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Restructuring the state: Federalist Dynamics in Nepal

Astri Suhrke



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Introduction

Since the end of the civil war in 2006, Nepal has been on the edge of a peaceful but truly revolutionary change to restructure the state. What this restructuring should entail has dominated the political discourse, wrecked the first attempt to write a permanent, new constitution, fuelled deep divisions, sparked violence and inflamed the political discourse. At the center of the struggle is the issue of federalism, and the extent to which the state should be restructured along ethnic and regional lines. Situated in a broader discourse of social and political inclusion, demands for federalism based on ethnic and regional identities reflect the transformative socio-economic and political developments that have taken place in the country during the past three decades. These demands, therefore, are not going to go away and, in some form, need to be accommodated. On the other hand, ethnic-regional federalism in Nepal in important respects challenges the present hierarchy of social and political power. Addressing such demands and resolving conflicting interests therefore promises to be a long and difficult process. Similar restructuring of a unitary into a federal state has been accomplished through negotiations and parliamentary action in a few other countries, but under conditions that are mostly absent in Nepal, and some conspicuously so.

What are the policy implications of this thesis? Most obviously, it shows the extraordinary ambition and inherent tensions of seeking radical change through peaceful means. Equally clear, it means that extraordinary exercise of patience, reason and restraint by all parties are required to reduce conflict and violence. In terms of strategy, it suggests a model of change where federalism is instituted as a gradual and continuous process, rather than as a single, comprehensive and momentous restructuring, and possibly disaggregated by function and unconstrained by territorial boundaries in the spirit of ‘functional federalism’ (Frey and Eichenberger 1999).

These themes are developed below. The first part examines the new types of identity politics in Nepal, the forces behind them, and the fierce contestations over federalism after 2008 when the Constituent Assembly grappled with the issue before adjourning in failure. The second part looks at comparable cases where restructuring from a unitary to a federal state has been achieved and examines what made it possible. The third part considers the implications for the federalist project in Nepal.

1. The new identity politics

Discussing state restructuring in India, Louise Tillin notes the importance of conjunctures: demands for reform may arise from grievance-based mobilization and be driven by politics of recognition, but a political opportunity structure is necessary to turn demands into policy output (Tillin 2013). A conjuncture of this kind developed in Nepal in the 1990s, and again in the early 2000s, to favour the rise of identity politics.

Identity politics as such is not new to Nepal. Political and social life has for centuries been regulated by caste and ethnicity,¹ famously inscribed in law by the King in 1854 (the *Muluku Ain*). The law's hierarchical categorization of groups served to legitimize the power of upper-caste Hindus and their control of the state apparatus. In this schema, a number of groups outside the Hindu caste system that trace their origin to Tibetan-Buddhist cultures - over time variously describing themselves as tribes, nationalities, and ethnic or indigenous groups - were placed somewhere on the middle of the ladder, above the lower-caste Hindus and the 'impure' castes on the bottom, but clearly below the upper-caste Hindus (Brahmin-Chhetri). While the schema was abolished by a new civil code in 1963, its political legacy remained.

By the end of the 20th century, the Nepali state was still in the grip of one social segment – the Brahmin-Chhetri from the hill region, who constituted about 30 per cent of the total population but held 80 percent of the officer-level entry positions in the government service (Thappa 2011, p. 6). This mattered on all levels of governance because the state was still heavily centralized in administrative and fiscal affairs. The main political parties and legislatively assemblies were likewise dominated by upper-caste Hindus. In education, especially higher education, the same imbalance prevailed. In 1991, 81 percent of the teaching posts at the country's elite university (Tribhuvan) were held by Brahmin-Chhetri (Whelpton 2005, p.185). With some notable exceptions, the Brahmin-Chhetri of the hills were also economically privileged (World Bank and DFID 2006; Das and Hatlebakk 2010). The sharp, systemic inequalities among castes and ethnic groups on virtually all indicators of development and political representation led to growing demands for 'inclusion' in the 1990s and was the single most important reason for the Maoist revolutionary war launched in 1996. A broad-based movement for peace and democracy helped to end that war - in the process toppling the monarchy - and set the stage for what was widely expected to be deep-seated reforms. The stunning victory of the Maoists in the 2008 elections to the Constituent Assembly sharpened expectations that a "New Nepal" was taking form.

In the struggle to shape the post-war "New Nepal", class, ethnicity, caste and region vied for primacy as categories of entitlements. Affirmative action in the name of social inclusion had started earlier but was now constitutionally validated by the Interim Constitution of 2007 as a matter of fundamental rights. Groups that traditionally had been marginalized or excluded from state power were designated for proportional inclusion, mostly through quotas ('reservations'), in education, public employment and political representation. The main beneficiaries were women, Dalit, ethnic groups – the latter now called indigenous (*janajati adivasi*) - the residual category of 'other marginalized groups', and, especially in an electoral context, the people in the lowland region bordering on India who define themselves as Madhesis. When the Constituent Assembly convened, members spoke the accepted political language of 'social inclusion' regardless of class, caste and ethnicity (Tamang 2012).

Given the stratified nature of Nepalese society, it is not surprising that the claims for reform were structured around the very strata that had been codified in the past and become socially embedded. The aim of the new identity politics was not to abolish these categories, but to redistribute entitlements and opportunities among them. The redistributive struggle had itself a reinforcing feature. Affirmative

¹ Defined as religious, cultural, language characteristics, or combinations thereof.

action naturally offered powerful incentives for political and social mobilization along lines of identity. Beyond that, two competing logics were at work. Unlike affirmative action, the conventional principle of federalism, and the way federalism in the main was discussed in Nepal, assigned a territorial dimension to entitlements. By contrast, if ‘social inclusion’ and social justice could be achieved through state support for programs that uplifted the backward and marginalized groups, the rationale for federalism would be diminished.

The competing logics framed the debate on state restructuring in the ‘New Nepal’, in which identity-based federalism appeared as arguably most controversial. The project was promoted in the name of two groups: the *janajati adivasi*, and the caste-and culturally diverse people in the lowland Madhes. Each represented almost one third of the country’s population - a potentially huge constituency - for whom federalism based on ethnic and regional lines was presented as an avenue to social improvement, cultural recognition and political power.

1.1 The antecedents

Among the *janajati*, ethnic activism in all but name goes back to the 1950s and in some places earlier (Hangen and Lawoti 2013). The point is important because of later charges by Brahmin-Chhetri critics that the ethnic movement was largely a creation of Western donors and international organizations. It is true that donors, particularly the British (DFID), the Swiss, the Norwegians, the World Bank and the UNDP, made significant efforts to increase social inclusion of marginalized groups, some British programs going back to the 1990s (Middleton and Shneiderman 2008). Similarly, the ILO Convention No. 169, The Indigenous and Tribal People’s Convention of 1989, which was ratified by Nepal in 2007, and other UN initiatives promoting the concept of indigeneity in the global-local discourse on rights lent strength and legitimacy to Nepal’s fledgling ethnic movements. Yet effective local adaptation of globally validated norms requires local engagement and genuine local grievances (Bennike 2013; Fukada-Parr and Hulme 2011). This was clearly evident in Nepal as well.

Several of the main ethnic groups (Tharu, Tamang, Magar, Newar) had established what they called ‘welfare societies’ already in the 1950s). In the eastern hills, where ethnic activism had deep roots, activist leaders (Limbu, Rai) had been jailed. In the 1980s, more welfare societies were formed (Thakali, Gurung) and already in 1986, an informal council of ‘nationalities’, as they then called themselves, was formed. When political liberalization in 1990 permitted open activism and political organizations, the council formally reconstituted itself as the Nepal Federation of Nationalities (Fisher 1993; Whelpton 2005, pp.180-185). The name was later changed to the Nepal Federation of Indigenous Nationalities (NEFIN) in line with the emerging global discourse on indigenous communities. NEFIN went on to become the leading umbrella organization of *janajati*, promoting collective rights of an internally diverse community in a classic case of ‘strategic essentialising’.

The early activism was most directly a response to the assimilationist policies of the Nepal state. Reflecting its origins as a small Hindu kingdom in the central hills of present-day Nepal, the state expanded during the 19th century to include a vast mosaic of peoples of different cultures. Keeping this diversity together in one unit ruled by upper-caste Hindu elites had led the government to introduce the civil law in 1854 that established a strict social hierarchy legitimized by caste concepts of purity and impurity. A hundred years later, assimilationist policies were designed for similar purposes, but with the additional aim to strengthen national unity in face of new regional uncertainties as India became independent and the Chinese communists gained power. Assimilationist policies were built around the idea of Nepal as a Hindu kingdom and the culture of the ruling elite, codified in the 1962 Constitution that declared Nepal as a Hindu state and Nepali as the national language. The slogan ‘one language, one style of dress, one country’ was aggressively pursued. Broadcasts in minority languages on the state radio were stopped and official educational policy was based on the view that minority languages ‘will gradually disappear’, leading to ‘greater national strength and

unity.’(Official Educational Plan 1955, cited in (Whelpton 2005, p, 184). Schoolbooks (approved by the Ministry of Education) laid out an ideology of national development whereby the ethnic groups of the mountains were to be uplifted – graphically illustrated in ways that portrayed the ethnic groups as backward (small in stature and at the end of the line), as against the educated, high-caste leaders at the head of the flock (Bennike 2013)

The assimilationist policy threatened the identity of the many ethnic groups that maintained their own distinct language, dress, culture and often syncretic blend of Hinduism, Buddhism and animism. It also alienated groups, notably in the Eastern Hills, who had historical memories of power and high status in earlier periods before the formation of the Nepali state in the 19th century. ‘Welfare societies’ to promote cultural markers and rights sprouted, and the more assertive groups demonstrated. The Newar of Kathmandu valley in 1979 organized the first of what became an annual motorcycle rally, ostensibly to demand recognition of the Newar New Year. When the 1990 Constitution brought some political liberalization, more openly political sentiments burst forth. “Some politicians call us dogs. But we Janajatis are not dogs, we are as much Nepali as anyone else, and we deserve to be treated as full citizens of this country,” the General Secretary of the Nepal Federation of Nationalities declared in 1992 (Fisher 1993, p.11).

Political liberalization in the 1990s was more effective in fuelling expectations than in meeting demands. The new Constitution recognized the multicultural and multi-language nature of society, but the affirmation of Nepali as the national language and the country as a Hindu kingdom enabled the state to privilege the dominant culture through political and financial support. The ban on parliamentary representation through political parties was lifted, but political parties based on caste, ethnicity or region were not allowed. Not surprisingly, the contradictions in a policy of partial democratization increased political consciousness among marginalized groups and created ‘a wave of ethnopolitics’ during the 1990s (Bhattachan 2013, p.40). While previous activism had focused on cultural and language rights, as the 1992 UN Declaration on minorities also emphasized, the attention now shifted to political action as the means to secure rights of all kinds. Welfare societies and NEFIN became overtly political. Some ethnic and regional groups tried to establish separate parties despite the ban, but most sought to work through the established national parties.

The idea that securing rights required a federal structure was not yet part of the mainstream *janajati* discourse, although autonomy or separatist ideas had circulated in the Eastern Hills where historical memories of independence in pre-modern times, and more recent loss of traditional land rights, long had generated unrest and some talk of self-determination (Caplan 1970; Hangen 2013, Hangen 2011). In the 1990s, it was a regionally-based movement in the southern lowland – the Madhes - that brought federalism into the political discourse.

In cultural and historical terms, the Madhes movement differed markedly from the ethnic activists in the hills. The main party, established informally in 1983 and formally in 1990 after the political liberalization, the Nepal Sadbhavana Party (NSP), campaigned for recognition of Hindi as an official language, a liberal policy of citizenship (to benefit migrants or descendants of migrants from India, many of whom lacked citizenship certificates), and federalism (Sijapati 2013). The Madhesi represented a sizable part of the population - exactly how large depends upon how ‘Madhes’ is defined² - and a dynamic sector of the national economy. Yet Madhesi elites had about as restricted access to state power as did the ethnic minorities in the hills. Devolution of power in the form of federalism seemed to many Madhesi the obvious answer to their predicament. It should not have been a surprise that when federalism resurfaced in the constitutional debate in early 2000s, it was spearheaded by the Madhesi activists rather than the ethnic minorities in the hills.

² A maximum count according to the 2001 census would be 33% , which includes Madhesi caste groups, terai *janajati* and Muslims;a minimum count that includes only the first group would be 12% .

Meanwhile, Nepal's Maoist movement had made cultural rights and ethnic-regional federalism a central issue in their struggle. When launching a 'People's War' in 1996, their 40-point manifesto included autonomous areas for ethnic minorities where they constituted a majority, equal standing for all languages and the right to education in the mother tongue. As the insurgency developed, the Maoists established ethnic fronts named after the principal nationality groups, proposed a federal structure based on nine autonomous regions mainly based on ethnic criteria, and set up presumptive 'people's governments' for these nine.

The organizational recognition of ethnic groups within the Maoist movement left a powerful legacy. As in India, where the Indian Congress Party had established regional-linguistic chapters within the party during the independence struggle (Dasgupta 2001), it legitimized the concept of ethnically-based sub-national units and empowered local activists. More generally, the wrenching force of the ten-year civil war fuelled the political energies that had been evident during the political liberalization of the 1990s. The war also affected the socio-economic landscape by causing disruptions, internal displacement and migration, which merged with more powerful longer-term socio-economic change that was transforming the country (Mishra 2007). Economic growth, urbanization, migration, improved education and health across the board, and the reduced importance of agriculture in a more diversified economy were eroding the social foundations and legitimacy that for so long had enabled a small social segment to control the levers of state power. The new forces were expressed most dramatically in the massive 'people's movement' in April 2006, when hundreds of thousands of demonstrators from all social strata and from all over the country clogged the streets of Kathmandu to call for peace and democracy. The demonstration delivered the *coup de grace* to the monarchy, and hastened the transition from war to a democratic peace.

1.2 Restructuring the state

Federalism was not a part of the initial war-to-peace transition. The language of the peace agreement, signed in 2006 between the Maoists and the Seven-party Alliance of the mainstream political parties, was progressive, reformist, and, in the Nepali context, radical. It promised to 'end the existing centralized and unitary state', which would be replaced by an 'inclusive, democratic progressive system.' (CPA 2006, Art 3.5), but did not mention federalism. Rather, the peace agreement envisaged preferential treatment of disadvantaged groups through quotas ('reservations') and electoral laws as the principal instrument for creating an 'inclusive system' and enumerated the marginalized groups: 'women, Dalits, indigenous community, Madhesi, oppressed, ignored and minority communities, [and] backward regions'. These categories were also given privileged recognition in the 2007 Interim Constitution, which specifically affirmed rights of these named groups to participate in state structures proportionally to their population size inclusion (Art 21), as well as positive discrimination to achieve social and economic rights (Art 33(d) and Art 35 (19)).

The omission of the word 'federalism' from the Interim Constitution – drafted by a government-appointed Commission - sparked a violent protest from the Madhesi when the document was made public. Already stung by being left out of the peace negotiations, a broad spectrum of Madhesi groups took to the streets to demand a federal constitution. Recognizing an opportunity, the *janajati* followed suit, with NEFIN making similar demands on the government. The protests worked. The first amendment to the Interim Constitution in March 2007 added the word 'federal' to describe Nepal's future system of government (Art 138). Federalism was confirmed in a subsequent amendment in 2008 that ended the monarchy.

With federalism constitutionally enshrined, a critical line had been crossed. From then onwards, the debate was not *if* Nepal should have a federal system of government, but what kind. The struggle over federalism during the five years from 2008 until 2012 consumed a great deal of political and social energies. It was fought in the Constituent Assembly and the streets, in the media and among the

intelligentsia. The battle lines hardened early on to focus on the boundaries of the sub-national units, political priority rights for disadvantaged groups within these units, and the symbolic but emotionally charged issue of the name of the provinces. Since the starting point was a highly centralized, unitary state, the question of where to draw the sub-national boundaries was wide open, generating intense discussion and numerous competing models (Sharma and Khanal 2009). The kind and degree of power to be devolved from the center attracted much less attention.

The War of the Maps

The federalist debate polarized around the competing principles of “development”, which in earlier periods had been the ideological framework for assimilation, versus recognition and preferential treatment of ethnic/regional identities. Recognizing that some kind of change was likely, the upper-caste elites who led the two large mainstream parties - the Nepali Congress and the UML- promoted a scheme which they claimed was most conducive to preserve national unity and promote development. Their favoured map had a few, large provinces demarcated along a North-South axis that included mountains as well as low-lying areas, hills and town and rich as well as poor districts. The model, it was also clear, meant that each province would be a patchwork of numerous smaller ethnic groups and a slice of the Madhes, enabling the two mainstream parties to use traditional mechanisms of leadership and control to maintain their political pre-eminence and blunt the challenge against the upper castes.

The Maoists, by now the largest political party and leading the government, had in June 2010 proposed a federal structure of 12 autonomous states based on caste, language and region, with the boundaries ‘to be determined’ (UCPN 2010, Art 62 (1)), but maintained a calibrated public distance from more detailed discussions. *Janajati* and Madhesi activists, for their part, worked on the principle of gerrymandering, seeking boundaries that would maximize the numerical edge of their respective groups. In this logic, access to power at the local level was the road to social justice and inclusion (Hachhethu 2012)). As the Constituent Assembly convened, a veritable war of maps erupted. The *janajati* favoured a Nepal of many provinces (11 or 14), the Madhesi didn’t mind smaller provinces as long as the lowland region was not divided, the Nepali Congress and the UML settled for 6 provinces overall, and numerous smaller factions promoted their respective maps as well.

Most *janajati* and some Madhesi had been elected to the Constituent Assembly on the ticket of the three main parties, the Maoist, the Nepali Congress and the UML, but on the restructuring issue they formed a caucus that cut across party lines to promote federalism based on ethnic-regional criteria. They produced a 14-province map that initially had pre-eminent status in the debate. This federal Nepal was composed of 2 large provinces in the Madhes and 12 smaller provinces elsewhere, each constructed around an indigenous group that also gave the name of the province. Caucus members further suggested preferential political representation for the main indigenous group in each province in an initial period. This would temporarily hand political power to the titular indigenous group even though none of them represented a majority in any of the 14 provinces, but ranged from 27 to 44 percent (UNDP/CCD 2010).³

The 14-province map toured every one of the proposed provinces in a large citizen-educational campaign that lasted from March to December 2010, financially supported by the UNDP in the spirit of popularly-based constitution-making that had become accepted in the international community of peacebuilding support (Miller and Aucoin 2010). Yet it proved too radical for the leadership of the three large political parties. In a series of complex political maneuvers, the party leaders joined forces to defeat the ethnic-regional federal schemes in what amounted to a parliamentary coup.

³ Map and percentages are taken from UNDP federalism dialogue series (UNDP/CCD 2010).

The show-down came in early 2012 when the Constituent Assembly's term was due to expire (ICG 2012; ICG 2012). The Madhesi and the *janajati* caucus had formed a tactical alliance to support an 11-province map that to a large extent reflected ethnic and regional considerations, although not exclusively so. By this time, caucus members were talking of mixed criteria for boundary delimitation (ethnic plus geography and economic capacity), name of province (ethnic and geographic markers) and earlier calls for preferential political representation by the provincial titular ethnic group had been muted. No decision had been made regarding the explicit criteria for boundary demarcation, or for that matter on the principles of devolution of power from the center to the sub-units. As the Assembly's term was about to end, the caucus wanted a vote on the floor where they claimed they had the numbers to pass the 11-state proposal. To pre-empt a vote, the party leaders took the issue off the floor for informal discussions, effectively stalling the process until the deadline for adjournment had passed. The Constituent Assembly adjourned, leaving the grand project of restructuring the state hanging.

The second round

At first glance, the elections to a new Constituent Assembly that followed in November 2013 seemed a setback for regional/ethnic federalism. The mainstream parties that had most strongly opposed the idea during the first Assembly, the Nepali Congress and the UML, made significant electoral gains, the Maoists faced a crushing defeat, going from 229 seats in the previous election to a paltry 80. A new party established specifically on a platform to unite the *janajati* vote on identity-based federalism barely made it into the Assembly, gaining only 5 of the elected 575 seats. The Madhesi vote was divided among numerous smaller parties as well as the mainstream parties. Ethnic activists who counted by caste and ethnicity rather than party noted that the number of *janajati* representatives elected was almost the same as in 2008, and that the representation from the Madhes had increased.⁴ This did not, however, translate into automatic support for ethnic/regional federalism.

On the other hand, very considerable political energy had been generated over the past two decades towards restructuring the state and redistributing access and benefits. It had culminated in the elections to the 2008 Constituent Assembly, where representation in terms of ethnic and caste groups was almost identical to their proportion in the population at large.⁵ This energy could hardly be expected to simply evaporate. Organizational structures in support of ethnic and region-based social inclusion had developed, among them NEFIN, which provided funding and opportunities for upward political mobility to talented, young activists. Intellectual leadership articulating the rationale for recognition of indigeneity had been established among academics at the elite Tribhuvan University in the early 1990s; twenty years later key personalities from that period were still active, though now supported by a new generation of activist-scholars at home and in the diaspora.⁶ Concerned social scientists and activists working for "social inclusion" of marginalized groups continued to receive ready international support. Western donors were in the forefront of financing research that documented the

⁴ Figures from the Election Commission, <http://www.election.gov.np/election/np>

⁵ Figures from <http://www.election.gov.np/election/np>

⁶ Two principal speakers at a 1993 conference on ethnicity and national integration at Tribhuvan University were Om Gurung and Chaitanya Mishra, who presented opposing views. Almost twenty years later, the same persons appeared in a principal capacity at a similar conference, also held at Tribhuvan University, and addressing the same topic. For a report of the first conference, see Gaenzle 1993; papers presented at the second conference, see Mishra and Gurung 2012. Apart from the federal issue, the debate had changed little. Among the diaspora, Mahendra Lawoti has been a particularly prolific and influential writer.

continued depth of social exclusion of women, *janajati*, Dalit and Madhesi.⁷ The Indian government supported social projects run by Madhesi political parties in the Terai.⁸

‘Restructuring’ had become a principle deeply embedded in the post-war political discourse, and, importantly, was specified in the Interim Constitution as leading to federalism. Although the process of getting the word into the Interim Constitution in retrospect appears as a highly contingent development, the result of diverse forces and ad hoc compromises rather than a single, purposive political will,⁹ there was now no way back from. Not surprisingly, as soon as the new Constituent Assembly had been elected, a second round in the war of the maps started.

As the 2013 Constituent Assembly resumes the process of constitution writing, a closer analysis of the organizational and political reasons why its predecessor failed to accomplish this task is useful, not primarily as a predictor of specific future outcomes, but as an indicator of the underlying difficulties of transforming a unitary into a federal state through a constitutional bargain.

1.3 Competing narratives and strategies¹⁰

Sorting through the narratives of the debacle of the 2008 Constituent Assembly reveals some distinct features. Most obviously, getting a radical proposal for change approved by an assembly of 601 members in multiple parties was a daunting task at the outset. The proponents of identity-based federalism were united only in the most general sense. The *janajati* and the Madhesi had no common organization or tradition of cooperation. On the contrary, when the Madhesi movement first introduced the federalist project in the 1980s, it ignored *janajati* claims for indigenous rights by envisaging a tree-fold division - the lowland (all of it to the Madhesi) and the rest of the country divided into hill and mountains that ignored settlement patterns of ethnic groups. The Madhesi had formed political parties, some of which had joined national coalition governments after 2006. The *janajati*, for their part, had focused exclusively on their struggle with the high-castes of the hill and had no professed interest in the regional demands of the middle castes in the lowland. They had no political party of their own until late 2012, and were divided among themselves on many aspects of federalization. The Dalits, who had won 50 seats in 2008, mostly on Maoist tickets, were not wholeheartedly behind the federal scheme, and deeply divided over the proposal for a separate, non-territorial province for the Dalits that the caucus promoted.

Their differences notwithstanding, advocates of identity-based federalism formed an informal caucus in the Constituent Assembly. Yet the membership was fluid, the caucus cut across established party lines, and there was no institutional capacity to whip its members into collective action. Not all caucus members belonging to the mainstream parties that opposed identity-based federalism were prepared to defy their own party leadership. The decisive moment came in early 2012 when the term of the CA was about to expire and no decision on the federal structure of the new constitution had been made. Caucus members managed to mobilize what they claimed was the necessary two-thirds majority to pass a proposal reflecting an identity-based federal structure. At that point, they were swiftly outmaneuvered.¹¹ As noted above, the leaders of the three main parties left for informal discussions of

⁷ The latest such report was a comprehensive survey produced in 2012: *Nepal Social Inclusion Survey 2012*. Produced by the Central Department of Sociology/Anthropology at Tribhuvan University, financed by the Norwegian government.

⁸ Madhesi political leader in interview with author, Kathmandu, March 18, 2013.

⁹ See Sijapati 2013 and ICG2012a

¹⁰ This section draws on interviews with political leaders and other participants in Kathmandu as well as Kaski and Makhwanpur districts in 2012-13.

¹¹ This was an 11-province proposal, a slightly modified version of the 14-province proposal discussed above.

their own, and the caucus floundered. The paralysis of the majority was effectively expressed in the final scene. The Speaker of the Assembly, who alone had the formal authority to call for a vote, was nowhere to be found. He had run away at the critical, last moment before the session ended and the Assembly was dissolved.

Ethnic activists had a ready explanation. The three main parties were all led by upper-caste Hindus, who now had closed rank. That the Nepali Congress and the UML strongly opposed ethnic-regional federalism had long been a given. But the failure of the Maoists to actively support the scheme in the Assembly, and to join the maneuver that effectively defeated it at a critical moment, was an apparent betrayal that stung more.¹²

A more generous explanation for the Maoist position is genuine fear that ethnic federalization would spark explosions of ethnic violence and possibly tear the country apart. Deliberations in the Constituent Assembly had been accompanied by a great deal of high-tension mobilization on both sides, including emotional language and violence at the street level. Limbu and Rai activists organized huge motorcycle rallies in the Eastern Hills and in some areas blocked all traffic for days. The rhetoric was fierce. When a separate mountain province for the Sherpas disappeared in the course of one map revision, a Sherpa stood in front of the Constituent Assembly declaring he would die for his province. The Brahmin-Chhetri were mobilizing as well to protest both an accelerated pace of ‘reservations’ for disadvantaged groups and identity-based federalism. A nation-wide Brahmin-Chhetri organization was collecting funds and holding rallies, some brandishing swords as they marched in Kathmandu and warned that blood would flow in the streets. It was rumored that army officers belonging to the upper-castes would fight to defend caste interests and prevent what they perceived as national fragmentation. Competitive mobilization in Nepal’s many mixed settlement areas raised the prospect of deepening social tension and violence. In Pokhara – the country’s second-largest city – the two main protagonists, the Gurung and the Brahmin-Chhetri, held competitive rallies and posted slogans at the city’s major roundabouts. The language was radically exclusionary and painted on metal signs made to last.

Off the street, the debate was intense as well and the language often inflammatory. Few seemed neutral, also among the intelligentsia.¹³ Opponents argued along the classic lines of conservatism as formulated by Alfred Hirschman: Change will make conditions worse, it will not work, and the costs will be too high (Hirschman 1991) Ethnic federalization was impossible, critics argued, given the diversity and generally mixed settlement patterns of Nepal. Education in ethnic languages would be a disservice to the ethnic minorities by hindering upward mobility. Devolution into many small units would sharpen existing geographic patterns of economic inequality. Analysts warned that overall, ethnic federalization would imperil democracy, stunt economic growth, and incite to violence (Mishra 2012). There were other concerns. Brahmin-Chhetri in the hills feared that autonomy for the lowland region would create severe imbalance in the body politic by opening for more influence and migrants from India. Echoing the official ideology behind the centralized state in earlier periods, some were convinced that both India and China would take advantage of a Nepal divided into smaller autonomous units. Symbolic concessions (such as naming a province after the largest ethnic group) were opposed for fear they would lead to substantive change.

The proponents of ethnic federalism basically rested their case on the principle of self-determination, and the need for disadvantaged groups to wield political power if greater distributive justice and social inclusion were to be achieved. In the present Nepal state, that could best be done by devolving power to federal units based primarily on ethnic identity (Gurung 2012). The role of minorities within a

¹² Critics included a far-left faction of the Maoist party that split off to form a rival party, citing disagreement on ethnic federalism and other issues.

¹³ See e.g. Mishra and Gurung 2012.

province – a likely feature of most provinces given the dispersion of ethnic groups and castes – could be addressed through the establishment of smaller autonomous areas similar to the autonomous regions within the federal states of India. Support for local languages, it was argued, was important precisely because these languages were about to disappear as the younger generation was more interested in learning English and Nepali; local language instruction would not exclude such learning but help protect the group's culture and identity. Naming the province after the largest ethnic group in the area was above all a measure of respect – a symbolic concession that had inherent value in and of itself. 'At least recognize us in name', a Tamang activist pleaded.¹⁴

In the lowland, the demands had a different tone. The Madhesi were not a small minority asking for recognition, but a fast-growing population in an economically vibrant region. While deeply factionalized, the Madhesi movement had at least one common core interest in claiming more power to the region as well as a greater regional role at the central level.

¹⁴ Interview, Hetauda, 18 March 2013.

2. Roads to federalism

The struggle over federalism in Nepal echoes divisions in the academic literature. The social science debate is split between those who regard federalism as a conflict-generating process as groups empowered by federal institutions engage in the political struggle over resource allocation, and those who see it as a peace-generating mechanism that defuses conflict through recognition of grievances and demands. On the whole, it is an inconclusive debate (Bakke and Wibbels 2006; Erk and Anderson 2009), and as such provides few signposts for Nepal. The more immediate question for Nepal, however, is not the consequences of federalism, but whether it will be possible to negotiate a federal bargain at all.

Here a comparative perspective provides some insight. How have such federal structures developed historically? Among the roads to federalism, which cases mostly resemble Nepal in terms of enabling conditions and strategies?

The first point to note is the generally strong conservative bias embedded in existing states, reflecting vested bureaucratic, economic and political interests. As a result, demands for even limited devolution of power typically provoke opposition, particularly when made on political systems with strong unitary features. Recent examples involve Kurds in Turkey, Muslims in Southern Thailand and the Southern Philippines, Basques in Spain, Uighurs in China, and Tamils in Sri Lanka. No wonder, then, that a complete federal overhaul of an existing unitary state is a rare occurrence. This can nevertheless occur in two kinds of situations: (1) when the prospect of serious internal conflict lead the parties concerned to negotiate a federal bargain to preserve the state, or what we will call ‘contractual federalism’, and (2) when war, revolution or decolonization has swept away the principal pillars of the old state and opened for restructuring.

2.1 Contractual federalism

This corresponds to what Alfred Stepan famously called ‘holding-together’ federalism, or a recognition that the only way to maintain the unity of the state is to move from a unitary to a federal structure (Stepan 1999).¹⁵ The classic example here is Belgium, a multicultural state so divided by internal conflict that devolution of power to two constituent units seemed the only way to preserve the country as a sovereign entity.¹⁶

As a negotiated restructuring of a unitary state, the Belgian experience is of some interest for the Nepal case. More a process than an overall design, federalism has developed gradually since 1970 when the first constitutional reform marked the end of the unitary Belgian state (Deschouwer and Reuschamps 2013). Over the next forty years, five major constitutional changes were adopted that amplified the federal structure. The process of restructuring has been a slow and difficult, not without violent episodes, and has frequently produced long periods of political paralysis at the federal level. These problems arose even though the definition of the national sub-units was not controversial with

¹⁵ The contrasting dynamic Stepan calls ‘coming-together federalism’, i.e. where several units agree to give up part of their sovereignty and pool resources to increase common security and achieve other goals. Switzerland, where smaller cantons formed a confederacy, is the classic example. The older confederacy dates to 1291, and it proved so popular that when the French revolutionary government after 1789 conquered the area and imposed a centralized government, the Swiss revolted. The centralized government was abolished already in 1803 (with decisive help from Napoleon’s armies), and the confederate structure restored.

¹⁶ Stepan also includes India (1948) and Spain (1975) as examples of devolution towards federalism as a holding-together mechanism.

Belgium's two, clearly demarcated, majority-populated linguistic regions (Flemish and Francophone). That left the nature and degree of devolution as the major issues to be negotiated. Socio-economic inequality between the two units produced disagreement in fiscal and social security matters, with the most 'advanced' region (the Flemish) demanding faster and greater devolution of power. Belgium's split party system with no cross-regional, national party further slowed consensus-formation at the federal level. Membership in the European Union apparently has had no decisive effect one way or another.¹⁷

The most striking aspect about Belgian federalism is the deep uncertainty about its final shape. The sixth constitutional reform in 2011 did not bring much clarity in this respect; there is no distinct, common vision of the nature of the Belgian state. The failure to negotiate a definitive blueprint does not mean a failure of the federal project, however. On the contrary, it is convincingly argued that 'the Belgian state is unfinished and open ended, but that is exactly the reason why it can exist' (Deschouwer & Reuchamps 2013, p. 263). As an open-ended process, rather than a design, the federal project contains a measure of constructive ambiguity that keeps the main parties committed to its continuation.

2.2 Federalism by design

Restructuring of the state from a central to a federal form entails significant dispossession of the institutions and social formations underpinning the *ancien regime*. Hence, federalism by design implies starting from a (relatively) clean slate (Simeon 2009). Violent events such as civil wars, revolutions and foreign invasions, or formal restructuring of state authority through decolonization, can go a long way towards cleaning the slate. It is therefore not surprising that federal restructuring is associated with such transitions, or what we shall call respectively post-independence and post-conflict federalism.

(i) Post-independence federalism

The path to federalism through decolonization typically starts not from a unitary state, but a complex and internally diverse colonial structure that has evolved over time with a heavy component of indirect rule. In this sense, federal structures are embedded in recent history and present plausible models for the post-independence government. In North America, for instance, the English crown had ruled through a set of diverse local communities, each with a high degree of de facto self-rule, thereby laying the infrastructure for federalism. In the US case, the choice before the 13 colonies at the Constitutional Convention in 1787 appeared as either a confirmation of the existing confederate structure, or the establishment of a tighter federalism. The latter prevailed through negotiations, famously theorized by Riker as a quest for military security and expansion (Riker 1964).

In the two major contemporary cases of India and Nigeria, the federal model adopted after independence likewise took the administrative division of the colonial system as its starting point. Nigeria's first federal structure reproduced the three geographic divisions (northern, eastern and western regions) that had served as administrative regions under the British. The division proved deeply conflict-generating, and smaller cross-cutting units (12 in all) were established after the civil war. The number of sub-national units subsequently tripled.

¹⁷ European integration has encouraged competition between the two sub-units but simultaneously required coordination to promote all-national interests at the EU level (Beyers and Bursens 2013).

In India, likewise, the administrative divisions of the colonial state formed the framework for deliberations of the 1946 Constituent Assembly. At the time, India was a patchwork of diverse administrations: provinces or presidencies, further classified as major and minor, and princely states with a high degree of autonomy. Their reconfiguration into states and territories of the Union was a gradual and continuous process. To accommodate demands of regional elites, the 1950 Constitution opened for reorganization of boundaries according to language as a primary, but not the sole, criterion. The 1956 States Reorganization Commission added 8 federal states; over the next thirty years, 12 more states had been cut out of existing ones, and the process continued.

Importantly, federalism in both cases has been a work in progress, involving changes in boundaries as well as the division of power between the federal and the sub-national level. In India, moreover, nationalist sentiments at the time of independence led federalism to be formally understated (as in South Africa, the word 'federal' does not appear in the Constitution), although its existence as a political reality is not in doubt.

(ii) Post-conflict federalism

The other main path to federalism is when revolution, invasion or other forms of armed conflict have opened for radical restructuring. Thus, Revolution in Russia paved the way for the establishment of the Union of Soviet Socialist Republics (USSR). World War II led to the demise of the Kingdom of Yugoslavia and the rise of the Federation of Yugoslavia. In more recent times, the transformation of Iraq from a unitary and authoritarian state to a federal structure occurred after the US invasion removed the existing regime, dismantled its key institutions (the Army and the Ba'ath Party), and requested the principal ethnic and sectarian groups to form a new constitutional order.

The transformation of a unitary into a federal state is by no means easy even when armed conflict has cleared away the principal structures of the previous regime. The tortuous negotiations on a new constitution in Iraq after 2003 are a case in point, even though the geographical boundaries of the main groups (Sunni, Shia, Kurds) were relatively clear, but that left vexing issues regarding the balance between shared-rule and self-rule, demarcation of boundaries in resource-rich areas in the north, and foreign policy. In the end, it took strong pressure from the occupying power, the US, to complete the constitutional bargain in a two-and-a-half year period (Finer and Fekeiki 2005; Morrow 2005).

In Ethiopia, the institutional slate was likewise wiped clean when insurgent armies crushed the communist regime in 1991. Organized along ethnic lines, the insurgents agreed in principle that the new Ethiopia should be a federal state, based on ethnic majority-regions where the boundaries were relatively non-controversial. A federal solution was also attractive as the alternative to the centralized state that the communists, and the emperor before them, had tried to impose, and which had generated deep resistance (Young 1996). Yet despite these favourable initial conditions, it took a strong central command - in effect a one-party regime - to realize the transformation. Moreover, the ethnic group that captured that process (the Tigreans) had strong incentives to bring the federal project to completion. Constituting only around 10 per cent of the population in a country with strong regional divisions, the Tigreans could hardly hope to rule in a formally centralized state. Devolution of power to regions, however, would enable the Tigreans to balance diverse interests or, as critics claimed, divide and rule (Ottaway 1995). Before long, the Tigrean-led front (EPRDF) had consolidated its position as the dominant party that in fact exercised considerable central control (Aalen 2002)

South Africa in the 1990s is a variant of the post-conflict model in that the old state was still very much there and a principal party to the negotiations that formalized the end of apartheid state and the new, federal Republic of South Africa. As a 'negotiated revolution' (Bouckaert 1997), the South Africa constitutional bargain may be more relevant to Nepal's situation than the cases cited above.

South Africa

The most important point about the transformation in South Africa is not that it changed the state from a unitary to a federal structure, but that it ended the repressive apartheid system and created a basis for a multi-racial democratic order. Federalism in this perspective appears as an adjunct to, and instrument of, the peacemaking process, a way of getting hostile fringe groups to accept the deal negotiated in the main by the African National Congress (ANC) and the National Party (NP) (Steytler and Mettler 2001).

By 1990, after a long and violent internal struggle, both the apartheid regime and the ANC were ready to negotiate. In institutional terms, the negotiations started from a 'clean slate' with regard to choice of state structure to replace the discredited Union of South Africa and its pockets of 'homelands' (Simeon 1998). Yet in historical terms, the slate was not clean at all.

To the ANC, federalism was discredited by the apartheid policy of establishing 'black homelands' as a strategy of rule. Federalism was tantamount to a 'bantustanization' of the new South African state (Fessha 2010). A strong central state, by contrast, was seen as necessary to realize the vision of the ANC leadership, above all Nelson Mandela, for a multi-racial, peaceful and democratic South Africa. Only a strong state had the capacity to develop the economy, restructure society on the basis of social justice, equality and human rights, and keep the centrifugal forces in check by providing room in the new South Africa for the powerful white minority as well as dissenting black voices. All parties were capable of continuing violence. During the first phase of formal talks (1990-94), an estimated 14 000 persons were killed in conflict among the black communities and from violence inflicted by white extremists who were mobilizing.

The other main party to the negotiations, the NP, was ambivalent. The party had governed a unitary state, the Union of South Africa, whose domination had been secured by slicing off black 'homelands'. But the party now looked to strong counter-majority measures to check the power of what would be a huge black majority in the new South Africa. The NP thus became a late convert to federalism, ironically in alliance with black federal voices, mainly the Inkatha Freedom Party which wanted recognition for a proposed Zulu kingdom. At the same time, the NP leadership came to appreciate that shared power at the central level was another, and possibly better, way of protecting its interests than federal devolution of power. As negotiations progressed in 1991-3, the NP 'placed its faith primarily in shared-rule rather than self-rule (Steytler and Mettler 2001, p.94). It was the agreement on power-sharing at the center, in a transitional government, that cemented the pact between the ANC and NP in 1993 and made possible the adoption of an Interim Constitution in December 1993.

Haunted by the 'bantustans' of the past, neither the Interim nor the final Constitution (1996) of South Africa contains the word 'federal'. Yet the Constitution's strong federal features reflect the need during the negotiations to accommodate militant federalist demands from right-wing Afrikaner and black nationalists, who threatened to boycott the elections for the Constitutional Assembly scheduled for April 1994. The backdrop of ongoing violence lent urgency to efforts by the principal negotiating parties to devise acceptable compromises.

Demarcation of provinces (nine in all) was uncontroversial. A Commission of experts produced a map within 6 weeks, which was accepted with only minor changes by a multiparty negotiating forum and the subsequent Constitutional Assembly. The Commission had taken regions used by the government's Development Bank as a point of departure, further modified by multiple criteria (economy, ethnicity, history, geography, administrative viability). The result was ethnically heterogeneous provinces, but - with two exceptions - each also had had a majority ethnic population (Fessha 2010, pp. 111-113).

Achieving a constitutional consensus in a deeply divided society was in no small measure due to the strong leadership of the ANC and the NP and their joint recognition that the alternative to a compromise was renewed violence and economic disaster. To realize this compromise, the two principals worked through a 'channel bilateral', which by early 1993 had led to agreement on the framework for the transition (an interim constitution, a transitional government of national unity, and constitutional principles to guide an elected Constitutional Assembly). At that point, other parties were invited to join, forming a larger Multiparty Negotiation Forum, convened in April 1993 that had 208 representatives from 26 groups and a big committee structure. But a smaller Negotiating Council wielded decisive influence and reinforced the core consensus already shaped by the ANC and the NP. As a result, an Interim Constitution was ready within a year. The Constitutional Assembly elected in 1994 likewise had a bilateral leadership structure. With the ANC and the NP as co-chairs, and the Constitutional Court as an added guarantee that constitutional principles previously agreed to would be observed, the final Constitution was adopted in 1996.

As suggested above, three factors stand that enabled the parties to conclude a constitutional bargain: a core consensus among the principals, a bilateral negotiating structure that drove the deliberations, and a widely shared sense of urgency to complete the constitutional bargain insofar as the latter was an integral part of the peace pact itself, not an add-on negotiated in the aftermath of a peace settlement.

3. Implications for Nepal: The way ahead

While shadows of similarities can be detected, Nepal does not easily slot into any of the categories or case models discussed above. Overall, the post-conflict category seems to be the best fit. While the transitions outlined in Iraq, Ethiopia and South Africa differ in many respects, there are some underlying similarities in the key conditions that made a federalist bargain possible.

First, the *ancien regime* was either totally discredited (apartheid South Africa), or physically destroyed and dismantled, including important institutional pillars of the state (Iraq and Ethiopia).

Second, federalism appeared in two cases as the immediate and most logical form of state restructuring for several reasons. The centralized state had been the target of the insurgency (Ethiopia) or controlled by a repressive regime that was defeated by invading forces (Iraq); the societies were deeply divided along ethnic or sectarian lines, with no single group strong enough to claim preeminence and rule in a system with centralized power. In the third case (South Africa), where institutionalized racial and ethnic divisions under apartheid had discredited federalism, devolution of power was used to co-opt ‘spoilers’: militant groups that threatened to derail the construction of a successor state to apartheid South Africa.

Third, ethnic-regional settlement patterns and attendant political mobilization were in all cases a force for federalism, and boundary demarcations of sub-national units were (except for oil-rich areas in Iraq) mostly negotiated with ease.

Fourth, the constitutional bargain was structured and driven to conclusion by strong leadership (effectively one-party domination in Ethiopia, and bilateral pacting in South Africa), and pushed by the occupying power which set time limits in Iraq.

Fifth, in all cases the constitutional restructuring process was closely tied to the war-to-peace transition. Failure to reach agreement on a new constitution thus spelled renewed violence, continued occupation, or catastrophic uncertainty.

In this schema, Nepal looks very much the outlier. Notwithstanding a ten-year civil war and a subsequent Maoist-led government, the institutional slate is far from clean. The state is no longer headed by a monarch, but is still dominated by the upper castes. The lines of continuity are marked elsewhere in the political sphere as well (the leadership of the army, the judiciary and the main political parties). Boundary demarcations for federal sub-units have few self-evident markers of ethnicity as settlement patterns in most areas are mixed, and administrative units have little significance in a state that long has been centralized. The principal geographic divisions (lowland, hills and mountains) are older, have strong cultural connotations and reflect social and economic differences, but are unlikely candidates as national sub-units. Only Madhes political leaders have proposed the region as a basis for federal subunits, and then only with reference to the lowland.

The main political parties are either opposed to federalism or ambivalent, while the opposing forces are disparate and lack a common party structure. The negotiations during the 2008 Constituent Assembly were unwieldy, involving a very large number of voices and diverse interests. The Constituent Assembly elected in 2013 with 30 political parties represented does not look much different. Finally, constitutional change was not an integral part of the peace settlement in 2006, but deferred to a later date. By the time a Constituent Assembly convened more than two years later, the sense of urgency that had produced a peace agreement seemed to have dissipated. When the second attempt to write a constitution started, Nepal had been at peace for over seven years and a sense of normalcy had returned.

Yet with the principle of federalism enshrined in the Interim Constitution, and a new constitution to be written, there is no going back to a unitary state. ‘Federal’ voices will demand to be heard and, as in the past, will consider political strategies as well as forms of direct action. Opposing forces led by Brahmin-Chhetri organizations are mobilizing as well to oppose both ‘reservations’ and federalism. As the next round of constitutional deliberations takes place against a backdrop of polarization and potential violence, Nepal may find that, like Belgium in 1970, devolution of power is necessary for the state to ‘hold-together’, or at least to pre-empt renewed violence.

If the overall purpose is to facilitate a constitutional bargain that reduces conflict, some mechanisms that helped move the federalist project forward in other cases are relevant. Most important, perhaps, is a recognition that federalism can be a continuous process rather than a once-for-all design. Adjustments can be made over time with respect to the devolution of power (as in Belgium) as well as in demarcation of boundaries (India and Nigeria). This makes bargaining akin to contract negotiations, where the objective is not only to obtain favorable terms on a particular point, but to secure a contract that opens for transactions over time to accommodate shifting interests and constellations of power. The constitutional equivalent for defining sub-national boundaries in a federal process would be a general rule that permits diverse outcomes, as Art. 3 of the Indian Constitution which gives the Parliament the right to alter boundaries of states and territories in the Union

The importance of an inclusive bargain to deflect militant opposition was underlined in the South African case. Other tools in the inventory of federal schemes can be of help to recognize grievances and construct compromises. Symbolic concessions (e.g. support for minority language and flags) are important in identity politics and may go a ways to placate demands for recognition; they need not, as opponents fear, inexorably lead to substantive concessions (transfer of power). Asymmetric provisions that grant more devolution to some sub-units than others may buy time, peace and social justice. Different combinations of shared-rule and self-rule can be adopted: for example, shared power in a national government at the center may be more important for an aspiring and politically self-conscious region like Madhes than for activists in the Eastern Hills, for whom degrees of autonomy may be more important. Jurisdiction in a particular public service function (e.g. instruction in mother tongue) can be transferred from the center to a particular group – whether territorially concentrated or not, in the spirit of ‘functional federalism’. There is no shortage of tools. What is required to conclude the bargain is restraint, reason and patience.

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Since the end of the civil war in 2006, Nepal has been on the edge of a peaceful but truly revolutionary change to restructure the state along federal lines. The issue has dominated the political discourse, wrecked the first attempt to write a permanent, new constitution, fuelled deep divisions, sparked violence and inflamed the political discourse.

Demands for federalism based on ethnic and regional identity have deep roots; they are not going to go away and, in some form, need to be accommodated. Yet the opposition remains formidable as political and economic elites fight to preserve their long-standing privileged position in the existing centralized state structure.

In this situation, what is required to secure a peaceful negotiated transition? What are the lessons from other countries that have negotiated a federal bargain?

This report is part of a joint project between the Chr. Michelsen Institute and the Department of Sociology, Tribhuvan University on social change in Nepal.