local democracy in South Asia: Microprocesses of democratisation in Nepal and its neighbours*. New Delhi: Sage Publications.
- Onta, P. (2006). "The growth of the adivasi janajati movement in Nepal after 1990: The non-political institutional agents." *Studies in Nepali History and Society*, Vol 11, No 2.
- Pfaff-Czarnecka, J. (1997). "Vestiges and visions: Cultural change in the process of nation-building in Nepal." In Gellner, Pfaff-Czarnecka & Whelpton (Eds.), *Nationalism and ethnicity in a Hindu kingdom: The politics of culture in contemporary Nepal*. London: Routledge.
- Regmi, M. C. (1978). *Land tenure and taxation in Nepal*. Kathmandu: Ratna Pustak Bhandar.
- Sagant, P. (1996). *The dozing shaman: The Limbus of eastern Nepal*. Delhi: Oxford University Press.
- Scheff, T. (1994). Emotions and identity: A theory of ethnic nationalism. In Calhoun (Ed.), *Social theory and the politics of identity*. Oxford: Basil Blackwell.
- Sharma, S. (2002). *The ethnic dimension of the maoist insurgency*. Kathmandu.
- Sen, A. (2006). *Identity and violence: The illusion of destiny*. London: Penguin.
- Sennett, R. (1980). *Authority*. New York: Alfred Knopf.
- Srinivas, M. (1952). *Religion and society among the Coorgs of South India*. Oxford: Oxford University Press, 2003.
- Subba, T. (1999). *Politics of culture: A study of three Kirata communities in the eastern Himalayas*. Chennai: Orient Longman Limited.
- Tamang, M. (2006). "Culture, caste and ethnicity in the Maoist movement." *Studies in Nepali History and Society*, Vol 11, No 2.
- Tamang, M. (2008). "Samanta sanghiyata ra bahusanskritik rashtravad." In Khanal, Subedi, and Tamang (Eds.), *Rajya punarsamrachana: rajnitik, arthik ra sanskritik drishtikon*. Kathmandu.
- Touraine, A. (1995). *La formation du sujet* ['The formation of the subject'], in Michel Wieviorka (Ed.), *Penser le sujet*, Paris, Fayard.
- Weber, M. (1922). *Economy and society*. Quoted in Stone (1995) "Race, ethnicity, and the Weberian legacy." *American Behavioral Scientist*, 38: 391.
- Weber, M. (1996). The origins of ethnic groups. In Hutchinson & Smith (Eds.), *Ethnicity*. New York: Oxford University Press.
- Zaretsky, E. (1994). Identity theory, identity politics: Psychoanalysis, Marxism, post structuralism. In Calhoun (Ed.), *Social theory and the politics of identity*. Oxford: Basi Blackwell.

# CHAPTER 5

## STATE RESTRUCTURING IN NEPAL: CONTEXT, RATIONALE AND POSSIBILITIES

- PITAMBER SHARMA





## **INTRODUCTION**

It is generally believed that lack of consensus on the issue of state restructuring was the primary reason for the demise of the first Constituent Assembly on 27 May 2012 without promulgating a new constitution. While this demise, which took place under the most extraordinary circumstances, invites a more detailed exploration of causes, consequences and beneficiaries, both domestic and external, the fact is that another Constituent Assembly election is the only option open to Nepal. In this sense the political process of the country is back to where it began in April 2008, more than five years ago. The only difference is that the new Constituent Assembly, if and when it comes into being, will have a pre-set and, let us hope, better-tailored agenda with state restructuring on the top of its list. However, state restructuring will remain a contentious issue and, if the new political formations are any guide, it is likely that the positions of contending parties will be even more entrenched than the first time around.

This paper revisits the issue of state restructuring and explores the prospects for a balanced approach to the contentious issues of identity and capability/viability, the two principle bases around which state restructuring was proposed to be undertaken. The discourse on the federalisation of Nepal has largely been constructed around ethnicity or identity and it is this construction that has polarised perceptions with respect to state restructuring. The historical context of state restructuring, the congruence of ethnicity and class, and the contemporary spatial picture of ethnicity is discussed to highlight why ethnicity cannot be ignored in Nepal's federalisation. The perceptions of the major political parties on the basis, or criteria, for state restructuring are presented. This is followed by a critical review of the federalisation exercises undertaken during the tenure of the first Constituent Assembly, to basically underline their inadequacies. Finally, an approach to balance identity and viability is suggested with some concluding observations.

## **THE CONTEXT OF STATE RESTRUCTURING**

Nepal is a country forged through migration. Claims of indigeneity are made by population groups notwithstanding that Nepal was peopled largely by the

migration of Mongoloid population groups from the north and the east and Caucasian groups from the west and the south. This migration occurred in spurts over a long period of time. The periodicity of migration differed a great deal and is a matter of conjecture. The Mongoloid migration was comprised of speakers of the Tibeto-Burman language groups. These population groups expanded their reach into the highlands of the Gandaki and Koshi basins. There seems to have been no imperative for further migration by such groups, probably because of their relatively small population size and mode of livelihood, which was based on sedentary agriculture complemented by livestock and hunting. By the time Caucasian migration began there were a number of Mongoloid groups occupying specific territorial niches. However, not all Mongoloid groups that inhabit Nepal today predate the arrival of the Caucasian groups. The identity of hill caste population groups in terms of language and culture was established in the far western hills by the 12–14<sup>th</sup> century, after which these groups gradually began to expand eastwards, probably in search of new agricultural land. This eastward migration of Hinduised groups, which remained spontaneous for the most part, was patronised by the state after the Gorkha conquest in the 18<sup>th</sup> Century.

The migration of Hinduised groups from the far and mid western hills to the east was instrumental in populating the low-lying areas and river valleys where they practised sedentary agriculture based on paddy. As population movement continued, the Mongoloid groups, collectively referred to today as janajiti, and the Caucasoid Hindu caste groups occupied distinctly different ecological niches by virtue of their different livelihood strategies and systems of production. Generalised areas occupied by major mongoloid janajiti groups can be recognised even today. The Limbus, for example, occupied the hills east of the Arun river, known well up to the 1960s as Pallo Kirat. The Rais inhabited the Koshi watershed, mainly west of the Arun river in what was known as Majh Kirat. The Tamangs occupied the highlands surrounding the Kathmandu valley comprising the western part of the Koshi watershed and the eastern segment of the Gandaki watershed. The Gurungs occupied the highlands from the Budhi Gandaki in the east to the Kali Gandaki in the west. The Magars occupied a wide swath of territory from the Gandaki to the Bheri in the west. The Newars championed a distinctive agropolitan civilisation in the Kathmandu valley. Smaller groups, such as the Sherpa, who were relatively later migrants to Nepal, occupied specific niche areas in the northern highlands such as the Khumbu. There were also areas of overlap such as between the Limbus and Rais and the Rais and Tamangs in the Koshi basin, and the Magars and Gurungs in the Gandaki basin.

As the stream of migration patronised by the state gathered momentum in the hills the competition for resources, particularly land, became more and more contested. This contest sharpened the political, economic and cultural divide and drew the identity of each group into sharp relief, as there was little economic and cultural interaction among them. This generalised scenario played out

differently in different areas and regions in the hills. In the Kathmandu valley, which was peopled mostly by the Newars with an incipient but unique urban civilisation based on highly productive agriculture and long-distance entrépot trade, was naturally the focus of political and military conquest. The conquest of the valley in 1768 by Prithvi Narayan Shah set the stage for the gradual imposition of the *parbatiya* (hill) ethos and the Khas (now Nepali) language on the Newars. The cultural fabric of the Newars, by virtue of population concentration and linkages with the production regime, remained strong, but many of the elements of their culture that derived from non-Hindu sources gradually lost the inspired patronage of the state. The Newars were alienated from the state, as the new rulers naturally manipulated power to serve their own cultural, economic and political interests.

The genesis of Nepal's federal project can be traced to state-sponsored differentiation, discrimination and inequality among social and regional groups, particularly after the conquest of the Kathmandu valley, which was the beginning of the unification of Nepal. The motivations for the unification of Nepal by Prithvi Narayan Shah were many, but two inter-related facts stand out: the creation of *asil Hindustan* (a true land of the Hindus) and, related to that purpose, the creation of a strong Himalayan defence capable of withstanding the onslaught and expansion of British power from India. With unmatched fortitude, political and military prowess, cunning and, undoubtedly, deceit, Prithvi Narayan Shah led the foundations of a highly-centralised Hindu, monarchic, exclusionary, unitary state. It was an attempt at political unification and assimilation in a territory with diverse ethnic groups, each with their own social, cultural and religious traditions.

According to his 'divine counsel', Prithvi Narayan Shah envisioned Nepal as a garden of 4 *varna* (castes) and 36 *jats* (sub-castes). It was, of course, a euphemism; more an expression of his socio-political drive to weld the country together rather than the all-inclusive magnanimity of a Hindu monarch. The state's patronage was decidedly biased in favour of a selected class of high caste Hindus. The leaders of many ethnic organisations and political parties today portray Prithvi Narayan Shah as an imperialist, a ruthless coloniser who imposed his will on a diverse social, economic and cultural landscape and a despot who denied cultural and human rights to Nepal's indigenous population. However, as a product of his time, Prithvi Narayan Shah was no different from his contemporaries. Had he, or any of his kind, not succeeded in laying the foundations of modern Nepal, in all likelihood the small, bickering principalities and fiefdoms that comprised Nepal at that time would have been subsumed within the realm of British India. It is true that political unification under the Shah kings did not lead to the political and socioeconomic integration of Nepal's diverse population groups, but that was neither their intent nor their compulsion.

Nepal's ethnic question, that is to say the problem arising from the differential status and privileges enjoyed by different social groups and categories with respect to their socio-cultural, economic, political and demographic rights, has been in the making for over two centuries. The Hindu caste system was really the blatant institutionalisation of social differentiation and discrimination to serve the interests of the higher castes, who were also the ruling class. While the caste system was in vogue under the Hindu chieftains in different principalities and fiefdoms even before unification, Jang Bahadur Rana, the founder of the Rana oligarchy, codified it in the national legal code (the Muluki Ain) in 1854. This legal code distinguished and graded caste/ethnic groups based on the ritual notion of 'pure' and 'impure' into five status categories: high caste *tagadhari* (wearers of sacred thread), the enslavable *matwali* (consumers of alcohol), the non-enslavable *matwali*, unclean but touchable, and the unclean or untouchable. The non-Hindu caste groups were included under the category of *matwali* but clean.

The Muluki Ain served two critical purposes for the ruling elite: It became the instrument by which to ensure that the socio-cultural and, therefore, political and economic supremacy of the *tagadhari* remained entrenched. It also created the basis and context for the acceptance and internalisation of non-Hindu groups into an all-encompassing Hindu 'world view'. This was the most comprehensive and explicit attempt at bringing all ethnic, cultural and linguistic groups in Nepal within a single social universe (Hoefer, 2004) and imposing a Hindu 'social order' on Nepali society. These hierarchies remain very much alive in contemporary Nepal despite the adoption of a new Muluki Ain in 1963 and successive constitutions that have guaranteed non-discrimination on the grounds of caste, creed, race, religion or sex.

Differentiation and discrimination, and the resulting inequality based on geographic regions and territories, followed a different trajectory. The unification of Nepal was basically the unification of hill-based principalities and fiefdoms, both in the east and in the west. The Tarai region had lost any semblance of autonomous rule even before it became part of unified Nepal. Geographical and cultural differences gave the Tarai, referred to as the Madhes by hill people, a distinct character. After the Gorkha conquest, the eastern Tarai was the largest source of revenue for the Government of Nepal. There were areas of significant settlement and population, but, by and large, the Tarai had an extremely sparse population. Throughout the 19<sup>th</sup> Century the state policy was to encourage settlement in the Tarai to exploit its productive potential and enrich the state coffers. Immigration from India was encouraged as the hill folk remained reluctant to inhabit the Tarai on account of its inhospitable climate and endemic malaria. Other than the indigenous population groups, such as the Tharus, and the caste groups that inhabited the old, established settlements, a large section of the eastern and central Tarai was populated by immigrants from across the border well up to the first half of the 20<sup>th</sup> Century (Regmi, 1972). Today,

immigration remains largely invisible in the Tarai as the immigrant groups blend easily into the cultural landscape. Unlike the rest of the Tarai, the Inner Tarai, or *Bhitri Madhes*, enclosed by the Siwalik range in the south and the Mahabharat range in the north, was sparsely inhabited by indigenous groups and did not experience immigration from across the border. The *Bhitri Madhes* (Udaypur and Sindhuli valleys, Chitwan, Dang and Surkhet) are distinct demographic and cultural entities, quite different from the Tarai even today.

Ruled from Kathmandu by hill men, throughout history the Tarai was considered a frontier, almost a colonial possession of the Nepali state. Hill migration to the Tarai accelerated after the eradication of malaria in the 1960s. This large-scale inflow of hill folk patronised by the state further exacerbated the divide between hill migrants and the Tarai population groups, although the newcomers did not encroach upon established settlements. Meanwhile, the economic clout of the Tarai increased as a result of steady population growth, due largely to hill migration, the realisation of its productive potential and investments made by the state to improve the access, as well as agricultural and industrial production, particularly since the 1970s. The state, in contrast, continued to thwart the political, cultural and linguistic aspirations of the Madhesi people. Madhesi loyalty to the Nepali state, which was controlled by the hill elite, was suspect. The sense of alienation from the state resulted in sporadic political movements in the 1950s. The potency of this alienation was noted by Gaige as early as the 1970s (Gaige, 1975). The Madhesi movement of 2007, which challenged and confronted the state, signalled a definitive and, for the traditional holders of power, a problematic departure.

However, the Tarai is far from a homogenous region in socioeconomic terms; it remains one of the most socially-differentiated regions in Nepal. People of non-hill origin fall into three distinct groups: Tarai janajiti, Tarai caste groups and Muslims. There are sharp differences between the Tarai janajitis and Tarai caste groups, so much so that the Tharu groups refuse to call themselves Madhesis. The Muslim identity is distinct due to religion. Culturally, five linguistic groups dominate: Maithili, Bajjika, Bhojpuri, Abadhi and Tharu. There is no pan-Madhesi identity in a cultural, religious or linguistic sense. There are extreme inequalities in social and economic development indicators among the different social groups. The common denominator that binds the Madhesi population together as a group is the sense of discrimination, inequality and exclusionary treatment at the hands of the Nepali state.

Ironically, the Karnali region, which straddles the mid and far western hills and is historically the cradle of hill caste groups, particularly the Chhetris and Bahuns, has not fared any better in terms of attention from the state. The increasing political, economic and strategic clout of the Kathmandu valley after the unification of Nepal cast a shadow on the Karnali. It was no longer a region inspiring civilisations, such as the ones it witnessed from the 12<sup>th</sup> to 14<sup>th</sup>

centuries. The interest of a basically predatory state naturally waned and the Karnali was forced to languish in isolation, poverty and neglect. Remoteness and the stranglehold of feudalism, patronised by the political class, contributed not only to the underdevelopment of resources, but also to an increasing dependency (Adhikari, 2008). Historic north-south economic and trade linkages with a reach beyond the borders to western Tibet – which were once the basis of an evolving civilisation – have long since been wiped away and the Karnali is a region in total distress (Bishop, 1990).

At the extreme receiving-end of discrimination, marginalisation and dehumanising exploitation are the Dalits, the so-called ‘untouchable’ caste group, who occupy the lowest rung of the Hindu caste system. They are invariably asset-poor, socially ostracised, and have very little control over, or access to, resources. Their condition is rendered unique by the fact that they do not possess a distinctive language and do not have a defined territorial presence. While the janajitis claim identity, for the Dalits identity has been a bane.

The above narrative provides an overview of the salient cultural, economic and political fissures within the Nepali state, even as it consolidated itself, well up to the middle of the 20<sup>th</sup> Century. Development strategies pursued during the Panchayat period (1960–1990) basically supported the status quo and continued the policy of cultural and political assimilation through a highly centralised process of governance. Nepali nationalism was not the product of a multicultural society, which Nepal is, but a reflection of the culture and ethos patronised by the state. The state played no role in ensuring the realisation of region-specific aspirations and potential, or in preserving the continuity of languages and cultures. On the contrary, there was a concerted effort to homogenise cultural diversity into a single *parbatiya* (hill Bahun-Chhetri) culture and language. The form of regional, social, economic and political inequalities changed somewhat over time, but their substance remained essentially the same. The homogenisation of culture was synonymous with national unity in Nepal. Co-option was construed as representation. The regional aspirations of population groups in the Tarai, the Karnali or Kathmandu were frustrated. Political innovations and policy initiatives were reduced to slogans and clichés. Land reform, a regional approach to development, decentralisation, basic needs and integrated rural development, among other things, were inaugurated as development strategies in the 1960s, 1970s and 1980s with varying donor support, but made no substantive dent on the nature of intra-state social, economic and political relationships. It was in the Fourth Plan (1970–75) that the country was divided into first four, and later five, development regions for the purpose of reducing regional inequality, fostering a planned process of regional development based on comparative advantages and integrating the Tarai and hill economies. The development regions, however, never received a political commitment to restructure the country’s spatial economy. Indeed the idea of regional development was based on the imperative

of structural change, meaningful decentralisation, and the devolution of political and economic power, an idea that was naturally abhorred by the political class under the Panchayat regime.

The legacy of highly-centralised governance during the Panchayat period continued under the successive post-1990 governments. The social, economic and political policies pursued by the state were not aimed at addressing the problematic legacies of the nation's history. Instead, the neo-liberal economic policies that had made inroads during the last decade of the Panchayat regime were consolidated with renewed vigour. The result was that the roots of inequality, discrimination and marginalisation were further strengthened.

### **ETHNICITY, CASTE AND CLASS**

The systematic bias and deep, entrenched socio-political and structural roots of inequality and discrimination linked to ethnicity have been highlighted and analysed by numerous scholars (Bhattachan, 1995; Nepal South Asia Centre, 1998; Neupane, 2000; Lawoti, 2005; Bennet, 2005; Gurung, 2006; Gellner, 2007; UNDP, 2009; Lawoti & Gunaratne, 2010). Nepali censuses ignored the ethnic dimension in data collection and analysis until 1991. Before 1991, the ethnicity of the population could only be approximated by language. In a changing migration context and with state patronage of the Nepali language, this was not a satisfactory approximation. The censuses and Nepal Living Standard Surveys conducted since 1991 have highlighted a very close association between ethnicity/caste and indicators of development. Available Nepal Living Standard Survey data show a high incidence of poverty, high rates of illiteracy and low income levels among Dalits and Muslims, in particular, and janajiti population groups, in general (CBS, 2011). Likewise, population groups such as Bahuns, Chhetris and Newars make up an overwhelmingly large proportion of state functionaries at the middle and high levels in the civil and judicial administration. This bias is a reflection of the uneven playing field, a product of centuries of inequality, discrimination and alienation, and a function of the structural biases inherent in Nepali society.

To a certain extent, and historically, there is a broadly perceptible congruence between ethnicity, caste and class in Nepali society. Socioeconomic classes, following the Marxist approach, are defined and structured by relations concerning work and labour and relationships to the means of production, which determine the source of income. In the classical formulation, landlords derived income from renting land without being engaged in labour. Capitalists control the means of production, provide employment for wages and derive income from the profits from investment. The working class or proletariat derive income by selling their labour for wages. Varying relationships with labour and the means of production result in classes and sub-classes. The social system governing

production and relationships of production determine the formation of classes in society and these classes change with changes in the system of production triggered by forces, both internal and external. Class is, therefore, a very dynamic concept.

Ethnicity/caste in contrast is a deterministic/fatalistic concept determined by birth and, therefore, beyond ones' control. The Hindu caste system influenced livelihood strategies and sources of income, as well as access to, and control over, means of production and the ensuing relations of production (Mukherjee, 1999). This was a definite outcome of an ascriptive social division of labour based on caste. It is no coincidence that the landlords, aristocrats, big traders and money lenders came from the 'high' castes, while the marginal farmers, the landless, and those who sold their labour and skills for wages invariably came from the 'low' castes. The congruence between caste and class was a direct result of a social system of production that was explicitly caste-based. It is true that not all of the high caste people belonged to the 'upper class', but the door to enter the upper class was relatively wide open to the higher castes (and relatively easy to enter for those with a drive) than to those from the 'lower' castes. For the Dalits, the door, for all practical purposes, was tightly shut.

Among the janajiti groups there was no strict hierarchy based on purity. There were subtle differences, but these were based on lineage rather than purity. The means and methods of production were not sophisticated or developed. Common ownership of land necessitated communal self-sufficiency in production. To provide for a growing population it was necessary to maintain a level of social and economic influence and bring surrounding communities under control. As a result, periodic conflicts were common. With very few exceptions, the leadership was mostly ascribed and based on lineage. Forms of feudal exploitation varied and were expressed in different ways.

Regmi (1977) describes three social classes in existence around the time of the unification of Nepal. Political and military leadership was with the Bahun-Chhetri castes, who were also the major landowners. Bahun-Chhetris had the right to the produce and revenue from land granted by the state on various accounts. While janajitis had their own areas of traditional occupancy and tenurial forms, they did not benefit from the patronage of the state. Some Magars and Gurungs from among the janajitis had been included in the middle and lower rungs of the political and military structure. Rais and Limbus did not participate in the campaign for Nepal's unification. The rise in the Bahun-Chhetri population resulted in their increased participation in the middle and lower rungs of the military at the expense of the Mongoloid groups. At the lowest rung of the class ladder were the Dalit occupational groups. Of the three social classes pertaining then, the Dalits had few assets and made a living selling their labour and skills. This was not the case with the janajitis, who had communal assets and made their



livelihood independent of the landlord class. In later times, some janajiti groups were ascribed an inferior status and bound by various obligatory relationships to the state. The *jhara* system of compulsory labour to the state was mostly obligatory on these groups.

The Newars in the Kathmandu valley observed a Hindu caste system that categorised social groups by their occupation, and the nature of the occupation often determined the source of income and class character. The Bahun-Chhetris as a caste were distributed across the class spectrum (from landlords to tenants), but in terms of class mobility the definite advantage lay with the Bahun-Chhetris. However, conditions for this group also varied spatially. Even in remote, poor regions such as the mid and the far western hills, caste had undoubted social significance in terms of status and opportunities for social and economic mobility, although it made little difference in terms of the sources of livelihood available.

This congruence between ethnicity, caste and class remained largely intact with reference to certain social groups until recently. However, a number of processes have historically been in motion affecting this congruence. The first was the recruitment of janajiti groups by the British Indian Army, which gathered momentum in the late 19<sup>th</sup> Century. This influenced the formation of classes within these groups as it affected differentiation on the basis of source of income and production relations.

The second process was hill-Tarai migration. As migration from the hills to the Tarai picked up in the 1960s, it gradually attracted other hill castes and janajiti groups, although the first groups to take advantage of the opportunity were the Bahun-Chhetris. Most hill subsistence farmers became surplus producers, in the process utilising wage labour, and production relations underwent a definite change. There were also *sukumbasis* (squatters), who encroached and settled on public land, and who were made up of all castes and janajitis.

The third and the most important process dismantling the caste-class congruence was the rise in level of urbanisation. With urbanisation, rose awareness and literacy. Urbanisation also opened up opportunities in the non-agricultural, services, trade, transport, and construction and informal sectors. As capitalist relations began to take hold, the old ascriptive caste barriers begin to crack. In the last three or four decades, the classes within the janajitis who have been part of the process of migration and urbanisation have been in flux. Migrants from rural to urban areas whose main source of income is the non-agricultural sector, the beneficiaries of Gorkha recruitment in British and Indian armies (such as Gurungs, Magars, Rais and Limbus), and those who have benefited from the growth in trekking tourism (such as Sherpas) are all part of a growing urban middle class comparable to their Bahun and Chhetri counterparts.

The rise in migration abroad over the last two decades has increasingly brought within its fold all caste groups, in fact anyone who can mobilise resources to meet the cost of migration. Remittances have influenced the structure of asset ownership, access to resources, migration to market towns and urban areas, and elements of the class structure in rural Nepal. Traditional patron-client relations are fast changing. Market-oriented competition and conflict has introduced novel elements into class, as well as ethnic mobilisation. However, the Dalits, the lowest in the caste hierarchy, still constitute the most marginalised and disadvantaged class. Hence, it seems that the determinism of caste remains an obstinate challenge to the dynamism of class.

## ETHNICITY AND IDENTITY

In the literature, the terms 'caste' and 'ethnicity' are often used interchangeably in Nepal. The Nepali words *jat* and *jati* have been increasingly used in recent years to denote caste under the Hindu *varna* system and by non-Hindu ethnic groups (Gurung 2003, 2006). The Madhes is a geographical region, but the term has also been used and interpreted in ethnic terms to identify a category of communities belonging to the Madhes region, irrespective of caste and on the basis of shared unequal treatment and discrimination by the state. Like *jati*, Madhesi denotes a group identity.

The terms 'adibasi', 'janajiti' and 'Dalit' are also in vogue. Adibasi, which means original inhabitants in Sanskrit, is widely used in India to denote tribal groups. Janajiti means native inhabitants. Dalit is an imported term that refers to communities considered untouchable under Hindu orthodoxy. In Nepal these terms have received wide currency on account of government committees and commissions set up to address the issues of these groups mostly after 1990. The National Foundation for Development of Indigenous Nationalities Act 2002 defined adibasi-janajiti as ethnic communities "with their own mother tongue, traditional customs, distinct cultural identity, social structure and written or oral history of their own". On that basis, the Act recognises 59 scheduled groups as adibasi-janajiti. In 2008, the Government of Nepal set up a high-level task force to revise and improve upon the earlier schedule (HLTE, 2010). The report classifies 81 communities as adibasi-janajiti, of which 11 have been identified as endangered, 51 as marginalised, 17 as excluded from opportunities and 2 as having access to opportunities. This classification also regards 'self identification' as a criteria. The Government has not yet made any decision with respect to the report of the task force.

Despite the presumption that they are the earliest inhabitants, not all adibasi-janajiti groups have been in Nepal longer than non-adibasi-janajiti groups. Sherpas in the Khumbu date back to only 1533, according to Oppitz (1973). Bahuns and Chhetris appeared on the scene much earlier.

The term *adibasi-janajiti* does not have a universally-accepted definition, although its increasing use gives the contrary impression. Even the Indigenous and Tribal People's Convention ILO 169 does not define indigenous and tribal people, although it identifies elements that make up these population groups. In Nepal, the construction of the academic concept of *adibasi-janajiti* has been inordinately influenced by the colonial history of the Americas, where the migration and expansion of west Europeans had a devastating impact on the population, livelihood and ways of life of the aboriginal population. In fact, much of the construction of the *adibasi-janajiti* identity derives from the work of western anthropologists whose efforts have been to highlight the distinctive ethnology of particular communities focusing on their uniqueness, rather than on their commonalities, and on areas of conflict, rather than areas of harmony and interaction. The rights of indigenous populations championed by the International Labour Organisation also reflect the indigenous experience of the west European colonisation of the Americas and the ensuing plunder of natural resources and decimation of cultures. As our knowledge of the internal migration and occupancy of Nepal's population groups is enhanced, the perspective on *adibasi-janajiti* based on territorial occupancy is likely to be reviewed and revised.

At present, the *adibasi-janajiti* concept seems to lay emphasis on three factors: (a) historical continuity of settlement (*that-thalo* in Nepali) and association with a specific geographical area; (b) a common historic system of economic production distinctly different from that of the mainstream; and (c) political, economic, social, and cultural exclusion and discrimination with respect to language, culture and so forth, including the hegemony of a different language and culture. In all these aspects it is the distinction between the mainstream (meaning upper caste Hindu groups) and the *adibasi-janajiti* groups that has been the main focus of attention in Nepal.

Considerable confusion prevails over what constitutes a common historic system of economic production. It is generally presumed that this system was based on communal ownership of resources and was relatively egalitarian. However, the *kipat* system of land tenure, which is often cited as an example of this production system, constituted a very tiny fraction (4% in 1952) of Nepal's land tenure system. The *kipat* system was prevalent among Mongoloid groups such as the Limbus, Rais, Sunuwars, Danuwars and Tamangs. Moreover, it was only the communal character of land ownership based on customary law that distinguished the *kipat* system from other systems. This system did not entail the cultivation, production and distribution of produce (Regmi, 1977). It also contained elements of an obligatory feudal system. Furthermore, production systems and the social relations of production differed as much between ethnic groups as according to the spatial context of production and settlements. Some *janajiti* groups, such as the Newars, display a whole system of variations in terms of internal differentiation and forms of communal ownership.

The federalisation debate has put the spotlight on ethnicity as the preeminent marker of identity. Ethnic identity is a powerful concept because of its potent emotional appeal based on a social and cultural bond and sense of oneness. Three approaches to ethnicity are found in the literature. The primordialist approach regards ethnic identity as something socio-biological, natural, given and fixed. Primordial elements, such as race, descent and lineage, are emphasised to reinforce and consolidate internal cohesion and solidarity. Indigeneity is seen as a particular and unique quality, unchanging and distinct irrespective of changes in the world around. The privilege of indigeneity is restricted to those who happen to be part of that community. Indigeneity confers a different world view, in which distinctions from the 'other' are sharply drawn. In this sense, the concept of ethnic identity is outward-looking – it tends to minimise the diversity, discrimination, inequality and exploitation within the group and maximise its distinction from other groups. Ethnic identity is class-blind; it has the potential to address aspects of class conflict, inequality and exploitation only to the extent that there is congruence between ethnicity and class. However, this congruence begins to dissipate as externally-induced or internally-driven changes occur in the system and to the relations of production. The major critique of the determinism inherent in the primordialist approach is that ethnic identities are not universal, all-time constructs, but are as much subject to change, modification, renewal, renegotiation and reconstruction as the socioeconomic, spatial and temporal context in which ethnic communities make a living and interact. Moreover, ethnic identities in terms of the consciousness that they entail may be at different levels for different groups depending upon their historical experience.

In contrast, the instrumentalist approach views ethnicity as an instrument to achieve particular political, economic, social, cultural and even psychological ends. The establishment of ethnic identity becomes a means to address issues related to the development of ethnic populations, promotion of language, culture and traditions, participation in the process of governance and decision-making, and, in that sense, achievement of not just legal, but fully-fledged, citizenship.

There is still a third approach – the constructivist approach – which regards the nature of ethnicity as something socially constructed. The constructivist approach regards ethnicity as neither immutable and unchangeable nor completely open and ever changeable. Ethnicity is essentially a social construct and affected by the forces of contradiction and conflict that are operating in society. These forces may relate to competition over resources and livelihoods and serve as a vehicle for the mobilisation of human and other resources for specific purposes. The emphasis on primordial elements or indigeneity itself may be a social construct and a strategy to reinforce perceived 'ethnic-ness', on the one hand, and to achieve certain social, cultural, economic and political goals, on the other. Ethnicity then becomes an instrument for creating social capital among communities that want to define their identity and uniqueness and on that basis negotiate their social, economic and political space. Ethnic consciousness may, therefore, be created

and recreated and there may be ethnicities in the making to serve certain ends all the time.

The federalisation debate in Nepal has shown that these approaches need not be exclusively expressed. A primordialist approach could easily meander into an instrumentalist or a social constructivist position, and so on, as an ethnic mobilisation strategy.

Can, or should ethnicity be regarded as the sole or most significant indicator of identity? It is this issue that has elicited the most sharply-divided response in the course of the federalisation debate in Nepal.

Those who regard ethnicity as the most distinctive element in Nepal's federalisation do so for several reasons. First, it is presumed that federalisation paves the way for realizing the aspirations of ethnic and regional population groups. The two fundamental tenets of federalisation – self-rule and shared-rule – create conditions for breaking the hegemony of the Hill Hindu elites, namely the Bahun-Chhetris over Nepal's power structure (Lawoti, 2005). Under the federal framework territorially concentrated ethnic groups can have a better scope for the exercise of autonomy. It is also argued that federalisation on an ethnic basis can help minimise inter-ethnic conflict and allow for a more democratic space for the accommodation of ethnic groups.

Second, it is argued that federalisation can be instrumental in dealing with the historic and contemporary inequalities and discrimination visited upon marginalised and disadvantaged communities and groups by a decidedly partisan state. This can be redressed through reparations for historic omissions and recognition of ethnic claims on territories and resources. The idea of self-determination by ethnic groups and communities under the various international instruments to which Nepal is signatory (such as ILO Convention 169 and United Nation Declaration on the Rights of Indigenous People) is basically an acceptance of group rights in addition to individual rights (Bhattachan, 2012).<sup>1</sup> This is based on the notion that the recognition of certain collective rights is consistent with liberal democratic principles (Kymlica, 1995). On this premise, ethnicity-based federalism is regarded as more egalitarian and a fairer political system for disadvantaged and marginalised ethnic communities and groups than other forms of federalism. This particular argument is often highlighted for its universal appeal by virtue of the binding international conventions.

The third argument is that Nepal is multi-racial, multi-religious, multi-lingual and multi-cultural. However, this diversity is not reflected in the socio-cultural and political reality of Nepal or in its governing structure, institutions and systems of representation. Federalisation can better reflect Nepal's inherent socio-cultural diversity and project multiculturalism as the cornerstone of Nepali nationalism. Multiculturalism is based on the theoretical and philosophical premise that different ethnic, linguistic, cultural and religious groups can coexist

in harmony on the basis of equality. Ethnicity-based federalism can provide the basis for the practice of multiculturalism. In Nepal, cultural diversity has been invoked to appease marginalised cultural groups, while the state continues to patronise the mainstream cultural values and ethos. Ethnicity-based federalisation has the potential to alter this context. Multiculturalism is closely associated with the politics of recognition, in which the emphasis is not on withering away differences but on nurturing institutions that promote a healthy respect for differences. Ethnicities are, in essence, the bearers of culture. Cultural federations, based on ethnicities can therefore be the only basis for fulfilling the aspirations of marginalised groups. Federalisation on the basis of culture has also been presented as a 'humanist' approach in contrast to the 'mechanistic approach' of territorial federation based on considerations of physical resources, infrastructure, distance, terrain and so forth. What counts, the argument goes, is the aspirations for cultural autonomy of marginalised people (Sharma, 2007).

Multiculturalism demands a different perspective on the construction of citizenship. Nepal's ethnic question is a product of the pursuance of the west European idea of the nation-state, which takes cultural homogeneity as an ideal. The relentless pursuit of cultural homogeneity has been counter-productive and hostile to cultural pluralism in Nepal (Tamang, 2008). Also, the values cultural pluralism foster the "dignified coexistence of plurality of cultures" (Oommen, 2012).

At the other end of the scale, and in contrast to the above, is the position that regards ethnicity and ethnic identity as irrelevant to federalisation (best exemplified by Mishra, 2012). Primordiality, claimed by ethnic activists as 'permanent' and 'unchanging', is seen as a product of the essentialist account of western academics. Prevailing definitions of ethnic groups as "comprised of some unique essence, owning a specific and relatively fixed and unchanging set of values, beliefs, and rituals, and identified by self and others as belonging to a particular group" (Mishra, 2012: 64) are seen as misrepresenting reality and, therefore, deeply unsatisfactory. Attempts to territorialise ethnicity at a time when traditional hierarchies are weakening are seen as counterproductive and almost a return to the Muluki Ain of 1854, which attempted to naturalise, primordialise and divinise ethnicity by creating a horizontally-differentiated and hierarchical body of subjects and citizens. Under this position the legitimacy of the claim of privileged citizenship for indigenous groups is redundant.

Mishra locates the reasons for the present ethnic upsurge on specific transitions in global and national structures and on factors, both internal and external. The continuing hold of ascriptive caste-based hierarchies; ongoing exclusion of Dalits, hill ethnic groups and Madhesi; widening gap in social and economic development outcomes for different social groups; and aspirations for greater equality, equity and material reward held by the new generation of marginalised groups are identified as major internal reasons for the ethnic upsurge. This

upsurge is also inspired by the global ethnic upsurge process that started in the 1970s and 1980s, and the growth of indigeneity as a powerful strategic tool, backed by international instruments spearheaded by the United Nations. Mishra suspects that donors' support and funding for multiculturalism and their tendency to localise, ethnicise and moralise has been no less significant in this ethnic upsurge.

The perspective articulated by Mishra views the ethnic upsurge as a struggle waged by a generation that is literate and educated, claiming of democratic rights and citizenship, pushed from family farms and striving to make a living in the highly competitive urban, non-agricultural sector with a sense of seizing the future. Ethnic identity is about this contest, a strategy to confront the future on better terms. At heart, ethnic struggle is not about ethnically platformed federalisation, it is about seeking new livelihood in a new Nepal. Ethnicity or indigeneity is a social construct, a social, historical product with no permanence. And, like all social constructions, it is a fluid, in-the-making, human endeavour. There is therefore no conceptual basis for ethnicity based federalisation. State policies for affirmative action and positive discrimination can and should suffice in taking care of the inequalities and discrimination suffered by marginalised and disadvantaged communities and ethnic groups. State policies should undermine the ascriptive values prevalent in society, even as liberal capitalism promotes the democratic ethos across the social spectrum. Ethnic federalisation is, therefore, unacceptable and divisive with the potential to sow the seeds of civil conflict. These arguments not only critique ethnicity-based federalisation, but appear critical of the whole idea of federalism itself.

The arguments that regard ethnicity as the preeminent form of identity and the basis for federalisation generally harp on the political and cultural aspects of ethnicity. There is also an assertion of the primacy of the social origin and cultural capital of certain population groups. Cultural productions and symbolic systems are believed to play an essential role in the reproduction of social structures of domination, which defines the position of different groups in the social space (Bourdieu, 1994).

Those who argue for ethnic federalism question the political and cultural construction of Nepal with one preeminent objective: to loosen the hegemony of the Bahun-Chhetri groups and create, if possible, ethnic areas or enclaves that restructure political power and renegotiate the basis of power sharing. There seems to be a deep-rooted belief that inequality and discrimination, which originated in differentiations based on ethnicity, can only be addressed through ethnicity-inspired federalisation; *that ethnic problems can only have ethnic solutions*. Ethnicity by itself is regarded as a representation of "ethnic consciousness", rather than a product of it (Shneiderman, 2012). Ethnic groups are seen as comprised of neat, a-historic and homogenous categories in easy

contrast with one another, with no intra-group contradictions or differentiation based on economic and livelihood criteria. The belief that Nepal, minus the hegemony of the Bahun-Chhetris, would be a paradise misses the point that nearly two million people, mostly janajitis, Madhesis and Dalits have to be lifted out of poverty; new opportunities for skill enhancement, employment and income have to be created; services in education, health have to be strengthened; and natural resources have to be optimally harnessed – and all this requires a resource-based development strategy *in addition* to recognition of ethnicity-specific issues. The question may not be whether or not the concern for ethnic identity is legitimate, but whether the concern for development, of which identity is obviously a part, can afford to ignore it.

Ethnicity is a constructed category which itself is in a phase of restructuring in tandem with the restructuring of the Nepali state (Shneiderman, 2012). It is because of its ‘constructed-ness’ that ethnicity has been mobilised as a resource in transforming the state and in ensuring the participation of marginalised groups at the national level. History has undoubtedly shaped the current forms of ethnic production in Nepal. The ethnic upsurge is certainly about the contest for a new livelihood in a new Nepal. The commoditisation of ethnicity as property to ‘brand’ and ‘sell’ is also an acknowledgement of the limited range of options for the politico-economic survival of a number of marginalised groups in the contemporary neo-liberal context (Shneiderman, 2012). International development actors have used this formulation of ethnic identity as a quantifiable resource to push the agenda of mainstreaming the marginalised and have learned, to their dismay, that it can be hijacked for purposes other than what was originally intended. However, this does not make ethnicity totally irrelevant to Nepal’s federalisation, nor does it mean that the ethnic question is a detraction from the development agenda. Ethnicities are certainly fluid, but this does not make the ethnic question any less important. Ethnicity may not be as significant a factor in social mobility in the emerging urban setting, but it certainly makes a difference in terms of the opportunities it opens up. An asset-poor hill upper caste person may face the same problems in relation to livelihood as an asset-poor janajiti, but the scope for upward mobility for a hill upper caste is certainly greater than for a janajiti. That is the reality in Nepal and this reality has to be confronted by recognising it for what it is. However, “to recognise both the constructed nature of ethnicity and the rights of those who possess ethnic consciousness” is a critical and “devilishly difficult” task (Shneiderman, 2012: 236). The missing element in the current debate on ethnicity as the basis of federalism in Nepal is in formulating the substantive content of ethnic consciousness. The challenge in the case of Nepal may be a creative form of federalism that recognises the power of ethnicity without reifying it as a timeless category” (Shneiderman, 2012: 235).

The social, cultural, political and economic dimensions of the question of ethnic identity are no less important and cannot be easily dismissed, despite the constructed but changing nature of ethnicity. The formal/informal space



accorded to different ethnic groups in social discourse, the concepts and ideas developed about such groups, and the impact of these concepts in the day-to-day interaction and relations between different groups relate to the social dimension. The question of ethnic identity relates to the deconstruction of social concepts on ethnic groups and the role that the state should play in ending social deprivation and exploitation. The cultural dimension of ethnicity includes the recognition and promotion of ethnic-specific languages and cultural features. Such identity can enhance awareness regarding the cultural achievements of particular groups, elucidate cultural diversity and promote deference for coexistence.

The political dimension of ethnic identity subsumes the questions and methods of political representation, ethnic autonomy and self-determination, participation and dialogue in policy formulation, prioritisation of development issues, and proportionate distribution of development results. The economic dimension of ethnic identity relates to opportunities in employment and income generation, access to and control over resources and economic activities, and economic exclusion resulting from ethnic identity. Ethnic and regional disparities in development indicators call for strategies to end the status quo. The question is: can federalisation be part of such a strategy?

### **CAN ETHNICITY BE IGNORED IN NEPAL'S FEDERALISATION?**

So far, this paper has presented two essentially opposing views on federalisation in Nepal. The first looks at federalisation basically as addressing way to address the ethnic issue. In this view, the holding together of different ethnic groups within the Nepali union is regarded as the prime purpose of federalisation. The second view considers ethnicity as irrelevant to federalisation because the idea of ethnic purity is a myth and ethnicity as a social construction is fluid, mutable and influenced by national, regional and global systems. According to this view, the nature of the state and relations between the state and its citizens are considered more critical issues than the inordinate primacy given to ethnicity in federalisation.

Federations are brought about in two ways, either through the aggregation of independent states or the disaggregation of a unitary state (i.e., through a devolutionary process leading to the federalisation of a once unitary political system). The first is a process of 'coming together', the second of 'holding together'. However, holding together imparts a sense of an otherwise impending break-up. The federalisation exercise in Nepal may be described as 'devolutionary federalism' in so far as it involves some form of democratic bargaining concerning the devolution of political and economic power to federal units and below.

Ethnicity in the federalisation process cannot be considered in the abstract. If ethnicity binds communities with a 'we' feeling, gives members the sense of

belonging to a group, even if in a temporal sense, and mobilises and inspires them to collective action in social, cultural and political spheres, then the spatial distribution and coherence of such communities is a matter of considerable significance in the federalisation process.

The 2001 Census identified 100 ethnic caste groups in Nepal (CBS, 2003).<sup>2</sup> Of these, six ethnic caste groups, including Chhetri, Bahun, Magar, Tharu, Tamang and Newar, had a population of more than a million. A total of 11 ethnic caste groups (71% of the total population) had a population of more than half a million; 31 groups had population of more than 100,000, and 69 groups had a population of less than 100,000. Notably, there were 18 ethnic caste groups with more than 1% of the total population each (CBS, 2012).<sup>3</sup> With the largest ethnic caste group, Chhetri, having only 15.8% of the total population, Nepal is truly a country of minorities, contrary to the impression given by the policies and practices of the state for over two centuries.

The 2001 Census revealed that 12 ethnic caste groups have the largest share of the population (or plurality) in 3,535 (89%) village development committees (VDCs), out of the total 3,973 VDCs in Nepal. Chhetris are the largest groups in 928 VDCs, followed by Bahuns (491 VDCs), Magars (362 VDCs), Tharus (310 VDCs), Yadavs (308 VDCs), Tamangs (301 VDCs), Muslims (278 VDCs), Rais (180 VDCs), Gurungs (130 VDCs), Limbus (121 VDCs), Newars (84 VDCs), and Sherpas (42 VDCs). Chhetris and Bahuns are also the most widely-distributed population groups, being present in numbers of 500 or more in 1,852 and 1,374 VDCs, respectively.

In terms of territorial dominance and majority, the picture is different. Five ethnic/caste groups (Chhetri, Magar, Tamang, Tharu and Bahun) are in the majority in over 100 VDCs. Chhetris are by far the largest group with a majority in 387 VDCs. Magars have a majority in 175 VDCs, Tamangs in 159 VDCs, Tharus in 106 VDCs, Bahuns in 102 VDCs, Gurungs in 77 VDCs, and Rais in 76 VDCs. Among the other ethnic/caste groups with a majority in the VDCs are Limbus (44 VDCs), Yadavs (38 VDCs), Muslims (36 VDCs), Newars (29 VDCs) and Sherpas (22 VDCs). Among the hill Dalit groups, the Kami are the largest and are in the majority in 4 VDCs and have the largest population share in 13 other VDCs. There are 17 other ethnic caste groups that have a majority in at least one VDC. In 1,291 VDCs (or 32% of the total VDCs in Nepal) one or the other ethnic caste group is in the majority. Several minority ethnic caste groups also have their niche areas. For example, Chepangs form a majority in 4 VDCs, Thami are in the majority in 3, Chhantel and Sunuwar in 2 each, and Lepcha and Pahari in 1 each. However, a total of 72 ethnic caste groups do not form a majority in any VDC and 37 do not have plurality in any VDC (see Map III in Appendix - I: 360).

However, in terms of the contiguity of VDCs with the plurality of a particular ethnic caste group, eight major generalised ethnic caste domains can be identified (Sharma 2008) in the hill-mountain regions.

The word 'domain' has been used here to recognise areas in which a particular ethnic caste group has plurality. The nature of these ethnic domains reveals that, while the core can be more or less identified, defining the boundaries poses problems.

Chhetris are the largest and most widely-distributed ethnic caste group in Nepal. The largest cluster with Chhetri plurality covers almost 500 contiguous VDCs spanning 18 districts from Dang, Rukum and Rolpa to Darchula and covering almost the entire mid and far-western hill-mountains. There are large areas of Chhetri plurality in the central and eastern hills as well, but the Chhetri domain is mainly the mid and far west.

The Magar ethnic domain lies mainly in the western hills covering nearly 250 VDCs in districts from Tanahu to Palpa, Gulmi and Arghakhanchi, Myagdi, Baglung, Dolpa, Rolpa, Rukum, Dang, and Pyuthan. The Magar domain is punctuated by a wedge of over 150 VDCs with Bahun plurality in districts from Arghakhanchi and Palpa through to Parbat and Tanahu. The Gurung domain is adjacent to the Magar domain in almost 90 contiguous VDCs from Gorkha, Lamjung, Kaski, Manang, and Mustang to Dolpa. The Newars enjoy ethnic plurality in about 40 contiguous VDCs in Kathmandu, Bhaktapur, Lalitpur and adjoining districts.

Tamangs have a strong territorial presence in about 250 contiguous VDCs from Dolakha-Ramechhap to Kavre, Makwanpur, Dhading, Nuwakot, Rasuwa and Sindhupalchok in the hill districts in and around the Kathmandu valley. The Rai domain makes up over 130 contiguous VDCs in Solukhumbu, Sankhuwasabha, Khotang, Bhojpur, Udaipur, Okhaldhunga and Dhankuta. The Limbu domain includes nearly 120 contiguous VDCs from Taplejung to Tehrathum, Panchthar, Ilam and Dhankuta. Sherpas have ethnic plurality in 18 contiguous northern VDCs from Taplejung to Solukhumbu and Okhaldhunga.

In the Tarai, the Tharu domain includes a group of nearly 80 contiguous VDCs from Banke to Kanchanpur district and nearly 40 VDCs from Rupandehi to Dang. In the eastern Tarai, Udayapur-Saptari and Sunsari-Morang districts have clusters of Tharu ethnic plurality. It is, however, the Maithili language, which is in plurality in 505 VDCs from Rautahat to Saptari, that defines the distinct contiguous Maithili linguistic domain in the eastern Tarai.

In terms of territorial spread, the nine ethnic caste groups (Chhetri, Magar, Tharu, Tamang, Newar, Rai, Gurung, Sherpa, Limbu) and the Maithili language group together make up 60.6% of the total population of Nepal. Of these, Sherpa is the only group that makes up less than 1% of the national population.

Major conclusions derived from studies on the distribution of ethnic and language groups in contemporary Nepal reveal the following (Sharma 2008):

- Major ethnic caste groups in Nepal have their territories of traditional occupancy, where they have settled continuously, are relatively

concentrated and have a significant presence in plurality. This is true with respect to all large and small adibasi and janajiti groups and with respect to the Chhetris.

- Most ethnic caste groups do not constitute a majority in areas in which they are in plurality. In VDCs in which they are dominant, only 42% of Chhetris, 21% of Bahuns, 48% of Magars, 34% of Tharus, 12% of Yadavs, 53% of Tamangs, 13% of Muslims, 42% of Rais, 59% of Gurungs, 36% of Limbus, 35% of Newars and 52% of Sherpas are in absolute majority.
- The spatial distribution pattern of most janajiti groups is such that, as one maximises the proportion of the target ethnic population within a province, the proportion of the national population of the target ethnic group declines and vice versa (Sharma & Khanal, 2009).
- In the Tarai, language appears to be an important marker of ethnicity. Language regions can be identified in the Tarai where particular mother-tongue speakers are dominantly distributed. There are 476 contiguous VDCs in the Tarai with a majority of Maithili speakers, 312 with Bhojpuri speakers, 96 with Tharu speakers, 91 with Awadhi speakers and 50 with Bajjika speakers.
- From the point of view of population size, Dalits together comprise the largest group in Nepal (about 12% in the 2001 Census), exceeded only by Chhetris and Bahuns. However, Dalits do not have their own distinguished geographical territory or separate identity by virtue of language.
- The major Hindu caste groups in the hills are much more widely-distributed than the adibasi-janajiti groups, although in recent decades there has been an ongoing process of migration of adibasi-janajiti groups in the Tarai, Inner Tarai, and neighbouring urban areas and market towns. In 2001, 24.9% of Chhetris, 37.6% of Bahuns, 25.4% of Magars, 15% of Tamangs, 17.4% of Newars, 26.4% of Kamis, 21.1% of Rais, 19.8% of Gurungs, 28.3% of Damais, 27.8% of Limbus were in the Tarai (CBS, 2012).<sup>4</sup>
- From a geographical or topographical perspective, or from the point of view of ethnic, language or socio-demographic formation, the Nepal Tarai is not a continuous expanse of territory. Although for reasons of political expediency the Madhesi parties include the Inner Tarai within the Tarai, there are in fact significant differences in settlement history, demographic characteristics and social attributes between the Tarai and Inner Tarai.
- The common denominator among the Tarai ethnic caste groups is the shared sense of alienation and discrimination at the hands of the state,

which has consistently denied them their political, cultural and language identity and aspirations. This has also been the symbol and rallying cry, as it were, of Madhesi identity groups. There is no pan-Madhesi identity based on ethnicity, culture or language.

- As a result of centuries of migration in the hills and more recent migration in the Tarai, there are clusters or concentrations of some ethnic caste groups within the geographical domains of major ethnic caste groups. There is considerable ethnic caste diversity even in areas that have a dominant ethnic caste population. Even among the janajitis there are dominant and minority janajitis in the same geographical area.

Hence, the distribution and spread of ethnic caste groups is such that, irrespective of how they are conceived, the federal units in Nepal cannot be anything but multi-ethnic and multi-lingual. However, despite this multi-ethnic and multi-lingual nature there are generalised areas with a distinct cultural character among particular ethnic caste groups. The spatial contiguity of major ethnic caste groups and their cultural areas makes it almost impossible to ignore the distribution of ethnic caste groups in the federalisation exercise. The question then is not whether ethnicity should be taken as a basis for federalisation, but what other criteria need to be taken into account to make the federal units viable?

## **BASIS FOR FEDERALISATION**

In the last decade a number of proposals to facilitate and expedite the administrative restructuring of the state have been made by scholars, political parties and interest groups, including ethnic groups. An assessment of a number of the proposed models has been made elsewhere (Sharma and Khanal 2009), accordingly this section attempts to provide a perspective on the proposed bases for federalisation.

In 2002, the late Harka Gurung made a proposal for a 'New Nepal' with just 25 districts. On the basis of the analysis of annual revenue collection and expenditure in the districts, he argued that a reduction in the number of districts could result in reduced administrative expenditure and more self-dependent districts. He argued that decentralisation in Nepal had failed mainly because of the command system at the centre and economic fragility of the districts. He claimed that district autonomy was feasible only through the consolidation of the economic base with a wider tax authority and revenue sharing of income from the local resource base. However, Gurung gives no explanation of how reducing the number of districts will lead to a reduction in the obligations of the state. Furthermore, how can districts be self-dependent without an adequate framework for inclusive development and a comprehensive strategy for regional economic development?

In his book *Nepalko Jatiya Prasna* (The Ethnic Question in Nepal), Govinda Neupane proposes 11 federal regions or *pradesh*. These include the Kirant Pradesh of the Kirat people (the Rais and Limbus) in the eastern hills, Tambasaling of the Tamangs in the central hills, Nepa of the Newars in the Kathmandu Valley, Tamumagarat of the Magars and the Gurungs in the western hills, and the eastern Khasan, central Khasan, and western Khasan of the Khas people in the mid and far west. He proposes four states in the Tarai, namely, Vijaypur and Mithila in the east, Lumbini in the centre and Kapilbastu in the west. Neupane's emphasis is on the historical-cultural background, language and areas of historical occupancy of particular population groups and is reminiscent of the situation existing at the beginning of the 18<sup>th</sup> Century. However, there is no justification of the geographical or economic feasibility of the states (Neupane, 2000).

Various janajiti groups have also proposed their own versions of the restructuring of the state in a federal set up. Most of the major ethnic groups, such as the Limbus, Rais, Tamangs, Gurungs and Magars in the hills and Tharus in the Tarai, have demanded the creation of states based on their historic areas of occupancy. Areas of historic occupancy, however, have been interpreted and identified differently by different groups and there is considerable overlap between territorial claims (International Crisis Group, 2011). Most of the janajiti groups have articulated their demands for ethnic states in a general way and some have based their claims on the distribution of ethnic groups as reported in the census. The federation of the janajitis, Nepal Janajiti Mahasangh, for example, has called for autonomous ethnic states with the right to self-determination, but has not clarified the number and extent of such ethnic states or forwarded a concrete proposal.

The major political parties in Nepal have in various ways expressed their views regarding the basis for the formation of federal units, and some have even provided a general picture of the proposed federal units. In its election manifesto for the Constituent Assembly elections (UNDP, 2008), the Communist Party of Nepal (Maoist) (CPN [Maoist]), now the Unified Communist Party of Nepal (Maoist) (UCPN [Maoist]), had proposed 11 federal units based on ethnic structure, geographical convenience, major language and economic potential. The UCPN (Maoist) submitted a framework of 13 federal units to the concerned committee of the last Constituent Assembly. Of these, 11 (Limbuwan, Kochila, Kirat, Sherpa, Newa, Tamsaling, Magarat, Tamuwana, Tharuwan, Bhotelama and Madhes) were identified on the basis of ethnicity and 2 (Bheri-Karnali and Seti-Mahakali) on a regional basis.

The UCPN (Maoist) have attempted to interpret ethnicity in terms of nationalities derived from the writings of Lenin and Stalin in the context of the Soviet Union. Under this view, a nation is regarded as a "historically constituted, stable community of people, formed on the basis of a common language, territory, economic life and psychological make-up manifested in a common culture" (Stalin, 1913). According to the Leninist approach, 'oppressed nations'

need autonomy and the right to self-determination to overcome semi-feudal and semi-colonial exploitation. Lenin had proposed the granting of self-determination as a strategy aimed at gaining the support of smaller nationalities. Rosa Luxemburg vigorously argued against this position and maintained that such self-determination would only grant legitimacy to the feudal and fascist leadership of these nationalities (Luxemburg, 1976). The CPN (Maoist) party's call for self-determination during the insurgency was an attempt to mobilise mass support based on a generalised idea of an ethnic homeland (International Crisis Group, 2011). Other than ethnicity, there has been no analysis regarding the 'commonness' of the attributes related to economic life. Lately, the UCPN (Maoist) party has also included economic capability as a basis for federalisation.

The UCPN (Maoist) proposal does not seem to give enough attention to aspects such as the size of the population, geographical and territorial spread, economic inter-relationships, objective livelihood conditions or resource potential of the federal units. Recent developments suggest that there is a continuing reassessment of the party's position with respect to the geographical structure of federalism.

In its Constituent Assembly election manifesto, the Nepali Congress proposed a number of criteria as the basis for the designation of federal units. These include national integrity, geographical conditions and convenience, population size, natural resources and economic potential, regional inter-relationships, the concentration of ethnic and language groups and cultural attributes, political and administrative potential, and the distinctive habitats of the Madhesi, adibasi, janajiti, Dalit and other language groups and communities. The Nepali Congress also advocated for a minimum number of federal units.

The Communist Party of Nepal (Unified Marxist-Leninist) (CPN [UML]) has put forward geographical conditions and distinctiveness, situation with respect to population and occupancy by ethnic/caste groups, mother tongue and situation with respect to its use, cultural distinctiveness, administrative convenience, economic and social inter-relationships, capacity and potential, situation with respect to the availability of natural resources, and historicity as the basis for the identification and delineation of federal units. In its submission to the concerned committee of the last Constituent Assembly, the party proposed the delineation of 15 federal units. Of these, seven are based on ethnicity (Limbuwan, Kirat, Newa, Tamsaling, Tamuwani, Magarat and Tharuhat), two on the basis of language (Mithila and Bhojpura), and six are mixed (Birat, Sunkoshi, Gandaki, Lumbini, Karnali and Kaptad). The CPN (UML) proposal indicates that their take on the establishment of ethnic federal units is based on the notion of nationalities, similar to that of the UCPN (Maoist). Similar to the UCPN (Maoist) proposal, the CPN (UML) proposal does not analyse, nor seems to have adequately taken cognisance of, the economic viability or potential of the proposed federal units. In recent times the CPN (UML) has not explicitly articulated a proposal for

a federal model, but appears to be in favour of a small number of federal units.

Even before the last Constituent Assembly elections were announced the Madhesi Janadhikar Forum had proposed the concept of a single Madhes province on the basis of geography, ethnic, language, social and cultural distinctiveness, diversity and similarities, and economic potential. The Tarai Madhes Loktantrik Party, in its manifesto for the Constituent Assembly elections, also proposed a single Madhes autonomous region comprising the entire Tarai ecological belt from Jhapa to Kanchanpur based on geographical similarities, affinity in terms of culture and language, similar climatic and economic conditions, emotional solidarity and unity. The Madhesi political parties have attempted to rationalise the slogan 'One Madhes, One Province' on the basis of cultural distinctiveness and identity.

The factions of the Sadbhavana Party are in favour of three provinces (Madhes, hills and mountains) based on geographical characteristics, history and culture. The Rashtriya Prajatantra Party has not articulated a federal model, but has proposed geography, population, ethnic community, language, cultural identity, natural resource endowment and economic potential as the bases for federalisation. Similarly, the Rashtriya Janashakti Party has proposed physical and geographical features, ethnic composition, language and cultural sensitivities, economic means and resources, and administrative conditions and convenience as the basis for federalisation. The Rashtriya Janamorcha Nepal and Rashtriya Prajatantra Party Nepal are among the parties opposed to federalism, although ideologically they are both poles apart.

## **RATIONALE FOR FEDERALISATION IN NEPAL**

With the exception of the UCPN (Maoist) party and the Madhesi parties, the federalisation of Nepal has been regarded as almost a *fait accompli* by the major political parties. The UCPN (Maoist) party, in particular, has argued in favour of federalism since the insurgency and the Comprehensive Peace Agreement implied it. However, it was the Madhesi movement of 2006/07 that was the catalyst for including the federal agenda in the fourth amendment of the Interim Constitution 2007. Federalisation was seen as a way of expressing the people's will as manifested in different political movements.

The Committee charged with the task of Nepal's federalisation, i.e., the Committee on the Restructuring of the State and Distribution of State Powers (CRSDSP) of the dissolved Constituent Assembly, in its draft report does not go into the details of the rationale for the federalisation of Nepal, but lists the following as factors to consider in state restructuring (CRSDSP, 2010: 15):

- Nepal's linguistic, ethnic, community, religious, cultural, geographical diversity



- regional and gender-based exploitation,
- the unwillingness of governance mindset for effective decentralisation of power in the past,
- promote affinity, ownership and proximity to the state,
- enhance representation and participation,
- address the agenda of the Madhes agitation of 2006 in favour of equality and against social, economic, political, linguistic, cultural discrimination, injustice and exploitation by a centralised feudal state power,
- democratisation of society and the search for equal and inclusive democracy,
- recognition of ethnic, linguistic and cultural identity,
- issues relating to all forms of discriminations based on class, ethnicity, women and gender, and
- equal distribution of services and facilities availed by the state and equal share in development outcome,
- address issues that could not be addressed through a unitary state,

First set of issues to be addressed by federalisation relates to the recognition of Nepal's socio-cultural diversity; promotion of ethnic, language and cultural identity, and enhance ownership of the state through representation and participation. The second set of issues relates to social, economic and political discrimination and exploitation, and the third set concerns decentralisation, equitable economic opportunities and a share in the fruits of development. The presumption is that the issues of diversity, identity and discrimination are primary. Once these issues are addressed, it is presumed that development will follow. This may really be a very simplistic understanding of federalism.

The rationale for federalisation in Nepal has to be appreciated from three perspectives. The first is that the reality of Nepal's social and cultural diversity has to be reflected in the identity of the Nepali state and the nation. The recognition of diverse ethnic, language, cultural and regional identity is a step towards the establishment and strengthening of a sense of ownership of, and affinity with, the state. If the Nepali state is regarded as the sum-total of its ethnic/caste groups and nationalities, each ethnic, language and cultural identity has to be reflected, as it were, in the mirror of the state. Such an identity can be expressed in different ways, namely, through: (a) the recognition of designated languages using some formula in government administration, in schools and as a medium of instruction, (b) special policies for the promotion and development of languages and cultures, (c) recognition and promotion of tangible and intangible cultural heritage, and (d) recognition of autonomous cultural areas for particular communities and the establishment of a system requiring prior information and consent for

development activities in such areas. The recognition of ethnic identity should not be understood in the narrow sense of ensuring ethnic purity or 'blood' and 'semen', but as a basis for taking pride in ethnic, social and cultural diversity and institutionalising multicultural nationalism.

The second perspective is related to inclusive development, the idea that socioeconomic development has to be equitable and inclusive based on the principles of social justice. This calls for a reassessment of the content, direction, pace and outcomes of development to ensure that the opportunities available are both equal and equitable. This has implications for the availability and mobilisation of natural and other resources for reducing regional, class, ethnic and gender inequalities. In a country such as Nepal where poverty is a major impediment to development, federalisation has also to be appreciated as medium for poverty alleviation and progressive socioeconomic transformation. The advocates of ethnic identity as a panacea for all ills idealise and simplify the problem. The fact is that the provision of opportunities for better livelihoods is the pivot around which the politics of development under federalism is going to move. While affirmative action policies can, to some extent, address issues of caste, ethnicity and the like, the broader issues of poverty can only be addressed through a class-based approach. The state has to negotiate on behalf of the basic classes. The resource base of federal units will, to a large extent, determine this capacity.

Federalism is just a means to an end, and the end is a prosperous Nepal where the prosperity is shared by all, irrespective of ethnic identity or class. If federalism is the means, development – and the assertion of identity as an important dimension of development – in its broadest sense can be considered the end, because it is ultimately against the yard sticks of how we define development (reduction in poverty, improved access to and provision of basic social services such as education and health, enhanced capabilities of all groups and classes of people, increased income and employment opportunities, improvement in livelihoods and so forth) that the achievements of federalism will be assessed by the Nepali people. This calls for creating equal and equitable conditions for development, particularly for those groups of people that have been historically disadvantaged, marginalised and neglected.

The third perspective relates to decentralisation and the devolution of power and autonomy. Nepal's development history is witness to the futility of attempts at decentralisation under a centralised unitary system of governance. The case for federalism in countries such as Nepal rests on the imperative it creates for administrative and fiscal decentralisation and the devolution of power to the lowest level of government. In this way, federalism and consequent devolution bridges the distance between the rulers and the ruled. Devolution is also the crux of participatory democracy because it devolves power to the lowest level, i.e., the level from which power evolves. The principles of shared rule and self rule make

decentralisation and the devolution of power inescapable under federalism. As such, federalism can be a way of ending the hegemony of the centre and the ruling elites who have historically dominated it.

Looking at federalisation from the perspective of inclusive development and devolution underlines the critical importance of a proposed federal unit's infrastructure and existing and potential natural resource base. The better the initial conditions and natural and human resource base of the federal units, the better the federal unit's prospects for autonomy and the formulation of a province-specific development strategy. The extent to which issues such as social and economic inequality, poverty and affirmative action can be addressed also depends on the mobilisation of existing or potential resources. The key concern is to build and share prosperity through federalism.

## **PROPOSALS FOR FEDERALISATION**

The federalisation of Nepal is no longer in the theoretical realm. The draft report of the Committee for Restructuring of the State and Distribution of State Powers of the dissolved Constituent Assembly, through a majority decision, has made recommendations for Nepal's federalisation (CRSDSP, 2010). This was followed by the report of the High Level State Restructuring Commission (HLSRC, 2011). Although both of these reports were cursorily debated in the Constituent Assembly, no decision was made. Indeed state restructuring provided the pretext for the ultimate dissolution of the Constituent Assembly. Both of the reports will be briefly reviewed here, with particular reference to the basis used for federalisation. The next constituent assembly, if and when it comes into being, may not be in a position to ignore these two reports (see Map IV in Appendix - I: 361).

Identity is taken as the primary basis of federalisation. Indicators for the recognition of identity include ethnic, community, linguistic, and cultural identity; continuity of geographical and regional habitation; and historical continuity in occupancy and settlements. Capability, or viability, is taken as the other basis for federalisation. The indicators of capability include economic interrelations, the condition of, and possibilities for, infrastructural development, availability of natural resources and administrative convenience. However, the emphasis is on keeping intact areas of geographical continuity and ethnic concentration; areas with concentration of particular language speakers and with a particular culture; regions that have suffered from exploitation; and areas that are distinct in terms of history and communities. The meaning of capability (and its indicators) is only presumed and is neither adequately explained nor operationalised.

The report proposes the nomenclature of the 14 provinces, the geographical extent and boundaries of the provinces in terms of existing VDCs, and makes a

preliminary identification of the capitals of the provinces. Of the 14 provinces, 8 have been proposed on the basis of ethnic plurality – Limbuwan, Kirat, Sherpa, Tamsaling, Newa, Tamuwan, Magarat and Jadan – in the hills. Two provinces in the Tarai have been identified on an ethnic-linguistic basis: Lumbini-Abadh-Tharuwan and Mithila-Bhojpura-Koch-Madhes. Two provinces, Sunkoshi and Narayani, are identified on the basis of mixed ethnic criteria, and two, Khaptad and Karnali, on the basis of geographical region. The delineation of provinces is also based on the understanding that no province shall be circumscribed by another province, i.e., a province will be bounded by at least two provinces. The two provinces delineated in the Tarai are not contiguous. The district of Chitwan forms part of Narayani province.

Three tiers of government – federal, provincial and local – have been proposed. Within the provinces, three types of 'special structures' (bishes samrachana) have been envisaged: autonomous regions, protected areas and special areas. Autonomous regions are areas with the concentration, dominance or plurality of a particular ethnic, community or language group(s). Protected areas are areas delineated for the protection and development of minority ethnic groups or endangered and marginalised ethnic groups. Special areas are geographical areas that may have population groups that are lagging or disadvantaged in terms of economic and social conditions or needing special attention for the development of particular sectors. A total of 23 autonomous regions have been proposed on a preliminary basis.

The report proposes giving the right of self-determination to provinces on the condition that the exercise of this right does not impinge upon the sovereignty, independence, unity and territorial integrity of the country. A condition of political prior rights has been proposed in the case of provinces formed on the basis of ethnic or community plurality. During elections, and in the process of formation of the government, political parties are required to give priority to members of the dominant ethnic or community group for the main leadership of the government for the first two terms. This gives members of the concerned ethnic groups privileged citizenship. This section critiques the federalisation model proposed by the CRSDSP.

**Wide variations in population and area:** The federal model proposed by the CRSDSP is not based on considerations of population size, territorial extent, density or agricultural potential. There is no scientific or realistic appreciation or establishment of the principles of minimum population size or territorial extent or indicators of man-land relationships in the division of the 14 provinces. As a result, there is an enormous difference in demographic and territorial magnitude between provinces. Jadan and Sherpa provinces, for example, have only 0.2 and 0.4% of the national population, respectively, while Mithila and Tharuwan have 29.5 and 16.3%. Similarly, the Karnali occupies 12% of the national territory while Newa and Sherpa occupy only 0.6 and 3.3%, respectively.

**(Table x1). Population, area, density and agricultural area in 14 provinces proposed by CRSDSP**

Province	Population in 2001 (000)	Percentage of national population (%)	Area (sq km)	Percentage of national area (%)	Population density (per sq km)	Agricultural land as percentage of province area (%)
Jadan	50	0.2	14,623	9.9	3.4	0.2
Karnali	980	4.3	17,864	12.1	54.9	2.8
Khaptad	1,160	5.1	13,569	9.2	85.5	1.5
Kirat	900	4.0	8,462	5.7	106.4	3.7
Limbuwan	930	4.1	8,652	5.9	107.5	2.1
Lumbini- Abadh- Tharuwan	3,700	16.3	15,151	10.3	244.2	61.9
Magarat	2,000	8.8	14,670	10.0	136.3	4.4
Mithila- Bhojpura- Koch- Madhes	6,680	29.5	13,908	9.4	480.3	75.6
Narayani	1,770	7.8	7,499	5.1	236.0	19.4
Newa	1,700	7.5	927	0.6	1,833.9	4.1
Sherpa	89	0.4	4,790	3.3	18.6	3.4
Sunkoshi	700	3.1	5,127	3.5	136.5	4.3
Tamsaling	1,420	6.3	9,885	6.7	143.7	8.3
Tamuwan	570	2.5	12,054	8.2	47.3	1.8

**Source:** CRSDSP (2010) for population and area; agricultural land computed on the basis of available data

The differences in population density are more glaring. With densities of about three persons per square kilometre in Jadan, which is a population vacuum compared to Newa and the Tarai provinces of Mithila and Tharuwan. Most hill-mountain centred provinces have a very low proportion of arable land. But Jadan exemplifies an extreme with only 0.2% of its land arable. The management of federalism can become difficult when the demographic and production potential of provinces display enormous variations.

**Inconsistent use of ethnic criteria:** Ethnic/linguistic identity is the primary, and the only, basis on which the federalisation exercise has been undertaken by the

Table x2. Ethnic characteristics of CRSDSP proposed provinces

Province	Major/target ethnic caste group	Major/target ethnic caste group as % of province population	Major/target ethnic caste group as % of national ethnic caste group population	Broad ethnic/caste categories in province (%) <sup>*</sup>			
				Hill caste <sup>**</sup>	Janajiti	Dalit	Madhesi
Jadun	Bhote	1.2	3.1	54.3	36.0	7.1	0.4
Karnali	CBST	62.4	8.8	62.4	14.8	20.3	0.6
Khaptad	CBST	74.7	12.3	74.7	2.1	19.3	0.8
Kirat	Rai	34.1	48.2	28.7	59.7	10.6	0.8
Limbuwan	Limbu	27.4	71.2	28.1	64.0	7.3	0.4
Lumbini-Abadh-Tharuwan	Tharu	26	62.9	26.8	35.4	13.3	23.1
Magarat	Magar	34.1	42.5	39.9	41.6	16.5	0.8
Mithila-Bhojpur-Koch-Madhes	Madhesi	46.6	75.7	13.0	23.9	15.6	46.6
Narayani	CBST	42.6	10.8	42.6	43.0	12.3	1.4
Newa	Newar	36.2	49.8	38.2	55.6	2.8	3.1
Sherpa	Sherpa	36.1	21.1	15.2	73.7	7.2	0.2
Sunkoshi	CBST	36.9	3.7	36.9	49.4	10.6	0.7
Tamsaling	Tamang	43.8	48.7	29.8	63.1	5.7	0.6
Tamuwan	Gurung	31.5	33.4	34.7	50.1	13.4	1.0

<sup>\*</sup>The categories do not add up to 100 because all categories are not included.

<sup>\*\*</sup>Hill caste groups are Chhetri, Bahun, Sanyasi, and Thakuri (CBST).

Source: CRSDSP (2010)

CRSDSP. The provincial map coincides almost exactly with Nepal's map of ethnic plurality. However, this basis has not been rigorously followed. The CRSDSP recognises 12 provinces in the hill-mountains, 8 on the basis of ethnicity, 2 on the basis of mixed ethnic population and 2 on the basis of geographic regions. However, if historical occupancy and generalised ethnic plurality based on census data is taken into account only eight ethnic domains (Chhetri, Magar, Gurung, Tamang, Newar, Rai, Limbu and Sherpa from west to east) should be recognised in the hill-mountains of Nepal.

All of the proposed 14 provinces have a predominantly mixed ethnic character (Table x2). Target ethnic caste groups make up 1% of the province population in Jadan, 35% in Kirat, 27% in Limbuwan, 26% in Lumbini-Abadh-Tharuwan, 35% in Magarat, 36% each in Newa and Sherpa, and 32% in Tamuwan. It is only in Mithila-Bhojpura-Koch-Madhes and Tamsaling that the target population comprises nearly half with Madhesis and Tamangs comprising 47% and 44%, respectively, of the province population. In fact in Limbuwan, Magarat, Newa and Tamuwan, the hill caste population is slightly larger than the target ethnic caste population. There is, therefore, no rationale for the creation of provinces on the basis of mixed ethnic, linguistic identity. The CRSDSP report does not dwell on the question of the historical continuity of habitation or the basis on which historical continuity is assessed. Much of Sunkoshi falls in the Rai and Tamang ethnic domains, while Narayani falls in the Tamang, Gurung and Magar ethnic domains. In terms of ethnic plurality, all of the three provinces in the mid and far western hill-mountains, i.e., Karnali, Khaptad and Jadan, are Chhetri dominated.

Not all provinces based on ethnicity criteria have a majority of the national target ethnic population. It is only in Limbuwan, Tharuwan and Mithila that Limbus, Tharus and Madhesis constitute the majority. For example, of the total national Limbu population Limbuwan has 71.2%. Similarly, Tharuwan has 62.9% of Tharus and Mithila has 75.2% of Madhesis. In Kirat, Newa and Tamsaling the target groups approximate over 40% of the national target group population. Only one-third of the total Gurung population is in Tamuwan. In Jadan and Sherpa, nearly 97% and 79% of the respective ethnic caste population lives outside the province.

The situation is different if the ethnic castes are grouped into broad ethnic/caste categories (Table x2). Ten of the proposed provinces have a majority of one or the other broad ethnic caste category: Chhetri, Bahun, Sanyasi, Thakuri (CBST) in Jadan, Karnali and Khaptad; janajiti in Limbuwan, Kirat, Sherpa, Newa, Sunkoshi and Tamsaling and Tamuwan; and Madhesi in Mithila.

The CRSDSP's report characterises Nepal's federalisation as 'federalisation by deaggregation'. However, it does not lay down the principles for 'deaggregation' or the basis on which the status of province is to be granted to particular ethnic, linguistic identities. When does an ethnic or linguistic community deserve its own province in recognition of its identity? When is autonomy within a province enough recognition? The CRSDSP does not address these kinds of questions.

**Layers of ethnic identity:** A major basis of federalisation by deaggregation is an appreciation of the history and level of ethnic consciousness and associated political mobilisation. The CRSDSP report is silent on this critical aspect of ethnic regionalisation. The reality in Nepal is that there is a significant difference in ethnic consciousness between ethnic groups and among people from the various ethnic groups residing in different regions of the country. The ethnic groups in the eastern hills, such as the Limbus, have a long history of struggle for autonomy compared to ethnic groups such as Magars and Gurungs. There are also ethnicities in the making as a result of the mobilisation of indigenous and janajiti groups by organisations such as Nepal Federation of Indigenous Nationalities (NEFIN). Ethnic identity is also a layered identity. The major ethnic/social contradiction in Nepal is one among the hill castes or CBST group, janajitis, Dalits and Madhesis, firstly as groups, and then only as specific ethnic or caste groups. This perspective on federalisation has not been articulated in CRSDSP report. Such articulation would provide a different perspective on federalisation.

**Economic capability and potential of provinces:** Contrary to its claims, there is no evidence in the CRSDSP report that any economic capability indicators, such as the condition of natural and other resources, economic activity, trade and commerce, the situation of infrastructure, or inter and intra-provincial flows, have been used in the CRSDSP's federalisation exercise. The economic base of the provinces, the situation with respect to the revenue base, and the use and mobilisation of resources, both at present and possibilities for the future, have not been considered in the delineation of provinces. Each province, by its very nature, has to function as a unit of development planning and there are significant externalities associated with this function. A strong sense of ethnic identity and association with a territory can motivate political mobilisation, as seen in countries such as Ethiopia, but political mobilisation alone is not a substitute for the availability of natural and other resources. It may even be counterproductive in terms of raising expectations and not being able to deliver. Available information on proposed provinces reveals not only enormous variations in the economic condition of provinces, but critical disparities in the level of economic activity and capacity to generate revenue.

**Population carrying capacity:** Nearly all hill-mountain districts in Nepal are food deficit. The Population Pressure Index (PPI), computed on the basis of the contribution of the production of six major crops (rice, wheat, maize, millet, barley and potato) to the calorific requirements of the population in the districts, reveals that Sherpa, Sunkoshi, Newa, and Jadan have moderately high to high PPIs (New Era 2004). A higher positive value for PPI indicates a lower population carrying capacity and a negative value for PPI means a higher population carrying capacity and potential. The only districts with low PPI values were Tehrathum and Bhojpur in Limbuwan and Kirat; Rasuwa in Tamsaling; Chitwan in Narayani; Nawalparasi in Magarat; Manang and Mustang in Tamuwan; Surkhet and Salyan in Karnali; and Doti in Khaptad. All other districts in these provinces had moderately high to



high PPI values. Tharuwan and Mithila are the only two provinces with moderately low to very low PPI values. Continuing population growth and the likelihood of reduced political incentives for migration to the Tarai in the future means that the population carrying capacity of the hill-mountain centred provinces will remain severely constrained.

**Forest resources:** A general picture of forest resources in Nepal, based on the work of JAFTA (Japan Forest technology Association) (2001) reveals that Jadan and the districts of Manang and Mustang in Tamuwan have an acute shortage of forest resources. The hill-centred provinces are generally better off in terms of forest resources. The state of forest resources in Mithila is comparatively critical. Provinces in the west such as Magarat, Karnali, Khaptad and Tharuwan are relatively better endowed in terms of forest and biodiversity resources.

**National parks and protected areas:** There is enormous variation in the area under protected areas (national parks, reserves and conservation areas) in the proposed provinces. Over two-thirds of the area of Tamuwan, nearly half of the area of Sherpa, and a quarter of the area of Jadan province is comprised of protected areas. In Limbuwan, Kirat and Tamsaling, only the northern mountain areas are designated as protected areas. Narayani and Tharuwan have major national parks with flagship wildlife species, but these cover only a small proportion of the territory of these provinces. Mithila, Sunkoshi, Karnali and Khaptad have a small area under protected areas. The role of protected areas, particularly in the hills and mountains, is critical for the mitigation and adaptation of climate change in the respective provinces, as well as the lower catchments of these major hydrological systems.

**Tourism potential:** Tourism potential in rural Nepal is also related to protected areas. Newa, which comprises the Kathmandu valley, presently receives almost all of the tourists (around 750,000) visiting Nepal. Pokhara in Tamuwan receives about 40% of all tourists and Chitwan in Narayani and Lumbini in Tharuwan receive about 16% each. The Annapurna Conservation Area in Tamuwan, Sagarmatha in Sherpa, and Langtang in Tamsaling are the main trekking areas in Nepal and see over 90% of the tourists visiting rural areas. Western Tharuwan also has the potential for wildlife tourism. There is enormous potential for trekking, adventure and wilderness tourism in the Karnali, Khaptad, and Jadan in the western hill-mountains and Kirat, Limbuwan, Sunkoshi provinces in the east, but this remains largely unexploited due to lack of tourism infrastructure and marketing. Mithila has the potential for religious tourism.

**Major watersheds and hydropower potential:** All hill-mountain provinces have significant potential for the economic exploitation of hydropower resources, but this is only theoretical potential. Actual exploitation of the hydropower potential depends on many factors – road infrastructure to potential sites, factors influencing domestic and foreign investment, political stability, and the strategies and policies pursued both by the federal and provincial governments.

The larger the project the greater the likelihood of inter-provincial bargaining over the benefits from resources.

An important factor in the exploitation of hydropower may be the ownership regime and integrity of a major watershed within a single province. In Kirat, Sunkoshi, Tamsaling, Sherpa, Tamuwan, Magarat and Narayani the major watersheds and hydropower sites are fragmented among provinces. In Khaptad, Karnali, Jadan and Limbuwan the major watersheds remain more or less intact. Resource sharing and the right to self-determination with respect to resources can be contentious issues in inter-provincial relations. The provinces of Newa, Tharuwan and Mithila do not have potential for hydropower, although the latter two can be significantly impacted by large-scale multi-megawatt projects such as the large dam projects in the Karnali and Koshi. The experience of neighbouring India shows that the riparian regime can also affect the exploitation and use of water resources.

**Road infrastructure:** Road infrastructure orients economic, commercial and trade relations and is often the basis on which major development initiatives can be undertaken. It also influences the emergence and growth of urban centres, which become the hub of diverse economic activities. Roads also provide ease of access and administrative convenience.

The present road network in Nepal is a reflection of both the excessively centralised character of Nepal's space economy and the market orientation of the economic policies of the state (and that of the donor community, in general), which has discouraged relatively costly road construction in mountainous and remote areas. Road density is, therefore, high in Mithila, Tharuwan, Newa, Narayani and Tamsaling. Provinces such as Karnali, Khaptad, Kirat, Limbuwan and Sunkoshi have very low road densities. Sherpa and Jadan have no roads to speak of. The road-less Jadan province straddles the trans-Himalayas from eastern Dolpa to Simikot and beyond. Here as in, the road-less mountains of the Karnali, Khaptad and other provinces, basic access is limited to by foot in very difficult terrain.

The question of administrative convenience is related to ease of access to the capital of the province and the state of economic integration of the province, as defined by existing or feasible infrastructure. On both these counts, the high-mountain centred provinces such as Jadan and Sherpa will face critical problems.

**Spatio-economic orientation of provinces:** Provinces make economic sense when they are congruent with economic regions. A study in 2007 (NPC & ADB, 2007) looked at the economic regions in Nepal on the basis of the identification of major economic centres and their sphere of influence, as determined by trade and migration flows and economic linkages reflected in the level and quality of infrastructure. The study identified eight economic regions in Nepal. With the exception of Kathmandu and Pokhara, all of the economic regions were oriented to major economic centres in the Tarai. These economic centres (from

west to east: Dhangadhi, Nepalganj, Bhairahawa-Butwal, Birganj, Janakpur and Biratnagar) varied in terms of status and hierarchy, but oriented the flow of goods, services and people from the adjoining hill-mountain regions. This illustrates the nature and dependence of Nepal's hill-mountain economy on the Tarai urban centres.

The 14 proposed provinces remain fragmented in terms of their economic orientation. The whole of Limbuwan and parts of Kirat and Mithila come under the Biratnagar economic region. Parts of Sunkoshi, Sherpa and Mithila are influenced by Janakpur. Tamsaling, Newa and parts of Sunkoshi are oriented towards Kathmandu. Parts of Mithila, Narayani and Tamuwān come under the Birganj-Bharatpur economic region. Parts of Narayani, Tamuwān and Magarat are oriented by Pokhara. Bhairahawa-Butwal influences parts of Tharuwan and Magarat. A very large area comprising the whole of Jadan, the whole of Karnali, and parts of Magarat and Tharuwan come under the influence of Nepalganj. Similarly, the whole of Khaptad and parts of Tharuwan are influenced by Dhangadhi.

With better infrastructural growth and complementary strategies for development, these economic regions will change over time. Meanwhile, inter-provincial economic linkages will remain critical in the development of provinces. Inter-provincial economic links remain much more important and fundamental than intra-provincial economic links. Also, the ethnic orientation of provincial boundaries disregards the spatio-economic logic defined by the existing flow of goods and services. Tanahu, Syangja and much of Parbat are important hinterlands of Pokhara, but in the proposed provincial division much of these districts fall under Narayani. A similar problem can be seen with respect to Dharan which is the major gateway to the eastern hills, but is within the bounds of Mithila.

**Province capitals and urban centres:** The level of urbanisation, as measured by municipal population, varies significantly among the proposed provinces. Newa has more urban centres and a higher level of urbanisation than any other province. Sherpa and Jadan have no urban population. Khaptad, Karnali, Limbuwan, Kirat and Magarat have a few small urban centres and very low levels of urbanisation. Mithila, Tharuwan, Tamuwān and Narayani have levels of urbanisation at par with the national level. Many of the proposed provinces (Jadan, Sherpa, Khaptad, Tamsaling, Sunkoshi, Kirat) lack an urban centre with the minimal infrastructure, services and facilities to operate as a provincial capital.

**Revenue generation and regular expenditure:** The viability of provinces is often judged on economic merit; that is, the existing situation and potential for revenue generation to meet regular and critical development expenditure. District development committee-wise revenue and regular expenditure data show that only 9 of the 75 districts in Nepal generate revenue that is equal to or above their regular expenditure needs. These districts are Kathmandu, Lalitpur, Morang, Dhanusha, Parsa, Chitwan, Rupandehi, Sindhupalchok and Jhapa. Six of

these districts are in the Tarai. In terms of the proposed provinces, only Mithila, Tharuwan, Newa, Narayani and Tamsaling generate enough revenue to meet regular expenditure. The situation is particularly grim in Khaptad, Karnali, Jadan, Magarat, Sunkoshi, Kirat, Sherpa and Limbuwan provinces, where the districts do not even generate a quarter of the revenue required to meet regular, let alone development, expenditure.

The contribution of provinces to central revenue shows that nearly 93% of central revenue accrues from four provinces: Newa (45%), Mithila (33%), Tharuwan (10%) and Tamsaling (5%). In other words, the other 10 provinces contribute little to central revenue. Hence, inter-governmental transfers will be decisive in the planning of development in the proposed provinces and can significantly circumscribe the decision-making autonomy of provincial governments.

## **REPORT OF HIGH LEVEL STATE RESTRUCTURING COMMISSION**

In November 2011, as the term of the Constituent Assembly was coming to a close, a High Level State Restructuring Commission was formed by an executive order with the consensus of three major political parties and the Samyukta Loktantrik Madhesi Alliance. The HLSRC was clearly a result of the inability of the Constituent Assembly to endorse the CRSDSP report. The nine-member commission reflected the differing and entrenched positions of the sponsoring parties and, as expected, could not arrive at a consensus. Two separate reports reflecting both the majority and minority views were submitted to the Government by the end of January 2012. The majority 6-member report recommended federating the country into 11 provinces, including a non-territorial province for the Dalits. The minority report, appended to the main report, recommended six provinces. The reports were presented to the Constituent Assembly and briefly discussed before they were sent to the Constitution Committee (HLSRC, 2011).

The majority recommendation of the HLSRC report basically drops three of the provinces recommended by the CRSDSP (namely, Jadan, Sherpa and Sunkoshi) and merges Karnali and Khaptad provinces into one to bring the total number of geographical provinces to 10. (see Map II in Appendix - I: 359)

Narayani, for some reason not explained in the report, is maintained with significant changes in coverage and boundaries. The two provinces in the Tarai are made contiguous to circumscribe the hill provinces. Also, unlike in the CRSDSP proposal, the names of both the Tarai provinces mention the word Madhes. Considerable gerrymandering has been engaged in to extend the boundary of the Newa province to Narayani, presumably to save the province from being bounded by Tamsaling. Tamsaling is almost double the area proposed in the CRSDSP report.

**Table x3. Ethnic characteristics of HLSRC proposed provinces**

Province	Major/target ethnic caste group	Major/target ethnic caste group as % of province population	Major/target ethnic caste group as % of national ethnic caste group population	Broad ethnic/caste categories in province (%)*			Total population 2001 (%)	Total area (%)	
				Hill caste	Janajiti	Dalit**			Madhesi
Karnali-Khaptad	CBST	68.4	21.8	68.4	8.9	19.5	0.7	9.8	31.9
Kirat	Rai	34.7	50.8	27.9	61.2	7.3	0.4	4.1	7.5
Limbujan	Limbu	27.4	71.2	28.1	64.0	7.3	0.4	4.1	5.9
Madhes-Abadh-Tharuwan	Tharu	26.4	62.9	26.5	35.4	13.1	23.5	16.0	9.5
Madhes-Mithila-Bhojppura	Madhesi	45.3	75.9	13.6	24.7	15.4	45.3	30.3	10.7
Magarat	Magar	35.4	43.3	37.2	44.8	16.0	0.8	8.7	10.3
Narayani	CBST	47.8	10.6	47.8	35.9	14.2	1.4	6.8	3.4
Newa	Newar	35.7	49.9	38.5	54.1	2.8	3.0	7.7	0.7
Tamsaling	Tamang	34.7	61.0	31.4	60.3	7.2	0.6	9.9	12.0
Tamuwan	Gurung	32.2	33.1	34.1	50.6	13.6	1.0	2.4	8.2

\* Does not include 'others'; \*\*the category Dalit also includes Madhesi Dalit  
**Source:** HLSRC Report (2011)

The majority report proposes political prior-rights only to special structures for the first term in leadership, but reiterates that local bodies, although their powers will be enshrined in the constitution, will remain under the purview of the provinces. Twenty-two autonomous areas are proposed under special structures. The position on the right to self-determination is basically the same as in the CRSDSP report. The report also proposes that residual rights accrue to the provinces in relation to provincial matters. The composition of the majority members and the parties they represented is clearly reflected in the federalisation model proposed.

The minority report of the HLSRC proposes 6 provinces, 4 in the hills and 2 non-contiguous provinces in the Tarai, but refrains from naming the provinces. Parts of eastern and far western Tarai are included in the respective hill provinces.

Table x3 shows that nearly one-third of the area falls in Karnali-Khaptad, while nearly a third of the population is in Mithila. Six of the ten provinces (Kirat, Limbuwan, Tharuwan, Mithila, Newa and Tamsaling) have been bounded in such a way that they have a majority of the target ethnic caste population in the country. All hill provinces with ethnicity nomenclature, with the exception of Magarat, have a majority janajiti population. However, significant differences remain in terms of the area and population size of the provinces.

The critique in terms of capability remains essentially the same as for the CRSDSP proposal. The better aspect of the report is the reduction in the number of provinces as provinces such as Jadan and Sherpa were hard to justify on grounds population size, ethnicity and capability. Sunkoshi and Narayani have similar characteristics: the former has a plurality of Chhetri and the latter of Bahun. The HLSRC does not elaborate on why a gerrymandered Narayani was maintained while Sunkoshi was abandoned. The report mentions that 16 indicators of capability were used to measure the viability of provinces recommended by the CRSDSP. Sherpa, Jadan, Khaptad and Sunkoshi, we are told, were found to have extremely low viability and, therefore, not deserving of the status of a province. The report does not enlighten us as to what these indicators were or how they were used to measure viability. How could Limbuwan, Kirat or Tamuwan be viable when Khaptad did not measure up?

## **NUMBER OF PROVINCES**

From a managerial point of view, federalism is complex because of the features of shared rule and self rule. Federalism is also a relatively costly system of governance because, barring some organs of the government, each federal unit has a structure of governance (particularly executive and legislative branches) that mimic the structure of the federal government. Therefore, the fewer the number of federal units, the less costly the federal system is. However, the issue

is not just the number of provinces; the more important concern is how and on what basis these few units are formed.

In Nepal, those who argue for a large number of provinces envisage in excess of 10 provinces (Sharma, 2007; Lawoti, 2012). For most proponents of a large number of provinces the arguments for a small number recall the politically-bitter taste of five north-south elongated development regions during the Panchayat regime, which was used as an instrument of assimilation rather than identity. The number of provinces has direct implications for the idea of provinces as vehicles of expressing ethnic identity. Those who favour a large number of provinces do so for the following reasons:

- Identity (whether ethnic or territorial) is basic to the formation of federal units. The larger the number of provinces, the better the identity of territorially-concentrated ethnic/community groups is reflected in the federation.
- In a culturally-diverse society a large number of provinces better mirrors the diverse social and cultural formations. Cultural identity would inhibit secessionist tendencies. Secession would be less viable because of the smaller size of each province; therefore, a large number of provinces would make for more stable politics.
- The larger the number of provinces, the greater the chance for territorially-concentrated minority groups to gain prominence and dominance in electoral politics. This would make political and social structures more inclusive. It would also help break the hegemony of more dispersed, but nationally dominant ethnic caste groups.
- The purposes of development would be better served by small provinces. The smaller the size of the province, the easier it would be for a provincial government to tailor services to specific cultural and social groups. Development would also be more accountable as the procedural distance between the people and provincial government would be shortened. It has also been argued that competition for resources among smaller provinces would contribute to efficient and effective investment.
- A large number of provinces would give more flexibility to the central government. Small provinces would be less intimidating and more cooperative with the central government. The central government would be able to more effectively use its fiscal power to negotiate and deal with provincial governments of small provinces.

These arguments basically presume that the political and economic objective of federalisation is achieved when cultural diversity and inter-provincial

dependency (as a result of a small resource base) is maximised. There is also an implicit assumption that politics and, for that matter, development would remain driven by ethnic and not ideological considerations. Indeed, some recent political formations in Nepal have professed indigeneity itself as an ideology.

The arguments for a small number of provinces follow a different line:

- Autonomy with respect to development and governance is the crux of federalisation. Autonomy is a function of the resource base of provinces. The larger the resource base, the greater the ability of provinces to exercise autonomy in terms of the expression of identity and in terms of charting a development strategy. Federal units that perennially depend on the largess of the centre usually find their decision-making autonomy circumscribed.
- The constitutional mechanism for ensuring inter-provincial cooperation notwithstanding, an important aspect of federalism is political competition among federal units with respect to the opportunities and resources for development. Federalisation should essentially be an instrument for rapid political, social and economic transformation. Federal units need to be considered units of regional development. The development capability of provinces is higher when federal units are large. A counter argument is that in a country where over half of the development expenditure is met through donor support there is nothing wrong in following the donor-driven and dependent model for the development of federal units. While this may be true, such logic tends to look at the future merely as a continuation of the dependent economy of the present. It does not view federalism as a way of expediting the impeded process of internal social and economic development and transformation.
- Large provinces reflect the reality of Nepal better where one or two ethnicities can be in plurality and remain dominant, but not so dominant as to ignore the aspirations of the other ethnic caste groups. The unequal initial conditions between provinces can be addressed more efficiently when federal units are large. So far as accountability and efficiency in the delivery of services is concerned, it is more a function of the power devolved at the local level, rather than the territorial extent of the province.

Nepal is among those mountainous countries in which the effects of climate change (increases in temperature and increased incidences of extreme climatic events) have already begun to manifest. Although our knowledge of the effects of climate change remain limited, there is an increased likelihood that the effects will become more comprehensive, dynamic and destructive in the future. The response to climate change would make it imperative to (Sharma, 2009):



- increase the effective size of protected areas particularly in the hill-mountains for sustained biodiversity conservation;
- promote connectivity conservation between ecological zones to enhance natural catchments and safeguard environmental integrity;
- strengthen ecosystem services between the highlands and the lowlands and ensure that highland communities derive benefits from conservation, which helps the lowlands; and
- ensure that the carbon benefits from one federal unit are not cancelled out by deforestation and degradation in another unit.

From the climate change perspective the north-south watersheds of the major rivers would be ideal for purposes of federalisation because of the ecological inter-connection and complementarity.<sup>5</sup> All other things being equal, five to six north-south elongated provinces would be ideal for integrating the hill-Tarai economies and for regional resource complementarity. This is, however, not politically feasible. While this may be so, the consideration of keeping intact the watersheds in the hills clearly merits attention.

In general, federal units with small territorial coverage make it easier to address the issue of ethnic, language identity. However, such units may suffer from lack of economic potential and may be untenable as meaningful units of development planning. Similarly, in smaller territorial units, because of the dominant ethnic identity, there can be a tendency to ignore the aspirations of minority groups. On the other hand, in federal units with large territorial coverage the target ethnic caste groups may not be numerically large enough to challenge the hegemony of the historically dominant groups and discrimination and consequent marginalisation may continue.

On the issue of the territorial coverage of federal units, the experience of India and Nigeria are instructive. While federal units with large territorial coverage can eventually break into smaller units in search of separate identity, the possibility of smaller federal units coalescing together to form larger units remains quite remote. There is virtually no example in the world where this has happened. Federalisation is not a once off choice, it is always a choice in the making.

## **THE SEARCH FOR BALANCE**

In trying to address the ethnic question in Nepal – and with it the issue of inequality and discrimination – the late Harka Gurung made some very pertinent observations (Gurung, 2003). There are three main social groups that have been marginalised by the state's monopolistic policies. These are the janajitis on the basis of culture, the Dalits on the basis of caste, and the Madhesis on the basis of

geography. Gurung notes the cultural, economic and political problems faced by these groups and the interventions called for to deal with these issues. It should be noted that the observations were made before Jana Andolan II (the uprising that toppled King Gyanendra and pre-empted the signing of the Comprehensive Peace Agreement in 2006) and the move towards a republic and federalism.

In the cultural, economic and political sphere, the major hurdles for janajitis are religious and linguistic discrimination, low literacy and unemployment, poor political representation and subjugated governance. For the Madhesi's, linguistic discrimination, employment bars in certain sectors, the dominance of hill people and obtaining citizenship are major problems. For Dalits, caste discrimination, poor literacy, unemployment and landlessness, and poor representation are the key problems.

According to Gurung, the creation of a secular state would address the issue of religious discrimination. Official status for janajiti and Madhesi languages would address linguistic discrimination. Targeting in education, affirmative action and a system of proportional representation would address janajiti issues. The lifting of the bar on employment in sectors such as the army, regional autonomy and the easing of the citizenship issue by ascertaining long-term residents could address the hurdles for Madhesis. Free education, reservations in employment, the provision of alternative livelihoods and collegiate elections are the interventions required to deal with the problems of Dalits.

Gurung's analysis basically views the problem of ethnic inequality and discrimination in terms of four major social groups in Nepal: janajitis, Dalits, Madhesis and hill caste groups (comprising the CBST).<sup>6</sup> In fact, much of the analysis on Nepal's socioeconomic and regional inequality has been made on this basis. This presents the ethnic problem on a meso scale. The micro scale would be looking at the problem from the perspective of each ethnic/caste group, on the scale of the 100 ethnic caste groups identified in the 2001 Census or the 125 groups identified in the 2011 Census. The micro-scale is clearly unworkable for the purposes of federalisation.

The distribution of population by the plurality of major ethnic groups show that there are major ethnic domains, i.e., areas with relatively-high concentrations and dense populations of major ethnic groups, even though the population is highly mixed due to centuries of migration, not only of hill caste groups, but also of janajitis. The diversity in the distribution of ethnic and language groups in Nepal is such that all the existing ethnic/caste groups and languages cannot be provided with a separate territorial identity through a federal structure. On the other hand, the historical experience and cultural consciousness created by political actors and ethnic organisations is such that ethnic/caste groups are unlikely to refrain from demanding the recognition of their ethnic/caste and language identity in any federal structure. The rationale for federalism in Nepal,

presented in the early part of this paper, clearly indicates that federal units based solely on grounds of major ethnicity/language groups carry the risk of not adequately addressing the equally important issues of equitable and inclusive development and the decentralisation and devolution of power to the lowest level. In such an eventuality, federalism could defeat its very purpose, which is the empowerment of all citizens and creation of a prosperous Nepal in which the prosperity is shared by all.

However, ethnicity cannot be ignored in Nepal's federalisation, not because it is a timeless category, but because promotion of cultural and linguistic heritage and identity is very much a part of development itself. Federalisation has to be a vehicle for expressing Nepal's socio-cultural diversity, not as a way of harking back to the past, but as means of charting a multicultural course for the future. It is in this sense that ethnic identity at the meso level (i.e., janajiti level) and economic viability appear most pertinent as the basic principles for federalising Nepal. This would make for a small number of provinces, in which: (a) there would be a plurality of one or two ethnic groups, (b) a major presence of janajitis, in the east, centre and the western hills, with the potential to make a difference in political representation, (c) a major presence of Madhesis and janajitis in the Tarai provinces, (d) a sizeable territorial coverage to minimise the difference in population, area and natural resources between provinces, and (e) to a large extent, the maintenance of the integrity of the watersheds in the hills in particular. This would go against demands for federalisation based on a single ethnic identity, particularly for ethnic groups with a relatively small territorial coverage. In any case federalisation on the basis of single ethnic identity would be a misnomer because the provinces would essentially be multi-ethnic.

The framework for such a federalisation could be created using two concepts. The first concept is of ethnic groups with contiguous historical occupancy. This would basically group together ethnicities that have historically inhabited geographically adjacent and contiguous areas, have suffered discrimination at the hands of the state, and have over time developed a sense of relative affinity towards one another. Such federal units could encompass a large natural resource base and be sustainable as meaningful units of regional development. For instance, Limbus and Rais in the eastern hills have historically shared contiguous habitats, a dominant territorial presence and traditions in those habitats, and share a sense of ethnic affinity. They have also been at the receiving end of the exclusionary policies of the Nepali state.

A similar, more general situation pertains with respect to the Gurungs and Magars in the western hills. It may, therefore, be possible to recognise one federal unit that incorporates the ethnic areas of the Limbus and Rais and another encompassing the Gurungs and the Magars. The name of the federal unit could be decided through mutual consultations to reflect the cultural roots of the respective ethnic

groups. The Tamang ethnic area covers a large territorial space and may be considered as a separate federal unit. The Newar ethnic area happens to also be the capital of Nepal and may need separate recognition, not only as a capital, but also as the expression of Newar cultural heritage. In the mid and far west, the area of Chhetri dominance, a single large federal unit could be envisaged to encompass the Karnali-Khaptad region. This would yield five provinces in the hill region. All these federal units or provinces, with the exception of the Karnali-Khaptad would have not only plurality, but a majority of janajiti (in Rai-Limbu, Tamang, and Newar areas), thus influencing the ethnic representation in the provinces, a major concern of all proponents of ethnic based federalism<sup>7</sup> (Hachhethu, 2010).

The situation has not changed much in the 2011 Census. The circumscription of the Kathmandu valley by one single province should not be a serious consideration as it would result in the creation of a wholly inappropriate artificial boundary and gerrymandering, as seen in the High Level State Restructuring Commission majority report.

In the Tarai, two provinces, as proposed in the CRSDSP report, can be envisaged, based mainly on regional identity in the east and ethnic identity in the west. Based on ethnic, language and hill identity considerations, the inner Tarai valley of Chitwan would be part of a hill province. There have been suggestions to incorporate the hill dominant areas in the eastern and western Tarai with respective hill provinces. This may not be feasible in view of the geographical identity of the Tarai and the fact that the sizeable presence of hill-origin population in these areas could foster better interdependence and good will among the Madhesi and Parbate or Pahadi (hill) populations.

Federalisation would not provide an ethnicity-based territorial identity to the Dalits, mainly because of the dispersed nature of Dalit settlements and the juxtaposition of hill caste and Dalit settlements. Provisions for special, non-territorial representation, reserved constituencies in Dalit plurality areas, special reserved quotas for Dalits in local government, and more assertive affirmative action at all levels and employment sectors could be ways of addressing the problems of the Dalits under federalism.

Another mechanism could be the creation of special autonomous areas. Areas with particular ethnic/caste dominance and cultural features could be designated special autonomous areas for those ethnic/caste groups. Special autonomous areas could be identified for both large and small ethnic groups with a contiguous territorial spread and a historical continuity in habitation. These could come under the purview of the provinces and the distinctiveness of the special autonomous areas and their rights and obligations could be enshrined in the constitution itself. This would make it possible to recognise the identity of even smaller ethnic groups that have a contiguous geographical or territorial spread. It should also be possible to provide for special representation of such special autonomous areas in the formation of the provincial legislature. Special

autonomous areas can also be an expression of the cultural integrity and solidarity of ethnic caste groups. Special autonomous areas would incorporate the special structures envisaged in the CRSDSP and HLSRC reports.

## **CONCLUDING OBSERVATIONS**

In Nepal, federalisation has been seen by the major stakeholders (political parties and ethnic organisations) as a once-off exercise. However, the experience of India shows that it is an evolving exercise with federal units moving from larger entities to smaller ones, from population groups with heterogeneous attributes to less heterogeneous attributes, and also from specifically ethnic concerns to development concerns. The broad seven-province framework may be seen as an evolving exercise in which the scope for the recognition and expression of socio-cultural diversity is matched by the capacity to exercise autonomy and engage in development that is in congruence with the resource base and the genius of the people.

The federalisation debate in Nepal has been rife with concepts and constructs that are misleading or shrouded in confusion. The federalism being advocated in Nepal by major political actors is not ethnic federalism in the sense that certain ethnic groups have privileged citizenship relative to others – but it could be an expression of ethnicity to the extent that the language and culture of plurality groups gain wider provincial recognition and patronage. A lot of noise is being created about nomenclature and single or multiple identity federalisation as if single identity would deny equal citizenship to other groups or multiple identity would deny the recognition of specific groups. Except for the name, the socioeconomic and political implications of identity-based federalisation have not been adequately elaborated by contending parties. With the exception of a few ethnic organisations, and ethnically motivated political parties who hold extreme positions with regard to privileged citizenship and political prior-rights, the kind of federalism being considered in Nepal is within the context of liberal democracy. This is unlikely to change.

Federalisation has also been confused with affirmative action, while the former is about redistributing power and the latter about equalising opportunities. There have been attempts to conflate the two via the self-determination model (Shneiderman & Tillin, 2012). The idea of a self-determination that violates the rights of local communities irrespective of indigeneity could be a recipe for conflict, particularly when Nepal provides a model for the community management of natural resources, where community is defined by locality and relationship to resources rather than ethnicity.

The federalisation debate in Nepal has been constructed with an eye to domestic ethnic and development issues. The fact that Nepal is located between two giant

neighbours with their own geo-political perceptions, aspirations and imperatives has not entered the federalisation debate so far in any conscious way. This does not mean that the concerned forces and processes are not in play, on the contrary. The federalisation of Nepal will have implications for its relationship with its neighbours and with the wider region. Some have surmised that a meaningful state reconstruction will include significant transformation in Nepal's current relationships with its neighbours (Sharma, 2010). This makes it all the more urgent for all stakeholders in Nepal's federalisation to take explicit cognisance of these geo-political implications, even as domestic ethnic and development concerns shape the federalisation agenda.

## REFERENCES

- Acharya, R.C. (2012). Nepal's State Restructuring: Inserting Economic Agenda. *Nepalnews* [online], April 2012. Retrieved May 10, 2012 from <http://www.nepalnews.com/home/index.php/top-column-hidden-menu/18315-state-restructuring-inserting-economic-agenda.html>.
- Adhikari, J. (2008). *Food crisis in Karnali. A historical and politico-economic perspective*. Kathmandu: Martin Chautari.
- Benett, L. (2005). *Citizens without rights: Nepal gender and social exclusion assessment*. Kathmandu: World Bank and DFID.
- Bhattachan, K.B. (1995). Ethnopolitics and ethnodevelopment. An emerging paradigm. In Kumar, D. (Ed.) (1995) *State Leadership and Politics in Nepal*. Kathmandu: Centre for Nepal and Asian Studies, Tribhuvan University.
- Bhattachan, K.B. (2012). 'Indigenous people's right to self-determination in Nepal.' In Mishra, C. & Gurung, OP (Eds) *Ethnicity and Federalisation in Nepal*. Kathmandu: Central Department of Sociology/Anthropology, Tribhuvan University: 139–165.
- Bishop, B.C. (1990). *Karnali under stress: Livelihood strategies and seasonal rhythms in a changing Nepal Himalaya*. Chicago: University of Chicago Press.
- Bourdieu, P. (1994) 'Structures, habitus, power: Basis for a theory of symbolic power.' In Dirks, et al. (Eds.) *Culture/Power/History: A Reader in Contemporary Social Theory*. Princeton: Princeton University Press: 155–159.
- CBS (2003). Population Census 2001. Kathmandu: Central Bureau of Statistics/National Planning Commission, Government of Nepal.
- CBS (2012). National Population and Housing Census 2011. Kathmandu: Central Bureau of Statistics/National Planning Commission, Government of Nepal.
- CBS (2011). *Nepalma garibi (Poverty in Nepal)*. Report based on Nepal Living Standard Survey 2010/11. Kathmandu: Central Bureau of Statistics, Government of Nepal.
- CRSDSP (2010). *Sambidhan Sabha. Rajyako punarsamrachana ra rajya Saktiko Badfad samiti. Aabadharanapatra ra prarambhik masyouda sambandhi pratibedan 2066*. (Constituent Assembly Committee for the Restructuring of the State and Distribution of State Powers: Report related to the Concept Paper and Preliminary Draft). Kathmandu: Constituent Assembly.
- DFID, World Bank (2006). *Unequal citizens: caste and ethnic exclusion in Nepal*. Kathmandu: DFID and World Bank.
- Gaige, F.H. (1975). *Regionalism and national unity in Nepal*. Berkeley: University of California Press.
- Gellner, D.N. (2007). Caste, ethnicity and inequality in Nepal. *Economic and Political Weekly*, 42(20): 1823–8.
- Gurung, H. (2002). Fragile districts: Futile decentralisation. In *Readings on Governance and Decentralisation*. Kathmandu: Institute of Governance and Development.
- Gurung, H. (2003). *Trident and the thunderbolt. Social context in Nepali politics*. Lecture delivered at the Conference 'The Agenda of Transformation: Inclusion in Nepali Democracy', 24–26 April 2003, Kathmandu. Lalitpur: Social Science Baha.

- Gurung, H. (2006). *From exclusion to inclusion: Socio-political agenda for Nepal*. Kathmandu: Social Inclusion Research Fund.
- Hachhethu, K. (2010). Sanghiya Nepalko Swarup ra Samrachana (Framework and Structure of Federal Nepal). In Khanal, K (Ed.) *Sambidhan Nirman ra Rajyako Punarsamrachana* (Constitution Building and the Restructuring of the State). Kathmandu: Nepal Centre for Contemporary Studies: 211–243.
- HLSRC (2011). *Rajya Punarsamrachana sujhab Uchastariya Aayogko sujhab pratibedan*. (Recommendation Report of the High Level Commission for State Restructuring). Kathmandu: Constituent Assembly.
- HLTF (2010). *Aadibasi Janajiti suchi parimarjan sambandhi uchastariya karyadalle Nepal sarkar lai bujhayeko pratibedan* (Report submitted by the High Level Task Force for the Refinement of the list of Aadibasi Janajiti). Kathmandu: Constituent Assembly.
- Hofer, A. (2004). *The caste hierarchy and the State in Nepal: A study of the Muluki Ain of 1854*. Kathmandu: Himal Books.
- International Crisis Group (2011). *Nepal: Identity politics and federalism*. Report No.199. Kathmandu: International Crisis Group.
- JAFTA (2001). *Information System Development Project for the Management of Tropical Forest: Activity Report of Wide Area Tropical Forest Resources Survey (Kingdom of Nepal)*. Kathmandu: JAFTA.
- Kymlica, W. (1995). *Multicultural citizenship. A liberal theory of minority rights*. Oxford: Oxford University Press.
- Lawoti, M. (2005). *Towards a democratic Nepal. Inclusive political institutions for a multicultural society*. New Delhi: Sage.
- Lawoti, M. (2012). 'Making federalism work: Promoting societal and institutional congruence and balancing centripetal and centrifugal tendencies.' In Mishra, C; Gurung, OP (Eds.) *Ethnicity and Federalisation in Nepal*. Kathmandu: Central Department of Sociology/Anthropology, Tribhuvan University: 166–181.
- Lawoti, M. & Gunaratne, A. (2010) *Ethnicity, Inequality and Politics in Nepal*. Kathmandu: Himal Books.
- Luxemburg, R. (1976) *The national question: Selected writings*. New Delhi: Monthly Review/Aakar Books.
- Mishra, C. (2012). 'Ethnic upsurge in Nepal: Implications for federalisation.' In Mishra, C. & Gurung, O.P. (Eds.) *Ethnicity and Federalisation in Nepal*. Kathmandu: Central Department of Sociology/Anthropology, Tribhuvan University: 58–90.
- Mukherjee, R. (1999). Caste in itself, caste and class, or caste in class. *Economic and Political Weekly*, 34(27).
- New Era (2004). *A Study on Population Pressure Index (PPI) in Nepal*. Kathmandu: Ministry of Population and Environment. His Majesty's Government of Nepal.
- National Planning Commission, Asian Development Bank (2007). *Regional development strategy study*. Kathmandu: National Planning Commission and Asian Development Bank.
- Nepal South Asia Centre (1998). *Nepal Human Development Report 1998*. Kathmandu: Nepal South Asia Centre.
- Neupane, G. (2000). *Nepalko jatiya prasna* (The ethnic question of Nepal). Kathmandu: Centre for Contemporary Studies.
- Oomen, T.K. (2012). Ethni-nationalism and building national states in South Asia: Towards federalisation. In Mishra, C. & Gurung, O.P. (Eds.). *Ethnicity and Federalisation in Nepal*. Kathmandu: Central Department of Sociology/Anthropology, Tribhuvan University: 6–16.
- Oppitz, M. (1973). Myths and facts: Reconsidering some data concerning the clan history of the Sherpa. In Fürer-Haimendorf, C.V. (Ed.). *Contributions to the Anthropology of Nepal*. Warminster: Aris & Philips.
- Regmi, M.C. (1972). *A study in Nepali economic history 1768–1846*. New Delhi: Adroit Publishers.
- Regmi, M.C. (1977). *Land ownership in Nepal*. New Delhi: Adroit Publishers.
- Shneiderman, S. (2012). Restructuring the state, restructuring ethnicity: Situating Nepal in contemporary social scientific debates. In Mishra, C. & Gurung, O.P. (Eds.). *Ethnicity and Federalisation in Nepal*. Kathmandu: Central Department of Sociology/Anthropology, Tribhuvan University: 224–237.
- Shneiderman, S. & Tillin, L. (2012). *Disentangling ethnic federalism and affirmative action*. Paper presented at the International Conference on Inequality and Affirmative Action: Situating Nepal in Global Debate, 18–20 July, Kathmandu.
- Sharma, J. (2010). On state restructuring in Nepal. *Economic and Political Weekly*, 45(4): 20–23.

- Sharma, P. (2006). *Loktantrik Ganatantra Nepalko Pradeshik Swarup* (Provincial framework of the Democratic Republic of Nepal). Mulyankan, Srawan (August).
- Sharma, P. (2008). *Unravelling the mosaic. Spatial aspects of ethnicity in Nepal*. Kathmandu: Social Science Baha and Himal Books.
- Sharma, P. (2009). Climate change implications, planning and federalism in Nepal. *The Journal*, 350 Nepal, August: 10–15.
- Sharma, P. & Khanal, N. (2009). *Towards a federal Nepal. An assessment of proposed models*. Kathmandu: Social Science Baha & Himal Books.
- Sharma, V.R. (2007). Comparative study of federation proposals for Nepal. *Liberal Democracy Nepal Bulletin*, 2 (2).
- Stalin, J.V. (1913). *Marxism and the National Question*. Collected Works, Vol. 2. Retrieved 17 October, 2013 from [www.marxist.org/reference/archive/stalin/works/1913/03html](http://www.marxist.org/reference/archive/stalin/works/1913/03html).
- Tamang, M.S. (2008). 'Samanata, sanghiyata ra bahusanskritik rashtrabad (Equality, federalism and multicultural nationalism).' In Khanal, K, Subedi, J. & Tamang, M.S. (Eds.). *Rajya Punarsamrachana. Rajnitik, Aarthik ra Sanskritik Dristikon (State Restructuring: Political, Economic and Cultural Perspectives)*. Kathmandu: Martin Chautarik: 105–158.
- UNDP (2008). *Rajnitik dalko Ghosanapatra ra Sambidhan Nirman* (Manifesto of political parties and constitution making). Kathmandu: UNDP.
- UNDP (2009). *Nepal human development report 2009. State transformation and human development*. Kathmandu: UNDP.



# CHAPTER 6

## AUTONOMOUS REGIONS: ETHNO-DEMOGRAPHIC ANALYSIS

A QUESTION OF  
ACCOMMODATION  
OF DIVERSITY

- BALKRISHNA MABUHANG



## 1. INTRODUCTION

The territory Nepal presently occupies is the expansion of the Gorkha kingdom that the late king Prithvinarayan Shah commenced building in 1768. The territory was extended and truncated, in turn, by his heir and followers. His initiative for territorial unification has been envisaged from various perspectives. Many people regard it as an expansionist step of the princely sum of states intended to make a strong and holy land compare to the Southern neighbors that were already occupied by Mughals, followed by British. Burghart (1996) argues that Prithvinarayan Shaha didn't consider the India or Bharat as a holy land, since there was no rule of Hindu four-fold system (Sharma, 2005: 452). According to Major Keshar Bahadur (1954: 20-23), Prithvinarayan recognised the supreme necessity of unifying the Thakuri<sup>1</sup> kings of Baise and Chaubise petty states. Not only did he meet that necessity, but he also subjugated three small kingdoms in Kathmandu valley. Subsequently, King Prithvinarayan Shah conquered Indigenous Nationalities (INs)<sup>2</sup> autonomous units, as Kathmandu used to call them: wither (Wallo) Kirat, amidst (Manjh) Kirat, and thither (Pallo) Kirat or Limbuwan<sup>2</sup>, brought them under the Gorkha Kingdom by the end of 18th Century. In contrast, Pradhan (1991, 2nd edition, 2009) argues that what happened in Nepal in the 18th century was not 'unification' in the sense that one can speak of the unification that happened in Italy or Germany. However, Whelpton (2009) argues that Prithvinarayan Shah certainly brought many populations in the central and eastern Himalayas under a single government and that can also be understood as unification. Moreover, he argues "Qin Shi Huan, for example, the man who forged a united Chinese state at the end of the 3rd century BCE was 'every bit as ruthless as' Prithvinarayan Shah. As his successors enlarged the areas under their control, and Han Chinese settlers moved into new lands, the treatment of indigenous population was no gentler than in eastern Nepal: a major reason that in China today those conquered by the dominant ethnic group make up only 10 per cent of the total population as against 30-40 percent in Nepal is that so many were either physically eliminated or assimilated, (p. ix)'. Whelpton draws a very interesting inference in the context of China that there is a shared sense of 'Chineseness' among Han Chinese and even a considerable numbers amongst minorities in China, whereas in Nepal people do not have a strong sense of Nepaleseness at first, since they can be seen struggling for recognition of their primary identities: janajitis, Madhesis, Dalits, and so on.

Nepali state is designed as a Hindu nation-state as Europeans built a homogenous nation-state in 19th Century (Burghart, 1984). And this is instantiated by a popular saying of Prithivinarayan Shah:

नेपाल चार जात, छत्तिस वर्णको साभा फूलबारी, असली हिन्दुस्तान, दुःखले आर्ज्याको  
मुलुक यदि सबैलाई चेतना भया ।

*Nepal is a shared garden of flowers characterised by four castes, thirty six different Verna (colour, or marker), true holy land of Hindus, achieved by tough effort, if anyone is aware (Stiller, 1968).*

One of the core contents of the saying above is 'Shared Space' of Hindus, hierarchically Brahmin at the top, followed by Chhetri, Vaishya, and Sudra (Dalits) and 36 different colours of distinct markers (possibly INs). However, when Junga Bahadur Rana came in power from Court Massacre in 1846, a shared value turned into hegemony of Hindus by promulgating the country code (Muluki Ain) in 1854, followed by the declaring Hindu Kingdom in 1866. In the declaration it was said:

"हाम्रो आफ्नै देश हिन्दु राज्य छ, जहाँ गोवध गर्न पाइँदैन । स्त्रीजाति र ब्राह्मणलाई प्राणदण्ड निषेध गरिएको छ । यस कलि युगमा यही मात्र एउटा देश हो जहाँ हिन्दुले शासन गर्दछन् । (Sharma, 2005)"

*We have a country, Hindu State where one cannot slaughter the cow. Death sentence for women and Brahman is strictly prohibited. This is the only one country where Hindus ruled (Sharma, 2004).*

In fact, the lower strata of Hindus (Dalits) itself, more than 59 distinct and different Indigenous Nationalities (janajitis) never have their due political space. As a result, the apprehension they had often become a watershed for those who want to create political instability. Ironically, the instability is always cultivated and led by leaders of mostly upper caste groups<sup>3</sup> in the name of either liberalism or communism. On an average, a revolution has taken place in every decade in Nepal, but nothing has been changed yet ever since democratic revolution successfully thrown away the Rana Oligarchy in 1950/51. The latest one, which Nepal resulted in a decade of warfare, instigated by Communist Party of Nepal (Maoist) eventually led to the declaration of the Nepali state as a secular state and Federal Democratic Republic of Nepal. However, the Nepali state has neither shown its secular practices against traditional Hindu regime (Kantipur Daily, March 22, 2012)<sup>4</sup>, nor adopted federal democratic structures by promulgating its constitution on time. Nevertheless, the Interim Constitution has projected Nepali state as a, "multiethnic, multilingual and multicultural characters, common aspirations and uniting diversity with commitments to sovereignty, in separation, national interest and prosperity (UNDP-Nepal, 2007: 54)."

A question of autonomy for ethnic groups has been raised over and over, but whether federalism based on 'Identity' would be an appropriate measure for Nepal has become a crux of the problem Nepal has been grappling with in the last 5 years. Constituent Assembly (CA), a historic organisation formed in 2007 as a cautious outcome of a decade long insurgency, nineteen days peaceful demonstration against dictatorial Hindu monarchy, Madhesi Movement, INs Movement, and so on. However, CA couldn't deliver the Constitution of Federal Democratic Republic of Nepal eventually. At this juncture, this essay tries to revisit the entire political process where an issue of accommodation of diversity is persistently raised and CA has discussed about the Autonomous Regions (ARs) along with federal units as an appropriate measure is analyzed from ethno-demographic point of view. It is divided into five major parts. First part will highlight the Conflict at global level in general and Nepalese experience in particular. Second part focuses the issue of State Restructuring and federalism. The third part will substantiate the accommodation of diversity in two neighboring countries- China and India, followed by an analogy between Nepal and East African country, Ethiopia. Fourth part will discuss the ARs by measuring tentative population size and geographic location. And fifth part or last part will be the concluding part with some policy measures.

## **2. COMPREHENSIVE PEACE AGREEMENT (CPA), 2005 A.D.**

Nepal has never experienced any insurgency in terms of armed conflict since 1995/51; and relatively peace if we compare with intra state or interstate armed conflict occurred in other parts of the world. However, due to Maoist armed insurgency or conflict or peoples' war, Nepal has got the experience of more than a decade long intrastate war that was formally ended by 2006 when Nepal Communist Party (Maoist) agreed upon Comprehensive Peace Accord (CPA). Thus it could be interesting to review the global trend of armed conflicts and how Nepal's experience does look alike.

Since World War II, there have been a total of 231 armed conflicts in 151 locations (countries) throughout the world. During the 17 years (1988-2005), since end of the Cold War, there were 121 conflicts in 81 locations (Harbom et. al, 2006). In 2005, there were 31 on-going armed conflicts in 22 locations whereas the highest number of armed conflicts was recorded in 1991 and 1992, with 51 conflicts active. In 2012, there were 32 armed conflicts found to be active in 26 locations worldwide which was a reduction by five since 2011 and a significant change for the second year (Themner & Wallensteen, 2012). It shows that the number of armed conflicts is declining comparatively. Nepal, a picturesque landlocked Himalayan country fell in violent conflict from 1996 to 2006. A decade-long (1996 - 2006) armed conflict (Jana Yuddha or Peoples' War), officially ended in November 2006 with the signing of the CPA. It has achieved few historic things-

end of Hindu monarch, and declares Nepal as a Federal Republican Democratic Nepal with secular and inclusive type of features. Nepalese people are able to achieve the Constituent Assembly (CA) after long awaited historic struggles since 1950. In a successful manner, the CA was formed aiming to design a federal democratic republican constitution in two years. However, it could not deliver the constitution in stipulated time frame and extended for two more years.

The literature suggests that civil wars or conflicts are mainly caused by two factors- greed and grievances (Bhatt et. al, 2009). Greed reflects elite competition over valuable natural resource rents, whereas grievances reflect relative deprivation that fuels the conflict. Conflict, however, can rarely be explained either by greed or grievances alone, though this greed versus grievance hypothesis may be complementary explanations for most conflict cases. In some cases, greed is the main or dominating cause of conflict; in other cases, grievances are found to be the main contributing factor. In Nepal, greed or elite competition is also prevalent from the very inception. Ruling elites have a very deep rooted mindset of opportunity seekers than to be popular among people. Another side of the coin is the affected community along with the people who are historically, socially, culturally, and regionally excluded often felt grievances.

Nepal had experienced the war from 1996 to 2006; however it has not been accounted in the above mentioned global database. The possible reason might be that there is no formal measurement of devastations of Maoist insurgency. An informal study shows that there were about 14 thousand deaths tolled during Nepal's decade long war. However, millions of members of the population were displaced, and a cost of billion Rupees State's property dismantled. Nobody knows the actual deaths, cost of individual's physical properties, cultural, and emotional traumas, however, people heave a sigh of relief when both state and non-state parties agreed to sign the CPA in 2006 which formally ended a decade long insurgency. In fact, the warfare unbelievably evolved and magically ended. Whatever changes appeared seems to be that a political party of a handful people, in the beginning, became the largest party in the CA. The grievances raised due to ethnic and regional disparities were well capitalised by the Maoist but left out in a cross road. So, a thesis largely conceived that an armed struggle is an imperative to demolish the old bourgeois regime for the establishment of the dictatorial regime of labours, peasants, and proletariat groups' is eventually jeopardised. However, in the Marxist literature, the peace is defined as a state in relation between people, nations, and states characterised by peaceful and friendly coexistence and by the settlement of outstanding issues by negotiations and agreement (Kara, 1968). It may be too early to say that the peace prevails at this moment can bring friendly coexistence among groups and common people, since outstanding issues are yet to be negotiated. In the mean time a larger wing of the CPN (Maoist) is already bifurcated, and they had boycotted the second CA election.

In the preamble of CPA it is well articulated that 'people's mandate for democracy, peace and progress expressed through repeated historic people's movement and struggles since 1951, would be highly respected. And it has also reaffirmed 'the 12-point and 8-point agreements, and 25-point code of conduct between the seven parties and the Maoists'. The preamble also pledges 'for progressive restructuring of the state by resolving prevailing problems related with class, ethnicity, regional and gender differences.' The agreement held between two parties mentioned about the broader socioeconomic and cultural changed conceived by Maoist Movement. The Sub-Article 3.5 clearly tries to articulate it:

End the existing centralised and unitary state system and restructure it into an inclusive, democratic progressive system to address various problems including that of women, Dalits, indigenous community, Madhesi, oppressed, ignored and minority communities, backward regions by ending prevailing class, ethnic, linguistic, gender, cultural, religious and regional discrimination.

This Sub-Article was quite often referred as a mile stone achievement to make change in Nepal, so believed that it would shift the State from a unitary and an exclusionary type to the federal and inclusive kind of state that would address the issues. So, the CPA clearly hinted that there is an intrinsic relationship between the conflict, the change agents, and the aspirations of people characterised with INs, Dalit, Madhesi, Women, and all ignored and minorities.

### **3. STATE RESTRUCTURING**

Nepal had gone through the very unitary state over the last six decades, even after democracy was successfully established against Rana oligarchy in 1951. Unfortunately, it was relapsed in 1960, when non-party Panchayat democracy was introduced by late king Mahendra and ran the country for thirty years under the active dictatorial regime. Peaceful political movement and struggles reinstated the multiparty democracy successfully in 1991. Again the democratic system was taken over by king Gyanendra in 2005 while the country was severely inflicted with Maoist insurgency. The political parties supposed to govern the state was almost messed up due to malpractices and in competencies in delivering services on one hand, and unable to tackle with the insurgency gave the space for constitutional monarchy to become ambitious. So Nepal has a bitter experience of back and forth of deprivation of democratic system over the six decades, but none of the upheaval or dictatorial regime said a necessity of change of unitary to federal system. For the first time, the quest for state restructuring articulated as a historic importance in the political domain when UCPN (M) and Seven Party Alliance (SPA) agreed upon 12 points agreements against the authoritative regime of King Gyanendra in November, 2004. Although the 12-point agreement

didn't mention categorically about the state restructuring, it has embodied the spirit of state restructuring in the preamble without elaborating on what "state restructuring" would stand for. The Agreement gave a clear message for those who were excluded by the Hindu Nation-State as to what state restructuring would mean to them.

State Restructuring was even taken as an unwanted word for people whose interest had been served by the unitary and centralised state meanwhile political leaders were also unwary about it while declaring state restructuring. The word Prithivinarayan used, "shared" flower- garden may be cropping out when political leaders intend to restructure the present Kathmandu centric Hindu kingdom. So, the state restructuring would mean to create a due share for all groups, individuals and particularly the deprived and discriminated populations. It basically envisages an equal space in the state and that would be possible when unitary structure can be transferred into the federalism (shared rule). However, it was not mentioned in the November agreement between CPN (M) and SPA. So, the Madhes movement ruptured out immediately especially in the Eastern Tarai and death tolled more than four dozen. It became a very urgency to the state to address the issue of state-restructuring by elaborating it up to federalism that the CA would decide. According to Hachhetu (2007: 2), "It was so powerful and effective that Girija Prasad Koirala, the Prime Minister of the eight-party coalition government including the CPN (Maoist), was forced to proclaim twice within a single week that federalism would be instituted and that the number of constituencies in the Tarai would be increased." Following Madhes, Janajiti Movement escalated in the East basically asked to the state to declare the federalism and other socioeconomic inclusive measures against the unitary State. Consequently, the uprising interests of people for federalism more or less based on ethnic identity urged political parties to express in manifestos that were launched in the CA election.

### 3.1 Federalism

The term federation literally refers to an agreement and acceptance between federal (National/ Central/ Union) and provincial (sub-national/ state/ autonomous) units to live and work together. The word, at the same time indicates the appropriate political apparatus to promote the rights of different social, cultural, historical, background of nationalities and ethnic groups by creating mechanisms that are demographically convenient to them. Only, numerical strength doesn't qualify the majority/ minority political dynamics, however, it is one of the determinants in power configuration. Edrisinha (2005) shares the ideas about the federal political system that depends upon a federal political culture, a political culture that values (rather than fears) diversity and that acknowledges the importance of consensus (rather than simple majority rule). Giving an example of Sri Lanka he warned that a political culture of both Sinhala majority (>72 percent)



and Tamil minority (>12 percent) is strikingly similar in their underlying drive for either Sinhala or Tamil homogeneity in Sri Lanka or in the Jaffna Peninsula. Both adopt a centralist, assimilationist model of government that might push both contenders towards the unending conflict. In the context of Nepal, Hindu high caste minority driven homogeneity and assimilistic approach is the major threats to multiple identities- INs, Madhesis, Muslims, Buddhists, Christians, and so on. They are expecting a federal system that let more or less each group to be autonomous in the respective zone, if federal units and subunits are recognised accordingly. The logic behind the state restructuring and federalism is that the power dynamics between dominant Hindu high caste group and other ethnic groups would be harmonised by creating significant demographic presence of a group in federal units or subunits by envisaging historically and culturally marginalised ones'. Since none of the groups will have overwhelming majority numerically at proposed federal units; the dominant Hindu high- caste groups don't have to worry with the state restructuring and federalism. So both dominant and dominated groups will have an opportunity to remain in win win situation. The question at this moment is how to empower the marginalised or dominated one, not to disempowering the dominant one. However, the dominant one is conceiving this as the reversal of the past. Therefore, the agenda of federalism is perceived by dominant group as an unwanted issue.

On the other hand, in spite of this, there is also an apprehension that Hindu high caste group may remain dominant even if state restructuring via federalism will take place. Since they are well educated and experienced with the state polity and they have been benefitted from the state; so, they are culturally and behaviorally fit in harvesting the benefit and grasping the opportunity. However, the restructuring of state in scientific and practical manner may heal the inequalities. By deepening and meaningful democracy may synchronise those demerits or deficit of democracy. In literature it is said that the conflict is prone even in federal settings when a minority group captured the power that deprived the larger population on economic, social, and political decision making opportunity (Christin & Hug, 2012). In the context of Nepal, a minority population of Caste Hill Hindu Elite Males (CHHEM) monopolised the political, economic, social and cultural power (Lawoti, 2010). So, both state restructuring and federalism in Nepal are expected to make up this discrepancy by making more robust the demographic presence of each group in each possible federal unit and sub-units and by dividing (providing as of need) the state power to people of units and subunits through federalism within the federalism.

Some people opine that Nepal should not adopt federalism, instead should adopt a decentralised democratic structure. Nevertheless, Nepal has already gone for Decentralisation for the last 6 decades in all kinds of democracy- Active Monarchy (1960- 1991), followed by Constitutional Monarchy with Multiparty Democracy (1991- 2007), and Democratic Republic (2007- 2013). Nepal has been practicing a various forms of decentralisation under unitary form of state for the

last 6 decades. The very initial one was attached with the non-party 'Panchayat' system in constitution in 1962, followed by, three levels of decentralisation plan acted in 1965, the establishment of the Local Development Department in 1972 that structured through decentralisation act issued in 1982 (Gurung, 2002). All 75 districts were given the powers to make local level projects, pass and implement that continued for more than two decades. All Village Panchayats and Nagar Panchayats (municipalities) were given power in 1984 to conduct various developmental projects at the local level. The power of centre was assumed to be devolved into 5 Development Regions by framing north to south longitudinal regions for maximizing efforts of developments. The essence of making vertical units was to integrated Tarai, hill, and mountain regions. We have bitter experience of constituting and passing Local Self governance Act and law (Nepal Municipality Federation, 2062 B.S.)<sup>5</sup> under unitary state polity. Despite the Act's promising provisions, political power remained at the centre and Kathmandu was unable to devolve the power down to the local level. Late king Mahendra was very much concerned with the soil (Mato), water (Pani), and air/ weather (Hawa) than the interest of various INs and regional groups. So, principally and philosophically Panchayat discarded them by accusing communal groups or interests. Instead, Panchayat formed class organisations (Bargiya Sangathan) for Farmers, youths, women, ex-army, and aged population intended to mess up INs, ethnic, cultural, regional issues. One of the famous foreign writers, Sedden (1993:160) made a critique that the conception of Panchayat as village 'community' ignored economic, social and cultural divisions, while 'Panchayat democracy' allows them no overt political expression. He further argued, "...as long as economic and social differences and inequality at the local level cannot be formally recognised and legitimately expressed, then it is doubtful whether 'the people' will be able to participate effectively in their own economic and social development."

After ten years of implementation of decentralisation, particularly after the restoration of democracy Gaun (Village) Panchayats, Nagar (Municipality) Panchayats, and Jilla (District) Panchayats were converted into the Village Development Committees, Nagarpalikas (municipalities), and District Development Committees in 1992 through the implementation of the Local Self Governance Act in order to empower local bodies. These changes were formally recognised by international and other foreign development agencies that it is publicly committed to give a high priority to rural development to decentralise the state apparatus, to give greater power to local (district) elected government and to promote popular participation at the grass roots. The 'Approach Paper' launched by the newly elected government in 1992 says, "It will promote at the earliest opportunity a programme of effective devolution of power (and financial responsibility) which will make the district the major focus for the spring 1992 of two tiers of local government- at the village development committee level and at the level of the district committee- will provide the framework of a democratic

and responsive local state capable of providing the technical and material support required for effective local development (HMG, 1992)." The Approach Paper also highlighted the 'room for non- governmental (NGOs) initiative for economic and social development. However, there was an early critique against the plan decentralisation efforts the State made. There was a considerable uncertainty regarding the detail of how powers would be devolved to the district level (Bienen at all, 1990: 72).

In 2002, Gurung (2002) conducted a study about the viability of the existing 75 districts in Nepal. As he said, there are only 11 districts that are able to meet their administrative expenses where each has a custom office (import duty). He further argued that if districts are deprived of resources and the ability to raise revenue, decentralisation ultimately becomes centralisation in practice, so local authority should given the power to collect revenue. He also claimed that the discrepancies found in the system was due to 'highly centralised governance system' and 'attitude and behavior of bureaucracy,' which was deployed by the central authority that did not let the true decentralisation, indeed. In a question of what is difference between decentralisation under unitary/ federal system, the decentralisation in federal system is quite different than of the unitary state. In unitary state, Watt (2008) argues that the centre hands over necessary power to the local bodies and can withdraw whenever centre needs. In contrast, each layer would work in own competencies constitutionally fixed in federalism. That is what we called self-rule for each autonomous unit, and power-sharing among them at federal level with shared rule reflect the multilayer governments; above all it brings unity in diversity.

However, in contrary to his earlier version, Sedden (2012) became fired when he heard that federalisation of Nepal is discussing whether its federal units should address the basic identity (acquired one) of people. He argued "it would be dangerous and racist," if federal units, sub-units, and special structures be created and 'formally recognised' based on social entities. He further stressed that it 'violates universal human and democratic rights.' The debate of Federalism, I mean division of powers between federal, provincial, special units (for Indigenous Peoples different from so-called mainstream culture), and local governments is the option to be accomplished under the state restructuring. Nepalese intelligentsia lacks the knowledge of own country, so as to rely on foreigners. But what they suggest at a time and the suggestion made in another time may not work properly, because, they are basically consultant, so that they suggest as to needs of the clients. However there must be a hot debate for and against of it.

Opponents of federalism against identity is very much status quo. Bohora (2003) argues the major river basins of Nepal, the federal unit have to border thus it will make development of water resources easier by minimizing hill versus Tarai conflicts in sharing the benefit. Main purpose of creating a series of north-south

growth axes or development corridors was to tie-in the economy of Tarai with that of the hills (Gurung, 2005). However, Nepal has the least significant experience in working with reciprocity in the development sector between mountain, hill and Tarai region in the last 6 decades. In fact, the current regional structure was purely a conception of the elite and development experts in the ruling hierarchy; it was not a grassroots' demands (Mabuhang, 2012). The Centralised performance of the structure showed that it was truly designed neither for devolution of political power to the people nor for addressing any grievances of the marginalised socio-cultural groups (Sharma, 2007).

According to Watt and his colleagues (2007) federalism addresses the issues of diversity and creates unity in diversities. But the question is how minorities do tend to mix with the dominant groups; by assimilating or trading off their interests, values, and necessity. Majeed et al (2008) argue that diversity is not a burden but a foundation on which the whole nation stands. Kymlicka (1998) says that the issues raised by minority communities could not draw the attention of liberal democratic scholars until the end of cold war or nineties. Western liberal democrats thought that the issue of ethnic and cultural diversity was not their issues. Kymlicka further argues that an issue of ethnic nationalism went along with the collapse of communism in 1990. However it emerged out from the asses of this compelled liberal democrats to think about it. Dissatisfaction expressed by indigenous peoples against immigrants and refugees (in France, UK, Germany and USA), restoration of indigenous nationalities and political dynamism illustrate it. UN declarations for indigenous peoples<sup>6</sup> continuously increased the tendencies for self-governance or autonomy. And Nepal is the one state parties who endorsed the United Nations Declarations of Rights of Indigenous Peoples (UNDRIP).

Due to various reasons, political theorists began to concentrate their attention towards ethnic issues and identity politics. In the western world federal or quasi-federal forms of territorial autonomy are increasingly seen as the only or best solution to these conflicts. Where national minorities form clear majorities in their historic homeland, and particularly where they have some prior history of self-government, Western democracies have not found any alternative for accommodating their interests apart from territorial autonomy or multination federalism (Kymlicka, 2005). In the context of Nepal, democrats think that Communist Party of Nepal (Maoist) brought the issues of identities which contradict with the notion of class struggle. However, we can learn from the global experiences and state has also ratified the ILO Convention No. 169 and UNDRIP shows that Nepalese Democracy have to sooner or later realise the issue of INs and so on. Otherwise, the issue of ethnic nationalism remains as different and pertinent issues in the polity.

### **3.2 Nepal: Federalism with or without Identity**

Heidegren (2004) says, "Identity prepares the foundation for social unification. It also answers the question: what brings social unity? It plays an important role for socialisation and different identity building. Factual and many other foundations are necessary to establish individual identity." In a question of national unity among diversity, Nepali intelligentsia have often referred the upright position of forefinger of late King Prithivinarayan Shah in his statue symbolises the unity. It is fundamentally wrong, since only the forefinger is upright, and remaining are down in that position. As he said, 'if 4 caste groups and 36 different Varna (colour) have a shared (stake) equally in the state,' no matter which one is longer/shorter, each and every finger must stand uprightly. But it didn't, so remaining all fingers always put 'downward' doesn't qualify the unity. Indeed, all INs and even the Dalit community of 4 fold caste are always keep in subordinate or excluded. Now the question arises that in order to ensure the shared stake among different entities, the federalism may provide that space. The demand for federalism challenges the centralisation of political power in the hands of small elite. But it goes a lot further, in that it will redefine an entrenched national identity and upends the dominant, state-sponsored narrative of the eighteenth century conquest of what now constitutes Nepal, which celebrates it as "unification" (International Crisis Group, 13 Jan. 2011).

Some politicians and intellectuals of the dominant community are arguing that federalism was never on the agenda of second political movement. When Maoist put forth their "40 points demand" in February 1996, three points were dedicated to the janajiti Issue.<sup>7</sup> Moreover, the party's Common Minimum Policy and Program of United Revolutionary People's Council devoted two of its 11 sections to the janajitis. Among other promises, the CPN (M) (2004: 171–172) argued that:

...the state shall guarantee equal treatment to all nations/nationalities and languages of the country. All nations/nationalities traditionally oppressed by the ruling class (?) shall exercise the right to self-determination, but their problems shall be resolved within the framework of national autonomy program in the New Democratic/ People's Democratic system.

Violent resistance to the government emerged in 1996 when the Communist Party of Nepal (Maoist) launched their insurgency especially in the remote areas of Rolpa and Rukum where Magar, INs densely lives. The Maoists' policies and programs included ethnic aspirations even before the start of the war and that was endorsed as the ethnic autonomy in July 1995. Accordingly, the 40-point demand called for the end of ethnic oppression in general and for a secular state, the equality of languages, and regional autonomy in particular. The central

committee systematised the policy on nationalities by endorsing national and regional autonomy with the right to self-determination in 1997. The party established a central level ethnic department, led by Dev Gurung, which included different ethnic fronts. The boundaries of the nine autonomous regions in the Maoists' people's government were drawn according to ethnic criteria. Though it didn't spell out the word 'federalism' and to some extent it might be true that the CPM (M) conceived the issue of autonomy for INs might be how comrade Mao sTe Tung provided the autonomy measures to ethnic minorities in China.

Even in Rana regime, Nepalese planner Bijaya Shamsher suggested that Nepal might use the Swiss model, adopted back in the forties, in developing his design for Nepal (Bhattachan, 2003). When Nepal got a parliamentary democracy in 1950, political parties Nepali Congress or Communist Party of Nepal didn't mention anything about federalism. However, King Mahendra spelled out a Swiss Model of democracy that might accommodate diversity than of parliamentary democracy when he wrote a letter to Comrade Mao sTe Tung (personal conversation with Mr. Khagendra Jung Gurung, envoy of King Mahendra). Nevertheless, when Mahendra took over the parliamentary democracy with guided democracy in the early 70s, king Mahendra also jailed Mr. Gurung in 1962, since he was in favor of federalism based on ethnicity. Nepal went for the autocratic regime for the 30 years under the dictatorial regime of king Mahendra. During that time, the janajitis issues were negatively connoted by the palace: SeTaMaGuRaLi short form of Sherpa, Tamang, Magar, Gurung, Rai, and Limbu.

After the People's Movement of 1990, out of the 44 political parties registered with the Election Commission, only three demanded federalism, namely: Nepal Rastriya Janajiti Party demanded federalism based on ethnicity; Nepal Sadhbhawana Party (NSP) demanded federalism with autonomy for the Tarai region; and, Nepal Rastriya Janamukti Morcha demanded administrative federalism. Two pro-Marxist very popular Magar leaders left their respective Communist party in the aftermath of Panchayat autocracy in the nineties. Leaders Mathwal Singh Thapa from NCP (Puspalal group), and Gore B. Khapangi from Marxist Leninist (ML), among others formed a party called National Peoples' Liberation Party (Rastriya Janamukti Party). The party raised the question of proportional representation with population in all sectors and provincial federalism they advocated for. Other leaders with the Panchayat background Mr. Khagendra Jung Gurung, Kajiman Kandangwa, and Ms. Bhadra K. Gurung formed a party which dealt the federalism based on ethnic entity. In regards to the Tarai based party, Bedananda Jha pro-congress leader formed the Tarai Congress party by splitting the Nepali congress in the sixties and asked for federalism with Madhes one of the federal units. However, it was not heard; and Gajendra N. Singh formed Sadvawana Party in 90s by demanding 3 ecological provinces including Tarai one of the province.

In regards to the basis of federalism, most of the parties who were represented in the CA, following elections in 2008, with significant seats expressed that federalisation would be done on the basis of ethnicity, language, region, etc. In the first wording of CPN (Maoist), CPN (UML), along with Madhesi regional parties committed that federalisation would have been carved out based on ethnicity, language, social, cultural, characteristics, diversity and homogeneity (UNDP, 2008). In spite of their commitments, CPN (UML) and Maoist didn't play the role honestly to achieve a commitment to federalism based on the identity (ethnicity, language, culture, etc). Even Nepali Congress (NC) also said 'linguistic/ethnic and cultural identity' among others as the basis of federalism in the manifesto. So, based on the commitments of the political parties articulated in the election manifestos of parties who had represented in the Committee for Restructuring the State and Division of State Power (RSDSP), Constituent Assembly unanimously agreed on basis of federalism 'Identity' and 'Capability'. The Committee further explained 'Identity' consists of ethnic/community, linguistic, cultural and historical continuity meanwhile 'capability' includes economic inter-dependence, economic capability, status of infrastructures and their viability, availability of natural resources and administrative accessibility. The RSDSP (2010) embodied the concept of State Restructuring as follows:

Whereas the progressive restructuring of the state is deemed necessary to solve the country's existing class-based, ethnic, linguistic, regional, gender-based and community-wise problems; and establish Nepal as a proportionate federal republic with fully inclusive democracy by eliminating the unitary and centralised structure of Nepal;

Whereas it is considered necessary to create autonomous, self-ruled and fully authoritative states, local units and special structures for political, economic, social, cultural, linguistic and physical development of the country by keeping Nepal's national sovereignty and independence intact.

There were 14 provinces, with names and delineation, and 22 ARs with name only crafted out as the federal units and sub-units. However, the committee couldn't unanimously decide the name and delineation of units and sub-units, so they had decided by majority members of the Committee. Professor Mangal S. Manandhar, Human Geographer and CA member argued that 14 federal units and 22 ARs were devised no other than basis the committee had unanimously decided. Meanwhile opponents are arguing that the only one criteria 'Identity' was taken, however, the second category 'Capability' was over looked by the members of the committee.

## 4. EXAMPLES OF ACCOMMODATION OF DIVERSITY

### 4.1 People's Republic of China

Despite the fact that China doesn't have federal system, under the unitary structure it has accommodated more than 55 National Minorities largely in the western region. With the advent of Hong Kong and Macau the British colonial regime returned, China has adopted the "two system, one country" approach to provide autonomy for historically, politically, and economically differently built territories during the Deng period. So, one can argue that China is a unitary state with some federal features. Since, China is a neighboring country to Nepal and there are many Nepalese politicians who have adopted the ideology that Comrade Mao propagated, it would be relevant for Nepal that how Chinese ethnic minorities are accommodated.

The Chinese Communist Party took issues like right to self-determination, federal system and autonomy for national ethnic minorities in their action policy (Xingwu et.al, 1988). First session of Chino-Soviet republic, made a decision to agree legal provision of rights to separate and constitute a new state under right to self-determination. The critique says that it was simply due to the influence of USSR and course of Chinese historical consequences. When China became free from feudalism and imperialism, the country has created provinces and counties within Mongolia in order to establish the ruling system of indigenous Mongolia minority. It had restored the tradition of selecting representatives from elite groups under the broader power exercise in each level. This tradition continued in many other regions. Different indigenous minorities began to consume the rights according to their own culture, aspiration and tradition. Ethnic minorities also became free from international imperialism, national racism and elitism during this period. Self-governance and right to self-determination for ethnic minorities have created unity among Hans and the whole nation. National Congress adopted the policy of uniting all in order to make the foundation of federal republic of China strong. However, new warlords became dominant in the power and people became again suppressed and discriminated as feudal did in the past. Ethnic minorities could not secure self-governance due to national and international conflicts and they finally agreed to live with autonomy. They agreed on the following principle:

- (a) Autonomous regions of all minorities will remain an integral part of China.
- (b) The governments formed at centre, region and local level should help creating self-governance and autonomy. This is a real unification of rational and regional autonomy.
- (c) Ethnic minorities have dispersed population; therefore, they cannot make territorial concentration for province. But Prefect, County or Xiang are formed by incorporating their population density. They make regional autonomy at provincial level due to their dispersed population.



Ethnic minorities acquired rights at province, prefecture and county. Mongol indigenous minorities clarify such province. Towards the end of 1990 five provinces, 31 autonomous Prefectures and 96 autonomous Counties were formed. However, the ethnic minorities are taken under the big brother Han nationality.

## **4.2 Democratic Republic of India**

Asian states have a policy of suppression towards minority nationalism; however, India stands out as an interesting exception of this trend. The Indian National Congress endorsed the idea of a multination federalism organised along ethno linguistic lines as early as 1920, and indeed the freedom movement as itself organised in this way. But after independence, Nehru resisted the idea of reorganizing states along ethno linguistic lines, and said that he preferred a more rational (and highly centralised) form of federalism which would be purely territorial, like the American or German model, that is, where the borders of the state are drawn so as not to enable minorities to exercise territorial self-government (Kymlicka, 2005: 39). However, faced with increasing restlessness amongst many ethnolinguistic groups, the government of India accepted the linguistic reorganisation of state in 1956. With the time lapses India has got the maturity and able to deal with diversity by accommodating in different forms. There are two important schedules known as 5th and 6th schedules the Indian Constitution consist of related to Tribal Groups and Tribal Areas in the Indian Constitution.

### **4.2.1 Fifth Schedule (2003)**

Provisions as to the Administration and Control of Scheduled Areas and Schedule Tribes.

Article- 244: Administration of Scheduled Areas and Tribal Areas:

- 1) The provisions of the 5th Schedule shall apply to the administration and control of the Scheduled Areas and Scheduled Tribes in any State other than the States of Assam, Meghalaya, Tripura and Mizoram.
- 2) The provisions of the 6th Schedule shall apply to the administration of the tribal areas in the state of Assam, Meghalaya, Tripura, and Mizoram.
  - Governor reports to President annually or whenever so required by the president on Administration of Schedule Areas- to extend the executive power of the Union to the giving of direction to the State as to the administration of the said areas.

**Tribes Advisory Council:**

- State which has either the Tribal Areas or the Schedule Tribes, there is provision to form "Tribes Advisory Council (TAC)" consisting of:
  - Not more than 20 members, of whom 3/4<sup>th</sup> (15) members shall be the representatives of Schedule Tribes in Legislative Assembly of concerned state. Provided that if the number is less than 3/4<sup>th</sup> or 15, the remaining seats shall be filled by other members of the tribe.
- TAC has a duty to advice on such matters pertaining to the welfare and advancement of the Schedule Tribes in the state as may be referred to them by the Governor.
- The Governor may make rule prescribing or regulating as the case may be:
  - the number of members of the Council, the mode of their appointments and the appointment of the Chairman of the Council and of the officers and servants thereof;
  - the conduct of its meetings and its procedure in general; and
  - all other incidental matters
- Law apply to Schedule Areas: -
  - The Governor may by public notification direct that any particular law or Act passed by the Parliament or Legislature of a State shall not apply to Tribal Area or any part thereof in the State subject to such exception and modifications as s/he may specify in the notifications and any direction given under this sub-paragraph may be given so as to have retrospective effect,
    - The Governor may prohibit or restrict the transfer of land by or among members of the ST in such areas;
    - Regulate the allotment of land to members of the ST in such areas;
    - Regulate the carrying on of business as money- lenders by persons who lend money to members of the ST in such areas
  - Governor may repeal or amend the Act of Parliament or of the legislature of the State or any existing law which is for the time being applicable to the area in question,
  - All regulations made under this paragraph shall be submitted forthwith to the President and until assented to by him, shall have no effect;
  - No regulations shall be made under this paragraph unless the Governor making the regulations, in the case where there is a TAC for the State consulted such Council.

**Schedule Areas**

The President may by order declare the "Schedule Areas"

The President may act at any time by order:

- a. direct that the whole or any specified part of a Scheduled Area shall cease to be a Scheduled Area or a part of such an area;
- b. increase the area of Schedule Area in a State after consultation with the Governor of the that State;
- c. alter, but only by way of rectification of boundaries, any Scheduled Area;
- d. on any alteration of the boundaries of a State or on the admission into the Union or the establishment of a new State, declare any territory not previously included any state to be, or to form part of, a Schedule Area;
- e. rescind, in relation to any State or States, any order or orders made under this paragraph, and in consultation with the Governor of the State concerned make fresh orders redefining areas which are to be schedule Area.

**4.2.2 Sixth Schedule:**

Provisions as to the Administration of Tribal Areas in the States of Assam, Meghalaya, Tripura, and Mizoram

**Autonomous Districts and Autonomous Regions**

**Table 1: Autonomous Districts of Tribal Groups by States**

SN	States	SN	Autonomous Districts
1.	Assam	1.	The North Cachhar hill districts
		2	The Karbi Anglong districts
2	Meghalaya	1.	Khasi hill districts
		2	Jantia hill districts
		3	The Garo hill districts
3	Tripura	1.	Tripura Tribal Areas Districts
4	Mizoram	1.	The Chakma districts
		2.	The Mara districts
		3.	The Lai districts

Source: Ministry of Law & Justice, 2003;

- If there are different Schedule Tribes in Autonomous Districts the Governor may, by public notification, divide the area or areas inhabited them into Autonomous Regions.

### **Constitution of District Councils (DCs) and Regional Councils (RCs)**

In order to govern the Autonomous District and Autonomous Regions, there are provisions for a District Council consisting of not more than 30 members, of whom Governor of the State would nominate not more than 4 members, and rest shall be elected on the basis of adult suffrage. The Governor makes rules for the first constitution of District Council and Regional Councils in consultation with the existing tribal Councils or other representative tribal organisations within the autonomous districts or regions.

The Governor's concerned rules shall provide for DCs and RCs to make laws on Administration and Justice in ADs and ARs. The competencies include establishment of Primary Schools, funds needed for ADs and ARs, land revenue and tax, licenses and leases for extraction of minerals, regulations for the control of money lending and trading by non tribal's; application of Acts of Parliaments, legislature of respective States (Assam, Meghalaya, Tripura, and Mizoram), Dissolutions of a DC and a RC, (see detail in Annex I).

The North Cachhar Hill Autonomous Council and Karbi Anglong Autonomous Council have additional power to make laws- industries, communications, roads, bridges, ferries, and other means of communication; preservation, protection and improvement of stock and prevention of animal diseases, veterinary training and practice; cattle pounds; primary and secondary education; agriculture, water, social security, flood control, theatre, public health and sanitations, irrigation, trade and commerce, libraries, ancient and historical monuments and alienation of land.

Indian Constitution made provisions for accommodation of ethnic groups seems to be very enthusiastic and effectively working as well. Nepalese INs are much more familiar with Indian governance system. The physical, social, and cultural proximity is also closure to Indian, so Nepalese CA can learn a lot regarding the accommodation and management of diversity from India.

### **4.3 Ethiopian Experience: An Analogy to Nepal**

East African country Ethiopia has more than 80 caste/ethnic communities. The country has longer than 2500 years political history and monarchy continued for long and the king was from Amharic community. It was ended in 1974 and military regime came into the power for 16 years with the backup of Soviet Union. But it was collapsed due to violent armed conflicts for self-governance of various ethnic groups. The constitution adopted federal system with right to self-determination along with right to secession for 'nation, nationalities and people. Hashim (2010) says that Ethiopian constitution has adopted the rights of self-determination of 'nation, nationalities and people' up to secession as a major source of state power.

Ethiopian experiences prior to establishment of federalism are quite common for Nepal. Both countries are landlocked, not colonised by any foreign country, and both had a long history of Monarchy. Both countries constitute multiethnic-social, cultural, and religious diversity where none of has overwhelming majority. Both went for an intra country conflict and are trying to resolve it by adopting the federalism (more details in the Box 1, below). In spite of these commonalities, there are some basic differences. For example, Nepal is at the juncture of power shifting from old regime to new with uncertainties (so called revolutionary force Maoist is almost downsized). But in Ethiopia, the revolutionary forces took over and the old regime of Colonel Mengistu left the country whereas Hindu Monarchy has left the Palace without leaving the country. Royal Nepalese Army of old regime remained intact with slightly changed its name (Nepalese Army) and structure (Supreme Commandant to the President of by subsuming about 1400, Peoples Liberation Army (PLA). In Ethiopia, the Military Army which backed up the Colonel Mengistu was totally replaced by the new revolutionary armies. The federalism adopted in Ethiopia preceded the Military dictatorial regime but in Nepal; it is being adopted preceding the multiparty democracy. In Ethiopia, revolutionary force agreed to adopt the right to self-determination for nations, nationalities, and peoples; but Nepali political leaders avoided the rights of self-determination- right to secession- and did not accept the federal units based on identity.

**Box 1: Compare and Contrast between two developing federal countries of Asia and Africa Nepal and Ethiopia**

Nepal	Ethiopia
Land lock	Land lock
Not Colonised	Not Colonised
Different forms of Hindu Monarchy until 2005 A.D.	Monarchy of Amharic Community until 1974 A.D
Decentralisation of Unitary State with 14 zones, 75 districts, 5 Development Regions in 80s.	Decentralisation of Unitary State with 5 Autonomous Areas, 25 Self-ruled Administrative Units in 80s.
Multiparty System for the last 14 years (1991-2005)	Dictatorial Regime of Col. Mengistu for 16 years
Under the leadership of Communist Party of Nepal (Maoist), Magarat, Tharuhat, Tamuwan, Madhesi, Kirat, Tamsaling, Limbuwan, Newa Liberation Fronts were fighting against the Hindu Monarchy came to agreement with Seven Party Alliance on 12 points agreement to kneel down the authoritative regime of King Gyanendra	Eritrean, Tigray, Oromi, Afar, W. Somali, Many Nationalities, and Ogadani Liberation Army were independly fighting. All came under the broader leadership of Ethiopian Peoples' Revolutionary Democratic Front thrown away the Dictatorial Regime]

End of Monarchy and Declare the Federal Democratic Republic- Identity and Viability unanimously agreed as the basis of federalism and 14 units with name are decided by majority vote (7 units based on ethnicity, followed by, 6 ( regional), and 1 (cultural) in Restructuring Committee.	Mingetsu went for exile and federalism established with the sovereignty lies on Nations, Nationalities, and Peoples' of Ethiopia consists of 6 ethnic, 3 regional, and 2 Mixed provinces of federation.
Multiethnic (About 100 caste/ ethnic groups including 59 Indigenous Nationalities.	Multiethnic (More than 80 groups)
None of Caste/ Ethnicgroups accounts for majority; while largest group is called Chhetree (16.5%).	None of Ethnicgroups accounts for majority; while largest group is called Oromi (32.1%).
Multireligious- Hindu, Buddha, Islam, Kirat, Christians, and others	Multireligious- Orthodox Christians, Islam, Protestant, Traditional and others.
Area (1, 41, 391 Sq. K.M.)	Area (11,04,300 Sq. K.M)
Population 26.5 Million	Population 80.5 Million
Urban Popn. 17 %	Urban Popn. 19 %
Est. 83,000 M.W. Hydropower	Est. 45,000 M.W Hydropower

**Source:** Adopted from Mabuhang, 2011;

The right to self-determination and constitutional guarantee of right to separate for 'nations, nationalities and people' united all armed groups Ethiopian Constitution ensured (Habtu, 2003). It was an ironic and assault too that Soviet Union is dissolved and Leninist theory of right to self-determination was widely criticised however, Ethiopia was taking it into account as a constitutional provision. One has to understand that Ethiopians accepted it in the backdrop of Eritrea secede with the aftermath of Mingetsu's regime. The right to self-determination is a blank cheque for the nations to prevent from secession. Ethiopian nations, nationalities, and peoples agreed to remain under the larger state of Ethiopian Democratic Federalism with the principle of Rights to Self-Determination or the right to secession eventually. And the house of federations, second chamber of Ethiopian federal state made a necessary political arrangement to ensure the shared rule among different nations, nationalities, and peoples.

In Ethiopia, there are 11 provinces made on the basis of nations, nationalities, and peoples' identities; and House of Federations (second chamber) constitute more than 80 ethnic groups. Thus, every ethnic minority can send a representative to federal legislative to the central level. In addition, every group may send a representative with every one million population. It means if a group has a population of 3 million, could send 3 representatives. In a federation, the second chamber often being formed by representing the states/ provinces with even or uneven number of representative. Meanwhile Ethiopia made a provision to

represent the Nations, Nationalities, and Peoples in the second chamber and is appropriated when the federal units are made based on the Nations, Nationalities, and Peoples.

The provinces have both unicameral or bicameral legislature depends on how they are ethnically characterised with. If one is characterised with overwhelming presence of single ethnic group has a unicameral legislature, and when it is a mix representation of Nations, Nationalities, then provincial legislature is bicameral. The example of Ethiopia shows the federalism within the federalism based on the identities.

## **5. SPECIAL STRUCTURES: AUTONOMOUS REGION**

Restructuring the State and Division of State Power (RSDSP), Constituent Assembly has recommended 14 Autonomous Provinces along with 23 Autonomous Regions where formers were well delineated, but the latter's were simply numbered and name on the basis of name of INs, numerically smaller groups. The Committee has also recommended two more entities Protected Area and Special Areas. These three entities under the special structures, apart from local governments, are defined as follows:

### **Box 2: Special Structure**

Autonomous region, special region and protected areas to be established within the state.

- a. Autonomous Regions (ARs) shall mean area having domination of a particular ethnic or lingual community to be established within the state
- b. Protected Areas (PAs) shall mean area not covered by the autonomous, and
- b. Special Areas (SAs) shall mean the protected areas, which is economically and socially backward or the geographical unit to be established for the special development of the area.

(RSDSP, 2010)

The committee had also suggested their competencies (Annex I); however, it did not specifically designate the Protected Area and Special Regions nor define their competencies.

**Table 2: Autonomous regions recommended by the RSDPS**

1. Kochila	7. Yakkha	13. Surel	19. Chantyal
2. Jhangad	8. Chepang	14. Jirel	20. Majhi
3. Dhimal	9. Dura	15. Hyolmo	21. Baram
4. Meche	10. Kumal	16. Byasi	22. Thakali
5. Santhyal	11. Danuwar	17. Sunuwar	
6. Lapcha	12. Pahari	18. Thami	

The committee didn't mention about the basis of ARs selection however the 'identity' and 'capability' as unanimously decided might be applied for Special Structures too. Nepali State had recognised 59 groups as INs. The RSDSP made 7 State/ Province on the basis of INs out of 14 proposed federal units, followed by 22 ARs, but seems to be silent for remaining 30 INs. Of 100 Caste/ ethnic groups the 2001 national census reported, only 43 groups are INs. It means rests of 57 groups whether they qualify for ARs or PAs not clear. Of them some may qualify for 'ethnicity'/ 'linguistic' criteria, so as they may qualify for ARs or PAs as they need.

### 5.1 Demographic and Geographic Locations of Autonomous Regions

According to the census 2001, there are 100 caste/ ethnic groups and 90 languages. Since 43 groups are INs, each has a social origin, history, language, culture, and territory and belief system. Similarly, hill caste groups, whether hierarchically of the top or the bottom, has a common language, Nepali, the only one official language of Nepal. In Tarai there are three major languages- Maithili, Bhojpuri, and Awadhi that are different from the official language of Nepal.

In regards to recognizing and identifying the Autonomous Regions, the RSDSP has taken the INs identities which are different from mainstream. In order to locate them geographically, and measure them demographically the following analysis carried out.

Three major groups are observed with demographic size:

- first, the groups with population of more than 51 thousand (6 groups);
- second, the groups with a population in the range from 10 to 50 thousand (8 groups); and
- third, groups with less than 10 thousand peoples (8 groups).



Geographical location of 22 groups can be observed into four zones- Mountain, hill, inner Tarai, and Tarai. Similarly, where they lie administratively and proposed provinces are given details in the Table-3.

**Table 3: Proposed Autonomous Regions by Population and Geographical Location**

S. N.	Autonomous Regions	Population		Geographical Locations		
		2001	2011	Ecology	District	Proposed
<b>A. More than 51 Thousand</b>						
1	Kumal	99,389	1,21,196	Inner Tarai, Tarai,	Gorkha, Tanahu, Gulmi, Nawalparashi	Narayani
2	Danuwar	53,229	84,115	" "	Shindhuli, Kavrepalanchok,	Sunkoshi
3	Majhi	72, 614	83,727	" "	Ramechap, Sindhuli	Sunkoshi
4	Chepang	52,237	68,399	Hill	Makwanpur, Chitwan, Shading, Gorkha	Tamsaling
5	Sunuwar	95,254	55712	Hill, Inner Tarai	Shindhuli, Okhaldhunga, & Ramechap	Sunkoshi
6	Santhal	42,698	51,735	Tarai	Jhapa, Morang	" "
<b>B. 10-50 Thousand</b>						
1	Jhangad	41,764	37,424	Tarai	Sunsari, Morang	" "
2	Thami	22, 999	28,671	Hill	Dolakha, Shindhupalchok, Ramechap	Sherpa, Sunkoshi, Tamsaling
3	Dhimal	19, 539	26,298	Tarai	Jhapa, Morang	" "
4	Yakkha	17,003	24,336	Hill	Shankhuwa-Shabha, Dhankuta	Limbuwan
5	Pahari	11,505	13,615	Hill	Lalitpur, Kavrepalanchok	Newa
6	Thakali	12973	13,215	Mountain	Mustang	Tamuwan
7	Chantyal	8,814	11, 810	Hill	Baglung, Myagdi	Magarat
8	H Yolmo	3,986**	10,752	Hill	Shindhupalchok	Tamsaling

C. Less Than 10 Thousand						
1	Baram	7,383	8,140	Hill	Gorkha	Tamuwan
2	Jirel	5,316	5,774	Hill	Dolakha	Sunkoshi
3	Dura	5,169	5,394	Hill	Lamjung	Tamuwan
4	Meche	3,736	4,867	Tarai	Jhapa	" "
5	Byasi	2,103	3,895	Mountain	Darchula	Khaptad
6	Lapcha	3,660	3,445	Hill	Ilam	Limbuwan
7	Surel	-	-	Hill	Dolakha	Sunkoshi
8	Kochila	1,210	1,635	Tarai	Jhapa, Morang	Mithila-Bhojpura-Kochila-Madhes

\*\* This is the population of Hyolmo language, since it exceeds the population 579.

Chepang shows much more convenient character to form an AR as RSDSP proposed. Three VDCs of Chitwan district and one VDC of Makawanpur show the majority population of Chepang. If we take at least 30 percent and above, the Chepang's population at VDC level increases and account for 14 VDCs- Chitawan has 5 VDCs account for at least 30 percent of the total population of VDCs, followed by Makawanpur (3 VDCs), and Shading (3 VDCs). And this kind of new delineation of ARs based on INs historical, cultural, and demographic concentration is possible. The concentration of population of respective groups in Mountain and hill shows much more convenient to go as proposed. And if it is of the Inner Tarai, or Tarai, then the degree of spread or incongruence is high.

### 5.2 Competencies for Autonomous Regions

It is good to know that the RSDSP has proposed the competencies for ARs as well. If we see the competencies, legislative power for AR is given to the Provincial authority, but executive power is confined to the AR. For instance, the AR would have its own 'police' and autonomous election commission to elect the AR authority that will have power to implement the activities that AR is constitutionally entitled to control. When we see the competencies enlisted for the AR, it is quite similar to Local Body. However, full fledge authority is constitutionally given to AR.

## 6. CONCLUSION AND RECOMMENDATION

The fatality of Nepalese people with state making project seems to be never ending process. The political discourse in which Nepal passed through over the decades reveals that in every movement a ruling party is abolished and the rulers are denounced; and people feel that they are emancipated, but all changes are false ultimately; and another initiative begins right after the aftermath of the previous one (Mabuhang, 2013: 104).

Federalism in Nepal has been adopting as an outcome of struggle of regional and ethnic identity as well as experiences of prolong ideological dispute. It is true that when political parties formed and begun to fight for democracy, and for long period, federalism was not envisaged though the Southern neighboring country India had adopted federalism in the mid of the last century. Northern neighbor also adopted the accommodation of ethnic minorities in a convenient manner, and also progressively adopted the one country two system approaches that has provided the autonomy to Hongkong and Macau shows the unitary state with federal features. However, social diversity and regional as well as economic disparities compelled major forces to realise that the culminated political issues could not be resolved by democracy alone, without considering ethnic, cultural, linguistic, and regional issues. Therefore, Major political parties CPN (Maoist), Nepali Congress, CPN (UML), and newly emerged Madhes-based political parties Madhesi Janadhikar Forum had committed to form federal units on the basis of Identity and Capability, but ironically they could not own the structures while RSDSP proposed 14 federal units and 22 ARs. As a result the CA could not deliver the constitution. The CA had declared, Nepal as a federal democratic republic but without its basic structure. It is still unitary and hoped that things will be changed along with promulgation of new Constitution.

Nepal already went through the 6 years of Transitional Periods (TPs), and seems to be further prolonged in the days to come. Since the issues raised a decade long insurgency remain as it is. There might be disagreements on the agendas the Maoist insurgency raised during the decade, but the peoples' basic concerns as an issue of right to self-determination of INs, Madhesis, Women, Muslims, and so on are yet to be addressed. We cannot ignore these issues that apparently attribute in socioeconomic deprivation and cultural extermination. ILO 169 and liberal democratic ideology have led ethnic issues beyond the discussion as individual rights however, the constitution making project denied it by ignoring the entire process. The classical definition of republicanism merely explains the citizenship rights doesn't meet the people's aspirations and expectations the present world. So, it is more challenging to manage the group differentiated rights, individual liberty and equality often expressed exacerbates the conflict across the globe.

Federal system, according to the experience of the federal countries, can manage diversities relatively better by creating unity and synchronizing the different values and difference within a single state with number of sub-states. The Committee

for RSDSP, therefore, proposed 14 provinces and 22 autonomous regions with respective competencies. Creation of provinces, local governments, and other special structures should be done consensually, because it could address the issues, aspirations and demands of all caste/ethnic communities in Nepal. Thus the state restructuring and writing new constitution should look at these issues to manage the diversity with ARs as political arrangements or federalism within the federalism principle.

1. For communities having less than 10,000 populations on socio-population basis and economically, politically and educationally weak communities but have different linguistic, cultural and religious identities should be provided protected areas. Such constitutionally protected areas are for 18 ethnic communities. They are: Chhantyal, Bhote, Baram, Jirel, Dura, Meche, Lapcha, Kisan, Raji, Byasi, Hayu, Koche, Walung, Munda, Hyolmo, Raute, Kushwadiya, and Kusunda.
2. Extreme minorities particularly having 10,000 to 100,000 populations can be incorporated through special provisions (special regions). These communities are: Bhujel, Rajbansi, Sunuwar, Majhi, Danuwar, Chepang, Santhal, Jhagad, Gangai, Thami, Dhimal, Bhote, Yakkha, Darai, Tajpuriya, Thakali and Pahari. But creation of such special provinces should be based on territorial concentration of these communities.
3. Jhagad, Munda and Santhal of Nepal are not only ethnic communities but they are different race too. Therefore, state structure should be suitable to their necessity, demands and aspiration for protection and development of their language, culture and tradition. There must be constitutional guarantee for special regions.
4. Autonomous Regions (ARs) for major ethnic communities based on ethnicity, language, cultural cannot address the issues of all caste/ethnic communities. But the province can provide the opportunity to other communities to consume the rights at local levels within the province. We can ensure such rights through appropriate local level structure.
5. For the management of protected area, following points should be considered for creating federal province, autonomous regions and special regions:
  - (1) How can communities with small population be incorporated into state mechanism; population, history, language or culture should be considered. This issue has not been discussed and analyzed yet.
  - (2) Census 2011 should present settlement wise data of each caste/ethnic community.
  - (3) Mechanism to determine which province should include special structure should be made.
  - (4) It is important to determine the relationship between issues of local bodies and population and special structures.

- (5) How the issues not addressed even by special structure can be managed.
- (6) No conceptual framework on non-territorial federal provinces has been made to address the issues of communities with dispersed population.
- (7) Federal constitution does not need to incorporate all theoretical and technical issues of special structure. Provincial governments can enact law to manage it.

## REFERENCES

- Bahadur, K. (1954). Modern Nepal, East and West, Vol. 5(1): 20-23.
- Bhattachan, K. B. (2003). Expected Model & Process of Inclusive Democracy in Nepal, Paper presented in an international seminar on *"The Agenda of Transformation: Inclusion in Nepali democracy,"* organised by the Social Science Baha at Birendra International Convention Centre in Kathmandu, Nepal 24-26 April.
- Bhatt, S. R. & Syed, M. M. (2009). Nepal: Federalism for lasting peace, *Journal of Law and Conflict Resolution*, 1(6):121-140.
- Bohara, A.K. (2003). Empowerment crisis: regional governance and the mixed proportional representation system of election. In Gurung, D.B. (Ed.), *Nepal Tomorrow: Voices and Visions* (Kathmandu: Koselee Prakashan): 86-101.
- (2008). Cooperative Federal Structure: A workable political-economic Approach for a New Nepal. A paper published in the guest column of *Nepalnews.com*. Retrieved on October 17, 2013 from <http://www.nepalnews.com.np/archive/2008/others/guestcolumn/jul/guestcolumns01.php>.
- Burghart, R. (1984). The Formation of the Concept of Nation-State in Nepal. *The Journal of Asian Studies*, 44 (1):101-125.
- Burghart, R. (1996). *The conditions of listenings: Essays on Religion, History and Politics in South Asia*. (Delhi: Oxford University Press).
- Cailmail, B. (December, 2008). *The Fall of a Hindu Monarchy: Maoists in Power in Nepal* (France, Brussels: Sie Visions 12, Centre asie ifri).
- Christin, T. & Hug, S. (2012). Federalism, the Geographic Location of Groups, and Conflict. *Conflict Management and Peace Science*: 29(93).
- Government of Nepal (2006). *Comprehensive Peace Accord*, 21 November, Concluded between the Government of Nepal and the CPN (Maoist).
- Constituent Assembly (2006). *Concept paper and Draft of State Restructuring and Power sharing*. Ministry of Law.
- Edrisinha, R. (2005). Multination Federalism and Minority Rights in Sri Lanka. In Kymlicka, W. & He, B. (Eds.), *Multiculturalism in Asia*. (New York: Oxford University Press).
- Gurung, H. (2005). *Nepal regional strategy for development*. Working Paper Series No. 3, Nepal Resident Mission, Asian Development Bank.
- (January, 2009). *Nepal Regional Strategy for Development, Working Paper Series No. 3*, Nepal Resident Mission,
- (1989). *Nature & Culture: Random Reflections* (Kathmandu: Mrs. Sarog Gurung).
- Habtu, A. (2003). *Ethnic Federalism in Ethiopia: Background, Present Conditions and Future Prospects*. Research Foundation of the City University of New York.
- Hachhethu, K. (2003). *Nepal: Inclusion, Federalism and Autonomy*, a paper presented in a Seminar organised by the Institute of Peace Studies, Dhulikhel.
- Harbom, L., Höglbladh, S. & Wallensteen, P. (Sep., 2006). Armed Conflict and Peace Agreements. *Journal of Peace Research*, 43(5): 617-631.
- Heidegren, C. (2004). Recognition and Social Theory. *Recognition, Redistribution, and Justice*, 47(4): 365-375.
- Hornsey, M. (2008). Social Identity Theory and Self-categorisation Theory: A Historical Review. *Social and Personality Psychology Compass* 2(1): 204-222 .

- Huddy, L. (2001). From Social to Political Identity: A Critical Examination of Social Identity Theory. *Political Psychology*, 22(1):127-156.
- Kara, K. (1968). On the Marxist Theory of War and Peace. *Journal of Peace Research*, 5(1): 1-27.
- Kinght, David B. (1982). Identity and Territory: Geographical Perspectives on Nationalism and Regionalism. *Annals of the Association of American Geographers*, 72(4): 514-531.
- Kukathas, C. (2003). *Theoretical Foundations of Multiculturalism*, Retrieved on October 17, 2013 from <http://econfaculty.gmu.edu/pboettke/workshop>.
- Kymlicka, W. (1998). Multicultural Citizenship in Mahajan, G. (Ed.), *Democracy, Difference, and Social Justice* (Delhi: Oxford University Press).
- (2005). Liberal Multiculturalism: Western Models, Global Trends, and Asian Debates. In Kymlicka, W. and He, B. (Eds.), (Oxford: University Press):22-55.
- Lawoti, M. (2010). Evolution and growth of the Maoist Insurgency. In Lawoti, M. & Pahari, A. (Eds.), *The Maoist Insurgency in Nepal: Revolution in the twenty-first century*, (London & New York: Routledge).
- Lijphart, Arend (1999). *Patterns of Democracy: Government Forms and Performance in Thirty Six Countries*, (New Haven & London: Yale University Press).
- Mabuhang, B. (2008). Federal System for Restructuring State: Ethnic Population Perspective (*In Nepali Language*). (Kathmandu: National Peace Campaign): 59-99.
- (2005). Federal System and Management of Social Diversities in Nepal: ethnic autonomy and positive initiative (*In Nepali Language*). *Federal system: management and implementation*, (Kathmandu: National Peace Campaign).
  - (2011). Constitution of Ethiopia: Peoples' Rights to Setermination, Magazine *Shanghiya Nepal* in (Nepali Language), published from Kathmandu, Nepal.
  - (2012). After Liberalism, Marxism – Leninism and Maoism What Next 'Ism' Does Nepalese Fate Adhere To?" *Contributions to Nepalese Studies*, 39, (Special Issue): 35-83.
  - (2013). Janajiti and democracy in Nepal. In Rijal, M. (Ed.), *Participatory Democracy: Issues and Reflections* (Kathmandu: Actionaid & IGD): 91-113.
- Majeed, A. et al. (2008). Building on and Accomodation of Diversities, In Ronald Watts and Rupak Chattopadhyay (eds.), *Unity in Diversity: Learning from Each Other*, (New Delhi: Viva Books).
- Pradhan, K. (2009). *The Gorkha Conquests: The Process and Consequences of the unification of Nepal, with particular reference to Eastern Nepal* (Lalitpur: Social Science Baha by Himal Books).
- Restructuring of the State and Division of State Power (2006). *Constituent Assembly Restructuring of the State and Distribution of State Power Committee Report on Concept Paper and Preliminary Draft*. (Kathmandu: Constituent Assembly).
- Seddon, D.(1993). Democracy and Development in Nepal. In Hutt, M. (Ed.), *Nepal in Nineties*, (New Delhi: Oxford University Press).
- (12-30 Aug. 2012), "A Dangerous Racism", *Nepali Times*, Issue No. 619.
- Sharma, V. R. (2007). "Comparative study of Federation Proposal for Nepal." *Liberal Democracy Nepal Bulletin*, 2:2.
- Sharma, S. (2005). Hindu kindom and secularism (In Nepali Language). In Dasan, M. & Onta, P. (Eds.). *Sociological Thouts in the Context of Nepal* (Kathandu: Social Science Baha: 447-474.
- Stiller, L.F (1968). *Prithivinarayan Shah in the Light of Ditya Upadesh*. (Ranchi, Bihar: Catholic Press)
- Tewfik, H. (2010). *Transition to Federalism: The Ethiopian Experience*, Paper Presented at Two Days Seminar Held at Kathmandu in 2010, organised by Forum of Federations.
- Themmer, L. & Wallensteen, P. (2012). Armed Conflicts, 1946-2012. *Journal of Peace Research*, 50(4): 509-521.
- United Nations Development Programme, (2008). *Interim Constitution*, (Lalitpur: UN House, Pulchowk)
- (2007). *Federalism and State Restructuring in Nepal: The Challenge for the Constituent Assembly*, United Nations Development Programme, Kathmandu, Nepal.
  - 2007 (2064). *The Interim Constitution of Nepal: As Ammended by the 1st, 2nd, and 3rd Ammendments*. Kathmand: UNDP Nepal.
- Watt, R. (2008). *Comparing Federal System* (Montreal & Kingston. London. Ithaka: Institute of Intergovernmental Relations, Published for the School of Policy Studies, Queens's University McGill- Queen's University Press).
- Whelpton, J. (2009). *The Gorkha Conquests. The Process and Consequences of the unification of Nepal, with particular reference to Eastern Nepal*. Lalitpur: Social Science Baha by Himal Books.
- Wimmer, A. (2008). The Making and Unmaking of Ethnic Boundaries: A Multilevel Process Theory. *American Journal of Sociology*, 113 (4): 970-1022.
- Xingwu, L. (1988). China's Policy towards Her Minority Nationalities. *Social Scientist*, 16 (1):136- 159.

## **ANNEX -I**

Competencies Given for District Councils, and Regional Councils as following:

1. District Councils and Regional Council may make Laws,
2. Administration of Justice in Autonomous Districts and Autonomous Regions.
3. Conferment of Powers Under the Code of Civil Procedures, 1908, and the Code of Criminal Procedure, 1898 on the Regional and District Councils and on certain courts and officers for the trial of certain suits, cases and offences.
1. Establishment of primary school.
2. District and Regional funds.
3. Assessment and collection of land revenue and to impose taxes.
4. Licenses and Leases for the purpose of prospecting, or extraction of minerals.
5. Regulations for the control of money lending and trading by non tribals.
6. Publication of laws, rules, and regulations, made under the schedule.
7. Application of Acts of Parliaments, legislature of respective States (Assam, Meghalaya, Tripura, and Mizoram), Autonomous districts and Autonomous Regions.
8. Planning of Estimated receipts and expenditure pertaining to autonomous districts to be shown separately in the annual financial statement.
9. Appointment of Commission to inquire into and report on the administration of autonomous districts and Autonomous regions.
10. Annulment of suspension of acts and resolutions of Districts and Regional Councils
11. Dissolutions of a Districts and a Regional Council
12. Exclusion of Areas from autonomous districts in forming constituencies in such districts.
13. Transitional Provisions
14. Tribal Areas
15. Dissolution of Mizo District Councils
16. Autonomous Regions in the Union Territory of Mizoram to be Autonomous District and Transitory Provisions Consequent thereto
17. Interpretations
18. Amendment of the Schedules

Additional Power of the North Cachhar Hill Autonomous Council and Karbi Anglong Autonomous Council to make laws:

- a. industries, communications, roads, bridges, ferries, and other means of communication;
- b. preservation, protection and improvement of stock and prevention of animal diseases, veterinary training and practice; cattle pounds;
- c. primary and secondary education;
- d. agriculture including agriculture education and research, protection against pests and prevention of plant disease; fisheries, water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage, and water power subject to the provisions of entry 56 of List I of the 7th Schedule;
- e. social security and social insurance, employment and unemployment;
- f. flood control schemes for protection of villages, paddy fields, markets, town, etc;
- g. theatre and dramatic performance, cinemas subject to the provision of entry 60 of List of the 7th schedule, sports, and entertainments.
- h. public health and sanitations, hospitals and dispensaries;
- i. minor irrigation;
- j. trade and commerce in, and the production supply and distribution of, food stuffs, cattle fodder raw cotton and raw jute;
- k. libraries, museums, and other similar institutions controlled or financed by the State; ancient and historical monuments and records other than those declared by or under way law made by Parliament to be of national importance, and
- l. Alienation of land.

**ANNEX -II****List of Rights of Autonomous Areas to be Set up under Special Structures****Related to Article 9(7) of the Constitution**

S.N.	Areas of Competencies
1	Police
2	Cooperatives
3	Management, and operation of FM radio and television
4	Primary, secondary education, library and museum
5	Health service
6	Autonomous Election Council
7	Property tax, business tax, house and land registration tax, automobile tax, entertainment tax, tourism tax, land revenue tax, remuneration and agriculture income tax
8	Royalty from natural resources
9	Road
10	Hydro power, irrigation and other development projects
11	Citizenship/passport management
12	Documentation of land, certification of housing and land
13	Mine excavation and management
14	Protection of language, culture, script and religion
15	Natural resources and their utilisation
16	Agriculture, animal husbandry, business
17	Service management
18	Statistics and documentation
19	Court
20	Other rights determined by the provincial government

**Source:** Restructuring of the State and Division of State Power (RSDSP, 2066B.S.)



# CHAPTER 7

## AN OVERVIEW OF VERTICAL POWER SHARING IN A FEDERAL SETUP: A COMPARATIVE ANALYSIS WITH REFERENCE TO THE WORKS OF THE FIRST CONSTITUENT ASSEMBLY OF NEPAL

- MOHAN LAL ACHARYA



*The fact is that instituting democracy by a revolution, by decree, or by a general vote is only the first step, the easiest one for that matter, on the way to democracy. Implementation of democratic behavior, rules and laws and their enforcement is much more difficult.*

(Hagen, 2012)

## INTRODUCTION

Power-sharing is defined “as a set of principles that, when carried out through practices and institutions, provide every significant identity group or segment in a society representation and decision-making abilities on common issues and a degree of autonomy over issues of importance to the group” (Sisk, 1995, cited in Traniello). Lijphart proposes two more characteristics: the mutual veto and proportionality (Lijphart, 2002: 39). He maintains that this consociational model “is not only the optimal form of democracy for deeply divided societies but also, for the most deeply divided countries, the only feasible solution” (Lijphart, 2002: 37). Generally speaking, if parties in intractable conflicts – particularly in societies divided or diverse by deep ethnic, racial, regional or religious differences – find that they are unable to escalate their way out of conflict, but seek a compromise that assures them a permanent place at the bargaining table, they may turn to power sharing as a potential solution (Sisk, 2003). Power sharing describes a system of governance in which all major segments of society are provided a permanent share of power. It has been argued that Nepal is not yet divided, but is certainly diverse, and that failure to address some issues including power sharing may lead to a divided society in the future.

In basic terms, federalism refers to a division of jurisdiction and authority between at least two levels of government. This division usually occurs between two or more constitutionally recognised levels of government. In most instances of federalism there is a single national government, often referred to as the ‘federal government’, which exercises its particular powers across the whole country. There are multiple regional governments, often referred to as ‘provincial’

or 'state' governments, which exercise their powers within their particular region or territory. Moreover, each level of government usually has its own particular jurisdiction. The national government will have final authority over national issues (such as national defence, foreign policy, and treaty-making etc.) and the provincial governments will have power over more regional issues, although this can vary widely from one country to another (mapleleafweb, 2008).

The United States was the first nation to divide authority between the federal government and the governments of the states. Federalism as a system of government arose in the United States due to its history as a British colony. Americans saw centralised power as a threat to liberty. For this reason, American-style federalism gives both levels of government (federal and state) the authority to govern in order to check the power of each (Centre for Constitutional Studies, n.d.).

The issue of horizontal power sharing was seriously debated during the constitution making process of the first Constituent Assembly in Nepal; however, vertical power sharing was almost entirely neglected, even though concerns were raised. Those concerns were basically either for the centre or for the provinces. Third tier of the government was almost neglected. The Constituent Assembly members were also indifferent on the status and power of local government, although local government was accepted as the third tier. The majority report of the High Level Commission on State Restructuring proposed two main tiers of government and local government was accepted as a third layer established under the provinces. However the report of the commission also proposed a separate list of competencies for local government in its schedule (see Article 7[1] and also Schedule 6 of the High Level Commission for State Restructuring Report; HLSRC, 2011). This issue of the list of competencies was considered neither contentious, nor was there much debate on the subject during the term of the Constituent Assembly.

The preliminary drafts of the committee and commission report provide for a clear sharing of power among the tiers of the federal units. However, in many countries, the large and capital cities are sometimes granted special autonomy, while in some countries the local government is provided for as per the law formulated by the legislative under the provincial government. In countries like Argentina, India, Belgium, Switzerland, South Africa and Austria the constitution makes clear provision for local autonomy. In these countries, local government is provided with the third-most important geo-regional governance powers. In a federal structure, if the local level of government is provided then its jurisdiction also needs to be clearly outlined. If the powers of local government are determined in the constitution, then those bodies can enjoy a level of autonomy and resist unnecessary intervention from the federal or provincial government (CRSDSP, 2010).

In Nepal's case, the centralised system was not able to address the issues of the different regions of the country or the issues relating to identity. Most of the policies and plans are made either in Kathmandu or in the regional centres, but seldom in the remote regions, which are always neglected in terms of their representation and allocation of resources. The Local Self Governance Act 1999 and its Rules 2000 were attempts to address some of these issues, but it was difficult to implement the act as per its objectives due to the internal armed conflict, which started in 1996. A lack of strong commitment and willingness on the part of the political parties to build a meaningful local government was another major factor in the failure to implement the act as they were concentrating on the central level, rather than the local areas. Unfortunately, as a result, Nepal failed in the decentralisation process in most important political and development fields. However, this issue is no longer relevant as the fourth amendment of the Interim Constitution of Nepal 2007 has already declared Nepal a federal republic (Article 4[1]; Government of Nepal and Cottrell, 2009).

This paper tries to clarify some of the myths and misconceptions about vertical power sharing based on the reports of the thematic committees of the first Constituent Assembly and the comparative experiences of a number of countries. The main aim of this article is to analyse the proposed provisions in the drafts of the various Constituent Assembly committees (mainly the Committee for State Restructuring and Distribution of State Power and the High Level Commission for State Restructuring), identify gaps and recommend some the provisions to strike a balance between the different tiers of the government for the future constitution making process.

## **THE PRINCIPLE OF POWER SHARING**

Federalism is a system of checks and balances to prevent a concentration of power in one level or branch of government. The principle of subsidiarity is central to the division of powers in a federation. Subsidiarity means that issues are dealt with by the lowest level of government possible, and only as high a level as necessary. Common issues with federations concern the distribution of legislative and executive power and the administration of the rule of law and justice. Federalism is a government structure that allows the union of regions and peoples with shared views and interests despite significant differences in culture, language, religion, race or history. Federations promote objectives such as economic unity and prosperity, national defence and the protection of individual rights, while at the same time preserving the ability of regional governments to govern over local and cultural matters. A federation has five essential elements:

- a written constitution that ensures certainty in the division of powers and gives the courts the authority to interpret and settle disputes that may arise between levels/tiers of government;

- the combination of self-rule and shared-rule;
- the constitutionally protected autonomy of each level of government;
- a central government designed to represent the units of the federation and protect the less populated regions; and
- a constitutional amending formula that is designed to prevent one level of government from making changes to the constitution unilaterally.

The following points are especially relevant to the debate about federalism in Nepal: The link between federalism and democracy; federalism and the ability to manage territorially-concentrated diversity; federalism and policy-making capacity; and federalism and the different concepts of the various communities in Nepal on some of the key contentious issues.

Constitutions do not usually leave open which level of government has competence in which areas. They determine these assignments in advance. Competencies are usually assigned to the different levels in schedules, lists or tables that are in the constitutional text itself or attached at the end. These schedules list the competencies for each layer in the constitution. There are different forms of power sharing competencies in different organ of the government. For example, in the executive body, there are two concepts of power sharing in a federal polity, i.e., dual federalism and executive/cooperative federalism. In dual federalism, levels of government are separate and act for themselves, whereas administrative and legislative competencies are intertwined and the levels need to cooperate with each other in the implementation of statutes. Similarly, there are four different types of legislative competencies can be distinguished as follows (Boeckenfoerde et al., 2007):

- **exclusive powers:** competencies are assigned exclusively to one level;
- **concurrent powers:** competencies are not assigned to only one level;
- **residual powers:** those competencies that have not been expressly distributed in the constitution; and
- **implied powers:** those competencies that are usually not clearly mentioned in the constitution but developed in the case law by the judiciary.

Similarly, there are two basic models of how to set up a court system in federal states: a separated model or an integrated model. In the separated model, both, the national level and state level each have their three-tier court system. The United States system is a pure example of this model. State courts only apply the laws of their respective states, whereas federal law is exclusively adjudicated on by federal courts. In contrast, in an integrated model, courts in general have the capacity to deal with both state law cases and federal law cases.

In Germany, the highest court of the country at the federal level only has jurisdiction over federal law cases, whereas the highest court of the state is the

court of last instance for state law. In India both types of cases can be appealed to the Supreme Court. In Germany, only the Supreme Court level is administered by the national level.

The Constituent Assembly Committee on Determination of Forms of Governance of the State proposed three different forms of governance for the centre (CDFGS, 2010): a presidential system (proposed by the UCPN [Maoist] and supported by 18 votes); parliamentary system (proposed by the Nepali Congress and UML and supported by 16 votes); and a presidential system with a different modality (proposed by Madhesi-based parties and supported by 3 votes).

In the provinces, a parliamentary system has been proposed unanimously and at the local level a presidential system has been proposed, also unanimously. There are no contentious issues in relation to the form of governance at the province and local level. Almost all parties were agreed on this entirely different system at the province level from at the local level (CDFGS, 2010). Similarly, with regard to the judiciary, a bicameral system has been proposed for the centre and a unicameral system in the provinces (CDFLB, 2010). There was also consensus on a unitary model for the judiciary (CJS, 2009).

## **SELF-RULE AND SHARED RULE**

One basic idea from the international experiences on federalism is that there is shared rule, on the one hand, and self-rule, on the other. Both are complementary and without accepting both there will be no federal structure. This sounds simple; however, it is absolutely crucial for the understanding of a federal system. Federalising in that sense is similar to 'strong' decentralisation – like Nepal tried to do back in the 1990s. A federal system, however, is different from decentralisation in terms of the legitimisation and sharing of power between the centre and the federal units (HIK, 2009; Heiniger, 2009).

It is true that federalism also involves self rule and shared rule; however, shared rule was not highlighted during the discussions in Nepal. Advocates of self rule were not able to convince others that federalism was also about shared rule. Potential spoilers were conveying the message that federalism is all about self rule and focused on the 'right to self determination', 'political preferential rights' and 'autonomous regions', while issues such as and 'undivided regions' (AKANDHA) were raised by the other side. These polarised views created tensions in society, while also creating problems for the political parties. There is a misunderstanding that multiculturalism is a problem per se (Saxena, 2011), which is empirically wrong. Multiculturalism only becomes a problem if multicultural groups become segmented, which is not the case in Nepal. Federalism, in other words, is neither means that the demands of each group will be automatically complied with according to their needs, nor that it is a game of survival of the fittest. It is an understanding of mutual rights as well as responsibilities so that understanding

is enhanced and nurtured by a process of communication and negotiated agreement (Hueglin, 2011: 11).

The debate on the 'right to self-determination' still continues, but it is perceived as self-rule. There are still questions as to whether Nepal is seeking the right to self-determination as defined in common Article 1 of the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, 1966, or it is more than that? Can the right to self-determination in Nepal go up to secession, as is provided for by the Ethiopian (Article 39, Ethiopian Constitution, 1995; see Haftetsion, 2013)<sup>1</sup> and Russian (Article 3, Union of Soviet Socialist Republics Law of Secession, 1990)<sup>2</sup> constitutions and as per ILO Convention 169 and United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)? The answer is obviously no, but the politicians have not been able to clarify this to those communities that are opposed to federal system.

Another aspect of the debate on self-rule is about 'political preferential rights'. When first proposed, preferential rights were only meant for the dominant ethnic groups and the Constituent Assembly State Restructuring Committee proposed at least two terms for their leadership positions in the concerned provinces (Proposed Article 13, CRSDSP, 2010). Similarly, the majority report of the High Level State Restructuring Commission proposed a single term in the autonomous regions and local level governments, while the minority report suggested for the removal of this provision (HLSRC, 2011). The debate is on whether or not such a provision is appropriate in a heterogeneous society and whether the provision supports ethnic federalism? Will the provision discriminate against other communities and prevent them from participating in the top-level positions of the proposed provinces?

The State Restructuring Committee also proposed political preferential rights to the provinces on the basis of ethnicity and to the executive bodies in the case of autonomous regions. It proposes that the political parties should give preferences to the members of dominant ethnic communities during the elections and while forming provincial governments in order to make them the heads of the respective provinces. The Committee also proposed that such preferential right would be applicable only for two terms (CRSDSP, 2010). This issue also became contentious and differing views were eventually presented to remove the words 'political preferential right'.

The State Restructuring Commission (majority report) proposes that only autonomous regions be created under the special structure (autonomous regions) for a single term (Section 13, HLSRC, 2011). However, the minority group report suggests scrapping this provision (HLSRC, 2011, minority report). This issue created divisions in the different political parties and among the stakeholders who are opposed to this idea.



Self-rule was advocated linked with identity, rather than with the tiers of government as a whole, which is why the list of competencies was almost entirely neglected during the first round of the Nepal constitution building process. It would have been more productive if the Constituent Assembly was able to focus on shared rule, starting at the provincial and local levels and working up to the central level to cover all three branches of government.

## **INTERNATIONAL EXPERIENCES OF VERTICAL POWER SHARING**

Vertical power sharing is the backbone of any federal system, but it also has close linkages with horizontal power sharing. Different federal countries have taken different power-sharing formula as per their need and to accommodate their diversity. Some are strictly centralised and others extensively decentralised. This also depends on how and why the country chose a federal arrangement. For example, in the context of pre-colonial Africa, the purpose of federalism was not solely government stability, but encompassed the need to protect the necessary components of a stable community life (Jordan, 2009). Some of the experiences from other countries have been analysed in this section.

The countries that have adopted a federal system of governance have created and fixed the tiers of governments as per the concerns of the stakeholders and the requirements of the countries concerned. In Australia, the constitution provides for a two-tiered system with an executive government at the centre and the states under it. The Constitution of South Africa provides for national, provincial, and local governments. The rights of all three tiers are specified in the constitution. The Brazilian Constitution has a three-tiered structure with the centre, states and municipalities. In India, the Constitution provides for the union and states, as well as local governments or panchayats (municipalities), and their rights are enumerated in the constitution. The German Constitution provides for four-tiers of government with the federation, Landers, counties and communes. The Belgian Constitution also has a four-tiered structure consisting of a federal government, regional and community governments, provincial and communal institutions, and urban entities/federations of communes.

The Constitution of Canada sets out a federal system of government by dividing the legislative and administrative powers between the federal and provincial levels of government. The division of powers is enforced by the courts and limits the power that can be exercised by any one government. Federalism also ensures the representation of Canadians from all parts of Canada by requiring regional representation in governing institutions, such as the Senate and the Supreme Court of Canada. Federal systems such as this divide the cost of government among several administrations while protecting regional and cultural rights.

The Swiss Constitution evolved from experience. Switzerland is probably the only federation in the world whose system of fiscal federalism allows one third of the revenue to be equitably shared between the federal, cantonal and commune-level governments (Saxena, 2011: xxi). The Swiss model is regarded as of growing importance, successfully tested for decades in areas like higher education, the protection of employees, zoning, or building and maintaining national highways and involves both federal and cantonal agencies in administrating the law. Article 55 of the Swiss Constitution provides for cantonal participation in foreign policy decisions when such decisions affect their competencies or their essential interests. Furthermore, “the federation must inform the cantons in time and comprehensively, and consult with them... [and] ...the responses of the cantons must be given particular weight when their powers are affected”. The cantons will participate in international negotiations in these areas if they deem it appropriate. While remaining within the scope of the powers, the cantons may also conclude treaties with foreign countries. The responsibilities of both federation and cantons also involve the area of security, national and civil defence. The responsibility for the army lies with the federal government and for the police with the cantons. Similarly, the responsibility for education, research and culture lies mainly with the cantons. Zoning and building law is predominantly a cantonal matter with adherence to certain principles established by the federal legislation. Even where detailed federal regulations exist, implementation is almost entirely left to the cantons. As a rule, the federal legislator takes care not to interfere with the residual power, which is retained by the cantons.

The political system of Brazil is characterised by two broad features: a presidential federal system within the framework of symmetric bicameralism and a multiparty system, and an independent judiciary vertically linked with a more or less similar structure of government at the state level with considerable federal autonomy for state and municipal governments. The Belgian parliamentary federal monarchy graduated to a formally asymmetrical federal system uniquely cognisant of multinational linguistic autonomies tied to both regions and communities with complex patterns of demarcations and overlaps (Saxena: xxxiv).

In India, central to the institutional and financial weaknesses is the unique position of Delhi in the country’s politico-administrative structure, whose growth and development functions are shared between the three tiers of government, local government, and several specialised institutions, and financed through a complex system of revenue assignment and grants, and a revenue-sharing arrangement between the government of Delhi and the two local governments (Hegulin: 24).

On specific power sharing issues to the central government, the Constitution of the United States of America has granted powers to the federal government on 18 areas including defence and war, international agreements on borrowing, foreign trade, the establishment of the Supreme Court and subsidiary courts, defining

marine crimes and treason, imposing and raising taxes, currency, metrology, postal services and intellectual property. In Canada, 30 different issues are placed under central control, including foreign affairs, defence and currency. In Germany, 11 different topics are under the control of the federal government including foreign affairs, defence, passports, immigration and extradition, federal citizenship, currency, coordination between the federal government and provinces, air transport and federal waterways. The Swiss Constitution lists foreign relations, nuclear energy, defence, criminal law, national highways, monetary policy, social security and property as powers of the central government. The South African Constitution has placed issues of national importance with the centre. In Australia, the Constitution has enumerated 40 powers to be handled by the federal government including defence, currency, foreign affairs, foreign corporations and railway, trade and commerce between other countries and its own states, taxation, statistics and insurance, metrology, copyrights, patent, design and trademarks, and marriage. Article 246 (1) of the Indian Constitution grants full rights to the centre on 97 issues, including defence, military and its mobilization, nuclear energy and mining of mineral resources, foreign relations, national highways, foreign debt, central bank, international trade and commerce, war, railway, insurance, metrology and intellectual property.

## **RESIDUAL POWER**

Residual powers are the powers given to states and regional governments that are not specified in the constitution of a country. Residual powers are those that are everything that is 'left over' (Yahoo Answers, n.d.).

In all federal constitutions, fields of jurisdiction are allocated in one way or another between two levels of government. However, it is quite impossible for constitution makers to provide an exhaustive list of powers: something is bound to be forgotten or new fields of jurisdiction are likely to appear in the future. Thus, it becomes necessary to provide some blanket clause which will determine which of the two levels of government shall get those new powers. This is what is usually called the residuary clause. In Canada, the residuary powers were allocated to the federal government. The Fathers of Confederation wanted to avoid the 'weaknesses' of the American constitution which had left all residual powers in the hands of the constituting states (Bélanger, 2001).

It is not possible to identify and foresee in the present the problems and topics that may arise in the future. With the development of science and technology it is also difficult to predict what issues may arise in the future. Sometimes a situation that was not thought of before could arise and new areas could develop from it, requiring the intervention of the government. In such a situation there may be a problem deciding which level of Government should look into the matter.

Usually, all countries with a federal structure have clear provisions outlining which level of government would exercise such residual powers.

There is no universal formula for the allocation of 'residual powers'. The Canadian model leaves both the 'residual powers' and lists 'specific powers' for the federal authorities; whereas in Germany, the legislative powers are vested in the federal government while the administration of the federal law is handled by the states (Law Teacher nd). In the case of Hong Kong, under the federal system, the central government and the region can reallocate 'residual powers' by agreement. The residuary power in the Australian constitution is granted to the states. In Canada and India, residuary powers are left to the centre and the federal second chambers are secondary chambers (Sisk: xxvi).

## **THEMATIC COMMITTEES PROPOSALS ON VERTICAL POWER SHARING**

Under the first Constituent Assembly of Nepal (formed in 2008), 11 thematic committees were formed to set up the power and structure of different tiers of the government. This section presents the major contributions of thematic committee reports.

### **General provisions proposed by thematic committees**

The Constituent Assembly Committee on State Restructuring and Distribution of State Power was the principal committee dealing with the vertical distribution of the state power. The committee accepted in the Preamble of its preliminary draft report that it is considered necessary to create an autonomous, self-ruled and fully authoritative states, local units and special structures for the political, economic, social, cultural, linguistic and physical development of the country while keeping Nepal's national sovereignty and independence intact (CRSDSP, 2010). In the definition section of the report, the term 'federation' has been defined as "the highest level of federal structure [...] also denotes different states, local units and special structure of federal Nepal" (CRSDSP, 2010). It also states that a "List shall mean a list that specifies the rights provided by this constitution to be used by the autonomous regions established under federation, state, local units and special structures [...] and] this word shall also denote the common list stated in the constitution" (CRSDSP, 2010, Article 2).

Article (4) of the committee report defines the main structure of federal Nepal as having three tiers: federal government, state government and local level entity. Additionally, it provides for autonomous areas and protected areas within the state. It also provides that "The federal democratic republic of Nepal shall be divided into 14 autonomous states, by putting an end to the existing unitary

and centralised state structure” (Article 5). At the local level, village councils and municipalities shall be established under the provinces (Article 7). The draft also provides that the federal government shall give the provincial government fixed criteria for determining the number and area of the local level organs and, on the basis of this criteria, the provincial government shall constitute a high-level commission to determine the name, number and area of the local level entities. The number, border and area of the local level organs are to be determined within one year of the formation of the provincial government and the existing local level bodies shall continue until the local bodies are formed.

In terms of sharing of power among the Federation, provinces, local level bodies and special structures, the report lists powers in annexes 3–7) (Article 9). It has also been proposed that, the relations among the federation, local level bodies and special structures shall be based on the principle of cooperativeness, coexistence and coordination. The right of self-determination (Article 12) is stipulated as being meant for internal exercise and special political rights (Article 13) in case of states constructed on the basis of one ethnic community (under the main structure) for at least initial two terms.

The Committee on Distribution of Natural Resources Financial Powers and Revenue (CDNRFPR) and other major committees also did important work regarding the structure and power sharing among different tiers of the government. The Natural Resources Committee proposed that the distribution of economic rights among the different levels of governments shall be as set forth in List 1 (CDNRFPR, 2010, Annex). It also proposed that the federal legislature may enact laws on any matter that is under its sole jurisdiction. Similarly, the provincial government and the local governments under the provincial government’s jurisdiction may enact law on any matter. The committee also proposed that if the issues relating to distribution of powers under List 1 are not clear between two or more governments, it shall be as determined by federal laws. The draft proposes that the federal legislature may specify the rights of provincial and local governments related to buffer zones by enacting framework legislation. Similarly, provincial governments and local governments shall develop policies and plans under their jurisdiction. It also spelt out that no federal laws shall be enacted that are likely to have a negative impact on the economic rights and financial procedures of the provincial and local governments.

Similarly, with regards to the distribution of sources of revenue, the federal, provincial and local level governments may impose taxes and collect revenue from the sources as set forth in List 2 (CDNRFPR, 2010, Annex). Except for revenue from religious endowments, all revenues received by the federal government, all loans raised on the security of revenues, and all the money received in repayment of any loan made under the authority of any Act and any amount received by the Government of Nepal shall as be credited to a government fund to be known as the ‘consolidated fund’. The Natural Resources Committee also made proposals

in relation to a revenue distribution (Article 20), budgets for provincial (Article 21) and local (Article 22) governments, and the creation of a national natural resource commission (Article 34) and a national financial commission (Article 25–27). It also proposed that the provincial and local governments shall not restrict, obstruct, impose tax and discriminate on the export or import of goods from their area to another province or on export in the area of local government or export from another province or local government or in relation to any kind of transportation of good passing through another province or through local governments.

The Article 9 of the report of the Committee for Preserving National Interest proposes that the centre shall have the authority to conduct Nepal's foreign relations. Similarly, the appointment and acceptance of the ambassadors (Article 10), power to conclude treaties (Article 11), the creation of a national defence council (Article 22) are proposed for the central government, but it has also been accepted that, with the consent of the central government, provinces may enter into contractual agreements on economic and industry-related issues (Article 11[3]). It further proposes that every province and local government shall enjoy full rights to self-determination for the political, economic, social and cultural development of the people residing within their territory and to promote, preserve and utilise the natural resources therein (CPNI, 2010).

The Constitutional Committee maintains that national integrity and internalising people's right to self-determination, autonomy and self-rule (Preamble, CC, 2010) will be the national agenda. The Committee on Forms of Constitutional Bodies, however, is not very clear as it proposes different provisions for different constitutional bodies. In terms of language, it has been proposed that the official language of the provincial governments shall be the language of official business of the central government and one or more national languages spoken in the province concerned, and as determined by the provincial legislature. In addition to this, other languages, as determined by the provincial legislature (according to law) shall be the official language of the local bodies (see report of the Committee to Decide the Basis of Cultural and Social Solidarity; CDSCB, 2009). Similarly, the Committee on Minority Rights proposed that the provincial executive shall choose one or more languages spoken by the majority of people in the province as official languages of the province. Furthermore, English shall serve as an international contact language (CPRMMC, 2009).

The report of the Committee on Determination of Forms of Governance of the State proposed that there shall be a provincial chief in each province as the representative of the central government. The president shall appoint the chief of the province after holding consultations with the chief minister of the province concerned. Similarly, a chairperson shall be there in each local government as the executive chief and a vice chairperson shall assist the chairperson or work in his/her absence. The election of a chairperson and vice chairperson shall be

based on the first-past-the-post system. Similarly, each executive body of local government in metropolitan cities shall consist of 5 to 11 members including the chairperson and vice-chairperson; 5 to 9 members in sub-metropolitan cities and municipalities, and 5 to 7 in village level bodies. The division of work and conduct of work shall be made according to the regulation approved by the executive body of the local government (CDFGS, 2010).

Likewise, the Committee on Determination of the Form of the Legislative Body proposed a legislature (to be called parliament) consisting of the head of the state and two houses: the House of Representatives (lower house) and the national assembly (upper house). The House of Representatives shall consist of 151 members, 76 of which members shall be elected by direct election and 75 members by proportional representation. The national assembly shall consist of 51 members, of which 38 members are to be elected by the provinces in equal numbers as prescribed by law and 13 members are to be elected by the House of Representatives (CDFLB, 2010). The provincial legislature shall be unicameral and shall also include the chief of the province. On the basis of the population density of each particular province, not more than 35 members shall be elected to the national assembly: 18 by direct election and 17 by proportional representation. Local autonomous units<sup>3</sup> shall be established based on the principle of decentralisation and with a view to institutionalising democracy at the local level by ensuring that local people participate in the legislature and fully exercise their sovereignty.

A single citizenship, issued by the federal government, along with regional identity has been proposed by the Fundamental Rights Committee report (CFRDP, 2010). The judiciary has been proposed as a unitary model by the Judicial System Committee, however, a provincial high court has been proposed along with formal and non-formal dispute resolution mechanisms at the local level.

### **List of competencies**

Despite the fact that the Committee on State Restructuring and Distribution of State Power was the main committee dealing with the list of competencies, almost all other committees touched on this issue in one way or other. Specifically, the Committee on State Restructuring and Distribution of State Power proposed five different lists for different structures: for the centre (Annex 3), for the provinces (Annex 4), common rights (Annex 5), local level bodies (Annex 6) and for autonomous areas (Annex 7). Similarly, the Natural Resources Committee proposed two lists for each tier (centre, province and local level bodies) – list one is related to the allocation of proposed economic rights and list two is for the allocation of revenue between the different levels of the government. Unfortunately, the Natural Resources Committee is silent on special structures, including the proposed autonomous regions.

### **Committee for Restructuring of the State and Distribution of State Powers**

The list of competencies proposed by the State Restructuring Committee for the centre covers 31 areas:

1. defence and security related matters
2. central police force
3. central bank
4. fiscal policy and monetary policy
5. foreign grants
6. central telecommunications
7. customs, duty, VAT
8. institutional income tax
9. passports, visas
10. postal service
11. tourism fees
12. service tax
13. royalties from natural resources,
14. the management of central civil service
15. central bureau of statistics
16. large hydro projects, irrigation and other projects,
17. central university
18. central library
19. central health policy
20. affairs relating to the federal legislature and executive
21. international trade, exchange, ports, quarantine
22. international and inter-state civil aviation
23. foreign and diplomatic affairs relating to United Nations, international treaties, extradition and international border management
24. management of national railways and highways
25. national intelligence and investigation
26. the supreme court and constitutional court



27. citizenship, visa
28. immigration-related law
29. nuclear energy and space
30. constitutional commissions
31. matters pertaining to defence, arms and the production of ammunition,
32. metrology
33. mine excavation
34. insurance policy
35. formulation of criminal law
36. intellectual property rights

As well as, these, the centre is given competence over any other subjects not included in other lists (i.e., residual power).

Similarly, the State Restructuring Committee report lists 28 rights for the provinces (Annex 4) including:

1. provincial main law
2. police
3. administration and management of law and order
4. radio stations, FM, TV
5. personal income tax
6. royalties from natural resources
7. the management of provincial civil service
8. provincial statistics
9. provincial level hydro power
10. universities
11. health services
12. provincial legislature
13. inter-provincial business
14. provincial civil aviation
15. provincial railways and highways

16. It also includes federal investigation bureau,
17. hydro and irrigation projects
18. provincial courts
19. citizenship and passport management
20. provincial level commissions
21. land management
22. mine excavation and management
23. insurance management and operation
24. protection and use of language, culture and religion
25. utilisation of forests and water
26. agriculture
27. books and printing presses
28. management of trusts

Annex 5 lists 27 common rights, but is still unclear whether these are common or concurrent rights:

1. criminal and civil legal procedures
2. supply of essential goods
3. preventive detention
4. waterways
5. communications
6. tourism
7. poverty alleviation and industrialization,
8. land policy etc.

Annex 6 lists the 20 powers of the local level government:

1. city and community police
2. cooperatives
3. operation of FM stations
4. local tax

5. royalties from natural resources
6. local level development projects
7. primary and secondary education
8. basic health and sanitation
9. local courts
10. bazaars
11. roads
12. issuance of citizenship certificates and passports
13. distribution of land and house certificates
14. personal events registration

Similarly, in Annex 7, 20 powers are listed for local autonomous areas that are to be set up under special structures in which almost all rights are the same as provided to the local level government.

### **Committee on Division of Natural Resources, Financial Powers and Revenue**

Two separate lists have been proposed by the Committee on Natural Resources (CDNRFPR, 2010). Interestingly, this committee does not mention the powers of special structures, but only lists those for the centre, provinces and local level bodies. Under the allocation of proposed economic rights, the centre is allocated with the power relating to:

1. police
2. immigration
3. financial policy
4. civil aviation
5. intellectual property
6. higher education

Competencies listed for provincial level include:

1. provincial police
2. regional planning policy
3. provincial railway

4. civil service
5. inter-state highway
6. middle-level drinking water projects
7. universities
8. regional hospitals
9. medium-level hydro projects
10. social security
11. industrial management
12. birth, death and migration registration
13. land management policy

Likewise, the competencies for local government include:

1. local planning policy
2. family planning
3. local civil service
4. local urban roads
5. small-scale irrigation projects
6. drinking water projects
7. education up to 10+2
8. district hospitals
9. micro hydro-power projects
10. agriculture production
11. management, protection and development of local heritage
12. disaster reduction/rescue operation
13. social security management
14. sports
15. industrial management
16. birth, marriage and migration registration

17. protection of environment, forests, watershed areas, wetland areas
18. wildlife conservation
19. excavation of mines and minerals

Similarly, in the second list (allocation of authority to generate revenue between different levels of government), the centre has the following competencies:

1. custom duty
2. value added tax
3. industrial income tax
4. institutional income tax
5. casino
6. carbon service

Excise duty is listed for centre and province only.

And all three tiers have power over:

1. Service charges
2. royalties and other income to be generated from natural resources
3. punishment and fines

For the provinces and local level bodies only:

1. entertainment tax
2. registration charges of land and house
3. service charge

For local level bodies only:

1. land tax
2. property tax
3. business tax

## **ANALYSIS OF PROPOSALS OF FIRST CONSTITUENT ASSEMBLY THEMATIC COMMITTEES**

The following observations have been made on some of the critical issues based on the reports of the first Constituent Assembly thematic committees:

### **Symmetrical model for the legislature**

Under an symmetrical model, all units (states or provinces) are given an equal share of the power, in other words, the different federal units enjoy the same rights. The United States and Australia are the perfect examples of a symmetrical model as they send an equal number of representatives to the federal upper house.

In an asymmetrical model, the provinces do not get an equal share of the power. There is debate whether or not it is justifiable to have an equal number of representatives even if the size of the province and population is extremely different. In terms of providing equal status in shared-rule, a symmetrical system is perfect, but in terms of equal representation based on the population it is wrong. Since in most countries the federal units are dissimilar in terms of their political situation, population, size, number of languages spoken, availability of resources and geographical conditions, the distribution of power equally among the provinces may not always be practical.

In Nepal, a bicameral legislature was proposed by the former Constituent Assembly based on a symmetrical model. This was also recommended by the task force. However, later, the number of legislature parliament was projected differently (15 May 2012 Agreement between four major forces: UCPN (M), NC, UML and United Madhesi Morcha). It was a highly contentious issue among the experts due to the huge differences in the proposed federal units: the State Restructuring Committee proposed 14 provinces in which the eastern Madhesi province was populated by 5,000,000, whereas Jadan province had only 48,000 (CRSDSP, 2010). From each of the provinces 3–6 members were suggested for the Upper House.

### **Cooperative federalism**

Cooperative federalism is a concept of federalism in which national, state, and local governments interact cooperatively and collectively to solve common problems, rather than making policies separately – but more or less equally.

In comparison, “competitive federalism is the powerful harnessing of our tripartite sovereignty system that allows states to compete with each other over a broad range of issues to provide citizens with the best value goods and services

at the lowest cost. Competitive federalism aims to rebalance the powers between the federal government and the states that more faithfully adheres to the Constitution. It is not government itself that is inherently troublesome; rather, it is the misappropriation of power by the federal government that requires action. The antidote is not the destruction of government. It is the returning of power to the states and a proper return to the natural constitutional order” (Yankee Institute for Public Policy, 2012).

The State Restructuring Committee report proposed cooperative federalism and recommended that, “the relations among the Federation, local level and special structures shall be based on the principle of cooperativeness, coexistence and coordination” (Article 10, CRSDSP, 2010). This is appropriate for a country that has been practising the unitary system from the beginning and in which there is no similarity between the various units of the government in terms of development, availability of resources and capacities to run them competitively.

### **Unitary nature of judiciary**

Both the State Restructuring Committee and the Judicial System Committee unanimously proposed a unitary form of judiciary for Nepal. There was no debate at all about the nature of the judiciary, except for the debate on constitutional court, which was proposed by the State Restructuring Committee. This system is appropriate for federal countries like the United States of America and Germany where the structures of the court may be complex and the regular court system handles such issues smoothly.

### **Concurrent or common powers?**

The State Restructuring Committee recommended 27 powers as common list in Annex 5 of its report, but was not clear as to whether these are common or concurrent powers. If these are common, then almost all rights will be exercised by the centre, as per the tendency. There is no clarity as to how these common list of competencies would be exercised. There are big differences between the common and concurrent lists. In its report, the Committee for State Restructuring has the common list whereas the concept note uses the concurrent list; this needs to be clarified.

### **Unitary nature of commissions**

The Committee on Natural Resources proposed a constitutional committee and two additional commissions; however, there is not much clarity regarding their status in the provinces and at the local level. The report of the Committee on Natural Resources states that there shall be a Commission for Investigation of

Abuse of Authority in the provinces (in general); a branch of the Federal Audit Commission in every province/state; a regional Public Service Commission as determined by law, and an Election Commission with a branch in every province/state. Similarly, the Committee proposes that there shall be a Regional Human Rights Commission and that provisions for all other commissions shall be as determined by law. The Committee proposed different provisions for different commissions, which are not very clear. Other than the National Human Rights Commission, the tier of all other rights-based commissions (Madhesi, Adabasi/Janajati, Women, Dalit, Muslim and Minority commissions) are left to the law (CDSCB, 2009). Thus, a proposal should be made for a clear provision for each of the commissions in the constitution itself.

### **Different nature of forms of government**

The Constituent Assembly Committee on Forms of Government made three different proposals for a presidential, a parliamentary and a presidential system, with a different form for the centre than for the provinces. Interestingly, the parliamentary model was proposed unanimously for the provinces, which is, however, entirely different from the local governance structure, which was also proposed unanimously (CDFGS, 2010). On 15 May 2012 an agreement was reached between the four major political forces, the UCPN (Maoist), Nepali Congress, UML and United Madhesi Morcha to propose a mixed model of government for the centre (Point No. [B]). Under this model, the president would be directly elected by the people and the prime minister would be elected by the legislature-parliament and power would be shared between the two. However, this agreement was not formally signed by these parties. Thus, there is no clarity as to the forms of government, especially for the centre, and no parity between the provincial and local government. It should generally be uniform in each tier of the government as a system of government.

### **Nature of special structures unclear**

In addition to the three tiers of the government (vertical), the State Restructuring Committee also proposed special structures (See Article 4 [4] and Article [8], ) CRSDSP, 2010): “There shall be autonomous areas and protected areas within the state as per Article 8 as special structure in addition to the mains structure as per the sub-article (1).” The high-Level State Restructuring Commission agreed with this proposal. However, it is not clear whether this structure itself is a separate layer or falls within the ambit of the provincial or local government. Both the Committee and the Commission proposed 22 autonomous regions, but the bases of those autonomous regions are unclear and this has been heavily criticised. The second Constituent Assembly should rethink special structures.



### **Residual powers of the centre**

Studies show that residual powers are devolved to a level of government by considering the character and needs of the country concerned. The United States of America, Switzerland, Australia and the United Arab Emirates (which were formed by the coming together of different states); Germany (which was formed by the expansion of the states); and Brazil, Spain, Bosnia-Herzegovina, Mexico, Venezuela, Argentina, Russia, Malaysia, Ethiopia and Iraq (which have been held together by going from unitary to a federal structure) have all left the residual powers to the provinces. In comparison, in countries like South Africa, Belau, and India the residual powers rest with the centre. In India, the residual powers in the case of Jammu Kashmir, rest with the State and the remaining powers are vested in the centre. Residual powers in Canada were initially with the centre, but now (following the separatist movement in the state of Quebec) are been mentioned in the Constitution as to be provided for by law. Residual powers in Canada are exercised on the basis of mutual agreement. Likewise, following a long conflict, residual powers in Sudan have been provided for in Article 113 of the Constitution, which says that it shall be the common responsibility of both the centre and state (CRSDSP, 2010).

In Nepal's case, both the State Restructuring Committee and the High Level State Restructuring Commission proposed residual powers to the centre. The proposal of the Committee states that:

*On the basis of the concept paper/manifesto/letter of commitment of political parties, and international standards and practices; the report of the public opinion collection team, answers to the questionnaires; suggestions that have come from various individuals and institutions, and also considering Nepal's diverse geographical situation, it would be practical and more useful for residual powers to rest with the Federation (Centre), and that it has been proposed that the residual powers should rest with the Federation (Centre). (CRSDSP, 2010)*

Federalism means delegating power to the lower levels of its constituent units and concentrating residual powers to the centre. It is also argued that as Nepal is moving from unitary to a federal system it would not be wise to vest these powers in the lower level tiers in the beginning. It is generally regarded that these powers could be shifted later after creating strong tiers at the provincial and local levels. In other words, a gradual shifting of powers to the provincial and local level would be ideal in Nepal's context.

### **Weak local government**

Both the State Restructuring Committee and the High Level State Restructuring Commission, for the first time, gave recognition to the local body as a third tier

of government. This is a remarkable achievement. However, a look at the list of competencies and other provisions shows this tier to be weak and potentially conflicting with special structures. Most of the reports are not clear about the third tier of the government. Some political parties argue that the third tier should be the responsibility of the provinces, while other parties and local government associations are in favour of mentioning strong local government in the constitution itself. There is another debate about putting a district-level body within the local government.

Despite the proposals of the State Restructuring Committee and the High level State Restructuring Commission (both the Committee and majority report of the Commission have not proposed district level under the local government, whereas the minority report of the high level commission proposed district level) to delete the district level entities (CSRDSR, 2010: 109–110), the ADDCN (Federation of District Development Association) and some political parties strongly suggested keeping the districts in tact as the proposed local level government may not be able to provide services smoothly without the district level bodies. It is also argued that too many layers in the local government would create problems to the people and the power is likely to be retained by the districts.

The powers given to the local level are very limited with most of the powers concentrated at the central level. A demand had been made to allocate more power to the local level and to clearly state the local level structure in the constitution itself, or at least set out clear guidelines.

### **Confusing list of competencies**

As indicated above, a lot of work needs to be done by the future constituent assembly of Nepal, mostly on state restructuring and forms of government. The main purpose of maintaining a concurrent list of powers is because some issues are not fully of national importance and some are not purely related to the states and the local bodies. Such issues are of common interest to the centre and the states. On many occasions, the centre will need to formulate laws for the state or federal units while in some cases the formulating of laws by the centre alone would not be sufficient. In many issues uniformity also needs to be maintained between the centre and state. As a result, a concurrent list between the centre and state is essential. In relation to powers on the concurrent list, both the federation and states can formulate the law. But, as the laws formulated by the federation and states may contradict one another, the federal legislature shall develop a fundamental principle, norms and framework on the concurrent list and the provincial legislature shall follow it to formulate necessary laws (CSRDSR, 2010: 104).

There is too much overlapping in the list of competencies recommended by the State Restructuring Committee and Natural Resource Committee). The list of competencies for local government (Annex 6 of both reports; see CSRDSR, 2010;

HLSRC, 2011) and Autonomous Regions (Annex 7 of both reports; see CSRDSP, 2010; HLSRC, 2011) are similar, whereas the nature of autonomous regions and the areas of overlap with local government and the provinces are not clear. Service delivery mechanisms are among those areas that are confusing. Little power is allocated to the local level.

Accordingly, the following specific recommendations are made in relation to the list of competencies:

- Clear provisions should be indicated in each of the lists without too much overlapping, otherwise the federal government will have the chance to takeover on those rights and may misuse its residuary power.
- The federal government may formulate any policy standard in the sector of economic rights and may enact framework laws for monitoring. Separate provisions giving details of the allocation of powers and how various levels of government would coordinate and cooperate etc. may be made. This is necessary at least for the allocation of fiscal and revenue generation and their utilisation, for security, defence and law and order, as well as water, natural resources and land.
- There is no clarity about local governance, for example, as to whether the local level can make laws or by-laws. Each area of power in the local list should be linked with the provincial list, if local level does not have power to from its policy at the lower level (e.g., primary and secondary education are in the local list, but not in provincial list).
- Policies regarding youth, women, sports, education, agriculture, industry, tourism, national land use policy and planning, national health policy, national plans on forestry, environment and conservation, national standards with regard to professions, occupations and training should be powers given to the centre.
- There is too much replication and it is known that replication always works against periphery. The power over royalties from natural resources and wildlife conservation, mines and minerals are allocated to all three levels (federal, provincial and local). Such provisions should be clearly allocated for each particular tier.
- The national policy on certain issues should be recommended in the constitution itself, mostly on health, agriculture and education. Those policy items should be specific.
- Some items are too vague, such as 'large scale', 'medium scale' and 'small scale' hydro power, and previous definitions of these scales might not work for forever. Such provision should be specified.
- Some other issues are also used in vague, e.g., "provincial laws on the basis of fundamental principles, standards and framework legislation

determined by the federal legislature” is used. It is not clear from this if a province can make a law on a topic in the common list in the absence of federal framework legislation.

## CONCLUSION

In fact, there is no particular formula regarding the division of power between the tiers of government. Devolution of state powers depends on the capabilities of the governments to be constituted in different federal units. A system has evolved in which rights are mentioned in common index and exercised concurrently both by the centre and the provinces to replace the separate lists of rights for the two levels of government. In essence, federalism means the collaboration of various tiers of governments or distribution of state authority among them. Federalism has been practised as a system that guarantees freedom, equality, prosperity and human rights and cures the problems inequality and imbalance. It has the capacity to balance the protection of individual freedom and collective identity.

Inclusive representation and fair participation is essential for meaningful management of federalism. In this sense, federalism does not merely mean autonomy or self-rule; it also means collaboration and shared-rule. Vertical power sharing among the tiers of the government is the core of any federal arrangement. Negligence in the power sharing among the tiers of the government leads towards further chaos in the country sooner or later. The entrenchment of local government in the Constitution and laws would not be meaningful if the central government would be able to arbitrarily intervene in the local decision-making and reverse decisions made by the local and provincial governments. The common commitment to democratic values and belief should be a uniform characteristic and a matter of priority for all the units under a federal system.

The devolution of rights largely depends on the federal structure to be adopted. Certain rights such as foreign policy, national security, currency and foreign trade are largely reserved for the central government. In the proposed committee reports, some rights are reserved only for the central government, while others are to be commonly exercised by both the central and provincial governments. It has been said that Nepal is turning into a federal country from unitary system under a feudal monarchy, which ruled for 240 years; there is the dominance of one religion, one language and one culture across the almost entire country. Taking this fact into consideration, Nepal’s integrity needs to be considered while adopting federalism. It is also necessary to develop goodwill among all the ethnicities, lingual communities, cultural and religious communities. In this context, Nepal’s state powers should be divided in such a way that the federal government is strengthened and the provincial and local governments are empowered.

## REFERENCES

- Bélangier, C. (2001). *Residuary powers* [online], 26 February 2001. Quebec History, Marianopolis College. Retrieved 20 November 2013 from <http://faculty.marianopolis.edu/c.belanger/QuebecHistory/federal/residual.htm>.
- Boeckenfoerde, M., Dann, P. & Wiesner, V. (2007). *Max Planck manual on different forms of decentralization*. Heidelberg: Max Planck Institute for Comparative Public Law and International Law: 36–37.
- CC (2010). *Constitutional Committee of Former Constituent Assembly*. Kathmandu: Constituent Assembly. Retrieved 20 November 2013 from <http://www.spcbn.org.np/index.php?action=resources>.
- CDFGS (n.d.). *Committee on Determination of Forms of Governance of the State: The preliminary draft of the constitution and the explanatory note*. Translation from Nepali to English by International IDEA in collaboration with the Nepal Law Society. Kathmandu: Constituent Assembly. Retrieved 20 November 2013 from [http://www.spcbn.org.np/resources/concept\\_paper\\_Determination\\_Form\\_Governance\\_State\\_ENG.pdf](http://www.spcbn.org.np/resources/concept_paper_Determination_Form_Governance_State_ENG.pdf).
- CDFLB (n.d.). *Committee on Determination of the Form of the Legislative Body: Preliminary draft of the constitution*. Kathmandu: Constituent Assembly. Retrieved 20 November 2013 from [http://www.spcbn.org.np/resources/concept\\_paper\\_Determination\\_Form\\_Governance\\_State\\_ENG.pdf](http://www.spcbn.org.np/resources/concept_paper_Determination_Form_Governance_State_ENG.pdf).
- CFRDP (2010). *Committee for Fundamental Rights and Directive Principles: A report on thematic concept paper and preliminary draft 2066 (2009–10 AD)*. Unofficial translation by UNDP/SPCBN/CCD. Retrieved 20 November 2013 from <http://www.spcbn.org.np/index.php?action=resources>.
- CDNRFP (2010). *Committee on Natural Resources, Economic Rights and Revenue Allocation. Report of the Preliminary Draft of the Constitution (with Concept Paper), 2066*. Kathmandu: Constituent Assembly. Retrieved 20 November 2013 from [http://www.spcbn.org.np/resources/concept\\_paper\\_Natural\\_Resource.ENG.pdf](http://www.spcbn.org.np/resources/concept_paper_Natural_Resource.ENG.pdf).
- CDSCB (2009). *Committee to Decide on the Structure of Constitutional Bodies: Preliminary Draft 2066 (2009)*. Kathmandu: Constituent Assembly. Retrieved 20 November 2013 from [http://www.spcbn.org.np/resources/concept\\_paper\\_constitutional\\_bodies\\_ENG.pdf](http://www.spcbn.org.np/resources/concept_paper_constitutional_bodies_ENG.pdf).
- Centre for Constitutional Studies (n.d.). Retrieved November 20, 2013 from <http://www.ualawccsprod.srv.ualberta.ca/centres/ccs/issues/federalism.psp>.
- CJS (2009). *Committee on Judicial System: A report preliminary draft with the concept paper 2066 (2009)*. Kathmandu: Constituent Assembly. Retrieved 20 November 2013 from [http://www.spcbn.org.np/resources/concept\\_paper\\_Judiciary\\_System\\_ENG.pdf](http://www.spcbn.org.np/resources/concept_paper_Judiciary_System_ENG.pdf).
- CPNI (2010). *Committee for Preserving the National Interests. Preliminary draft along with the explanatory note, based on the Concept Paper 2066*. Kathmandu: Constituent Assembly. Retrieved 20 November 2013 from <http://www.spcbn.org.np/index.php?action=resources>.
- CPRMMC (2010). *Committee on the Protection of the Rights of Minorities and Marginalised Communities. Preliminary draft along with the explanatory note, based on the Concept Paper, 2066*. SPCBN/UNDP unofficial translation. Kathmandu: Constituent Assembly. Retrieved 20 November 2013 from [http://www.spcbn.org.np/resources/concept\\_paper\\_national\\_interest\\_ENG.pdf](http://www.spcbn.org.np/resources/concept_paper_national_interest_ENG.pdf).
- CRSDSP (2010). *Committee for Restructuring of the State and Distribution of State Power: Report on Concept Paper and Preliminary Draft, 2066*. Kathmandu: Constituent Assembly. Retrieved 20 November 2013 from [http://www.spcbn.org.np/resources/Concept\\_Paper\\_Restructuring\\_State\\_GTZ\\_ENG.pdf](http://www.spcbn.org.np/resources/Concept_Paper_Restructuring_State_GTZ_ENG.pdf).
- Federalism in Canada: Basic Framework and Operation (2008). Retrieved 20 November 2013 from <http://mapleleafweb.com/features/federalism-canada-basic-framework-and-operation>.
- Federalism (n.d.). Retrieved 20 November 2013 from <http://ualawccsprod.srv.ualberta.ca/centres/ccs/issues/federalism.php>.
- Four Major Political Forces (2012). *15 May 2012 Agreement between four major forces: UCPN (M), NC, UML and United Madhesi Morcha*.
- Government of India (1950). *The Constitution of India, 1950*. Dehra Dun: Photolithographed at the Survey of India Offices.
- Government of Nepal; Cottrell, J. (2009). *The Interim Constitution of Nepal, 2063 (2007): as amended by the first to sixth amendments: with English and Nepali side-by-side and introductory material in both languages*. Kathmandu: UNDP Nepal.
- Haftetsion, F. (2013). *Does the Ethiopian Constitution allow for a unilateral secession of the member states of the federation?* [online], 5 February 2013. Aiga Forum. Retrieved 20 November 2013 from <http://aigaforum.com/articles/constitution-uni-secession.php>.

- Hagen, T. (2012). *Decentralization and development: the role of democratic principles: Some comparisons between Switzerland and Nepal in the fields of tourism, hydropower and infrastructure*. Kathmandu: Ratna Pustak Bhandar.
- Heiniger, M. (2009). *Nepal's peace process and Swiss support* [pdf], July 2009. Switzerland: Federal Department of Foreign Affairs Switzerland. Retrieved 20 November 2013 from [www.swiss-cooperation.admin.ch/nepal/en/.../resource\\_en\\_178458.pdf](http://www.swiss-cooperation.admin.ch/nepal/en/.../resource_en_178458.pdf).
- HIK (2009). *Support to constitution making and federalism* [pdf]. Retrieved 20 November 2013 from [www.swiss-cooperation.admin.ch/nepal/.../resource\\_en\\_178469.pdf](http://www.swiss-cooperation.admin.ch/nepal/.../resource_en_178469.pdf).
- HLSRC (2011). *Recommendation Report of the High Level Commission for State Restructuring (Majority report)*, Kathmandu: Constituent Assembly. Retrieved 20 November 2013 from <http://www.spcbn.org.np/index.php?action=resources>.
- Hueglin, T.O. (2011). Federalism: An alternative category in political thought? In Saxena, R. (Ed) (2011). *Varieties of federal governance, major contemporary models*. New Delhi: Cambridge University Press India: 11.
- Jordan, S. (2009). Federalism in Africa: An indigenous idea with colonial history. In Ward, A. & Ward, L. (Eds.). *The Ashgate Research Companion to Federalism*. Canada: Campion College, University of Regina: 480.
- Khanal, K. (2008). *Sankramankalin Rajniti ra Sambidhansabha Chunaav*. Kathmandu: Friends for Peace: 105–110.
- Law Teacher (n.d.). *The doctrine of residual power* [Online]. Retrieved 20 November 2013 from <http://www.lawteacher.net/administrative-law/essays/critique-the-doctrine-of-residual-power-law-essay.php#ixzz2fheSYeeZ>.
- Lijphart, A. (2002). The wave of power-sharing democracy. In Reynolds, A. (Ed.) *The architecture of democracy: constitutional design, conflict management, and democracy*. Oxford: Oxford University Press: 39.
- Robertson, S. (n.d.). *What are residuuls powers* [online]. ehow. Retrieved 20 November 2013 from [http://www.ehow.com/info\\_8289318\\_residual-powers.html](http://www.ehow.com/info_8289318_residual-powers.html).
- Saxena, R. (Ed.) (2011) *Varieties of federal governance, major contemporary models*. New Delhi: Cambridge University Press India: 65.
- Sisk, T.D. (1995). *Democratization in South Africa: The Elusive Social Contract*. Princeton: Princeton University Press.
- Study Mode (2012). *Differences between dual and cooperative federalism* [online], 7 March 2012. Retrieved 20 November 2013 from <http://www.studymode.com/essays/Differences-Between-Dual-And-Cooperative-Federalism-931326.html>.
- Traniello, M. *Power sharing: Lessons from South Africa and Rwanda*. p 31. Retrieved 20 November 2013 from [www.ucl.ac.uk/ippr/journal/downloads/vol3-2/Traniello.pd](http://www.ucl.ac.uk/ippr/journal/downloads/vol3-2/Traniello.pd).
- Union of Soviet Socialist Republics (1990). *Law of Secession*.
- Upreti, B.R., Töpperwien, N. & Heiniger, M. (2009). *Peace process and federalism in Nepal: Experiences, reflections, and learning*. Kathmandu: South Asia Regional Coordination Office, Swiss National Centre of Competence in Research (NCCR) North South.
- Web Definitions (n.d.). *Cooperative federalism* [online]. Retrieved 20 November 2013 from [https://www.google.com/search?q=cooperative+federalism&oq=cooperative+federalism&sourceid=chrome&spv=210&es\\_sm=122&ie=UTF-8#es\\_sm=122&espv=210&q=cooperative+federalism+definition&revid=1514262072](https://www.google.com/search?q=cooperative+federalism&oq=cooperative+federalism&sourceid=chrome&spv=210&es_sm=122&ie=UTF-8#es_sm=122&espv=210&q=cooperative+federalism+definition&revid=1514262072).
- Yahoo Answers (n.d.). *What's the difference between Exclusive, Concurrent and Residual powers?* [online] Retrieved 20 November 2013 from <http://answers.yahoo.com/question/index?qid=20090328030936AAykBSO>.
- Yankee Institute for Public Policy (2012). *Competitive Federalism in the States* [online], 20 September 2013. Retrieved 20 November 2013 from <http://www.yankeeinstitute.org/2013/09/competitive-federalism-in-the-states>.

# CHAPTER 8

## PROPOSED ALLOCATION OF COMPETENCIES BETWEEN LEVELS OF GOVERNMENT IN NEPAL

- JAYAMPATHY WICKRAMARATNE





## **INTRODUCTION**

It is now agreed that Nepal should be a federal state. In fact, Article 138 of the Interim Constitution, 2007 declares Nepal to be a federal state and makes it clear that the new constitution too shall be a federal one. It is important to bear in mind that the Nepali state would be radically restructured, from a centralised unitary state to a federal one. The unitary mindset would therefore not easily go away. Political parties have varying degrees of commitment to federalism. Courts are more likely to interpret the constitution in favour of the Federation rather than the periphery, at least for quite some time. The same attitude could be expected of bureaucrats, even those serving in the periphery. These are also the experiences of other developing countries that have undergone similar restructuring.

In the above circumstances it would be prudent to clearly lay down the powers of the Federation and peripheral units with as less ambiguity as possible. Clear-cut division of powers, with the powers of the periphery and the limits of federal powers set out in detail, would certainly be in the interests of federalism, unless of course Nepal wishes to be a strongly centralised federal state, which appears not to be the case. There has been agreement in Nepal that residual powers (those not specifically set out in lists of competencies) should be matters for the Federation. In the absence of clear-cut division, the residual powers clause is certain to be used against the periphery. That the constitution will be too long is no excuse for not setting out important matters in detail.

## **PROPOSALS OF CONSTITUENT ASSEMBLY COMMITTEES**

The issue of competencies has been dealt with by two committees of the Constituent Assembly (CA), Committee for Restructuring of the State and Distribution of State Powers CRSDSP and the Committee on Division of Natural Resources, Financial Powers and Revenue (CDNRFPR), both of 2009. The writer has relied on unofficial English translations of the reports of the two committees. No tentative consolidated draft that the CA considered is available. The Nepal Law Society (NLS) with the assistance from the International IDEA has prepared a 'model' constitution which has reproduced the lists of competencies given in the report of the CRSDSP, with a few changes.

The CSRDSP report has five lists of competencies—Federation, Province, Common, Local, and Autonomous Areas (see Chapter 7 for detail lists of competencies). The CDNRFPR gives the subjects and functions of only the Federation, Provinces and Local Areas; there is no reference to a Common or Concurrent List or an Autonomous Areas List.

Some of the suggestions made and questions raised by the Concept Paper and Preliminary Draft Study Committee (also known as the Gaps and Overlaps Committee) were also available to the writer, again in an unofficial English translation.

## **NATIONAL POLICY**

Some countries with federal or devolved structures permit the Centre to make framework legislation in respect of identified subjects and functions. In fact, it may be desirable to permit national policy to be made in respect of certain subjects in a country like Nepal which is moving from a centralised unitary state to a federal one.

A preliminary question is whether national policy should bind the periphery or be merely recommendatory. If binding national policy is to be permitted, it is necessary that the subjects in respect of which such national policy can be made be clearly laid down. If not, the Federation could use the residual powers provision to lay down national policy on all devolved units and claim that all units should follow such policy. The items relating to national policy in the Federation List should be specific and not elastic. For example ‘courses of study’ in the CDNRFPR list is rather widely stated.

When binding national policy can be made, it is necessary that the process of making such policy is participatory, with the Provinces being involved, rather than the Federation laying down policy at its will. The process to be followed should be laid down in the constitution. If the process is participatory, peripheral units would take ownership of such policies and be willing to implement them.

Ideally, national policy so formulated should be adopted by the Federal Legislature as framework legislation. While in unitary states, national policy is determined by the executive and legislation is adopted when needed to implement it, it is quite a different situation in federal and devolved situations. In the latter case, if national policy binding on peripheral units is made by the federal executive, it would be the policy of the party in government at the Centre, which may even be a minor party in the opposition in a particular federal unit. On the other hand, if national policy is agreed upon through a participatory process involving the units too and is finally laid down by the federal legislature after debate, it would represent the collective wish of the country.

The Federal-State Relations Committee of the Parliament of Victoria has produced a very useful report titled 'Federalism and the Role of the States: Comparisons and Recommendations.'<sup>1</sup> Recognising the powers granted by State Constitutions and the Australian Constitution, the Committee has recommended that the States be free to make their own policy decisions unless there is an overriding national imperative for a single policy for the whole of Australia. The Committee recommended that national policy decisions be made in a way which maximises the possibility of interests within States being represented in the decision-making process and satisfied by the decisions reached. This would require the participation of State Governments to represent those interests particular to their States.

In Sri Lanka, a unitary state where limited devolution to the provinces was introduced in 1987, national policy has been declared by the central executive in many cases without any input from or participation of Provincial Councils and has been followed by Provincial Councils without demur. A committee appointed by the Minister of Provincial Councils to study the operation of Provincial Councils found a tendency on the part of central ministries to interpret national policy in operational terms, thereby extending their areas of administrative action in respect of provincial subjects.<sup>2</sup> Most government ministries continued to conduct their operations on a pre-devolution basis and routinely addressed guidelines and circular instructions direct to the respective heads of departments by-passing the provincial ministry.

The CSRDSP appears not to have paid much attention to the issue of national policy, except to say broadly that on matters of national importance and for coordination between provinces, the Federation can, pursuant to the constitution and law, issue necessary directives to the provinces and it shall be the duty of the province concerned to adhere to such directives.

The CDNRFPR, on the other hand, has adverted to the need to have national policy on some devolved subjects. For example, it suggests that 'higher education and regulation and standardisation of quality of universities, national agenda of education, courses of study, examinations' be federal competences. In regard to powers of the peripheral units to raise revenue (incorrectly referred to or translated as 'economic rights'), the CDNRFPR proposes that the federal 'government' may formulate any policy standard in the sector of economic rights and may enact framework laws for monitoring.

Some of the areas in respect of which national policy may be useful are: health policy, education, agriculture, industries, tourism and promotion of youth, women and sports. National standards with regard to professions, occupations and training, national land use policy and planning and national plans on forestry, environment and conservation may also be laid down by framework legislation.

It may be useful to consider the allocation of subjects and functions that were proposed in the Constitution of the Republic of Sri Lanka Bill of 2000, presented to the Sri Lankan Parliament by the Chandrika Bandaranaike Kumaratunga government (see Annex 2). The Bill was debated but not put to a vote as the required two-thirds majority was not forthcoming. It proposed a clear-cut division of powers between the Centre and the Regions, without a Concurrent List as at present. The subjects and functions are set out in rather detail. The Centre could lay down national policies and national standards in respect of a limited number of subjects which were laid down. However, no participatory process for making such national policies and standards was provided for.

For example, in respect of health, the Bill proposed the following for the Centre: National health administration (inclusive of existing special purpose hospitals, teaching hospitals affiliated to National Universities, co-ordination of health services, training and coordination of education and research relating to health, determination of national health standards, administration of all special programmes) and national health plan. Health and indigenous medicine including Regional Health Services and Regional Health Administration in conformity with the national health plan was a competence of the regions. In respect of education, the Centre would be competent to lay down national policy on education, determine minimum standards for national public certification examinations and conduct such examinations and determine syllabi and curricula, and minimum qualifications for teachers while administering national schools. Regions could determine regional education policy and administer education and educational services within the Region with due regard to national policy.

## **REPLICATION OF SUBJECTS, HARMONISATION, VAGUE PROVISIONS**

Any replication of subjects and functions in the lists of competencies would always work against the periphery and in favour of the Federation. This should be avoided. To take an example, the CSRDSP report has royalties from natural resources in the federal, provincial, autonomous areas and local lists, without any accompanying explanation.

Where a subject appears in more than one list, some explanation as to the limits of powers should be included. The CDNRFPR report has wildlife conservation, mines and minerals in all three lists. However there is some explanation in column 4:

As the conservation of wildlife, control of illegal hunting and illegal trade has international dynamics, the federal government has to regulate and conserve it developing necessary rules and policies. In order to make the conservation of wildlife and control the illegal

hunting and illegal trade effective, it will be appropriate to delegate power to provincial and local governments. In the community conservation areas, it is the responsibility of the community to make conservation effective and to control illegal hunting and illegal trade.

The CDNRFPFR report has royalty and other income from natural resources in all three lists, Federation, Province and Local. In an interpretative comment (column 4) it states:

*It will be appropriate to regulate and manage the crucial minerals such as mines, oils, gold, and uranium by the federal government. Regulation and management of other minerals should be managed by provincial and local government subject to the federal law. The impact of the use and exacting stone, cross stone, concrete, sand, and soil lies in the local areas. Therefore, for the protection and sustainable use of such resources it would be appropriate to give right to the provincial and local governments.*

The principles laid down in column need to be worked in to the lists. When a court has to interpret the constitution, it would look at the constitution and not the CA reports.

The CSRDSP and CDNRFPFR drafts need to be harmonised. For example, while the CSRDSP proposes that in respect of health, the Federation shall have only the power to lay down 'Central health policy' the CDNRFPFR goes further and, very correctly, adds special hospitals.

Some items in the lists are vague. For example, the CSRDSP proposes that 'large scale' power houses be a competence of the Federation. The CDNRFPFR proposes 'mega/big/medium hydroelectricity projects' for the Federation, 'medium' projects for provinces and 'small/micro' projects for the local level. It would be more appropriate to classify such projects with regard to their capacities.

## COMMON LIST

It is not uncommon for federal and devolved states to have a list of subjects in respect of which both the Federation and federal units have power. India has such a 'Concurrent List.' Both Parliament and the State Legislatures have the power to make laws in respect of subjects in the Concurrent List but where there is a conflict, the Parliamentary law will prevail.<sup>3</sup> There are no constitutional provisions for consultation between Parliament and State Legislatures.

South Africa does not have a Federal List. It has a Concurrent List (Schedule 4) and a Provincial List (Schedule 5). Both Parliament as well as a Provincial Legislature

can make laws in respect of matters in Schedule 4. Again, there is no process of consultation. Where national and provincial legislation on a concurrent matter are inconsistent, national legislation that applies uniformly in the country as a whole prevails over the provincial legislation, provided that it complies with any of the conditions set out in section 146.<sup>4</sup> Otherwise, the provincial legislation prevails. Parliament may legislate on a matter in Schedule 5 when it is necessary to maintain national security, economic unity or essential national standards, or to prevent unreasonable action by a province which is prejudicial to the interests of another province or the country as a whole. The Constitutional Court has held that the Parliament should use this power only in exceptional circumstances (Certification Case).

In Sri Lanka, both Parliament and Provincial Councils have legislative powers with respect to matters set out in the 'Concurrent List' but are required to consult each other before exercising such powers. Consultation is however limited to ascertaining the views of each other.

While the CDNRFPR makes no reference to a Common List, the CSRDSP gives a Common List and states that a Provincial Legislature may 'formulate necessary laws on the basis of the fundamental principle, standards and framework of legislation determined by the Federal Legislature.' A question that would arise is whether a Provincial Legislature may legislate on a subject in the Common List when no framework legislation has been passed on that subject. If a Provincial Legislature cannot do so in the absence of framework legislation, the Federal Legislature can block provincial legislation by not passing framework legislation.

The Concept Paper and Preliminary Draft Study Committee (also known as the Gaps and Overlap Committee) appears to have noted the difficulties that may arise if the CSRDSP's formulation is used. It has suggested thus: 'With regard to the subjects in the concurrent list in the schedule 5 of the constitution, the provincial legislature may enact necessary laws ensuring that they are not inconsistent with laws made by the federal legislature.'

Considering that Nepal is converting itself from a centralised unitary state to a federal state, it would be advisable for both central Parliament and a Province to be able to pass legislation on a subject in the Common List but after ascertaining the views of each other. A Federal Bill on a subject in the Common List should be forwarded to the all Provincial Legislatures and their views obtained. Similarly, a Provincial Bill would be forwarded to the Federal Legislature. No concurrency may be required. This would keep the legislatures concerned informed of what is happening at the federal or provincial level. It would be open to the Federal Legislature to make its own legislation on a subject if it does not agree with the any Provincial legislation passed notwithstanding the views expressed by the Federal Legislature. In such event, federal legislation would prevail.

The proposal by the CSRDSP that both the Federation and Provinces would have executive power over the Common List may give rise to problems and it is the

Provinces that are likely to lose out, given their low capacity to make legislation. What would be desirable, considering the subjects that have been proposed to be included in the Common List, is to permit the Federation to make legislation on subjects that are in the list but for the Provinces to exercise executive power relating to the Common List.

## **AUTONOMOUS AREAS**

The CSRDSP stated in its report that the three main structures – federation, province and local areas – may not address the concerns of the people belonging to some regional, ethnic and lingual communities. It recommended the creation of autonomous areas so that ‘such people should be identified and it should be ensured that such people will be able to exercise rights relating to self-rule and autonomous right as per the federal system of governance and also be able to be involved in the governance. With this objective in mind, the provision of special area has been incorporated to ensure the representation, self-rule and access to governance and decision making of the minorities, endangered groups, marginalised communities in some areas.’ An autonomous region may make its own laws but where such a law contradicts a provincial law it would be void to the extent of the contradiction. It would also have executive powers.

From the above, it is clear that an autonomous area would have self-governing powers over certain subjects and functions that are otherwise within the competency of the province which the autonomous area forms part of. Thus, all the subjects and functions in the list pertaining to autonomous areas should be within the provincial competencies. An odd item out is ‘Autonomous Election Council’ which is in the Autonomous Areas List whereas the holding of elections is not a provincial or common subject.

## **PROVINCE AND LOCAL LEVELS**

According to the CSRDSP, the local level may ‘formulate necessary laws on subjects outlined in Schedule 6. If laws formulated as such contradict with the provincial laws, then they will automatically be annulled to the extent of contradiction.’

One of the issues that need to be considered is whether the local level should make laws or by-laws. By-laws are ordinarily made under a law, provided that there is provision under the law to make by-laws. The parameters of the by-laws are usually laid down in the law concerned. By-laws would ordinarily be required to be placed before the legislature that made the law concerned. They may take effect upon being published with a requirement to place them before the legislature for approval within a given period of time, which is mostly the case, or take effect upon being approved.

If the local level is to only make by-laws, then the province would have to have laws on the various subjects devolved on it as a pre-requisite for the local level to be able to make by-laws. The provinces would take a long time to do that and, in the interim, the local level would not be able to make by-laws. One way out is to have a transitional provision that would permit the provinces to use and act under laws on devolved subjects in force at the commencement of the new constitution. Again, such laws may not provide for by-laws.

Rather than by-laws, it may be appropriate to permit the local level to make legislation of a subordinate nature ('statutes?') on subjects in the Local List. Any provision in a statute contrary to an existing law would be void to the extent of the inconsistency. Once a provincial law is made, the local statute would be tested against the provincial law.

Some of the subjects in the Local List do not figure in the Provincial List, e.g., primary and secondary education. The intention may have been to give exclusive executive power in respect of primary and secondary education to the local level. But without primary and secondary education being in the Provincial List, the province cannot make any legislation on the subject. A way out would be to have an omnibus clause to say that a province could make legislation on subjects in the Local List but that executive power would be for the local level.

## **TRANSITIONAL PROVISION RELATING TO LAWS**

Given the fact that the provinces would have very low capacity to draft their own laws, a transitional provision that permits the provinces to use existing legislation until they make their own laws is a must.

The experiences of Sri Lanka would be very useful to note. Provincial Councils were introduced by way of the 13<sup>th</sup> Amendment to the Constitution passed in 1987. For provincial authorities to exercise executive power, they need express statutory authority. When Provincial Councils were set up in 1988, it was estimated that there were at least 300 laws in respect of matters coming under the Provincial List and the Concurrent List. References to the minister or a particular public officer in such laws cannot be taken to be references to the governor, provincial minister or the corresponding provincial public officer in the absence of an express provision to that effect in the 13<sup>th</sup> Amendment. Provincial Councils thus began with 'zero statutes' and were faced with the daunting task of passing statutes corresponding to all such laws if they were to exercise executive power. They did not have their own draftspersons and had to rely on the centre for that too. In the absence of a statute, the centre would continue to exercise executive power in respect of the subject in question.

Proposals were made to the government that parliamentary legislation be enacted providing that all references as aforesaid in existing law in respect of matters set



out in the Provincial and Concurrent Lists be construed as being references to the corresponding provincial authorities. The government reluctantly agreed to make such a provision, but applicable only to the Provincial List. The Provincial Councils (Consequential Provisions) Act, No. 12 of 1989 was accordingly passed.

However, the wording of the Provincial Councils (Consequential Provisions) Act is to the effect that such references in existing law shall be deemed to include references to the corresponding provincial authorities and not to be deemed to be references only to them. The powers of the authorities at the centre thus remain.

A pre-1987 parliamentary law on a matter in the Provincial Councils List will be inoperative in a Province only if a Provincial statute is made on the same subject. Article 154G (8) states:

Where there is a law with respect to any matter on the Provincial Council List in force on the date on which this Chapter comes into force, and a Provincial Council established for a Province subsequently makes a statute on the same matter and which is described in its long title as being inconsistent with that law, then, the provisions of that law shall, with effect from the date on which that statute receives assent and so long only as that statute is in force remain suspended and be inoperative within that Province.

What this means is that unless and until such a statute is made, although provincial authorities are able to exercise powers under a pre-1987 law to which the Provincial Councils (Consequential Provisions) Act applies, central authorities are also able to exercise powers if they so wish.

The take-over of the Ratnapura and Kegalle Base Hospitals that were administered by the Sabaragamuwa Provincial Council is a case in point. The Centre moved to take over the administration of the two hospitals in 1994, at a time when the main party in the opposition was in power in the Sabaragamuwa Province. The Attorney-General advised the Secretary of the Ministry of Home Affairs and Provincial Councils that in the absence of a statute which provides for the administration of the two hospitals, “the control of these two hospitals legally remains with the Ministry of Health (*Gunawardena, et al 1996*).

Again, on being asked for advice on whether the Minister at the Centre too could exercise the power of supervision over local authorities if there was no provincial statute on the subject, the Attorney-General stated:

It should also be noted that the Provincial Councils (Consequential Provisions) Act does not take away from the Minister of the Central Government the powers which he has under any Act of Parliament, which can continue to be exercised by him as well.

[I] am of opinion that matters affecting Local Government in the Northern and Eastern Provinces can be dealt with by the Minister in charge of the subject of local government at the centre as well as by the Governor, if he so desires.

(Gunawardena, et al, 1996)

Given the experiences of Sri Lanka, it would be appropriate to include a transitional provision in the new Nepali constitution to the effect that an existing law on a devolved subject could be used by a Province as the legal basis for the exercise of its executive powers. It is also necessary that a substantive provision be made in the chapter on the Federal Executive that it would have no executive power in relation to devolved subjects.

### REVENUE PROVISIONS

The CDNRFPR’s report on revenue goes into somewhat detail. The CDNRFPR has proposed that ‘the federal government may formulate any policy standard in the sector of economic rights and may enact framework laws for monitoring.’ Also, ‘no federal laws shall be enacted that makes [a] negative impact on economic rights and financial procedure of provincial and local governments.’

A few revenue items that have been considered by the CDNRFPR are given in the following table:

Source	Federal	Province	Local	Comments
Customs duty	√			
VAT	√			
Excise duty	√	√		‘Certain’ portion of the royalty as determined by law to provinces
Entertainment tax		√	√	
Land tax			√	
Institutional income tax	√			
Individual income tax	√			Remuneration tax from provincial & local employees remitted back.  (CSRDSP recommends this tax to provinces)
Royalty from natural resources				Federation and provinces to allocate ‘certain’ portion to lower levels

As in the case of its proposals relating to subjects, the CDNRFPR has indicated what powers of revenue the various levels of government should have. Some items such as revenue from natural resources are common to all three levels. The CDNRFPR explains how this is to be done:

According to the nature and expansion of the natural resources and as per the allocation of such sources among the different level of governments, the charges and royalties to be received from such sources is included under the jurisdiction of such governments. The federal and the provincial government have to allocate the revenue generated by the utilisation of natural resources under their jurisdiction to the subordinate governments. The respective government shall have to make arrangement to distribute certain portion of such revenue to the affected local communities in equitable manner. The federal and provincial governments shall have to make arrangement to distribute certain portion of royalty (cash/goods/services) to the subsequent governments on the basis of revenue sharing.

In respect of excise duties, legible by both the Federation and the Provinces, the CDNRFPR states:

*The excise duty is imposed against the creation of the traditional social cost (such as impact on public health) in the production and consumption of goods, and in order to manage the cost on the same basis. At present, the area of the tax is extended, therefore this tax is imposed on the on the production and consumption of goods except the goods of basic needs. Since the responsibility to manage the social and environmental obligation created by the production and consumption of good lies on the federal and provincial government together, it would be appropriate to provide certain portion of the royalty as determined by law to the provinces.*

As suggested for the subjects and functions, the above principles need to be worked out into the constitution.

## **OTHER**

It would be advisable to have separate chapters or special provisions giving details of allocation of powers in respect of some important areas and how various levels of government would co-ordinate and co-operate. It is suggested

that there should be separate chapters or special provisions in relation to the following broad areas:

- Defence, security and Law and order
- Finance and revenue
- Land, natural resources and waters

## REFERENCES

- CDNRFPR (2010). *Committee on Natural Resources, Economic Rights and Revenue Allocation. Report of the Preliminary Draft of the Constitution (with Concept Paper), 2066*. Kathmandu: Constituent Assembly. Retrieved March 27, 2013 from [http://www.spcbn.org.np/resources/concept\\_paper\\_Natural\\_Resource.ENG.pdf](http://www.spcbn.org.np/resources/concept_paper_Natural_Resource.ENG.pdf).
- CRSDSP (2010). *Committee for Restructuring of the State and Distribution of State Power: Report on Concept Paper and Preliminary Draft, 2066*. Kathmandu: Constituent Assembly. Retrieved March 27, 2013 from [http://www.spcbn.org.np/resources/Concept\\_Paper\\_Restructuring\\_State\\_GTZ\\_ENG.pdf](http://www.spcbn.org.np/resources/Concept_Paper_Restructuring_State_GTZ_ENG.pdf).
- Gunawardena, A. S. et al (1996). *Provincial Councils: Operational Experience of Devolution- Report of the Committee to study the operation of Provincial Councils in Sri Lanka*. Colombo: Ministry of Co-operatives, Provincial Councils. Local Government & Indigenous Medicine.
- (n.d.). Retrieved March 27, 2013 from <http://www.parliament.vic.gov.au/fsrc/report3/front/receos.htm>.

## ANNEX - I

**Proposals of the Committee on Natural Resources, Economic Rights and Revenue Allocation (CDNRFPR) on of proposed Economic Rights**

Region/ Subject	Federation	Province	Local	The reason why the provision is proposed, or interpretative Comment
	National Security and Army			Issue of national concern and related to the sovereignty of the country.
Police	Federal Police	Provincial Police		May send to the local governments from the province due to administration training and economies of scale.
	International Trade			Related to foreign relations/affairs. However, international trade can be carried out from any part of the world, it is necessary to have coordination in order to develop capacity to compete and to maintain economic progress.
	Telecommunication (Regulation/ Management)			Having national concern and international dynamism.
	Currency, Currency Policy, Banking and Insurance			It has national and international dynamism. Related with the right to issue currency. Currency and Currency Policy should have national dynamism for economic stability, and in order to make coordination with international trade through currency exchange in the era of free market. Since, monetisation, banking, insurance cannot be fostered in a small place and has international scope and dynamics, it should be addressed by national policy.

Region/ Subject	Federation	Province	Local	The reason why the provision is proposed, or interpretative Comment
Immigration /Foreign Affairs/In-ternational reaties or Agreements etc				Related with national interests, national security and international relations.
Financial Policy				It is necessary the role of the center to maintain economic stability
	National Planning Policy	Regional Planning Policy	Local Planning Policy	If the federal and other governments at various levels develop their own plans and policies under their jurisdiction on the issues of national importance and concerns, the development would be more effective and it would also help to advance national prosperity and progress.
	Statistics			The federal government should have role in the statistics so as to maintain national and international quality and standard. Other governments should follow the standard/ mechanism as set out by the federation in order to maintain statistic.
	International border and security			It has national concerns, related with the sovereignty and international dynamism.
	Secret service			Related with national security
	Investigating institutions/ Academies	Investigating Institutions/ Academies		Could be different given the nature of investigation
Civil Aviation	Civil aviation and airport	Airport		It has national dynamism and needs to have regulation of international standard. If these works are performed by the governments of lower level, it would be risky from the security point of view and too expensive from the financial point of view (Economy of Scale). A provincial government can construct an airport coordinating with the federal government.

Region/ Subject	Federation	Province	Local	The reason why the provision is proposed, or interpretative Comment
	Railway service regulation and management	Provincial Railway		It has national dynamism and needs to have regulation of international standard. If these works are performed by the governments of lower level, it would be risky from the security point view and too expensive from the financial point of view (Economy of Scale). A provincial government can construct a railway coordinating with the federal government.
	Post office service			It has national and international dynamism.
	Public health and determination of quality of food and regulation			It is necessary to maintain minimum standard of services at national level in order to guard public health.
	Population and family planning		Family planning	Depending on the nature, governments of all level may engage in this.
Intellectual Property	Intellectual property: copy rights, patent, trademark etc.			Since the intellectual property has national and international extension, these rights should be preserved at national and even at international level.
	Quality standard and measurement			There should the same standard of quality and measurement at national level. It is because it has international dynamism.
	Labour security, labour relations and trade unions			There would be economic productivity, positive impact in the progress of economy and also protect the interests of the labours, if a uniformity is maintained among employers, labour and government at national level.
	Science and technology			It has national and international dynamisms and concerns.

Region/ Subject	Federation	Province	Local	The reason why the provision is proposed, or interpretative Comment
	Federal civil service	Provincial civil service	Local civil service	If every government has its own civil servants, the services to be provided to the people would be more effective. However, it is necessary to establish interrelation between the servants of government at different level for their professional development.
Road	National Highway (including bridges)	Inter-state highway	Local/urban roads	The ratio of investment and benefit is different. The investment and benefit can be limited (internalisation) to the prescribed area. Resources can be used efficiently and service monitoring would be more effective.
	Inter-provincial road (including bridges)	(including bridge) residential development/ planning	(including bridges) connecting bridges	Can be used in service and the monitoring of service would be effective.
Irrigation	Mega and inter-provincial irrigation	inter-local governments and provincial level middle underground irrigation project, irrigation project in a province	Small and underground irrigation project within territory	The ratio of investment and benefit is different. The investment and benefit can be limited (internalisation) in the prescribed area. Resources can be used efficiently and service monitoring would be more effective.
Drinking water	Mega drinking water project and quality standard of drinking water	Middle drinking water project	Small drinking water project, distribution and management of drinking water and garbage management	The ratio of investment and benefit is different. The investment and benefit can be limited (internalisation) in the prescribed area. Resources can be used efficiently and service monitoring would be more effective.s



Region/ Subject	Federation	Province	Local	The reason why the provision is proposed, or interpretative Comment
Education	Higher (including higher) education and regulation and standardisation of quality of universities, national agenda of education, course of study, examinations			Should make conformity with international level by maintaining quality and standard at national level.
	Universities	Universities, technical and vocational educations, course of study/ text books/ examinations, special education ( for visually challenged, deaf and other type of physically challenged people)	Education upto 10+2/ informal education	The ratio of investment and benefit is different. The investment and benefit can be limited (internalisation) in the prescribed area. Resources can be used efficiently and service monitoring would be more effective.
Health	Quality standard and monitoring	Quality standard monitoring		Should make conformity with international level by maintaining quality and standard at national level.
	National /special health service provider hospitals	Current regional/ zone hospitals	Current district hospitals, health centers, health posts, and sub- health posts	The ratio of investment and benefit is different. The investment and benefit can be limited (internalisation) to the prescribed area. Resources can be used efficiently and service monitoring would be more effective. The special service provider, like hospitals, can be placed at different locations of the country. Provinces can establish such hospital on their own.

Region/ Subject	Federation	Province	Local	The reason why the provision is proposed, or interpretative Comment
	Traditional treatment services	Traditional treatment services		The return of the investment in the traditional treatment services may not be achieved in a short time period, it is more expensive for protection and development, and the federal government has to take responsibilities to provide financial assistance to such services, and the provincial and local governments in coordination with the federal government may also regulate and manage such services.
	Prevention of communicable diseases	Prevention of communicable diseases		Efforts from all the sectors need to be made as the communicable diseases expand from one part to another part very fast.
Electricity	Mega/big/medium hydroelectricity projects	Medium hydroelectricity projects	Small/Micro hydroelectricity	Due to the amount of production of electricity, differences may be seen in affected areas, capital and technology and the distributing area. It seems appropriate to provide power to issue license to the different level of governments depending on the size of projects. The management of license, charge and royalty shall be as prescribed by the Federal law. No license is necessary for micro project.
	National grid			Electricity produced at one place may be distributed to another place through national grid. The arrangement of distribution should be made according to national needs.

Region/ Subject	Federation	Province	Local	The reason why the provision is proposed, or interpretative Comment
	Distribution of Electricity	Distribution of Electricity Alternative energy	Distribution of Electricity Alternative energy	<p>Distribution: Out of the electricity produced by the different level of governments issuing license or produced by the different level of governments themselves, the respective government may manage the distribution to those areas that are not connected with the national grid, and for other electricity, the respect governments may sell out through the national grid as per the power purchase agreement made before the finalisation of the project . The distribution to be carried out by one level of government may be transferred to another level of government. A government at any level may, while distributing the electricity produced in its area , via national grid, signing a power purchase agreement with the concern body, make an arrangement in order to distribute certain portion of electricity to its area. The concern government shall issue license for survey and production, and the body as prescribed by the federal law shall sign power purchase agreement. The production would be in small amount and the investment and benefit can also be internalized in a small place.</p>

Region/ Subject	Federation	Province	Local	The reason why the provision is proposed, or interpretative Comment
Agriculture	Agriculture quality standard, regulation, investigation and technology	Agriculture investigation, technology management  Production management	Agricultural production management, agriculture, veterinary and technical service	<p>It is necessary to maintain quality standard in agricultural productions, need to do research and investigation which is important for nation, to maintain quality standard on research and investigation, federal government will facilitate for the technology development, and provincial government will manage and facilitate the technology and research and investigation which is suitable for it.</p> <p>To manage agricultural production according to regional and local geographical situation. As the agriculture and the veterinary has local dimension, it will be more effective service if it is provided at local level.</p>
Tourism-Culture	Protection, regulation, development and management of national and international heritages, trekking, expedition (permit), hotel, archeology standard	Protection, development and management of provincial heritage sites	Protection, development of local heritage sites, protection and promotion of language/culture	<p>The tourism and culture has local, regional, national, and international dynamic. Therefore, it would be more appropriate to breakdown the jurisdiction into different level of governments. The issues that have national international dynamism should be under the jurisdiction of federal government, the issues that have regional dynamism should be under the provincial jurisdiction and the issues that have local dynamism should be kept under the jurisdiction of local government. It is necessary to regulate the archeologically important heritages at national.</p>

Region/ Subject	Federation	Province	Local	The reason why the provision is proposed, or interpretative Comment
	Development of tourism sites, protection and promotion of language/culture	Development of tourism sites, protection and promotion of language/culture	Development of tourism sites	From the tourism point of view, hotels should maintain international standards.
Social development	Disaster reduction / Rescue	Disaster reduction / Rescue	Disaster reduction / Rescue	The disaster reduction and rescue operation is different depending on the nature of disaster and rescue.
	Social Security (Regulation)	Social Security	Social Security management	It would be more effective if the regulation and implementation of social security is carried out by the higher level. For social welfare, the state may develop plan for the social protection and social help and implement it. Under the social security, provident fund, pension, health care, accident and compensation, compensation for handicap, protection of maternity, child care, survival benefit ( such as old aged house etc.), family benefit, educational facilities, unemployment facilities, sickness benefit etc. are the major issues.
	Sports (standardisation and regulation)	Sports	Sports	Since it has national and international dynamics, the federal government should act for standardisation and regulation, and all level of governments will have to manage it.

Region/ Subject	Federation	Province	Local	The reason why the provision is proposed, or interpretative Comment
Industries/ Enterprises	Industries/ Enterprises , Foreign investment (regulation)	Industrial management	Industrial manage- ment	<p>The policies and regulation relating to industries, enterprises, and foreign investment shall be as determined by the federal law. Except the federal law has prescribed limitations within its jurisdiction, the provinces and local units shall manage and regulate the industries and enterprises. The provincial and local units shall work for developing infrastructure and establishment of industries. This provision discourages unhealthy competition and encourages for achieving economic progress.</p> <p>For the industrial development, establishment of special economic zone or frameworks like this shall be promoted by the federal, provincial and local governments, on the coordination of the federal and provincial governments.</p>
Registration	Birth, marriage, death and migration	Birth, marriage, death and migration	Birth, mar- riage, death and migra- tion	It would be more appropriate to make a division that the federal government formulates necessary policies, the provincial governments manage for necessary investment and monitoring and the local governments implement it.

Region/ Subject	Federation	Province	Local	The reason why the provision is proposed, or interpretative Comment
Environment	Environment (Standardisation and Regulation )	Environment	Environ-ment	<p>As the environment effects in the human health, climate change, and the sources and opportunities of livelihood, it is more appropriate to regulate, manage and determine the standardisation of the issues related to this by the federal government. The environment contains local, regional, national and international dynamics. Therefore, all the governments of different level should take responsibility of protection and management of the environment depending on the nature of it.</p> <p>As the climate change has international dynamics, it is necessary to adopt measures of reduction the effects of climate change (due to carbon trade, limitation of emission, etc.)</p>
	Bio-diversity	Bio-diversity		<p>Bio-diversity has environmental and economic dynamics. As Nepal is rich in biodiversity, it is appropriate to give a major role of registration, protection, promotion and prohibition of piracy of the biodiversity to the federal government in order to accomplish maximum benefit of the use of biodiversity and equitable benefit sharing. The provincial governments, local governments and local communities also have responsibility to protect the biodiversity.</p>

Region/ Subject	Federation	Province	Local	The reason why the provision is proposed, or interpretative Comment
Forest	Forest	Forest	Forest	<p>As the forest has national and international dynamics, it is appropriate to make a common list of the local, provincial and federal governments in order to address the forest. To this respect, the federal government formulates certain policies and measures and the provinces and local units manage and implement these federal policies and measures.</p> <p>The protection and management of forest can be accomplished by communities, on the basis of the principle of community forest, and provincial and local governments, cooperatives or private sectors as per the specification of federal law.</p>
	National/inter-provincial water shed area	Water shed area	Water shed area	<p>As the water shed area is sensitive and crucial, it is appropriate to have power of regulation and management to the federal government. It will also be appropriate to give power to the different level of governments for the management of such areas according to the nature and size.</p>
	National Park, wildlife conservation area, conservation area  (including buffer zone)	Wetland areas	Wetland areas	<p>As the wetland areas are important from the view point of biodiversity, birds' habitat, and national identification, it is appropriate to integrate the listed areas under Ramsar Convention in the list of federal government. Other wetland areas can be placed under the jurisdiction of provincial and local government according to the nature, size and importance of the wetlands.</p> <p>If communities can better protect the wetland areas, it will be appropriate to handover to the communities.</p>



Region/ Subject	Federation	Province	Local	The reason why the provision is proposed, or interpretative Comment
	Wildlife conservation	Wildlife conservation	Wildlife Conservation	<p>As the conservation of wildlife, control of illegal hunting and illegal trade has international dynamics, the federal government has to regulate and conserve it developing necessary rules and policies.</p> <p>In order to make the conservation of wildlife and control the illegal hunting and illegal trade effective, it will be appropriate to delegate power to provincial and local governments.</p> <p>In the community conservation areas, it is the responsibility of the community to make conservation effective and to control illegal hunting and illegal trade.</p>
Mines and Minerals	Mines and Minerals	Mines and Minerals	Mines and Minerals	<p>It will be appropriate to regulate and manage the crucial minerals such as mines, oils, gold, and uranium by the federal government. Regulation and management of other minerals should be managed by provincial and local government subject to the federal law.</p> <p>The impact of the use and exacting stone, cross stone, concrete, sand, and soil lies in the local areas. Therefore, for the protection and sustainable use of such resources it would be appropriate to give right to the provincial and local governments.</p>
Land	Land consumption policy	Land management / consumption policy		<p>It will be uniformity if the federal government makes a policy for land consumption, and there will be effective implementation if it is managed (promotion and protection) at provincial level.</p>

### Allocation of Revenue among the different level of governments

Source of Revenue	Federal	Province	Local	The reason why the provision is proposed, or interpretative comment
Custom duty	√			It is the fare in order to regulate the international market. The international market is regulated by means of custom and such power is exercised by the federal government. Custom is related with the production, import-export, and revenues of the country, and it does impact the competitive capacity of the country. Therefore, the federal government has to regulate the international market through trade tax.
Value Added Tax	√			Such tax is imposed on the various stages of transactions of goods and services- from the production stage to retail sale-where the value is added. The tax imposed in the first stage is deducted in the subsequent stages. Therefore, the person who consumes at the last pays this tax. Giving this power to the federal government means it does not discontinue the chain of tax deduction and get rid of the problem of boarder tax adjustment.
Excise Duty	√	√		The excise duty is imposed against the creation of the traditional social cost (such as impact on public health) in the production and consumption of goods, and in order to manage the cost on the same basis. At present, the area of the tax is extended, therefore this tax is imposed on the production and consumption of goods except the goods of basic needs. Since the responsibility to manage the social and environmental obligation created by the production and consumption of good lies on the federal and provincial government together, it would be appropriate to provide certain portion of the royalty as determined by law to the provinces.
Entertainment Tax		√	√	Generally the entertainment services lies in a particular place and it is difficult to transfer such entertainment to another place only due to tax.
Land Tax ( Land Revenue)			√	There is not possibility of transfer of base of tax due to the reason of tax. It would be more appropriate to collect from the local level.

Source of Revenue	Federal	Province	Local	The reason why the provision is proposed, or interpretative comment
Institutional Income Tax	√			<p>An institution ( such as a company) may be transferred from one place to another place due to the variation of tax rate, collected in a limited geographical areas, one company can have multiple transactions and consequently there might be unnecessary competition between the lower political units. By means of this tax, overall financial stability should be maintained addressing the fluctuation in economy, and it is the duty of the federal government. In addition, through this tax, it will be re-distribute income and this would be more effective and efficient if the federal government carries this task out. Under this tax, the income from a profession, investment, rent (such as machinery, land, house etc.) , interest, contingency income, and etc are considered the major sources.</p>
Individual Income Tax	√			<p>Through this tax there will be re-distribute of income, and this would be more effective and efficient if the federal government carries this task out. Individual income tax influence the entire economic stability and it is the duty of the federal government to make overall financial management stable. In addition, if this tax is levied by the federal government, there would not unnecessary competition among the different political wings.</p> <p>Under this tax, the income of a profession, investment, rent (such as machinery, land, house etc.), interest, contingency income, and etc are considered the major sources. The federal government collects the remuneration tax from the employees of the provincial and local governments and sends back to the respective governments.</p>
Property Tax			√	<p>The tax base is not moveable, the value of the property would increase from the development activities performed by the local government, and the benefits of it should also go to the same government. It would be more effective and appropriate if the local government performs this task because the local government better knows its taxpayers. House and land tax is also included in this tax.</p>

Source of Revenue	Federal	Province	Local	The reason why the provision is proposed, or interpretative comment
Business Tax			√	It would be more appropriate if the local government charges fees or levies other taxes according to law, while giving permission to establish a business at the local area.
Vehicle Tax		√		There is less chance to be transfer tax base due to the rate of tax, the province levies taxes over the ownership of a vehicles. However, the federal government levies taxes on the income of the rent of vehicles.
Registration Charge of land and house		√	√	This tax is related with the land administration, and the provinces have rights to collect this tax. The provinces have to allocate some portion of such tax to the local governments.
Casino	√			Casino is run in a regulated way in order to attract tourists, and it is located at a particular place. Therefore, it is appropriate to collect by the federal government and distribute among others.
Service Charge	√	√	√	The government that provides services can only impose the services charge on its service. The services which are only provided by the federal government such as passport, visa, and post office charges etc go to the federal government. Similarly, the charges collected by the provincial and local governments upon their services are the income of such governments. The provincial government will collect the taxes for the services to be given to the provincial and local level such as vehicle tax, house and land tax etc. The taxes which are considered to be more effective to collect at the local level such as rent tax, house construction permission tax, advertisement, local bazaar (haat bazaar) recommendation etc are collected by the same government that provides services at local level. However, for the services to be provided at different level (such as irrigation, drinking water and permission for tourism), the respective government that provides services will impose service charges.
Carbon Service	√			Since this issue has international dynamics, the federal government has to settle the amount to be received by Nepal having necessary dialogue with the concerns. Such amount should be provided to the provincial and local government on certain basis.

Source of Revenue	Federal	Province	Local	The reason why the provision is proposed, or interpretative comment
Royalty and other income to be generated from natural resources	√	√	√	According to the nature and expansion of the natural resources and as per the allocation of such sources among the different level of governments, the charges and royalties to be received from such sources is included under the jurisdiction of such governments. The federal and the provincial government have to allocate the revenue generated by the utilisation of natural resources under their jurisdiction to the subordinate governments. The respective government shall have to make arrangement to distribute certain portion of such revenue to the affected local communities in equitable manner. The federal and provincial governments shall have to make arrangement to distribute certain portion of royalty (cash/goods/services) to the subsequent governments on the basis of revenue sharing.
Punishment and Fine	√	√	√	The fine or penalties awarded by local government shall be the revenue of the same level of government.

## ANNEX - II

### Constitution of the Republic of Sri Lanka Bill, 2000

#### Reserved List

1. Defence; national security; national police; security forces; special forces; para-military forces established by or under law
2. Law and order including public order and the exercise of police powers in the Capital Territory and where expressly provided in the Constitution
3. Firearms, ammunition, explosives and other armaments
4. Immigration and emigration; citizenship
5. Foreign affairs, including all matters which bring the Republic of Sri Lanka into relations with other States and the undertaking of international obligations
6. Entering into treaties, conventions and agreements with other States and international organisations and implementing such treaties, conventions and agreements
7. Elections

8. National planning
9. National census and statistics
10. Currency and foreign exchange, international economic relations, formulation of monetary policy and external resources
11. Public debt of the Government of Sri Lanka
12. Foreign loans of the Government of Sri Lanka
13. Regulation of banking, banking institutions and other national financial institutions
14. National policy on insurance and national institutions providing insurance services
15. Regulation of securities, stock exchanges and future markets
16. Audit of the Government of Sri Lanka, State institutions and public corporations
17. Taxes on income, capital and wealth of individuals, companies and corporations as provided in Chapter XXI
18. Customs duties, including import and export duties, and excise duties (excluding such excise duties as may be specified by law) as provided in Chapter XXI
19. Turnover taxes and stamp duties, goods and services taxes as provided in Chapter XXI
20. Any other taxes, duties or levies not mentioned in the Regional List
21. National lotteries
22. Pensions payable by the Government of Sri Lanka or out of the Consolidated Fund of Sri Lanka
23. Atomic energy
24. National grid for the supply of electricity, maintenance and management of the national grid
25. Regulation of the development and exploitation of mines and minerals including oil fields, petroleum and petroleum products and the collection of royalties thereon
26. Inter-regional rivers; inter-regional waterways
27. Airports; ports and harbours with international transportation; provision of facilities, in consultation with the relevant Regional Administrations, in fishery harbours used mainly by vessels engaged in fishing beyond Sri Lankan waters
28. Inter-regional transport
29. Railways
30. Civil aviation

31. Inter-regional highways linking the Capital Territory with regional capitals, regional capitals with each other and district capitals with each other in so far as the highway linking district capitals traverse regional boundaries; toll roads and expressways constructed by or under authority of the Central Government
32. Roads within the Capital Territory other than roads maintained by local authorities
33. Shipping and navigation; Maritime Zones including historical waters and territorial waters; Exclusive Economic Zone and Continental Shelf
34. Posts and telecommunications
35. Mass media including Central Government broadcasting and television institutions in conformity with national standards; licensing of broadcasting and media; establishment of regulatory authorities for the determination of national standards relating to communication and media
36. National Public Service; National Public Service Commission
37. National health administration (inclusive of existing special purpose hospitals, teaching hospitals affiliated to National Universities, co-ordination of health services, training and coordination of education and research relating to health, determination of national health standards, administration of all special programmes); national health plan
38. Policy and enforcement procedure relating to drugs, poisons and narcotics
39. Administration of justice; court procedure
40. Prisons
41. Policy and law relating to adoption of children
42. Inter-regional irrigation schemes
43. Fishing beyond Sri Lankan waters; registration of vessels engaged in fishing beyond Sri Lankan waters; rights relating to traditional migratory fishing within Sri Lankan waters; reference of inter-regional fishing disputes and disputes relating to traditional migratory fishing for settlement in accordance with Article 141
44. Protection, development and exploitation of marine and aquatic resources in keeping with international obligations and measures to enforce such obligations
45. National policy on education; national institutes in the field of education, such as the National Institute of Education; administration and supervision of national schools existing immediately prior to the commencement of the Constitution, provided that the administration of any national school may be handed over to the relevant Regional Administration; determination of minimum standards for national public certification examinations and the conduct of such examinations; determination of syllabi and curricula;

- determination of minimum qualifications for teachers; teacher training institutions; higher technical institutions; educational publications provided by the Central Government; powers under the Education Ordinance and the Assisted Schools and Training Colleges (Special Provisions) Act in relation to private schools
46. University Grants Commission; National Universities; National standards for Regional Universities
  47. National standards with regard to professions, occupations and training
  48. National standards relating to research, development and training in the areas of agriculture, fisheries and aquatic resources, science and industries
  49. National research institutions; lands and factories owned, managed or administered by such institutions immediately prior to the commencement of the Constitution
  50. Tea, rubber, coconut, oil palm and teak plantations owned by the Republic immediately prior to the commencement of the Constitution; the regulation of the manufacture of tea, rubber and coconut; tea small holdings; rubber small holdings; coconut small holdings
  51. Foreign trade; general policy on inter-regional trade
  52. Subjects and functions of the Sri Lanka Standards Institution immediately prior to the commencement of the Constitution
  53. Intellectual property including patents, inventions, designs, copyrights, trademarks and merchandise marks
  54. Monopolies, mergers, restrictive trade practices
  55. Buddha Sasana
  56. National Archives and Museums
  57. National Libraries and the National Library Services Board
  58. Archaeology - policy formulation; excavation and conservation including access for such purpose; maintenance and administration of ancient and historical monuments, archaeological sites, archaeological remains and records declared by or under law before the commencement of the Constitution to be of national importance, and those declared, after consulting the relevant Regional Administration, by or under law, to be of national importance
  59. Preservation and promotion of the national heritage
  60. National standards relating to public performances
  61. National policy on tourism and promotion of tourism
  62. National land use policy and planning
  63. National plans on forestry, environment and conservation including conservation of flora and fauna in keeping with international obligations



64. National parks, Strict Natural Reserves, Nature Reserves, Sanctuaries and National Heritage Wilderness Areas declared by or under law and existing immediately prior to the commencement of the Constitution
65. Reserved Forests and Conservation Forests declared by or under any law and existing immediately prior to the commencement of the Constitution, which shall be used in conformity with national plans on forestry and in accordance with national land use policy as determined by the National Land Use Council
66. Foreshore; national plans on coast conservation; declaration and demarcation of coast reservations for the implementation of national programmes relating to coast conservation
67. National housing programs with the concurrence of the relevant Regional Administration
68. National physical planning; national urban development planning
69. Formulation and co-ordination of national poverty alleviation programmes
70. National policy on youth
71. National policy on women's affairs
72. National policy on sports; administration of national sports bodies
73. Intervention in instances of 'national' (natural and environmental) disasters and epidemics.
74. Labour regulation and standards; labour laws
75. Promotion of and Policy on industrial development
76. Institutions for the promotion of, and determination of policy relating to investment
77. National programmes for infrastructure development
78. National programs on spatial and urban planning in consultation with the relevant Regional Administrations
79. Urban planning and implementation in the Capital Territory; public utilities in the Capital Territory
80. Drainage and waterways within the Capital Territory
81. Establishment of any authorities for the discharge of any or all of the functions subjects specified in items 32,79 and 80 of the Reserved List and for the delegation of any of the functions of such authority to any local authorities within the Capital Territory
82. Surveys for the purpose of any matters enumerated in the Reserved List
83. Fees in respect of any of the matters in the Reserved List, but not including fees taken in any court
84. Acquisition of private property required for the purposes of any matter in the Reserved List

85. Requisition of private property for the purposes of any matter in the Reserved List
86. Any other matter not enumerated in the Regional List

### **Regional List**

1. Regional Planning including employment planning at the Regional level and plan implementation including employment programmes
2. Public debt of a Region, excluding debts owing to the Central Government
3. Domestic and international borrowing to the extent specified in Chapter XXI
4. The management and promotion of foreign direct investment, international grants and developmental assistance to the Region to the extent specified in Chapter XXI
5. Regional programmes for public utility infrastructure development
6. Regional financial and credit institutions including regional institutions providing insurance services
7. Excise duties to be specified by law
8. Betting and gaming taxes, taxes on prize competitions and on lotteries to be specified.
9. Motor vehicle licence fees
10. Stamp duties on transfer of immovable properties and motor vehicles
11. Utilisation of fines imposed by courts within the Region, provided that not less than ten per centum of the fines imposed shall be utilised for construction and maintenance of court buildings and the development of the infrastructure of courts
12. Court fees, including Stamp fees on documents produced in courts
13. Land revenue, including the assessment and collection of revenues, and maintenance of land records for revenue purposes
14. Taxes on mineral rights
15. Pensions payable by a Regional Administration or out of the Consolidated Fund of a Region
16. Regional lotteries and their conduct
17. Regional Public Service, Regional Public Service Commission
18. Regional Commissioner for Administration (Regional Ombudsman)
19. Health and indigenous medicine including Regional Health Services and Regional Health Administration in conformity with the national health plan
20. Regional policy on education; administration of education and educational services within the Region with due regard to national policy; administration of national schools handed over by the Central Government; research on

- education; in-service training of teachers; higher education other than as provided in the Reserved List; regional universities; pre-schools; educational publications provided by the Regional Administration
21. Agriculture and agrarian services inclusive of agricultural research, extension, promotion and education within the Region and promotion of agro-based industries within the Region
  22. Animal husbandry
  23. State land and its use, alienation or disposal as specified in Chapter XVI
  24. Irrigation within the Region other than irrigation schemes utilising water through diversions from water systems from outside the Region
  25. Fisheries, marine resources and aquatic resources within Sri Lankan waters, excluding rights relating to traditional migratory fishing in Sri Lankan waters as provided in the Reserved List
  26. Forests, excluding those specified in the Reserved List, which shall be used, subject to paragraphs (3) and (4) of Article 145, in conformity with national plans on forestry and with due regard to national land use policy as determined by the National Land Use Council
  27. Protection of the environment within a Region in conformity with national plans on environment and conservation
  28. Regional programmes for coast conservation in conformity with national plans
  29. Industries and regional industrial development inclusive of industrial research and training within the Region.
  30. Energy excluding the national grid
  31. Trade and commerce excluding foreign trade
  32. Co-operatives and Co-operative Banks
  33. Supply and distribution of food
  34. Markets and fairs
  35. Manufacture and supply of salt, distribution of salt within the Region of manufacture
  36. Roads excluding those specified in the Reserved List; toll roads and expressways constructed by or under the authority of the Regional Administration
  37. Drainage and waterways other than within the Capital Territory
  38. Transport excluding railways but including ferry services
  39. Ports, harbours and fishery harbours other than those specified in the Reserved List
  40. Housing and construction

41. Urban planning and implementation, other than within the Capital Territory; public utilities, other than within the Capital Territory
42. Rural development
43. Local Government to the extent provided in Chapter XXV
44. Regional libraries and museums
45. Promotion of cultural activity within the Region including the preservation of cultural diversity
46. Maintenance and administration of ancient and historical monuments, archaeological sites and records other than those specified in the Reserved List
47. Public performances
48. Promotion of regional tourism
49. Relief and reconstruction and the granting of compensation
50. Social security and social insurance
51. Social services
52. Regulation of unincorporated associations and societies within the Region, charities and charitable institutions
53. Law and order, Regional Police and Regional Police Commission to the extent provided in Chapter XXII
54. Administration of justice within a Region, to the extent of the provision and setting up of court buildings in consultation with the Judicial Service Commission, the maintenance of court buildings and the development of infrastructure of courts; mediation and conciliation
55. Borstal and reformatory institutions
56. Implementation of programmes for the advancement of youth
57. Implementation of programmes for the advancement of women
58. Sports
59. Surveys for the purpose of any matters enumerated in the Regional List
60. Fees in respect of any of the matters in the Regional List
61. Acquisition of private property required for the purposes of any matter in the Regional List
62. Requisition of private property required for the purposes of any matter in the Regional List
63. Imposition, collection and utilisation of fines, other than court fines, in respect of the matters in the Regional List
64. Any other tax that may be devolved by law on the Region
65. Any other matter provided for in the Constitution

# CHAPTER 9

## FEDERALISM AND DECENTRALISED GOVERNANCE: PREPARING FOR THE TRANSITION TO FEDERALISM AND IMPLEMENTATION OF NEPAL'S NEW CONSTITUTION

- MARCUS BRAND



## I. INTRODUCTION

One of the key agendas of Nepal's stalled constitution building process was the endeavour to restructure Nepal into a federal state. The divisions among the main political parties on this issue, reflective of larger divergences among various social and ethnic groups in Nepal's society, were probably among the prime reasons why the Constituent Assembly (CA) ultimately failed and why the peace process that began in 2006 has therefore still not come to a formal conclusion. At the same time, the work of the dissolved CA has resulted in considerable consensus about how the state in Nepal should be decentralised, in a manner qualitatively different from all earlier decentralisation efforts. Even if Nepal has not produced a new Constitution, and even if federalism remains a vague and contested concept for many of Nepalis, the path towards more effective, decentralised and inclusive governance is the only alternative for the country – which appears to be understood by political and bureaucratic elites alike. And yet, too little has been done to prepare for any eventual implementation of a new constitution whose outlines are clear and tangible enough to expect a significant degree of state restructuring.

Efforts to support Nepal's constitution building process must therefore be accompanied by dedicated and long-term programmes to prepare and facilitate the transition from the currently over-centralised and unitary system to a more shared, inclusive and flexible form of governance for the country. This chapter analyses the early efforts of preparing Nepal for the legal and administrative changes a federal state structure would bring, beginning in 2009 and intensifying in 2010, and summarises the developments since then, including the eventual dissolution of the CA in 2012.

An earlier version of this analysis was written for key stakeholders in the constitution building process – the CA, the Government of Nepal, political parties, civil society, representatives of the institutions that needed to be created, and Nepal's development partners, in September 2009, at a time when the timely conclusion of the since-aborted constitution drafting process still seemed within reach.<sup>1</sup> A particular focus then was on the question how the constitution building process, and in particular a new formula for sharing powers between the centre and the to-be-created provinces would impact on Nepal's relationship with its development partners.

The original argument was an effort by the UN, through its UNDP Support to Participatory Constitution Building Project (SPCBN), to draw attention to the need for an early preparation for the transition period, and the setting in motion – already before the adoption of the final text – of concrete plans and preparatory works to make the actual state restructuring phase as smooth, swift and effective as possible. The 2009 paper<sup>2</sup> outlined the challenges of constitutional transformation and state restructuring, under which substantial powers would be devolved to sub-national units. The challenges would emerge in three phases:

- (1) **Phase 1: Constitution writing** (before the promulgation of the constitution). What should the constitution say about its own implementation? How can the stakeholders work together during the drafting period to ensure that the constitution itself gives appropriate guidance to the implementation processes to come? And how can it be ensured that stakeholders who are not immediately involved in the drafting process but on whose cooperation successful implementation will vitally depend (e.g., the government generally and senior civil servants in particular, and development partners) have adequate ways to contribute and are adequately informed, allowing them to make necessary preparations?<sup>3</sup>
- (2) **Phase 2: Transition** (between promulgation and the establishment of the institutions of the restructured state). What will need to be done at the national and sub-national levels in order to have a smooth, steady and orderly transition to creating new institutions while at the same time continuing to deliver services and provide public security?
- (3) **Phase 3: Institutional development** (between the creation of the institutions and their full functionality). What will have to be done to enable newly created institutions at the various levels of governance to begin functioning so that they can be partners in restructuring while delivering improved services and provide better public security?

The 2009 paper also discussed the possible role of international assistance in the implementation process. It was anticipated that there would be a shift from assistance to a unitary state to assistance to a newly federalising state. Globally, the interrelationship between federalism and foreign aid has been neglected by development policy makers and practitioners. Little is known about the relationships between poverty reduction, sector performance and the institutional arrangements in federal settings. Despite an increasing number of countries either becoming federations or adopting quasi-federal models of governance, the interaction between federalism and donor aid instruments has not been inadequately explored, particularly in the health and education sectors of relatively aid-dependent countries, with arguably serious consequences for development outcomes and aid effectiveness (Eldon & Waddington, 2007).



In addition, there appears to be very little guidance on how development partners should engage with governments in various phases of constitutional transformation.<sup>4</sup> For the development partners, key strategic issues would be how to interact with the federalising Nepal when sub-national institutions are not yet established and how to avoid that political relationships and fund flows negatively affect or (inadvertently) counter the decentralisation process at large.

With the hindsight of soon three years after that original target date and the bitter but incontrovertible fact that the Constituent Assembly's mission has come to a naught (for the time being), it is nevertheless useful to revisit the thinking on both the Nepali and the international development partners' side in terms of how any radical overhaul in the state structure of the country could be absorbed and put into practice. This is valuable even beyond purely academic/historical perspective.

As many of the main forces behind the erstwhile conflict continue to be intact, and as the various key demands of the constitution building process remain unfulfilled, it can be anticipated that the issues raised in the course of the debate on federalism, including the transition and implementation of state restructuring, will reappear before long on Nepal's political agenda. The unaddressed challenge of genuinely decentralising and vertically sharing political powers will continue to threaten Nepal's stability and human development unless a commonly agreed and workable formula for state restructuring will be in place, whether it ultimately qualifies as 'federal' or not.

## II. BACKGROUND AND CONTEXT

The popular uprising of April 2006 (*jana andolan II*) was an expression of a widely-felt need for change. The decade-long armed conflict was formally ended in November 2006 with the Comprehensive Peace Agreement (CPA) between the Government of Nepal, then constituted by a coalition of seven political parties, and the Communist Party of Nepal (Maoist), [later UCPN(M)].

Going far beyond a ceasefire accord, the CPA set out a comprehensive agenda for change, including a commitment to carry out an inclusive, democratic and progressive restructuring of the State by eliminating the current centralised and unitary form of the State in order to address problems related to women, Dalit, Adivasi janajati, Madhesi, oppressed, neglected and minority communities and backward regions by ending discrimination based on class, caste, language, gender, culture, religion and region.

The CPA continues to be the foundation of the ongoing peace process. Its main objectives were to draft an interim constitution and to hold the CA elections to draft a new constitution. The Interim Constitution, 2007 – agreed on by all the major parties in the interim parliament of the time – lays down the foundational

principles of the new constitution – republicanism, secularism, federalism, inclusion and democratisation. These principles were designed to guide the building of the new state and its functioning in the years to come. The Interim Constitution was however rather vague with regard to federalism. Yet the protest movements launched by various regional (Madhesi) and ethnic (janajati) communities in 2007 and 2008 aimed at a fairer distribution of political power and an end to discrimination and marginalisation. That led to amendments of the Interim Constitution, 2007 further deepening the commitments to these principles, in particular also including state restructuring in explicit terms. As the Interim Constitution remains valid until and unless it is replaced by a newly adopted constitution, these mandates arguably also constitute a legal obligation, in addition to their political dimension.

The election of the 601-member CA in April 2008 produced the most representative and inclusive legislative body in Nepal's history, as it was based on elaborate electoral quotas aimed at proportional representation of various groups and communities. The CA convened on 28 May 2008, and after some initial delays, in the course of its second year of operation and after a broad-based public consultation exercise, the relevant drafting committees produced 11 Committee Reports and draft Concept Papers which together laid out the ground for drafting the new constitution. Each Concept Paper addressed the issues allocated to the Committee and provided preliminary draft language. It was clear from the provisions of most of the concept papers that federalism would be a key feature of the restructured state.<sup>5</sup>

While legally the CA remained free to ultimately adopt a constitution different from the proposals made in the Committee Reports, it was understood at the time that any forward-looking planning for the transition and implementation phase would have to be based on the content of the 11 Concept Papers.<sup>6</sup> This would have to be done with caution, however.<sup>7</sup> It was clear that it could not be taken for granted that the provisions proposed by various Committees would actually be included in the new constitution. The major parties still publicly disagreed over core issues such as the form of government; the electoral system; the appointment of the judiciary; the names, number and boundaries of federal units; preferential community rights at the provincial level; and, notably, arrangements for the transition and implementation period.<sup>8</sup> Nonetheless, the likely challenges related to the transition and early implementation phase would need to be considered already at the time of drafting to ensure optimal preparedness and adequate planning.

After the CA's mandate was extended for the first time in May 2010, it was expected that in 2011, Nepal's peace process would finally reach its formal conclusion with the adoption of a new democratic constitution, which would effectively transform Nepal into a federal state and would fundamentally change the way the diversity of Nepal's people is reflected in law and governance.<sup>9</sup> It was in that period, that

a number of development partners, upon the initiative and leadership of the UN Resident Coordinator and UNDP's SPCBN, began to focus in earnest on the issue of preparing for the transition, in particular state restructuring.<sup>10</sup> It was also hoped that a more pragmatic and technical approach to the administrative aspects of federal state restructuring could help to provide constructive feedback to the designers of the new framework within the CA, and remove some of the anxiety and resistance against the concept from among those people that had been largely side-lined in the debate, primarily senior officials in the civil service.

It became increasingly apparent that, at the moment of promulgation, none of the institutions foreseen under the new constitution at the sub-national level and only few at the federal level would actually be in place. In accordance with the experience in other constitutions, this would have necessitated clear and elaborate transition provisions in the constitution itself, as well as the drafting of detailed plans for a deliberate and orderly transition. In 2010, SPCBN began to provide targeted technical advice and policy proposals, and led related coordination services to assist in the early identification of transition and implementation challenges before and as they were to emerge.<sup>11</sup> It was widely understood that UNDP had a key role to play in providing the best possible assistance to the process of drafting the constitution, through a participatory process under the CA, as well as in assisting a planned and orderly transition process following the new constitution's promulgation, and an effective implementation of the new basic law.

The first extension of the CA's mandate in 2010 was a big disappointment for the process, but nevertheless kept the momentum going towards a new constitution as envisaged in the aftermath of the CPA. The main parties eventually agreed to form a High-Level State Restructuring Commission, which had already been foreseen in the Interim Constitution, 2007. It was formed by the government in late November 2011. This was done partly in order to dispel looming concerns over the proposals made by the CA's own Committee on State Restructuring and Distribution of Powers. The establishment of the technical commission under the government had been stalled due to differences among major political parties. The Nepali Congress and the Communist Party of Nepal (UML) wanted the commission to have a strong independent and technical mandate whereas the largest party of the CA UCPN (M) wanted an advisory commission strictly subordinate to the CA.<sup>12</sup>

The Report of the State Restructuring Commission was finally submitted by the government to the CA on 4 February 2012, two full years after the last CA Committee report had been finalised. And even that report, prepared by a group of party-nominated but technically independent 'experts,' was not able to break the prevailing deadlock over the new federal structure. The State Restructuring Commission was not able to reach consensus on its own report, with the members divided into majority and minority groups. Quite similar to the proposal of the CA's

State Restructuring Committee two years earlier, the majority report proposed the creation of 11 states/provinces, namely, Limbuwan, Kirat, Tamsaling, Newa, Narayani, Tamuwan, Magarat, Karnali-Khaptad, Madhes-Mithila-Bhojpura, Madhesi-Awadh-Tharuwan, and, innovatively, a non-geographic state for Dalits.<sup>13</sup> The minority report proposed six states (four in the hills/mountains and two in the Tarai plains) with the names to be decided by the provincial parliament. However, the differences between the majority and minority also related to ‘fundamental issues on state restructuring,’ as the minority group stated in its separate report. The State Restructuring Commission’s proposal immediately led to protests by groups that found their interests infringed upon, and ultimately did not help the parties in the CA come any closer to agreement on the basic parameters of the new federal structure. Due to its failure to draft a new constitution and a bar imposed by the Supreme Court over any additional extension, the CA was dissolved on 28 May 2012, four years after its first session.

The consequences of these developments for the peace process, and the state restructuring agenda in Nepal are still unclear. The long term viability of the peace process and of more equitable socio-economic development in Nepal still depends on how effectively and quickly a new constitution, in particular a new federal state structure, will be implemented in practice, rather than when and how it is adopted on paper. The existing institutional structures are unable to provide the governance and administration Nepal’s population expects and needs. Democratisation and decentralisation will have to go hand in hand for Nepal to stabilise and develop, and – with or without a new constitution – state restructuring will need to remain on the agenda for the years to come. It is still possible that following new elections, the constitution building process will be resumed and brought to a conclusion. Any new constitution, even if it was based on the minimal option such as the one preferred by a minority group of the State Restructuring Commission, would entail significant transition challenges and would require sustained capacity building and external support. This is to a large extent reflected in the new The United Nations Development Assistance Framework UNDAF, adopted in late 2012, which provides the blueprint for the UN agencies engagement in Nepal for the years to come.

## **II.1 The Key Features of the Emerging New Constitution**

The Concept Papers followed the guidance of the CPA and the Interim Constitution and proposed components of the new federal system, in particular the reports by the Constitutional Committee, the Committee on State Restructuring and Distribution of Powers, the Committee on Legislative Bodies, the Committee on Forms of Governance, the Committee on the Judiciary, the Committee on Constitutional Bodies, and the Committee on Natural Resources. They contain the following basic features:<sup>14</sup>

- Definition of the State of Nepal as an independent, indivisible, sovereign, secular, inclusive, socialism-oriented and multinational republic, protecting multi-ethnic, multi-lingual, multi-religious, multi-cultural and regional diversity.
- Commitment to democratic norms and values including a system of 'people's, competitive, multiparty, democratic, proportionate and inclusive' rule, civic liberties, fundamental rights, human rights, adult franchise, periodical elections, freedom of the press, competent, impartial and independent judiciary and the concept of the state of law.
- Sustainable peace, prosperity and development to be achieved through a system of federal, democratic, republican rule while ending the remains of all kinds of feudalism.
- No amendment of the constitution if it negatively affects the norms and values of sovereignty vested in the people, the republican system, the rule of law, independent judiciary, fundamental and human rights, press freedom, pluralism, multiparty competition, adult franchise and periodic elections.

In addition to these basic features, there had been a large degree of consensus also on elements of the form of government, the devolution of powers and constitutionally protected fundamental rights. All of these alone gave sufficient grounds to anticipate that the new constitution would bring significant changes in the legal, political and administrative structure and processes in Nepal, and would require significant efforts to be implemented in practice.

### ***Form of Government***

At the stage of the concept papers, there was no agreement between political parties on whether to adopt a presidential or parliamentary system, or a uni- or bi-cameral parliament. The concept papers therefore did not provide clarity on these matters. There were, however, some elements of governance on which there was already agreement among most major parties. They included:

- **President** to serve as the Head of State (differences over degree of executive powers and modality of election), with a 5-year term, limited to two terms
- Government to be accountable to a democratically elected parliament
- All representative bodies and state organs were to reflect Nepal's diversity on the basis of proportionality, and to provide for a degree of multi-lingual governance

### ***Devolution of Power and Federalism***

It should be emphasised that since the convening of the CA, there had already been a significant degree of consensus that the new constitution would need to be built on a federal system (as the amended Interim Constitution also required), and that significant powers would be devolved to the new sub-national tiers of government. While it can be questioned how sincere the commitment to federalism really was at that stage across the party spectrum, it nevertheless had become politically taboo to doubt the concept of federalism as such as a basic principle of the new order. And even if there continued to be disagreement among the major parties on key aspects of the federal system, most importantly the names, numbers and boundaries and the degree to which ethnic identity should play a role in the creation and the functioning of the system, a number of important elements of federalism had been agreed upon at the Committee level, including by those committees that were not dealing with the most hotly debated points. What follows is a summary of what there had already been consensus on, all of which also indicated a significant challenge in terms of transition and implementation, regardless of how the remaining contested issues would be resolved:

- Government will be organised in three general tiers (federal, provincial and local), with the additional element of ‘autonomous regions’ and other special structures in some geographic areas. The names, number and boundaries would be determined in the constitution itself.<sup>15</sup>
- Each tier of government would derive its law making and executive powers directly from the Constitution (which is a constitutive and defining aspect of a federal system).
- Important powers to be devolved in whole or in part to sub-national units would include
  - Policing
  - Health services
  - Provincial civil service
  - Radio and television
  - University, higher education
  - Banking and insurance
  - Land management<sup>16</sup>
- The three levels and territorial jurisdiction of the judiciary would essentially follow the federal structure: Federal Supreme Court, Provincial High Court in each province and District/Local Courts, as well as courts in Autonomous Regions.<sup>17</sup>

- The local governments would consist of two types: Municipalities [with the subtypes of metropolis (*mahanagarपालिका*), sub-metropolis (*upamahanagarपालिका*), and regular municipality (*nagarपालिका*)] and villages (*gaun or gaunपालिका*), however with both types having identical competences and forms of governance.<sup>18</sup> The district level (DDC), which according to the 1999 Local Self-Government Act forms the upper level of elected local self-government, was not included in the preliminary draft provisions.<sup>19</sup>
- At least six new commissions were to be created as constitutional bodies.<sup>20</sup> Some of them would also have regional offices in the provinces.
- The proposed provisions also foresaw the formation of the following government services (public administration): public service, judicial service, parliamentary service, health service, education service, Nepal Army, Armed Police and Nepal Police, and corporate services. If necessary, however, provinces and local governments could also form their own services, which would be in line with common practice in federal systems.

### ***Constitutionally Protected Fundamental and Minority Rights***

- The relevant Committee proposal foresees the expansion from 20 fundamental rights articles contained in the Interim Constitution to 31 fundamental rights articles. Proposed additions include the rights to food, housing, consumer's rights, rights regarding family, youth, child rights, unemployment benefits, farmers' rights, etc.
  - The proposed provisions would further expand some rights contained in the Interim Constitution, including the right to health (free basic health services and access to clean drinking water/sanitation).
  - Social security, adequate wages and an explicit right of workers to strike have been proposed to be added to the rights regarding labour.
  - The rights of the child have been significantly strengthened in the preliminary draft, which sets out that every child shall have the right to child development, education in mother tongue, freedom from torture and child-friendly justice.
- Religious freedom: freedom to accept or not accept; profess and practice; disseminate; renounce or convert from one religion to another; right to associations and schools; and management of places.
- Proposed introduction of 'first rights' (*pahilo adhikar*) on preservation, promotion and investment on local natural resources for indigenous and ethnic communities, as well as local communities. This represented an effort to empower local communities regarding land, water, forests and other natural resources, and would impose an obligation to consult and share benefits from resource utilisation with the above-mentioned groups.

- All languages spoken in Nepal (numbering 92 according to the 2001 census) have been proposed to be national languages; with a state responsibility to protect and develop them; Nepali in Devanagari script is to be official language of Central Government; however, provincial parliaments would have the right to decide on possible additional languages to be official in province and in local bodies; Provinces would also be allowed to use their own languages vis-à-vis the central level.<sup>21</sup>

This latter section on fundamental and minority rights is significant in the context of state restructuring as many of these new provisions could have led to new, now constitutionally guaranteed claims by Nepali citizens vis-à-vis state institutions. As many of the basic services, to which these new rights give entitlements, would have been provided by the local or provincial tiers of government, they would add to the challenge of organising a smooth and swift transition and providing effective service delivery quickly, consistently and reliably. Politically, this also raised the stakes for the new federated entities, as the expectations raised by the participatory constitution building process and these rights-expanding provisions would need to be fulfilled by the new provincial and local governments, which themselves would be facing innumerable challenges of mobilising resources and mustering the commensurate governance capacity.

## II.2 No Provisions on Implementation

The preliminary draft as per the concept papers did not provide clarity as to the formation of new state structures after the promulgation of the constitution. The committee proposals did not include any provisions for the implementation of restructuring of the state and the delivery of the rights agenda. There were no provisions dealing with the accountability for driving the constitutional transformation, the sequencing of events and specific tasks to be addressed – for example, the development of laws at the sub-national level and the holding of elections.

The Constitutional Committee, which prepared one of the 11 committee reports and concept papers, addressed a number of transitional provisions in its proposed constitutional provisions. Accordingly, all laws inconsistent with the constitution would, to the extent of such inconsistency, become void. Generally, however, the draft proposes a considerable degree of continuity of the existing state structures but does not include a roadmap/sequence for the implementation of the constitution or the establishment of new institutions:

- All laws in force at the time of commencement of the constitution would remain in operation until repealed or amended. Laws inconsistent with the new constitution shall, to the extent of inconsistency automatically cease to operate a year after the first session of the legislature under the



new constitution. Most importantly, for the operability of the governing framework, the Interim Constitution would be abrogated with the promulgation of the new constitution.

- The CA would serve as interim legislature-parliament until the first session of the federal legislature convenes under the new constitution following elections. However, no proposal was made for a sequencing of the electoral cycle, or a timeframe within which the new institutions should be formed. Also, it would be difficult for the CA to function as what according to the new constitution would become a bi-cameral federal parliament with quite different functions and prerogatives than the ones foreseen in the Interim Constitution.
- Similarly, the President, Vice-President, Council of Ministers, members of the judiciary, local bodies and constitutional bodies will continue to work until successors are elected/appointed under the new constitution. This would, however, be difficult as the bodies built on the Interim Constitution would now have to operate on the basis of the new federal constitution.
- The President and Vice-President 'shall remain in their office' while the Council of Ministers 'shall be deemed to have been constituted' under the new constitution. However, their functions and prerogatives would now be based on the new constitution, rather than the Interim Constitution. This would be complicated when a caretaker president or government resigns, as the required institutions to create new ones would not yet be in place.
- Also in an effort to provide continuity, it was proposed that the existing local bodies would remain as they are until the local bodies under the new constitution are formed. Here, a number of questions could be raised. The local bodies 'as they are' are not how they should be according to applicable legislation, i.e., the Local Self Government Act of 1999. Could local elections still be held according to the old legislation? Also, would the provisions of the new constitution already apply to the villages and municipalities, while they were still administered according to the interim arrangements in place since 2002 and 2008 respectively?
- Perhaps the Constitutional Committee alluded to what could be the most likely solution to the various questions and complications emanating from the transition period, when it proposed that, 'if any difficulty arises in connection with the implementation of the constitution until the legislature convenes following elections, the Head of the State may, on the recommendation of the Council of Ministers, issue necessary orders to remove such difficulties.'

This legal shortcut to solving apparently intractable constitutional complications is already present in Nepal's existing constitutional framework and legal tradition. Whether giving such sweeping powers to the executive branch of the

would-be federal government is the only possible or wisest solution, remains to be discussed. Certainly, many gaps were still left open in the proposed provisions, which altogether may have contributed to considerable room for uncertainty.

If not addressed in the subsequent stages of constitutional drafting, such a vacuum would create a serious issue for stakeholders. For government, it would create a lack of clarity about who is to drive the implementation agenda. For development partners, it would create uncertainty as to which is the appropriate, constitutionally mandated counterpart for which issue. And for the people of Nepal, it would create a significant level of unpredictability, alongside a renewed risk of instability and conflict.

### **II.3 The Starting Point: The Results of ‘State Restructuring’ Drive**

Efforts to (1) decentralise power from Kathmandu to the periphery, to (2) democratise public policy making and governance, and to (3) promote inclusiveness are far from new in Nepal. In one way or another, these have been the main ‘agendas’ for political development since the end of the Rana regime in 1951. Following the 1990 democratic movement, they also had become part of the official government policy. And yet, the subsequent conflict and renewed uprisings provide evidence for the apparent failure or at least gross insufficiency of past efforts to decentralise, democratise and make Nepal more inclusive.<sup>22</sup>

If these three agendas were to become the key components of the new constitution, and if they were to fare better than their predecessors, efforts to put them into tangible reality would have to be based on honest analysis and appraisals of past attempts, and learn lessons from them.

By the time the CA concept papers were presented, central government and political parties, who had been playing the key driving role since the end of the armed conflict in 2006, enjoyed limited trust and fell short in democratic legitimacy. Decentralisation to local government had resulted in some important improvements, but overall failed to empower local communities in both rural and urban areas, in particular because of the absence of elected and accountable councils and executive council chairperson since 2002. Affirmative action had begun to guide recruitment and training efforts in many areas, but results have yet to become visible in relevant statistics.

#### ***The Centralised State and Past Decentralisation Efforts***

The 1990s had been characterised by waves of efforts to devolve powers to local governments. These efforts culminated in the 1999 Local Self-Government Act (LSGA), which created two levels of local bodies (as an ‘upper level of local government,’ 75 District Development Committees – DDCs; and as a lower level,

58 Municipalities for urban areas and 3,915 Village Development Committees – VDCs, for rural ones). The LSGA equipped these local bodies with significant institutional structures, powers and allocations of resources.

The armed conflict (1996-2006) played an important role in defeating the decentralisation agenda.<sup>23</sup> However, it is also clear that decentralisation was poorly implemented in part because of a lack of political and bureaucratic will to see power devolved from Kathmandu. A 2009 Asian Development Bank study concluded that decentralisation in Nepal had been weak and partial. Importantly in view of future state restructuring, expenditure assignments had remained unclear creating poor accountabilities for local authorities:

*Central ministries continue to play a major role in determining the type and level of public goods provided to citizens. The local authorities suffer from weak capacity, both in terms of human resource and systems. The local officials in most cases are not trained in local level service planning, resource allocation or revenue generation. The reluctance of the government to decentralize more roles to the local level has resulted in a weak demand for skills from local officials. The unclear assignment of functions and the consequent weaknesses in local accountability further dampens it. Revenue mobilization systems are weak and undeveloped. In most cases the potential remains untapped. The intergovernmental transfers due to their sporadic nature have created incentives for negotiated increases diminishing reliance on own- source revenue. Due to such reasons, local government has yet to emerge as a major player in providing public goods to citizens in accordance with their preferences determined through an electoral mechanism.*

(ADB, 2009)

A serious problem in implementing local self-government in the past was related to the failure to provide the system with a constitutional guarantee. Without a guarantee for local self-government in the constitution, the centre retained the monopoly to change or take back the powers granted to the local bodies, or control the timing or suspension of local elections. It also has plenty of possibilities to undermine the spirit of devolution by practical measures (or lack thereof), such as setting standards and procedures, holding back funds, manipulating appointments and the like. Moreover, the unclear and anomalous jurisdiction of the local bodies, especially of the DDC and VDC, in the work of drinking water, irrigation, forest, public health etc., created overlaps and confusing duplication in many areas, hampering the progress of implementing consistent and uncontested decentralisation policies.

### **Past Initiatives on Decentralisation**

- The LSGA gave a full recognition to the local body associations – Association of District Development Committees in Nepal (ADDCN), Municipal Association of Nepal (MuAN) and National Association of Villages in Nepal (NAVIN) – with their role in policy advocacy and decentralisation.
- The LSGA also established a Decentralisation Implementation and Monitoring Committee (DIMC), headed by the Prime Minister as the main committee for formulating decentralisation policies.
- The committee approved ‘Decentralisation Implementation Plan (DIP)’ to prepare action plans for short term and long term interventions in regards to decentralisation. The District Development Fund (DDF) has been operationalised to manage funds related to revenue sharing, internal and donors funding among others.
- District Technical Office (DTO) established in DDCs with the recommendation of Public Expenditure Review Commission.
- In 2004, the Districts received additional mandates for sectoral development in the area, in the light of Local Infrastructure Development Policy.
- Local Body Fiscal Commission (LBFC), an entity of Ministry of Local Government, was created to make recommendations to promote financial autonomy and fiscal decentralisation.
- Similarly, an Immediate Action Plan (IAP) was induced to prioritise urgent planning related to decentralisation.
- The Tenth Development Plan (2002-2007) and the Poverty Reduction Strategy Paper (PRSP) emphasised decentralisation and sectoral devolution as instrumental in strengthening the local governance system. The Tenth Plan also included decentralisation as the main strategy for poverty reduction.
- Similarly, Public Private Partnership policy (directed by Private Sector Investment in Infrastructure Development and Cooperation Act, 2003) for local bodies was adopted to promote the private sector investment in the development of local bodies.
- Likewise, donors’ harmonisation mechanism and support has been one of the crucial elements in strengthening decentralised governance in Nepal. Local Governance Community Development Programme (LGCDP) has been instrumental in empowering the local bodies through local participation.

However, the absence of elected representatives in the local bodies after 2002, the continued lower institutional capacity of local bodies as well as the conflict-related destruction of local infrastructure and delayed rehabilitation created a number of serious problems for the delivery of services at local level, and hampered the provision of essential development efforts. Confronted with criticism over lack of progress on decentralisation, central authorities were always able to point to existing legislation as well as a large number of policies, plans, strategies and other tools aimed purportedly at promoting decentralisation. However, in practice local government continued to lag far behind the goals of these policies.

### ***Diversity and Inclusion***

As with decentralisation, efforts to provide more inclusive governance are not new. Both the CPA and the Interim Constitution contain concrete commitments to more proportional representation and participation. The electoral quota rules for the CA elections are the most salient example of these efforts. However, the state continues to suffer from unbalanced representation, and past efforts to address the issue have had only mixed results. Following the dissolution of the CA, Nepal has lost not only the last elected representative body, but also its most diverse and inclusive state institution.

In public statements, the interim government highlighted inclusive development already in 2006 focusing on the socially excluded and oppressed groups of people in the geographical regions that are distant from mainstream development. The Interim Constitution, adopted in early 2007, laid out inclusive government and proportional representation in broad terms. However, concrete development programmes incorporating social inclusion were slow to be implemented and remain a challenge for the government, mainly due to resource limitations and capacity shortcomings, poor governance structures and political uncertainties.

The lack of inclusiveness and under-representation by many sections of Nepal's society in the bureaucracy forms an obstacle for the development of greater trust between citizens and the state. The prevalence of high caste Brahman/Chhetri/Newar groups among the civil service has been highlighted by a number of studies, and remains a challenge for the establishment of a more inclusive, democratic civil service. Although these groups together make up about 37 percent of Nepal's population, they hold an estimated 80 percent of the top posts in the civil service and the judiciary. Women are also seriously underrepresented. Generally, this dominance is even more pronounced at senior and decision-making levels.

In September 2009, of 363 secretaries of the government, 353 (or 97.25 percent) were male, and only 10 (2.75 percent) were female.<sup>24</sup> In terms of caste/ethnic distribution, 231 Hill Brahmins dominated with 63.64 percent, followed by 57 janajatis (15.70 percent), and 55 Chhetris (15.15 percent). Of the janajatis, 75.44 percent were Newars. Nine of the 10 Madhesi secretaries (2.75 percent) are

Madhesi Brahmins. One secretary belonged to the Marwari group. There was no secretary from the Dalit community, which constitutes between 15 and 20 percent of the population according to estimates.

This skewed balance in favour of only some sections of Nepal's society was arguably one of the main contributors to the increasing calls for more proportional representation and fairer access to government positions, both elected and administrative. Although the focus of this paper is not Nepal's development towards more participatory and inclusive governance, but the transition to a federal state structure, it is important to factor this set of issues into the equation. This is because the new provincial and local government tiers, which would have to take on considerable tasks of service delivery and governance, would not only have to be effective, but would also have to pass the tests of proportional inclusivity and representativeness. The agendas of decentralisation and proportionalisation would considerably overlap, and interrelate.

This interrelation would also add to the pressure on the central government authorities, which – as has been stated above – continue to be dominated by Brahmin men, and a few other elite groups, as they would not only have to share power with newly created sub-national tiers of government but would also, as a group, have to give up some space in favour of lesser represented groups of society who would now be able to make constitutionally protected claims for inclusion and representation proportional to their numbers.

### **III. THE IMPLEMENTATION CHALLENGES OF THE NEW CONSTITUTION: -'FEDERALISATION' OR THE DEVOLUTION OF STATE POWER**

The original thrust of the CPA and the Interim Constitution was to dismantle a discriminatory, centralised system of government. However, continued advocacy by adivasi/janajati groups and the Madhes uprising of early 2007 led to an amendment of the Interim Constitution which explicitly designated Nepal as a federal country. This has also led to a debate on federalism that has been mainly focused on identity issues, rather than aspects of practical arrangements for the transition, governance or service delivery.

The CA was tasked, by provisions of the Interim Constitution, to develop a federal structure based on fully autonomous provinces in recognition of the aspirations of Madhesis and Adivasi/janajati people. It prepared a decentralisation scheme that would create three general tiers of government plus autonomous regions in some areas, each element with constitutionally guaranteed powers and institutional framework.

Throughout the four year existence of the CA, political and public opinion was polarised essentially between Madhesi and janajati political movements, whose leaders generally tended to favour a federal structure with an emphasis on identity elements, and Brahman, Chhetri and Dalit leaders, among whom many tended to think of federalism as something that would not be to the advantage of their communities. While much of this remained in flux, it soon emerged as a prerequisite that the wholesale restructuring of Nepal into a federal system would require buy-in and cooperation from all its varied communities and social categories.

### **III.1 Institutional Restructuring**

What follows is an attempt to summarise and describe the various implementation challenges that would emerge at the various levels of government, which would need to be taken into consideration already at the drafting stage:

#### ***National (Federal) Government***

In any federation, the role of the central/federal government is a critical element in overall state performance. Designing and properly developing a new role for the federal government in a changed overall structure is therefore just as important as working on the entirely new provincial level of government and a modified system of local government.

According to the proposals made by CA Committees, the federation would be granted

- Exclusive powers over defence, central police force, foreign affairs, central banking, monetary policy, international trade, criminal laws
- Concurrent or joint powers over foreign assistance, health policy, education and others
- Residual power over matters not enumerated in the constitution
- Power to supervise and control provinces<sup>25</sup>

Within the federal level, each of the powers and roles of the currently existing institutions would have to be addressed and shaped to fit into a new federal setting. This relates to the federal parliament (as the legislative, budgetary and parliamentary control organ), the federal executive government (President or Prime Minister, Ministers, Ministries) and its subsidiary institutions, the judiciary (Supreme Court, Constitutional Court, special courts) and Constitutional Bodies.

Despite the relatively extensive proposed legislative powers of the federal government, administratively, functions and resources would migrate from what is now the central level to the provinces, special structures and local

governments. In a federal system, the role of the federal government would change from overall responsibility and operational conduct of practically all areas of governance to one where it would mainly be engaged in policy making, supervision and coordination. The role of the National Planning Commission (if retained) as well as the modalities for planning and monitoring would need to be thoroughly redefined. At the same time, the provinces and local governments would take up most of the administrative implementation/operational aspects. Given the current lop-sided distribution of staff and resources in favour of the central government, such reorganisation would essentially mean the transfer of significant human, infrastructure and financial resources along with the political and legal responsibility from the central government to sub-national authorities.

### Provincial Governments

In January 2010, the CA Committee on State Restructuring and Distribution of Powers proposed the creation of 14 provinces (see Map IV, Appendix I: 361).<sup>26</sup> While historical and ethnic background points to some regional particularities, the formation of provinces for a federal set-up is anything but obvious in Nepal. Few if any countries have gone from a unitary centralised set-up to a full-fledged federal system without any pre-existing government structure at the sub-national/regional level. The proposals made in the CA did not foresee using the existing government structures at district level as building blocks for future provinces, but rather aimed at the formation of such provinces from scratch.

There are no general models of a federal structure, as existing federations differ in the degree to which they are based on diverse societies, the number of units, the degree of symmetry or asymmetry in size, powers and resources, the scope of allocated responsibilities, the allocation of revenues, the degree of regional input in federal policy making, and the procedures for change.<sup>27</sup>

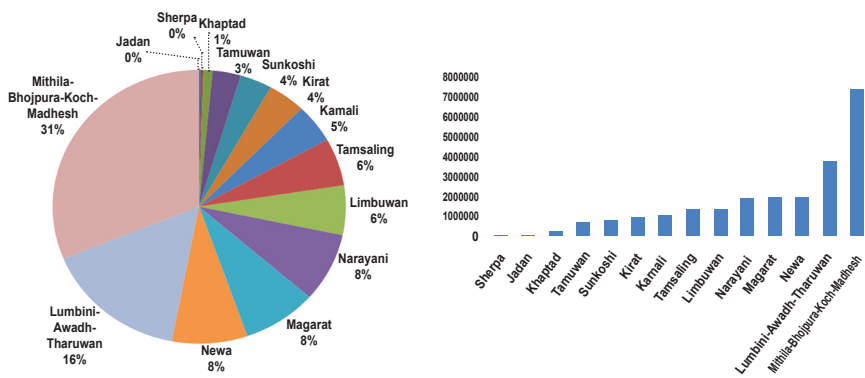


Figure 1: Rough estimates of population distribution in the proposed 14 provinces



A preliminary analysis of the proposed provincial boundaries demonstrates significant disparities between these units in many respects: size of population, topography, infrastructure, economy and resource availability and accessibility. This is likely to result in severe gaps in terms of economic performance and, in relation to that, the likely performance in terms of governance and service delivery.

An additional factor that complicates the establishment of provinces is the fact that the proposed provincial boundaries would cut through existing districts, on the basis of which most statistical information is available. Certain human development indicators can therefore not be determined at the proposed provincial level. Preliminary analysis of public finance data indicated significant disparities in terms of both revenues and per capita expenditures, although the existing structures and reporting modalities did not easily disclose such data.

**Autonomous and other Special Regions**

The CA proposals included the option of establishing autonomous, protected and special regions within the provinces as a special tier of government to be set up only in some areas with dense population of certain ethnic groups, namely those that would not be numerous enough to be given ‘their’ own province in the new constitution. Twenty-two<sup>28</sup> such Autonomous Regions were proposed to be prescribed in the constitution itself (which would make their establishment obligatory, not optional). The proposed 22 Autonomous Regions for ethnic

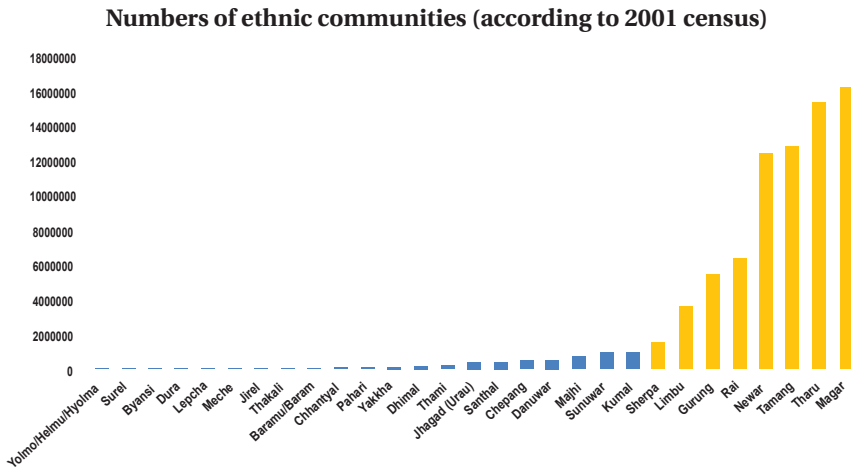


Figure 2: Census figures of 2001 for ethnic (janajati) communities in Nepal

and linguistic communities would have to be formed by the provinces through commissions within a year of the formation of the provincial government. Autonomous Regions would have elected councils, with legislative, executive and judicial authority, similar to provincial powers. Legislative power would have to be exercised in a manner consistent with provincial law, however.

As the proposal was far from clear, there remained many open questions related to the establishment of Autonomous Regions. Such questions relate to the number, to the identification of geographic areas falling under such structures, given that populations of the communities concerned are often dispersed, including across several different provinces, and only in rare cases form majorities at the VDC level. In terms of legal framework, the relationship between the special structures and provinces on the one side, and local governments on the other remain to be more thoroughly defined. In terms of practicalities, questions arise how some of these mostly poor and marginalised communities, some of which constitute only several thousand people, would be able to build and run full-fledged sub-national structures and services as per the proposed constitutional framework.

The proposal also foresaw that other regions can be maintained as a Protected Region in order to protect and promote the ethnicity/community, cultural area, declining and marginalised ethnic groups who are in the extreme minority. A third form of special structure would be Special Regions for backward areas or areas which have remained behind in socio-economic terms and not covered by other forms of special structure or to develop an area within a province.

### ***Local Governments***<sup>29</sup>

As per the CA proposals, local self-government would gain constitutional status and the principle of local self-governance would be firmly enshrined, which would be a significant advance compared to the constitutional and legal framework so far.

Local self-government units would be Village Councils (Gaunpalika) and Municipalities (Nagarpalika). The number and boundaries of local governments would be determined by the Provincial Government in accordance with standards set by the Federal Government. This would have to be done within a year of establishment of the Provincial Government and the present structure of local bodies was to be continued until the new structure for local governments was created. The stated intention was to reduce the number of currently 3,915 VDCs to around 800 and increase the number of municipalities from currently 58.

The proposed new local government structure would imply that the district local bodies (District Council/DDC) would in the future not be a constitutionally

protected tier of local self-government. However, the role of the 75 districts as a level of government for managing development and administrative services through the presence of district offices of line agencies and other central or provincial government bodies (i.e. through 'deconcentration') was not clear. It appeared from the Concept Papers and the discussions at the CA that there was an intention to abolish the districts altogether. Whereas the existing VDCs and Municipalities have (at least according to the law) significant own functions and finances (own revenues as well fiscal transfers), the district currently remains the main level of local government in terms of staffing and planning/managing development services. Whether the district will be retained as an administrative level under the provinces and 'technical hub' for support to local government, and the extent to which institutions and staff will be shifted 'down' to the villages/municipalities or 'up' to provinces remained a largely open question relegated to the phase of transition and implementation.

Due to the history of conflict and political violence in Nepal, the challenge would not only be to reorganise the structures and boundaries of local government, but in particular in a number of rural areas, the re-establishment of any effective governance presence after many years of neglect and institutional erosion. By mid-2009, roughly a third of all VDC secretaries, often the only visible government presence on the ground in much of the country, were either not in their duty station, or had vacated their posts due to the conflict in the past or the current security situation. In the years since, the situation has hardly improved.

The proposed powers and functions of local government were outlined in the preliminary draft provisions for the constitution.<sup>30</sup> However, two fundamental issues determining whether local government can in practice discharge these functions would – as in most other countries – be determined by policies and actual change in the implementation phase.

Even after the CA Committee proposals had been presented, there were significant areas that would have yet to be decided for provincial and local governments. Major issues of implementing state restructuring related to this level, not least to achieve the objective of proportionalisation and democratisation, remained unclear. However, an even more formidable task would be to plan for a transition and implementation process during which the local self-government system would deliver 'better government' – as envisaged with the new constitution and expected by the people of Nepal – and for the entire restructuring and subsequent management of affairs to contribute to peace and social harmony. As much of the existing governance structure of Nepal would be uprooted with the change from a unitary to a federal state, the local bodies would play a critical role as institutions to deliver for the people of Nepal to see tangible changes improving their lives.

It turned out to be fundamentally unclear whether this could be achieved if too many structural and institutional change processes were tackled at the same time, including changing boundaries of the VDCs and districts and dismantling the district level in the first years of implementation.

It has been suggested for a long time, in particular by the residual local government associations that, if local elections were held at the beginning of the process, elected local bodies could help finding acceptable solutions for the redrawing of district boundaries, the merger of VDCs, or the establishment of Autonomous Regions. According to the proposals made in the CA Committee reports, however, local elections were to be held last, after federal and provincial elections had been completed and the respective institutions formed accordingly.

### ***Human Resources – Civil Service Reform***

The Interim Constitution gives the Government (i.e., Council of Ministers) the power to constitute the civil service and other government services as required in order to run the administration of the country. The constitution, operation, and terms and conditions for such services are determined by the Nepal Civil Service Act.

Nepal's civil service is large compared to other sectors of formal employment, but not overstaffed based on the population it serves. With a civil servant per population ratio of around 1/400, Nepal ranks low even by South Asian standards. The civil service suffers from poor incentives, fragmented decision-making, large numbers at the lower rank and income levels, and inflexible working practices. The Civil Service Act, first passed in 1956, was revised in 1993 and again in 2007. Due to various efforts made for downsizing, the number of civil servants in 2010 stood at around 76,600, not including the security sector. It was estimated that almost half of these were physically located in Kathmandu valley with central level institutions, with most of the rest at the district level, serving central ministries. The staff at regional or zonal levels are negligible, and essentially part of the security apparatus. The 58 municipalities were estimated to have a total of only around 8,000 staff.

As a legacy from the conflict, the security sector is oversized, with around 100,000 members of the Army, around 56,000 members of the centrally administered Nepal Police (NP), and around 25,000 members of the Armed Police Force (APF), a paramilitary formation controlled (like the NP) by the Ministry of Home Affairs, that was created to fight the Maoist insurgency in 2001. The proposed provisions foresaw that the power for general security police would go to the provinces, but also that the Nepal Army, the APF and the NP would continue as (federal)

government services. The implications of the new state structure on the security sector remained hard to predict on the basis of the Committee proposals, but the impact of federalisation on the police service in particular could be huge, and could be expected to be a politically hotly contested issue between the federal government and the newly emerged provinces.

Whereas in the proposed provisions a provincial and local government service was envisaged, the scope (e.g., cadres managed locally) was still to be decided and, more fundamentally, the actual assignment of staff to assist local government in delivering and the possibilities for local governments of holding them accountable were all areas to be negotiated in implementation. The role in this regard of 22 Autonomous Regions, which were to be equipped with almost the same powers as provinces as per the proposals, was also yet to be determined. As such, the real capacity for development infrastructure and the services of the future local governments, Nepal was by no means guaranteed with the proposed new constitution and the lessons on past decentralisation efforts suggested some major challenges ahead.

### ***Fiscal Decentralisation, Fiscal Federalism and Equalisation***

Whereas the proposed revenue authority was also addressed in some detail in the Committee proposals, the revenues of provincial and local governments would only constitute a limited share of the finances needed to discharge the functions assigned.<sup>31</sup> Therefore transfers from the national government would have to form a significant part of provincial and local revenues.

With the fiscal powers proposed, the resources of provincial and local governments would constitute a share of revenues which according to the current collection patterns would amount to a maximum of approximately 10 percent of the total revenues collected by the state (see Table 1). Whereas a costing of the assigned functions would still have to be carried out, this amount is likely to be grossly insufficient for provincial and local governments as a whole. As a consequence and as is typical for comparable federal systems, a complex transfer system would need to be devised. Hence, whereas much discussion was taking place on whether some proposed provinces are 'viable,' implementation discussions would need to focus on how to organise the right fiscal system in Nepal addressing both vertical and horizontal imbalances. This is likely to be a hard battle not only due to a general resistance to fiscal decentralisation; but it would also involve agreement on the distribution of funds among provinces (and local governments within them) and further development of the revenue-sharing arrangements between provinces.

**Table 1: Projected Revenues for New Provincial Governments and Local Self Governments**

Types of Revenue	Amount (NRs. billion)	Percentage (%)	Inclusion in list of fiscal powers (proposed)
Value Added Tax (VAT)	24.62	30.90	Federal
Customs Duties	16.12	20.23	Federal
Excise Tax	11.06	13.88	Federal
Income Tax	14.92	18.72	Federal
Foreign Cash Grants	13.06	16.39	Federal
Others	8.44	10.59	Federal, provincial and local
<b>Total</b>	<b>79.78</b>	<b>100</b>	

**Source:** Nepal Rastra Bank, Government Revenue for the first half of the fiscal year 2009-2010

The proposed constitutional provision provided for the key national institutions supporting local governance (e.g., National Fiscal Commission) but much would still need to be decided and implemented to have the corresponding capacity within each of the provinces for them to manage their mandated areas of provincial and local self-government.

Given the low tax ratio (of around 14 percent, with only around 475,000 payers of income and property tax as per 2009 figures) and the enormous regional income disparities, it is likely that Nepal would follow a rather centralised model of revenue collection, which would require a sophisticated arrangement for subsequent formula-based equalisation payments to provinces and lower tiers. At present, most of the revenues are generated either at the customs posts at the international border and in Kathmandu valley, the centre of gravity of the country's current consumption-driven, remittance-based economy.

### ***Cross-cutting Objectives for State Restructuring: Service Delivery and Peace***

In addition to the three 'change-agendas' of federalisation, democratisation and proportionalisation, the new Constitution would have to lead to a situation where service delivery and public security is noticeably improved. The demand for services and peace has been a recurrent dominant issue consistently raised in a series of public consultations related to the constitution building process. In other words, people may at the end of the day not care all that much about the division of powers between different levels of government, or where the

### New Institutions and Changes at All Levels of Government: Who Will Deliver?

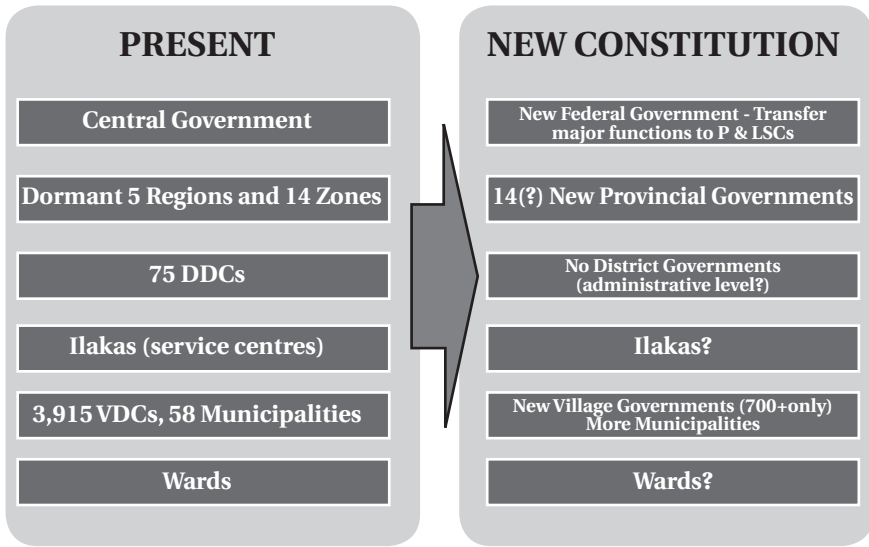


Figure 3: Note: The levels highlighted in orange are the tiers of government (proposed to be) established by the new constitution. The new constitution may also foresee an additional level, of special structures (e.g. Autonomous Regions) which would be below the provincial government level. These are not reflected in this graph.

boundaries between provinces were to be drawn, as long as effective state presence and government services (infrastructure, social services, and security) are provided and individual freedoms and security are guaranteed.

While moving towards transition to a new constitutional order and implementation of state restructuring Nepal would need to address the two core state-building challenges commonly facing post-conflict societies – delivering basic goods and services for recovery and development, and reduction of the risk of a recurring country-wide conflict as well as local conflict management (for instance over the use of natural resources) [Collier, Hoeffler & Soderbom, 2008].<sup>32</sup> Focussing only on structural (inward-oriented) government reform without planning for and actually ensuring effective delivery on development and peace would risk repeating some of the mistakes of the past and certainly would not help any newly established institutions gain credibility and legitimacy.

#### **Improved Service Delivery**

How to ensure delivery on the first of these two objectives – improving basic services? The new federal system and the new provincial governments and local

self-governments would be central to this effort (Larsen, 2010). As the proposals for the new constitution stand, the responsibility for the bulk of basic administrative and development services for social development and in support of peoples' livelihood will be in the hands of the future village councils and municipalities. This includes, for example, primary and secondary education, basic health and sanitation, local roads, local courts (and mediation and arbitration), agriculture and animal husbandry as well as the majority of administrative services with an immediate impact on peoples' livelihoods. The remainder of the main development functions (e.g., tertiary education, some agricultural development functions, etc.) will be in the hands of the provincial governments, and only subsidiary administrative and social service functions would remain with the central, i.e., future federal government (CRSDSP, 2010).

As noted above, a series of governance reforms had been carried out to establish local self-governance in Nepal in the past. However, the local bodies had not developed as institutions delivering on the intended role in development. As was concluded in 2004, it proved 'necessary to review and initiate new policies, strategies and actions in keeping with the citizens' expectations for effective service delivery through local governance. It was also found to be 'necessary to [identify] policy, programme and activities that impede decentralisation policy and re-tune them as per the principles of devolution.'<sup>33</sup> The provincial and local governments need to have a radically different policy and actual operating frameworks for them to deliver on people's expectations in their mandated areas following the new constitution. As specified in the transition provisions of the proposed draft constitution, institutions will continue to function according to existing legislation until the new ones are put in place. This probably implied that local governments would continue to operate with the limited role as at present for the first years after promulgation (which is notably below the standards set by the Local Self-Government Act).

As outlined in the previous section, several options exist for electing local councils – immediately after the promulgation of the new constitution or later. Currently, delivery rates for grants to local bodies are low primarily due to lack of agreement on allocation within the interim bodies (and with informal decision-makers). Elected, i.e., representative and accountable, political bodies at the local level would, arguably, be key to ensuring effective service delivery after promulgation. Opening the 'Pandora's box' of re-defining the entities and boundaries for new VDCs within each province would, however, likely further complicate the entire local governance and service delivery system. Hence, very careful attention would need to be paid to how the district offices of line agencies and the local bodies would be 'transitioned' and integrated into the new federal state structure.



The proposed boundaries of the 14-province model would 'cut through' 29 of the 75 districts. This would in all likelihood mean that people living in areas of those districts would be assigned to different services centres, as they would be 'cut off' from their existing district headquarters. This would, according to the proposed 14-province map, affect people in 496 (13%) of the 3,915 VDCs across the country, and may require considerable degree of effective communication and change management.

### **Public Security/Peace**

How to ensure delivery on the second of the two objectives – a peaceful transition, with governance institutions capable of managing and mitigating conflicts while they are being restructured? Devolution through the federalist variant is not a panacea guaranteed to establish peace and address all root causes of conflict. While it holds great promise for empowering and giving voice to disadvantaged and excluded groups, the manner in which devolution is structured and local governance practiced have great implications for whether or not traditionally excluded groups are actually represented in the public arena, and whether the arrangement contributes to peace-building efforts (Larsen & Selim, 2009).

Much of the potential for peace-building of a federal system is inherent, not only in the devolution of power in symmetric or asymmetric federations, but in how such a model is structured and managed at the local level. If the arrangements and mechanisms of devolution replicate and reinforce social patterns of exclusion and inequity, and furthermore do not allow for the representation and empowerment of marginalised groups a federal structure will likely fail as a peace building tool.

In other words, an important part of the equation is the question of who manages the powers devolved through federalism, and how. The pattern of representation and the accountability of councils to various groups and individuals is a product of a number of different factors (including, e.g., the electoral systems for provincial and local councils and the choice between direct and indirect election, the functioning of political parties, affirmative action policies, etc.) – most of which is not or only very loosely laid out with the proposed draft constitution. Independent of the final balance between ethnic groups and caste, the use of *agradhikar* – preferential rights for ethnic groups for certain political positions – and a range of other decisions with the final agreed constitution, the actual operationalisation of the principles aimed to guarantee peaceful co-existence will only happen with the transition and implementation when policies, laws, guidelines and practices are developed.

The constitutional debate in Nepal that centred on ethnicity and other elements of identity was a powerful reflection of past injustices in a society where people were often excluded from influence and resources due to their identity. Hence, the political institutions due to be developed following the adoption of a new constitution need to ensure that avenues are available to advance the rights and recognition of the relevant identity-based groups under a common and accepted vision of a democratic Nepali identity. At the same time, likely minorities within proposed provinces are already uncertain about their future in ethnically divided entities whether political preferential rights/prerogatives are introduced or not.

Much of the transition period will thus need to be geared towards nurturing state formation and addressing the risks of new conflicts emerging. Identities are not fixed or established with the final agreement on the constitution, and one of the key post-constitutional challenges will be for existing identities to be mobilised in ways that contribute to an emerging democratic Nepal enshrined in the values of the constitution. The establishment of the various commissions as constitutional bodies as well as, possibly, a Constitutional Court, as was proposed by a number of CA members, could be important elements of establishing national capacity to address grievances.

Part of the effort to ensure delivery on the two major objectives would thus need to focus on developing the capacity across the new government system. Processes for assessment and strong national institutions supporting capacity at federal, provincial and local level would need to be brought in place.

#### **IV. THE GOVERNMENT'S ROLE IN THE CONSTITUTION BUILDING PROCESS AND IMPLEMENTATION OF A FEDERAL STATE STRUCTURE**

By the end of 2009, when most of the CA's concept papers and committee reports had already been presented, and presumably only a few months were left to finalise the constitution and prepare for the transition, a lack of action continued to prevail from the government in planning for the post-promulgation period. There was no meaningful, coordinated, national-led planning process for tackling the major change agendas.<sup>34</sup> This improved somewhat during 2010 when the Administrative Restructuring Commission under the spirited leadership of its Secretary undertook a number of important initiatives in this regard. This process eventually got stalled, however, and the Commission was dissolved in 2011. The transfer of the federalism portfolio to the Ministry of Local Development was certainly a step in the right direction, but overall, government preparations for state restructuring remained inadequate, and practically came to a halt with the dissolution of the CA in May 2012.

In 2009, as the government had not given clear guidance and directions to the administration, senior level bureaucrats stated that they were hesitant to take any initiative to prepare for implementation, referring for their need to stay politically neutral and refrain from interfering in the political mandate of the CA. Senior bureaucrats also noted the uncertainty over whether it was then existing government or a subsequent one that would be in charge of the transition and implementation process (in fact it did change several times in the four years of the CA's existence).<sup>35</sup> Privately, senior administrative officials also conceded, however, that there was a lack of mental preparedness for substantive changes in the governance of the country. Despite this general reluctance, some government departments started, in an ad hoc manner, to look into the possible changes for their respective areas of administrative responsibility as soon as the CA Committee reports had been presented to anticipate the future federal set-up with the assistance of development partners.

The May 2010 UNDP paper on the 'Management of the Transition towards a Federal System in Nepal' included the recommendation to establish 'a high level commission led by the Prime Minister to direct, manage and coordinate the transition into the federal system.' Other partners, such as the World Bank, have also been advising the government to establish such a commission. It would notably be different but possibly related to the State Restructuring Commission, provided for in the Interim Constitution. The Prime Minister's office even agreed in principle to establish this transition planning commission and the cabinet deliberated, in November 2010, whether such commission should be established at the Prime Minister's office or at line agency level (e.g., at the Ministry of General Administration or what was then still the Ministry of Federalism, Parliamentary Affairs and Culture). A proposal to establish (1) a High-level Co-ordination Committee for the transition to federalism headed by the Prime Minister and (2) the assignment of a specially deputed full-fledged Secretary at the Prime Minister's office was eventually prepared by the cabinet secretariat, but it was never approved by the cabinet.

Meanwhile, the Administrative Restructuring Commission<sup>36</sup> (ARC), a statutory body under the Ministry of General Administration (MoGA), had redirected its work related to the administrative reorganisation of the civil service generally towards looking at requirements for the new federal structure. Apart from carrying out related studies, in August 2010, it instructed all 27 central level line ministries to establish Technical Committees, giving ministries a four-month target to complete their internal assessments and analysis. After some initial reluctance, the ministries formed the Technical Committees (usually led by the Planning Division chiefs of the respective agencies) and began their work accordingly. As per the ARC's guidelines, the ministries were expected to analyse the 11 CA Committee Reports and comprehensively assess the possible impacts the federal set-up proposed therein would have on the mandate, organisational set-up, infrastructure, staffing, budget and responsibilities of the respective agencies.

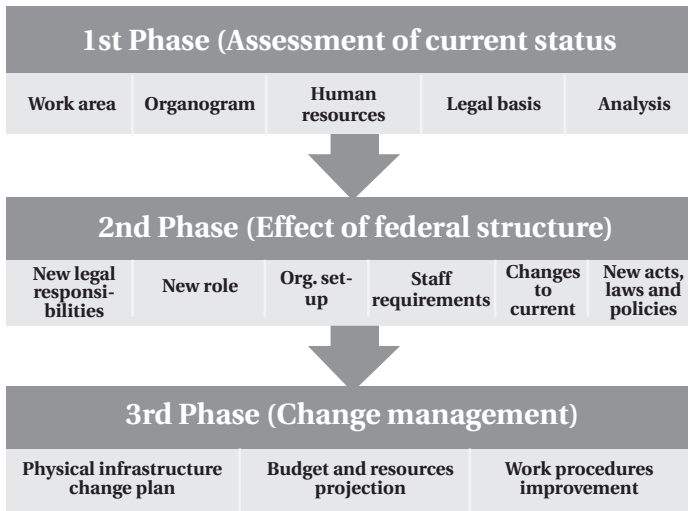


Figure 4: Source: ARC guidelines (this schematic overview is based on the provisions of the original text)

Although the high level coordination commission under the Prime Minister was not set up, the Administrative Restructuring Commission's mandate was extended until March 2011, and it continued to lead the efforts by the ministries and executive agencies to take stock of existing administrative resources and arrangements (see scheme below). Entering the next phase of planning would however require an effort to 'unbundle' the powers and competencies allocated in the CA proposals to different tiers of government (federation, provinces, local governments, autonomous regions) in order to provide for concrete and detailed functional assignments for various government entities and plan related transition plans. Also, it is important to note that the ARC only had a mandate related to the executive branch of the government which meant that there was no equivalent government collection of data, analysis or planning for the transition of the legislative branch, the judiciary or tribunals and commissions.

The Ministry of Local Development, and the Local Bodies Fiscal Commission under it, were naturally predisposed to play a lead role in the transition to federal governance, as it had been in charge of previous decentralisation programmes, and the multi-donor Local Government and Community Development Programme (LGCDP), and was therefore familiar with the technicalities of fiscal decentralisation, performance-based, conditional and unconditional transfers of public funds, block grants, distribution formula and concepts such as fiduciary risk – all of which would need to be applied in the operationalisation of a new federal state structure. Equally, a number of sectoral ministries undertook studies and assessments of what a federal state structure would entail for them (including, for instance, health,<sup>37</sup> education and agriculture).

Originally, however, the Ministry of Federal Affairs, Parliamentary Affairs, Constituent Assembly and Culture was the ministry formally put in charge to make arrangements for the administrative set-up of various government institutions along with the management and reshuffling of the pool of human resources (existing in the entire government set-up) into a new federal structure. As the senior officials in the Ministry themselves realised, this would be a quite complicated task and required significant ground-work before implementation, which was challenging especially as the Ministry lacked experience, expertise, human and financial resources and field presence. It essentially funded a group of consultants to prepare studies identifying the emerging needs and challenges to start the restructuring and implementation processes. It was also intended that in the light of the studies, district level consultations would be held, where the Ministry was planning to call in other sectoral and line ministries, government bodies, experts and civil society for generating new ideas and recommendations. While this sounded good in principle, the studies were seriously delayed and were poorly disseminated, the consultations never took place or only with very moderate results, and not much had been achieved until the federalism-related tasks were mandated to the Ministry of Local Development in 2011, which all along had better chances of having a significant impact in this context.

Generally, however, there continued to be a dearth of research, analysis and debate on how exactly the very complex new state structures proposed would work in practice. The complicated set of financial, operational, legal and political relationships between the levels of the federation, the provinces, the Autonomous Regions and other special structures, the districts, municipalities and VDCs remained largely unexplored and poorly understood, especially by the people concerned most – the civil servants on the ground in the periphery, who would have to take on the bulk of implementation measures, and for whom the state restructuring agenda was going to bring most profound changes.

The key findings of the May 2010 UNDP-paper remained valid: that (1) there had yet to emerge a systematic and coordinated approach to preparing for the introduction of federalism, and that (2) there continued to be a significant communication gap between the CA and senior civil servants in that regard.

## **V. UNDP'S SUPPORT TO TRANSITION AND STATE RESTRUCTURING<sup>38</sup>**

In order to address at least some of the identified shortcomings in terms of research, consultation and capacity building and in order to support the authorities of Nepal in developing better strategies in preparation for the eventual transition to a federal system, UNDP's SPCBN programme significantly upgraded its transition and implementation-related activities in 2010. These efforts aimed primarily at bringing in the civil service at the various levels, and linking the high-

level administrative stakeholders with the main proponents of the federal agenda within the political parties and the Constituent Assembly.

### **Policy Paper, Awareness Raising and Coordination**

A Policy Paper on Transition to Federalism and Implementation of State Restructuring was shared with the UN system, donors and government officials with the aim of further sensitising the various institutions for the challenges likely to arise in the period following the promulgation of the new constitution. It sought to deepen the understanding of processes that contribute to building a responsive and inclusive federal system and spelled out explicitly how the international support for the process could be designed. The Policy Paper was helpful in developing an understanding among development partners and UN agencies identifying the need for transition planning and served as a basis for further consultations with UN agencies and development partners. It also recommended more analysis and studies for transition management following the promulgation of the new constitution.

Also, a dedicated Transition and Implementation coordination group was formed to organise joint discussion programmes and meetings on issues related to transition planning and federal state structure. The partners<sup>39</sup> agreed to coordinate programmes and activities well in advance, share a common analysis and seek to build on each other's achievements. It was agreed that the optimal situation would be when Nepal's government itself will take the lead in coordinating international assistance to its complex and likely lengthy state restructuring process. However, for the time being, and due to the uncertainty regarding the drafting process, the government had at that stage not yet officially and formally called upon the development partners to provide coordinated support to this process. Coordination among partners, primarily in the form of information sharing and joint agenda setting and advocacy, should however have existed before the actual state restructuring process would set in. This is related to the critical time period between coordinated support to the constitutional drafting process, as provided since 2008 through a variety of coordination and information sharing mechanisms, as well as a series of joint initiatives, and the promulgation of the new constitution, which would be the formal start of a new phase, the restructuring process.

### **Research and Debate on Provincial Governance**

A series of policy research papers was funded and coordinated to analyse likely governance challenges of the proposed units of subnational government (14 provinces, autonomous regions, and local governments). 10 research papers were

selected for sector- or area-specific studies of the proposed federal structure from perspectives of economic development and finance, law, public institutions, infrastructure, natural resources, environmental, social change aspects, and other related public policy areas.<sup>40</sup> The purpose of the studies was to develop a 'regional studies lens' for the proposed units, as well as to better inform the ongoing debate about the optimal design for such new units and structures with evidence-based research and objective analysis.<sup>41</sup>

In the same context, the Centre for Constitutional Dialogue (CCD) arranged for a series of seminars titled 'Federalism in Nepal: How will it work?' with the aim of promoting a fact-based and implementation-oriented discussion on the proposed federal structure. CCD had identified a high demand (in particular also among CA members, who attended the series in significant numbers) for a high-quality, fact-based debate and information on Nepal's federal future. Around 20 such events (on sectorial issues as well as and on each of the proposed provinces) were thus held at the CCD in the course of 2010. In addition, special CCD events were held with international experts presenting on issues related to transition planning with a focus on fiscal decentralisation in federalism, sectorial planning, affirmative action policies, governance and peace building. This increased the level of awareness of the participants about the proposed provinces and issues related to their implementation in practice, including administrative capacity, economic and financial viability/sustainability and likely relationships with other provinces and the federal government. The ensuing dialogue on state restructuring between people of various groups, castes, gender, ethnicity and occupational groups highlighted and addressed many new concerns and challenges, while also often throwing out misconceptions and attitudes based on disinformation.

A 290-page compilation of 'Provincial Profiles' for all the 14 proposed provinces was prepared, reviewed by an expert panel and shared with CA Members, the government and development partners. The profiles were prepared by a team of UNDP/CCD analysts with the aim of supporting a more fact-based and implementation-oriented discussion of the 14-province proposals presented by the CA State Restructuring and Distribution of Powers Committee of February 2010, which had so far been mostly limited to identity-based recriminations and superficial exchanges on the boundaries and names of proposed provinces. Each provincial profile presented a rough picture of the proposed province being examined and provided information on the general background, and outlines of the economic and development parameters. It presented a snapshot of what was known about these new provinces in terms of demography, geography, government and politics, the judicial system and security forces and extrapolated information on the likely prospects and scenarios for the economy, agriculture, infrastructure, education, health services, natural disasters and poverty for each

of the proposed provinces.<sup>42</sup> The data was presented in an accessible format and accompanied with a large number of specially prepared maps and graphs.

The 'Profiles' were intended to be a living document. As more accurate and up-to-date information would be received, or as the CA would change the proposal for the creation of provinces, the information on the respectively proposed provinces could be modified and updated. Although much work would still be needed on the profiles, data from this compilation was expected to provide valuable information and insights for the discussion on the proposed provinces. It was hoped that this document would serve as a useful starting point from which more detailed studies could be carried out by using this source book as a reference for the purposes of planning the transition to whatever was eventually agreed by the drafters of the new constitution.

### **Regional Assessments and Workshops on 'State Restructuring and Transition Planning'**

In February-March 2010 the UNDP/SPCBN Transition and Implementation team conducted several field assessment visits in Pokhara, Janakpur, Biratnagar, Dharan and Dhankuta.<sup>43</sup> The objective of these visits was to assess the emerging needs prevalent in the respective regions while transitioning to a federal system with specific regard to issues of inclusion, transition management, governance reform, administrative feasibility and the linkages/relationship of these places with the proposed capitals (where applicable) of provinces and the federal government. However, due to lower-than-expected familiarity of the interlocutors (district officials, local party leaders, civil society activists and media) with the CA proposals, the reasoning behind them, and the practical aspects of federalisation and state restructuring, the objectives of the assessment visits were adjusted and limited to (1) Understanding the local political dynamics; (2) Assessing the general views of the local stakeholders related to the constitution building process, the state restructuring agenda and issues related to the transition and implementation of the new constitution; (3) Briefing and updating local counterparts on the constitution building process, especially related to the state restructuring, and (4) Assessing the preparedness of government officials/institutions in relation to planning for a federal system. Active government representatives and retired civil servants (due to their combination of insider knowledge and liberty to express themselves freely) from the locations had originally been identified as the primary target group. However, the interactions were in some cases expanded to a wider group of civil society, media, and political party representatives with the aim to get a holistic perspective on state restructuring and other related issues in the constitution building process. It was found, however, that mixing groups of very diverse backgrounds not always had the desired effect of bringing about dialogue. Rather, when government officials were confronted with agitated civil



society or ethnic movement demands, they tended to be defensive and close ranks. When they were among themselves, or at least in a dominant position in the interaction, the acknowledgement for the need to reform was more frank, and the exchanges more honest and constructive.

The interaction with various groups at different intervals (two-three hours of intensive discussion with a group) showed that most participants were only remotely following the developments in the constitution building process with very little information on the decisions and updates from the national level institutions, both the CA and government agencies. The understanding on state restructuring issues and federalism was generally basic at best and what had been perceived from the media had received mixed reactions from the participants. Most of the information as well as concerns were related to the rather limited aspects of the proposed size, boundary and naming of the future provinces.

On the basis of the findings of these assessment (and as perhaps one of the most meaningful and innovative initiatives taken at the time by UNDP – judging from the feedback received) a series of regional two-day workshops on ‘State Restructuring and Transition Planning’ was conducted in different regions. These workshops were organised with support from the UN Field Coordination Offices (FCOs), set up under the Resident Coordinator’s Office. Workshops were conducted in Biratnagar, Bharatpur, Nepalgunj, Dadeldhura, Pokhara and Ilam between November 2010 to February 2011.

The workshops were specifically targeted to government officials but were also attended by the representatives of Municipality Association of Nepal (MuAN) and Association of District Development Committees in Nepal’s (ADDCN), and a smaller number of Civil Society Organisations. Altogether, the initiative reached around 200 mid- to senior level government officials at the district and municipal level across the country (from around 20 districts), including the six Chief District Officers of the districts hosting the events.<sup>44</sup> The workshops were inaugurated by the CDOs of the respective host districts, which ensured a high profile and high level participation and the discussions were lively with active participation from the attendees.

The workshops focused on preparations for state restructuring and the transition to federalism. The programme covered detailed briefings related to (1) Transitional provisions; (2) Administrative Reform; (3) State restructuring (14 province proposal/special structures); (4) Fiscal decentralisation and Inter-state relations/transfers; and (5) Power sharing between tiers of government. This included an overview of practical international experiences of selected federal countries around the world, with a focus on public finance and public administration, as well as transitional issues where countries underwent rapid transformations in terms of devolution. It was observed that there was considerable thirst for

unbiased, detailed information on the constitution building process, basic questions around the federal system, an objective discussion of its pros and cons, bases and viability of federal system, different levels of powers devolved to central, provincial and local level governments and intergovernmental relations.

The workshops were aimed at an open and informal exchange on the process of transition to a federal structure. The participants generally praised this initiative that had specifically targeted government officials with detailed information and a platform for informed discussion on Nepal's future federalism and state restructuring agenda. The level of knowledge among most government officials about the constitution building process and preparations for moving into a federal structure was found to be highly inadequate. The organisers collected many concrete recommendations related to preparedness on transition planning.<sup>45</sup>

After a number of workshops had been successfully held, the Administrative Restructuring Commission accepted the invitation to participate and play an active role. It had been stated from the outset by UNDP that it would be much better if a government entity, rather than a UNDP project, took the lead in informing and preparing government officials at the various levels for the challenges of state restructuring. It was therefore considered an expression of appreciation that the ARC Secretary himself participated in the Pokhara workshop on 24-25 January 2011. That was also the first workshop attended by Lokendra Bista Magar, the UCPN (Maoist) CA Member who had chaired the CA Committee on State Restructuring and Distribution of Powers and had submitted its report about a year earlier.<sup>46</sup>

While a number of programmes had already begun (from the SPCBN project itself and other Development Partners/CSOs) to orient people on federalism and developments of CA, very little was targeted towards government agencies in terms of updating them on developments of the constitution building process and filling the information gap between the two spheres. Also, due to the lack of a fully developed inter-ministerial coordination mechanism and systematic information exchanges on state restructuring government officials were found to have very little prior information on state restructuring and federalism in general.

In the course of 2010, the understanding on federalism and related issues enhanced gradually, however still with very little enthusiasm among the bureaucratic elites, especially from among people belonging to Khas-Brahman/Chhetris and the Dalit community who continued to perceive the issue of federalism essentially as an identity-related issue pushed by Madhesis and janajatis.<sup>47</sup> It soon became apparent that a lot of effort would still be needed to engage these groups into the federal debates and discussions to create a sense of ownership in the state restructuring process.

### **Fiscal Decentralisation Seminar for High-Level Government Officials**

From 13 to 17 December 2010, UNDP organised a training course on 'Fiscal Decentralisation and Sub-national Financial Management in a Federal Nepal' for senior officials at the CCD office in Kathmandu.<sup>48</sup> A total of 29 participants had been selected from a wide array of government, private and civil society sectors of Nepal, but focused on high level government officials.<sup>49</sup>

The course was the first systematic effort to identify issues related to fiscal decentralisation in a federal context in Nepal, and brought theory and principles of fiscal decentralisation together for consideration in the Nepali context in order to ensure in-depth knowledge for participants. The sessions provided in-depth orientation of fiscal decentralisation, economic, administrative and legal dimensions of central-local fiscal relations, sub-national and local revenues and intergovernmental transfer systems. It also provided comparative international experiences on fiscal decentralisation, local government revenues, transfers, transparency and accountability. Competencies in these areas among a critical mass of high-level officials are a prerequisite for a successful transition that entails complex changes to the legal, administrative and financial machinery of the state.

The course was highly appreciated by the participants. In the course of the week participants identified theme-wise key lessons learned and practical recommendations. The themes were Decentralisation: Opportunities and Challenges; Allocation of Expenditure and Revenue Responsibilities; Mobilising Sub-National Revenues from Property Taxes; Intergovernmental Fiscal Transfers; and Performance-based Grants and Enhancing Sub-National Government Transparency, Accountability and Responsiveness.

### **An International Conference on Restructuring, Transition and Implementation**

It was also proposed that a conference on Restructuring, Transition and Implementation be held in early 2011, led by the CA Secretariat and supported by the national and international associations and agencies who had been working in the area of restructuring, transition and implementation within the context of Nepal.<sup>50</sup> In addition to the work being done by the ARC, as described above, various national and international associations and agencies had conducted research on state restructuring and transition and/or undertaken the collection of data that might assist the government with its transition planning and implementation – some in areas not within the jurisdiction of the ARC. A conference focused on restructuring, transition and implementation would provide a forum for participants to increase their knowledge as well as to interact and exchange ideas, especially also between elected CA members and civil service officials of the various government institutions.

It was understood that transition planning would be complex and its implementation would be ongoing long after the promulgation of the new constitution. It would require consideration of governance and administrative needs and realities that Nepali lawmakers had only recently begun to study and understand. The objectives of the conference were, in general, to build upon the work commenced by the ARC and benefit CA members in both the writing and/or finalising of the draft constitution, and to prepare for the effective creation and running of Nepal's new federal state institutions, and more specifically, (1) to review the transitional provisions proposed (by the Constitutional Committee) for inclusion in the draft constitution and to identify additional provisions that would facilitate an effective transition period; (2) to provide information and examples to assist with the development and execution of Nepal's transition plans after the promulgation of the constitution; and (3) to provide recommendations to support the CA and the executive branch in the execution of its responsibilities related to the smooth transition from a unitary to a federal structure.

The event was originally planned for March 2011, at a time when formally the prospect of finalising the new constitution within May of the same year, or a few months later, was still held up by a small but rapidly dwindling number of protagonists of the constitution building process. The event was however rescheduled several times, and eventually abandoned altogether. Around the same time, the mandate of the ARC was not renewed and the work of the Commission brought to an end. In terms of debating the future federal model, the political focus shifted to the expectations and preparations of the State Restructuring Commission. As mentioned above, those efforts later equally failed to provide for a consensus on the major outlines of the new state structure.

## **VI. INTERNATIONAL DEVELOPMENT ASSISTANCE AND THE NEW FEDERAL STRUCTURE**

Foreign aid has played a major role in Nepal's development. Donors coordinate development aid policy through the Nepal Development Forum comprised of donor countries, NGOs, development banks, and inter-government organisations including the UN. The development banks, particularly the World Bank (WB) and the Asian Development Bank (ADB), are the largest donors to Nepal. Nepal's largest bilateral aid donors are Japan, the United Kingdom, Denmark, Germany, Switzerland, Norway, the Republic of Korea, India, China and the United States.

Since the early 1970s, multilateral assistance programmes have played a significant role in the development planning for Nepal. Among multilateral institutions, the ADB and the WB as the major multilateral donors provide both

loans and grants for Nepal. The ADB and the WB prioritise their assistance to a number of sectors: financial services, natural resources, energy, industry, trade, and transportation. International donor contributions amount around a quarter of Nepal's annual national budget. In the past years, ODA to Nepal has steadily increased, from about USD 430 million in 2004 to USD 578 million in 2007, and USD 640 million in the fiscal year 2008-09.

For the UN, Nepal has also been a very important priority country over the recent years, exemplified by the deployment of its large political mission (UNMIN) and the equally sizeable mission of OHCHR in Nepal. Both invested heavily in the peace process, and supported the formation of the Constituent Assembly as well as the constitution drafting process. Both missions have since closed down and left the country. But the agencies, part of the UN Country Team, under the leadership of the Resident Coordinator, have also been playing an active role, with many agencies focusing on specific aspects of the new constitution (e.g., child rights, social inclusion, education, health, etc.).

UNDP's SPCBN project was designed to play a lead and coordinating role for the UN system in terms of its involvement in the constitution building process. The components related to transition to federalism and state restructuring have been outlined in this section, whereas other parts of the projects are discussed elsewhere in this publication. UNDP's overall mandate is not just limited to the actual constitutional drafting process in a narrower sense, but it has a clear global UN mandate on democratic governance and peace building support. Until all newly created bodies are duly established and consolidated, UNDP will therefore need to continue to focus on the process and link it into its other development activities.

From an overall planning perspective, however, it was also important to reflect the constitution building process, and in particular its expected outcomes in terms of state restructuring in the overall development frameworks, first and foremost the new The United Nations Development Assistance Framework UNDAF, which was agreed on with the government in late 2012.

Designing and implementing a strategy for the use of aid instruments is neither simple nor straightforward, and involves a complex set of judgments. In federal countries, with multiple levels of government, the situation is even more complicated and raises additional concerns. Federations require additional costs. For example, donors may need offices in several regions to maintain the level of dialogue needed with key state stakeholders at the sub-national level.

Depending on the volume of aid relative to national budgets, donor financial assistance provided directly to the federal level can have centralising tendencies vis-à-vis sub-national government. Where fiscal decentralisation is weak,

general budget support provided to the federal government can have the effect of undermining provincial and local governments, and can focus attention on capacity development at central level while ignoring lower levels of government.

In the case of sectorial budget support, evidences suggest that there are frequently tensions between individual sectors and the provincial and local governments, and that how donors choose to provide assistance affects these tensions.<sup>51</sup> There is a growing literature on the relationships between Sector Wide Approaches (SWAs) and decentralised governance, assessing the extent to which SWAs have a tendency to 'recentralise' decision-making (Eldon & Waddington, 2007). A key issue is whether SWAs should be developed at the federal and/or sub-national level. Vertical federal programmes – large sector programmes designed at, and managed from, the federal level, are mainly implemented through sector ministries, with provincial and district ministry staff having little real horizontal accountability to provincial and district governments. This could contradict the stated commitment to devolution. Vertical programmes, for example, in Pakistan have undermined the provincial and local government credibility, authority and accountability, and provided incentives for the centralisation.

Care therefore needs to be taken to avoid donor investments that are not congruent with the devolution process and that a broad policy dialogue should focus on such questions. At this stage, it is far from clear how much of the CA's proposals and agendas will ever be agreed on, when a new constitution will come into place, and how any of the changes discussed here will materialise in practice. Eventually, development assistance in Nepal may require some new arrangements, with some new partners and stakeholders. It may emerge over time that the strongest drivers of change (in terms of governance innovations and social inclusion) turn out to be at the sub-national level, with a more cautious approach being shown by those at the centre whose powers are to be devolved. Certainly, the performance of the sub-national institutions is likely to be unequal within a range from inadequate to above expectations. The experience of decentralising local government may offer some guidance. Nepal's development partners will be challenged to respect a constitutionally mandated process; the very essence of which will be to share sovereignty and devolve powers and resources from the centre to (yet-to-be-established) provinces at the regional level. At the same time, it will be important to bear in mind that successful state restructuring will depend in part on initiatives that must be taken at the centre to support the restructuring process or, in some cases, to remove barriers to restructuring in areas such as financial and human resource management. Changes in mind-set and operational principles will certainly constitute a big part of that.

Many of Nepal's international partners have been present and active in the country for a long time. They may have their own plans, programs and priorities. While their work has always required some coordination, and significant efforts have

been made in this regard, the coordination that will be required to implement and support state restructuring will be more demanding because of the scope of the enterprise and because of its political sensitivity.

The failure of the CA to complete a new constitution and the ultimate dissolution of the CA posed a particular problem for the international development partners, including the UN agencies that had been trying to support the process. This was in particular true for SPCBN and the CCD, which have now lost their *raison d'être*. Developing a new UNDAF in a situation where it was not clear whether or when the country would actually begin a major state restructuring exercise was also particularly challenging. It is therefore encouraging to see that the UNDAF that had been concluded in 2012, for the period of 2013-2017, provides sufficient flexibility and room for adjustment for the still possible adoption of a new constitution and embarking on a state restructuring process.

Outcomes 5 and 6 of the new UNDAF specifically relate to governance reform, and state restructuring under a federal constitution:

- Outcome 5: Institutions, systems and processes of democratic governance are more accountable, effective, efficient and inclusive.
- Outcome 6: Tiers of government established and function to meet the provisions of the new federal constitution

The UNDAF duly recognises that the Interim Constitution, 2007 envisions the creation of a secular and inclusive federal republic Nepal. It also emphasises that the changes contemplated in terms of institutional design, values, principles and the creation of new institutions would create an environment that is much more favourable to vulnerable groups, which are the focus of the UNDAF across the board. The UNDAF reiterates that state restructuring and the principles of inclusion are expected to empower the excluded, empower the newly established provinces, and create a governance structure equally responsive to the excluded and the marginalised groups. It states that the UN will continue assisting the Constituent Assembly (including its successor) in drafting and adopting a new constitution. In addition to that, the challenges of transition to federalism and state restructuring are fully recognised: 'Ahead lie multiple challenges of institutional capacity, human and financial resources. Not least of these will be the establishment of a new tier of provincial government and the redesign of central government institutions to incorporate the provinces' stake in these national institutions.' An overarching goal would be to support the transition to a federal Nepal as one that secures the inclusion of all citizens and their communities; secures a strong stake in the process and results for the formerly excluded and marginalised; and secures that equity of opportunity in influencing the process is

translated into democratic accountability for all, particularly vulnerable groups. Many of the planned outcomes follow directly from the transition and implementation related work SPCBN had begun to design in 2009, and to carry out beginning 2010. Among these are:

- Institutions, systems and processes of democratic governance are more accountable, effective, efficient and inclusive.
  - Provincial and local bodies can plan, budget, monitor, report and deliver inclusive government services.
- Tiers of government are established and function to meet the provisions of the new federal constitution.
  - National institutions, policies and legislation reviewed from inclusion and gender perspectives, and developed in line with the provisions of Nepal's inclusive federal constitution.
  - Civil service has the capacity to meet the needs of the inclusive federal constitution and government structures.
  - National and provincial legislatures, executives and other state bodies have necessary capacities to fulfil their accountabilities to vulnerable groups.

Naturally, all of this will depend on when a new CA will resume and complete its work, how much the new constitution will in fact build on and follow what has been proposed and discussed in the CA between 2008 and 2012, and how quickly broad enough agreement can be found on the salient open questions regarding the new federal structure. Whichever direction this may take, unless the idea of devolution and state restructuring is thrown out altogether, which is rather unlikely, it will require considerable adjustments in the way Nepal is governed, but also in the ways external partners seek to support economic and social development in Nepal.

## VII. CONCLUSION AND OUTLOOK

The prospect of imminent federalisation has somewhat receded with the dissolution of the CA, but may well be revived in the near future as the underlying grievances over unrepresentative, overly centralised and often ineffective and unaccountable governance remain intact. Any future devolution to newly created sub-national units will pose unprecedented challenges for Nepal's political leaders, civil servants, as well as its development partners. New sub-national units hold the promise of a government that is closer to the people and more concerned



with advancing the social inclusion agenda. With this could come economic and social benefits if provinces, reorganised local governments and autonomous regions become engines of growth and drivers of social accountability. At the same time, whatever form devolution may take, it will not be a panacea. It will come with some major challenges:

- **Political Reluctance**

Widespread acceptance of the inclusion agenda has made it affirmed by the policy commitment of the major political parties. However, it will need to be delivered through a restructured state. One lesson of Nepal's earlier efforts to decentralise may be that those with power at the centre may not wholeheartedly support the major devolutions of power, such as those contemplated by the proposals made in the CA. If the shift towards an effective and workable federalism fails, so will the principal mechanism designed to implement the inclusion agenda.

- **Uncertainty**

Throughout the debates on federalism in recent years, there still remained uncertainty around basic issues. How would the national government be restructured? Who would be responsible for the creation and capacity development of sub-national units? How many units will there be? Over what period will they be functional? Will there be interim structures? This uncertainty lead to reticence among both national and international actors to launch even a provisional planning process for fear of being seen to interfere in a sovereign matter falling exclusively within the mandate of the Constituent Assembly.

- **Scale**

Whenever Nepal's governance system will be restructured, the challenge will be to work with a newly structured state to improve governance and to advance Nepal's inclusion agenda at all levels – national/federal, provincial, local and, possibly, within autonomous regions. Each level of government is likely to have its own constitutionally mandated powers with its own legislative, judicial and executive institutions. The provincial (and regional autonomous – if any are established) structures will be entirely new and the national/federal and local ones will need to be substantially reformed. In each case, there will be an unprecedented need for provisional and long-term infrastructure investments, human and financial resources and systems.

- **Lack of Precedent**

There are modern examples of states moving from unitary to federal structures. There may also be much to be learned from recent experience in

regionalisation, as states around the world pursue the goals of subsidiarity, without adopting the fully federal variant. There seems to be no example of restructuring on the scale contemplated in Nepal given the complete absence of governmental structures at the level to which the bulk of sub-national governance ought to be transferred.

○ **Instability**

Implementation of any new constitution will likely have to be phased in, with fully functioning sub-national institutions several years and several election cycles away. Capable, responsive and effective institutions are even farther in the future. As state restructuring can never fulfil the aspirations and needs of all stakeholders, even orderly restructuring carries some risk of instability. Weak implementation could lead to disruption of government services across the country, damage to the inclusion agenda and widespread instability, or even conflict.

○ **Donor Engagement and Coordination**

The relevant CA Committee proposals foresaw a lead role for the national government, while the powers in matters of development, and assistance thereto could be exercised at all levels of government – national, provincial, local and autonomous regions. At the same time, the concept paper provides for devolution of some or all state power from the national government to new sub-national governments in many of the sectors where development partners are most active: health, education, roads, agriculture, water and forestry.

For the government of Nepal and its development partners, there is no need to wait for the finalisation of a new constitution to carry on preparatory work that will facilitate an eventual state restructuring process once it sets in. The time lost in completing the new constitution could be time gained one day when the moment comes to create new provinces, reform and reorganise local governments and reconfigure the role of central government. Provided there is commensurate political will, many steps in the right direction could already be taken on the basis of the existing interim constitutional framework. Certainly, capacity building and a much better understanding of the possible consequences (both risks and opportunities) of state restructuring would make any future decision on a federal system smarter, and the subsequent state restructuring process easier.

In the course of its deep involvement in Nepal's post conflict peace and reform process, UNDP has clearly understood that constitution building consists of more than the simple drafting and promulgation of a constitution. To achieve

lasting peace and inclusive development, a longer term process to implement the constitutional provisions needs to be facilitated and supported. This entails building into the constitution provisions on a transition process that does not create major instability and insecurity, and leads to effective and tangible implementation of the new constitutional provisions. But it importantly also means involving the executive branch of government, first and foremost the civil servants, in the debate and the planning for how state restructuring would occur. They are the ones who will have their fingers on the switches that will make the process stall or flourish. They will need to see themselves as part of the solution, and not the problem. Constructive and unbiased engagement with civil service professionals with regard to federal governance turned out to be much easier and productive than had been assumed when UNDP tried to pursue such avenues beginning in 2010. If the next phase of the debate on federalism will be dominated less by age-old grievances over identities and identity-related claims of domination and subordination, but rather by a genuine effort to bring better government to all the people of Nepal, it is likely that a workable formula can be found that will allow Nepal to enter the next phase of its historical development towards a stronger and more democratic society. If level-headed, pragmatic and well-informed work with a focus on the technicalities of state restructuring can take out some of the naive fervour from the arguments of the protagonists of federalism, and alleviate some of the scepticism of the opponents, then the prospects for a truly federal and democratic Nepal will be revived and hopes would be resurrected for Nepal to enter a new era and live up to its potential.

## REFERENCES

- ADB (2009). *Nepal's Choices in Fiscal Federalism*, an unpublished report by Ministry of Local Development and Asian Development Bank, August 2009.
- Brand, M. (2012). A bird in the hand ... – The federal pattern of Myanmar's 2008 Constitution.' Retrieved 10 October, 2013 from [http://www.academia.edu/1883468/A\\_bird\\_in\\_the\\_hand\\_-\\_The\\_federal\\_pattern\\_of\\_Myanmars\\_2008\\_Constitution](http://www.academia.edu/1883468/A_bird_in_the_hand_-_The_federal_pattern_of_Myanmars_2008_Constitution).
- Chalise, B. & Upadhyay, P. (2010). The management of the transition towards a federal system in Nepal – A concept paper. 10 October, 2013 from [http://www.ccd.org.np/resources/Mgmt%20of%20Transition\\_to\\_Federal\\_System\\_Chalise\\_ENG.pdf](http://www.ccd.org.np/resources/Mgmt%20of%20Transition_to_Federal_System_Chalise_ENG.pdf).
- Collier, P., Hoeffler, A. & Söderbom, M. (2008). Post-Conflict Risks, in *Journal of Peace Research* July 2008, Vol. 45, No. 4: 461-478.
- CRSDSP (2010). *Committee for Restructuring of the State and Distribution of State Power: Report on Concept Paper and Preliminary Draft, 2066*. Kathmandu: Constituent Assembly. Retrieved 20 November, 2013 from [http://www.spcbn.org.np/resources/Concept\\_Paper\\_Restructuring\\_State\\_GTZ\\_ENG.pdf](http://www.spcbn.org.np/resources/Concept_Paper_Restructuring_State_GTZ_ENG.pdf).
- Decentralisation in Nepal; Paper prepared for the Nepal Development Forum 2004.
- Eldon, J. & Waddington, C. (2007) *Federalism, sub-national financing and aid effectiveness*. Retrieved 10 October, 2013 from <http://www.hlsp.org/LinkClick.aspx?fileticket=r0f0SVbiwNQ%3D>.

- ICG (2011). *Nepal: identity politics and federalism*. Asia Report N°199. Kathmandu: International Crisis Group (ICG).
- Larsen, H. & Selim, N. (2009). *Local democracy and peace-building in Asia: Devolution arrangements and power sharing in local government councils*. Background paper for Regional Technical Seminar on Local Governance and Basic Service Delivery in Conflict Affected Areas, UNDP & UNESCAP.
- Larsen, H.F. (2010). 'State-building for peace – the sub-national challenges.' Technical paper for UNDP Global Report on State-Building for Peace.
- Martin Chautari (2010). *Constitutional complexities and transitional planning*. Policy Paper No. 3. Kathmandu: Martin Chautari.
- Watts, R.L. (2008). *Comparing federal systems*. Montréal: Published for the School of Policy Studies Queen's University by McGill-Queen's University Press.

# CHAPTER 10

## POLITICS OF RECOGNITION

CANADIAN FEDERALISM: LINKING  
COMMUNITIES TO FORM A  
UNIFIED NATION

- SHERI MEYERHOFFER



## **PART I**

### **INTRODUCTION**

Canadian federalism was designed to manage difference and distance. This paper will focus on difference, and specifically, on how linguistic and cultural differences shaped Canada's federal structure. That is, how the British colonial government and subsequent Canadian federal governments responded to and managed issues related to the identity of the people who inhabited its territories.

The paper is divided into six parts. Part II looks at Canadian federalism from a theoretical perspective and focuses on the impact the group has had on its development. Part III Section A identifies Canada's non-dominant groups – its aboriginal or First Nation peoples and French speaking population. Part III Section B looks at Canada's historical and political background and, in particular, at the treatment of aboriginal and French speaking populations by the British colonial and Canadian governments. This section also reviews the consequences of and responses by First Nations and French Canadians to this treatment. Part III Section C lists the demands made by aboriginal and French speaking Canadians and the Canadian Federal Government's reactions to these demands are articulated in Part IV. Part V contains an analysis of the applicability of the Canadian experience to the development of a federally structured state in Nepal, particularly as such development relates to addressing issues of identity. Lessons learned through the Canadian experience will be incorporated in this Part. Concluding remarks are made in Part VI.

If the history of Canada is viewed as a strong and vibrant river constantly flowing in one direction, it is fair to say that the histories of its Aboriginal and French speaking peoples, while part of that larger river, have travelled down different tributaries, merging into the main body to participate in various constitutional debates and processes. From time to time each group has found itself caught in an eddy, unable to advance and even moving counter to the current or backwards. These are the times, as will be shown in this paper, that have generally sparked strong reactions from these groups and their demands have resulted in constitutional, legislative or other acknowledgements that recognise their interests. Once released from these eddies of extreme discontent, Aboriginals and French Canadians move forward in their own tributaries, part of Canada, yet

distinct. It is for this reason that Parts II, III and IV of this paper have separate sections for First Nations and French Canadians. That is, while the federal government's reasons for recognizing both groups have been for the most part identical – calculated to promote their own interests, based on pragmatism and necessity and often given reluctantly – the ways in which they recognised them have been different and have often manifested at different points in Canada's history.

## **PART II**

### **CANADIAN IDENTITY THEORY**

It is the thesis of this paper that the prevailing identity theory in Canada is communal or group based. Canadian history books traditionally referred to Canada as having two founding nations – the British and the French. However, more recent historians (e.g., Saul, 1997) now refer to Canada's three founding nations which adds to the list, correctly in the view of this author, Canada's Aboriginal or First Nations peoples. These three founding nations or groups have distinct traditions, cultures, religions and languages. However, General Montcalm's victory on the Plains of Abraham in 1759 ensured that the North American territories which are now Canada would be governed by the British and that English speaking Protestants would be the dominant group. After this date, it was this group who dictated who had what 'rights' and most rights were granted to their own members except when, as set out in Part III below, the granting of rights to other groups, ensured the safety or provided other benefits to the dominant group. As such, Canada began with a focus on group rights – the rights of the colonisers – as opposed to any sense of or reference to individual rights. A brief review of Canada's constitutions and selected legislation and case law in this Part shows that the group has continued to be a focus of Canadian governmental organisation and legislative enactments, particularly enactments related to political, civil and fundamental rights of Canadians.

Unlike the Constitution of the United States of America (1776), the Canadian Constitution Act, 1867 did not contain provisions recognizing individual or collective rights. This is because the framers of the Canadian constitution believed that civil liberties and human rights such as freedom of religion, speech, association, and assembly, freedom from arbitrary arrest and imprisonment and the right to exercise the franchise in regularly held elections, were implicitly protected by the principles of British common law. To strengthen the force and effect of these implied rights, the Canadian Supreme Court, through its decisions, created a judicial theory referred to as Canada's Implied Bill of Rights.

One of the foundational cases leading to the recognition of an implied bill of rights in Canadian constitutional law was *Saumur vs. The City of Quebec* (1953).



Mr. Saumur had been arrested 103 times for distribution of Jehovah's Witness literature before he decided to challenge the legality of his arrests. In its decision the Supreme Court of Canada based its dicta arguments on the division of powers between the federal and provincial governments which gives the federal government the exclusive power to create criminal legislation. With respect to the division of powers the court held that where provincial legislation intrudes deeply into fundamental rights, it is creating criminal legislation and, as such, the Quebec City law was ultra vires its jurisdiction and thereby void and of no effect. In the decisions obiter arguments, a majority of the justices stated that the municipal law created an effect where the chief of police would have to act in the role of a censor, deciding whether the literature was objectionable. The result, they observed, would be that unpopular groups such as the Jehovah's Witnesses would be censored. The focus on the impact of laws on certain groups is significant and the fact that Canada's highest court felt the need to expand the concept of implicit rights beyond that of the framers of the constitution reflects the importance of the group in Canadian society. The courts were seeking to do justice in a difficult situation and the judicial theory of an Implied Bill of Rights invoked constitutional obligations and limits, quite apart from an application of legislation and the written constitution.

The first formal recognition of rights in Canadian law was its Bill of Rights (1960).<sup>1</sup> The Bill was championed by then Prime Minister John G. Diefenbaker who had been working on various drafts since 1936 (CBC, 1960). Ten years earlier, at a citizens' forum broadcast on national radio, Diefenbaker, then a Saskatchewan Member of Parliament, stated that, among other reasons, Canada needed a Bill of Rights to "forthwith stand against discrimination based on colour, creed or racial origin...[and that] a Bill of Rights would deny that there are first or second class citizens in our country measured by colour, race or surname." At the forum he also noted that growing up in Saskatchewan he had seen discrimination against that province's First Nations, Metis and French speaking populations, its Chinese immigrants brought in to build Canada's national railway, and its European immigrant farmers. It was the plight of these groups, he said, that sparked his passion to push Canada to enact a bill of rights (CBC, 1950).

The Bill of Rights wasn't entrenched in the Constitution and, as it never received provincial assent, only applied to federal laws. One of its major weaknesses was that many judges regarded it as a mere interpretative aid. In practice this meant that where legislation conflicted with the provisions of the Bill of Rights the courts relied on Parliament to repeal or amend any laws contrary to the Bill of Rights. A notable exception to this practice was the 1970 Drybones case (*R. v. Drybones*, 1970) in which the Supreme Court of Canada held that the Canadian Bill of Rights empowered the courts to strike down federal legislation which offended its provisions. Accordingly, the Supreme Court of Canada held that section 94(b) of the Indian Act (which prohibited 'Indians' from being intoxicated off of a reserve)

was inoperative because it violated section 1(b) of the Canadian Bill of Rights. As a consequence of this case, section 94 was repealed by Parliament in 1971. Once again, when faced with discrimination against a group, Canadian judges were inspired to find a way to do justice even if that meant applying the Canadian Bill of Rights in a manner it had not been done previously and in which it has not been applied since. Indeed, in two subsequent decisions, *Attorney General of Canada v. Lavell* (1974) and *Bliss v. Canada* (1979) the first dealing with the rights of Indian (First Nation) women, specifically, and the second dealing with the rights of Canadian women, generally, the Supreme Court of Canada was not moved to stretch the application of the Canadian Bill of Rights to address individual rights related to the rights of women, even where the women were part of an identifiable group.

Human Rights were finally constitutionally entrenched in the Canadian Charter of Rights and Freedoms (hereinafter referred to as the Charter) which forms the first part of the Constitution Act, 1982. The Charter guarantees certain political rights to Canadian citizens and civil rights of everyone in Canada from the policies and actions of all areas and levels of government. However, while the Charter entrenches individual rights that apply to all Canadians regardless of any group they might identify with, the Canadian method of creating unity since the British colonial government passed the Quebec Act in 1774<sup>2</sup>, necessarily includes recognition of group rights or exempting groups from the application of certain laws and the provisions. The Charter maintains and strengthens this tradition by balancing individual political, civil and fundamental rights set out in Sections 1-15 and 24 with rights which can practically be seen as protecting group rights. For example, Sections 16-23 refer specifically to English and French language rights. As pointed out by Michael Ignatief (2001: 67) an individual right to speak French is not in and of itself useful. There needs to be a collective right to speak French for the exercise of the right to have true effect. Accordingly, Sections 16-23 entrench collective (or group) language rights for French Canadians.

Further adherence to the Canadian tradition of recognizing groups are found in Sections 25 to 31. These sections clarify how the rights in other sections of the Charter should be interpreted and applied by the courts and explicitly protect group rights by reaffirming existing Aboriginal rights and freedoms (Section 25), confirming the preservation of religious school rights (Section 29) and directing that the Charter be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians (Section 27). That is, in a manner recognizing the pluralistic nature of Canada's citizens and supporting the rich diversity of its peoples.

The individual right not to be discriminated based on race, religion, gender, nationality or ethnicity is based on the identification of a person with a group. The utilitarian position, as advocated by Ignatief (2001), among others, is that group rights should exist only in so far as they promote individual rights. This

position, however, does not fully reflect the Canadian experience or reality. Specifically, it does not reflect the position of either Canada's French speaking or First Nations populations both of which have always advocated for the rights of the group for the purpose of preserving the identity of the group and not for the ultimate protection of the individuals who compose it.

A recent example was a decision to ban the wearing of turbans on the soccer field by the Quebec Soccer Federation. At the time of the ban the Federation Internationale de Football Association (FIFA) rules did not explicitly state a position on the wearing of turbans. In April 2013, The Canadian Soccer Association called for all provincial associations to allow religious head wear. Quebec was the only province to resist. In a radio interview by the Canadian Broadcasting Corporation (CBC) on June 5, 2013, Rachad Antonius, Deputy Director of the Research Chair in Immigration, Ethnicity and Citizenship at the University of Montreal, said that while he disagreed with the decision he also disagreed with the explanation that it was due to xenophobia or racism and considered it logical, or at least understandable, within the context of Quebec. Antonius noted that in Canada (outside of Quebec) the relationship between the majority and the minorities is so unequal that those in the majority do not feel threatened by the rising of minority identities. Quebec, however, does feel threatened and its past dominance by the Catholic Church and its concerted efforts to create a secular society creates a sensitivity that makes them want to distance themselves from religion, and all religious symbols such as the Sikh turban, in the public space.

In the same CBC interview, Christian Bourque, partner and Executive Vice President at Leger Marketing indicated that based upon survey data it is hard to reconcile the fact that while individually Quebecers are very open and extremely tolerant of difference they become very strict when it comes to a situations they perceive breaks the rule that everyone is equal because if everyone is equal in a French language province then everyone decides they belong to that French culture and ensures its survival.

Interestingly, this formal approach to the concept of equality within Quebec's borders, as described by Bourque, is at odds with the historic and ongoing demand of the Quebec government for substantive equality with respect to its place within the Canadian federal system – that is, to be recognised as a distinct society and to be treated differently, in order to address historic inequalities between its population and that of the rest of Canada. These dichotomies can only be explained by acknowledging that for governing minority groups it is the survival of their identity, and not theory, that guides their policies, processes and decisions.

While protecting a homogenous group identity is fundamental to Quebec and First Nation leaders, the rest of Canada has embraced the concept of multiculturalism which advocates that various cultures in a society merit equal respect [(n.d.)a]

and that several cultures, rather than one national culture, can coexist peacefully and equitably in a single country. By definition multiculturalism embodies the concept of substantive equality and in Canada that has resulted in finding ways to provide minority groups meaningful ways to participate in its majority culture. For example, Canada's highest courts have held that it is acceptable for a police officer to wear a turban in place of the standard police head wear (*Grant v. Canada, 1995*) and for Sikh children to wear the kirpan, a ceremonial dagger, to school (*Multani v. Commission scolaire Marguerite-Bourgeoys, 2006*). These decisions, which protect both the individual and collective rights of Sikhs to use religious symbols in public spaces, are in stark contrast to the 2013 Quebec Soccer Association ban on wearing turbans by young Sikh athletes and would be difficult to reconcile if one did not understand Quebec's fears, sensitivities and objectives as noted above.

Perhaps the genius of federalism is that it provides space for difference as well as space for common ground and reasonable reflection and compromise. With respect to the overall balance between group and individual rights in Canada, Quebec's acceptance of, and empathy for, the concept of substantive equality, related to its place within the Canadian federal system, provides a common ground of theoretical understanding between it and the rest of Canada. The strength of multiculturalism outside of Quebec is evidenced by the fact that a national soccer association asked for a ruling on the actions of a provincial association in a situation it believed crossed the line of acceptability under any concept of equality. The ability of a non-government organisation to provoke reasonable reflection and compromise within Quebec is evidenced by the ultimate reversal of the Quebec Soccer Federation's ban on turbans (Boston Herald 2013). Thus, while the goal of governing minority groups to ensure the survival of their identity raises real concerns related to the treatment of minorities within minorities, such as the treatment of Sikhs within Quebec, this example shows how a federal structure of government can reduce or eliminate the ability of a ruling minority to discriminate against other minorities through the provision of some very interesting checks and balances.

As will be shown later in this paper, history evidences that when Canada has attempted to ignore or terminate group rights unity and cohesion have suffered. A stark example being the reaction of First Nations to the federal government's attempt to terminate their special status in 1969 which was based on the view that all Canadians held the same rights regardless of ethnicity, language or history and that the 'special status' of First Nations and Inuit had put them at a disadvantage (Government of Canada, 1969).

History also shows that when Canada has taken steps to recognise difference unity has been enhanced or, at the very least, tensions have waned. Examples of this include the resolutions in Canada's House of Commons recognizing Quebec as a distinct society and as a nation (IdealNoMore, n.d.) This is the point

made by Charles Taylor (1994: 35-6) which this author would summarise as the need to value difference – to value different equalities between groups, between individuals as well as between groups and individuals – to ensure universal equality (Taylor, 1994). In addition to Canada's three founding nations, Canada's growth as a nation has been built on waves of immigrants from other regions such as Europe and Asia, among many others. The importance of identity to the three founding nations led to a tacit recognition of these new groups as hyphenated Canadians; that is, Chinese-Canadian, German-Canadians and the like. As such, Canada contains 'worlds within worlds, within worlds' and it has used the policy of multiculturalism and its acceptance of group rights to link people across communities to create a unified country (TVO, 2012).

### **PART III**

#### **HISTORICAL & POLITICAL BACKGROUND**

In the 1500s teeming cod stocks on what are now known as Canada's Grand Banks attracted Basque, Breton, Spanish, Portuguese, French, Irish and English fisherman eventually creating a network of competing colonies as each country pushed to expand its own wealth and influence in the New World. By the end of the 17th Century the British and French were the dominant powers each with control over large territories. A century later, as a part of the Seven Year's War (1756-1763) which involved most of the major powers of Europe, France and England battled for control over North America (1856-1860). The historic battle on the Plains of Abraham between the Marquis de Montcalm and General James Wolfe (1759) marked a decisive loss for France and under the Treaty of Paris (1763) France gave up claim to its North American territories. This marked the beginning of an era of British dominance in the territories that later became Canada. For this reason, French Canadians call the conflict in North America *La guerre de la Conquête* (The War of Conquest) (n.d.). It is also called the French and Indian War to reflect the French-Indian alliances that fought, and lost, to the British. It is important as the two parties who lost became Canada's major non-dominant groups which this paper will look at in detail in this Part and in Part IV below.

#### **Canada's Non-Dominant Groups**

##### **First Nations<sup>3</sup>**

The fact that the ancestors of Canada's First Nations occupied Canada long before the arrival of European explorers provides them with a distinction from all other Canadians. Canada's First Nations are numerous and diverse. A partial list of First Nations, organised by linguistic and cultural area and not including Inuit or Metis, shows that Canada's indigenous peoples are made up of more than

180 major ethnicities[(n.d.)b]. Each nation or group of nations was distinct and had their own language, culture and territory. All First Nations believed that their values and traditions were gifts from the Creator. One of the most important and most common teachings was that people should live in harmony with the natural world and all it contained. This deep respect that First Nations cultivated for everything and every process in the natural world was reflected in songs, dances, festivals and ceremonies. With the exception of the loss of some native languages and much of their territory, the characteristics that continue to make First Nation populations distinct are their language, culture and religion.

### **French Canadians (Quebecois)**

French Canadians are the descendants of French settlers in what was New France prior to the signing of the Treaty of Paris in 1763. Not only was the French settlers' language different from the victors of the Seven Years War but their religious and legal cultures were significantly different – being Roman Catholic instead of Protestant and familiar with the French civil and criminal codes as opposed to the British common law system. Accordingly, language, religion and legal tradition are the major characteristics that make French Canadians distinct.

## **Treatment of First Nations and French Settlers by the British Colonies and Canadian Government and its Consequences**

### **First Nations**

Prior to the Treaty of Paris in 1763 First Nations people were the trading partners of the fishermen attracted by the cod on the Grand Banks and English and French settlers involved in the fur trade. The European colonies needed the First Nations to support their commercial interests and this created alliances of equal power and benefit. As French and British colonies pushed further inland, their competition for the control of the rich interior of North America became a new theatre of war for these two European powers which transformed their respective commercial partnerships with First Nations into vital military alliances.

After the signing of the Treaty of Paris, Britain's North American colonies depended upon stable and peaceful relations with First Nations. To help achieve these aims, King George III issued a Royal Proclamation in 1763 which prohibited the purchase of First Nation lands by any party other than the Crown. Under the proclamation the Crown could purchase lands from a First Nation group that had agreed to a public sale at a public meeting of the group (Treaties with Aboriginal people in Canada, n.d.). Significantly for the demands of First Nations later on, the Royal Proclamation was the first public recognition of the First Nations rights to lands and title.

The outbreak of the American War of Independence and Britain's subsequent recognition of the United States of America in 1783 had a dramatic impact on the relationship between the British Crown and its First Nations allies. First, the loss of the American colonies brought some 30,000 United Empire Loyalist refugees to the remaining British colonies in North America (the future Canada) and these Loyalists asked colonial administrators for new lands. Second, First Nations who fought alongside the British had their lands unilaterally ceded to the Americans by the 1783 Treaty of Versailles and were asking for compensation for their efforts on the Crown's behalf. In response, officials from the Indian Department negotiated a series of land surrender treaties under which First Nations surrendered their interests in lands in what is now the province of Ontario for certain other benefits that could include reserves, annual payments or other types of payments and certain rights to hunt and fish (Treaties with Aboriginal people in Canada, n.d.).

In the last decades of the 18th century, British military leaders and the Indian Department still placed great value on their strong military alliances with First Nations. During the War of 1812, First Nations fought alongside the British and Canadian colonists against the American invasion of what is now southern Ontario.

Once peace returned to North America, new immigrants and colonists continued to arrive. As settlers demanded more and more property, they began to pressure the colonial administration for the lands held by First Nations. Instead of being regarded as a bastion of colonial defense, the colony's First Nations populations were now viewed as an impediment to growth and prosperity. As a result, in the decades following the War of 1812, British administrators increasingly treated First Nations as dependents rather than allies and, based on the belief that British society and culture were superior, decided it was necessary to bring British 'civilisation' to the Empire's Indigenous peoples.

These new perspectives resulted in the passing of legislation by the British colonial government that established reserves for the First Nation populations disposed of their lands,<sup>4</sup> made the government the guardian of First Nation interests by limiting trespassing and encroachment on Indian Reserve Lands<sup>5</sup> and attempted to assimilate them into the larger British, Christian agrarian society.<sup>6</sup> Few First Nations, however, actually relocated to the reserves. A majority continued to live on small plots of land set aside by the treaties. Some squatted on Crown Lands living an increasingly destitute life. Finally, in 1860 the British Crown enacted legislation that transferred authority for Indian affairs to the colonies.<sup>7</sup> As a result, immediately prior to the emergence of Canada's federation, First Nations peoples were, by and large, landless, impoverished and abandoned by their former ally and protector.

In 1867, colonial responsibility for the management of 'Indians and Indian lands' became a federal responsibility with the creation of the new Dominion of Canada under the 1867 British North America Act. Between 1871 and 1921, Canada

undertook a series of land surrender treaties throughout its new territories. Under these treaties First Nations gave up large tracts of land to the Crown in exchange for many of the benefits listed above as well as farm equipment, ammunition, clothing, provision of teachers and educational help and, in one instance, a medicine chest.<sup>8</sup> The objectives of these surrenders were: to fulfil the requirements under the transfer from the British Crown; to secure Canadian sovereignty; to open the land for settlement and exploitation; and to reduce possible conflict between First Nations and settlers. The new Canadian government's treatment of First Nations continued to be based on policies of paternalism and assimilation. Policies, which, according to the Assembly of First Nations Chief, Shawn Atleo, in 2013, have not fundamentally changed due to 'colonial notions' and 'imposed legislation.' Chief Atleo noted that there is a growing frustration among First Nations across the country with the lack of action and lack of commitment on the part of the Government of Canada to work in real partnership with First Nation peoples and governments (Reichel, 2013).

In 2012 three mandatory United Nation reviews<sup>9</sup> found serious human rights challenges facing Canada's First Nations, affecting virtually every facet of life. In a summary of these reports Amnesty International said:

By every measure, be it respect for treaty and land rights, levels of poverty, average life spans, violence against women and girls, dramatically disproportionate levels of arrest and incarceration, or access to government services such as housing, health care, education, water and child protection, Indigenous peoples across Canada continue to face a grave human rights crisis. (Amnesty International, 2012)

In summary, from the 1500s to the late 1700s the British and the French treated First Nations peoples varyingly as trading partners, enemies and military allies. At the end of the 1700s to the present day the British colonisers and the Government of Canada treated them initially as persons with whom they needed to co-exist, increasingly as impediments to prosperity, and ultimately as dependents who needed protection and savages who needed to be civilised and assimilated. The paternalism and attempts to assimilate indigenous peoples led to the marginalisation of Canada's First Nations and their people and this treatment, then and now, has led to situations of statelessness and poverty. First Nation responses and demands to this treatment are set out in Section C.i. of this Part below.

### **French Canadians**

After France ceded its colonial territories in what is now Canada under the Treaty of Paris, the British, pursuant to the Royal Proclamation, 1763, created the colony of Quebec and substituted civil authority for military authority. French civil and criminal laws were abolished and the requirement for all office holders to formally



accept the articles of the Protestant faith meant that no French Canadians were legally able to fill positions of authority or participate in the government. For obvious reasons, this fuelled tensions between the French settlers and the British government in Quebec. The growing uneasiness in the Thirteen Colonies<sup>10</sup> led to the passing of the Quebec Act, 1774 in an effort to curb French discontent toward the British and ensure citizen loyalty, or at least neutrality, in the event of hostility between England and the Thirteen Colonies. This Act expanded the boundaries of the colony, recognised the French language and civil law and allowed Roman Catholics to practice their religion. And, although it imposed an authoritarian system of governance, it gained the support of the French clergy and seigneurs through the inclusion of provisions for the collection of the tithe (a tenth part of one's annual income contributed voluntarily or due as a tax, especially for the support of the clergy or church) and feudal dues to the Church.

The beginning of the American Revolutionary War in 1776 led to an influx of British Loyalists from the Thirteen Colonies to Nova Scotia and Quebec. The Loyalists in Quebec demanded British institutions, including representative government. In order to appease them, the British passed the Constitutional Act, 1791 aimed at reducing expenses by giving colonial assemblies the power of taxation and strengthening ties between the colonies and Britain.

Since the Loyalists had settled predominantly west of the Ottawa river (in what is now the Province of Ontario) the British decided to divide the colony into Upper Canada (in the West) and Lower Canada (in the East which is now the Province of Quebec). They believed this would satisfy the demands of both the Loyalists and the French Canadians. The Constitutional Act was intended to persuade French Canadians of the superiority of British institutions and assimilate them into British culture. This Act, which reinforced a structure of government that assured the continued domination of wealthy merchants, the Church of England, and the British-appointed members of government, had the opposite effect as it increased hostilities between the Assemblies of Upper and Lower Canada, colonial officials, governors, and the colonialists.

In both Upper and Lower Canada relations between the Legislative Assemblies (elected by the people) and the Executive Council (appointed locally by the governor and responsible to the British Crown) grew ever more hostile. While the Assemblies had the power to pass legislation, their decisions could be overturned by the Executive Council. Throughout this period, Britain continued to increase immigration to Lower Canada in an attempt to assimilate French Canadians, further fuelling tensions. The calls for responsible government and an elected Executive Council grew, culminating in a series of rebellions in both Upper and Lower Canada between 1837 and 1838. In response to violent civil disorder in the colonies, the British government dispatched Lord Durham, as Governor General and High Commissioner, to investigate the situation and make recommendations. He drafted The Durham Report, which called for responsible

government (English dominated); a union of Upper and Lower Canada; limited colonial control of internal affairs; and the assimilation of the French-speaking population. On Durham's advice, the British government unified the two provinces with the Union Act, 1840. This Act succeeded in uniting the provinces but failed in its objective to weaken the French Canadian population's demands for recognition of their linguistic, religious and legal rights.

When leaders from Upper Canada (Ontario), Lower Canada (Quebec) and from Acadia (the Atlantic Provinces) met to discuss the terms of The British North American Act, 1867 (now more commonly referred to as the Constitution Act, 1867) one of the most important concepts that emerged was the need for a division of powers between the federal parliament and the provinces. The federal union that emerged was highly centralised, in part, because the federal government had assumed some of the powers previously exercised by Britain whose descendants continued to hold the power and most leadership positions in the new country of Canada. The French speaking population was divided on joining the new federation. The division of powers was (and remains) important from an identity perspective as it allows for the decentralisation of control over certain rights. While they were pleased in 1867 that the Constitution incorporated some of the provisions of the Quebec Act respecting Quebec's distinctiveness, including the official status of the French language in the Quebec, their agreement on the division of powers between the federal and provincial governments was far from settled.

In summary, between 1763 and Confederation the British imposed their institutions and laws on French Canadians, precluded them from participating in government and indirectly strengthened the influence of the Catholic Church on their daily lives. The recognition of the French language, the Roman Catholic Church and French civil law was given with one hand while the other took actions and made official recommendations for the total assimilation of French Canadians into British culture and tradition. While not marginalised to the extent of First Nations, the direct and indirect attempts to assimilate the French settlers into British culture created a group psychology that feared losing its identity. The French Canadian responses and demands related to the treatment by the British and its consequences are set out in Section C.ii of this Part below.

## **Non-Dominant Group Responses and Demands**

### **First Nations**

From Confederation in 1867 through the first four decades of the 20th Century, First Nations peoples faced disease epidemics and famine and their leaders looked to the Crown for assistance to care for their people. They also wanted assistance to adapt to a rapidly changing economy as buffalo herds neared extinction and the fur trading companies shifted their operations North. In return, notwithstanding

decades of difficult and painful living conditions, Canada's Aboriginal people assisted Canada's war efforts.

By the late 1940s, social and political changes were underway that would mark the start of a new era for First Nations in Canada. Several First Nations' leaders emerged, many of them drawing attention to the fact that thousands of their people had fought for Canada in both World Wars (Current features, n.d.).<sup>11</sup> First Nations across the country began to create provincially-based organisations that forcefully expressed their peoples' desire for equality with other Canadians, and to simultaneously maintain their cultural heritage. First Nations largely rejected the idea of cultural assimilation into Canadian society. In particular, they spoke out against the enforced enfranchisement provisions of the Indian Act and the extent of the powers that the government exercised over their daily lives. Many groups asked that these 'wide and discretionary' powers be vested in First Nations chiefs and councillors on reserves so that they themselves could determine the criteria for band membership and manage their own funds and reserve lands.

Between 1969 and 1971, First Nations responded negatively to the federal government's 1969 White Paper recommending the total repeal of the Indian Act, demanding the retention of the special status and rights derived from their unique and historical relationship with the Crown as provided under that Act. Demands to modernise the Indian Act by removing discriminatory provisions were made to the Supreme Court of Canada in the early 1970s by two women who had both lost their Indian status by marrying white men (*AG of Canada v. Lavell et al*). At the same time, various First Nations brought court challenges to Canada's highest court seeking to stop the development of lands subject to claims under treaties<sup>12</sup>, demanding recognition of Aboriginal title<sup>13</sup> to lands and declaring a prior interest in lands based upon Aboriginal rights and traditional use by First Nation peoples.<sup>14</sup> The constitutional procedure that would permit Canada to amend its constitution without reference to the British Parliament is referred to as patriation. From 1977 to 1981 First Nations demanded to be included in the constitutional talks related to amending and patriating Canada's constitution and for the entrenchment of Aboriginal and Treaty rights in Canada's then proposed Charter of Rights and Freedoms. They renewed these demands in the late 1980s when talks began related to amending the Charter. The federal government's failure to provide First Nations with a seat at the negotiating table provoked Elijah Harper<sup>15</sup> to block the passing of a package of amendments referred to as the Meech Lake Accord in the Manitoba legislature in 1990. In addition to wanting their rights entrenched in the constitution, the period immediately following the patriation of Canada's constitution up until the present day, First Nations increased their demands for greater autonomy, self-government and self-determination.

The details of the demands set out in the paragraph above are described in conjunction with the response of Canada's federal government in Part IV below.

A common characteristic of these demands, overall, is that they were made through formal processes and respected the rule of law in Canada. There have, however, been clashes between First Nation peoples and Canada's federal, provincial and local governments falling outside of legal processes ranging from road blocks, occupations, standoffs as well as physical and armed violence. These manifestations began in the 1960s and have continued until the present day. Most famously, they include the Oka Crisis (Quebec, 1990), the Ipperwash confrontation (Ontario, 1995), and the Gustafsen Lake confrontation (British Columbia, 1995) (Warrior Publication, n.d.).<sup>16</sup> All three confrontations arose from long standing disputes over the ownership of lands that were never ceded under treaties with the British or Canadian governments, or the right to use lands as provided for in specific treaties, and the right to Indigenous sovereignty, including the rights to self-determination and self-government. The right to Indigenous sovereignty is of particular importance to the identity of Canada's First Nation peoples as it would provide them with control over their right to practice their own culture and customs including language and religion. The First Nation defenders in the Oka crisis were armed and when the Quebec Provincial Police tried to dismantle a road block one police officer was killed. In the Ipperwash confrontation the Ontario Provincial Police shot and killed an unarmed First Nation protestor. All three situations involved Canadian Military operations and the Gustafsen Lake standoff was subject to an extensive and expensive operation mounted by the Royal Canadian Mounted Police (RCMP). In all three cases agreements were eventually negotiated and followed by inquiries into the actions of the provincial and federal security forces. More details on the federal government's response to these extreme examples of First Nation discontent and hostilities are set out below in Part IV. While some negotiations have been successful, First Nations continue to be concerned with the failure of the federal government to honour Indigenous rights to sovereignty and reinstitute traditional laws and Nation to Nation Treaties.

In late 2012 these concerns sparked the rise of a 'peaceful revolution, to honour Indigenous sovereignty, and to protect the land and the water' called Idle No More (The Vision, n.d.). This campaign began as a series of teach-ins throughout the province of Saskatchewan to protest impending parliamentary bills that First Nation peoples believed would erode Indigenous sovereignty and environmental protections. It quickly became one of the largest Indigenous mass movements in Canadian history driven by social media and popular protest. According to its website the impetus for the movement:

... lies in a centuries old resistance as Indigenous nations and their lands suffered the impacts of exploration, invasion and colonization. Idle No More seeks to assert Indigenous inherent rights to sovereignty and reinstitute traditional laws and Nation to Nation Treaties by protecting the lands and waters from corporate destruction. Each

day that Indigenous rights are not honored or fulfilled, inequality between Indigenous peoples and the settler society grows (The Story, n.d.)

The demands of Idle No More include: the repeal of proposed legislation; changes to Canada's voting system; increased consultation with First Nations; the right of Indigenous peoples to say no to development on their lands; recognition of Treaty rights and land claims; and, actively resisting violence against Aboriginal women (Calls for Change, n.d.).

While referred to as peaceful, it is not clear what will happen if the Canadian government does not recognise First Nation sovereign rights government and non-government entities do not respect the environment and the rights of First Nations to the economic benefits flowing from their Aboriginal and traditional lands. Two recent reports written by different authors for the MacDonald-Laurier Institute (Who are we/MacDonald-Laurier Institute, n.d.).<sup>17</sup> make two totally different predictions. The first report, *Canada and the first Nations: Cooperation or Conflict*, hypothesises that living standards for indigenous peoples on par with third world countries, buttressed by a large population of unemployed men fertile as recruits for militant groups, and easy-to-target resource industry infrastructure, all mean Canada has conditions for a potential indigenous insurgency (Bland, 2013). Another report, *New Beginnings: How Canada's Natural Resource Wealth Could Reshape Relations with Aboriginal People*, provides a more optimistic picture pointing to examples of successful, positive collaborations between Aboriginals and Canada's resource sector in the last couple of decades and arguing that this bodes well for future collaborations which would improve relationships and increase Aboriginal economic prosperity (Cotes & Crowley, 2013). While these two reports paint different pictures, it is clear that Canada's First Nation peoples' demands for greater autonomy as well as economic and social equality will continue and that the response of Canada's non-Aboriginal actors will influence which picture ultimately gets painted.

In summary, from the middle of the 20th Century to the present, First Nation peoples responded to Canada's paternalism and their situation of poverty and destitution by demanding greater autonomy over their daily lives – from administrative control under the Indian Act to self-government. The form of their demands included direct requests to the federal government for talks and negotiations, blocking the passing of constitutional amendments through an Aboriginal member of a provincial parliament, peaceful protest, road blocks, standoffs and violence.

### **French Canadians**

Quebec's major demand was, and remains, the protection of its language, culture and legal systems. Many Quebec governments have worked within the Canadian

federal system to ensure these protections, however, there are those who have argued that only sovereignty in the form of full political independence can adequately ensure the survival of the French language allowing Quebecers to establish their nationality and preserve their cultural identity. This is in contrast to the claim for sovereignty by First Nations who historically were not granted any control over their own destinies within Canada and who are now, generally advocating for either a degree of political, cultural and economic autonomy, sometimes in the form of a federal relationship or the right to live on and manage their traditional lands free of external interference and incursion.

The rise of Quebecers seeking full political independence, or 'separatists' as they are referred to in Canadian political nomenclature, in the 20th Century, grew out of two centuries of the direct and indirect attempts by the British and Canadian governments to assimilate the French into British culture. These ongoing acts of domination are described under Part B ii above and their effect was the perpetuation of the French settlers' fear of losing their identity. This fear coupled with the rapid and effective secularisation of society and extreme economic and social development in Quebec during the 1960s created conditions that encouraged certain nationalists to push for political independence such as the Parti Quebecois (PQ), a sovereigntist<sup>18</sup> political party created in 1968 and the Front de Liberation du Quebec (FLQ), a small group of Marxist separatists which used terrorist actions. The FLQ's activities ended with the 1970 October Crisis, during which British diplomat James Cross as well as Labour Minister Pierre Laporte were both kidnapped by FLQ cells, with Laporte eventually being killed (Dickinson & Young 2003: 321). In contrast, the democratic actions of the PQ continued to gain political strength ultimately winning the Quebec provincial election in 1976 on a platform promising to hold a referendum on sovereignty-association which would create a politically independent Quebec with a strong and preferential economic 'association' with Canada.

The PQ referendum was held on May 28, 1980 and a majority (59.5 percent) of Quebecers voted 'no' to separation from Canada. During the constitutional talks initiated by the federal government in 1980 and 1981, Quebec, through its PQ government, made demands through the courts as well as through negotiations with the other provinces and the federal government. Quebec's immediate response to the federal government's intention to patriate the constitution without the agreement of the provinces was to ask its Court of Appeal to rule on the constitutionality of such a course of action. When the courts decided that the federal government could unilaterally patriate the constitution, the constitutional talks resumed and Quebec then demanded an absolute veto over constitutional amendments. As a result of negotiations with seven of the other provinces, Quebec subsequently offered to give up a veto on amendments provided the Charter was removed from the proposed constitutional amendment package as such was viewed as a threat to Quebec's distinct status within Canada on the grounds that it would significantly shift political power from Quebec's legislature

to the courts. As noted in the discussion on formal and substantive equality in Part II of this paper, the Quebec government's objective was/is to ensure everyone is equal in manner that ensures the survival of the French language and culture and it feared that the Charter's provisions on fundamental freedoms, legal rights and equality rights under the power of the judiciary to review the government's actions and decide whether or not is acting within the rules and norms of the constitution would diminish or eliminate its ability to protect these group rights. Quebec wasn't the only province that was concerned with the Charter's ability to shift political power from elected legislatures to the courts and in response to this concern the Notwithstanding clause (Section 33) was added to the Charter.

The Notwithstanding clause permits elected legislatures (federal, provincial, or territorial) to declare that a particular action or law operates 'notwithstanding' or 'in spite of' the Charter's fundamental freedoms (Section 2), legal rights (Sections 7-4) and equality rights (Section 15). Under Canadian constitutional law the judiciary is still responsible for interpreting the Charter and reviewing government actions in general. However, the Notwithstanding clause allows legislatures to make some of their laws or actions immune from judicial review under these provisions of Charter for a period of five year. By invoking the Notwithstanding clause the judiciary no longer has the power to force the legislature to change the law in that case. While the addition of the Notwithstanding clause brought the other provinces onside, Quebec, continued to oppose the Charter's inclusion in the Constitution. Accordingly, when the Charter was ultimately included in the package Quebec refused to sign the agreement. Quebec denounced the political legitimacy of the Constitution Act, 1982, and in June of that year passed the Act Respecting the Constitution Act, 1982 which enabled the Quebec government to invoke the Charter's Notwithstanding clause for all past provincial laws, as well as for any law the government passed in the three years to follow. The declaration, however, was allowed to lapse following the election of the more federalist Liberal Party of Quebec in 1985. Since 1985 the Quebec legislature has rarely applied the Notwithstanding clause. The most notable usage came in 1988, when the province sought to protect its sign laws under the 1977 PQ Charter of the French Language, better known as Bill 101.

Bill 101 stipulated, among other things, that all signs in Quebec must be in French. The intent of the sign law was to protect the use of the French language in commercial activities. Several individuals and groups challenged the sign law based on the grounds the legislation violated their rights to freedom of expression under Section 2(b) of the Charter. The Supreme Court of Canada agreed, and in two 1988 decisions,<sup>19</sup> ruled that an outright prohibition of the use of languages other than French was an unreasonable limitation on the freedom of expression. The Quebec government responded by amending the original sign-law to permit the usage of other languages on signs inside of commercial establishments, but continued to prohibit the use of any language other than French on exterior signs. Additionally, the Quebec provincial legislature invoked the Notwithstanding

clause to protect the amended legislation from any further judicial review under the Charter. When the five-year time limit for the Notwithstanding declaration expired, it was not extended by the Quebec legislature. Instead it passed a new law, one that was more in keeping with the Charter and its principles, allowing signs in both languages, but only as long as French was the predominant language displayed. The passage of this new law by Quebec is a good example of how federalism provides space for difference as well as space for reasonable reflection and compromise in Canada as discussed under Part II of this paper.

It was the more federalist Quebec Liberal party who held office and participated in the failed constitutional talks of 1987<sup>20</sup> and 1992<sup>21</sup>. These failures coupled with the election of the PQ in 1994 laid the ground work for the 1995 Quebec referendum on sovereignty. While the separatists lost the vote, it was very close – 50.6 percent against and 49.4 percent for independence from Canada. While the PQ continued in office until 2003 this period saw no major movement related to sovereignty and their ability to advance their goals was diminished when they lost the election to the provincial Liberal Party in 2003.

In summary, Quebec's demands for greater provincial powers, increased language rights and separation, while adversarial, have been made within the framework of Canada's democratic system and rule of law, with the exception of the FLQ and the October Crisis of 1970 which was an extreme and unique example of illegal and violent protest. Quebec's demands for sovereignty or sovereignty-association lessened after the 1995 referendum, most probably because of the 1998 case on secession<sup>23</sup> and the election of a liberal and non-separatist government in 2003. With the defeat of the Liberal government by the Parti Quebecois in 2012, it is possible that these demands will be renewed and increased.

## **PART IV**

### **CANADA'S REACTIONS TO GROUP DEMANDS**

#### **First Nations**

In response to First Nation requests to vest the powers of the Indian Act with the chiefs and councillors on their reserves, in 1946, a special joint parliamentary committee of the Senate and the House of Commons undertook a broad review of Canada's policies and management of Indian affairs. The Committee hearings were one of the first occasions on which First Nations leaders and Elders were able to address parliamentarians directly instead of through the Department of Indian Affairs. While the joint committee did not recommend a full dismantling of the Indian Act and its assimilation policies, it did recommend that unilateral and mandatory elements of the Act be scaled back or revised. The committee also recommended that a Claims Commission be established to hear complaints



related to the government's failure to provide First Nation groups with the benefits promised in exchange for the land surrenders made under various treaties as described above in Part III.B.i of this paper. Despite the committee's recommendations, amendments to the Indian Act in 1951 did not bring about sweeping changes to the government's Indian policy and, accordingly, Canada's federal government continued to exercise considerable powers over the lives of First Nations.

In 1969, the federal government tabled a policy paper commonly known as the White Paper which called for a repeal of the Indian Act, an end to federal responsibility for First Nations and termination of special status. It also called for the decentralisation of Indian affairs to provincial governments, which would then administer services for First Nations. The White Paper further recommended that an equitable way be found to bring an end to treaties. In this way, the government hoped to abolish what it saw as a false separation between First Nations and the rest of Canadian society. First Nations overwhelmingly rejected the White Paper. The complete lack of consultation with the peoples who would be directly affected – First Nations themselves – was central to their criticism. It became apparent that while many people regarded the Indian Act as paternalistic and coercive, the Act nevertheless protected special Aboriginal status within the Confederation and therefore their specific rights. In the face of such strong negative reaction not only from First Nations, but also from the general public, the government withdrew the White Paper in 1971.

The government's attempt to change its relationship with First Nations created a new form of Aboriginal nationalism characterised by demands for more control to determine their own destiny including the ability to choose their own political status and form of economic, cultural and social development. As with Quebec, Aboriginal peoples began demanding greater sovereignty. First Nations leaders from across the country united in new associations and organisations determined to protect and promote their peoples' rights and interests. These organisations proposed their own policy alternatives. The Indian Association of Alberta, for example, argued in a paper entitled *Citizens Plus* that Aboriginal peoples held rights and benefits that other Canadians did not. Rallying around this concept, First Nations leaders argued that their people were entitled to all the benefits of Canadian citizenship, in addition to special rights deriving from their unique and historical relationship with the Crown. Again, like Quebec, First Nations believed that to be equal within Canada they must be viewed and treated differently. Formal equality, as proposed by the 1971 White Paper, was neither sufficient nor acceptable. The negative reaction from the general public to the White Paper proposal referred to above was in part an indication that Canada's non-Aboriginal people on one or more levels viewed Aboriginal people as needing or being entitled to different treatment within the Canadian federal union. Having said this, Aboriginal claims to lands or to the use of lands which impact the economic

benefits of non-Aboriginals has historically created tensions and it remains one of the most difficult areas of negotiation.

The special rights deriving from First Nations' unique and historical relationship with the Crown are referred to as Aboriginal Rights. These rights are collective rights which flow from Aboriginal peoples' continued use and occupation of certain areas. They are inherent rights which Aboriginal peoples have practiced and enjoyed since before European contact. Because each First Nation has historically functioned as a distinct society, there is no one official overarching Indigenous definition of what these rights are. Although these specific rights may vary between Aboriginal groups, in general they include rights to the land, rights to subsistence resources and activities, the right to self-determination and self-government, and the right to practice one's own culture and customs including language and religion. Aboriginal rights have not been granted from external sources but are a result of Aboriginal peoples' own occupation of their home territories as well as their ongoing social structures and political and legal systems. As such, Aboriginal rights are separate from rights afforded to non-Aboriginal Canadian citizens under Canadian common law.

It is difficult to specifically list these rights, as Aboriginal peoples and the Canadian government may hold differing views. Some rights that Aboriginal peoples have practiced and recognised for themselves have not been recognised by the Crown. In a move towards addressing this gap, in 1982 the federal government enshrined Aboriginal rights in Section 35 of the Canadian Constitution, and in Section 25 of the Charter of Rights and Freedoms, the government further ensured that Charter rights cannot 'abrogate or derogate' from Aboriginal rights. Yet the ensuing First Ministers' Conferences at Meech and Charlottetown could not reach a consensus on what specifically qualifies as an Aboriginal right, and the federal government has since recognised that, while Aboriginal rights exist, what these specific rights are will have to be determined over time through the court system.

Given the importance of self-government to providing First Nations with control over their own destinies and the fact that the 1982 Canadian Constitution and Charter did not acknowledge self-government as either a specific or Aboriginal right, First Nations continued to lobby the Canadian government for greater autonomy. In response, in 1983 a House of Commons Parliamentary Committee conducted a study and in its report stated that the right to self-government was inherent to all First Nations and should be entrenched in the Constitution alongside Aboriginal and treaty rights. Notwithstanding the report's recommendations, the 1987 Meech Lake Accord did not include the entrenchment of Aboriginal self-government in its proposed amendments to Canada's Constitution.

Accordingly, when it came time for the Manitoba provincial legislature to approve the Accord, First Nation protesters were outside raising awareness of their opposition to the accord. Unanimous support was needed to bypass a public

consultation process and Member of the Legislative Assembly, Elijah Harper, raised an eagle feather to mark his dissension. Harper's dissension assured the failure of the Meech Lake Accord and, as a result, the 1992 Charlottetown Accord approved Aboriginal self-government in principle and, to permit further negotiations on the form it would take, provided that after a period of three years the concept could be recognised in the courts. In addition, the Accord formally institutionalised the federal-provincial-territorial consultative process and provided for Aboriginal inclusion in certain circumstances. The amendments failed to obtain approval by public referendum and, thus, as with other Aboriginal rights, the right to Aboriginal self-government continues to be one that is not expressly entrenched in Canada's constitution today.

However, while not recognised as a constitutional right, the Government of Canada was spurred by, among other factors, the physical and armed violence between the government and First Nations in the Oka Crisis (1990) and Ipperwash and Gustafsen Lake confrontations (1995) [see Part III.B.i above] to launch the Inherent Right Policy in 1995. Under this policy the Government of Canada recognises the inherent right to self-government as an existing Aboriginal right under section 35 of the Constitution, and that the inherent right may find expression in treaties, and in the context of the Crown's relationship with treaty First Nations. This recognition includes the right to self-government 'in relation to matters that are internal to their communities, integral to their unique cultures, identities, traditions, languages and institutions, and with respect to their special relationship to their land and their resources.' This policy expressly states that the Aboriginal right to self-government '...does not include a right of sovereignty in the international law sense, and will not result in sovereign independent Aboriginal nation states. On the contrary, implementation of self-government should enhance the participation of Aboriginal peoples in the Canadian federation, and ensure that Aboriginal peoples and their governments do not exist in isolation, separate and apart from the rest of Canadian society (The Government of Canada's Approach to, n.d.).'<sup>23</sup>

The Inherent Right Policy also provides a process for the government of Canada to negotiate practical arrangements with Aboriginal groups to make a return to self-government a reality. This process involves extensive consultations with Aboriginal leaders at the local, regional and national levels. The policy states that: 1) new self-government agreements would be partnerships between Aboriginal peoples and the federal government; and, 2) no single form of government was applicable to all Aboriginal communities. Self-government arrangements would therefore take many forms based upon the particular historical, cultural, political and economic circumstances of each respective Aboriginal group. As of September 2012, 26 comprehensive land claim and self-government agreements, covering over 50 percent of Canada's land mass, had been ratified and brought into effect. There are also two stand-alone self-government agreements (Fact sheet, n.d.).

Finally, the Canadian government has made two significant non-constitutional or legislative gestures to recognise the place of First Nations within Canada and to address past mistreatment of Aboriginal peoples. The first was the 1996 designation of June 21 as National First Peoples Day to focus attention on the history, achievements and contributions of Aboriginal peoples in Canada.<sup>24</sup> The second was the 2006 apology made by Canada's Prime Minister in the House of Commons on behalf of the federal government and all Canadians to former students in Canada's residential school system.

As part of Canada's policies of assimilation, for more than a century over 150,000 aboriginal children were separated from their families and placed in residential schools. Many students were physically, emotionally, and sexually abused. In response to these atrocities and after years of negotiations, the implementation of the Indian Residential Schools Settlement Agreement began on 19 September 2007 aimed at achieving a fair and lasting resolution of the legacy of Indian Residential Schools (Settlement Agreements, n.d.). The apology in the House of Commons was intended to underscore the importance of the legislation and to provide a new beginning and opportunity for the federal government and First Nations to move forward in partnership. However, in 2013, Assembly of First Nations (AFN) National Chief Shawn Atleo said that in the five years since the apology, the relationship between First Nations and the government has not fundamentally changed and cited 'colonial notions' and 'imposed legislation' as barriers to progress (Reichel, J. (2013, June 13).

These comments by Chief Atleo and the rise of the Idle No More campaign described in Part III.C.i of this paper, indicates that, notwithstanding some of the positive responses by the Canadian government to First Nation demands described above, there are still demands that must be addressed for First Nations to receive equal, albeit different, benefits from the Canadian federal union. Accordingly, it is imperative that the government continue to assess its relationship with First Nations and institute constitutional, legislative and other measures in response to their needs and reasonable demands for the following reasons: 1) it is simply the right thing to do; 2) it is necessary to ensure Canadian adherence to international human rights standards; and 3) to avoid the potential for Indigenous insurgency as hypothesised by one of the MacDonald-Laurier reports referred to in Part III.C.i above (Bland, 2013).

### **French Canadians**

The Canadian Confederation was an innovation to cope with the major constitutional and economic issues of the day including the issue of how to accommodate the descendants of Canada's French speaking settlers. The incorporation of some of the provisions of the Quebec Act respecting Quebec's distinctiveness, including the official status of the French language in Quebec in the British North America Act, 1867 was a direct response to their demands.

In 1968 then Prime Minister, Pierre Elliot Trudeau, and the provincial premiers agreed, for the first time in Canadian history, to a broad constitutional renewal process that included patriation, an amending formula, changes to national institutions and the distribution of powers, and an entrenchment of rights in the constitution. At a federal-provincial conference held in Victoria, B.C. in 1971 (the Victoria Conference) an agreement was reached to reform Canada's constitution (Intergovernmental Affairs, n.d.). The agreement eventually failed primarily as a result of a fundamental disagreement in approach between the federal government and the English speaking provinces on the one hand and Quebec on the other. That is, while the former sought fairly small changes, Quebec was looking to achieve 'equality' not just by receiving safeguards for its cultural and linguistic rights, but by strengthening its 'national' government. This would have required a change to the division of powers between the federal and provincial governments, something the federal government was not willing to do (The Victoria Charter, nd.).

Before the 1980 referendum in Quebec, then Prime Minister Trudeau promised Quebecers who voted 'No' in the referendum that he would personally take action to renew efforts to patriate the constitution. After almost 60 percent of Quebecers voted against the referendum the federal government held a series of meetings with the provinces to discuss changes to the constitution. The federal government advocated patriating the constitution with a made-in-Canada amending formula; a statement of principles; a charter of rights; a constitutional commitment to reduce regional economic disparities (sometimes referred to as equalisation); and a strengthening of federal powers over the national economy. These meetings failed to reach a unanimous agreement, and on 2 October 1980 the federal government announced its intention to push ahead, unilaterally, in patriating the constitution without the agreement of the provinces. Eight of the provinces immediately objected to this action as unconstitutional, and three provinces, including Quebec, asked for a ruling from their provincial Courts of Appeal on the constitutionality of the federal government's proposed plan. In response the federal government agreed to refer all questions to the Supreme Court and on September 28, 1981, the Court deemed unilateral patriation of the Constitution to be legal.<sup>25</sup> The court added, however, that while not required by law, significant provincial consent was required by constitutional convention<sup>26</sup> before the federal-provincial relationship could be altered.

Quebec's failure to sign the Constitution Act, 1982 led to several additional attempts by the federal government to bring Quebec into Canada. The first round of formal talks was held in 1987 at Meech Lake, Quebec, thirty minutes outside of Ottawa. At this meeting led by Prime Minister Brian Mulroney and attended by the provincial premiers, an accord was negotiated which identified five main modifications to the Canadian constitution: a recognition of Quebec as a 'distinct society'; a constitutional veto for all provinces; increased provincial powers with respect to immigration; extension and regulation of the right for a reasonable

financial compensation to any province that chooses to opt out of any future federal programs in areas of exclusive provincial jurisdiction; and provincial input in the appointment of senators and Supreme Court judges (Primary Documents, ca. n.d.). Because the accord would have changed the constitution amending formula, it needed to obtain the consent of all provincial and federal legislatures within three years.

Opposition to the Meech Lake Accord was voiced from both French and English Canada. The opposition PQ party opposed it when it was debated in the Quebec National Assembly and some outside of Quebec viewed the 'distinct society' clause as granting Quebec 'special' status. It ultimately failed to obtain consent of the provinces within the three year period.

The 1992 Charlottetown Accord package of proposed amendments to the constitution contained the 'Canada Clause' which sought to codify the values that define the nature of the Canadian character. These values included egalitarianism, diversity, and the recognition of Quebec as a distinct society within Canada. The Accord's ratification process provided for a national referendum. Quebec opted not to participate in the federal referendum but to conduct its own separate vote. The referendum campaign was one of 'yes' and 'no.' On the 'yes' side, while acknowledging that the accord was a compromise and had many flaws, its advocates felt that without it the country would break apart. The 'no' side included the western-based Reform Party which was opposed, among other things, to 'distinct society,' as well as the federal and provincial Quebec sovereigntists, the Bloc Quebecois and the Parti Quebecois, who felt the Accord did not give Quebec enough powers. The federal and Quebec referendums were both held on 26 October 1992. Approximately 72 percent of the population turned out to vote and, while the votes were tabulated and varied by province, overall Canadians voted 54 percent 'no' and 46 percent 'yes.' The Charlottetown Accord defeated in both Quebec and English Canada, but for different reasons in each case. Many Quebecers voted no because they thought the Accord did not give Quebec enough through the federal division of powers, while many English Canadians voted no because they thought recognizing Quebec as a distinct society gave it too much power and created an imbalance of powers between it and the other provinces (Marquis, 1993).

After 49.4 percent Quebecers voted in favour of sovereignty in the 1995 provincial referendum the federal government responded in numerous ways. First, and almost immediately, the House of Commons and the Senate passed a resolution in November 1995 recognizing Quebec as a distinct society within Canada. Like the Charlotte Town Accord but in contrast to Meech Lake, the resolution recognises the distinct character of Quebec's unique culture, civil law tradition and French speaking majority (O'Neal, 1995: 22). Second, in 1996, Quebec's demand for a veto over constitutional change was met when the Parliament of Canada passed Bill C-110<sup>27</sup> which requires the consent of Quebec, Ontario, British Columbia, the Prairie provinces and the Atlantic provinces before the federal government can

propose constitutional amendments to Parliament. Third, through a reference by the Governor in Council, the federal government asked the Supreme Court of Canada to consider the question of Quebec's secession from Canada. The Court held that, even in the event of a clear referendum result in favour of separation, Quebec did not have a unilateral right to secede from Canada because:

The Constitution vouchsafes order and stability, and accordingly secession of a province "under the Constitution" could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.

Fourth, in 2000, the Canadian House of Commons passed the Clarity Act (Clarity Act, n.d.)<sup>28</sup> which was designed to give effect to the opinion in the 1998 Quebec Secession Reference.

The last two responses to the 1995 referendum were clearly to ensure Quebec 'knew the rules' should it ever, in fact, get enough support to proceed with separation from Canada. The first and second, however, can be seen as an attempts by Canada to keep Quebec within the union by directly responding to its demands. Another measure taken by the federal government in the same spirit was the passing of a motion in Canada's House of Commons on 7 November 2006 recognizing the Quebecois '...as a nation within a united Canada' (CBC, 2006; emphasis added). Canadian Prime Minister, Stephen Harper, said he was using the word nation in a 'cultural-sociological' rather than in a legal sense. It is important to note that the government's motion was a reaction to Quebec's national separatist party, the Bloc Quebecois, motion to declare Quebecers a nation without reference to Canada. While the Bloc ultimately supported the government's motion it is important to note that they had initially requested an amendment to the government's motion to say that they are a nation 'currently within Canada,' which was clearly an attempt to leave the door open to independence. It should also be noted that the federal government's emphasis that Quebec's right to self-determination be limited to self-government within the context of the Canadian federal union is consistent with its position on Aboriginal self-government as proposed under the failed Charlottetown Accord and subsequently embodied in its Aboriginal Inherent Right Policy as described above (Reference Re Secession of Quebec, 1998).

## **PART V**

### **APPLICATION OF THE CANADIAN MODEL AND LESSONS FOR NEPAL**

While there are many differences between Canada and Nepal, the author believes that Canadian federal model and the manner in which Canadian governments have managed group identity and identity politics has application to Nepal in the 21st Century. Referring to the Canadian experience in the development of

its federal system set out above, this part will make specific observations on how Nepal might use the Canadian experience to develop a strong and vibrant federal democratic union.

### **Threshold of Applicability**

As noted above, the province of Quebec and First Nation communities perceive their place within Canada as ‘distinct’ and as requiring different treatment in order for their languages, religions and cultures to enjoy equal standing and benefit within the federal union. This creates tensions between Quebec and Canada’s other provinces who view Quebec as but one of ten provinces and, as such, should not enjoy ‘more powers’ than any other(s) within the union. It also creates tensions between Canada’s Aboriginal and non-Aboriginal populations when First Nation land claims threaten to diminish non-aboriginal rights and economic benefits. Canadians, however, have learned to live with these tensions. Historically Quebec and First Nations have made demands and the federal government has responded with constitutional amendments, legislative enactments, policies, processes and symbolic gestures providing them with more powers, more land, more financial resources, economic opportunities or, perhaps, just a sense of dignity. The rest of Canada, often begrudgingly yet secure in its position as the majority, ultimately accept these concessions as the cost of maintaining the integrity of Canada’s federal union. Concessions and compromises have also been made by Quebec and First Nations such as Quebec’s eventual revision of its sign law and reduced use of the constitution’s Notwithstanding clause, and the First Nations acceptance of the Aboriginal right to self-government being recognised through a policy as opposed to being entrenched in the constitution. This illustrates that for the Canadian model to have any application to Nepal a majority of its citizens, from both its dominant and non-dominant groups, must, at some level, value the unity of its current component parts geographically and ethnically.

### **Consequences of Ignoring Group Needs**

#### *Protest and violence leading to political and economic instability*

Canada has learned that if it doesn’t address the needs or recognise the rights of various groups they will demand them – sometimes violently. The FLQ and the October and Oka crises are extreme examples of what groups in Canada are capable of when they are ignored and/or extremely frustrated. Government actions or omissions that create or contribute to a situation of poverty or destitutions can create ‘warrior cohorts’<sup>29</sup> that pose potential direct threats to political and economic stability. The current fear in Canada of young, unemployed Aboriginal males vandalizing and rendering inoperable resource industry facilities is a prime example. Nepal is no stranger to protest, violence or warrior cohorts and the Canadian experience highlights that it ought to be particularly mindful of



ensuring all groups are consulted, included in decision making both before and after the promulgation of the constitution and are recognised in constitutional, other legal and non-legal ways. It is important to note that all groups, dominant and non-dominant, benefit from recognition and protection of individual and group rights by reducing the risk of civil unrest, violence and political and economic instability.

### *Threat of secession*

Nepal's elites and academics have voiced fears that federalisation will lead to disintegration or secession. There is no question that ignoring the needs of groups with a geographical land base and a unique linguistic or cultural history has the potential to create a desire and a demand to secede from the larger political union. As to how Nepal should address its fears, the author agrees with Kymlicka (2009, p 6) that "... A state can only fully enjoy the benefits of democracy and federalism if it is willing to live with the risk of secession...." In the Quebec Secession Reference the Supreme Court of Canada held that, subject to negotiation with Canada's federal and provincial governments, First Nations and minorities within the territorial boundaries of Quebec, Quebec has a right to secede. And Canada's acceptance of Quebec's secession would be, as Kymlicka points out, dependent on whether or not Canada, without Quebec, would continue to exist as a viable and prosperous democracy (Kymlicka, 2009:12). Of course the risk of Quebec leaving its union with Canada can also be measured by an assessment of whether Quebec could exist as a viable and prosperous democracy on its own. This author believes that the uncertainty of the answer to this question is why Quebecers did not vote for sovereignty in either the 1980 or 1995 referendums. This uncertainty and knowing that, subject to certain requirements, they could secede in the future, is the glue that holds Quebec within Canada. In order to move beyond fear of secession, Nepal must assess the risk and consider if it will address the issue constitutionally or otherwise. To assess the risk of secession Nepal must ask if it could exist as a viable and prosperous nation without the Tarai and/or if the Tarai could truly exist without Nepal. If, as postured by Kymlicka, and as borne out by the Quebec example in Canada, allowing secession as an option increases the chances of the Tarai staying, then perhaps it is worth stating this expressly in the constitution as well as setting out any conditions such a right is subject to.

### *Judicial activism*

With the opportunity to draft a new constitution Nepal can decide whether it wants to grant and protect the rights being requested by the various groups or risk having the courts grant them over the course of time. Because, if there is one thing Canadian constitutional history and jurisprudence shows, it is that judges who want to do justice in difficult cases will find ways to expand the words of the written constitution and even to imply unwritten obligations and limitations of the state to respond to group demands or injustices.

The advantage of including the requests of all groups in the written document is that it shows a commitment to the kind of shared rule federalism was created to advance. Non-inclusion will require/allow the courts to consider the demands of groups and to direct the state to create a balance between the centre and provincial governments, the dominant and non-dominant groups over time. Either way, as evidenced by the Canadian experience, federalism is a governance structure that allows growth and therefore can serve and advance the interests of both the dominant and non-dominant groups.

### **Balancing the Needs of Groups in a Unified Nepal**

#### *Self-rule versus shared rule*

Canada provides for self-rule (provincial and territorial) within the framework of shared rule – its federal system. In addition to Canada's ten provinces and three territories, as noted in Part IV above, since 1995 the federal government has negotiated 26 comprehensive land claim and self-government agreements and it is in the process of negotiating more. The process is based upon The Government of Canada's Approach to Implementation of the Inherent Right and Negotiation of Aboriginal Self-Government (The Government of Canada..., n.d.) which is a policy of shared rule. The policy clearly sets out: 1) areas in which Aboriginals might want and should, if they so choose, have jurisdiction over; 2) areas which could be shared; and 3) areas over which the federal government must have sole jurisdiction. This process illustrates that not all questions or arrangements related to self or shared rule need to be addressed in the constitution, or at the same time or include the exact same division of powers and responsibilities. Nepal's lawmakers may wish to review this policy as they consider how to manage demands for autonomy and self-rule of groups within the territorial boundaries of Nepal's new provincial governments.

For non-dominant groups to optimise the concept of shared rule, the example of Elijah Harper blocking the passing of the Meech Lake Accord in the Manitoba provincial legislature underscores the importance of ensuring these groups have representatives elected to federal and provincial parliaments and a seat at any table, or on anybody, making decisions that will directly impact their interests.

### **Managing and protecting minorities within minorities**

Quebec's sensitivity to accommodation and tolerance of multiculturalism, as evidenced by its recent, albeit temporary, ban on Sikh youth wearing turbans on the soccer field, flags the concern of theorists and politicians related to the oppression of minorities by other minorities. As noted in Part II above, Canada's federal union provided mechanisms which caused Quebec to reverse a decision

that clearly discriminated against Sikhs as a group and as individuals. Nepal can look to the Canadian federal model and experience to develop its own mechanisms to guard against the ability of minority groups to discriminate against other minority groups. Such mechanisms would include those that create a balance of rights between groups and the balance of the rights between groups and individuals. This can be done through the constitution, legislation, the courts or, as in the Quebec turban ban case, through federal-provincial sporting associations. With respect to the courts, it is important to note that Canada's concept of an implied bill of rights is based upon the structure of Canada's federalism, specifically, on the division of powers between the federal and provincial governments<sup>30</sup> which gives the federal government the exclusive power to create criminal legislation. Pursuant to the Canadian Supreme Court's decision in the Saumur case (*Saumur vs. The City of Quebec*, (1953) referred to under Part II above, where provincial legislation intrudes deeply into fundamental rights, it is creating criminal legislation which is, therefore, ultra vires its jurisdiction. This allowed the courts to render a provincial law that discriminated against a minority group void and of no effect. Accordingly, if Nepal's new constitution gives the federal government jurisdiction over criminal law, this, coupled with any individual or group rights it entrenches, may provide a useful mechanism to counter any attempt by a provincial government led by one dominant ethnic group to discriminate against one or more non-dominant groups.

### **Symbolic recognition**

As noted in Part IV above, in recent years the Canadian government has made a number of non-constitutional, non-legislative gestures to respond to the demands of its First Nations and the province of Quebec. With respect to the former, in 1996 Parliament declared June 21 as National Aboriginal Day and in 2008 it apologised for the wrongs meted out through its residential school system to Aboriginal children. With respect to Quebec, the House of Commons passed a resolution recognizing that province as a distinct society (1995) and as a nation within Canada (2006). These types of gestures do not entrench rights, pay compensation or have the force of law yet they acknowledge the character, importance and status of a particular group within the larger political body. They can help to right past wrongs and imbue the group with pride and dignity. Gestures of recognition, celebration and reconciliation are important tools to address identity issues and strengthen unity. And, in terms of time, cost and effort to effect, the investment is generally low while the returns are potentially quite high. Nepal can consider using symbolic recognition of one or more groups in situations where constitutional and/or legislative recognition is untenable for either practical or political reasons.

### Special group recognition

Canada uses its federal structure to officially recognise two languages – French and English – and it does so in different ways with the federal government and New Brunswick being officially bilingual, Quebec being officially unilingual (French) and Ontario, New Brunswick and Manitoba requiring the government to provide services in French where justified by the number of whose mother tongue is French and the Canadian Charter requires all provinces to provide primary and secondary education to their French and English minorities at public expense. Nepal will similarly want to use its federal structure to address the issue of official languages.

Canada, however, is not a country of only two languages. In its 2011 Census of Population more than 200 languages were reported as a home language or mother tongue (The Daily, 2012) – a number greater than the languages and dialects that a federal system in Nepal would be required to manage. The 2011 Census also reported that one-fifth of Canada's population spoke a language other than English or French at home, either alone or in some combination with English or French – a reality also reflective of Nepal's various ethnic groups who speak their mother tongue either alone or in some combination with Nepali, Maithili, Bhojpuri, Tharu and Tamang, to name just a few.

For administrative and financial reasons, Nepal's federal and provincial governments will necessarily have to choose one or a limited number of official languages in which they will do business (Choudhry, 2009). This does not mean, however, that they cannot recognise or meet the demands of those citizens whose mother tongues do not receive official language status. While not yet pervasive across Canada, the provision of public services in a multitude of languages is becoming more common at the local level. As an example, the city of Toronto offers a range of public service information in more than 180 languages (City of Toronto, n.d.) using telephone interpretation services. In addition the information on the city's website can be browsed and read in more than 51 languages using Google Translate (Welcome to City of Toronto, website, n.d.). Toronto city courts also provide interpretation services for defendants in a number of languages and dialects. These are but a few examples of how technology and local administrative options can respond to the demands for linguistic recognition and the need/desire to receive public services in their mother tongue. In the 'new' Nepal, these types of services and others could be provided by the federal government nation-wide and by provincial governments in areas of their jurisdiction as well as by municipal or local governments as in the case of the city of Toronto (see Choudhary, 2009).

## PART VI

### CONCLUSION

Perhaps because Great Britain was forced to recognise group rights to land, culture, language and religion of its First Nations and French speaking populations, it is now, in the 21st Century, more open to accept the languages, cultures and religions of new groups. While this paper has focused on Canada's three major groups, the English, the French and First Nations, Canada has welcomed people from all over the world and its federal system and official policy of multiculturalism work together in an attempt to accommodate all ethnic and linguistic groups. Multiculturalism is a Canadian value adopted as the official policy of the Canadian government under Prime Minister Pierre Elliot Trudeau in the 1970s and 1980s. And, while its application is limited in Quebec, for reasons discussed in Part II above, in the rest of Canada it permeates the collective psyche and is reflected in federal, provincial and local government policies and legislation as well as in decisions by judicial and quasi-judicial bodies.

Indeed, in a 2002 interview with the *Globe and Mail*, Karim al-Hussaini, the 49th Aga Khan of the Ismaili Muslims described Canada as 'the most successful pluralist society on the face of our globe,' citing it as 'a model for the world.' He explained that the experience of Canadian governance – its commitment to pluralism and its support for the rich multicultural diversity of its peoples – is something that must be shared and would be of benefit to all societies in other parts of the world (Martin 2002, p F-3). It is hoped that the Canadian federal experience shared in this paper will be of benefit to Nepal as it moves forward to design and implement its new federal, democratic structure to govern the rich diversity of its peoples.

### REFERENCE

- Amnesty International (2012). *Matching international commitments with national action: A human rights agenda for Canada*. Retrieved August 23, 2014 from <http://www.amnesty.ca/sites/default/files/canadaaihra19december12.pdf>.
- Belanger, C. (1998). *The Victoria Charter, Constitutional Reform and Quebec (1971)*. Retrieved August 23, 2014 from <http://faculty.marianopolis.edu/c.belanger/quebechistory/readings/victoria.htm>.
- Bland, D.L. (2013). *Canada and the First Nations: Cooperation or conflict?* Ottawa: MacDonald-Laurier Institute Publication. Retrieved August 23, 2014 from [http://www.macdonaldlaurier.ca/files/pdf/2013.01.05-MLI-Canada\\_FirstNations\\_BLAND\\_vWEB.pdf](http://www.macdonaldlaurier.ca/files/pdf/2013.01.05-MLI-Canada_FirstNations_BLAND_vWEB.pdf).
- Boston Herald (2013, June 14). FIFA rules male players can wear turbans. Retrieved August 23, 2014 from [http://bostonherald.com/sports/revolution\\_soccer/soccer/2013/06/fifa\\_rules\\_male\\_players\\_can\\_wear\\_turbans](http://bostonherald.com/sports/revolution_soccer/soccer/2013/06/fifa_rules_male_players_can_wear_turbans).
- Calls for Change. (n.d.). Retrieved August 26, 2013, from [http://www.idlenomore.ca/calls\\_for\\_change](http://www.idlenomore.ca/calls_for_change)
- CBC. (1950). Diefenbaker, J. (1950, March 16). Dief the chief – the Canadian bill of rights. [Radio broadcast]. Retrieved August 23, 2014 from <http://www.cbc.ca/archives/categories/politics/prime-ministers/john-diefenbaker-dief-the-chief/the-canadian-bill-of-rights.html>.
- CBC. (1960). Canada gets its own bill of rights. Retrieved August 23, 2014 from <http://www.cbc.ca/archives/categories/politics/the-constitution/the-constitution-general/canada-gets-its-own-bill-of-rights.html>.
- CBC. (2006, November 27). House passes motion recognizing Quebecois as nation. *CBC news*. Retrieved August, 23, 2014 from <http://www.cbc.ca/news/canada/story/2006/11/27/nation-vote.html>.

- Choudhry, S. (2009). Drafting Nepal's language policy. *Federations*. Retrieved August 24, 2014 from <http://www.forumfed.org/en/products/magazine/Nepal-2009/Nepal-language-policy.php>.
- City of Toronto. (n.d.). Retrieved August 26, 2013, from <http://www.toronto.ca/311/languages.htm>.
- Clarity Act. (n.d.). Retrieved August 26, 2013, from <http://www.canadianlawsite.ca/clarity-act.htm>.
- Cotes, K. & Crowley, B.L. (2013). *New beginnings: Canada's natural resource wealth could reshape relations with Aboriginal people*. Ottawa: Macdonald-Laurier Institute. Retrieved August 24, 2014 from [http://www.macdonaldlaurier.ca/files/pdf/2013.01.05-MLI-New\\_Beginnings\\_Coates\\_vWEB.pdf](http://www.macdonaldlaurier.ca/files/pdf/2013.01.05-MLI-New_Beginnings_Coates_vWEB.pdf).
- Current Features. (n.d.). Retrieved August 26, 2013, from <http://www.veterans.gc.ca/eng/>.
- Dickinson, J. & Young, B. (2003). *A short history of Quebec*. Montreal: McGill-Queen's University Press.
- Fact Sheet: Implementation of Final Agreements. (n.d.). Retrieved August 26, 2013, from <http://www.aadnc-aandc.gc.ca/eng/1100100030580/1100100030581>.
- Government of Canada. (1969). The White Paper, 1969. Retrieved August 24, 2014 from <http://indigenousfoundations.arts.ubc.ca/home/government-policy/the-white-paper-1969.html>.
- Ignatieff, M. (2001). *Human rights as Politics and Idolatry*. New Jersey: Princeton University Press.
- Intergovernmental Affairs - Intergovernmental Affairs. (n.d.). Retrieved August 26, 2013, from <http://www.pco-bcp.gc.ca/aia/index.asp?lang=eng&page=constitution&doc=victoria-eng.htm>.
- Kymlicka, W. (2009). Federalism and secession: At home and abroad. *Canadian Journal of Law and Jurisprudence*. 13(2): 207-24.
- Marquis, P. (1993). *Referendums in Canada: The effect of populist decision-making in representative democracy*. Background Paper BP-328E. Ottawa: Parliamentary Research Branch, Library of Parliament. Retrieved August 24, 2014 from <http://www.parl.gc.ca/content/lop/researchpublications/bp328-e.pdf>.
- (n.d.)a. Retrieved August 26, 2013, from <http://dictionary.reference.com/browse/multiculturalism>.
- (n.d.)b. Retrieved August 26, 2013, from [http://en.wikipedia.org/wiki/List\\_of\\_First\\_Nations\\_people](http://en.wikipedia.org/wiki/List_of_First_Nations_people)
- O'Neal, B. (1995). *Distinct society: Origins, intentions, implications*. Background Paper BP-408E. Ottawa: Parliamentary Research Branch, Library of Parliament. Retrieved August 24, 2014 from <http://publications.gc.ca/Collection-R/LoPbDP/BP/bp408-e.htm>.
- Primary Documents.ca. (n.d.). Retrieved August 26, 2013, from <http://www.originaldocuments.ca/documents/1stMinistersConfMeechCom1987Apr30>.
- Reichel, J. (2013, June 13). Canada's residential school apology five years on. *Epoch Times*.
- Saul, J.R. (1997). *Reflections of a Siamese twin: Canada at the end of the twentieth century*. Toronto: Viking.
- Stackhouse, J. & Martin, P. (2002, Feb. 2). Canada: A model for the world. *The Globe and Mail*: F-3
- Taylor, C. (2011, November 3). (Malamet, E. Interviewer). Retrieved on August 24, 2014 from <http://www.youtube.com/watch?v=RV2fDNVb1sc>.
- Taylor, C. (1994). The politics of recognition. In Gutman, A. (Ed.) *Multiculturalism: Examining the politics of recognition*. Princeton: Princeton University Press.
- The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government. (n.d.). Retrieved August 26, 2013, from <http://www.aadnc-aandc.gc.ca/eng/1100100031843/1100100031844#PartII>.
- The Story. (n.d.). Retrieved August 26, 2013, from <http://www.idlenomore.ca/story>.
- The Victoria Charter, Constitutional Reform And Quebec (1971) - Readings - Quebec History. (n.d.). Retrieved November 23, 2014, from <http://faculty.marianopolis.edu/c.belanger/quebechistory/readings/victoria.htm>.
- The Vision. (n.d.). Retrieved August 26, 2013, from <http://www.idlenomore.ca/vision>.
- The War of the Conquest (1756-1760). (n.d.). Retrieved August 26, 2013, from [http://www.slmc.uottawa.ca/?q=seven\\_years](http://www.slmc.uottawa.ca/?q=seven_years).
- Treaties with Aboriginal people in Canada. (n.d.). Retrieved August 26, 2013, from <http://www.aadnc-aandc.gc.ca/eng/1100100032291/1100100032292>.
- Settlement Agreement. (n.d.). Retrieved August 26, 2013, from <http://www.aadnc-aandc.gc.ca/eng/1100100015638/1100100015639>.
- Statistics Canada. (2012). 2011 census of population: Linguistic characteristics of Canadians. Retrieved August 24, 2014 from <http://www.statcan.gc.ca/daily-quotidien/121024/dq121024a-eng.htm>.
- Warrior Publications. (n.d.). Retrieved August 26, 2013, from <http://warriorpublications.wordpress.com>
- Welcome to the City of Toronto website. (n.d.). Retrieved August 26, 2013, from <http://www.toronto.ca>.
- Who We Are | Macdonald-Laurier Institute. (n.d.). Retrieved August 26, 2013, from <http://www.macdonaldlaurier.ca/about/who-we-are>.

#### Court cases:

- Saumur vs. The City of Quebec* [1953] 2 S.C.R. 299
- R. v. Drybones*, [1970] S.C.R. 282.
- Attorney General of Canada v. Lavell; Isaac v. Bédard*, [1974] S.C.R. 1349
- Bliss v. Canada* (Attorney General) [1979] 1 S.C.R. 183
- Grant v. Canada*, [1995] 1 F.C. 158 Federal Court of Canada
- Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, 2006 SCC 6
- Kanatewat et al v. James Bay Development Corp et al*, [1973] Superior Court of Quebec.
- Calder et al v. Attorney-General of British Columbia*, [1973] S.C.R. 313
- Ford v. Quebec*(AG)[1988] 2 S.C.R.712, and, *Devine v. Quebec* (AG) [1988] 2 S.C.R. 790

# CHAPTER 11

## THE ACCOMMODATION OF THE PRINCIPLE OF UNITY IN DIVERSITY IN THE CONTEXT OF SPAIN AND NEPAL: IDEALISM OR REALITY?

- IRANTZU PINILLOS URRA





## INTRODUCTION

A century's long process of authoritarian and centralized state building nationalism was enforced with the heaviest hand during the military dictatorship led by General Franco, which was grounded in a unitary and exclusionary conception of Spain and Spanishness. During almost four decades of totalitarian regime, any manifestation of pluralism, be it linguistic, cultural, political or related to identity was brutally suppressed; voices emanating from the Basque Country and Catalonia demanding decentralization<sup>1</sup>, asking for regional autonomy and in some cases claiming the right to self-determination, were not only disregarded, but harshly repressed.

Both the Basque Country and Catalonia enjoyed significant levels of self-government during the short-lived first (1873-74) and second Spanish Republic (1931-39), but these were eliminated with the advent of the General Franco's dictatorial regime (Témime, Broder, Chastagnaret, & Carreras, 1995). The atrocities committed by this regime contributed to increased demands for recognition and respect by both the Basques and the Catalans that could not be openly articulated until the beginning of a democratic transition in 1975. After the demise of Franco's dictatorship, political forces in the Basque Country and Catalonia started voicing their own conceptions of national identity and their views concerning the re-organization and re-structuring of the Spanish state and their own territories.

The Constitution of Spain of 1978 recognizes linguistic, cultural, and some degree of national pluralism and outlines the establishment of autonomous regions. However, Spain's transition to democracy, including the constitution writing process, was faced with many challenges, including bringing together a fractured and polarized country, and accommodating the aspirations for recognition of their distinct identity from the Basque Country and Catalonia. Forging a compromise over issues of national identity proved an almost insurmountable task with far-reaching and long-lasting consequences for the relationship of the Basque Country and Catalonia with the central government. A relationship, often tense and not very amicable, that still today is characterized by constant tensions and contests. The study of the constitution writing and state restructuring processes in Spain, with a particular focus on the demands and grievances coming from the Basque Country and Catalonia, is relevant to the current process of democratic

transition in Nepal in which different groups in the Nepalese social and political sphere are demanding recognition and accommodation of their identities in the still to be written new Constitution of Nepal.

The aim of this paper is to highlight some elements and lessons learned from the Spanish experience that might be worth considering in the Nepalese context, while bearing in mind the differences in the conditions and circumstances of the democratic transitions in both Spain and in Nepal, as well as the very different social and political dynamics and realities in both countries.

### **BASQUE COUNTRY AND CATALONIA: WHAT MAKES THEM DIFFERENT?**

The term Basque Country, or Euskal Herria, has traditionally referred to the Basque-speaking populations and to the lands occupied by them. Historically, the Basque Country was composed of seven provinces, including Bizkaia, Gipuzkoa, Araba, Nafarroa<sup>2</sup>, and Lapurdi, Zuberoa and Nafarroa Behera<sup>3</sup> where the Basque language, also known as Euskera, was spoken and Basque culture practiced. The current Basque Autonomous Community is composed by only Bizkaia, Gipuzkoa and Araba<sup>4</sup>, though Basque language is also spoken in the other provinces listed above. The Basques are regarded as ethnically different and spoke an ancient language unrelated to any other European language. Basque<sup>5</sup> is considered to be the last remaining descendant of the pre-Indo-European languages of Western Europe and remains isolated from other known language families. Over the last centuries, the Basque-speaking population decreased considerably due to political persecution, attempts at language annihilation that took place during the above-mentioned military dictatorship, as well as a consequence of the influence of Latin languages. The United Nations Educational, Scientific and Cultural Organisation (UNESCO) Red Book of Endangered Languages (Moseley, 2010) includes Basque as a vulnerable language in Spain<sup>6</sup>. As of January 2011, the population of the Basque Country was 2.179.815<sup>7</sup>, a significant proportion of which moved there from different regions in Spain during the Basque industrialization process that started in the mid-nineteenth century.

The current Catalonia (or Autonomous Community of Catalonia) is composed of four provinces: Lleida, Girona, Tarragona and Barcelona. However, the Catalan language and culture are also present and practiced in Valencia, the Balearic Islands, Aragon<sup>8</sup>, and in some parts of France, Andorra and Italy. In the late nineteenth century, the term Catalan Countries, or Paisos Catalans, was first used by some Catalan intellectuals in reference to the territories in which the different varieties of Catalan were spoken. This concept, which initially had a cultural and linguistic dimension, became increasingly politically charged by the late 1960s and early 1970s in opposition to Franco's exclusionary state building nationalism that imposed Spanish language and culture and in reference to

the Catalan Countries as a unitary nation with a shared culture that had been divided by the course of history, but which should be politically reunited<sup>9</sup>. Unlike Basque language the origins of which are uncertain, Catalan is regarded as a Romance language that developed from Latin and is therefore easier to learn and understand for any Spanish speaker. The use of Catalan language was also strongly suppressed during Franco's military dictatorship, but given that the language had a wider social use than in the Basque Country, Catalan did not experience such a backward set-back, as was the case with Basque. Catalan is not included in UNESCO's Red Book of Endangered Languages. Catalonia has a population of 7.547.000 inhabitants<sup>10</sup> many of whom migrated from other parts of Spain during the industrialization process that began in Catalonia in the eighteenth century manufacture of cotton goods and other textiles.

Both the Basque Country and Catalonia are considered "historical nationalities"<sup>11</sup> with a longstanding tradition of self-government and a strong historically constituted sense of identity based in their own languages and cultural practices. For centuries, local Basque institutions of governance enjoyed certain powers and customary privileges that among others exempted Basque people from taxation and military service (Conversi, 2000: 45). These local charters and laws also known as *fueros* were codified and formally established in agreements signed with the Spanish monarchy in the seventeenth and eighteenth centuries, but date back to the seventh century. Notwithstanding the politically very restricted powers of the Basque institutions, the economic powers conferred upon them led to a culture rooted in self-government, as well as to the distinction of the Basque society from the rest of Spain. In the case of Catalonia, it has also maintained a constant will to self-government over the course of the last centuries<sup>12</sup>. In 1359 the first Catalan institutions were created along with their own specific legal system, which was assembled together with other legal compilations in the *Constitucions i altres drets de Catalunya* (Constitutions and other laws of Catalonia). The collection of taxes was also part of this legal system. However, Catalan political institutions were eliminated by the Spanish and French crowns following the War of Spanish Succession (1700–13) (War of Spanish Succession, n.d.). These institutions, which enjoyed extensive self-government, were reestablished during the Second Republic in the 1932 Statute of Autonomy of Catalonia. However, Catalonia was again deprived of any power of self-rule by Franco's military dictatorship after the Spanish Civil War (1936-39).

It is important to emphasize that Spain has never had a single national state identity that embraces all Spaniards. In both the Basque Country and Catalonia, expressions of some sort of dual identity and feelings of being both Spanish and Basque or Catalan in the same or different degree have long existed, as have expressions of identification exclusively with a Basque or Catalan nation<sup>13</sup>, denying any Spanish identity. Bearing in mind that it should be the responsibility of a state to promote an inclusive national identity or identities that embraces other sub-identities that may co-exist in a country, it can be argued that modern

Spain has never done so. Continuous centralizing attempts to homogenize Spain under a sole conception of Spanishness have clashed over and over again with regional efforts in the Basque Country and Catalonia demanding that their languages and cultures be recognized, valued and respected, historical injustices acknowledged and a pluralist vision of identity established and promoted. For the purpose of this paper, the term Spanishness makes reference to a mindset linked to the concept of Spanish nationalism developed and enforced particularly during Franco's dictatorship which considers Spanish language and culture as superior to Basque and Catalan and neglects and defames everything related to them. This mindset represents an exclusionary vision of what being a Spaniard is with no place for the acknowledgment of diversity and pluralism as represented by the Basque Country and Catalonia which are seen as a threat to the indivisibility of Spain and to the then project of a "One, Big and Free" Spain, famous Francoist slogan.

## **HISTORICAL BACKGROUND OF A COUNTRY UNDER CONSTRUCTION**

Modern Spain was originally composed of a number of independent kingdoms that had their own laws and institutions, as well as their own social, political, economic and cultural realities. These kingdoms emerged as a unified country in the fifteenth century, following the marriage of the Catholic Monarchs and the completion of the *Reconquista* of the Iberian peninsula which brought an end to a 781-year presence of Islamic rule (Témime, Broder, Chastagnaret, & Carreras, 1995: 165-170). It was in the eighteenth century when competing visions of the Spanish state and national identity began to manifest. With the rise to power of a new Bourbon monarchy, a process of centralizing state power and of building a unified nation-state relying heavily on military means started. The unification process continued throughout the nineteenth century, but against the backdrop of several political and military challenges<sup>14</sup> that weakened the Spanish state significantly. It was also in the nineteenth century that both Catalonia, and later on the Basque Country, experienced considerable economic growth following a process of industrialization. This economic growth brought wealth and prosperity to these two regions while the rest of Spain remained predominantly agricultural.

The State's lack of ability to attain a process of economic transformation and modernization and the Crown's obsession with centralizing power and a narrow-minded concept of Spanishness began to compete with conflicting views of the Spanish state and national identity steaming from the Basque Country and Catalonia. The process of state centralization was first challenged during the first Spanish Republic (1873-1874) when unsuccessful attempts were made to introduce federalism and to implement a territorial structure and division of power. Following the Basque defeat in the Second Carlist War (1872-76), the

traditional local privileges or *fueros* were abolished by the Spanish Crown. It was during the second Spanish Republic (1931-1939) that self-government was granted to the Basque Country and Catalonia in the Statutes of Autonomy that were approved in 1936 and in 1932 respectively. However, this autonomy did not last long. The Spanish civil war (1936-1939) between the republicans and the Spanish nationalists, which was partly about destroying regional autonomy and reinstating national unity, brought an end to self-government. The civil war was won by the Spanish nationalists and General Franco who rose to power in 1939. Because both the Basque Country and Catalonia fought on the republican side to defend their newly granted autonomy, Franco labelled them as traitor provinces (Bernatowicz, 1992: 149) and revoked their respective Statutes of Autonomy. In the case of the Basque Country, Franco also instigated the bombing of Gernika by the German air force in April 1937. Gernika was home to the independent Basque Government and a bastion against the Franco regime. This was the first aerial bombardment against civilian population in the history of Spain. This event deeply etched into the collective memory of the Basque and served both to deepen sentiments of nationalism among all levels of Basque society and to foster their resentment and their opposition against Franco's dictatorial military regime (Conversi, 2000: 77).



*Famous anti-war painting by Pablo Picasso of the bombing of Gernika.*

Since its inception, the Franco regime led by conservative state elites severely repressed Basque and Catalan cultures and languages. The idea of a strong homogenized state was a constant goal for these elites who imposed Spanish as the lingua franca in education through a centralized system in a clear attempt of assimilation by coercion and threatened the linguistic survival of those languages that represented an identity that did not abide by the parameters of what was then considered as Spanishness (Grugel & Rees, 1997: 139)<sup>15</sup>. By targeting Basque and Catalan languages, symbols of Basque and Catalan identity, the Franco regime gave credibility to fear of cultural annihilation in Basque and Catalan societies, forcing them to opt for nationalist strategies to combat it and thus contributing

to a gradual strengthening process of Basque and Catalan nationalisms with the support of the non-nationalist opposition (Powell, 2001: 77). According to Daniele Conversi, Franco's cultural homogenization policies, added a powerful element of accusation against the centralist regime that was identified as bearing the main responsibility for cultural assimilation and loss. In the case of the Basques, they even perceived themselves as a people on the verge of extinction (Conversi, 2000). The harshness of these policies and the general hostility to all things considered Basque made people aware of the need to protect the language. The impossibility to pass on the language from one generation to another persuaded many parents of the need to teach Basque to their children (Moliner, 2000: 169). In the 1960s, clandestine Basque schools known as *Ikastolas* were initiated by local communities and parents. Unlike Catalan, Basque did not have a strong tradition as a written and literary language of the educated elites and thanks to this initiative a revival of the language was initiated in many parts of the Basque Country. Nowadays, it is not uncommon to find Basque families in which parents are unable to speak Basque, but children speak it fluently.

Under these circumstances of oppressive practices and dispossession of one's own language and culture by the Spanish state and elites, Basque and Catalan formulations initially responded by demanding autonomy for their respective regions based on the self-government that both the Basque Country and Catalonia had previously enjoyed. While the Catalan nationalism followed a republican federalist tradition, the Basque nationalism followed a more exclusivist pattern in strong opposition and reaction to not only the language loss but also to the abolition of traditional local privileges or *fueros*. Whenever the Franco regime increased its repression against any aspect related to the Basque and Catalan identity, language and culture, movements in the Basque Country and Catalonia grew more radical. In July 1959, a group of Basque youth formally founded ETA (Euskadi ta Askatasuna)<sup>16</sup> as an intellectual cultural forum in reaction to Franco's totalitarianism and in order to save their culture and language from dying out (Conversi, 2000: 83 & 90). Among their demands, was also the reunification of all historic Basque provinces and self-determination of the entire Basque Country in its historical extension. The lack of freedom of expression to expose opinions and to channel feelings of anger and frustration might have contributed to the transformation of this forum into an organization dedicated to armed struggle (Funes, 1998: 494). During the Franco regime, ETA enjoyed the support for their cause of a large sector of the Basque society, and of anti-Franco supporters in Spain and internationally (Grugel & Rees, 1997: 82). However, ETA suffered a progressive radicalization after the Spanish transition to democracy and apart from selective attacks targeting members of Franco's military and paramilitary forces, it started to target politicians and civilians which resulted in a steady loss of support. In January 2011, a window of opportunity to find a peaceful solution to the protracted Basque political conflict opened when ETA declared a permanent ceasefire and a cessation of armed activity,<sup>17</sup> which remains in force to date.

During the almost forty years (1939-1975) of autocratic military dictatorship by General Franco in Spain, the entire systems of Basque and Catalan self-government and historical privileges were abolished. The fear of assimilation by the Basques and the Catalans into a homogenous single Spanish national identity and memories of the attempts at annihilating their language and culture would play a crucial role in the constitution writing process of Spain and its future political course.

### **CONSTITUTION WRITING PROCESS: THE CHALLENGE OF ARTICULATING A PLURINATIONAL AND UNITARY CONCEPTION OF SPAIN**

After the death of Franco and the demise of his regime in 1975, Spain, left on the brink of ruin both economically and socially, faced many challenges. There was an urgent need to initiate a democratization process and to write a Constitution that would acknowledge and pave the way for the centuries old proclivity for self-government in the Basque Country and Catalonia by accommodating the historical grievances and aspirations of the Basques and the Catalans. On one side, was a pluralist vision of the Spanish state and identity and on the opposite side, was the still unitary, centralist and exclusionary vision of Spanishness that perceived diversity and pluralism as a threat for their project of national state-building.

In June 1977, the first democratic elections were held in Spain that convened the Constituent Cortes (the Spanish Parliament, in its capacity as a constitutional assembly) for the purpose of drafting and approving a constitution. A lower house or Congress of Deputies and an upper house or Senate were established along with a 36-member Constitutional Affairs Commission and a seven-member working group to draft a constitution. These seven members came to be known, as the "Fathers of the Constitution" and were chosen to represent the wide and deeply divided political spectrum within the Spanish Parliament<sup>18</sup>.

During the preparation of the preliminary draft, the greatest stumbling blocks were the task of forging a consensus on national identity, and agreeing on the extent of symbolic recognition for the aspirations of Basque and Catalan nationalisms and on the outline and the scope of the juridical and institutional space for accommodating such aspirations. In Article 2 of the Constitution [(n.d.) a] attempts were made to tackle all these issues: *The Constitution is based on the indissoluble unity of the Spanish Nation, the common and indivisible homeland of all Spaniards; it recognizes and guarantees the right to self-government of the nationalities and regions of which it is composed and the solidarity among them all.* The inclusion of the words 'Spanish Nation' and 'nationalities' was very

controversial and was harshly criticized, but for different reasons. Segments of the conservative Spanish center and right equated the term ‘nationality’ with a synonym for nation and pointed out that such inclusion was against maintaining the unity of Spain as they feared that it could give ground to further claims for self-determination that ultimately could lead to the disintegration of the country. Simultaneously, Basque and Catalan parliamentarians criticized the reference to Spain as a nation. In their opinion, Spain is not a nation by itself, but just a state composed of a number of stateless nations, including the Basque Country and Catalonia. Nowadays, these different conceptions of Spain still persist among politicians and intellectuals and are the cause of hot debates. Furthermore, in Catalan political circles, the notion of Spain as a pluri-national state (Requejo, 2005) has also been advocated, while some scholars have regarded Spain as a ‘nation of nations’ (Dominguez, 2006). In the final wording of Article 2, the term ‘nationalities’<sup>19</sup> was retained and hence the recognition of the existence of other collective subjects apart from the Spanish people, but within the clearly stated indissoluble unity of the Spanish nation, which emphasized the unitary and indivisible character of Spain.

With regards to the future territorial organization of Spain, the seven-member working group was unable to find any consensus due to competing and contradictory views<sup>20</sup>. The final formulation was kept very vague: *The State is organized territorially into municipalities, provinces and the Self-governing Communities that may be constituted. All these bodies shall enjoy self-government for the management of their respective interests*<sup>21</sup>. While the right to self-government was again recognized, the final draft avoided using any concrete terminology regarding the form of state. Moreover, this draft did not mention which territories or regions would be entitled to self-government, neither the criteria to determine whether a region would qualify for it or not. The extent of the right to self-government was also not mentioned. The issue of the territorial organization of Spain was thus left open. It was this ambiguity and lack of clarity on fundamental issues what brought the Catalan parliamentarians into the consensus, but the Basque, whose aim was to regain the afore-mentioned *fueros*, wanted some specific commitments before backing the proposal. An additional provision was added to the draft constitution to try to garner the support of Basque parliamentarians: *‘The Constitution protects and respects the historic rights of the territories with traditional charters (fueros). The general updating of historic rights shall be carried out, where appropriate, within the framework of the Constitution and of the Statutes of Autonomy*<sup>22</sup>. However, this provision was termed as very vague and lacking explicit words and some Basque parliamentarians presented an amendment asking for the recognition of the right to self-determination that was rejected. Finally Basque parliamentarians were not brought into the constitutional consensus and thus the Constitution lacked any sense of ownership in the Basque Country.



The Basque society eventually rejected the new constitution<sup>23</sup> in the referendum held in December 1978. The constitution was only supported by 34.9% of the electorate in the Basque Country. In the whole of Spain 67% of eligible voters cast their vote, 88% of which voted in favour of the Constitution. All in all, the total number of supporters of the Constitution was 58%. The Constitution was also approved in Catalonia (Ministerio del Interior, n.d.). The new Constitution should have laid the foundation for the construction of the new Spanish state, but it was not supported in the Basque Country, which already created fault lines for the beginning of an encysted political conflict that has not been solved yet.

While keeping the country together and maintaining a theoretical sense of unity, the Spanish constitution of 1978 tried to find a balance between those who favored a centralized and unitarian system and those who supported a decentralized and pluralist system based on the recognition of the diversity of identities and on the respect, protection and promotion of the varied cultural and linguistic realities. And was this balance achieved? Some argue that if a compromise had not been struck, the threat of revocation of newly gained democratic freedoms could have materialized. In February 1981, a failed coup d'etat was executed by a sector of the army who tried to restore a military dictatorship. The re-imposition of another dictatorial regime did not materialize, but the conflict between a centralized and unitarian, as opposed to a decentralized and pluralist, Spain would remain as it will be explained in the coming sections.

The 1978 Constitution gave Spain the form of a parliamentary government system under a constitutional monarchy, whereby the Monarch is the Head of State and the President (equivalent to Prime Minister) is the Head of the Government in a multiparty system. By 1985, all the 17 regions had passed their own Statutes of Autonomy and 17 Autonomous Communities all ruled by a government elected by a unicameral legislature were established<sup>24</sup>.

## **THE STATE OF AUTONOMIES: A SYSTEM OF TERRITORIAL POWER-SHARING**

Given the difficulties in building consensus on the form of the state, the Constitution deliberately omitted any reference to how Spain should be configured and a procedural framework that established an "optional autonomy system" was developed: "*The State is organized territorially into municipalities, provinces and any Autonomous Communities that may be constituted. All these bodies shall enjoy self government for the management of their respective interests*" (Article 137). After the Constitution was passed, the Basque Country and Catalonia, alongside Galicia, were given the ability<sup>25</sup> to accede to autonomy automatically due to their status as historical nationalities<sup>26</sup> with a distinctive language, culture, history and identity.

### **Division of Powers**

The Constitution offered the Autonomous Communities the possibility of taking authority from a group of powers<sup>27</sup> listed in Article 148 in what has been defined as a process of autonomy 'a la carte'. Article 149 sets the list of powers<sup>28</sup> of exclusive competence to the central government. Apart from these two lists of powers for the Autonomous Communities to choose from, and for the central government to undertake, powers not expressly assigned to the state by the Constitution can be assumed by the Autonomous Communities in their respective Statutes of Autonomy by virtue of Article 149, clause 3. However, if certain powers - those in which exclusive jurisdiction has not been conferred to or assumed by the Autonomous Communities - are not included in the Statutes of Autonomy, then jurisdiction falls with the central government and the Constitution by default. Besides, the Constitution also recognizes that the central government can delegate powers to the Autonomous Communities, and that in certain cases it could enact laws to homogenize matters falling under the powers of the Autonomous Communities. Finally, if an Autonomous Community fails to meet a constitutional obligation or seriously acts against the Spanish interest, the Constitution permits the central government to enforce the fulfilment of those obligations.

### **Role of the Constitutional Court**

Conflict may arise in cases in which Statutes of Autonomy do not have exclusive jurisdiction over certain powers. In these situations, the norms of the central state prevail over the laws of the Autonomous Communities, but given that many of the constitutional provisions related to self-government are ambiguous and sometimes contradictory, this provision has been the object of much controversy. The Constitutional Court is required to intervene in these situations. This Court is composed of twelve judges, eight of whom are appointed by the Spanish parliament, two by the Spanish government and two by the General Council of the Judiciary. In practice, the two main nation-wide state parties (the Spanish Conservative People's Party and the Spanish Socialist Workers' Party) have the de facto power on this court. This court, the decisions of which cannot be appealed<sup>29</sup>, has played a critical role in the political and social development of Spain.

### **Linguistic Provisions**

With the advent of democracy, an attempt to accommodate and recognize "other Spanish languages" (no mention of Basque and Catalan languages appears anywhere in the Constitution) started through constitutional arrangements, but

in a very ambiguous and imprecise manner<sup>30</sup>: *Castilian (What's the difference between Spanish & Castilian?, n.d.)<sup>31</sup> is the official Spanish language of the State. All Spaniards have the duty to know it Autonomous Communities in accordance with their own Statutes. The other Spanish languages shall also be official in the respective Self-governing Communities in accordance with their Statutes. The richness of the different linguistic modalities of Spain is a cultural heritage which shall be specially respected and protected<sup>32</sup>.* Spanish, spoken all over the current territory of Spain, is the only official language in the whole Spanish territory. Basque and Catalan are also recognised as official but only in the respective Statutes of Autonomy of the Basque Country and Catalonia, which does not include all the regions in which these two languages are actually spoken. This means that Spain cannot be strictly regarded as an “institutionally pluri-lingual state”, since only Spanish has the status of a national language. However, the respect for linguistic pluralism embodied in the constitution served as a starting point in the process to eliminate the idea that the state could only have one language if unity were to be preserved. This was one of the precepts of the traditional Spanish centralism.

### **The Right to Self-determination and the Right to Hold Referenda**

The right to self-determination for the nationalities and regions mentioned in Article 2 is not recognized in the Spanish Constitution. Likewise, these entities do not have the right to hold referenda. As per the Constitution, the exclusive competence for authorizing popular consultations through the holding of referenda is in the Spanish Parliament. Political decisions of special importance can be submitted to all citizens in a consultative referendum, but this has to be called for by the King on the President of the Government's proposal after previous authorization by the Parliament<sup>33</sup>. In other words, no referendum can be held by any Autonomous Community without the permission of the central government. In September 2007 the then ‘Lehendakari’ or head of the Basque Country's regional government, Juan Jose Ibarretxe, proposed the celebration of a consultative referendum in 2008 to know Basque citizens' views regarding two issues. The first issue was whether to start a negotiation process with ETA aimed at achieving the resolution of the Basque conflict and peace. The second issue was related to the launch of a political debate on the right to self-determination of the Basque Country and on the right of the Basque people to decide on it. This initiative was contested by the central government before the Constitutional Court, and the Court ultimately determined the unconstitutionality of the referendum on legal grounds.

## **BASQUE AND CATALAN STATUTES OF AUTONOMY: DEVOLUTION ARRANGEMENTS**

Basque and Catalan parliamentarians played a crucial role in the constitution writing process, but the outcome of this process was embraced differently in Catalonia and in the Basque Country. The regional autonomy enjoyed by Catalans under the Second Republic (1931-39) and Basque local rights or *fueros* were taken as a point of departure to develop, deepen and expand the notions for self-government embodied, though ambiguously, in the Constitution. Negotiations for the approval of the Basque and Catalan Statutes of Autonomy were regarded as very difficult due to the differing views of the representatives of the Basque and Catalan assemblies with the representatives of the government's Constitutional Commission. The Statutes of Autonomy of the Basque Country and Catalonia were ratified by referendum in October 1979 in the Basque Country and Catalonia respectively, despite the abstention of approximately 40% of the electorate in both regions. In December 1979, these statutes were confirmed and ratified by the Spanish Parliament and sanctioned and promulgated a few days later by king Juan Carlos I.

Several initial aspirations enshrined in both the Basque and Catalan drafts were drastically revised and watered down by the representatives of the government, as was the case with the first article in both Statutes. The original Basque draft read that 'national sovereignty resides in the Basque people', from whom 'the powers of the Basque Country emanate'. The wording of the Catalan draft also stated that 'the powers emanate from the people' (referring to the Catalan people as a collective subject) without including any reference to Spain or the Constitution. These references were made explicit in the final version in the articles<sup>34</sup> of both Statutes of Autonomy and in the case of the Basque Statute, any reference to Basque sovereignty was also removed<sup>35</sup>. In an additional provision the Basque draft also made a carefully worded reference to the right to 'self-determination' by implying that the acceptance of the Statute did not mean 'the renunciation of the Basque people to the rights which correspond to it in virtue of its History and its will to self-government'. The final version diluted this expression by means of vague wording<sup>36</sup>.

### **Language Policies: From Annihilation to Linguistic Diversity and Accommodation**

Identity of Basque and Catalan people has been strongly articulated around culture and language. For them, language has been a key trait in maintaining their cultural uniqueness and distinctiveness, an important factor of identification with members of their collective group, and an intrinsic element of the way members of their shared linguistic communities behave, transmit values and interpret the outside world.

As stated in the Statutes of Autonomy of the Basque Country and Catalonia, language policies and the regulation of Basque and Catalan are the responsibility of the Autonomous Communities<sup>37</sup>. Basque and Catalan languages have been greatly protected and promoted in the past two decades through language normalization policies adopted by the Basque and Catalan<sup>38</sup> governments, as well as through the language use and promotion campaigns launched by civil society organizations. In the Basque Country, parents can choose the language of instruction of their children in public education from three models<sup>39</sup>: -Model A uses Spanish as the language of instruction and teaches Basque as a subject; -Model B uses both Spanish and Basque as languages of instruction and teaches them as a subject as well; -Model D<sup>40</sup> uses Basque as the language of instruction and teaches Spanish as a subject. Model D is overwhelmingly preferred by parents when schooling their children<sup>41</sup>.

The process of linguistic normalization in Catalonia followed stronger policies than in the Basque Country. One of the most noticeable effects of the Catalan governments' efforts at language revitalization has been made through the use of the education system. In Catalonia's public schools, Catalan is the language of instruction and Spanish is taught as a subject in order to guarantee that all pupils finish their studies knowing both official languages. This model which has been praised as a good practice by the Council of Europe<sup>42</sup> has attempted to integrate non-Catalan speakers into a bilingual and bicultural society and has contributed to the almost universal ability of the population, including migrants from other parts of Spain, to at least understand Catalan language and to integrate into the Catalan society.

These two different processes of linguistic normalization put in practice after the attempts at linguistic annihilation by the Franco regime have also suffered serious backlashes from the central government whenever the Conservative Spanish Nationalist People's Party<sup>43</sup>, which advocates a unitary and highly centralized system in Spain, has enjoyed an absolute majority in the Spanish Parliament<sup>44</sup>. There is a recent significant example of interference by the central government in the competences of the Autonomous Communities on matters related to language policies. The Spanish Parliament with an absolute majority of the above-mentioned party passed a legislative proposal by the Spanish Minister of Education, José Ignacio Wert, to reform the education system. This proposal relegates Catalan to a 'specialized subject' in schools while Spanish would continue to be a 'core subject' In October 2012, Wert went as far as to say in the Spanish Parliament that the Spanish government should "Spanishize Catalan schoolchildren" so that "Catalan schoolchildren are as proud to be Spanish as Catalan"<sup>45</sup>. He further added that with his reform plan Catalan schoolchildren would have a balanced experience of both the Spanish and Catalan identity. This legislative proposal, which was adopted in May 2013 by the Spanish Parliament but rejected by the Catalan Parliament<sup>46</sup>, is seen as a push to give the central government greater control over education at the regional level. The Minister for Education of Catalonia, Irene Rigau, warned that this new law would be

challenged in the Constitutional Court. In June 2013, the Spanish President nominated two new conservative judges to the Constitutional Court and the current power division is of seven conservative judges against five progressive judges; since the Court is now of a conservative lean, any decision against this law is unlikely to be made by the Court.

The closure by the Spanish authorities of the only newspaper in Basque language is also worth mentioning as it serves to illustrate this point. The daily *Egunkaria* was established in 1990 as the only Basque-language daily newspaper in the Basque Country. The Spanish authorities closed down *Egunkaria* in February 2003<sup>47</sup> claiming that it was financed by the above-mentioned Basque group ETA. Seven years later, in April 2010 the defendants were acquitted on all charges related to ties to ETA, and released (Testimony by Martxelo Otamendi at the Universal Forum of Cultures, Barcelona, May, 2004).<sup>48</sup> According to the final and unanimous verdict by the Spanish National Court, there were no grounds for the closure of the newspaper. The verdict emphasized that the narrow-minded and erroneous view according to which everything that has to do with Basque language and culture is promoted and/or controlled by ETA led to an incorrect assessment of facts and figures, as well as to the inconsistency of the accusation<sup>49</sup>. The verdict also noted that the closure of *Egunkaria* was an interference with the freedom of the press.

### **Asymmetrical Fiscal Policies: Special Arrangement for the Basque Country**

The Basque Country enjoys an asymmetrical fiscal system with the Spanish state called ‘concierto económico’ (economic agreement). By means of this agreement, the Basque Autonomous Community is entitled to levy its own taxes and manage its own budget arrangements after having agreed with the central government the amount of money to be paid to the state in order to cover the cost of the state’s public services expenditure. This is a special arrangement based on the local historical rights or *fueros*, which does not apply to any other Autonomous Community except Navarra. This economic agreement can be regarded as the most asymmetrical legal attribute of the State of Autonomies.

In the rest of the Autonomous Communities, including in Catalonia, taxes are collected by the State, which is responsible to return an amount of money to help the Autonomous Communities finance the expenditure of the powers laid down in their respective Statutes of Autonomy. As per the “principle of inter-territorial solidarity” enshrined in Article 2 of the Constitution, a transfer of funds takes place from the wealthier Autonomous Communities to the poorer ones in a redistributive basis with the aim to guarantee a minimum level of basic public services throughout the state. Catalonia is the biggest net contributor to this system of solidarity and has criticized it for being too redistributive and for not receiving enough investment from the central government in comparison to the amount transferred from its own Treasury.

## **POST-IMPLEMENTATION OF THE STATE OF AUTONOMIES: RECENT POLITICAL DYNAMICS**

Since the late 1990s, Basque and Catalan aspirations for significant constitutional reforms have increased considerably, challenging the constitutional compromise enshrined in both the Constitution and in the respective Statutes of Autonomy. In some cases, more self-government or powers have been demanded while in others claims have been made that the actual territorial model is obsolete. But all in all these aspirations have been advocating for the re-interpretation of the constitutional provisions regarding historical rights and a re-assertion of Basque and Catalan identities. Given that the Statutes of Autonomy are, after the Constitution, the second most important Spanish legal norm concerning the political structure of the country, reform attempts in the Basque Country and Catalonia produced considerable controversy at the central government level and were either substantially amended or outright rejected by either the Spanish Parliament or by the Constitutional Court.

In December 2004, the Basque Parliament passed by a narrow margin the so-called 'Plan Ibarretxe' [(n.d.)b] developed by the then President of the Basque Government to modify the 1979 Statute of Autonomy of the Basque Country. This plan began a process to establish a new agreement of sovereignty-association or a new con-federal status of free association with the Spanish state, which included the right to self-determination<sup>50</sup>. The plan would also give the Basque regional government the right to unilateral recourse to referenda, opening the door to a possible future vote on secession and would remove a Spanish government right to suspend the Basque regional government's powers. In February 2005, the two main state-wide parties jointly voted it down in the Spanish Parliament and lodged a complaint at the Constitutional Court against the right to hold a referendum. The court ruled the call for the referendum unconstitutional.

In September 2005, a proposal for Statute reform was passed in the Catalan Parliament by 90% of its members<sup>51</sup>. Apart from tendencies in favour of centralization, Catalonia had also been having persistent conflict over financial matters with the central government. The proposal shifted the locus of sovereignty from Spain to Catalonia, proclaimed Catalonia's status as a nation and the vocation and right of the citizens of Catalonia to freely determine their future as a people as enshrined in the right to self-determination under international law. This time, the Spanish Socialist Workers' Party chose to support the reform as it was approved by the Spanish Parliament, but with the introduction of several amendments and the suppression of the afore-mentioned three points. New option: The Spanish Socialist Workers' Party chose to support the reform given that the Socialist Workers' Party in Catalonia voted in favour of it in the Catalan Parliament, but with the introduction of several amendments and the suppression of the afore-mentioned three points. As a consequence, one of the

main political parties in Catalonia, the Republican Left Catalan Independence Party withdrew its support for the new Statute<sup>52</sup>. The new Statute of Autonomy of Catalonia was approved in a referendum in Catalonia with a 73.2 % of votes in favor but with a participation of only 48.9 % of voters.

Given that the reform of the Catalan Statute was not turned down by the Spanish Parliament, the Conservative Spanish Nationalist People's Party<sup>53</sup> legally contested a number of articles before the Constitutional Court for alleged breaches of the 1978 Spanish Constitution, particularly those related to the fiscal principle of solidarity between regions, language and justice. This party also challenged the definition of Catalonia as a 'nation'. The Constitutional Court assessed the constitutionality of the challenged articles and delivered its determination in June 2010 after being the centre of big controversy for four years (Catalian President, n.d.)<sup>54</sup>. 14 articles were rewritten and 27 more re-interpreted by the Court's judges. The binding judgment not only left all of the legal clauses that could have guaranteed a factual level of self-government for Catalonia without effect, but also abolished all the mechanisms that had been put in place to reduce the distorting effects of the existing Spanish tax and transfer system. An agreed minimum expenditure guaranteed from the Spanish Government in Catalonia was eliminated, as was the placement of a formal limitation in the fiscal effort and solidarity of Catalonia<sup>55</sup>.

The 2006 Statute of Autonomy established Catalan<sup>56</sup> as the language of preferential use in public administration and in the publicly owned media, but the ruling of the Constitutional Court abolished this preferential status for Catalan. The judgment further reiterated that the term "nation" included in the preamble<sup>57</sup> of the 2006 Statute of Autonomy has no legal validity. The inclusion of this term, which in any case was not legally binding, was even agreed by the then Spanish Prime Minister that belonged to the Spanish Socialist Workers' Party. The Constitutional Court reiterated that Catalonia "is a nationality" within "the only and indissoluble unity of the Spanish nation" and thus banned the idea of Spain being a nation of nations or a plurinational state. The legitimacy of the sentence was widely questioned in Catalonia and marked a turning point in the history of the State of the Autonomies. The political agreement between the Spanish and Catalan Parliaments, which was also ratified by the Catalan people via referendum in 2006, was significantly modified by the Constitutional Court. Since this verdict the relationship between the Catalan and central governments has grown even sourer.

In December 2012, the Centre-Right Catalan Nationalist Coalition and the Left-Wing Catalan Independence Party who currently hold a majority at the Parliament of Catalonia reached an agreement to call for a citizen vote or consultation<sup>58</sup> on Catalonia's secession from Spain in 2014. The agreement also included the approval of a law on citizen votes, following the Catalan Statute of Autonomy that foresees this possibility, should the Spanish government go



against the consultation. As per the agreement, the date for the consultation, which has not been fixed yet could also be delayed or postponed beyond 2014 depending on the socio-economic and political situation in Catalonia. In January 2013 in order to legitimize the Catalan Parliament's commitment to the right to self-determination the latter approved a 'Declaration of the Sovereignty of the People of Catalonia' [(n.d.)c]<sup>59</sup>. This declaration asserted that Catalonia is "a legal and sovereign political entity" and marked the beginning of a process by which "the citizens of Catalonia will be able to choose their political future as a people". Following an appeal against this declaration that the Spanish government led by the Conservative Spanish Nationalist People's Party presented at the Constitutional Court in May 2013 the latter suspended the declaration until the judges take a final decision on it.

### **FORGING A "UNIFIED NATION": LESSONS LEARNED**

During the eighteenth, nineteenth and twentieth centuries, Spain failed to accommodate the different identities and national realities that existed in the country. Basque and Catalans resisted the imposition of a unitary and homogenized model of Spain, while their demands for the recognition and appreciation of their different identities were seen and treated as a threat by the establishment, rather than as richness to embrace and to be proud of. Attempts were made to accommodate the aspirations of the Basques and the Catalans after the fall of Franco's dictatorship, but decades of negation and of repressive policies only increased and strengthened the sentiments of many Basques and Catalans. The 1978 Constitution and the State of Autonomies with their own particularities and peculiarities came into being to a great extent due to the political pressure for self-government exerted by Basque and Catalan parliamentarians and a highly decentralized state was established in comparison with the previous centralized regimes. One can argue, though, that the decentralizing model worked fairly well when leaving behind the previous authoritarian regime and transitioning into a democratic system, but it was also conceived with serious flaws. If one acknowledges that the initial drivers of the process of devolution of powers in Spain were primarily political and not functional<sup>60</sup>, it can also be concluded that the principles of diversity and pluralism has not been successfully integrated in the principle of territorial unity of Spain. Constitutional arrangements continue to be of a unitarian nature<sup>61</sup> and those regulating self-government are generally very vague. Problematic issues such as the form of state and the different national realities in the country were treated with calculated ambiguity in the Constitution to allow for future debates and interpretations. However, there has never been an open discussion between the historical nationalities and the central government, nor a formal reconciliation process, and the former have never been frankly asked how they would like to see the state organized and their identities recognized.

In the last decade, demands for the right to self-determination have increased in both the Basque Country and Catalonia, but when attempts have been made to initiate some serious political debates with different proposals on the table, including by calling a referendum –this was attempted by the Basque Parliament under the leadership of its then President Ibarretxe in 2005 and 2008 respectively–, statewide parties have ultimately counted on the Constitutional Court to abort any possibility of discussion on sensitive issues. A pattern of referendum request and denial clearly shows that the political regulation and resolution of the conflict on identity and national pluralism is an unresolved matter in the Spanish constitutional model still today. The construction of a legitimized and inclusive conception of Spanishness that includes the recognition and the political accommodation of Basque and Catalan identities has never materialized in Spain. The Spanish nation-building process has failed to integrate its different identities into an articulated and overwhelmingly embraced conception of Spanishness. Some scholars argue that the Spanish Constitution tried to re-structure the state and accommodate its several identities, two distinct concerns, all at once (Requejo, 2005: 89). This is perhaps where one of the problems lies; the application of same political solutions and same procedural rules, when different ones were required.

## **LESSONS LEARNED TO NEPAL FROM THE EXPERIENCE IN SPAIN**

Although there are many differences in the economic, social and political dynamics and circumstances in both Nepal and Spain, there are several lessons learned from the constitution-writing and state re-configuration processes in Spain that could serve as an orientation mechanism to Nepal.

In both modern Nepal and Spain an imposition of a single and exclusionary conception of Nepaliness and Spanishness, respectively, by the state elites and those in power took place, along with the suppression of groups that did not possess the true characteristics of what was regarded as being a real Nepali or Spaniard. The Basques and the Catalans in Spain and the so-called historically marginalized and excluded groups<sup>62</sup> in Nepal suffered attempts by the state to assimilate their diverse cultural practices and distinct languages in a sole hegemonic language and culture. In the case of Nepal, Hinduism was also imposed as the religion of the state in the Muluki Ain (General Code) of 1864, as well as in the constitutions of both 1962 and 1990 (SPCBN, n.d.). Before its unification, Nepal was composed of a number of smaller kingdoms and several principalities (Hamilton 2007; Bista 1992) with their own systems of administration and revenue (Regmi 1978), and in some cases with their own distinctive language and cultural and social practices such as those of the Limbu Kingdom [(n.d.)d]. Spain was also composed

of different kingdoms which had their own laws and institutions, as well as their own social, political, economic and cultural realities. All these kingdoms and principalities were unified in both Nepal and Spain in the eighteenth and fifteenth centuries respectively. In the case of Nepal, the new kingdom of Nepal was established in 1768 by King Prithvi Narayan Shah. Nepal was thereafter ruled by the Shah dynasty, by the Rana dynasty and by a party less system known as Panchayat.

For centuries, the notions of pluralism and diversity went on to be out rightly rejected by the state and the establishment. A process of Nepali state-building nationalism propagated an extremely exclusionary national identity based in policies that continued with a systematic discrimination of groups that historically spoke different languages and practiced other cultures such as indigenous peoples and Madheshis. The case of Dalits is also noteworthy given that they suffered from practices of discrimination and untouchability even though they generally followed Hindu traditions and spoke Nepali, but were placed in the lowest rank of the social hierarchy.

The Jana Andolan or People's Movement of 1990 overthrew the Panchayat system and facilitated the proclamation of a new constitution that defined Nepal as multi-ethnic, multilingual and democratic, but also as a Hindu and Constitutional Monarchical Kingdom. In reality, old practices of subordination and exploitation continued and the upper-caste class, particularly the Brahmins, institutionalized their hegemony in society by dominating politics, the judiciary, the universities and the civil service (United Nations Mission in Nepal, 2008). A history of exclusionary practices and a very centralized state have been named as some of the primary reasons that led to the decade-long (1996-2006) armed conflict in Nepal (Gurung, 2003). Likewise, the increased sense of and emphasis on identity and ethnic solidarity that Nepal has been experiencing in the last decades (Gellner, Pfaff-Czarnecka, & Whelpton, 1997: 56) and particularly after the establishment of the first Constituent Assembly could be regarded as the result of the defensive reaction against the intrusive, authoritarian and dominating activities of the upper-caste class people and state elites. Moreover, the highly centralized state apparatus dominated by the latter has proved unsuccessful in bringing about economic growth and extending quality basic service and welfare measures beyond the capital and a few other economic hubs in the Tarai and in major tourist destinations. Any homogenization effort linking the idea of national unity with upper-caste Hindu cultural elements has been increasingly resented and rejected among historically marginalized groups, particularly indigenous peoples.

### **A New Constitution and State-Restructuring of Nepal**

The restructuring of the state in federal terms and the dismantlement of the centralized and unitary state system with a greater scope for self-government have been recognized in both the Comprehensive Peace Agreement (CPA)<sup>63</sup> of November 2006 and the Interim Constitution<sup>64</sup> amended in April 2007 as a consequence of the Madheshi Andolan (Hachhethu, 2007) to include a commitment to federalism as the way forward for the creation of an inclusive, equal and prosperous Nepal with a higher representation of historically marginalized groups in political and administrative bodies. The abolition of the monarchy after 240 years of royal rule and the declaration of Nepal as a secular country after the celebration of the first Constituent Assembly (CA) Elections in April 2008 constituted the first step in this direction. However, the inability of the CA to complete and promulgate a constitution and its subsequent dissolution has posed new hurdles and challenges in the process ahead.

The 1978 Spanish Constitution was an essential component in the process of state restructuring and in leaving behind a past of authoritarianism and oppression. The “State of Autonomies” dismantled the unitary and centralized state system opening the door to a state based on self-governing autonomous communities fostering a substantial process of economic development, the establishment of a system of quality public services for all and ultimately an improvement in the living standards of the majority of the population. These processes were relatively smooth given that there were no major countrywide disputes<sup>65</sup> regarding territorial units in Spain. Regions and provinces were already established and agreed upon which speeded up the process of devolution of powers from the centre to the regions, contrary to the situation in Nepal where these different units are in a process of being redefined, an utterly complicated task due to competing and opposing claims by different groups. For a process of devolution of powers to be successful in Nepal, a thorough demarcation of the territorial units and subunits should be carried out based on clearly defined criteria (identity, geography, economic viability or a combined model), but this has proved to be a major point of contention.

### **The Need for a Collective and Inclusive Nepalese Identity**

While all the afore-mentioned criteria should be considered when designing a viable model of decentralization, the experience in Spain also shows that the question of national identity and the process of its redefinition cannot be ignored or undervalued, but should be seen as an intrinsic element of constitution writing and state-restructuring. Historical exclusionary practices and centuries of attempts at assimilation by coercion and linguistic and cultural annihilation have shaped the identities of the Basques and the Catalans, as well as their sense of self

and their relationship with the state. It can be argued that to a great extent this has also been the case in Nepal with historically marginalized groups who not only suffered attempts of assimilation in the established and dominant conception of Nepaliness constituted of the distinctive national characteristics of upper-caste Hindus (Nepali language, Nepalese dress and Hinduism as the state religion), but also clear-cut discrimination in the economic sphere by the development apparatus and state elites. This, however, was not the case in Spain as both the Basque Country and Catalonia were the most economically developed regions and did not endure practices of economic discrimination. In the future Nepal, economic emancipation, equal distribution of natural and welfare resources and access to equal opportunities for all the historically marginalized groups<sup>66</sup> will be as important as the recognition and political accommodation of their identities. These are two distinct tasks that should go hand in hand but which will require different political solutions and procedures, if the experience in Spain is to be considered.

The construction and recognition of a legitimized and inclusive conception of “Nepaliness” should be deemed of the utmost importance for a future peaceful and prosperous Nepal. Recognition should be understood as a mutual acknowledgment that individuals, groups and the state choose to give one another from the point of view of equal respect that makes all the citizens of a country equally worthy and entitled to the same array of rights<sup>67</sup>. However, the attribution of equal rights is not always enough for equal respect to be granted. People can be endowed with equal rights and still not be regarded as equals by society or certain groups in society, which is often the case when there are social and economic disadvantages at issue, but different identities which are an impediment to respecting people’s equally. In Nepal, an exercise of public recognition of erased and suppressed identities should take place engendering appreciation for the tremendous value of Nepal’s rich linguistic and cultural diversity. This should be seen as a moral and fundamental political principle.

### **Threat of Secession: Real or Imaginary?**

The 1978 Constitution of Spain established an open-ended asymmetrical model of territorial organization with similarities to a federal state, but without mentioning the term federalism. Spain offered self-government to three regions regarded as historical nationalities and invited the rest of the regions to negotiate with the centre for autonomy. Spain’s federalization was driven to a great extent by the strong sense of political, social and group identity that emanated from the Basque Country and Catalonia and which manifested itself in demands for self-government, and in some cases also in claims for self-determination and secession. Secessionist movements, which seek to sever ties and to break away

from an existing state to establish a new state, consider themselves as distinct nations and want to assume sovereignty over their homeland as has been the case with some Basque and Catalan movements in favour of independence. The latter, though, did not appear from one day to another and represented the tipping point in a historical process of confrontation with the Spanish state due to the neglect, lack of recognition and lack of political accommodation of Basque and Catalan identities. Secessionist movements are very different from movements for self-government and self-rule, which seek to remain within the national boundary of the present state but to obtain greater or complete control over their homeland for matters related to economic, political and cultural affairs (Bandara, & Mudiyanse, 1995: 3-4).

In the case of Nepal, the country is overwhelmingly conceived as a society made up of different identities that should be constitutionally recognized and politically accommodated. Among Basques and Catalans, the conception of Spain as a state made up of different nations is strong, but Nepal is not conceived as a plurinational country. It can be argued, though, that group consciousness has increased in Nepal and that the sense of belonging to an own community has become stronger in the current context of new Constitution writing and restructuring of the state. This can be regarded as the case with indigenous peoples and Madheshi groups in particular. However, contrary to expressions of identification exclusively with a Basque or Catalan identity and 'nation', such a sense of exclusiveness seems to be non-existent in Nepal and a strong dual sense of nationality is present among indigenous peoples and Madheshis which indicates that a Limbu, Tharu, Tamang, Newar or Madheshi identities are totally compatible with an overarching Nepalese identity. This also explains why no demands for secession (Einsiedel, Malone, & Pradhan, 2012) have been made in the current political context.

The argument often raised by those who are against any process of power-sharing or devolution of powers is that it will lead to the disintegration of the country. What perhaps the defendants of this argument willingly or unwillingly do not realize is that Nepal is composed of a multiplicity of identities that are waiting and asking to be accommodated and integrated in a new Nepal and that the denial of any acceptable form of self-government might create sentiments of separatism or secession that in the long run can threaten national unity and enable those less interested in a peaceful solution to exploit the sense of grievances of any group compromising on Nepal's sovereignty. Neither assimilation nor secession will work in the current context of polarization that Nepal is submerged in, but an accommodative form of integration that would allow group based ethnic, cultural, linguistic and religious identities and practices to be recognized and supported in the public space.

### **Multilingualism and Linguistic Diversity**

Nepal's rich cultural diversity is manifested in the tremendous number of languages spoken in the country<sup>68</sup>. However, people from different linguistic backgrounds, particularly indigenous peoples and Madheshis, have long been among the most excluded in terms of equal access to social, economic and political benefits. During the Panchayat (Gellner, Pfaff-Czarnecka & Whelpton, 1997: 25-26), a method of national integration and acculturation was developed through the imposition of Nepali language that became the only official language and medium of education in schools and government institutions<sup>69</sup>. Similar but seemingly harsher policies and practices were enforced in Spain against Basque and Catalan languages and cultures under Franco's dictatorship.

Different demands voiced by indigenous and Madheshi groups has brought about significant legal developments in the last years. As an illustration, the Interim Constitution of Nepal 2007, recognizes all the languages spoken in Nepal and the right to use them in the administration, as well as in primary education<sup>70</sup>. It also acknowledges the right to basic education in the mother tongue<sup>71</sup> and the need to eliminate discrimination based on language<sup>72</sup>. However, firm and serious steps on the path to implementation have not taken place yet and Nepali is still used as the only official language and the main medium of education and media.

Language constitutes a strong symbol of identity and attachment to one's own community or group. When the mother tongue of a group is ignored, undervalued and/or suppressed by the state and its elites, the sentiments of belonging to one's own group will be strengthened and the opposition against those in power will increase, often leading to the radicalization of these groups and to the request of more drastic demands. This has been the case in the Basque Country and Catalonia and if not properly addressed will likely be the case in Nepal too. For indigenous peoples and Madheshis to be accommodated in a future Nepal and to feel part of an inclusive Nepalese identity, a future language policy will require the state and future states or subunits to encourage the social inclusion of the different language communities. This will by no means be an easy task. Spain did not have to deal with such a number of languages and the willingness of the regional governments to put in place strong policies to protect and promote Basque and Catalan languages was essential in the process of language recovery and normalization. In Nepal, some indigenous languages have considerable number of speakers and have developed their scripture and written forms such as Limbu and Newar, but others remain confined to few VDCs in specific districts. Most of these languages such as Bhujel and several Rai languages for example have not developed their own standard forms yet and are facing endangerment. It will also be challenging to design a language policy that includes Bhojpuri, Awadhi and Maithili languages in a future Madhesh province or state. Linguistic normalization in the Basque Country and Catalonia have followed

different approaches and paths, Basque being an optional language in public education and Catalan compulsory, and could provide some guidance for future plurilingualism processes in Nepal (Pfaff-Czarnecka et al, 2009: 105).

### **An Inclusive and Participatory Process is a Must**

Elections were held in Spain in 1977 after the demise of Franco's regime paved the way for a democratic transition. These elections convened a Parliament in the capacity of a constitutional assembly tasked with writing a constitution. Several discussions and debates took place during the preparation of the preliminary draft in a process that could be regarded as inclusive and participatory insofar as it included representatives from Basque and Catalan political parties. This was also the case regarding the composition of the CA in Nepal that to a great extent included members of historically marginalized groups who actively participated in the constitution drafting process until the period in which the deadline for the promulgation of the constitution was approaching. By then, the decision-making power shifted to the hands of few assembly members and leaders of the main political parties. In Spain, citizens were given the last word as to whether the constitution fulfilled or not their aspirations and hopes by means of a referendum. The call for a referendum is an option that should also be considered in Nepal to assess the level of acceptance of the constitution or of its most controversial issues among Nepalis. If the constitution is written for the people, then the latter should be given the opportunity to decide on it.

## **CONCLUSION**

To develop an inclusive and egalitarian society acceptable to all Nepalese people, Nepal should rise above the interests of any specific group and embrace and recognize the multiplicity of identities in Nepal by developing a new notion of Nepaliness based on the principles of unity in diversity. When there is no overwhelming recognition of the importance and value of different identities in a country, ignoring and attempting to prevent the development of their specificities, they will likely come up with more drastic demands as is the current situation in the Basque Country, and especially in Catalonia where there seems to be a need for another model of coexistence. Considerable measures of self-government will have to be devised to ensure access, equal representation and participation in government and politics, the judiciary, the universities, the civil service and state security forces, particularly the army, of the different historically marginalized indigenous and caste groups that conform the country. These measures will have to be accompanied by an efficient and fair allocation of welfare and natural resources, and equal rights and opportunities for all. The different value systems in the country, including those of the traditional ethnic groups which have a great



potential will have to be recognized and valued. Furthermore, devices that stress common bonds and build institutions that hold people together will have to be formulated. All in all, even though the idea of Nepal as a nation-state is not being contested, there seems to exist a wide consensus that defining a new national identity and developing a basis for national unity is an important task. Identity politics now have a strong base not only in urban areas, but at the grass-root level in rural Nepal and pose a serious threat to political stability in the country (UNMIN, n.d.)<sup>73</sup>. How to incorporate the collective demands of historically marginalized groups within a broader integration process based upon defining and protecting individual rights and duties will be the main challenge of Nepal in the years to come.

## REFERENCES

- Bandara, N., Mudiyanse, A. (1995). *Management of Ethnic Secessionist Conflict: The Big Neighbour Syndrome*. Aldershot: Dartmouth Publishing Company.
- Bista, D.B. (1992) *Fatalism and Development: Nepal's Struggle for Modernization*. Kolkata: Orient Longman.
- Bernatowicz, G. (1992) National Minorities in Spain. *Polish Quarterly of International Affairs*, Vol. 1, No. 1/2, 149.
- Catalan President: It is "disappointing" that Spain's reaction to November 9 is based on "courts and prosecutors" (n.d.). Retrieved August 19, 2014, from <http://www.catalannewsagency.com/news/politics/the-spanish-constitutional-court-shortens-the-current-catalan-statute-of-autonomy>
- Conversi, D (2000) *The Basques, the Catalans and Spain: Alternative Routes to Nationalist Mobilisation*, Reno: University of Nevada Press.
- Dominguez, F (2006). *Mas alla de la nacion. La idea de Espana como 'nacion de naciones.'* Barcelona: Fundacion Rafael Campalans.
- Einsiedel, S., Malone, D.M., Pradhan, S. (2012). *Nepal in Transition: From People's War to Fragile Peace*. Cambridge: Cambridge University Press.
- Eustat. (n.d.). Retrieved August 9, 2014, from <http://www.eustat.es>.
- Funes, M. (1998). Social Responses to Political Violence in the Basque Country, *Journal of Conflict Resolution*, Vol. 42 (4).
- Gellner, D., Pfaff-Czarnecka, J., Whelpton, J. (1997). *Nationalism and Ethnicity in a Hindu Kingdom: The Politics of Culture in Contemporary Nepal*. Amsterdam: Harwood Academic Publishers.
- Grugel, J., & Rees, T. (1997). *Franco's Spain*. London: Arnold Publishers.
- Gurung, H. (2003) Nepal: Maoist Insurgency and Indigenous People, *Nepal Journal of Contemporary Studies*, Vol. 3, No. 2.
- Hachhethu, K. (2007). Madheshi Nationalism and Restructuring the Nepali State. Centre for Nepal and Asian Studies. Hachhethu, K. (2007, August 24). Retrieved November 23, 2014, from <http://www.uni-bielefeld.de/midea/pdf/Hachhethu.pdf>.
- Hamilton, F. (2007). *An Account of the Kingdom of Nepal and of the Territories Annexed to this Dominion by the House of Gorkha*. New Delhi: Rupa and Co.
- Idescat. Institut d'Estadística de Catalunya. Pàgina principal. (n.d.). Retrieved August 9, 2014 from <http://www.idescat.cat>.
- Ministerio del Interior. Subsecretaría Dirección General de Política Interior. (n.d.). Retrieved August 19, 2014, from <http://www.infoelectoral.mir.es/min/busquedaAvanzadaAction.html?vuelta=1&codTipoEleccion=1&codPeriodo=197812&codEstado=99&codComunidad=0&codProvincia=0&codMunicipio=0&codDistrito=0&codSeccion=0&codMesa=0>.

- Molinero, C. (2000). *The Politics of Language in the Spanish-speaking World: From Colonisation to Globalisation*. London: Routledge.
- Moseley, C. (2010) *Atlas of the World's Languages in Danger 3rd edition*, Paris: UNESCO Publishing. Available at <http://www.unesco.org/culture/languages-atlas/> (Assessed on August 19, 2014).
- (n.d.) a. Retrieved November 23, 2014, from <http://www.congreso.es/consti/constitucion/indice/index.htm> (Assessed on August 19, 2014).
- (n.d.) b. Retrieved August 19, 2014, from [http://estaticos.elmundo.es/especiales/2002/10/nacional/pais\\_vasco/propuesta\\_estatuto.pdf](http://estaticos.elmundo.es/especiales/2002/10/nacional/pais_vasco/propuesta_estatuto.pdf).
- (n.d.) c. Retrieved August 19, 2014, from [http://www10.gencat.cat/gencat/binaris/declaration\\_of\\_sovereignty\\_tcm34-239795.pdf](http://www10.gencat.cat/gencat/binaris/declaration_of_sovereignty_tcm34-239795.pdf).
- (n.d.) d. Retrieved November 23, 2014, from [http://www.limbulibrary.com.np/pdf/HISTORY & CULTURE-Iman.pdf](http://www.limbulibrary.com.np/pdf/HISTORY_%20&%20CULTURE-Iman.pdf).
- (n.d.) e. Retrieved August 19, 2014, from <http://un.org.np/sites/default/files/2012-05-22-Field Bulletin-Issue-41.pdf>.
- Pfaff-Czarnecka J., Stokke K, Manandhar M.D. (Eds). (2009). *Identity and Society: Social Exclusion and Inclusion in Nepal*. Kathmandu: Mandala Book Point.
- Powell, C. (2001). *España en democracia, 1975-2000: Las claves de la profunda transformación de España*. Barcelona: Plaza & Janés Editores.
- Regmi, M. (1978). *Thatched Huts and Stucco Palaces: Peasants and Landlords in 19th Century Nepal*. New Delhi: Vikas.
- Requejo, F. (2005). *Multinational Federalism and Value Pluralism: The Spanish Case*. London: Routledge Series in Regional and Federal Studies.
- SPCBN. (n.d.). Retrieved August 19, 2014, from <http://www.ccd.org.np/index.php?action=resources>.
- Témime, E., Broder, A., Chastagnaret, G., Carreras, A. (1995) *Historia de la España Contemporánea: Desde 1808 hasta Nuestros Días*, Barcelona: Ariel.
- Testimony by Martxelo Otamendi at the Universal Forum of Cultures, Barcelona (May 2004). Retrieved August 19, 2014, from <http://www.englishpen.org/testimony-by-martxelo-otamendi-at-the-universal-forum-of-cultures-barcelona-may-2004/>.
- UNMIN, Social Affairs Office, 2008. (n.d.). Retrieved August 19, 2014, from <http://www.un.org.np/unmin-archive/downloads/publications/PeaceProcessBook.pdf>.
- War of the Spanish Succession. (n.d.). Retrieved August 19, 2014, from <http://www.britannica.com/EBchecked/topic/558207/War-of-the-Spanish-Succession>.
- What's the Difference Between Spanish and Castilian? (n.d.). Retrieved August 19, 2014, from <http://spanish.about.com/od/historyofspanish/a/castilian.htm>.

# CHAPTER 12

## THE FEDERALISM DEBATE IN SOUTH ASIA: LESSONS FOR NEPAL

- ROHAN EDRISINHA



*“Asia is witnessing the rise of ‘identity politics.’ People are mobilizing along ethnic, religious, racial and cultural lines, and demanding recognition of their identity, acknowledgement of their legal rights and historic claims, and a commitment to their sharing of power.”*

*(Kymlicka & He, 2005)*

Whether one likes it or not, identity based politics is today a reality in South Asian politics. In many other parts of the world too, societies are becoming more plural, heterogeneous and multicultural in character. Political claims for recognition of identity; the rise of political movements and parties based on ethnicity, language and religion; demands for representation in democratic institutions based on identity are increasing. In this context there is renewed interest in federalism as a constitutional mechanism that responds to the reality of diversity in society (Chaudhary, 2008). Many scholars and commentators have argued in recent years that a federal constitution may be more appropriate than a unitary constitution in managing multi-ethnicity and the challenges of a plural society (Ghai, 2000).

Many scholars have cited India’s federal constitution as a reason for its success in managing its multiethnic and multi religious polity; Pakistan has recently strengthened its constitution’s federal characteristics; Sri Lanka’s best chance for a durable peace with justice between the Sinhalese majority and the Tamil minority was when it explored constitutional reform based on federalism between 1996 and 2004; Nepal, following a decade long conflict that ended with a peace agreement in 2006 is working on the details of a new constitution that will introduce a federal, secular, democratic, republic. There are powerful claims from Myanmar’s ethnic minorities for constitutional reform on federal lines. The Malaysian and Indonesian constitutions contain federal features while there is discussion in Thailand and the Philippines on federal type reforms to address minority aspirations.

The debate on federalism in South Asia has occurred within the context of the lingering influence of British political and constitutional influence. Since many South Asian countries were former British colonies, their political and legal elites were influenced by and therefore more familiar with British constitutional

doctrines and principles such as the sovereignty of Parliament, the Westminster parliamentary executive model and the simple plurality electoral system. This has often made it difficult for such elites to comprehend some of the basic features of federalism and their constitutional underpinnings, as well as more complex constitutional mechanisms to promote power sharing and inclusion.

There are two issues that frequently feature in the debate on Federalism in South Asia and which therefore, need to be clarified as far as this is possible. The first is with the respect to the meaning of federalism; what it is and what it is not; the second is related; does federalism promote secession? The paper will discuss these two issues, then briefly the federalism debate in Nepal and then focus on the federalism debate in 2 South Asian countries- India a success story and Sri Lanka, a tale of failure. This will be followed by a section on the South African experience given its ability to inspire and the widespread respect that scholars have for the South African Constitution of 1996.

## THE MEANING OF FEDERALISM

The term federal is difficult to define and has no fixed meaning. The terms unitary and federal can be considered to cover a range or a spectrum of meaning. However, notwithstanding this, it is possible for purposes of this paper to develop a working definition by comparing and contrasting the terms, unitary and federal, in order to understand the essence of the federal idea.

A unitary constitution is generally defined as one with the habitual exercise of political power by one, central authority. (*Unus*= one in Latin).

Power may be decentralized or devolved within a unitary constitution, but this is granted or given by the central authority and therefore can be taken back by that authority unilaterally. The power granted to the decentralized authority is therefore relatively insecure.

As Strong has observed “It does not mean the absence of subsidiary law making bodies, but it does mean that they exist and can be abolished at the discretion of the central authority” (1966).

A Federal Constitution, on the other hand, is different, as the powers that are granted to the provinces or states are more secure as they are guaranteed by the constitution, the supreme law of the land.

Ronald Watts, a Canadian scholar, provides a useful working definition of a federal constitution which highlights 5 features (1994):

1. Two tiers of government each acting directly with the people;

2. A written, supreme Constitution with a clear division of powers and which because it is deemed to be a covenant or contract between the two tiers of government, cannot be changed unilaterally.
3. Provincial/state representation at the centre;
4. An umpire to resolve disputes;
5. Mechanisms to facilitate inter-governmental cooperation.

(Watts, 1994)

Contrasting these five features of a federal constitution with the definition of a unitary constitution highlights some key differences. In a federal constitution there are more than one tiers of government with powers that cannot be taken away by unilateral action. Whether it actually happened or not, a federal constitution is considered to be like an agreement and as such any changes to such agreement have to be made by the parties to the agreement consenting to such change. The term “federal” comes from the Latin, *foedus*, which means a covenant or compact. Federalism The division of powers and competencies is therefore more secure as it is set out in a written constitution that is supreme. Parliament is not supreme, rather it is the constitution that is supreme. A federal constitution is more complex than a unitary one as it involves two, rather than one tier of government with constitutionally guaranteed powers. Since there are bound to be disputes between the tiers of government, an independent, impartial umpire who commands the confidence of both tiers of government, is necessary. In many federal countries the final arbiter/umpire is a Constitutional Court. Watts’ final feature is noteworthy as he suggests that modern federations need to be cooperative rather than competitive and that the two tiers of government have to collaborate and cooperate to make them successful.

The essence of a federal constitution is therefore, a combination of shared rule and self-rule. Watts’ third feature, provincial/state representation at the centre is important in appreciating the shared rule dimension of federalism. In most federal countries, the provinces/states are represented at the centre through a second chamber which forms part of a bi-cameral legislature. There are two rationales for a second chamber that provides for the provinces/states to be represented at the centre:

- a) A Protection of Devolution rationale;
- b) A Protection of National Unity rationale.

#### *The Protection of Devolution rationale*

In a federal system, the second tier of government or province/state is responsible for certain powers and responsibilities provided in the constitution. However, very often, central legislatures tend to encroach upon the powers granted to the provinces/states. If the provinces have a voice at the centre in a second chamber whether it be a Senate ( like in the U.S.) or a Council of Provinces ( like in South

Africa), the provinces have a mechanism whereby they can raise the alarm or object to any attempt at undermining provincial powers in the central legislature itself. Furthermore such a chamber also provides a forum for provincial concerns and interests to be raised at the central level.

### *The Protection of National Unity rationale*

Ensuring that the provinces in addition to enjoying certain powers over subjects and functions that directly affect their people, have also, a stake at the centre or in the country as a whole, helps to promote national unity and the territorial integrity of the country. If for example a regional minority such as the Tamils in Sri Lanka who are largely concentrated in the north east of the country are given autonomy to look after some of their own affairs in a federal arrangement, it will be in the long term interests of national unity if they are also given a voice in the affairs of the central government through participation in central institutions in Colombo.

Max Frenkel (1986) has described federalism as follows:

A system for decision making is federalist if it is an entity composed of territorially defined groups, each of which enjoys relatively high autonomy and which together, participate in an ordered and permanent way in the formation of the central entity's will.

(Frenkil, 1986)

In the 5 features of federalism therefore, there is a combination of the shared and self-rule dimensions of federalism. A federal constitution is not merely focused on promoting autonomy; it is also focused on promoting power sharing and inclusivity at the centre. President Nelson Mandela referred to the new South Africa as a "Rainbow Nation," where the distinctiveness of each colour of the rainbow was recognized and celebrated, but within the context of one entity. The Federal Idea which seeks to promote unity in diversity and the Rainbow Nation concept have a great deal in common.

## **FEDERALISM- MYTHS AND MISCONCEPTIONS**

In Asia there are often myths and misconceptions about federalism that need to be clarified. These include

- a) That a federal state is established only by previously independent states coming together.
- b) That a federal constitution must include a right to secession.

Constitutional scholars recognise that there are two ways in which a federal constitutional arrangement may be established. The more common method



known as Integrative Federalism is where previously independent nation states integrate to form a new political entity. The second method, known as Devolutionary Federalism is where a country that is unitary opts to change to a federal system by introducing constitutionally entrenched devolution of power that corresponds to the five features of federalism discussed above.

As Peeters (1994) has explained:

Integrative Federalism refers to a constitutional order that strives at unity in diversity among previously independent or confederally related component entities. The goal of establishing an effective central government, with direct effect on the people inside its sphere of powers is pursued while respecting the powers of the component entities, at least to the extent that the use by the latter of their powers does not result in divisiveness.

Devolutionary Federalism on the contrary, refers to a constitutional order that redistributes the powers of the previously unitary state among its component entities; these entities obtain an autonomous status within their fields of responsibility. The principal goal is to organise diversity within unity.

(Peeters, 1994)

Belgium, Spain, Brazil, Nigeria and South Africa are examples of countries that have adopted devolutionary federalism. Sri Lanka considered constitutional reform between 1995 and 2003 that would have moved it from a unitary to a federal state. Nepal has decided to follow the devolutionary federal route in terms of its commitments in the Peace Agreement of 2006 and the Interim Constitution of 2007.

## **FEDERALISM AND SECESSION**

A common myth in the debate on federalism in South Asia is that a federal constitution by definition must necessarily include a right to secession. A federal constitution may or may not include a right to secession. Most federal constitutions do not include a right to secession. In many western countries federalism is often proposed as an alternative to secession or as a strategy to undermine secessionist tendencies. For example in Canada, it could be argued that a federalist response countered the separatists in Quebec. Federal type reforms have been proposed in Spain, the United Kingdom and Belgium, in order to counter the threats of secession by addressing reasonable aspirations for autonomy within a united country. In Asia however, advocates of federal constitutional reforms are often seen as supporters of separation rather than opponents like in other parts of the world. In Sri Lanka for example advocates of constitutional reform based on federalism as a solution to the island's protracted ethnic conflict were often

criticised by leaders of the majority Sinhalese community as supporters of secession.

Developments in Canada following the referendum on secession in Quebec in 1997 where the “no” vote won narrowly are instructive. The Government of Canada sought an advisory opinion from the Supreme Court of Canada on two questions.

- 1) If the people of Quebec vote “yes” to secession, are they entitled to secede under the **Canadian Constitution**?
- 2) If the people of Quebec vote “yes” to secession, are they entitled to secede under **International Law**?

The Canadian Supreme Court in a unanimous judgement, answered “No” to both questions, but suggested that dialogue and negotiation had to take place in respect of the will expressed by the people of Quebec. With respect to International Law, the court observed:

In summary, the international right to self- determination generates, at best, a right to external self- determination in situations of former colonies; where people is oppressed.; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self- determination. (**Reference re Secession of Quebec, 1998 2 SCR, 217.**)

The court held that the people of Quebec enjoyed meaningful access to government through the principles of democracy, federalism and the rights protected under the Canadian constitution and therefore did not have the unilateral right to secession.

While it must be accepted that the concept of self-determination is being reviewed and reassessed in modern international law, it seems clear at present that the right to external self-determination which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign independent states is not recognized by international law subject possibly to three qualifications.

A similar position was taken by the report of two special rapporteurs who were invited to examine the question of the self-determination of peoples and secession in 1981 by the United Nations Human Rights Commission. While denying an unlimited right to secession to populations living in the territory of an independent sovereign state it accepted a right of secession in the special case, that of peoples, territories and entities subjugated in violation of international law. The report suggested that peoples subject to violations of international law, alien domination or gross oppression should have a right to secession.

The position on secession in international law corresponds closely to the 'just cause' theory of secession in political theory. There are broadly two main approaches or theories, the 'just cause theory' and the 'choice theory'. There are typological labels for two categories of normative theory concerned with the morality of self-determination-based rights to secession. They have been employed by political theorists to organize their discussions, and as such, articulate the various conditions upon which a justified claim can be made for session.

These two theories are not as different as it may seem, in that both tend to qualify the existence and exercise of the right to secession, albeit upon the basis of different assumptions and arguments. More importantly, both theories apply established liberal arguments and liberal values to the issue of secession, in that while these are normative discussions about the morality of secession, those normative standards are but variations on a broader liberal theme.

While the Choice Theory is the certainly the more permissive, it nevertheless contains conceptual impediments, to prevent the right from being exercised too easily. The Just Cause Theory restricts the right to secede as being available only to those groups who have suffered various forms and degrees of injustice within the existing social and political structures. At a conceptual level, both categories of arguments contain strengths and weaknesses just as much as at the practical level, they possess advantages and disadvantages over each other.

### **Choice Theory**

Choice theories of secession are based primarily on the understanding of democracy in the classical liberal sense. A decision of a territorially concentrated group to secede is simply a matter of choice as expressed by the majority of that community. No further justification is necessary. The secessionist aspirations of (the majority of) the seceding community as expressed in free referenda, legitimates the claim to secede. Here, the choice theories are distinct from the just-cause theories in that the latter require a demonstration by the seceding group of suffering injustice by remaining in the existing state. Typically, a choice theory argument for a right to self-determination leading to a right to secession is one that is closely associated with rights of political association and the liberal value of autonomy. Here, choice theories of secession are accurately described as extensions, to a group, of liberal democratic notions of individual, voluntary choice.

Herein lies the choice theories' main conceptual weakness. It has been pointed out that they ignore totally the character of most secessionist movements. Most secessionist movements are mobilized on perceptions of nationality or nationhood. Liberal assumptions about political association based on individual autonomy and freedom of choice tend to completely ignore the ascriptive nature

of groups demanding secession on bases of common ethnicity or religion. On the other hand, choice theories fail to regard and thereby, to provide criteria for evaluating the territorial claims of these groups, secessionist movements are based on perceptions of self-determination invariably linked to contiguous territories over which they make special claims.

### **Just Cause Theory**

Just cause theories are primarily distinct from choice theories in that they require further justification over and above the mere 'choice' of a group to legitimate a right to secession. In other words, they place a greater 'burden of proof' on the secessionist group. In this respect, many typical just-cause theories are analogous to Locke's theory of revolution. That is, an act of secession is legitimate only where it is absolutely necessary to remedy an injustice. In other words, this is a right that must be exercised only as a remedial measure in extreme situations where no other course of action is possible. However, there is some measure of variance between different just-cause theorists as to what constitutes a sufficient degree of injustice so as to warrant secession. To some, discriminatory injustice is sufficient, while to others it requires graver degrees of injustice such as genocide or conquest.

Most just-cause theories display a degree of cynicism on the formation of national identities. Many just-cause theorists view national identities as being mobilized by social elites, and as such, they argue there cannot be such a thing as a 'national right to self-determination'. They sharply reject the genuineness of such a right, especially where it has been grounded in the individualist language of choice.

The most significant of the advantages of the just-cause conceptualization of secession is the emphasis it places on the connection between the right to resist tyranny or oppression and the right to self-determination. Put another way, a just-cause concept of secession has necessarily a basis in, and is located within, a general framework of human rights.

Critics of the just-cause theory point to its reliance on the application of objective criteria to subjective aspirations of secessionist groups in assessing or approximating the relative justice of their claims. Defenders argue that this is precisely the strength of the theory. Critics counter that if the legitimacy or otherwise of the secessionists' claim can only be judged with reference to a human rights based standard of justice, it ignores the real dynamics and socio-political forces that sustain secessionist movements. The political potency of loyalty ties such as culture, language, ethnicity and religion need hardly be stressed. Therefore while just-cause theory appeals from the liberal standpoint by virtue of its imputation of universal human rights norms to secession, it suffers from the fundamental weakness in its assumption that 'justice' constitutes a realistic legitimating criterion.

Perhaps the most influential proponent of the just cause theory, Allen Buchanan, responding to the view that the choice theory is more compatible with democracy, makes the convincing argument that enabling easy exit from a state undermines democracy as it subverts the conditions for citizens of a state to nurture and practice the virtues of deliberative democracy where they engage in rational dialogue prior to decision making or to manage or resolve conflict. <sup>21</sup> Easy exit encourages withdrawal and retreat from the confrontation of complex, difficult challenges and a tendency to construct a boundary wall around the individual and like-minded citizens. As Buchanan (1998) explains,

In a state in which it is generally believed that a territorially concentrated minority has the right to secede if it votes to do so and that the exercise of this right will not be exposed, it will be less rational for individuals to invest themselves in the practice of principled debate and deliberation. A healthy democracy requires large numbers of citizens who are committed to rational dialogue – who feel obliged to become informed, and who are committed to agree to disagree rationally, to appeal to reasons backed by principles, rather than indulging in strategic behavior that is designed to achieve their ends without the hard work of achieving principled, rational consensus.

There are however eminently practical considerations which support the adoption of the just cause approach to secession. Firstly, it is more compatible with international human rights norms and standards and even modern trends which lean more towards support for the representation of sub-national units and groups in international fora, rather than a trend towards the adoption of a choice theory in international law. Secondly, it will make it easier for liberal opinion among all communities in countries like Nepal, Myanmar and Sri Lanka to marginalize their nationalist counterparts by campaigning for maximum autonomy within a united country.

In Sri Lanka during the peace negotiations between the Government of Sri Lanka and the Liberation Tigers of Tamil Eelam in 2002-3, there were efforts to explore a federal constitutional arrangement for conflict resolution in the country. There were fears among the Sinhalese majority that federalism would include a right to secession in the proposed Tamil majority province. This would have been difficult to refute under the choice theory. Under the just cause theory however, Sinhalese liberals would have been able to allay the fear that autonomy would inevitably lead to secession. Tamil moderates would have been able to cite both the military and legal impediments to the creation of a separate state in support of internal self-determination based on equality, dignity and justice. Thirdly, the theory would have served as a check on Sinhalese majoritarian excesses that were the primary cause for the exacerbation of the ethnic conflict and also provide an incentive for them to seek a reasonable compromise based on power sharing within a united country. Fourthly, it would have prevented the snowball effect of

the choice theory with particular reference to the Muslims and the hill county Tamil community.

## **THE FEDERALISM DEBATE IN NEPAL**

Nepal experienced a decade long conflict that ended with the signing of a Comprehensive Peace Agreement (CPA) in November 2006. The CPA committed Nepal to a change agenda that included a new constitution for a new Nepal that should be drafted and adopted by an elected and inclusive Constituent Assembly. The CPA also committed Nepal to “an inclusive, democratic and progressive restructuring of the state by ending the centralized, unitary state” and the empowerment of historically excluded ethnic groups, women and people living in backward regions (Adhikari, 2010).

A 601 member Constituent Assembly was elected in 2008 under the Interim Constitution of 2007 in order to ensure that Nepal’s diverse ethnic, caste and regional groups were represented in the constitution making process. There were 197 women members. The Interim Constitution declared that Nepal would be an inclusive, secular, federal, democratic republic, all characteristics that did not exist in Nepal prior to 2006. The CA had to flesh out the details. The members were divided into various thematic committees that considered the main constitutional issues that confronted the country.

The committees on state restructuring and natural resources focused on the federal design of the country. They agreed on a division of powers and functions between the central, provincial and local tiers of government, where like in South Africa, there would be a strong centre. The CA also agreed that the country should be divided into provinces on the basis of identity and viability. But the CA of 2008-12 could not agree on more detail and the issues of the name, the number and the boundaries of the proposed provinces prevented a consensus on the constitution and the CA’s term ended in 2012. After a crisis of constitutionalism and a political stalemate, a political understanding was reached and fresh elections held to elect a second CA in November 2013. The second CA has less representation from excluded groups but has agreed to build on the work of the first CA and accept identity and viability as the bases for the country’s federal structure. At present the options have been narrowed to a federal structure with between 6 and 10 provinces. The second CA hopes to complete the task of constitution making in 2015.

There has in the past 8 years been a relatively informed debate on the pros and cons of federalism; how federalism can empower minority groups; how power can be moved away from the Kathmandu based dominant elite; how backward regions can be empowered; and also the strengths and limitations of federalism. Legitimate concerns about federalism have also surfaced in the debate: Does

federalism by emphasizing the particular do so at the expense of the common? Does federalism by in effect devolving power to the larger minorities in a province forget about the aspirations and concerns of the smaller minorities within such regions (the minorities within a minority critique of federalism); can federalism work in a country that is as diverse as Nepal? Is federalism too complex a system for a poor country that lacks human and financial capacities and resources? As was the case in Sri Lanka, since the champions of federalism were groups that wanted autonomy, there has been insufficient focus on the shared rule dimensions of federalism.

There is therefore in Nepal a consensus that Nepal will be a federal state and that identity and viability will be the bases for the demarcation of the provinces. Though the respective weightage to be given to these two criteria has prevented consensus on the details of the federal architecture for the country, it is likely that a compromise will be reached and a centralized federal system adopted in Nepal sometime next year (Khanal, 2014).

The federal idea is one that has been discussed extensively in South Asia (Griffiths, 2005). The next part of the paper will briefly examine a country with a strong commitment to federalism and where federalism has been practised for many years. It was then examine a country in which there has been discussion on federalism for many years, which came close to agreement on a federal constitution as a basis for conflict resolution, but where a strong anti-federalist movement successfully prevented its adoption. The paper will then discuss South Africa's post-apartheid constitution, widely seen as one of the most progressive constitutions in the world, which has several federal features.

## **FEDERALISM AND INDIA**

There is a general consensus that federalism has helped to keep India united, democratic and strong. Soon after India became independent in 1947, it convened a Constituent Assembly to draft and adopt a constitution that would derive its legitimacy from the sovereign people. The Constitution that was adopted in 1950 remains one of the longest and most detailed constitutions in the world (Austin, 1966).

The framers of the Indian Constitution were aware that given India's size and diversity, they had to construct an encompassing frame or constitutional structure that allowed adequate expression of diversity while at the same time maintaining the unity that was essential for national cohesion and unity (Mahajan, 2007). The constitution did not use the term federal, but rather, a "union of states" as initially there was a reluctance to grant too much recognition to diversity or to grant too much power to the states as there were fears that this might lead to disunity. But over the years India has evolved into a federal republic

that has successfully managed ethnic, linguistic and religious diversity, dealt with secessionist movements, divided large states into smaller ones and successfully preserved its unity and territorial integrity and democratic traditions. In recent years the Indian Supreme Court has declared federalism to be one of the basic features of the Indian Constitution.

India is a federation with a parliamentary system of government. It has 30 states, six “union territories” and a national capital territory. The states derive their powers directly from the Constitution. The Constitution provides for the division of powers between the centre and the states in the form of 3 lists –one for the centre; one for the states and one list of subjects over which power to legislate is shared-the concurrent list. The central legislature has exclusive powers to legislate on 97 subjects on the union list of competences and concurrent power with the states to legislate on 47 subjects on the Concurrent List. The states have power over 66 subjects spelled out in the state list. In the legislative sphere, India’s central legislature is when compared with other federations, generally quite powerful. In the executive sphere, the Constitution permits executive power to be exercised by the states but in a manner that ensures compliance with the executive power of the union. The governor of each state acts not only as the nominal head of the state but also as the link between the state and the centre. Another mechanism by which the centre exercises control over the states is through the All India Civil Service whose members exercise oversight over the public services in the states.

The Indian Constitution provides that sovereignty resides in the people of India and recognises one citizenship for the whole country. The Constitution protects the provisions dealing with federalism by requiring that amendments to those provisions require the consent of the majority of state legislatures. However today the federal character of the Indian constitution has even greater protection as the Indian Supreme Court has declared federalism to be a basic feature of the Constitution thereby ensuring that it will always be a feature of the Indian Constitution. The other basic features of the constitution include the supremacy of the constitution; the republican and democratic form of government; the secular character of the constitution and the separation of powers. The Indian Constitution does not grant any state the right to secession. There is a single constitution for both the Union and the states.

The Indian Constitution recognises the principle of asymmetrical federalism where not all states have the same degree of powers. Where it was felt that a state for various reasons was entitled to some additional powers or distinctive powers, this was provided for in the constitution.

Over the years, India’s federal structure has been strengthened and with it the process of democratisation. The 73rd and 74th Amendments to the Constitution that were introduced in 1992, gave constitutional recognition to local government institutions thereby strengthening their role and promoting participatory democracy at the local level. In India and in many Asian countries considering



federalism, the relationship between the 3 tiers of government raises difficult issues. The second tier—the provinces or the states are often worried that the first tier, the centre, will work directly with the third tier of government to undermine its powers. In India and in countries debating federalism such as Sri Lanka and Nepal, often the champions of provincial autonomy have been lukewarm in their support for a strong system of local government. This is unfortunate as the principle of subsidiarity, an important component of the federal idea suggests that there should be a presumption in favour of power being devolved as far as it is possible and effective. As such a strong system of local government can be viewed as an extension of the federal principle. The Amendments in India ensured the extension of the federal idea and participatory democracy to local communities and people.

As territorially located communities have begun to participate more effectively in their governance both at the state and national levels, the nation state as a whole has also been transformed into what scholars like Will Kymlicka have described as multi-nation states, thereby promoting unity in diversity.

### **SRI LANKA'S DEBATE ON FEDERALISM**

Federalism has been part of the political discourse of Ceylon/Sri Lanka for many years (see, Edrisinha, 2008). Soon after Ceylon obtained independence from Britain in 1948, the main minority group the Tamils sought a federal constitution to provide for a certain degree of self-government within a united Ceylon in the Tamil majority regions of the north east of the island. The main Tamil political party from the 1950s to the 1970s was the Federal Party which was even willing to accept at various stages devolution of power that fell short of federalism. The party was led by a committed Gandhian and democrat who used peaceful means to campaign for federalism and remained steadfastly opposed to secession. The main political parties of Ceylon that were dominated by the Sinhalese and Buddhist majority population, however, rejected federalism which they believed would lead to secession. During this period, successive governments also sought to entrench the language and religion of the majority community at the expense of the Tamil minority. This culminated in the adoption of the first Republican Constitution of 1972 which repealed the independence constitution and its minority safeguards and made the new republic of Sri Lanka a unitary state with a privileged constitutional status for the Sinhala language and Buddhism, the language and religion of the majority. It is not surprising that the moderate, Gandhian and democratic leadership of the Federal Party was rejected by the Tamil youth in particular in the mid-1970s.

The Tamil militant movement gained momentum in the following years with a direct demand for a separate state in the northeast of the island, the rise of Tamil nationalism, a violent ethnic conflict and the rise of the Liberation Tigers of

Tamil Eelam (LTTE). The LTTE waged a fanatical civil war, eliminating rival Tamil political leaders and groups and successfully resisted both the Indian and Sri Lankan armed forces for many years. In the mid- 1980s the main Tamil political forces including the LTTE adopted the Thimpu Principles as their basic set of political claims and demands. They included recognition of the Tamils of Sri Lanka as a distinct nationality; the recognition of the north and east of the country as a Tamil homeland; the recognition of the inalienable right to self- determination of the Tamil nation and granting equality and fundamental democratic rights to all Tamils. The main political parties in Sri Lanka interpreted the Thimpu Principles as a claim to a separate state and rejected them.

By the mid-1990s, the LTTE controlled territory in parts of the north and the east, ran a parallel administration in those regions with its own police, administrative service and judicial system and prevented the writ of the Sri Lankan government from extending over those parts of the country. Between 1995 and 2000, the government of President Chandrika Kumaratunga worked with moderate Tamil parties on a new constitution that sought to introduce greater rights for the Tamils and other minorities and quasi federal devolution of power. The President had to abandon her attempts to introduce the constitution as it was rejected by hardline Sinhalese elements within her own party, a significant section of the Buddhist clergy and also by Tamil political forces who argued that the constitution was “too little too late.”

In 2001, Norway began to facilitate negotiations between the LTTE (which had rejected the 1995-2000 constitution reform project from the outset) and a new coalition government of Sri Lanka. The Government of Sri Lanka was committed to maximum devolution of power within a unitary state while the LTTE remained committed to the Thimpu Principles of the Tamil homeland, nationhood and self-determination. In a significant breakthrough in December 2002 in Oslo the LTTE and the Government of Sri Lanka agreed to explore a federal solution based on the principles of internal self- determination, in areas of historical habitation of the Tamil people, within a united Sri Lanka and affirmed that the solution should be acceptable to all communities, a clear indication that the Muslim minority in the Tamil majority regions would also be engaged in developing the political solution. The references to internal self- determination and a united Sri Lanka were crucial in allaying the consistent and perennial fear of the Sinhalese, that federalism was a stepping stone to secession. For the Government of Sri Lanka responding positively to the federal idea and internal self- determination was a significant change that was not too difficult given the groundwork laid by the constitution reform project of 1995-2000.

However within a few months opposition to the Oslo agreement grew both within the LTTE which saw it as an unacceptable compromise and also among the Sinhalese Buddhist majority which remained trenchantly opposed to the federal

idea. The distrust between the two negotiating parties never abated with each side accusing the other of using the ceasefire and the protracted negotiations as an opportunity to fortify militarily. The promise of Oslo soon disappeared and the negotiations collapsed. When efforts were made to resume negotiations, the LTTE insisted on an interim administration for the north and east. The LTTE's proposals for an Interim Self Governing Authority (ISGA) in October 2003 were ironically but not surprisingly, centralist and unitary in character and were seriously deficient from the perspectives of federalism and constitutionalism. Though the two parties to the conflict were exploring constitutional compromise on the basis of the federal idea, their conduct and their proposals demonstrated that they were both incapable of internalizing the core elements of constitutionalism and federalism. Scepticism as to the bona fides of the maximalist LTTE grew among the Sinhalese and the Muslim minority; the LTTE viewed the Government as intransigent and incapable of withstanding the pressure of the Sinhalese Buddhist majority; the peace process collapsed; the election of a new, hawkish President in 2005 led to a bloody resumption of the conflict.

While discussions on a federal constitution have figured prominently in Sri Lanka as it has sought to manage tensions between its two largest ethnic groups, a federal constitution has consistently been rejected because of fears that federalism by emphasizing identity and ethnicity, the particular as opposed to the common, will encourage division and ultimately secession. This was accompanied by a majoritarian mindset that rejected any notion of power sharing and meaningful minority rights. Another lesson from Sri Lanka's sad litany of failed attempts at constitutional reform for durable peace, was that when moderate political leaders failed to reach compromise, the forces of extremism gained political momentum.

## **FEDERALISM AND SOUTH AFRICA**

The South African Constitution of 1996 is considered one of the most progressive constitutions in the world. Not only does the constitution provide for a comprehensive Bill of Rights and impose effective restraints on the wielders of political power, but it also has facilitated the healing of the wounds of the country's bitter legacy of apartheid.

Between 1990 and 1996, following a negotiated political settlement, a new constitution for a new democratic South Africa based on equality, non-racialism and non-sexism was drafted and adopted by an elected and inclusive Constituent Assembly (see Klug, 2001). The new constitution was expected to be an instrument for national reconciliation and a new covenant that bound the peoples of South Africa among themselves and with the newly designed nation state. As President Mandela declared:

We enter into a covenant that will build a society in which all South Africans, both black and white, will be able to walk, talk without any fear in their hearts, assured of their inalienable right to human dignity, a rainbow nation at peace with itself and the world.

The process by which the Constitution of 1996 was adopted was significant and demonstrated the spirit of reconciliation and compromise that pervaded the transfer of power (Haysom, 2007). There was distrust and suspicion both on the side of the National Party that held political power and the African National Congress (ANC) that had led the struggle against apartheid. The National Party wanted to ensure certain constitutional safeguards and the rights of the white minority whereas the ANC wanted the new constitution to be adopted by a democratically elected Constituent Assembly. A compromise was reached whereby an Interim Constitution was adopted in 1993, under which elections to a Constituent Assembly were held; the Interim constitution was described as a bridge between the past and the future and the parties agreed to 34 core constitutional principles that would be binding on the Constituent Assembly when it drafted and adopted the final constitution. When the Constituent Assembly adopted the new constitution in May 1996, the Constitutional Court that had been established under the Interim Constitution, reviewed the draft to ensure compatibility with the 34 principles. It ordered some changes to be made and the final constitution was formally adopted in December 1996.

One of the most significant features of the new Constitution is that it enshrines founding provisions that commit South Africa to core values that are justiciable including equality, dignity, accountability, responsiveness and openness. Over the years, the Constitutional Court that is required to be inclusive and reflect South Africa's diversity has through constitutional interpretation, applied these values and the comprehensive Bill of Rights to facilitate the change that South Africa needed with the end of apartheid.

The ANC was initially opposed to the introduction of a federal constitution as it felt that South Africa needed a strong, powerful government to effect radical change to dismantle the legacy of apartheid and that a unitary constitution would enable such a powerful government to be elected. However in a spirit of reconciliation, the ANC abandoned its commitment to a unitary state and the final constitution is federal in all but name.

The new constitution established the principle of Cooperative Government (Chapter 3) which provides that the government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated. All three spheres of government have constitutional status and have to recognise the other branches of government. The second tier of government consists of 9 provinces with provincial governments, a provincial

premier and a provincial executive council exercising executive power at the provincial level and a provincial legislature with a list of exclusive subjects and functions and limited revenue raising powers. Provinces share power with the centre on a number of subjects including education, health, and social welfare. The division of powers in South Africa provides for the national parliament to wield more power than provincial legislatures. The third tier of government consists of municipalities that have specified responsibilities, limited revenue raising powers and which depend on fiscal transfers from the centre.

These centralised federal features are mitigated somewhat by an imaginative mechanism to provide for provincial representation at the centre. The South African Constitution instead of opting for a conventional upper house like a U.S. style Senate, introduced a National Council of Provinces (NCOP) which together with the National Assembly (House of Representatives) comprises the bicameral National Parliament. The Constitution describes the role of the National Council of Provinces as the house that represents the provinces to ensure that provincial interests are taken into account in the national sphere of government. (Article 41 (4)). The NCOP has three main functions: it considers and passes national bills; it balances the interests of the three tiers of government through an oversight/watchdog function that the constitution provides for and it seeks to ensure that government is a partnership in keeping with the principle of cooperative government.

Membership of the NCOP is based primarily on provincial representation. Each of the 9 provinces is represented by a 10 member delegation including members from the provincial executive and legislature. There are 6 “permanent” delegates elected by the provincial legislature in proportion to the political parties’ representation in the provincial legislature. The 4 “special” delegates are members of the provincial legislature who can change depending on the subjects/issues to be deliberated upon in the NCOP. The Provincial Premier or his/her nominee heads the provincial delegation. On matters that affect provinces each provincial delegation has one vote thereby compelling the provincial delegation to adopt a common position across party lines to ensure that the interests of the province are upheld when a vote is taken in the NCOP. The design of the second chamber in South Africa ensures that the rationale for a second chamber in a federal constitution: ensuring a provincial voice at the centre/the protection of devolution is effectively realised.

The South African Constitution of 1996 with its emphasis on values and principles, a strong Bill of Rights, an inclusive and empathetic Constitutional Court and the principle of cooperative government which is interrelated, has helped to give practical effect to the ideal of the rainbow nation.

## LESSONS FOR NEPAL

The Indian and South African federal experiences and the extended debate on federalism in Ceylon/Sri Lanka offer some useful lessons for Nepal as it seeks to realise its commitment to introduce a federal constitution and respond to the critics of federalism.

### India

The Indian example demonstrates how a federal constitution can promote national unity and territorial integrity amidst great diversity. While India has its share of challenges in various parts of the country, the fact that, by and large, India has remained united while over the past 60 years strengthening its federal features, is a singular political achievement. Could India have survived and dealt with its linguistic and regional nationalist challenges if it had not been federal? The Indian experience is a reminder of the interrelationship between federalism and inclusion. The aspirations for empowerment of historically disadvantaged groups can be met often by a combination of measures that could be classified under federalism- self- government, recognition of identity or inclusion-affirmative action, quotas, special measure for representation etc. More recent constitutional developments in India highlight the importance of the third tier of government as an integral part of the federal idea. The federal idea does not only focus on the division of powers between the centre (tier 1) and the state/province (tier 2). It must also extend to the local government level (tier 3) if the federal principles of participatory democracy, subsidiarity and a diffusion of power is to be meaningful. In India and the other countries discussed above, there were understandable fears that the centre would manipulate the local to undermine the provincial spheres of influence and power. Often the proponents of strong provincial autonomy were suspicious of granting too much power to local government for this reason. India (and South Africa) offer lessons on how these concerns can be addressed through constitutional means.

India also offers valuable lessons regarding the linkages between federalism and other basic features of the constitution such as a secular state, democracy, the Rule of Law and strong, independent and inclusive national institutions.

### Sri Lanka

Sri Lanka's inability to adopt a federal constitution also offers lessons for Nepal. It reminds us of the importance of dealing with the widespread myths and misconceptions about the federal idea and also of responding effectively to the reasonable apprehensions about the federal idea. The concern that by emphasising the particular one could undermine the common; the linkage between federalism and secession; the need to distinguish between federalism and autonomy; the importance of highlighting the shared rule dimension of federalism, not just its self rule dimension; and "the minorities within a minorities" critique of

federalism that suggests that by focusing on the larger minorities who often are at the forefront of the campaign for autonomy, one does so to the detriment of smaller minorities. Another weakness of the debate on federalism in Sri Lanka and the quasi-federal proposals for constitutional reform of 1995-2000 was the absence of any focus on a second chamber or a council to represent provincial interests at the centre and other share rule elements. This helped to fortify the perception that federalism was only about self rule and autonomy.

The resistance to the federal idea in Sri Lanka also highlights the resilience of the centralised, unitary mindset among the political and legal elites of a country. This centralist and often hierarchical political culture is so entrenched that it finds it difficult to contemplate and understand the federal idea which challenges such an approach and is more complex in its institutional arrangements and underlying assumptions. This is compounded when the political and legal elites seem to have an obsession with British constitutional doctrines and political traditions. The prevalence of the “mindset challenge” was vividly demonstrated by the fact that when the Tamil Tigers presented constitutional proposals for an interim self governing authority for Tamil majority areas as part of the peace negotiations in 2003/4, the proposals were unitary and majoritarian in character. Champions of federalism for the country as a whole can often be advocates of centralisation for their own territory.

### **South Africa**

The South African Constitution making process offers several lessons both with respect to process and substance. The primacy accorded to constitutional principles; the generosity of spirit which saw President Mandela, in particular, but also the other political forces, reaching accommodation on contentious constitutional issues; the central role played by a Constitutional Court and the incorporation of the principle of Cooperative Government stand out as distinctive features.

The South African principle of Cooperative Government addresses the fears concerning the “battle of the 3 tiers” by ensuring that the powers and functions of each tier of government is derived from the supreme law itself and is not dependent on the discretion of another tier of government. The design of the second chamber in South Africa ensures that the chamber fulfils its primary rationales- the protection of devolution rationale and ensuring provincial representation at the centre. In South Asia again possibly due to the British colonial legacy, second chambers are often viewed as mere fora for debate and for the appointment of distinguished personalities and therefore not generally viewed as important democratic institutions. The design of the National Council of Provinces in South Africa facilitates a united provincial response to national legislation that ensures that it is ideally situated to uphold provincial interests in the national legislature.

The positive role of the Constitutional Court in protecting the agreed constitutional principles during the constitution adoption process and thereafter through constitutional interpretation has been widely acknowledged. One of the main reasons for the success of the court was its composition. There was a realisation that the guardians of a new constitution adopted to facilitate change and transformation in South Africa had to be persons who had empathy for the change agenda in addition to being technically competent and committed to the Rule of Law. The composition of the first court therefore included not only senior judges, but also constitutional scholars and human rights activists who collectively represented the diversity of South Africa. A new constitutional dispensation requires a new approach to constitutional interpretation.

## CONCLUSION

The introduction of a federal constitution to deal with societies that are multi-ethnic and plural in character is an option that has become increasingly popular around the world. It has proved effective in dealing with the rise in the politics of recognition or identity based politics. The reality of politics in South Asia suggests that identity and ethnicity cannot be merely wished away; nor can it be suppressed. While federalism may take different forms (He & Galligan, 2008), the essence of the federal idea is that it combines shared and self rule by promoting unity in diversity and , celebrating difference but within a united whole. The federal idea is a useful constitutional model that should be considered by constitution makers who have to design a constitution to respond effectively to the plural political reality of their countries. This paper has attempted to capture many of the issues, challenges and design choices that constitution makers have to confront when exploring federal arrangements particularly in the regional context.

## REFERENCES

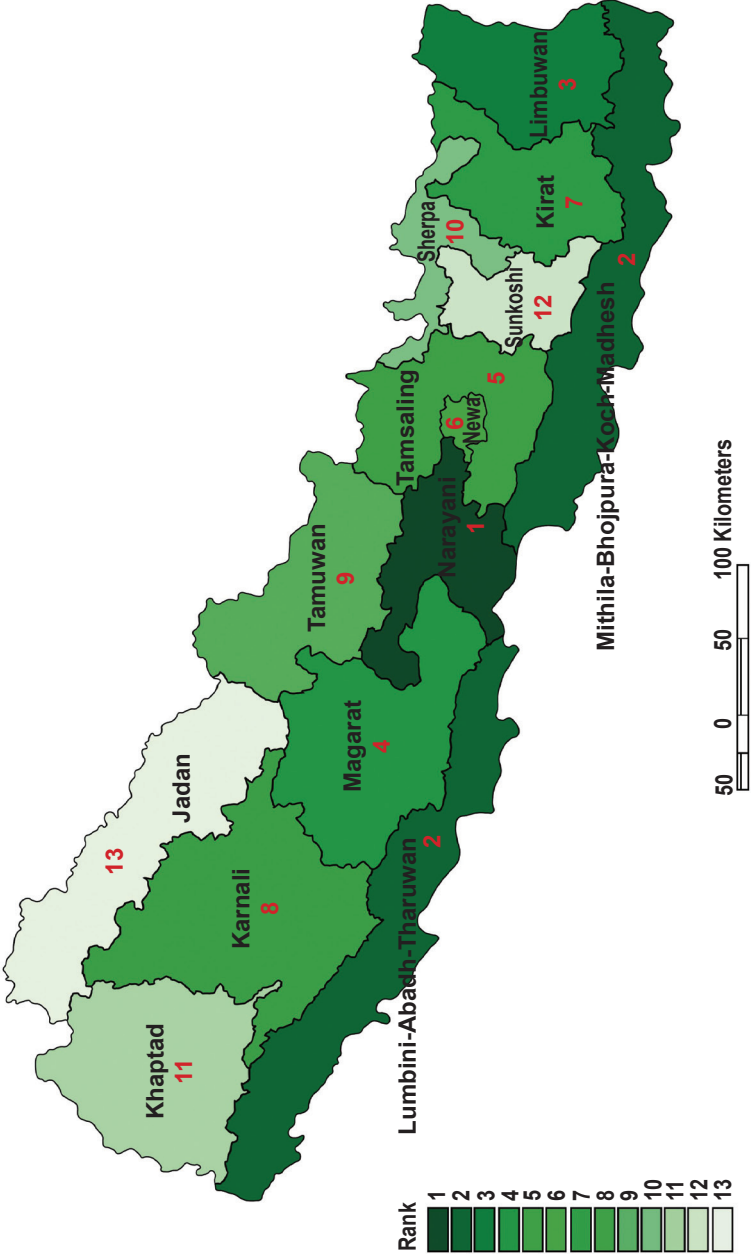
- Adhikari, B. (Ed). (2010). *Nepal: Design Options for the New Constitution*, Kathmandu: NCF, Tribhuvan University and Supreme Court Bar Association.
- Austin, G. (1996). *The Indian Constitution: Cornerstone of a Nation*. New Delhi: OUP, India.
- Buchanan, A. (1998). Democracy and Secession. In Moore, M. (Ed.). *National Self Determination and Secession*. Oxford: OUP.
- Choudhary, S. (2008). *Constitutional Design for Divided Societies*. Oxford: OUP.
- Edrisinha R., Gomez M., Thamilmaran V. & Welikala A. (Eds.) (2008). *Power Sharing in Sri Lanka: Constitutional and Political Documents 1926-2008*. Colombo: Centre for Policy Alternatives.
- Frenkel, M. (1986). *Federal Theory*. Canberra: The Australian National University.
- Kymlicka, W. & He B. (2005). *Multiculturalism in Asia*. Oxford: OUP.
- Griffiths A.L. (Ed.) (2005). *Handbook of Federal Countries*, 2005. Montreal: Forum of Federations.
- Ghai, Y. (2000). *Autonomy and Ethnicity: Negotiating Competing Claims in Multi-Ethnic States*. Cambridge: CUP.
- Haysom, N. (2007). Negotiating a Sustainable Political Settlement: Lessons from the South African Transition. In Bhattarai, H. & Subedi, J. (Eds.), *Democratic Constitution Making: Experiences from Nepal, Kenya, South Africa and Sri Lanka*. Kathmandu: NESAC.



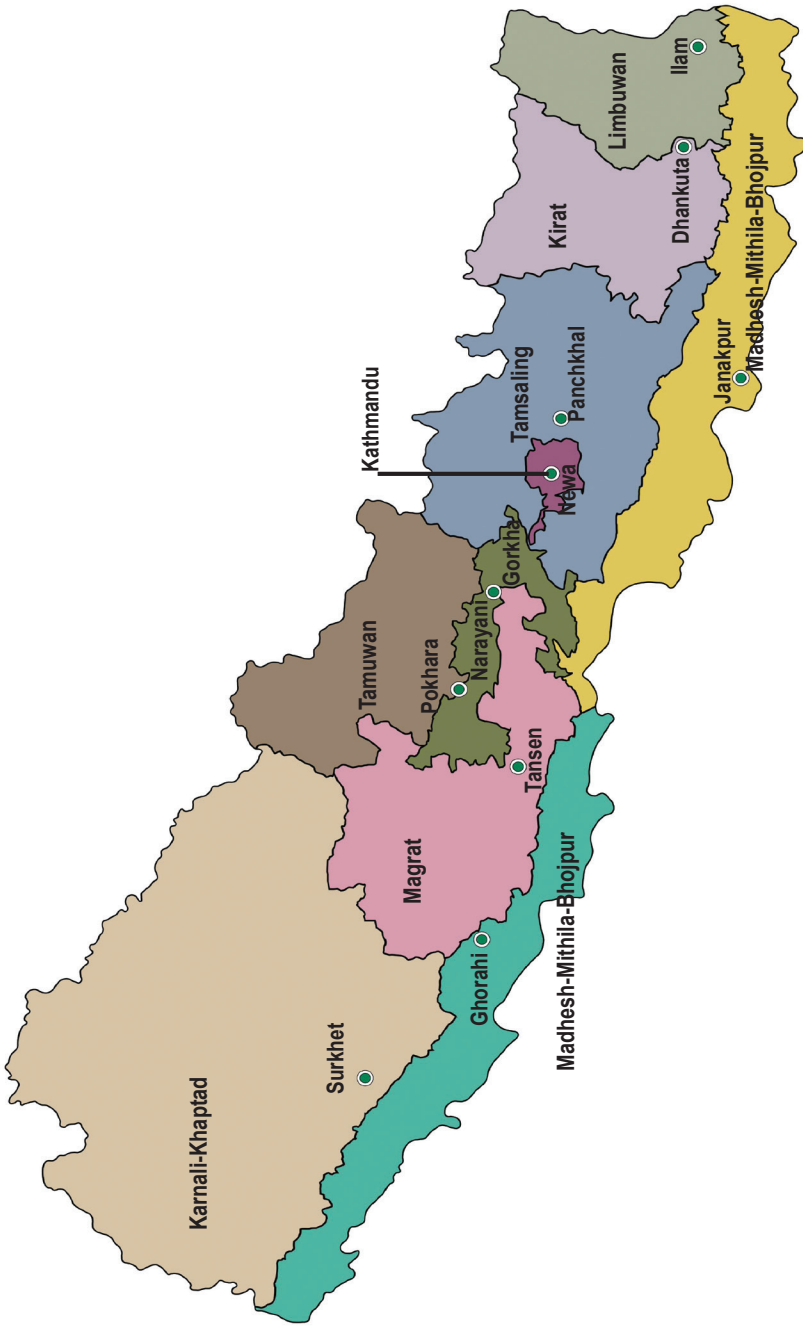
- He, B. Galligan, B. & Inouye, T. (2008) *Federalism in Asia*. Cheltenham, U.K.: Edward Elgar.
- Khanal, K. (2014). Federalism Discourse in Nepal: An Appraisal. In Baral, L.R. & Hachhethu, K.(Eds.), *South Asia: Nation Building and Federalism*. New Delhi: Vij Books.
- Klug, H. (2001). Participating in the Design: Constitution Making in South Africa. In Andrews, P. & Ellman, S. (Eds.), *The Post Apartheid Constitutions: Perspectives on South Africa's Basic Law*. Johannesburg and Athens: Witwatersrand and Ohio University Presses.
- Mahajan, G. (2007). Federal accommodation of Ethno-Cultural identities. In He, B., Galligan, B. & Inoguchi, T. (Eds.), *Federalism in Asia*. Cheltenham, U.K.: Edward Elgar.
- Peeters, P. (1994). Federalism: A Comparative Perspective-Belgium transforms from a Unitary to a Federal State. In de Villers, B. (Ed.), *Evaluating Federal Systems*. Cape Town: Juta.
- Strong, C.F (1966). *Modern Political Constitutions*. London: Sidgwick and Jackson.
- Watts, R. (1994). Contemporary Views on Federalism in *Evaluating Federal Systems*. de Villiers, B. (Ed.). Cape Town: Juta.

APPENDIX - I

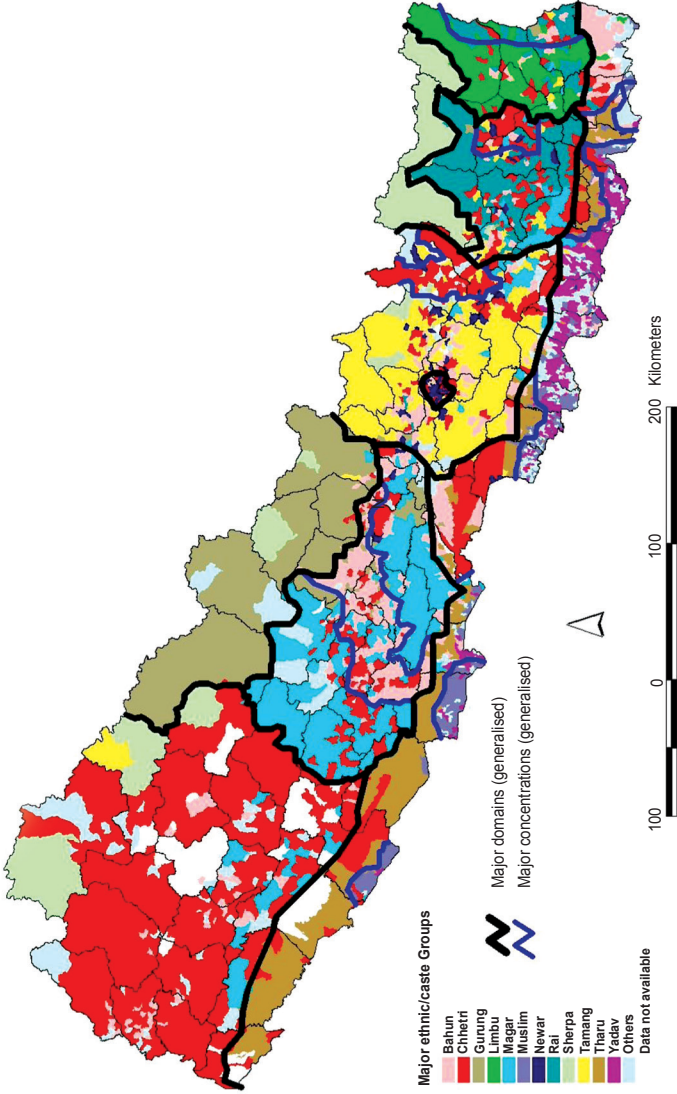
Map - I - Nepal: Level of Proposed Provinces on the basis of Various Indexes



Map - II: Provinces of Federal Nepal Proposed by the Majority Report of the High Level Commission for State Restructuring



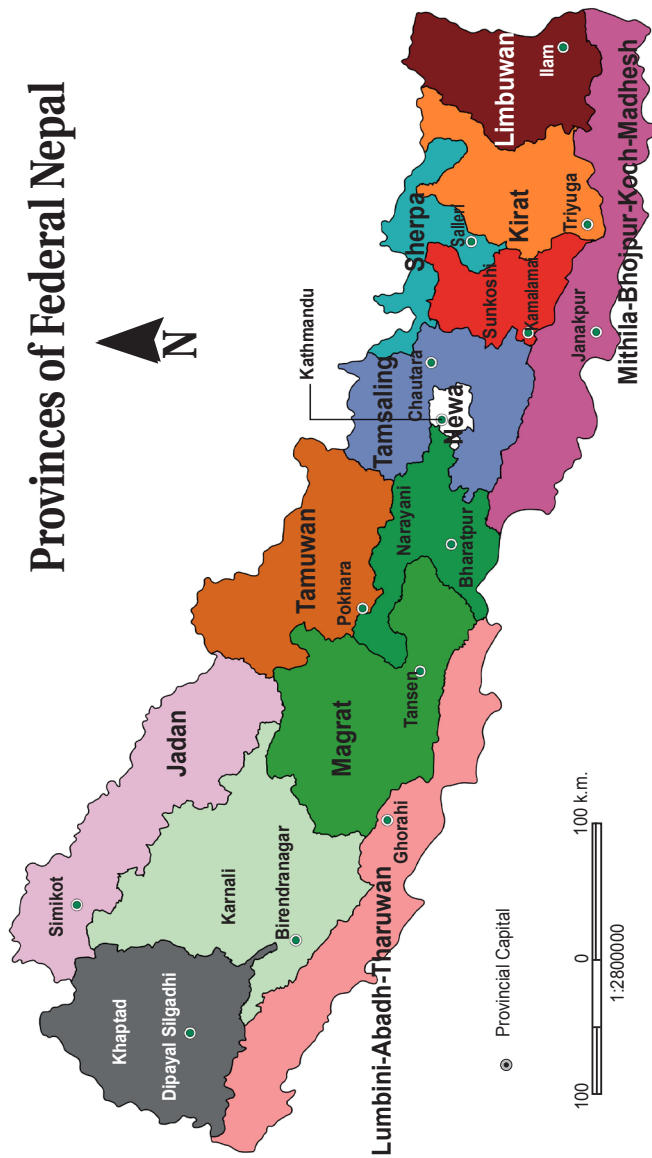
**Map - III: Major Ethnic/Caste Groups, Domains and Concentrations 2001**  
**Based on contiguity and share of major ethnic/caste population in VDC/NPs**



*On the basis of contiguity and largest population share 8 major generalized ethnic/caste domains can be identified in the hill-mountain region – that of Limbu, Rai, Sherpa, Tamang, Newar, Magar, Gurung and Chhetri. In the Tarai Tharus dominate the western Tarai and Yadav and Tharu in the eastern Tarai. There are also major concentrations of Bahun and Chhetri in the hills and tarai, and of Muslims in the Tarai.*

Map- IV : Provinces of Federal Nepal Proposed by the Constituent Assembly Committee for the Restructuring of the State and Distribution of State Powers (2010)

Proposed by the Constituent Assembly Committee for the Restructuring of the State and Distribution of State Powers



## END NOTES

### CHAPTER 1

1. A 'weak state' is one that does not have the "capacities to penetrate society, regulate social relationships, extract resources, and appropriate or use resources in determined ways" (Heir & Robinson, 2007).
2. A 'failed state' is a state in which developmental and governmental ineptitude has become so entrenched that it fails to live up to the universal expectations of a state in the contemporary world (Prah, 2004; Chomsky, 2006: 38).
3. For example, Social Science Baha organised a seminar on 'The Agenda of Transformation: Inclusion in Nepali democracy' in Kathmandu from 24–26 April 2003 at which Krishna B. Bhattachan argued that federalism could be one of the elements of inclusive democracy in Nepal (Bhattachan, 2003). At the same programme, Mahendra Lawoti argued that one practical model for achieving inclusion is federalism (Lawoti, 2003).

### CHAPTER 2

1. The provinces were Limbuwan, Kirat, Sherpa, Mithila-Bhojpur-Koch-Madhes, Sunkoshi, Newa, Tamsaling, Narayani, Tamuwani, Magarat, Karnali, Jadan, Khaptad and Lumbini-Awad-Tharuwan. "Special structures" were also proposed: autonomous regions, special regions and protected areas within the province.

### CHAPTER 3

1. The CSRDP's proposed 14 provinces are: Limbuwan, Kirat, Sherpa, Mithila-Bhojpur-Koch Madhes, Tamsaling, Sunkoshi, Newa, Narayani, Tamuwani, Magarat, Lumbini-Awad-Tharuwan, Karnali, Khaptad and Jadan.
2. The identity is shaped by a combination of five aspects: (1) ethnicity/ community (2) language (3) culture (4) geographical/territorial continuity (in settlement of targeted groups) and (5) historical continuity (in settlement of targeted groups).
3. Capability is an aggregation of four variables: (1) economic interrelations and existing capability (2) present state of or potentiality for infrastructural development (3) availability of natural resources and (4) administrative accessibility.
4. Capability indicators include (I) Size of population and area (II) Infrastructure (i.e. literacy, roads, health services, communication etc.) (III) Natural resources (i.e. land, livestock, forest, rivers, hydro power, minerals etc.) and (IV) Economic development (i.e. poverty, industry, trade, remittance and tourism etc).
5. The HLSRRC proposed 10 provinces are: Limbuwan, Kirat, Madhes- Mithila-Bhojpur, Tamsaling, Newa,

Narayani, Tamuwani, Magarat, Madhes- Awad-Tharuwan, and Karnali and Khaptad.

6. Historically it emerged (for instance, Limbu uprising in eastern hill and Madhesi movement in the 1950s) with a desire for differentiation against state designed aggressive assimilated process of national integration.
7. For the election to the CA, Nepal adopted a mixed parallel system (FPTP and PR) giving a greater weight to the PR, 56 % or 335 out of total 601 seats. Seats allocated for the FPTP was 240 (40%). For those elected from the PR system, the contesting parties must ensure representation of different social groups in proportion as follows: 37% for janajati, 31% for Madhesis, 13% for Dalits, 4% for backward region, and 30% for others (hill Brahmin, Chhetri, Thakuri and Sanyasi).
8. In 14 provinces proposed by the CSRDP, the targeted group of concerned provinces is in majority or in dominant position only in 4 provinces (Kirat, Sherpa, Tamshaling and Kochila-Mithila-BhojpurMadhes) and in the rest 10 provinces the hill high castes (Brahmin, Chhetri, Thakuri and Sanyasi) dominant demographically. But demography of six out of 10 provinces recommended by the HLSRRC is in favour of the targeted groups. Caste/ethnic breakdown of human geography of theHLSRRC's proposed 10 provinces suggests three categories of federal units: (1) provinces with the presence of targeted group as the majority population (Mithila-Bhojpur-Koch Madhes, Narayani, and Khaptad-Karnali) (2) provinces in which the targeted groups constitute as dominant groups (Limbuwan, Kirat, Tamshaling, Magarat and Madhes-Abadh-Tharuwan), and (3) provinces that targeted groups are in minority with small margin of less than one percent vis-à-vis hill high castes (Newa and Tamuwani).

### CHAPTER 4

1. The dominance of hill Brahmins, Chhetris and Newars was clear in executive positions. All prime ministers since 1951 were Brahmins, Chhetris, and Newars. Between 1951 and April 2006, 65% of ministers came from these three groups.
2. The CPN(M) renamed itself United Communist Party of Nepal, UCPN(M), in January 2009 after merging with three smaller communist parties. The original name was readopted by Maoist leader Matrika Yadav when he split from the UCPN(M) in February 2009.
3. 'Aitihasis janayuddhako pahilo yojana' (the first plans of the historical people's war) CPN(M), July 1995
4. 'Kehi tatkalin rajnaitik ra sangathanatmak prasnabare prastav', (some suggestions for the current political and organisational issues) CPN(M), February 1997.

## CHAPTER 5

1. The core elements of self rule, as interpreted by ethnic activists, are free, prior and informed consent. Control of ancestral land and territories is regarded as basic to self-determination. This includes the right to dispense with natural wealth and resources in ancestral lands, the right to self rule without external interference, the right to freely determine political status, and the right to freely pursue economic, social and cultural development (Bhattachan, 2012).
2. The 2011 Census identifies 125 ethnic caste groups by name. Of these, 9 ethnic groups including Chhetri, Bahun, Magar, Tharu, Tamang, Newar, Muslim, Kami and Yadav have a population of more than a million. Two groups (Rai and Gurung) have a population between half a million to less than a million. These 11 groups with a population of over half a million make up 70.7% of the total population of Nepal. Another 27 groups have a population between 100,000 to less than 500,000, and 87 groups have a population of less than 100,000. Chhetri is the largest ethnic caste group, but comprises only 16.6% of the total population. The percentage of non-Dalit hill caste groups (Chhetri, Bahun, Thakuri, Dasnami/Sanyasi) is 31.2% of the total population (CBS, 2012).
3. These are Chhetri, Bahun, Magar, Tharu, Tamang, Newar, Musalman, Kami, Yadav, Rai, Gurung, Damai, Limbu, Thakuri, Sarki, Teli, Chamar and Koiri. The 2011 Census shows these groups have more than 1% each of the total population (CBS, 2012)
4. The 2011 Census shows an increase in the hill caste and janajiti population in the Tarai. In 2011, 26.6% of Chhetri, 39.4% of Bahun, 28.4% of Magar, 16.1% of Tamang, 15.7% of Newar, 29.1% of Kami, 25% of Rai, 21.6% of Gurung, 29.5% of Damai, and 31.5% of Limbu population was in the Tarai (CBS, 2012).
5. Such a north-south six-province framework was presented by the author earlier (Sharma 2006). See also Acharya (2012) who recently proposed a four-province framework. Ethnic activists and scholars of both the janajiti and Madhesi fold tend to see a hill Bahun-Chhetri 'conspiracy' in such suggestions (see in particular Lawoti, 2012).
6. The categorisation of ethnic caste groups varies among scholars, but in 2001 janajitis made up 37.2%, Dalits together 11.8%, Madhesis (including Muslim) 19.1% and hill castes 30.9% of the national population. As per the 2011 Census, janajitis together comprise 36.9%, Dalits together 13.1%, Madhesis (including Muslims) 18.1% and hill castes 30.8% of the national population. Other groups make up 1.1% of the total population.
7. Computations based on the data used in the HLSRC report show that in the hills Limbu and Kirat areas together would have around 28% of hill castes (other than Dalits) and 63% of janajitis; Tamang areas would have 31% of hill high castes and 60% of janajitis; Newa would have 38% hill castes and 54% janajitis; Gurung and Magar areas would have 37% hill castes and 46% janajitis. The division of Narayani into Tamang and Gurung/Magar areas would still give the edge to janajiti plurality. In the eastern Tarai, Madhesis would comprise 47% and janajitis 24% of the population. In the western Tarai, hill castes would comprise 26% of the population compared to janajitis at 35% and Madhesis at 23%. Dalits would comprise less than 10% of the

population in Rai, Limbu, Tamang and Newar areas, and around 15% in the rest, with the exception of Karnali-Khaptad where it would be about 20%.

## CHAPTER 6

1. Thakuris had come to Nepal as immigrants after Mughal got victory over them. They were Hindu particularly Brahmins, Chhetris, Baishya and Sudra. Their settlements extended all over khasan, magarat, tamuwan, Makawanpur (Tamangs have high density of population) and kirat province. The king Prithvi Narayan Shah is said to have helped Magar and Gurung for his territorial expansion. Therefore, they had supported the king Prithvi Narayan Shah to fight against old enemies or they were impressed by that he declared he was the king of Magars. Thakuri had partial impact in the settlements of Tharus due to thick forests and malaria.
2. The king Prithvi Narayan Shah issued the royal decree in 1831 and it says: '...you are the generations of Tutu Tumyahang Yakthunghang. This territory not only belongs to us, you are also our people.'
3. Late Krishna Prashad Bhattarai, former Prime Minister of Nepal opined with 'Samakalin, Tisiri Duniya' while he was the prime minister that there is no Indigenous Peoples in Nepal and if any movement janajitis need upper caste group must lead that. After a few years as Mr. Bhattarai said Dr. Baburam Bhattarai and Prachanda led the Maoist Movement where a question of Indigenous Peoples' Autonomy was raised and a tiny size of NCP (Maoist) became a significant force and able to create ripples globally in the name of Maoism.
4. LALITPUR, 26 MAR, 2012. Godamchour area in Lalitpur district remained tense over a cow-slaughter scandal on Monday. The situation in the area became tense after a local informed police about some youths slaughtering cow and eating the meat on Sunday. The locals vandalised the house of those who slaughtered cow, police informed. Large numbers of police have been deployed in the area to contain the situation. Meanwhile, police detained two on the charge of slaughtering cow. Nepali law recognises slaughtering of cow, which is the national animal, as a crime and anyone involved in the act is subject to punishment (<http://www.ekantipur.com/2012/03/26/national/lalitpur-tense-over-cow-slaughter-scandal/351246.html>).
5. DDC federation, Nepal Municipality federation and VDC National federation jointly formed local level stakeholder committee to pressure to pass the bill of local self-governance act in fourteenth session of parliament in 2055. They had to launch program to pressure to pass the bill from Ashad to Bhadra. During that period, representatives of local bodies were arrested when they assembled outside the parliamentary building to pressure the members of the parliament. Similarly, 250 representatives were the victims of lathicharge and some were arrested during the protest programs just in front of Bhdrakali. They had strongly demanded the implementation of decentralisation to share powers and resources to the local bodies (Nepal Municipality Federation 2062).
6. UN Declaration on Rights of Indigenous Peoples says that UNDRIP is a declaration containing an agreement among governments on how indigenous

- peoples should be treated. UNDRIP consists of 46 articles that describe specific rights and actions that governments must take to protect these rights. All the articles are very important, linked to each other and form a frame for governments to make sure that the rights of indigenous peoples are protected. The main themes are: (i) the right to self-determination; (ii) the right to be recognised as distinct peoples; (iii) the right to free, prior and informed consent; and (iv) the right to be free of discrimination.
7. Maoist policies and programs included ethnic aspirations even before the start of the war. In July 1995 the party endorsed ethnic autonomy.<sup>37</sup> The 40-point demand called for the end of ethnic oppression in general and for a secular state, the equality of languages, and regional autonomy in particular. In February 1997, the central committee systematised the policy on nationalities by endorsing national and regional autonomy with the right to self-determination.<sup>38</sup> In 2000 the party established a central level ethnic department, led by Dev Gurung, which included different ethnic fronts.<sup>39</sup> The boundaries of the nine autonomous regions in the Maoists' people's government were drawn according to ethnic criteria

## CHAPTER 7

1. Article 39 of the 1995 Ethiopian Constitution sets out the Right of Nations, Nationalities and Peoples: (1) every nation, nationality or people in Ethiopia shall have the unrestricted right to self-determination up to secession.
2. The Soviet Republic has autonomous republics, autonomous regions and autonomous territories within its borders. Referendums about secession are conducted separately in each of the autonomies. The people residing in the autonomies are given a right to independently decide whether or not to remain in the Soviet Union or in the seceding Republic and on their state legal status. Referendum results are to be considered separately for the territory of a Soviet Republic with a compactly settled ethnic minority population, which constitutes a majority on that particular territory of the Republic.
3. This shows that the concept of this Committee is to establish a unit rather than a strong third tier of local government.

## CHAPTER 8

1. Available at: <http://www.parliament.vic.gov.au/fsrc/report3/front/reccos.htm>; (accessed March 27 2013).
2. The Committee was chaired by A.S. Gunawardena, former Additional Secretary, Ministry of Provincial Councils and later, Chairman of the Finance Commission. The report was submitted in 1996 but has not been made public.
3. Articles 246 and 254 of the Constitution of India.
4. (2) National legislation that applies uniformly with regard to the country as a whole prevails over provincial legislation if any of the following conditions is met:
  - (a) The national legislation deals with a matter that cannot be regulated effectively by legislation enacted by the respective provinces individually.

- (b) The national legislation deals with a matter that, to be dealt with effectively, requires uniformity across the nation, and the national legislation provides that uniformity by establishing
  - (i) norms and standards;
  - (ii) frameworks; or
  - (iii) national policies.
- (c) The national legislation is necessary for
  - (i) the maintenance of national security;
  - (ii) the maintenance of economic unity;
  - (iii) the protection of the common market in respect of the mobility of goods, services, capital and labour;
  - (iv) the promotion of economic activities across provincial boundaries;
  - (v) the promotion of equal opportunity or equal access to government services; or
  - (vi) the protection of the environment.
- (3) National legislation prevails over provincial legislation if the national legislation is aimed at preventing unreasonable action by a province that -
  - (a) is prejudicial to the economic, health or security interests of another province or the country as a whole; or
  - (b) impedes the implementation of national economic policy.

## CHAPTER 9

1. The original two-year mandate of the Constituent Assembly ran from 28 May 2008 to 28 May 2010.
2. Larry Taman, International Project Manager of SPCBN at the time, as well as Henrik Larsen, then UNDP's Regional Advisor on Decentralisation and Local Governance in Bangkok, also contributed to the analysis and the paper in significant ways.
3. The focus on senior civil servants eventually proved to be highly relevant, given that with the dissolution of the CA, the locus of political power shifted dramatically back to the long-established bureaucratic elite.
4. A similar context has been explored by this author with regard to the new Constitution of Myanmar, adopted in 2008 and coming into force in early 2011, which created what the author describes as a 'quasi-federal system' (Brand 2012).
5. This could notably be concluded from the assumed state structure aspects of which were described in a significant number of committee reports, including several that had been adopted by consensus, as the federal structure was not only to be described in the report of the Committee on State Power and State Restructuring, but also in important ways in the reports dealing with the legislative power, the judiciary, fiscal arrangements, and the report of the Constitutional Committee that dealt with fundamental principles of the federal system. See Appendix for the allocation of powers to different levels of government proposed by the Committee on State Restructuring.
6. The CA members had made significant efforts to complete the 11 Concept Papers, including forming 47 sub-committees and 18 taskforces; holding 682 committee meetings (127 by the Committee on State Restructuring and State Power Division alone); producing reports totalling 2,933 pages, the



- longest of which was produced by the Committee on Fundamental Rights and Directive Principles (560 pages); preparing 117 pages of draft provisions; adopting two reports by consensus, while putting nine others to a majority vote.
7. One of the priorities, in this context was the effort to avoid the impression that the UN, or any other external partner, was actually interfering in the sovereign and independent deliberations on federalism by Nepal's CA. A subtle balance had to be found between favouring the widely discredited status quo and 'putting the cart ahead of the horse,' as the Chief Secretary of the Government of Nepal once put it to this author, by rushing into conclusions about what the new federal structure would look like.
  8. The main difference between the Committee proposals and any ultimate constitutional provision is that while the former could be adopted by simple majority votes at the Committee levels, and it fact were so with different combinations of support by parties, the latter would have to be adopted by consensus, or at least a two-third majority vote in the full house of the CA. Even if a majority of parties clearly favoured an alternative to the status quo, reaching a broader agreement was not possible due to the inability of bridging the gaps between particular interests.
  9. Technically, the Interim Constitution did not allow for an extension of the mandate by the CA itself. The technique used to extend its mandate was to amend the Interim Constitution's article specifying the length of the term of the CA's mandate. The ultimate dissolution of the CA was a result of the Supreme Court's ruling that this technique could not be used to extend the mandate indefinitely.
  10. Probably the first event dedicated to the issue of transition and implementation of federalism was a one day workshop titled 'Coordination Sub-group on Federalism and Systems of Government,'" on 8 May 2009 in Budhanilkantha, organized by the GTZ and UNDP.
  11. From 2010 onwards, SPCBN for instance included a specific project component entirely dedicated to the transition to federalism and state restructuring.
  12. The Interim Constitution stated clearly that the ultimate decision on the new state structure would lie with the CA, and would not be bound by the report of the governmental commission. The State Restructuring Commission under the Interim Constitution was empowered to make recommendations for the restructuring of the state. Its composition, function, duty, power and terms of service were to be as determined by the Government of Nepal. It would have to stay within the parameters of the Interim Constitution which establishes the goal of 'eliminating the centralized and unitary form of the state,' and 'accepting the aspirations of indigenous ethnic groups and the people of the backward and other regions, and the people of Madhes, for autonomous provinces' with full rights.
  13. The main difference with the CA's proposal was the elimination of the Sunkoshi, Sherpa and Jadan provinces, which were considered too small and therefore not viable, the merging of Karnali and Khaptad province and the creation of a non-territorial Dalit province.
  14. While by the time the concept papers were presented (by February 2010) the major parties still disagreed on some details of the basic outline as presented here (such as, for instance, the definitions of pluralism vs. multiparty democracy), there appeared to be a large degree of agreement on the essence already by the autumn of 2009.
  15. The Interim Constitution requires that this decision be made by the CA itself. This would make it more difficult to introduce later changes to the basic features of the system, and grant the new constituent units a stronger guarantee of existence than, for instance, the constituent states of the Union of India.
  16. See Appendix 2 on the division of powers. While there was considerable debate on the number, names and boundaries of the proposed provinces, parties appeared to be in relatively broad agreement over the future assignment of powers and competencies.
  17. The system would still remain a single judicial system hierarchically subordinate to the Supreme Court.
  18. This would be contrary to the concept of the 1999 LSGA, which provides for different competencies and institutional frameworks for VDCs, DDCs and municipalities.
  19. This would not mean that the districts would cease to exist, but only that they would not be foreseen as a constitutionally mandated tier of self-government. They could still remain as administrative units of the respective provinces. The 1999 LSGA would probably have needed to be revised and brought in line with the terms of the new constitution.
  20. (Federal) Women's Commission, (Federal) Dalit Commission, (Federal) Indigenous (Adivasi Janajati) Commission, (Federal) Commission for the Protection of the Rights of People with Disabilities, Minorities, Marginalized Groups and from Backward Regions, (Federal) Madhesi Commission, and a (Federal) Muslim Commission. Other new commissions proposed include: Language Commission, Natural Resources Commission, Fiscal Commission, Military Service Commission, Paramilitary Force Service Commission, Police Service Commission at province level, etc.
  21. The English language, although widely used including in official communications, is not mentioned in the proposals.
  22. This assessment, while sobering, has been expressed by numerous Government of Nepal official documents and is not contested by the relevant key actors. This is, however, not to belittle or disrespect the significant efforts many have invested over the years to build capacity at the local level, provide basic services and empower individuals and communities.
  23. In July 2006, an estimated 68 percent of VDC secretaries were displaced, mainly to district headquarters. According to the latest statistics, the internal conflict resulted in physical losses equivalent to NRs 5 billion (USD 71.4 million). The most damaged facilities due to the conflict were police posts, VDC buildings, office buildings of local level service units and communication transmissions and telephone infrastructure. During the conflict, most of the VDC level official buildings were destroyed which also badly affected the morale of VDC secretaries. Even after the conflict and the elections of the CA, activities of armed criminal groups – sometimes using political claims

- of autonomy and resisting central government authority on identify grounds – have had a similarly bad effect on the presence of VDC secretaries in villages across the country.
24. Of the 10 female Secretaries, six was Brahman, three were Newar and one was Tarai Brahman (2010).
  25. There are proposals that the federal government would manage relations between provinces and would be able to issue binding directives to all provinces on matters of national importance and to coordinate among the provinces. It was also proposed that if any province carries out an act that would hurt national sovereignty, integrity and the law and order of the country, the President, on recommendation of the federal government, could, with approval of a two-thirds majority of the federal parliament, dismiss or dissolve the provincial government and legislature.
  26. In contrast, the State Restructuring Commission under the government later proposed 11 provinces in February 2012. Even if the 11-province, or indeed the 6-province model was to emerge eventually, the implications for transition and implementation would be practically the same.
  27. For an authoritative comparative analysis of the subject, see Watts (2008).
  28. The annex of the state restructuring committee listed 23 ethnic communities for which Autonomous Regions would have to be created. However, Danuwar was listed twice, and it appeared, based on unofficial sources from within the CA, that this was due to an oversight. In effect, therefore, 22 Autonomous Regions were proposed.
  29. Local Self Government (LSG) has been addressed as a cross-cutting issue in the drafting process with different CA Committees dealing with the issue. However, the main elements proposed are laid out with the concept notes of the Committee on Restructuring of the State and Distribution of State Power and the Committee on Forms of Government. Most of the other papers, in turn, address the intergovernmental and LSG aspects from a sectoral perspective (e.g., concept note of the Committee on Natural Resources, Revenue, Distribution & Financial Rights, etc.).
  30. Whereas the constitutional amendments related to Panchayat Raj Institutions in India have schedules outlining the powers and functions at the different tiers, most Asian countries leave this for subsequent legislation. The proposals made by the CA mirror the Indian constitution in terms of details.
  31. In virtually all countries in the world, sub-national governments as a whole are not 'financially self-sustainable' and any pursuance of this objective is most often meaningless for two major reasons: First, there are more functions where provincial and local governments have a comparative advantage than there are good revenue sources which can be assigned to them so there will always be a vertical imbalance to be addressed through the intergovernmental fiscal arrangement, including equalisation among provinces. Second, the tax base (property, economic activity, national resource extraction, etc.) is often different among individual provinces, villages and municipalities so there is a horizontal imbalance which transfers and revenue-sharing arrangements attempt to deal with.
  32. Note that the authors suggest that post-conflict societies face two distinctive challenges: economic recovery and reduction of the risk of a recurring conflict (using indicators of per capita income and per capita income growth as indicators of the former). The present paper applies a broader understanding of recovery going beyond economic growth, notably to include social development.
  33. Decentralisation in Nepal; Paper prepared for the Nepal Development Forum 2004.
  34. For reference and a detailed analysis, see (Chalise and Upadhyay 2010). Already in January 2010, Larry Taman, Project Manager of UNDP SPCBN, had focused on this issue in his presentation 'The Transition Provisions in the Nepal Constitution of 2010' at the 15 January Kathmandu International Conference on Constitution Building supported by a variety of donors and partners.
  35. Since the election of the CA, the government has been led by a series of Prime Ministers, presiding over unstable coalitions: the late Girija Prasad Koirala (Nepali Congress) until 18 August 2008; Prachanda (Unified Communist Party of Nepal [Maoist]) from 18 August 2008 to 25 May 2009; Madhav Kumar Nepal (Communist Party of Nepal [Unified Marxist-Leninist]) from 25 May 2009 to 6 February 2011; Jhala Nath Khanal (Communist Party of Nepal [Unified Marxist-Leninist]) from 6 February 2011 to 29 August 2011; and Baburam Bhattarai (Unified Communist Party of Nepal [Maoist]), since 29 August 2011.
  36. The Administrative Restructuring Commission (ARC) was established in 2008 by decision of the Government of Nepal. The ten-member commission was headed by the Minister for General Administration and led, in practical terms, by a Secretary (Teertha Raj Dhakal). The ARC prepared a detailed work plan and strategy for transitional arrangements with a specific reference to administrative reform with support from the World Bank.
  37. A draft Transitional Plan (2010-2015) of the Health Sector Reform Programme was prepared by Research Triangle Institute, associated with the Ministry of Health and Population, and with significant support from the donor community. The plan outlined the activities related to assessing, strengthening and identifying key strategic areas to align health initiatives in a federal context.
  38. This is not to suggest that UNDP was the only development partner providing such assistance. In fact a number of bilateral agencies, UN organisations, intergovernmental bodies, and development banks also provided support in this direction. These efforts were also closely coordinated through regular information exchanges, consultation meetings and mailing lists. This section, however, focuses on the specific contributions UNDP made to the process, as it relates to the overall purpose of this publication.
  39. The initial partners consisted of UNDP, GTZ, SDC, Forum of Federations, International IDEA, WB, ADB, but the group was deliberately kept open for additional participation.
  40. The first batch of seven published papers included the following subject areas: 'Designing the Autonomous Regions under the Federal Structure of Nepal – A study on the perspective of public institutions (With Case Studies: Jirel, Majhi, Danuwar and Pahari Communities)' by Milan Shrestha; 'Dalits and Federalism – A Study of the Position of Dalits in the Proposed Federal Structure' by Yam Bahadur Kisan and Hom Yamphu; 'Drinking Water Management in Newa State (A key reference to Melamchi Water)' by Pramila Subedi; 'Federal

- Judicial Structure and Administration of Justice (A special reference to Tamsaling)' by Dr. Gopal Prasad Dahal and Munendra Prasad Awasthi; 'Public Health and Federal Nepal – Opportunities and Challenges' by Nisha Pandey; 'Security Challenges and Federalism – A Case study on the Proposed Limbuwan Province' by Kuldeep Niraula; 'A Study on Spatial Planning, Regional Development and Federalism in Nepal' by Pradip P. Upadhyay.
41. The final outputs of this research initiative were included in a working paper series compilation published by the CCD.
  42. The figures were presented as estimates and indicative at best. All proposed provinces would have at least one district that would fall only partially within the proposed province; hence, it was not possible to provide accurate data for the proposed provinces, as most government statistics was available only at the district level rather than the VDC level. Therefore, most of the figures presented were derived from the available district level data. Readers were accordingly advised that data should not be taken as actual figures/data for the proposed province, but as tentative estimates for the purpose of a general discussion.
  43. From the putative provinces of Tamuwan, Mithila-Bhojpura-Koch-Madhesh, Limbuwan and Kirat as proposed by the CA State Restructuring Committee.
  44. UNDP had secured the support of the Ministry of Home Affairs (MoHA) prior to the events, which instructed the CDOs, operating under MoHA authority, to give the series of discussions full support. This high level buy in from the government gave the consultations an entirely different character than what the bulk of UNDPs and other organisations had achieved otherwise in their outreach activities, which often fell short in terms of government participation altogether. In the case of these workshops, most CDOs stayed throughout the programme and participated actively in the discussions.
  45. The participating government officials raised many questions on federalism and state restructuring such as: why is it required; what are the bases of the proposed 14 provinces, is it final, why were most of the provinces named according to ethnic criteria, what are the bases for autonomous regions, what are positive and negative impacts of federal system, what are political preferential rights and right to self-determination, and so on. The participants overwhelmingly requested additional information on international experiences on ethnic and non-ethnic federalism. Participants were also eager to know what the transitional provisions the Committee reports had proposed, what would happen to the existing administrative structure once Nepal becomes a federal country, challenges for implementation of the new constitution, challenges of administrative management, adjustment of current civil servants in federal models, what would be the institutional arrangements (legislative, judiciary and executives) in the centre, province and local bodies, what would happen to newly recruited staffs, how to recruit staff at the local level, areas of competencies for centre, province and local level governments, how could use be made of the existing structure of districts, what kind of plans and policies were being designed and formulated by the government, what would be the number, structure and areas of responsibilities of existing local bodies, etc.
  46. Notably, and characteristically for the wide gap between the political debate on federalism in the CA and the administrative sphere that would need to lead the implementation process in practice, this constituted the first ever encounter of Lokendra Bista Magar and Teertha Raj Dhakal, the ARC Secretary at the time. They were able to exchange views and consult each other for several hours on that occasion, in a professional, pragmatic and constructive manner, leading to a long-overdue but necessary meeting of minds between the political and the bureaucratic elite in terms of building a federal future for Nepal. It was an evidence for at least the possibility that under certain circumstances, even people from drastically different backgrounds could come together and agree on practical approaches for creating a much more modern, inclusive, effective and responsive modality of governance in Nepal. Magar later became Minister for Tourism and Civil Aviation and Dhakal Joint Secretary at the National Planning Commission.
  47. For a detailed analysis of this context, see the report of the International Crisis Group (ICG 2011) Available at <http://www.crisisgroup.org/en/regions/asia/south-asia/nepal/199-nepal-identity-politics-and-federalism.aspx>.
  48. The main presenters for the course were Roy Kelly and Roger Shotton. The course was modelled on the Program on Fiscal Decentralisation and Local Government Financial Management at Duke University, now in its eighth year, was formerly offered at the Harvard Institute for International Development, by the Public Finance Group. It is one of the world's leading programmes designed specifically for elected politicians and public officials who are responsible for designing and implementing fiscal decentralisation strategies, restructuring intergovernmental transfers, strengthening local government revenue systems and enacting local government reforms. Kelly has over 25 years of international experience designing and implementing intergovernmental reforms in Africa, Asia, Latin America and Eastern Europe. Shotton is the retired former Asia Regional Director for the UN Capital Development Fund, which leads the UN's development assistance in terms of fiscal decentralisation and local governance.
  49. The course was opened by Krishna Gyanwali, Secretary at the Ministry of Local Development.
  50. It was proposed that the targeted number of participants would be between 120-150 persons and would include CA Members, key Ministry representatives, members of the ARC, senior civil servants, the judiciary, legal and other subject matter/sector experts, and key civil society representatives.
  51. The provision of sector budget support to state/province level also risks increasing the transaction costs of aid delivery (see Eldon and Waddington 2007).

## CHAPTER 10

1. The provinces of Manitoba (The Manitoba Libel Act, 1934), Ontario (Racial Discrimination Act, 1944) and Saskatchewan (Bill of Rights Act, 1947) enacted legislation to protect against racial discrimination

- and other human right prior to 1960 but their application was limited to their particular province. The Canadian Bill of Rights was the first written document protecting human rights across the nation.
2. The Quebec Act recognised the French language and civil law and allowed Roman Catholics to practice their religion. See *Infra* page 14 & 15 for further details on this Act.
  3. This paper does not focus on Inuit or Metis, two other distinct groups of Aboriginal peoples in Canada recognised in the Constitution Act, 1982 in sections 25 and 35. The Inuit live throughout most of the Canadian Arctic and subarctic in the territory of Nunavut, 'Nunavik' in the northern third of Quebec, 'Nunatsiavut' and Nunatukavut in Labrador and in various parts of the Northwest Territories, particularly around the Arctic Ocean. These areas are known in Inuktitut as the 'Inuit Nunangat'. The Metis trace their descent to mixed First Nation and European heritage. The term was historically a catch-all describing the offspring of any such union, but within generations the culture syncretised into what is today a distinct aboriginal group.
  4. Bond Head Treaty, 1836
  5. Crown Lands Protection Act, 1839
  6. Gradual Civilization Act, 1857
  7. Management of Indian Lands and Property Act, 1860
  8. The Thirteen Colonies were the colonies that formed the United States of America following the American Revolution.
  9. These UN regular periodic reviews were: 1) Concluding Observations of the Committee on the Rights of the Child: Canada, CRC/C/CAN/CO/3-4, 5 October 2012, para. 33(d); 2) Concluding Observations of the Committee against Torture: Canada, CAT/C/CAN/CO/6, 25 June 2012, para. 20; and 3) Concluding Observations of the Committee on the Elimination of Racial Discrimination: Canada, CERD/C/CAN/CO/19-20, 9 March 2012, para. 20(a).
  10. The Thirteen Colonies were the colonies that formed the United States of America following the American Revolution.
  11. It is estimated that more than 7000 Aboriginal men and women answered Canada's call to arms during both World Wars and the Korean War with at least 500 giving their lives. Statement by the Minister of Veteran Affairs, The Honourable Steven Blaney, for Canada's National Aboriginal Day on 21 June, 2013.
  12. *Kanatewat et al v. James Bay Development Corp et al*, [1973] Superior Court of Quebec.
  13. *Calder et al v. Attorney-General of British Columbia*, [1973] S.C.R. 313
  14. *Paulette's Application* (1973) 6 W.W.R. 97 (NWT S.C.).
  15. Harper was the elected Chief of the Red Sucker Lake First Nation (1978), Member of Legislative Assembly for the Rupertsland constituency (1981-92) and Member of Parliament for the Churchill constituency in northern Manitoba (1993-1997).
  16. For a historical account and list of clashes between the Mohawk peoples and the Canadian and American governments from a First Nation perspective and detailed accounts of the Oka Crisis, and Ipperwash and Gustafesen Lake confrontations, see <http://warriorpublications.wordpress.com/>.
- The purpose this website is to promote warrior culture, fighting spirit and resistance movements.
17. The Macdonald-Laurier Institute for Public Policy proposes thoughtful alternatives to Canadians and their political and opinion leaders through non-partisan and independent research and commentary.
  18. In Canadian political discourse the terms 'separatist' and 'sovereignist' are used interchangeably to describe individuals or groups wanting the province of Quebec to separate from Canada to become a country of its own.
  19. *Ford v. Quebec (AG)*[1988] 2 S.C.R.712, and, *Devine v. Quebec (AG)* [1988] 2 S.C.R. 790
  20. The Meech Lake Accord, 1987 discussed in detail in Part IV below.
  21. The Charlottetown Accord, 1992 discussed in detail in Part IV below.
  22. Reference Re Secession of Quebec [1998] 2S.C.R., 217.
  23. The Government of Canada's Approach to Implementation of the Inherent Right and Negotiation of Aboriginal Self-Government.
  24. This gesture was made based on one of the recommendations set out in Canada's Royal Commission on Aboriginal Peoples (RCAP) 1991 report.
  25. Reference re a Resolution to amend the Constitution, [1981] 1 S.C.R. 753 (aka the Patriation Reference)
  26. Constitutional conventions are rules and practices regarding the operation of government, which have been developed incrementally over long periods of time and never formally codified in a written document.
  27. Bill C-110, An Act respecting constitution amendments, 42-43-44 Elizabeth II, Chapter 1, Assented to by the Parliament of Canada, 2 February 1996.
  28. Clarity Bill (C-20) passed by the Canadian House of Commons on 15 March 2000 and by the Senate on 29 June 2000. Copy of the bill is available at: <http://www.canadianlawsite.ca/clarity-act.htm>; (accessed 23 August 2014). Quebec immediately enacted its own, contradictory law in response.
  29. Warrior cohorts is a term used by Douglas Bland (2013) to describe men fertile as recruits for militant groups.
  30. The Constitution Act, 1867, Sections 91 and 92.

## CHAPTER 11

1. A political and organizational strategy by which a central government within a unitary system establishes new units of government with defines boundaries at the regional or provincial level. These new units of government would have legally-conferred executive and legislative powers in designated fields of policy and administration, over agreed powers and competences, and will function within them as autonomous units of governance outside the formal command structure of the central authority. This entails that power is divided between the central government and territorially defined constitutional units of self-government under the agreement of a Constitution.
2. Currently known as the Autonomous Community of Navarra and located in Spain.

3. These three provinces are part of the department of the Pyrénées-Atlantiques under the French administration.
4. For the purposes of this paper, when references to the Basque Country are made, only these three provinces will be considered unless otherwise stated.
5. It does not have any similarity with Spanish language and it requires a considerable effort and time to learn.
6. According to UNESCO, Basque is severely endangered in France where it does not have any official status.
7. Figure of 2011 by the Basque Institute of Statistics. Available from: <http://www.eustat.es>
8. These three autonomous communities are located in Spain and have borders with Catalonia.
9. Nowadays, this concept is associated with the views of some Catalan nationalist and with some supporters of Catalan independence.
10. Latest figure of 2013 by the Catalan Institute of Statistics. Available from: <http://www.idescat.cat>
11. Galicia is also considered a historical nationality but for the purposes of this paper, only the Basque Country and Catalonia will be analyzed.
12. As mentioned in the preamble of the 2006 Statute of Autonomy of Catalonia.
13. The Basque Country and Catalonia are considered by some, nations without state or stateless nations.
14. The Napoleonic invasion and the loss of Spain's last colonies.
15. The Law for the Defense of the Language was promulgated in 1941 with the objective of establishing Spanish as the official language and banning the use of any autochthonous language including foreign idioms.
16. Basque Homeland and Freedom.
17. A spokesperson speaking on a video announcing the ceasefire said the organisation wished to use "peaceful, democratic means" to achieve its aims. While the ceasefire and cessation of armed activity have been respected so far, no development has taken place in the negotiation process since the Conservative Spanish Nationalist People's Party rose to power in November 2011 following general elections in Spain.
17. Three representatives belonged to the center-right party, some of whom had been involved with the Franco dictatorship, one representative belonged to the conservative party, and a representative each from the communist party, the socialist party and the Catalan nationalist party. The Basque nationalists were absent from the working group.
19. Even though the term 'nationalities' was used in Article 2, the Constitution did not explicitly mention which those nationalities were. There was no specific mention to the Basque Country and Catalonia.
20. Some of these members were in favour of a centralized system, while others advocated for symmetrical federalism or for some kind of asymmetrical quasi-federal structure.
21. Article 137, Part VIII of the Spanish Constitution.
22. See First Additional Provision (Disposicion Adicional Primera) of the Spanish Constitution.
23. Some of the nationalist parties positioned themselves against it, while others promoted active abstention.
24. Nowadays, seventeen autonomous communities and the two cities of Ceuta and Melilla located in North Africa enjoy constitutionally guaranteed political autonomy.
25. Second Transitional Provision of the Spanish Constitution: "The territories which in the past have, by plebiscite, approved draft Statutes of Autonomy and which at the time of the promulgation of this Constitution, have provisional self-government regimes..." will be allowed to proceed to autonomy.
26. The rest of the regions achieved self-government and the status of Autonomous Community by following the so-called slow-track enshrined in Article 143 of the Constitution, with the exception of Andalusia which followed a middle path enshrined in Article 151.
27. These powers include: -social security; the legal system of all public administrations; environmental protection; planning, construction and exploitation of hydraulic projects, canals and irrigation of interest; mineral and thermal waters; health; education; press, radio and television regulation; mining and energy; general planning and economic activity; credit, banking and insurance regulation; woodlands and forestry.
28. These powers include, among others: -the regulation of the basic conditions that ensure the equal exercise of the constitutional rights to all citizens; nationality, immigration, aliens and the right of asylum; international relations; administration of justice – which is a non-decentralized power in Spain; national defense; criminal and prison legislation; customs, tariffs and foreign trade; railroads and transport across more than one autonomous community; authorization for calling a referendum; and public security "with the possibility to set up an autonomous-community police force" (both the Basque Country and Catalonia have their own police force).
29. Article 164, clause 1, of the Spanish Constitution.
30. Preamble of the Spanish Constitution: 'Protect all Spaniards and peoples of Spain in the exercise of human rights, of their culture and traditions, languages and institutions'.
31. As a synonym of what nowadays is regarded as Spanish.
32. Article 3 of the Spanish Constitution.
33. See Articles 90 and 92 of the Spanish Constitution.
34. Catalonia, as a nationality, exercises its self-government constituted as an autonomous community in accordance with the Constitution and with this Estatut, which is its basic institutional law.
35. Article 1 of the Statute of Autonomy of the Basque Country: The Basque People or «Euskal-Herria», as an expression of their nationality and in order to accede to self-government, constitute an Autonomous Community. within the Spanish State under the name of «Euskadi» or the Basque Country, in accordance with the Constitution and with this Statute, which lays down its basic institutional rules.
36. The acceptance of the system of autonomy established in this Statute does not imply that the Basques waive the rights that as such may have accrued to them in virtue of their history and which may be updated in accordance with the stipulations of the legal system.

37. Article 6, clause 2 of the Basque Statute: The common institutions of the Autonomous Community, taking into account the socio-linguistic diversity of the Basque Country, shall guarantee the use of both languages, controlling their official status, and shall effect and regulate whatever measures and means are necessary to ensure knowledge of them.
38. The 1983 Law on Linguistic Normalization of Catalonia and the 1998 Law of Linguistic Policy which substituted the former. Agustí Pou Pujolràs, Linguistic Legislation and Normalization Process: The Catalan Case in Spain, (Barcelona, CIEMEN, 2002).
39. While this optional system of three models may seem to lead to a process of polarization along linguistic lines, major Basque political parties acknowledged that making the learning of Basque language compulsory in education would have been an unwelcomed imposition by some segments of the population and particularly by those who migrated to the Basque Country from other Autonomous Communities.
40. Letter C does not exist in the Basque alphabet.
41. According to data provided by the Basque Ministry of Education regarding 2010-2011 academic year, of a total of 18,241 school applications in students of two and three years old, 13,436 (73.6%) opted for model D, 4,077 (22.4%) for model B and 728 (3.9%) for model A.
42. Under the auspices of the Council of Europe, the European Charter for Regional or Minority Languages was adopted in 1992 to protect and promote historical regional and minority languages in Europe. Spain ratified it in 2001. In a report published in December 2008 by the Council of Europe, a group of experts judge that education systems in Spain need to be based on a model of 'total immersion' in the respective co-official languages and therefore fully validate the use of Catalan as the first language in schools.
43. This party has its roots in the People's Alliance founded in October 1976 by Manuel Fraga, a former minister under Franco's regime.
44. This party ruled with an absolute majority from 2000 to 2004 is nowadays enjoying an absolute majority in Parliament after the November 2011 elections.
45. See <http://www.elmundo.es/elmundo/2012/10/10/espasa/1349858437.html>
46. 107 out of 135 parliamentarians at the Parliament of Catalonia rejected it. Only the 19 parliamentarians of the Conservative Spanish Nationalist People's Party and another 9 parliamentarians from a local party voted in favour.
47. In June 2003, a new daily named Berria published wholly in Basque language was created after the closure of Egunkaria. This newspaper is among the most read by the Basque youth and is available from <http://www.berria.info>
48. The then director of Egunkaria Martxelo Otamendi, who was kept incommunicado for five days after his arrest, denounced that he was tortured in detention, but the Spanish judge allocated to Otamendi's case closed down the case without calling him to testify on the allegations of torture. In October 2012, The European Court of Human Rights condemned the Spanish state for not carrying out a genuine investigation into the allegations of police ill-treatment of Otamendi. An account of his arrest and subsequent experience in prison: <http://www.englishpen.org/testimony-by-martxelo-otamendi-at-the-universal-forum-of-cultures-barcelona-may-2004/> (Assessed on August 19, 2014).
49. Verdict of the Spanish National Court (in Spanish).
50. Principle of international law to have the right to freely choose the sovereignty and international political status of a country with no external compulsion or interference. This principle, though, does not say how the decision is to be made, or what the outcome should be.
51. It was only opposed by the Conservative Spanish Nationalist People's Party.
52. So did the Conservative Spanish Nationalist People's Party but for opposite reasons.
53. At that time, this party was the main opposition party at the Spanish Parliament.
54. The composition of the Court was altered several times particularly by the Conservative Spanish Nationalist People's Party until there was a majority of judges on their side and their views on the final verdict could be imposed.
55. The fiscal system established in the 2006 Catalan Statute of Autonomy was still far from the Basque 'concerto economico', but this system granted the Catalan government more financial autonomy with a major scope for regional taxes and negotiation on the share of resources to be annually devolved to the central government.
56. Article 6, clause 2: *Catalan is the official language of Catalonia, together with Castilian, the official language of the Spanish State. All persons have the right to use the two official languages and citizens of Catalonia have the right and the duty to know them.*
57. Preamble of the 2006 Statute of Autonomy of Catalonia: *In reflection of the feelings and the wishes of the citizens of Catalonia, the Parliament of Catalonia has defined Catalonia as a nation by an ample majority. This Preamble defines Catalonia as a nation, whereas the Spanish Constitution recognizes Catalonia as a nationality. However, the Preamble lacks legal status and in legal terms and as per constitutional provisions, Catalonia continues to be an Autonomous Community.*
58. This terminology has been used instead of the term referendum as only the Spanish government is authorised to hold referenda in Spain.
59. The declaration was passed in the Parliament of Catalonia with 85 votes in favor, 41 against and 2 abstentions.
60. It was the pressure for self-government exerted by Basque and Catalan parliamentarians that made a process of decentralization possible. Spain would have likely remained as a highly centralized country if this pressure would not have been wielded.
61. The Spanish Constitution emphasizes the unitary and indivisible character of Spain as an indissoluble unit and does not explicitly mention the type of structure of the country.
62. Indigenous peoples, Madheshis, religious minorities and Dalits are part of them. The latter do not have their own distinct language and culture like indigenous peoples and Madheshis and generally follow Hindu traditions and speak Nepali, but it can be argued that their identity has been severely repressed and neglected through untouchability practices and centuries of discrimination. The case of Newars and Thakalis is also important to mention. These two groups count amongst the elite and advantaged groups, but have

- their own distinct language and cultural practices. Some of them follow Hinduism, but others are Buddhists or practice a combination of both religions.
63. Clause 3.5 of the CPA states: *Dismantle the existing centralized and unitary state system and restructure it into an inclusive, democratic progressive system to address various problems including that of women, Dalits, indigenous community, Madhesis, oppressed, ignored and minority communities, backward regions by ending prevailing class, ethnic, linguistic, gender, cultural, religious, and regional discrimination.*
  64. Article 138 of the Interim Constitution states: "To bring an end to discrimination based on class, caste, language, gender, culture, religion and region by eliminating the centralized and unitary form of the State, the State shall be made inclusive and restructured into a progressive, democratic federal system."
  65. The annexation of Navarre to the Basque Country was the main territorial dispute.
  66. The Brahman and Chhetri communities in the remote and poor Karnali and Far-Western regions of Nepal should also be taken into consideration for purposes of economic development.
  67. To be given different treatment is to be treated as inferior or superior, as first and second class citizens.
  68. It is difficult to know the exact number of languages spoken in Nepal, but different sources mention more than a hundred. The figures of the 2001 census estimated that 50% of the total population of the then approximately 23 million were non-Nepali speakers.
  69. In 1957, Nepali was prescribed as a medium of instruction and in 1961 the National System of Education promoted the use of only Nepali in the administration, education and media.
  70. Article 5 Language of the nation: (1) *All the languages spoken as mother tongues in Nepal are the national languages of Nepal;* (2) *The Nepali language in the Devanagari script shall be the language of official business.* (3) *Notwithstanding whatever is written in clause (2), the use of one's mother tongue in a local body or office shall not be barred. The State shall translate the language used for such purposes into the language of official business for the record.* Interim Constitution of Nepal. Available at: [http://www.ccd.org.np/publications/2010-10-13-NEPAL\\_Interim\\_Constitution\\_8amd.pdf](http://www.ccd.org.np/publications/2010-10-13-NEPAL_Interim_Constitution_8amd.pdf)
  71. Article 17 Education and cultural rights: (1) *Each community shall have the right to receive basic education in their mother tongue as provided for in the law;* (3) *Each community residing in Nepal has the right to preserve and promote its language, script, culture, cultural civilisation and heritage.* This right is also enshrined in articles 13 and 14 of the non-binding United Nations Declaration on the Rights of Indigenous Peoples signed by Nepal. Available at: <http://www2.ohchr.org/english/issues/indigenous/declaration.htm>
  72. Article 33, clause (d) states that the state is responsible "to carry out an inclusive, democratic and progressive restructuring of the State by eliminating its existing form of centralized and unitary structure in order to address the problems related to women, Dalits, indigenous tribes [Adivasi Janajati], Madhesis, oppressed and minority communities and other disadvantaged groups, by eliminating discriminated based on language (among others)".
  73. The escalating tensions and protests that took place around the deadline for the completion of a new constitution by the now defunct Constituent Assembly in May 2012 should be kept in mind while renegotiating the contours of the future Nepal in order to address possible conflicts and support local capacities for peace. See RCHCO Field Bulletin: *Confrontation over Federalism: Emerging Dynamics of Identity-Based Conflict and Violence*, Issue #41, May 2012. Available at: <http://un.org.np/sites/default/files/2012-05-22-Field%20Bulletin-%20Issue-41.pdf> (Assessed on August 19, 2014).







*The two volume publication seeks to describe and analyse the remarkable and ambitious participatory constitution making process in Nepal and its challenges both with respect to process and substance. It also seeks to critically examine the difficult issues that have prevented agreement on the substance of the new constitution. Authors were identified so as to capture a range of views and opinions on a variety of constitutional issues that have featured in the national debate on constitutional reform. It is hoped that the collection of essays will contribute to a more informed debate that will, in turn, lead to a successful conclusion of the process.*

*Volume II focuses exclusively on federalism, as it was the major contentious issue that led to the demise of the first Constituent Assembly without the adoption of a new constitution. The issue remains a challenge for the second Constituent Assembly.*

