

## **Background Paper for the UNDP Conference on**

### **Restructuring and Federalism in Nepal**

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#### **I Introduction**

While Nepal has experienced much diversity of governments and styles of governance since 1990, there is widespread agreement that the Nepali state remains highly centralised and provides little space for the participation of the people in public affairs. There has been very limited progress in establishing effective institutions of government at local levels and the great majority of people feel they have no opportunities to influence policy or exercise accountability over the executive. This prevents the growth of the exercise, or even the awareness, of democratic practices.

The centralisation of state power in Kathmandu also alienates the vast majority of the people from the structures of the state. There is also considerable resentment arising from the belief that this centralisation is a strategy for the continued monopolisation of power by a small elite, based on caste and region. Consequently many people see federalism as a way to empower communities and regions, which have been marginalised by the centralisation of power, through forms of self-government. They also see it as a recognition of the religious, linguistic and ethnic diversity of the Nepali people.

The drafters of the 1990 Constitution understood the problems arising from centralisation, but adequate provisions for reform were elusive. A directive principle (not a provision that can be enforced by legal action) required the state to 'bring about conditions for the enjoyment of fruits of democracy by providing opportunities for the maximum participation of people in the governance of the country by means of decentralisation of administration' (art. 25(4)). Such subsequent attempts as were made to decentralise power encountered significant obstacles, and were further undercut by the onset of the conflict and the considerable political turmoil that followed. While janaadolan II was foremost a movement against the monarchy's resistance of democracy, it also highlighted the continued exclusion of communities and regions and their related political and social problems.

The context for the current debates on federalism can be described as follows, in the words of Professor Pitamber Sharma, 'For nearly 237 years of a unitary system of governance the neglected regions, sectors and population groups of Nepal remained

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<sup>1</sup> This paper is an expanded version of a chapter written for IDEA and forthcoming in its publication on constitution making in Nepal. I am grateful to IDEA for permission to distribute the paper in this form. In the writing of this paper I have greatly benefited from discussions with Professor Pitamber Sharma and have relied, for the section on the proposals in Nepal for territorial or ethnic basis of federalism, on his paper written for IDEA, "Towards a Federal Structure for Nepal" (2006). I am grateful for permission to use the tables from that paper.

forever neglected. The state played no role in ensuring the historic continuity of region-specific languages, culture and aspirations. On the contrary there was a concerted effort at homogenization of cultural diversity into a single *parbatiya* (hill Bahun-khas) culture and language. The form of regional, social, economic and political inequalities changed slightly over time but the substance has remained basically the same. The legacy of the highly centralized governance of the Shah and Rana periods continued even under the democratic governments of the 1990s. Successive governments could not and, because of ethnic and class-bound interests, did not see the necessity of breaking from the past. It is worth reminding that it was only after the appreciation of the roots of the Maoist rebellion that the mainstream political parties joined the band wagon of the call for inclusive democracy. Indeed the weakest aspect of the unitary system of governance was the continued maintenance of the status quo which ensured that ownership of the state in terms of decision-making remained with the select few (Bahun, Chhetri and Newars). However, a difference between the ruling Chhetris and the rest also needs to be made because the mid and far western hills overwhelmingly populated by the Khas Chhetris are among the least developed regions of Nepal. Marginalization within Nepal seems to have taken two forms – one exclusively ethnic, and the other regional or spatial. Within the ethnic marginalization fall all the mongoloid ethnic groups. The Madhesi linguistic group in the south and all the caste groups in the mid and far west fall in the latter form of marginalization. Thus it is that the *dalits* within the mid and far west evidence the worst case of exclusion and marginalization

‘Historically, this process contributed to make the foundations of Nepal’s democracy quite shallow because structural issues that would strengthen people’s sovereignty were always swept under the carpet. The fallacy of the slogan of ‘unity in diversity’ during and after the Panchayat rule was starkly brought home by the *Janajati*, *dalit* and *Madhesi* movements in the wake of the Maoist rebellion. Also, in a very fundamental sense the myth of monarchy frustrated Nepal’s evolution as a nation-state. Indeed, the myth of monarchy and the myth of the unitary state appear no more than two sides of the same coin.

‘Nepal has only two tiers of government at the present, the centre and the districts. The designation and delimitation of the existing districts was made in 1961. In the new years message to the nation in April 1961 King Mahendra announced the setting up of a Committee to “divide the country into 14 Zones and 75 development districts” for purposed of development. The Committee submitted its report in October 1961. According to the report economic self-sufficiency, ease of access and transport, creation of a linear group of districts along the northern border based on their unique cultural identity, comparable population size, and the recognition of historical tradition were the five criteria used in the delimitation of the districts. Also the districts were categorized into mountain, Hill and Tarai districts. These criteria notwithstanding, the most over-riding concern seems to have been the need to create a new political environment to dispel the prevailing confusion in a context when the king had just dismissed the elected government and usurped power. The 14 Zones identified comprised of groups of districts representing the major geographical regions of Nepal to serve the purpose of national integration. Some adjustments were made in the boundary and names of the district but

the basic frame remains the same till today.’ This account by Professor Pitamber Sharma shows how the division into districts was politically motivated, and has been a source of considerable resentment among the Madhesis.

In 1970 as part of the Fourth Plan (1970-75), the country was divided into first four, and later five, development regions for purposes of reducing regional inequalities and fostering a planned process of regional development. Sharma says that development regions, however, never received the economic, administrative or political status to make a difference in the highly centralized governance of the country. Indeed the idea of regional development was based on the idea of structural change and meaningful decentralization and devolution of power, an idea that was naturally abhorred by the power-holders of the centralized feudal state. The result was skepticism of the concept of administrative decentralization.

Consequently the restructuring of the state has become the major objective of the people’s movement. With the repeal of the 1990 constitution on the 15<sup>th</sup> January 2007 by the Interim Constitution (art. 167), the constitutional foundations of centralization disappeared. The Interim Constitution gives great importance to restructuring of the state for democracy, inclusiveness and social justice. The preamble envisages the restructuring of the state to resolve ‘the existing problems of the country based on class, caste, region and gender’. What was article 25(4) of the 1990 Constitution has been made more specific by requiring self-governance based on ethnicity, language, culture or religion (art. 34(2)). The state is committed to promoting co-existence among various communities and to ‘helping in the equal promotion of their languages, literature, scripts, and arts and culture’ (art. 35(3)). For present purposes, perhaps the most explicit provision is article 138 which commits the Constituent Assembly to eliminate the ‘centralised and unitary form of the state’ as a means to end discrimination based on ‘class, caste, language, sex, culture, religion and region’. A high level commission is to be set up to make recommendations on the restructuring, leaving the final decision to the CA. An amendment on 9<sup>th</sup> March 2007 specifies that the decision of the CA would be on the ‘federal system of state’, putting federalism firmly on the agenda.

While there now appears to be near unanimity on the need to decentralise the state, the issue of federalism remains contentious. On the one hand, there is controversy between those who support federalism and those who argue that decentralisation, carried out administratively or through a legislative framework, is a better approach, in part because it is simpler and more flexible. On the other hand, supporters of federalism are divided among those who favour a geographically based federation and those who favour a federation based on ethnicity, language or ‘historical regions’. The former emphasise factors like the geographical terrain and cohesion of the area, resources, infrastructure, capacity and the potential of economic development. The latter see the primary function of federation the recognition of identity and the empowerment of marginalised communities. Other considerations also touch on the choice: representativeness and participation, democratisation, fairness to all the inhabitants of the constituent units, national unity and the integrity of the state.

## **II Unitary, devolution or federation?**

In a unitary state only level of government, the national government, is established in the constitution. All legislative, executive and judicial functions are given to the organs of the national government. Generally a unitary state will have some form of decentralization of some or all of these powers, such as in the system of local government. A lesser form of decentralization is *administrative decentralisation*, in which legislative and policy powers remain with the centre while implementation is delegated to either national civil servants stationed in the regions or to locally established councils. These arrangements are not usually contained in the constitution; they might be made either administratively or through legislation and can be easily revoked by the centre.

In the case of devolution (in some countries called regionalism), the devolved unit has significant legislative and executive powers. The grant of these powers is legally protected, either in the constitution itself or through another constitutional law (often called the organic law). Even in Britain, where under the fundamental principle of parliamentary sovereignty it is not possible for the national legislature to grant powers to subnational levels irrevocably, the constitutional arrangements for Scottish devolution provide considerable legal security to Scotland.

The most secure form of the protection of powers to subnational levels is federalism. The arrangements for the distribution of power are entrenched in the constitution, so that powers of the subnational unit (sometimes called a state as in India and the US, or provinces as in Canada or cantons in Switzerland) are not given by the national government but by the constitution itself. The constitution divides state powers and functions between the centre and subnational units, for which there are a number of models. In 'classical' federations, governments established at the national and regional levels are co-ordinate and supreme within the spheres allocated to them, but in some federations like India, the subnational units can be subordinated to the centre in some circumstances. A federal constitution will also regulate the power to levy taxes, to collect, distribute and spend revenue. Normally, disputes between different levels of government are resolved through the courts, although in some recent federations, governments are required in the first place to settle disputes through negotiations or mediation. These federations also provide the machinery to handle inter-government relations.

Another term used in discussions on decentralization is 'autonomy'. At one level autonomy is a generic term and means any system under which a group or territory has the power to make decisions on certain matters on its own. Thus it would cover federal, devolved, and local government systems. But autonomy is also used in a specific way to refer to a system in which one part of the country enjoys powers to make decisions different from other parts which come under the control of national authorities. An example of this autonomy is the system established by China for Hong Kong and Macau. It is also possible in a federation that one part of a subnational unit may be given special powers (as in Bodoland in 2003). This type of autonomy is used in situations where people in one part of the country have established a case for some degree of self-government.

A key element of a federal system is the combination of ‘shared-rule’, that is, the powers and structures of authority at the centre in which all the different subnational communities participate at the national level, and ‘self-rule’ where the autonomous powers of each subnational unit are exercised. It is important for the viability of federal relationships that the powers of ‘shared-rule’ and ‘self-rule’ are balanced, and that there are effective institutions and mechanisms for consultation and co-operation.

In practice the degree of legal security does not depend only on legal or constitutional provisions. Some countries have a strong culture of local government which the national government cannot disregard without serious consequences (as in Sweden). And within each of these cases of decentralization, there are considerable variations. Variations within a federation result from the way the constitution deals with a number of issues. The fact that a large number of components make up a federal system means that the federal arrangements can be adjusted to the needs and circumstances of each country.

### **III Fundamental bases of federalism: the why of federalism**

There are two critical variables which determine the form of the federation: the reason for, and the method of, the formation of the federation. In order to understand issues in the prevention and management of conflict, it is useful to consider different types of federations and the kind of issues they are likely to raise. One categorisation relies on the mode in which the federation came about (where the distinction is between federations by aggregation and by devolution or disaggregation) and the second as to the underlying basis of the federal arrangements (and here the distinction is between the territorial or ethnic rationale). (I prefer to use the expression ‘disaggregation’ as ‘devolution’ suggests, misleadingly, both that the federal arrangements are a gift from the centre and can be removed by it).

#### *Federation by aggregation and federation by disaggregation*

Federation by aggregation refers to the coming together of previously separate sovereign entities. Generally in these situations the units of the federation are deemed to retain sovereignty over those matters which they have not transferred to the federal authorities. Since such a federation arises out of the free decision of sovereign states, it can be safely assumed that there is no resistance to the federation (in this regard it is important to distinguish the failures of what might have been federations by aggregation in the Caribbean, East African and Central African—the attempts were forced on them by the colonial power and did not flow from their own choice). The principal task in the formation of a federation by aggregation is the establishment of the federal institutions and government which is seen as formed by and representing the states. States themselves have already well established constitutions, institutions, identity and political systems—and so do not feel threatened by the formation of federal authorities. Key politicians have operated and continue to operate at the state level. The creation of federal authorities is a less onerous task than the creation of numerous new states (as in federation by disaggregation) and often their powers and jurisdiction are limited and do not require (at least to start with) detailed regulations and institutions.

A federation by disaggregation usually results from breaking up of a unitary state with a highly centralised administration. A number of new states have to be established. Powers have to be divided, but the reality is that on the formation of the federation, it is the national (now designated federal) laws which cover all powers. The transfer of powers to states is thus complex, for unless positive steps (requiring co-operation between the centre and the states, and sometimes between the states) are taken, the old legislation remains in force and restricts the policy and administrative options of the new states. The establishment of new states requires not only a formal (almost one might say paper) transfer of powers, but the willingness of the centre to surrender its powers and authority and the allocation as well as building of resources at the state level. The willingness of the centre cannot be assumed, for even if the political authorities consent to transfer, well entrenched bureaucracies resist the transfer of personnel and resources from their ministries to the new entities. A great deal of new legislation has to be prepared and new institutions created. High levels of skills, expertise and dedication are required to establish the new states. Much greater co-ordination is required than in federation by aggregation. These bureaucratic problems are aggravated by the lack of political will, for federations by disaggregation are often the result of bitter internal conflicts and sometimes imposed by the international community (such as in the Sudan and Bosnia-Herzegovina). The experiences of Kenya, Uganda and Papua New Guinea (to take only three examples) to dismantle the centralised colonial state are worth studying to understand fully the politics and tactics of resistance.

#### *Territorial and ethnic federations*

All federations have of course a territorial base. In a federation power is divided between the federal government which has prescribed powers throughout the country and a number of state governments which have powers in relation to the territory of the state/province. The distinction between territorial and ethnic federation lies in the character of the territory. In the former the territory does not have an 'ethnic' dimension. It is, if one can say so, ethnic-neutral. Indeed, as in the United States a territory which might be seen to have an 'ethnic' dimension (such as Puerto Rico with its Hispanic background) may be denied statehood (in India the 'religious dimension' has traditionally been treated in the same way; and in the original Pakistan federation, the dominant partner suppressed the 'Bengaliness' of the state of East Pakistan). The rationale of federation is different: one deals with distance, democracy, responsiveness and accountability, and the other with self-determination and identity and culture. Because the purposes of federalising are different, the criteria for the subnational unit, the balance between self-rule and shared rule, the salience of culture, the politics of internal mobility, the allocation of resources, and the modes of dispute settlement, are often also different in the two federal types.

In territorial federation, rights and obligations of individuals are based on residence in that territory, and personal characteristics like language, religion or culture are irrelevant. (Of course not all federations can be fitted neatly into one or the other category—India, Canada, Switzerland, and Malaysia have elements of both, but it is perhaps possible to identify the primary orientation, and logic, of each of them).

By contrast, in an ethnic federation, the territory has ethnic dimensions—perceived by a community as ‘homeland’, vested with religious history or emotions (‘sacred territory’, ‘gift from god’), or in a more mundane way, land where a community has numerical majority. When state power is vested in such territory with these characteristics, the exercise of that power is related in some sense to ethnicity. It may be that the language of the dominant community will be the language of the government (as in India), or that the religion of the majority will have a special status (as in Switzerland), or that members of a particular community will have some rights denied to others (as under some Latin American constitutions in territories belonging to indigenous communities). Even if there are no rules privileging an ethnic community, the ethos and culture of the majority community will dominate the policies and practices of the government. In an ethnic federation, the division of the country into states is governed by the relevant ethnic factor; and there may be formal or informal rules that a community which can establish either its general ethnic distinctiveness or some specific characteristic, is entitled to a state or autonomy of its own (Spain, Ethiopia, China, partially in India, indigenous peoples in Latin America), carving it out of existing entity or entities or merging bits of territories in existing entity or entities. This can lead to considerable re-interpretations of history, discovery of ancient roots, or the re-invention of identity. The critical tensions and conflicts may arise from relations between ethnic communities (as each advances competing and often incompatible claims) rather than between the centre and the community.

It would therefore seem that ethnic federations face greater social and political problems than the territorial, of balancing and adjusting the interests and claim of states. The dynamics of the two are different—there is likely to be more stability of internal borders in territorial federations, and considerable proliferation of states in the other. The objectives of the territorial federation (efficiency, geographical coherence, accountability) may not always be compatible with the ethnic (where the dominant considerations are likely to be ethnic coherence and the promotion and satisfaction of needs and emotions of identity). There is likely to be a much stronger sense of belonging to a locality in the latter, and therefore in a sense less inclusive.

Before we turn to the choices and issues which need to be addressed in Nepal, it is necessary to refer to two dimensions of federalism and management of ethnic conflict. The first is whether federalism is an appropriate and effective constitutional and political device to resolve tensions that arise out of the presence of multiplicity of ethnic groups within the state. There is growing literature on this issue and there are examples of the adoption of federalism for this purpose (of which Ethiopia is an example, and the Sudan more recently, as regards Africa). Although a device to resolve difficulties, federalism also generates its own tensions. Such federations are almost always the result of disaggregation and are thus contested, often with a bitter history. The operation of such federations frequently involves the management of ethnic claims and tensions, especially if the constitution or politics permits the readjustment of boundaries or the establishment of fresh states.

This while it is not the purpose of this paper to canvass the pros and cons of ethnic federalism, it is important to look at them, particularly the arguments against, in order to understand the likely tensions and conflicts that may arise in ethnically based federations. It has been stated that ethnic federations weaken the sense of the people that they belong to a single nation, as their primary (and sometimes exclusive) loyalty turns to the ethnic community to which they belong. Major ethnic communities get a territorial base from which they can exercise important state functions, and their dependence on central institutions is reduced. In these ways not only does national unity weaken, but ethnic groups acquire the resources for successful secession. At the least, it may be argued, that a great deal of the time and energy of the national authorities is taken up constantly re-negotiating ethnic claims. National unity may also be threatened by the vulnerability of minorities within a state or province dominated by one ethnic group, to discrimination, even oppression—which may also force the central authorities into intervention in the affairs of the state or province, producing further tensions. Factors directed to the maintaining of national unity (through effective and legitimate dispute resolving mechanisms, consultation and co-operation, and power sharing where relevant) become critical. The ability of the centre to ensure equitable distribution of resources and the fair development of all regions may be handicapped if resources are unevenly located in the states.

On the other hand, where ethnic consciousness is strong, federations based primarily on geographical or administrative grounds, may fail to satisfy a community's sense of identity, and desire for a measure of self-government and the recognition of the value or importance of its culture. The politics of federalism in India and Nigeria are good examples, where the administrative factors have had to be abandoned in favour of ethnicity under intense pressure (and violence) from communities which felt that state boundaries drawn around their ethnicity would alone be acceptable. The experience of India and Spain shows that national unity and integrity are not necessarily threatened by federalism: indeed in both these instances the contrary is the truth.

### **III Designing a federation: the how of federalism**

If Nepal were to become a federation on the basis of ethnicity, it would face dual problems of dis-aggregation and ethnic competition. Whether the approach is territorial or ethnic, there are certain features of a federal structure that need to be incorporated into the design of the federation, although the emphasis would vary according to the primary objectives of federalism and the national context. A large number of components make up a federal system. These components open up choices in the design, and permit flexibility. Key components are:

- the *purposes of federalism*—classical federations aimed to create pluralism of policy and accountability of administration in largely homogenous people, or to manage government over a large territory; most recent federations have been established to manage ethnic or linguistic diversity;
- the *unit to which power is granted*—the size, number, homogeneity or heterogeneity of the population of the units; experience shows that when there are only two units representing two communities (East and West Pakistan, Czech and



- Slovakia, Tamils and Sinhala in Sri Lanka), federations are prone to extreme tension and tend not to last, while India, Spain and Switzerland, with multiple ethnicities, are better able to achieve a viable balance;
- the *number of levels of government* (for example two or three levels, including local authorities); in many countries the regional level reproduces many of the problems of size that exist at the national level, and that a third tier (local government) may be necessary to ensure a wide degree of people's participation as well as that of minorities which may be concentrated in specific towns or rural districts;
  - *one or more constitutions*: in older federations (especially those resulting from aggregation) there is one constitution for the national or federal government and separate constitutions for sub-national units (US, Canada, Australia); but in some of the newer federations, there is only one constitution which covers both federal and sub-national structures (India, Nigeria); the former provides more flexibility and permits, within the national constitution, the adaptation of sub-national structures to local cultural or political traditions;
  - the *representation of subnational units at the centre*, particularly in relation to the second legislative chamber—some provide for equal representation of units regardless of their population, some provide for the representation of the people while others provide for representation of subnational governments, so that the second chamber becomes a kind of forum for negotiations between the national and subnational governments;
  - *uniformity or asymmetry* in the powers and institutions of subnational units; when all the units are similar in size or resources, federalism may work smoothly, but when they are dissimilar or asymmetrical, some with more powers or resources than others (the Northern State in the original Nigerian federation, Quebec in Canada, Kashmir in India or Zanzibar in Tanzania), tensions may arise, yet degrees of asymmetry may some times be better able to respond to the accidents and circumstances of ethnicity or history;
  - the *extent of powers* of the national and subnational units; if significant powers are vested in the latter, denoting a small sphere of 'shared rule', the ability of the national government to regulate the economy, distribute resources, and even safeguard national security may be seriously affected, while if only a few matters are vested in subnational governments, the centre will dominate local communities.
  - the *methods for the distribution of powers* has a major effect on the relationship between the centre and regions. When certain powers are vested exclusively in the centre and others exclusively in regions, there is a clear separation between the two levels of government, but where a significant number of powers are 'concurrent', that is, both the centre and regions may use these powers, the centre and regions have to regularly consult and co-operate;
  - another method to distribute powers is to *separate legislative from executive powers*, and instead of, as is usual, give both legislative and executive responsibility to one level of government in respect of specified matters, to give, for example, legislative responsibility over certain matters to one level of government, normally the centre, and the executive responsibility to another. In

this way most policies are nationally determined and apply uniformly throughout the country, but their implementation takes account of local circumstances. Germany and South Africa follow this system, as to a lesser extent do India, Switzerland, Austria and Malaysia;

- the *powers of the national government to intervene* in or direct, monitor or even suspend the governments of units depend on the priority given to the national government and the perception of its ultimate responsibility for the welfare of the people (as in India and Malaysia). In some federations the different levels of government are considered equal or co-ordinate, enjoying their legitimacy and authority from the people equally, and protected by the constitution (examples being the US, Switzerland and Australia).
- The *financial arrangements* for national and subnational governments, including the division of powers to raise and spend public revenue and the transfer of funds from one level of government to another (usually from the centre to the regions). Financial arrangements touch on some fundamental issues, such as whether the less developed regions receive special grants from the centre to ensure that their inhabitants enjoy the same level of amenities and social services as the well off regions, other equalisation measures, and co-ordination of economic policies through fiscal measures.
- diverse mechanisms for *inter-governmental relations*, for consultations between the national and regional governments, co-ordination of policies, adjustments in fiscal relations, and the implementation of laws. Federations with a significant degree of concurrent powers and interlocking fiscal policies use these mechanisms more than where powers are exclusive; these mechanisms compensate for divided authority inevitable in federal or devolved systems.
- *mechanisms for the settlement of disputes* between governments, and the balance between consultative and mediation procedures and the judicial enforcement of constitutional provisions, the former being more valued where governments seek to co-ordinate and co-operate.
- devices for the *protection of minorities* within regions, either through the supervening powers of the national government or mechanisms within the region, such as the protection of minority languages, equal rights of all citizens resident in that region, including the right to live, work and own property;
- the degree and method of *entrenchment*, reflecting the priority given to devolution—usually the most entrenched form of devolution is federalism, where the consent of both the centre and regions is necessary to any change in their legal status or powers, while a lesser form some of protection is provided by the requirement of a special majority in the national legislature, and even less is when changes can be made by a simple majority—the last situation is indistinguishable from local governments. The degree of flexibility depends, among other factors, on the degree of entrenchment.

#### **IV The fundamental basis of Nepali federalism**

A fundamental choice that the people of Nepal have to make is the primary function of the federation. Would it be territorially based, with boundaries drawn on the basis of geographical features, capacity, resources, the potential for development, equal rights of

all persons and communities living in a subnational unit, democracy and accountability? Or would it be based on ethnicity, where persons of the same ethnicity or caste or language constitute the subnational unit, and enjoy benefits that others do not, such as the use of their language or control of resources, in order to protect and promote their economic and social well being, recognizing their distinct identity? Putting the issue in this stark form may exaggerate the polarity of approaches, for some the same purposes, such as identity, administrative rationality, and accountability, can be served by either type of federation. And there can be units based on a mixture of geography and ethnicity so that it is not necessary to follow one approach to the exclusion of the other. Nevertheless, the debate on the desirable approach in Nepal has revolved around this polarity. It is also the case that the extreme caste and ethnic diversity of Nepal shows the differences of the two approach in sharp relief, for the ethnic approach could lead to a large number of small units while the other would advocate a small number of large units, with somewhat contradictory consequences for administration, 'efficiency' and identity. And although the amendment of the IC on 9 March 2007 may seem to favour the communal rather the geographical/developmental approach (removing discrimination based on 'class, caste, language, sex, culture, religion and region'), it is certainly not unambiguous.

The intense focus on federalism has also diverted attention from the question whether the problems for which federalism is seen as prescription can be tackled, perhaps in a more effective way, by other methods. This is not the place for a discussion of these methods, although there is a brief mention later in the paper.

#### *Criteria for establishment of subnational units*

In any case, most of the debate on federalism in Nepal has turned on the question of the criteria for the subnational unit, divided between these two approaches. This debate is a useful starting point, for questions of the design of the federation would depend fundamentally on which approach is adopted. In a comprehensive paper on the subject, on which I have relied heavily in writing this section, Professor Pitamber Sharma has provided invaluable data on the size and distribution of ethnic, linguistic, and caste groups by district and VDCs, as well as data on the distribution of resources. He summarises different proposals for the establishment of subnational units.

Among those who favour an ethnic base, Govinda Neupane proposes 11 units ('Pradesh'), based, as Sharma says, on 'the historical-cultural background, language and the areas of historical occupation of particular population groups...reminiscent of the situation existing at the beginning of the 18<sup>th</sup> century' and ignoring geographical or economic feasibility.

Sharma states that 'most of the major ethnic groups such as the Limbus, Rais, Tamang, Gurung, Magar in the hills and Tharus in the Tarai have demanded the creation of states based on their 'historic areas of occupation. The Madhesi groups have tended to equate ethnicity with language groups and have demanded the creation of states based on language groups. While some groups see the need to create one single Madhesi state along the southern border, others are for two or three separate states including that of the Tharus in the west. Some of the *janajatis* groups such as the Tamangs have demanded

that the areas of Tamang occupation be given a state status in their historic territory. Most of the *anajatis* groups have articulated their demands on ethnic states in a general way and are in the process of more concrete articulation. The federation of the *janajatis*, *Nepal Janajati Mahasangh*, for example has called for autonomous ethnic states but has not clarified the number and extent of such ethnic states or forwarded a concrete proposal’.

Maoists have proposed 11 autonomous regions. According to Sharma, ‘These groupings represent both ethnic occupation as well as historical neglect, geographical marginalization and remoteness.’ The principal criteria are derived from Stalin, namely “common territory, common language, common economic life and common psychology”. He says that ‘Other than ethnicity, the Maoists have not explained adequately the basis for the formation of these autonomous regions’.

Of the other parties, the Nepal Sadbhavana Party, a regional party based in the Tarai, proposes federalism with the Tarai as one unit. The CPN (UML) supports autonomy based on ethnicity, language, culture and region (as aspect of the right of indigenous nationalities and ethnic groups to self-determination). Sharma comments that while the criteria ‘seem to be comprehensive *and* confusing, the CPN (UML) has yet to come up with concrete proposals for designating federal regions or states and explain the meaning and context of self-determination and the extent of autonomy and how it is to be exercised’. The Nepali Congress has long been opposed to federalism, although it was among the parties which promoted the recent insertion of this goal in the Interim Constitution.

In a recent book (*Towards a Democratic Nepal: Inclusive Political Institutions for a Multi-Cultural Society*, 2005) Mahendra Lawoti proposes that ethnic affiliations should be the basis, where feasible. Citing the case of Limbus, he writes that ‘since many of the many of the marginalized sociocultural groups are concentrated in different regions, different groups might be able to form majority governments in those regions...’ (p. 233). He believes that even if a marginalized group is not a majority, it would have more influence at the regional level than the national level. Where ethnic basis for territorial federalism is not possible, the smaller communities should be given ‘non-territorial federalism’, through their cultural councils (pp. 253-4). Lawoti’s strong advocacy of ethnic federalism is based on his belief that only in this way the ethnic aspirations of marginalized groups would be met, and it is the only avenue out of their oppression by the ruling communities.

Among those who support federalism based on the logic of geography, viability and the imperative of development, the late Dr. Harka Gurung proposed the district as the unit, with the reduction of the number from the present 75 to 25. He believed that district autonomy was possible only through the consolidation of the economic base with a wider tax authority and revenue sharing of income from local resource base.

Pitamber Sharma himself uses criteria composed of economic geography and to a lesser extent of ethnicity. First he demonstrates why the ethnic, caste, linguistic and historic

homeland criteria are neither realistic nor viable. There are only 14 districts which have the majority of one group (9 of them dominated by Chettris). Groups, particularly the caste groups, which are dominant in one or more districts are also the most dispersed, the result of the mobility of people. He concludes, 'As a result there is considerable ethnic/caste diversity even in areas that have a dominant ethnic/caste population...Even among the janajatis there are dominant/majority and minority janajatis in the same geographical area...Dalits do not have a territorial enclave'.

The consequence is that if ethnicity is used as the criterion, there would be a large number of units, and the logic of the system would tend towards further proliferation. Some, but perhaps most units would be quite small, with limited resources, unable to take on major responsibilities. Sharma opposes ethnic basis, if the objective is inclusiveness. For ethnic based units would be exclusionary; and would obscure real inequalities among and the people if the focus is on communities, not classes. He believes that the real way to fight exclusion is to focus on development, and therefore accords high priority to economic viability and resources. Consequently, he argues that 'the identification of federal units or regions should be guided by the objectives of regional development'. But he recognizes that there is an overlap between ethnic groups and regions, particularly in the context of eastern, central and western sectors of the country. Federal regions under this criterion would basically multi-ethnic and multi-lingual, although specific major ethnic/linguistic groups will be dominant in specific regions. Taking as guidelines macro-watersheds, dominance of specific ethnic/caste groups, prospects and feasibility of the development of inter-geographical regions, resources and potentiality for autonomous development, and historic experience, obstacles and challenges for inclusive development, he recommends the creation of 6 regions, running north-south, except for one, Karnali.

Although Sharma's own criteria may be seen to be internally incompatible, he is able to factor in ethnicity by devising a four tier level of government, particularly the district and the village. He would reduce the number of districts even more drastically than Harka Gurung, down to 19. The Capital region would have one district, two regions would have six each, and the rest will be divided among other regions. Districts would have greater ethnic and cultural homogeneity, although as his own analysis shows, there would be few with an absolute majority.

There are likely to be serious difficulties in agreeing on the fundamental basis of Nepali federalism. It is clear that if each or most of the ethnic, caste or language groups were to have their own region or even district, Nepal will end up with a very large number of very small units. The dilemma is obvious. If ethnicity or identity were to be criteria, the regions would not be able to take on many functions and responsibilities given the lack of resources and capacity. If on the other hand, the scale of size were to be increased by reducing the number, ethnic self-rule would be diminished and many groups would feel quite remote from the centres of power. Organising on the basis of three or so tiers may overcome the dilemma to some extent, as the region would be the focus of policy and legislative initiatives, and of region wide development and projects, while districts would

deal with matters of greater local significance, including culture. Of course the more the tiers, the more complex, and perhaps more expensive, the federal system will become.

There are differences even among proponents of ethnic federalism. Sharma's attempt to integrate ethnicity via districts might be regarded as rather half-hearted by sections of Madhesis. His north-south axis for demarcation of regions would certainly upset them, as a device to dilute Tarai majority. His scheme under which Tarai is divided runs counter to their public position of a single Tarai unit. And yet the Madhesi preference for a single Tarai unit will most probably meet opposition from Tarai janajatis communities. Janajatis and to some extent Madhesis build on ethnic distinctions, while Dalits have an interest in eliminating caste distinctions.

The debate about the basis, size and number of units will achieve more concreteness (and would be easier to assess) if the powers and structures at each level were specified. How many tiers of government should there be? How are powers to be divided between them? How would regional/district governments be financed? How would relations between different levels be managed? Will there be one public service or many, one judiciary or many? Will there be enough resources and capacity to manage a complex federal system? How will disputes between different levels of government be resolved? What impact will federal relations have on inter-community relations? There are many other issues which will have to be tackled in designing the details of the federal system. Examining their implications may help to resolve differences among the different proponents of federalism.

These implications may also help Nepalis to assess the desirability of a federation, or what kind of federation. They might prompt reflections on what kind of issues and problems are best dealt through federalism. It may also focus attention on other kinds of constitutional devices that may be better suited to dealing with some at least of the problems that currently are expected to be resolved perceived through federalism.

## **V Structuring federalism: issues and choices facing Nepal**

This section refers to a number of issues on which a decision would have to be made in designing federal arrangements in Nepal. The general implications for decisions on these issues are spelled out, although no specific recommendations are made in respect of Nepal. This section, like previous sections, is intended to convey a sense of the complexity of federal arrangements and how some federal arrangements might work in practice.

### *Levels of government*

There has been relatively little discussion in Nepal of the number of levels of government, as is obvious from the preceding section. Pitamber Sharma's four level proposal shows how flexibility can be achieved through multiple levels, to deal with issues of policy, resources and capacity, and dealing with the national government, at the regional level, and identity and participation at the district level. Frequently the adoption of a federation turns previously dominant groups into minorities in some federal units. One way to deal with their concerns is to grant them a limited autonomy in areas where

they might constitute a significant proportion of the population (this solution was widely canvassed in Sri Lanka in the 2000 proposals to protect Sinhala and Muslims in the North-East and for Tamils in the south). In Switzerland there are three levels (national, cantonal and commune) which are constitutionally protected. Many federations, such as Bosnia-Herzegovina, have moved to three tiers, with constitutional protection of local councils and municipalities (including recently India). Such an approach may be worth considering in Nepal, with its bewildering complexity of caste, ethnicity, languages and regions, although it must be borne in mind that the more the levels, the greater the need for political and administrative structures and co-ordination (and greater care with which divisions of responsibilities are determined).

#### *Number of units*

The number of units can be a critical factor bearing on the survival of the federation. A federation which is composed of a small number of units can come under considerable pressure. If there are only two units (as in (East and West Pakistan, Czechoslovakia, the non-territorial federation of Cyprus), each dominated by different cultural communities, the larger community would want as many powers as possible with the national government which it would expect to control and the minority would want as much power as possible at the subnational level. All disputes are between the two communities. A federation would likely be unbalanced if there were a big discrepancy in size and resources among subnational units. In a federation with larger number of units, different kinds of balances can be struck, and the disputants may change with the issue, and there are possibilities of mediation by other units. On the other hand, with a large number of units, co-ordination may be difficult; and if the large number is in a relatively small country, the units would have limited capacity and would be unable to resist the influence of the national government.

#### *Boundaries, merger of units and creation of new units*

The tendency in ethnic based federations is for the number of units to increase by the fragmentation of existing units (as in India, Nigeria, and Spain). There may be disputes about the boundaries of neighbouring units. And sometimes there may be pressures for the merger of units (as in the Indian exercise of the integration of princely states). All of these developments are likely in Nepal, as the process of federalisation unfolds. It is therefore important that the constitution should provide procedures for splitting or merging of units and the adjustment of boundaries. The procedure should make it neither too easy nor too difficult to bring about change. If it too easy, many demands for new units would be made and if it too difficult, the failure of necessary adjustments will lead to conflict. The procedure should ensure proper consultation with the people of the areas concerned before these decisions are made; in most cases their approval should be necessary. There must be adequate time for proper debates on the desirability of change. In some constitutions, such as in Spain, some criteria are specified before the process for change can begin.

#### *One or more constitutions*

It is essential that one, national constitution must prescribe the parameters of the federation, including the division of powers, relations between governments at different

levels, resolution of disputes, interpretation and amendment of the constitution. It is customary for such a constitution to specify the nature of government at the national level (i.e., of the federal government). The structures of government at the subnational levels are generally dealt with in the constitution of the subnational unit. Subnational constitutions have to be consistent with the national constitution but otherwise are free to establish the institutions of the unit and its system of government within a broad range. There can be considerable differences between constitutions of subnational units (e.g., some are unicameral and others bicameral, some may have their own bills of rights while others rely on the national constitution, and, in Malaysia, some are monarchical but others are 'republican'). The scope and importance of state constitutions therefore varies depending on how centralized power and institutions are. In some countries subnational constitutions may require the approval of the central executive or the legislature.

In a few countries, the national constitution also deals with the structures of government of subnational units ((India, Nigeria, and Pakistan). This is perhaps administratively more convenient and is employed in federations which are centrally oriented. Some units may not have capacity to make their own constitutions (it is interesting when subnational units are allowed their own constitutions, there is remarkable similarity between them). But it leaves less scope for the accommodation of traditional structures where they vary across the country (as may be the case in Nepal).

#### *Second chamber*

Federal legislatures are generally bi-cameral. One chamber is based on the principle of the representation of the people, so that membership is based on population in each of the units. The other chamber represents the units at the national level, protects their interests, and enables them to participate in the governance of the whole country (as an aspect of shared rule). The basis of the memberships is sometimes equal representation of the units, sometimes it is the size of the population (provided that every unit has at least one member).

In some countries the second chamber represents not subnational units, but ethnic communities (as in Ethiopia), providing a different kind of balance between the national government and communities. In Nepal itself there have been suggestions for such a legislative chamber (in contrast to the National Assembly under the 1990 constitution which was based essentially on party representation).

The powers and responsibilities of the second chamber also vary. Some, as in Germany and South Africa, are used as a framework for negotiations between the national and subnational governments (in which case there is representation of subnational governments, rather than of people directly). In Ethiopia the second house, the Federal House, has the explicit responsibility to protect the rights and interests of subnational units and ethnic communities, ensure adequate budgetary allocations, and interpret the constitution.

The work of the second chambers can be supplemented by other institutions and procedures for inter-governmental relations (such as premiers' conferences). In short



there is considerable room for creativity regarding the second chamber, including the meshing of the interests of the national and other governments as part of the strategy of ‘bonding’, as well as the ability to represent non-state communities and groups.

*Institutional arrangements: the role of independent institutions*

This paper does not discuss how institutions at the national and subnational levels should be organized. But it considers a special aspect of it. Normally, each level of government has its own institutions (legislature, executive, etc). But in some cases it might be more appropriate as well as cheaper to for the different levels to share institutions. The most obvious, and less controversial, are the Electoral Commission, the Audit Commission, the Human Rights Commission, and the Anti-Corruption Commission, and the Ombuds type of body. These bodies are meant to be independent, not subject to any politician or official; they have to maintain national standards uniformly throughout the country; and some of them require a presence in all zones or districts. They are best described not as institutions of the central government, but as *national* institutions. Their national character would become even more evident, and increase their legitimacy as such, if the appointment of their members could be made through a process where the subnational units had some participation, for example through a national appointments board consisting of persons appointed by both levels of government.

Another institution which could be shared is judiciary, and legal advice and prosecution services. Judges are supposed to be independent, sworn to obey and enforce the constitution and the laws. Also having a common judiciary would eliminate complex legal issues that arise from multiple jurisdictions, such giving ‘full full and faith’ to decisions of separate judiciaries, enforcing the laws of different jurisdictions, extradition, taking evidence in another jurisdiction, etc. Again, it would be necessary to ensure that a truly independent process is established for the appointment, and where appropriate, dismissal of judges. It is of course not uncommon for each unit in a federation to have its own judiciary, but is it doubtful if Nepal can afford the resources for a multiplicity of judiciaries. The world’s largest federation, India, is able to operate with only one judiciary. The same type of approach could be adopted for the provision of legal advice and the conduct of prosecutions. An added benefit would be the enhancement of these independent institutions, as they would be delinked from any particular government.

The subject of a shared public service raises different kinds of issues (including that of loyalty), but certainly some sharing of services would be sensible and should be feasible. The new subnational units will need very considerable support as they begin to establish their governments. A pool of senior or retired public servants could assist them with this task. More broadly, a national commission could be established to provide expert advice on finance and taxation, law drafting, management systems, etc could be set up. This point is discussed later in this paper.

*Division of powers: contents and methodology*

One of the most important decisions is the division of powers among governments at different levels. Certain powers are almost always reserved for the national government: foreign affairs, defence, citizenship, currency, and international trade; in practice there

are many more (as in India and Malaysia). In principle, the central government should have those powers which are essential to preserve the independence of the state, national security, interactions at the international level, with other states and international organisations, the maintenance of integrated domestic economy, regulation of large natural resources, and national infrastructure. Typical powers for the subnational units include primary and secondary education, local markets, co-operatives, health clinics, agriculture, irrigation, land taxes, culture (including libraries), sanitation, and local roads. In principle subnational units should have powers which are of particular regional interest: local transportation, education, primary health, marketing of agricultural products, local languages, co-operatives, micro credit, and local taxes.

But in fact there is no standard formula for dividing powers, and in the newer federations, the central government is given many powers which have a direct impact on every day life in the subnational units, in areas from which the central government in older federations were carefully excluded. The division is also determined by the capacity of governments at different levels. Under international norms and agreements, states have assumed responsibilities in many areas of life; these bind the state and have to be discharged by the central authorities. There is also increasing co-operation between the national and subnational units, which makes the older type of division unrealistic.

The last point is also concerned with the method of division of responsibilities. At one time there were two lists of powers: one which belonged to the centre, the other to the subnational units (and the unprescribed, the residue, to the centre). Each level of government had to stay within its own prescribed area. Today this kind of separation of functions is giving way to a more collaborative form in which the centre and the units work together or both have responsibility for several areas ('concurrent powers') such as agricultural, education, irrigation, transport, energy, airports, housing, and environment. This approach generally leads to three lists—for the centre, for the units, and for concurrent powers of each. It is necessary to have a rule as to whether the law of the centre or the unit would prevail in case of conflict—the traditional answer is that of the centre, but in the case of disaggregation (as would be the case in Nepal) consideration should be given to the rule of the paramountcy of the unit, since on the establishment of the federation, all laws would be of the central legislature, leaving very limited scope to units. A modification of this proposal would be to divide the concurrent list into two parts, one where unit laws would prevail, and the other where the national law would prevail.

In deciding both on the substance and the methodology of the division of powers, it is well to remember that a scheme for the most appropriate division would emerge after trial and error and powers may need to be phased over time—which suggest that the system should be flexible. A concurrent list provides flexibility. Three other devices are useful. One is a general provision for the transfer by one of government of its powers to another unit. The second is the South African rule that the national law would prevail over unit laws if a national law is necessary on that matter. Thirdly, the power to make laws and the power to implement those laws can be given to different governments.

### *Resource allocation*

A critical function of a federal constitution is to allocate resources among the different levels of government. However many powers are given to a government, it would be unable to act unless it has adequate resources. We can think of resources as including: public service, money, taxing power, and natural resources. Resources should be matched to responsibilities. Equally, the responsibility to raise resources should be given to the government which has to spend or use them, to induce a sense of responsibility. This rule is subject to the economies of raising resources, for sometimes a government may be better at doing so, but may not need them itself.

This issue arises most clearly in the area of taxation. The most productive type of taxes (corporate tax, customs duties) are most efficiently raised and collected by the centre. Yet a part of that revenue is best spent in the subnational units. This, and the general principle of equalization of resources and development, requires a complex scheme of taxation and revenue, called fiscal federalism.

### *The cultural question*

If the justification of federalism is ethnic, it is that this kind of federation ensures the protection of minority culture. A national minority which is dominant in a subnational unit would be able to promote its culture which would normally be marginalized in a unitary state. It is thus common to give responsibility for cultural matters (including customary laws or practices) to subnational units. Such arrangements also open up possibilities regarding language policy and use. The unit could prescribe a local language, perhaps of the majority or dominant people, as an official language, and require that public servants must learn that language so that the people can deal with official business in that language. Even if it is made an official language, the government is likely to take measures to develop it. Such an approach is also possible in a unitary state, but it is less likely (as Nepal's experience itself demonstrates).

It is unusual to have different official religions in a country, even federations. But an exception is Switzerland where each canton can decide on its religion. However, this may not apply in Nepal as the Interim Constitution commits it to a secular state, with full equality of all religions.

### *The rights of minorities*

A paradox of federalism, established for the protection of a national minority, is that it can put other groups in the autonomous area (some previously dominant) under risk. In order to prevent endless ethnic conflicts at local levels and to protect these 'new' minorities, special provisions must be devised. The following are some examples.

- The constitution should provide for the equal rights of all citizens, regardless of ethnic origins or other usually accepted distinctions. No region should be able to discriminate against citizens who may have once belonged to another region.
- The central authorities can be given a role of protecting minorities, for example by the power to veto legislation of regions which is discriminatory; to consult with subnational units which treat minorities unfairly, and to take special measures of redress.

- The constitution should provide a strong bill of rights which protects citizens wherever they live, through recourse to national courts, law enforcement authorities, ombudsman, and should contain special provisions to protect both national and regional minorities.
- Where, within a region, a minority is concentrated in a rural area or township, autonomy in respect of matters of local concern can be given to them. This is becoming standard practice.
- In some countries, the constitution or the law requires that regional or district governments should include ministers from minority communities.

#### *Dispute settlement and inter-governmental relations*

It is inevitable that disputes will arise in a federation, to a greater extent than in a unitary system—disputes between different governments, between individuals or corporation and governments, about the allocation of resources. Many of these disputes concern interpretations of the law, as to who has what powers, whether a law or act exceeds the authority of the government, and about conflicts of laws. A federal system is essentially legalistic, even when the system emphasises the principles of co-operation and consultation. These disputes have ultimately to be resolved by the courts. And this means that all governments and non-government groups require good legal expertise and advice.

But there are also disputes about policy, and ironically there are more acute in a federation oriented towards co-operation than when the divisions of responsibilities are clearly separate. These disputes can be settled through negotiations, and perhaps only in this way. Therefore systems which emphasis co-operation also need a host of committees and commissions—for settlement of claims to rivers and water, the equalization of development, the allocation of money, co-ordination of planning, etc. Decision making becomes complex and time consuming.

In ethnically based federations, there are very specific (and difficult to resolve) disputes about inter-community relations, boundaries, definitions of identity, membership of a community or region, which can lead to violence and can only be resolved through negotiations, and fairly constant intervention or mediation by the centre. In designing an ethnic federation, one should not disregard the dynamics of ethnicity, which under a new framework may achieve new impetus. If ethnicity can influence federalism, federalism can also influence ethnicity.

#### *Entrenchment*

One crucial factor which distinguishes federalism from other methods of decentralization is its entrenchment in the constitution. Many see this as a virtue, for it means that the centre cannot take away the powers of the subnational unit or disband its institutions. And it means that legal disputes between them are finally resolved by an independent supreme or constitutional court. Others, however, see this as the problem with federalism—conflict prone and rigid. Even when there is very wide acceptance of the need for change, amendment procedures may make it impossible. When flexibility is needed for a fundamental transformation of political power and institutions, federalism locks the parties and the system into a rigid framework.

Perhaps both positions are overstated. And certainly it is useful to consider the appropriate balance between legal security and flexibility. This paper has already suggested that one way to do this is to have a long list of concurrent powers, over some of which the units have the final say, and the other over which the national government has the final say. Another is to use the second chamber as a negotiating forum for national legislation which would be enforced by the units. A third method may be to confine the constitution to the principles and parameters of federalism and leave the detail to a law which itself will enjoy some degree of entrenchment (but not as high as for amendments of the constitution). And yet another method might be to require a review of the working of the federal arrangements after, say 7 years, of their introduction.

### *Implementing federal arrangements*

The experience of the 1990 constitution, despite the requirement for decentralization, shows that decentralization does not come about unless there is the political will. The history of the demise of the federal provisions in several independence constitutions in Africa and Asia reinforces this lesson. This paper has demonstrated the political and administrative difficulties of instituting federalism of the disaggregation type, when a unitary state has to be transformed into a federation. It has also shown the complexity of the federal system and the many legal and technical details that have to be got right if it is work. And decisions on these details must be informed by a great deal of knowledge—of geography, demography, taxation, sources of revenue, administrative capacity, transport and other forms of infrastructure, historical affiliations, political attitudes, and so on. It is also obvious that a full blown federation cannot come into existence overnight; of necessity it has to be gradual and phased. A great deal of new legislation and administrative re-arrangements must be made to lay its foundations.

The implications of the above analysis is that a body must be charged now to begin research and the accumulation of knowledge that must inform the deliberations of the Constituent Assembly when it begins its review of this topic (which now it is required to do after the constitutional amendment of 9 March 2007). As shown above, the Interim Constitution does require a high level commission to facilitate the decisions of the Constituent Assembly (although it does not specify its precise tasks).

It is also clear that sustained efforts must be made to implement the federal provisions of the new constitution. An independent, expert commission (perhaps drawing on the personnel, experience and documentation of the high level commission) should be established to work with the various departments of the government and of the new governments of the subnational units to build capacity, prepare the necessary legislation, build new fiscal mechanisms, and assist in the gradual transfer of functions and resources to the subnational units. For the transfer must be gradual, as each unit demonstrates the willingness and the capacity to take on more functions (while taking care to ensure that this system of gradual transfer does not become an excuse for doing nothing).

### *Alternatives to federalism*

From the current debates on federalism in Nepal, it would seem that federalism is seen as the remedy to numerous problems. This paper has suggested that it would be useful to examine the kinds of problems that federalism is good at resolving and the problems it is unlikely to resolve, if not actually to aggravate them. Now the paper suggests that consideration should be given to constitutional devices other than federalism which might be better suited than federalism or as supplements to federalism. There is no space now to examine them (and they will be taken up in another paper; and readers may wish to consult Professor Mahendra Lawoti's book, *Towards a Democratic Nepal*, where some of these devices are discussed). But a brief reference to them is made here, to put another perspective on the federation debates in Nepal.

Alternative or supplementary approaches will bring the focus on national institutions and policies. It would aim to restructure the entire state. One important element would be fair representation of the marginalized communities in all the institutions of the national government, elective as well as appointive. Affirmative action may be necessary for a period in order to bring this about. The state should promote the economic development of depressed areas, and encourage the opening up of opportunities in the economy and professions for the marginalized communities. More attention will need to be given to group or community and minority rights. The state should respect and promote the languages and cultures of the marginalized communities. Greater use of major languages, in addition to Nepali, should be authorized, in the legislature and at local level administration. A languages commission could be established to promote teaching and research in these languages. The transformation of Nepal into a secular state should be followed up by legislation or other action which ensures that all religions have the same status. Symbols of the state which are divisive should be abandoned. There is certainly no need for a national animal, as there might be for a national anthem, and Nepal can put to rest the controversy over the symbolism of the cow. The lack of trust among communities would diminish. In all these ways not only would marginalized communities benefit, but there would be a greater integration of Nepali people and the emergence of a Nepali identity which reflects its diversity, and of which all can be proud.

### **Concluding observations**

Bar a few, most people accept the need for decentralization. The centralization of the state has limited economic growth outside a few centres. The national government has poor understanding of the situation and problems of the hinterland and is largely unable to make any positive contribution to their development. People have few opportunities to participate in the affairs of the state, which is a major obstacle to the development of democracy. There seem few effective mechanisms for the equalization of resources, benefits and development across the country.

If federalism is to be way out of this, it is important that the CA is able to make informed decisions. For this purpose there is need for more research, focused on the legal and other technical issues identified in this paper. There is also need for a more focused debate on the merits and demerits of federation, ways in which federalism can be designed to

achieve the objectives of inclusiveness and social justice. And it would be desirable while this exercise is undertaken, to consider supplements and alternatives to federalism.

## Appendix

**Table 1**  
**Distribution of major Caste/Ethnic groups dominant in Districts and VDCs 2001**

Major Castes/Ethnic group	Percent of major Castes/Ethnic group in total population	Number of Districts		Number of VDCs	
		with highest percent	with over 50% population	with highest percent	with over 50% population (% of VDCs)
Chhetri	15.8	21	9	928	387 (9.6)
Bahun	12.7	10	0	492	102 (2.5)
Magar	7.1	7	1	362	175 (4.3)
Tharu	6.7	4	1	310	106 (2.6)
Tamang	5.6	7	1	301	159 (3.9)
Newar	5.5	3	1	84	29 (0.7)
Muslim	4.3	5	0	278	36 (0.9)
Yadav	3.9	5	0	308	38 (0.9)
Rai	2.8	6	0	180	76 (1.9)
Gurung	2.4	4	1	130	77 (1.9)
Limbu	1.6	3	0	121	44 (1.1)

**Table 2**  
**Dominance and dispersal of major ethnic/caste population groups in VDC/NPs, Nepal 2001**

Ethnic/Caste groups	Population		VDCs Dominant in		VDCs Present in		VDCs with over 500 pop.	
	Total	Percent	Total	Percent	Total	Percent	Total	Percent
Chhetri	3593496	15.8	928	22.9	3378	83.4	1852	45.7
Bahun	2896477	12.7	491	12.1	3493	86.2	1374	33.9
Magar	1622421	7.1	362	8.9	2553	63.0	908	22.4
Tharu	1533879	6.8	310	7.7	1768	43.6	489	12.1
Tamang	1282304	5.6	301	7.4	1757	43.4	652	16.1
Newar	1245232	5.5	84	2.1	1825	45.1	283	7.0
Muslim	971056	4.3	278	6.9	1962	48.4	558	13.8
Kami	895954	3.9	17	0.4	3284	81.1	477	11.8
Yadav	895423	3.9	308	7.6	1887	46.6	623	15.4
Rai	635151	2.8	180	4.4	1366	33.7	352	8.7
Gurung	543571	2.4	130	3.2	1825	45.1	283	7.0

<b>Damai/Dholi</b>	390305	1.7	0	0	2873	70.9	79	2.0
<b>Limbu</b>	359379	1.6	121	3.0	849	21.0	214	5.3
<b>Thakuri</b>	334120	1.5	35	0.9	1723	42.5	188	4.6
<b>Sarki</b>	318989	1.4	2	0	2220	54.8	106	2.6
<b>Teli</b>	304536	1.3	14	0.3	2018	49.8	159	3.9
<b>Chamar</b>	269661	1.2	9	0.2	1261	31.1	133	3.3
<b>Koiri</b>	251274	1.1	51	1.3	1334	32.9	154	3.8

**Table 3**  
**Distribution of Major Mother Tongue in Districts, VDCs 2001**

Major Mother Tongue	Percent of major mother tongue in total population	Number of Districts		Number of VDCs	
		With highest percent	with over 50% population	with highest percent	with over 50% population
Nepali	48.6	55	49	2076	1853
Maithili	12.3	6	5	505	476
Bhojpuri	7.5	3	3	324	312
Tharu	5.9	1	1	128	96
Tamang	5.2	2	1	197	161
Newar	3.6	1	1	32	29
Magar	3.4	0	0	115	101
Awadhi	2.5	2	1	99	91
Bantawa Rai	1.6	0	0	55	31
Gurung	1.5	1	1	69	54
Limbu	1.5	2	0	76	39
Bajjika	1.1	1	0	51	50
Bhote, Sherpa	0.6	1	0	41	32

Note- In 1991 Rai-Kiranti speakers were 2.4 percent of the population of Nepal. In the 2001 census 25 languages have been identified within the Rai-Kiranti group. This is indicative of how the smaller minority groups seek their own identity, given the opportunity. There is no unanimity among linguists regarding the total number of languages spoken in Nepal

**Table 4 Proposed Federal Regions and Districts**

#### **Eastern Federal region**

1. Arun district (Taplejung, Sankhuwasabha, Panchthar, Ilam, Dhankuta, Tehrathum)
2. Sagarmatha district (Solukhumbu, Bhojpur, Okhaldhunga, Khotang, Udayapur)
3. East Madhes (Jhapa, Morang, Sundari, Saptari, Siraha)

#### **Central Federal region**

1. Sailung district (Dolakha, Sindhupalchok, Sindhuli, Ramechhap, Kavre)
2. Trishuli district (Rasuwa, Nuwakot, Dhading, Makwanpur)
3. Central Madhes district (Dhanusha, Mahottari, Sarlahi, Rautahat, Bara, Parsa)

#### **Capital Federal region**

1. Kathmandu district (Kathmandu, Lalitpur, Bhaktapur)



**Western federal region**

1. Manaslu district (Manang, Lamjung, Gorkha)
2. Annapurna district (Tanahu, Synagja, Kaski, Parbat)
3. Dhaulagiri district (Mustang, Myagdi, Baglung)
4. Ridi district (Gulmi, Palpa, Argha)
5. West Madhes district (Chitawan, Nawalparasi, Rupandehi, Kapilbastu)

**Karnali federal region**

1. Jumla district (Dolpa, Jumla)
2. Humla district (Mugu, Humla)

**Far-western federal region**

1. Swargadwari district (Pyuthan, Rukum, Rolpa, Salyan)
2. Bheri district (Surkhet, Dailekh, Kalikot, Jajarkot)
3. Khaptad district (Bajhang, Bajura, Doti, Achham)
4. Byashrishi district (Darchula, Baitadi, Dadeldhura)
5. Far-west Madhes (Dang, Banke, Bardiya, Kailali, Kanchanpur)

**Table 5 Population, GDP and Area of proposed Federal Regions**

<b><u>FEDERAL REGIONS</u></b>	<b><u>POP %</u></b>	<b><u>GDP %</u></b>	<b><u>AREA %</u></b>
<b>Eastern</b>	<b>23.1</b>	<b>21.1</b>	<b>19.3</b>
<b>Central</b>	<b>25.5</b>	<b>23.7</b>	<b>16.5</b>
<b>Capital</b>	<b>7.1</b>	<b>15.9</b>	<b>0.6</b>
<b>Western</b>	<b>21.8</b>	<b>21.6</b>	<b>21.5</b>
<b>Karnali</b>	<b>0.9</b>	<b>0.7</b>	<b>13.3</b>
<b>Far-western</b>	<b>21.6</b>	<b>16.9</b>	<b>28.7</b>

**Table 6. Food Situation in the proposed Federal Regions (2003/4)**

<b>FEDERAL REGIONS</b>	<b>Total Edible Production</b>	<b>Requirement</b>	<b>Surplus/Deficit</b>
<b>EASTERN</b>	1325408	1052243	273165
<b>CENTRAL</b>	1284241	1178382	105859
<b>CAPITAL</b>	119883	365712	-245829
<b>WESTERN</b>	1164574	1018311	146263
<b>KARNALI</b>	22531	40567	-18036
<b>FARWESTERN</b>	967734	1016129	-48395
<b>NEPAL</b>	<b>4884371</b>	<b>4671344</b>	<b>213027</b>

**Table 7 Ethnic Concentration in Proposed Federal Regions and Districts**

<b>FEDERAL REGIONS/Districts</b>	<b>Ethnic/caste concentration (% of population)</b>	<b>Percent of dalit</b>	<b>Percent of Adibasi /janjati</b>	<b>Total population</b>
<b>EASTERN</b>				
1. Arun	Limbu 24, Rai 17	7	63	<b>1058353</b>
2. Sagarmatha	Rai 26, Chhetri 21	10	57	<b>986480</b>
3. Purba Madhesh	Bahun 10, Yadav 8, Tharu 8	13	34	<b>3299643</b>
<b>CENTRAL</b>				
1. SAILUNG	Tamang 27, Chhetri 19	8	57	<b>1387987</b>
2. Trisuli	Tamang 37, Bahun 17	7	61	<b>1064471</b>
3. Madhya Madhesh	Yadav 13, Muslim 13	15	16	<b>3462032</b>
<b>CAPITAL</b>				
1. Kathmandu	Newar 35, Chhetri 19	2	56	<b>1645091</b>
<b>WESTERN</b>				
1. Manaslu	Gurung 27, Bahun 16	15	53	<b>474870</b>
2. Annapurna	Bahun 27, Gurung 16	16	39	<b>1170910</b>
3. Dhaulagiri	Magar 31, Chhetri 18	22	39	<b>398365</b>
4. Ridi	Magar 30, Bahun 28	16	37	<b>773603</b>
5. Paschim Madhesh	Bahun 17, Tharu 13	11	33	<b>2225313</b>
<b>KARNALI</b>				
1. Jumla	Chhetri 58, Bahun 8	15	11	<b>118972</b>
2. Humla	Chhetri 44, Bahun 5	16	15	<b>84532</b>
<b>FAR WESTERN</b>				
1. Swargadwari	Chhetri 40, Magar 31	15	34	<b>824426</b>
2. Bheri	Chhetri 32, Magar 14	26	17	<b>754176</b>
3. Khaptad	Chhetri 56, Bahun 10	24	2	<b>714158</b>
4. Byasrishi	Chhetri 52, Bahun 19	16	2	<b>482576</b>
5. Sudur Paschim Madhesh	Tharu 35, Chhetri 18	13	43	<b>2225465</b>

**Table 8 Regions as proposed by the CPN (Maoists)**

1. Kirat autonomous region (the hills of the Mechi, Koshi and Sahgarmatha zones)
2. Tamsaling autonomous region (incorporating the hills excluding the Kathmandu Valley of the Bagmati, Narayani and Janakpur zones),
3. Tamuwan autonomous region (hill region from Budhi Gandaki to Kali Gandaki river)
4. The Magarat autonomous region (hill region from Kali Gandaki to Bheri),
5. The Seti-Kali autonomous region (hills of the Seti and Mahakali zones),
6. Bheri-Karnali autonomous region (hills of the Bheri- Karnali zones),
7. The Newar autonomous region in the Kathmandu Valley,
8. Madhes autonomous region (including Abadhi, Bhojpuri and Maithili language speaking areas), and
9. Tharuwan autonomous region (including Tharu dominant inner Tarai and Tarai areas from the river Rapti to Mahakali).