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Federalism and human development

Nepal is now poised to adopt a new constitution that could provide the framework for dealing with the country's problems of exclusion, including those involved in political participation, that have troubled the country so long

Elected in April 2008, the Constituent Assembly (CA) has been given the task of drafting and adopting a new constitution within two years of its first meeting—which took place on May 28, 2008. Under the Interim Constitution, the CA has an unrestricted mandate to decide on the values, principles and institutions to be embodied by the constitution—except in two important respects. First, Nepal would become a functioning republic upon the first meeting of the CA, a concept which can accommodate a wide variety of arrangements.¹ For the interim, the functions and powers of the King were invested in the Prime Minister. Many people believe that the abolition of the monarchy has in itself improved prospects of democracy, inclusion and secularism.

Second, Nepal must become a “progressive democratic federation” (Art. 138, as amended on April 13, 2007). Though the details of the federal system are not spelled out, its purpose is clearly stated: “to bring an end to discrimination based on class, caste,

language, gender, culture, religion and region.” As in the case of instituting a republic, the CA is free to decide on what kind of federal system would be established.² However, the state must be “inclusive” and “progressive”, i.e., it must serve all citizens, including those who had earlier felt marginalized. Indeed, the adoption of a federal strategy stemmed in part from pressures from marginalized communities.

This chapter examines the politics of identity that are now central to debates on how Nepal should be governed. We then turn to the ways in which federalism can contribute to enhancing the human development of all the country's citizens. Ironically, the very concept of federalism has proved divisive: a 2007 survey showed a clear opposition by the Hill people and support among those of the Plains, as well as among Muslims.³ While the authors believe that federalism can provide a framework for the resolution of questions of identity and fairness and equity among citizens and communities, it cannot by itself solve all the problems of the country—and may indeed create problems of its own. We must therefore look at constitutional devices and measures that can supplement federalism so as to address the problems of discrimination and exclusion that are now so keenly felt.

Challenges facing Nepal

As earlier chapters have pointed out, Nepal now struggles with the legacy of ten years of conflict in which 13,347 died and 1,027 disappeared, while countless others were raped, dispossessed, displaced, bereaved or traumatized in other ways.⁴ Shame prevents many of these war victims from publicly acknowledging the extent or depth to which they were affected. Worse still, the underlying causes of the conflict have not yet been resolved. Nor have most of the results of the conflict been addressed. Poverty and discrimination on the basis of caste and ethnicity continue. So does marginalisation for other reasons, including remoteness from Kathmandu and other centres. In short, the grievances associated with the war persist and have been increased by its results—among these, ineffective government, internally displaced persons, frustrated combatants, and a population suspended between cynicism and hope. Indeed, in some areas, low-level conflict continues.

The underlying causes of the conflict have not yet been resolved. Nor have most of the results of the conflict been addressed

Consequently, Nepal is faced simultaneously with problems of nation-building and of state-building. As this Report has pointed out earlier, the country is undergoing multiple transitions:

- ▶ from monarchy to republic;
- ▶ from authoritarianism to democracy and human rights;
- ▶ from a hegemonic to a participatory system of governance;
- ▶ from a state wholly pervaded by one religion to secularism; and
- ▶ from a heavily centralized unitary system to one characterized by decentralization and autonomy.

Above all, the country is moving from a hierarchical society in which one's place was dictated by gender, by caste and by ethnicity, to one that aspires to making human dignity and equality its fundamental principles.

Although the 1990 Constitution of Nepal acknowledged that the country was 'multi-ethnic and multi-lingual,'⁵ it described the state as indivisible and sovereign⁶ and created a highly centralized government. It also declared Hinduism the official religion⁷ and made Nepali (in the Devanagari script) the sole official language; other languages were treated as national languages.^{8,9} The King, closely associated with Hinduism and its caste social structure, was described as the symbol of the Nepali nation and the unity of the Nepali people. Further, the people of Nepal were envisaged as a "collectivity" and the assertion of identity on the basis of religion, caste or language was banned.¹⁰ Thus, the 1990 Constitution not only established an exclusionary state, but actively endorsed it. Moreover, the hegemony of the high-caste elite in the major political parties was perpetuated by the prohibition of sectarian and ethnic parties.¹¹ A principle task of the state was the promotion among the people of Nepal of the spirit of fraternity and the bond of unity on the basis of liberty and equality.¹²

Nepal was not unusual in using the state to establish the hegemony of a particular elite or community and to define the entire population in its image. In this respect, the Constitution reaffirmed a much older tradition of state formation in Nepal¹³—and, indeed, of most existing states worldwide, whatever their constitutions proclaim. For this very reason, the legitimacy and fairness of this concept of the "nation-state" has come under severe challenge in many parts of the world. The roots of discontent lie in the economic, social and political exclusion of the non-elite communities and their members, such as non-whites in the USA and citizens from former colonies in other Western democracies. There is a close correlation between poverty and ethnic minorities. Although a powerful case for a more inclusive state system is based on the threat to the cul-

ture of minority communities and therefore to their identity, self-respect and social orientation, many ethnic protests and insurgencies are less about the preservation of culture, religion or tradition than about the lack of access to the state and the economy. In this way, ethnicity itself becomes a social and political force, a means to mobilize and organize members of the community, as its leaders advance claims for full participation in the affairs of the state.¹⁴

It has become increasingly difficult to resist such claims. Ethnic minorities now find support in both moral and legal theories rooted in the ideas of justice and self-determination. The international community urges political leaders to agree on measures of self-government or power-sharing, putting both the government and the insurgents under considerable pressure to find means to resolve internal conflicts. Efforts today to suppress ethnic loyalties, demands and organizations result largely in their gaining strength and reinforcing their potential to disrupt internal order and existing good will. Fuelling a deep sense of grievance risks violent outbursts, especially given the easy access to supplies of arms in international and regional markets that prevail today.

Claims of identity have come to play an important role in contemporary politics globally. Identity, it is claimed, is critical to a person's sense of belonging and orientation; the recognition of his or her ethnicity is an essential component of that person's dignity and self-respect. The denial of that identity is a manifestation of ethnic discrimination, the disparagement of other cultures and the disregard of the legitimate right to protection and development of the communities adhering to those cultures. The new politics of identity and recognition is seen as emancipatory and an empowerment of the hitherto marginalized and oppressed com-

munities. It is the weapon of the weak. By contrast, redressing past injustice enriches society through safeguarding diversity. Most political thinkers today believe that every culture can make some positive contribution to the states in which they now find themselves.

These contemporary understandings of collective identities have led to the review of the foundations of the state and its institutional organization, emphasizing the need for the political recognition of differences, together with finding ways to promote the co-existence of cultural and ethnic communities in peace and dignity. Consequently, in a number of states, new norms stress the virtues of diversity. This reconceptualisation of the political community and the division and sharing of sovereignty have found their way into the constitution. Clear alternatives, based on the political and legal recognition of ethnic or "national" communities, to the single nation state have emerged, among these:

- ▶ modes of representation and participation in public institutions and affairs;
- ▶ structures and distribution of power;
- ▶ the place of culture in the public sphere; and
- ▶ the settlement of competing claims of communities.

Often, these and various other ways of accommodating ethnic differences are grouped under the rubric of "unity in diversity."

As in many countries, a strong sense of ethnicity is most frequently a response to discrimination and deprivation. All the "marginalized" communities have suffered in this way. For many long years, they have asked for fair representation, fair treatment and fair opportunities. They have not rejected the state, but asked for their rightful place within it. Whether one looks at Nepali statistics for the economy, education, public service posts, representation in the legislature or the government,

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Nepal faces the challenge of squaring the recognition of diversity with the benefits of the “nation-state”

one comes away with an overwhelming impression of the monopolization of power, authority, and opportunities by Brahman, Chhetri and Newar.¹⁵ Dalits have been oppressed for centuries, the Janajatis’ languages and cultures have been ignored; women suffer from severe discrimination across the whole of society; and Madhesis have long felt that they were not accepted as Nepalis, and labelled disparagingly as Indians.¹⁶ Most people, especially in the rural areas, feel—with good reason—that they cannot communicate with state officials: most of these representatives of the central government do not speak local languages.

The resistance of the eight-party alliance to the participation of the marginalized communities in decisions about the Interim Constitution and the future—in some cases, a refusal to acknowledge the legitimacy of the claims of these communities—has prompted a vigorous development of ethnic politics and organizations and disrupted the national unity of the Janandolan.¹⁷ In this way the traditional elites, by their intransigence, have created a situation which was one of their worst fears. Smarting under their exclusion, Dalits, Janajatis, Madhesis, and women are formulating their own agendas and recommendations for the new constitution. These include:

- ▶ fair and effective representation in state institutions;
- ▶ equality and elimination of all forms of discrimination;
- ▶ affirmative action, including “reservations” or quotas;
- ▶ secure citizenship;
- ▶ a secular state;
- ▶ political recognition of the diversity of cultures and languages; and
- ▶ self-government through a federal type of autonomy, preferably based on language and ethnicity.

Self-determination, understood in terms of group rights, has in some cases become the

leading principle of state reorganization for many of these groups. Understandably, the elite is uneasy with this agenda—and not only because it would chip away at its privileges. Yet the factors underlying these reform agendas lie at the heart of Nepal’s problems and will not go away. For stability and development, the constitution-making process must deal with it. Nepal faces the challenge of squaring the recognition of diversity with the benefits of the “nation-state” (community cohesion, common values, willingness to sacrifice for the common good, prospects of democracy, common public spaces, the expression and development of culture). In a word, the constitution-making process is about identity in a New Nepal, which emphasizes common bonds and interests while respecting differences.

This calls for recognizing the representatives of these communities in the CA as full members, not applicants. There are no simple or uniform solutions. The complexity of the ethnic situation is bewildering. Nepal has a heady—but potentially productive—mixture of race, caste, class, region, religion and ethnicity, along with gender as a factor in each proposed remedy. As indicated earlier in this Report, the country comprises more than 103 caste and ethnic groups, which speak more than 92 languages, and adhere to differing religions. Population and resources are unevenly divided among regions, so that there are also social and historical differences determined by topography. But this fragmentation also means that no group can be described as the majority. Hindus may be one sort of majority, but they are divided into sects, and also speak different languages as well as come from different regions. The Nepali speakers constitute the largest linguistic group, but these speakers belong to different classes and religions. Dalits have certain common characteristics (including social oppression), but they are divided by language and region—and even caste. Janajatis repre-

sent a variety of groups in size and cultural traditions and in varying degrees of integration into the modern economy and state structures.

Consequently, the most fundamental challenge facing Nepal and the making of the constitution is defining its identity in ways acceptable to its communities and regions. The constitution is more than the rebuilding of the state. The building or rebuilding of the state assumes a prior agreement to come together, to form a political community. But when there is disagreement on the fundamental values of the state or no sense of belonging to a common political community, the task of the constitution is two-fold. The first is the building of consensus, developing a framework for coexistence and cooperation among communities based on social justice, and the negotiation of national values and national identity. In short, constitution-making is about nation-building rather than the reconstruction of a particular polity. The process is as important as the substance of the constitution. State building—the “restructuring of the state”—follows from the way the first task is resolved.

Marginalized groups are united in their opposition to the present dispensation, but divided on what remedies and policies must be pursued. The inherent clashes in ideas, aims and practices of these communities mean that common devices may not suit every one of them. Some of these devices may indeed conflict with one another. Federalism may make sense for the Madhesis and perhaps the larger Janajati groups, but it is unlikely to do much for Dalits or for women. Similarly, more diverse language policies are not a major concern of Dalits or women. Dalits want the abolition of the caste system, while the agendas of other groups concern largely the recognition of caste, ethnic and linguistic distinctions.

This complexity also suggests that solutions cannot be based simply on ethnicity. There are more cross-cutting than overlapping differences, but even this should not obscure the fact that on various points, the interests of Dalits, Janajatis, Madhesis and women would conflict. And even among the Brahmins and Chhetri, there are poor people whose needs must be addressed. So while ethnicity should not be ignored, constitutional reform must be tied, broadly, to social justice. The roots of the political and social problems that have caused such suffering to the people of Nepal during the last decade lie not so much in ethnic differences as in pervasive injustice, massive discrimination and exclusion, and the failure of the state to develop constructively the notion and institutions of a common political community. There are many ways in which diverse identities can be fostered while being accommodated within an over-arching national loyalty; some of these are indicated in this chapter. Federalism itself, the principal focus here, is a device frequently used to acknowledge and integrate diversity. Moreover, the current wave of recognition of language, religion and culture of different caste and ethnic groups by the state suggests that Nepal needs to build its future laws and policies on social justice through the inclusion and participation of different social groups. This will also foster recognition of multiple culture and identities.

Social inclusion—the core values and principles of the constitution

The values and principles espoused by the eight political parties have been gleaned from the Comprehensive Peace Agreement, the most comprehensive accord among the major political parties, and the Interim Constitution. Both these documents are the product of negotiations among the political parties (substantially in pursuit of the goals of

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Interim Constitution 2007 represents a considerable improvement on the rights of minorities and disadvantaged communities compared to the similar provisions of the 1990 Constitution

the Janandolan of April 2006), which now have the people's mandate to make the new constitution and to ensure its acceptance and enforcement.

The 12-point agreement held between the seven parties and Unified CPN (Maoist) in 22 November 2005 was marked more by a commitment to democracy rather than to the rights of marginalized communities. However, the 2006 Janandolan, led by communities hitherto excluded from political and social power, established a progressive reform agenda with particular attention to the concerns and aspirations of minority, marginalized communities. This agenda was first reflected in the eight-point accord between the seven parties and the Unified CPN (Maoist) signed on 16 June 2006, when they agreed to "make a forward-looking restructuring of the state so as to resolve the class-based, racial, regional and gender-based problems through the election of the Constituent Assembly".¹⁸ In an agreement on 8 November 2006 between the high-level leaders of the parties, a slightly more elaborate form of this commitment was agreed: "In order to end class, ethnicity, lingual, gender, cultural, religious and regional discriminations and also to end the centralized and unitary structure of the state, it shall be restructured into an inclusive, democratic and progressive state" (Point 10). This was expanded in Article 3.5 of the CPA by identifying groups or communities, including Dalits, against whom discrimination would be ended. The CPA also committed the parties to socioeconomic rights: to food; health; education; and private property (Article 7.5)—of particular relevance to the marginalized communities and to the poorer members of otherwise well-off communities due to pervasive poverty.

This fundamental transformation in attitudes, policies and commitments has been expressed in the Preamble and a number of Articles of the Interim Constitution. The Interim

Constitution 2007 represents a considerable improvement on the similar provisions of the 1990 Constitution. When providing for affirmative action, beneficiary communities are mentioned and include Dalits (Article 13(3)). The language in which the provision against untouchability and racial discrimination is expressed is longer, but not necessarily more extensive, than the preceding text. Real advance is manifest in Article 21, which gives "women, Dalits, indigenous groups, Madhesi communities, oppressed groups, the poor farmers and labourers, who are economically, socially or educationally backward...the right to participate in state structures on the basis of the principles of proportionality". An amendment of the Interim Constitution provides for proportional recruitment into the armed forces (Art. 144(4) A). The Interim Constitution also sets out specific rights of women and of children (Arts. 20 and 22).

The provision concerning exploitation has been strengthened by two new clauses: (a) no person shall be exploited in the name of custom, tradition, and practice, or in any other way; and (b) no person shall be subjected to human trafficking, slavery or bonded labour (Art. 29(2) and (3)). The Interim Constitution also guarantees the right to work (Art. 18 (1)) and to "proper work practices" (Art. 30(1)). The cultural rights of minorities receive greater protection than in the former constitution (Art. 17). These rights are reinforced by the articulation of various state responsibilities and policies and directive principles (especially Article 33(d) to (i)). All in all, the regime of the rights of minorities and disadvantaged communities represents a great improvement on previous constitutions.

Federalism and human development

The commitment of the major political parties to federalism came late—only after vio-

lent protests by Madhesis and Janajatis. There was no reference to federalism when the Interim Constitution was first promulgated, though the text made reference to decentralization and the restructuring of the state. Few people—certainly almost no one among those who made the decision—had any real understanding of the institutional structures and functioning of federalism. The Interim Constitution itself provides no guidance on the principles or substance of a federal system. The matter was therefore left entirely to the CA—with the proviso that a high-level commission would make recommendations on the restructuring of the state. There have been fairly extensive discussions on federalism and explorations of the major federal systems.

Arguments for and against federalism in Nepal have been vigorously articulated, more on principles than on structures, the division of powers, and relationships between the centre and federal units. Although all major parties expressed support for federalism in their manifestoes for election to the CA, the degree of real commitment to it may be limited.¹⁹ The insurgency in Nepal was not primarily about federation (as in Sri Lanka or the Sudan); the key protagonists were concerned essentially about the control of the unified state. A combination of insufficient understanding of varied federal experiences elsewhere and lukewarm support may result in a weak system that cannot respond to problems of inclusion and national integration.

The constitution deals with various matters concerning the relationship between the different levels of government. It sets out the resource and financial powers available to each level, including the power to impose, collect and spend state taxes. Although in principle each level of government is free to exercise such power—subject to any consti-

tutional limitations, including the protection of human rights—in practice it is often necessary for governments to coordinate their policies or acts, or plan joint activities. For this purpose, machinery for intergovernmental discussions and decisions is usually established. In some federations like India, the constitution allows the national government to intervene in regional matters in an emergency. If there is a dispute—for example, if one level of government has encroached on the powers of another—the matter is usually resolved by the national courts, often the Supreme Court.

How these and other matters are dealt with in constitutions varies a great deal from one federation to another. Such matters as the methods of the division of powers and the actual division, the relative share of resources and revenue among different levels, the number and size of regions, the scope of cooperation between the centre and the regions, and procedures for dispute resolution depend on the characteristics of the country. Thus some federations give the bulk of the powers (at least, the most important) to the centre, others to regions. Some give all taxation powers to the centre, but provide for the sharing of the proceeds between the centre and the regions. In some federations, one region may have more powers than others, such as Quebec in Canada.

Before we discuss dealing with the issues of inclusion, we must look at the way in which the federation came about and at the underlying criteria for the formation of regions. A federation may be formed by the coming together of previously independent entities (“aggregation”, as in Australia, Switzerland, and the USA) or the restructuring of a unitary state (“disaggregation” as in Belgium, Ethiopia, Nigeria, Spain, and South Africa). The former has generally been easier to set up: It is based on the consent of the separate

There was no reference to federalism when the Interim Constitution was first promulgated, though the text made reference to decentralization and the restructuring of the state

units. It involves the establishment of only one new unit—the federal government (with transfer of limited powers). In addition, the regions have already well-established systems of government and laws, identity, and boundaries, which more or less guarantee their viability.

By contrast, federalizing by disaggregation raises a much larger number of issues, among these:

- ▶ the boundaries and number of the regions;
- ▶ the levels of government;
- ▶ the dismantling of at least some structures of the state;
- ▶ the establishment of numerous new governments and laws; and
- ▶ the transfer of substantial powers and personnel to the new regions.

*Federalism
represents a form
of power-sharing*

Moreover, almost all these issues are compounded by the fact that this type of federation is often accompanied by controversy and has sometimes resulted from armed conflict, as in the Sudan and the USA during its expansion from the Atlantic to the Pacific in the course of the 19th century.

The second distinction among federations lies between those based on considerations of geography and economy (“geo-economic”) or old boundaries (“territorial”), and those based on ethnic, linguistic or religious criteria (“ethnic”). The rationales of the two are different: the first deals with distance, common defense, democracy, responsiveness and accountability, the other with self-determination, identity and culture. With different objectives and purposes, they may produce very different kinds of federations. These differences become manifest in terms of the criteria for regions, the number and size of units, the relationship between the regions and the central government, the division of powers among different levels, the salience of culture and the politics of internal mobility. The dynamics of the two kinds are also dif-

ferent, the ethnic being perhaps more unstable. Often, it has tended towards the proliferation of regions, and towards strained relations between both the regions and the centre, and among the regions themselves.

It would therefore seem that ethnic federations face greater social and political problems than the “territorial”. In a territorial federation, the rights and obligations of individuals are based on residence in the region; personal characteristics like language, religion or culture are largely irrelevant. By contrast, in an ethnic federation, the land itself has ethnic, cultural dimensions. It is perceived by a community as its “homeland”, vested with religious history or emotions or, in a far more common way, the physical space in which a particular community has a numerical majority. In some federations of this last type, the members of that community have greater rights than other inhabitants of this land, as in the former Soviet Union. The exercise of regional power is in some sense tied to ethnicity. It may be that the language of the dominant community in the region will be the language of the government (as in France and India) or that its religion will have a special status (as in Switzerland), or that it will have superior land rights (as in Brazil and Colombia). Even if there are no special rights, the ethos and culture of the dominant community will pervade the policies and practices of the government. Several recent federations have an ethnic orientation; the precise rights related to ethnicity vary. The purpose of these federations is to acknowledge and provide for cultural diversity and to empower politically and economically a community that would otherwise be a permanent minority in the state. Federalism is a compromise between a highly centralized state and secession (as in the Oslo agreement between Liberation Tigers of Tamil Eelam and the Sri Lanka government, north and south Sudan, and Bosnia-Herzegovina). It represents a form of power-sharing. It is of-

ten forced on warring communities by the international community, and therefore is less consensual than the other, older federations.

How far could federalism resolve Nepal's problems of exclusion, the marginalisation of various communities, poverty and the lack of economic development, threats to national unity, the ineffectiveness and lack of accountability of the government, and its capacity and willingness to protect the rights of the people? These factors are crucial for human development. Supporters of federalism say that the domination of the country from Kathmandu (referring to excessive centralism) has prevented growth elsewhere. Further, this domination is exercised by small elite of Brahmins, Chhetris and Newars, resulting in acute discrimination against other castes and communities—and serious deficits in democracy. Two results of this concentration are widespread poverty and the failure to respond to the needs of the people, particularly in the rural areas of many parts of the country.

The experience of other countries shows a massive increase in political participation when they become federal—for example, India and Spain. Central institutions are organized to allow for the participation of all regions in central governance. Normally, a second legislative chamber is set up, or if one already exists, it is reorganized, often composed of regional representatives who are usually elected by the residents, as such, of the regions. In some federations, each region has the same number of representatives, in some it is based on population (with a minimum number for the smaller regions). Regions are also represented in the other national chamber, usually on the basis of population. The second chamber, where the regions are directly represented, plays a more important role in state affairs than in a unitary system. It gives the people of even remote regions the opportunity to bring to the

attention of the central government their pressing problems and to influence national policies. They also receive opportunities to influence policy and administration at local levels. In a federation, regions have their own elected legislatures and executives, with significant and independent powers. Here, citizen participation or influence can be direct, for they live close to the operations of these institutions and their members and officials have permanent local residence (with few opportunities to visit Kathmandu).²⁰ At that level, quite small communities that cannot expect to participate in—much less, influence—national affairs can wield considerable political power.

These constitutional arrangements also impact the organization and structure of political parties. They give rise to regional parties, giving people a greater choice among parties and the ability to influence party members. Political parties then have incentives to learn about local issues and establish an effective presence outside the capital city. In some federations, regional parties play a significant role at the national level (as in India today), so that the national government has to pay due attention to regional problems and needs. Through regional institutions, information about national affairs and policies is disseminated locally, and people become aware of them and of how they themselves fit into the national scene. Their understanding of democracy and political processes grows.

Although it is not guaranteed, the establishment of regional governments often leads to more efficiency and accountability. Almost by definition, the regional government will have greater knowledge of local circumstances, aspirations and obstacles to development, and is well placed to plan and execute appropriate policies. The regional government will have incentives to promote economic and infrastructural developments, ex-

The experience of other countries shows a massive increase in political participation when they become federal

ploring local opportunities, which would lead to the emergence of new growth centres and the creation of employment opportunities, reducing dependence on Kathmandu. Moreover, this is also not against the principles of subsidiarity, which hold that a larger and greater body should not exercise functions that can be carried out efficiently by a smaller body. Instead, the former should support the latter and help to coordinate its activity with the activities of the whole community.

The federal scheme for the sharing of revenue and the lobbying of the national government by regional representatives should ensure greater resources to the region for economic and social development. And if the constitution adopts mechanisms for equalizing development across the country, the less developed regions would receive a larger share of the national revenue. There should also be improvements in the delivery of welfare services, due to a greater familiarity of officials with local needs. And since the focus of most regional governments should inevitably be rural, disparities between rural and urban areas should begin vanishing.

Moreover, it will be easier to involve people in state organs and in development projects. The residents will have easier access to local officials, and should be able to deal with them in local languages. The regional government will have an incentive to please the local people in a way that the central government seldom has. Persons who until now were ignored as candidates at elections because of their caste or region would now have opportunities to contest elections to regional legislatures or appointments to other institutions. Proficiency in local languages, some of which will become official languages at the regional level, will enable persons hitherto handicapped by the lack of command of Nepali to compete in entrance examinations and to obtain posts in the civil service. Participation in regional and

local affairs will give people confidence in their ability to plan their own future.

People's confidence and their self-respect will also grow if regional governments promote their cultures and languages. For many communities, one of the most valued results of federalism would be the recognition of the worth of these cultures. Centuries of the denigration of their cultures and languages by ruling elites at first produced a sense of inferiority that is now developing into anger. Regional governments will provide the framework for sustaining local languages and cultures—and beginning to reverse the imposition of the values and cultures of others. The resurgence of these languages, literature, music, dances, religions, and life styles will truly enrich the cultural diversity of Nepal. And with the pride and confidence that this creates, the marginalized communities will be better able to participate in other public spheres, to work together with members of other communities, and to strengthen national capacity and unity. The tapestry of Nepal's rich and diverse cultures and the genius of its communities must become the background for developing the new identity of the country and the basis of its nationalism.

Federalism can also give voice to minorities at the national level, through arrangements for "shared rule". Regional participation in the second chamber of the legislature has already been noted. If regional parties become important, they will also be represented in the other chamber and, if the political system is parliamentary, they will also have representation in the national government (as part of a coalition government, as is becoming the norm in India). There will also be pressures to reflect regional diversity in the civil service, the judiciary and the armed forces. Regions can maintain a presence at the capital through an office dedicated to lobbying federal authorities. Regional partici-

The tapestry of Nepal's rich and diverse cultures and the genius of its communities must become the background for developing the new identity of the country and the basis of its nationalism

pation in national affairs can also take place through membership in bodies for intergovernmental cooperation (like a fiscal commission, a water authority, a development planning department, or a unit for dispute settlement). The broad federal structure thus becomes a node of centre-regional negotiations on a host of matters.

The granting of substantial powers to the regions often means that many problems between the regions and the centre become intra-regional. The politics of language in India in the 1950s became the centre of intense conflict between Delhi, bent on Hindi as the official language of the country, and the southern states, which wanted due recognition of regional languages, including the reorganization of federal units on linguistic grounds. The issue united several states and their residents in a national campaign against the central government. But once the linguistic principle was granted and states reorganized, the pressure on Delhi was replaced by internal differences and by competition within states. Centre-state relations subsequently improved, and it is generally believed that Indian unity was strengthened.²¹

Federalism is not the panacea for every one

Despite the promises of federalism, it is unlikely that it would deliver all that is expected of it. Among the groups unlikely to benefit are women, Dalits, those whose class now provides grounds for discrimination, and somewhat vaguely “oppressed and minority communities”. They will benefit as members of the general public if the positive developments noted above actually materialize. Although there is nothing to prevent regional authorities from making progressive provisions for women or Dalits, they may have no more incentive to do so than the national government. But Dalits are unlikely to have sufficient numbers in any re-

gion to exercise power at that level. In areas predominantly populated by Dalits, they may obtain some form of local autonomy within the region. And women will be in no different a position than in the country as a whole. However, it is possible that women may find it easier to participate in public affairs, including legislative debates, at the regional level than the national because their political activity would involve less travel, fewer absences from the family, and familiarity with local people. The position of women and Dalits may also depend on whether the federal or the regional governments are likely to be more sympathetic to their interests and welfare (Box 5.1), and on how the powers over matters of particular interest are divided between the national and regional governments and which have policies for promoting the interests and welfare of these particular groups. If federalization tends toward an emphasis on ethnicity and culture, it is possible that both women and Dalits will be

BOX 5.1 The effects of federal structure on excluded groups—women and the attitude of the authorities: some examples

Federalism does not necessarily ensure the rights of women unless the authorities have a positive attitude towards them. Examples abound on this issue, among these:

When a conservative party took office in the Kelantan and Terengganu states in Malaysia, it introduced various restrictions on women, including some practices of gender segregation that were not traditional in Malay Muslim culture. In addition, the Chief Minister of Kelantan discouraged Muslim women from taking employment that would require them to work on night shifts.

In Canada, where considerable autonomy has been given to “First Nations”, women have sometimes found that their rights are threatened by the application of the traditional law of those communities. This was so in the case of Sandra Lovelace, who had been deprived of the right to own land and participate in the community because she married an “outsider”. Similar action would not have been taken against a man in the same situation. Her case was referred to the United Nations Commission on Human Rights.

Source: Lovelace 1977; and Stark 2004.

handicapped, since both are in their different ways victims of religion and culture.²² Malaysia and Switzerland are instructive with regard to ethnic autonomy in respect of federations, as are Native American reservations in Canada and the USA. A particular form of this issue is likely to arise if there is a system of customary or traditional community law that federal units or local communities are able to apply. If this is the case, many such systems have been in conflict with international human rights standards. At the regional level, those who draft the constitution face a choice: favouring traditional law and practice in the hope that the community will advance or as in case of the constitution of South Africa, customary law subject to international human rights standards.

With regard to Madhesis, it must be recalled that the Madhes uprising in early 2007 put federalism firmly on the national agenda—and into the Interim Constitution, only a few months after its promulgation. In one sense, Madhesis have even more to gain from federalism than the Janajatis, who have long argued for it.²³ That amendment also gave Madhesis additional political representation (and easier access to citizenship cards) and led to changes in the electoral system for the CA, giving them the ability to play a major role in the design of the federation. The movement gave particular prominence to regionalism as a geographical and demographic concept, along with the sense of identity associated with it. Despite these gains, it is not clear that the Madhesi objective of “One Madhes, One Pradesh” (“pradesh” referring to a federal unit)—of converting what many non-Madhesis regard as geographical concept into a political and constitutional unit—is realistic. As Hachhethu (2007) has remarked, as a geographic unit, Madhes is the plains landscape from Siwalik hill range onwards and the Madhesi, as a group, broadly encompass people of non-

Hill origin. He states, “... such ethnic and regional identity is contested as there is non-Madhesis identity, culturally, religiously, or linguistically. The people of non-Hill origins are divided into three distinct cultural groups: Plains Hindu castes, Plains Janajati groups, and Muslims”. The latter two do not regard themselves as Madhesi. The picture becomes even more complex when one considers that although the Tharu assert their distinct identity, some are assimilated to the Madhesi. Hachhethu notes that the cultural differences between the Plains Janajatis and the Plains caste groups are as large as those between the Hill castes and the Hill Janajati groups, and that Muslim identity is predominantly associated with religion rather than region.²⁴ It is thus clear that the incorporation of the Tarai (as the Plains are often called) into the Nepali federation may not be a simple affair, although the ethnic Madhesis would stand to gain greatly from the federalization of the Tarai; it would allow them to negotiate more effectively with the centre. The divisions which have emerged among the people of Tarai could lead to the kind of internal conflicts and fragmentation that have characterised the North East of India, with the frequent and troubled carving up of the original Assam state.

Nor would the least developed regions, such as Karnali, necessarily benefit from federalism, as is often claimed. While it is true that some proposals would not only grant the least developed areas regional government, but also a higher degree of autonomy than other regions, these suggestions stem from the assumption that autonomy would promote development. Undoubtedly, such areas require special attention and extra resources, but federalism by itself is unlikely to increase such benefits. In general, better-off areas tend to attract personnel and resources. If officials do not have resources of their own, they will be hard put to secure

them from the better-endowed regions if the constitution makes the allocation of national resources a matter of regional need. As the authority of the central government in the regions is progressively reduced, these areas may suffer from further inaction and it may be more difficult to provide them with even the most basic services. Consequently, it would be necessary to complement the powers of these regional authorities with additional resources; the central government would have to assume responsibility for providing these resources and, at least initially, administering their disbursement.

Even if ethnicity is accepted as a criterion for defining a region, there are serious doubts, that many indigenous or cultural communities could govern the area. Here, of course, a great deal depends on the basis, size and number of regions—all of which are complicated by the fact that there are few substantial, contiguous areas in which any one ethnic community has a clear population majority. Moreover, the distinguished geographer, Professor Pitamber Sharma, states that one particular group constitutes a majority in only 14 districts (nine of these are dominated by Chhetris).²⁵ Groups that are dominant in one or more districts are also the most dispersed, a consequence of mobility. Sharma observes that 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.”²⁶ Therefore, if a single group is to be given a region of its own (as some groups have claimed), the area would have to be rather small. This would give rise to a large number of regions, a large proportion of whose members would not even live there. Too many small regions would also mean that few regions would have the resources or the capacity to undertake significant projects and national coordination would be difficult.

It has been proposed that in a region with a significant number of one caste or ethnicity (although short of a majority), the area would in some sense be deemed to “belong” to that group. This is reminiscent of the former Soviet Union’s theory of the titular autonomous community, which had special rights in that region. Moreover, such an arrangement would create anxiety in other communities—and although their rights would be fully protected in principle, it is not clear that they would feel the same affinity to the land as the dominant community.

One way to circumvent this difficulty is creating regions with substantial territory (populated by various castes and ethnic groups) for matters in which scale is important, and establishing additional tiers of government below the regional authority where a proportionally large ethnic group would enjoy autonomy in matters of particular concern to them. Partly for this reason, Professor Sharma has proposed three tiers below the national government: the regional, district and village/town levels. However, increasing the number of tiers would raise the cost of administration, a condition often overlooked. The concept of small autonomous areas like this has found favour in some countries, among them China, Bosnia-Herzegovina and India’s North East. Though well worth consideration, this idea compounds the complexity already inherent in a two-tier federation. Further, this complexity would spread thin both financial and human resources.

Even in a two-tier federation, it would be possible to specify the cultural and other rights of minorities, particularly at the regional level. Conceiving of culture as exclusive to a particular community is restrictive. The strength of diversity lies not in enclaves of cultural communities—almost analogous to apartheid—but exchanges of culture, so that every community has an interest and

The strength of diversity lies not in enclaves of cultural communities—almost analogous to apartheid—but exchanges of culture, so that every community has an interest and stake in the culture of its neighbours

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stake in the culture of its neighbours. This is a promising basis for national unity, and can perhaps be practised among the cultural communities in the region more easily than on a national basis. This approach would have to be supplemented by national policies on language and religion. The experience of both Nigeria and India shows that a major source of instability in a federation is not necessarily differences between the centre and regions, but differences between different communities in the region which spill over other parts of the country, and compel some form of federal intervention. Adequate protection of the rights of minorities, and their participation, at all levels of government is crucial for harmony and stability.

Another possibility where culture is a dominant concern is establishing a community council for each group that has minority status in one or more regions to deal with those cultural issues which affect that community throughout the country as a whole. Belgium, Hungary, Latvia and Poland are well-known examples of this sort of policy. Because of internal migration, many communities now live throughout large parts of the country, and the council device may provide a means of communication and the cultivation of their cultural values and practices. However, bodies like these have either become politically difficult to sustain, as in Belgium, or dwindle in significance, as in Hungary and Latvia.

Those who oppose “ethnic federalism” argue that this approach would deter development because the regions would not be based on criteria of economic viability. Development planning would become difficult because “natural” areas for development (such as river basins) would be broken up. Further division of powers would further undermine the ability to plan for the entire

country. The costs of government would increase dramatically, with several layers of government, additional legislatures, bureaucracies, and perhaps courts, absorbing money that could otherwise increase welfare services. In addition, there are fears that corruption would increase, finding new avenues in regional authorities. For these and other reasons, administration would become inefficient, and the delivery of services would suffer.

Serious political repercussions might also emerge. Regional minorities could suffer discrimination. Tensions might well arise between communities dominant in different regions, as well as among the dominant and smaller communities within a region. Communal harmony would be disturbed. Regionalism, particularly along Nepal’s borders, would expose the country’s vulnerability. The state would become weak because of its obligations in fulfilling regional interests, national symbols would be undermined, and federalism would become the first step towards the disintegration of Nepal.

One way to move forward is broadening the scope of the debate, which so far has focused almost entirely on the criteria for regional division rather than on institutional needs and technical requirements. As we have now seen, there is considerable flexibility in designing a federation, through which differences between the two sides can be narrowed. The design of the federation can also be fundamental to its success. There is a tendency to assume that there is a “federal model”, and to ignore the many ways in which federations vary and which influence the functioning of the federation, with significant influence on ethnic relations or stability. Federations differ in the nature of the executive at the centre (parliamentary or presidential), the electoral system (majoritarian or proportional), the structure

of parties (the balance between national and regional parties), the role, structure and influence of the federal government (whether dominant as in India and Nigeria, or coordinate as in Canada), the distribution of resources (oil being a major element in Nigeria and Iraq), dispute settlement procedure (particularly value placed on mediation and political conciliation), and so on. In India and Nigeria, the dominant role of the federal government has determined the unfolding of the federal relations. These are critical factors to take into account in designing federal arrangements.²⁷

The debate could benefit, too, from a more objective analysis of comparative federal experience. What does the experience of federalization elsewhere show us? The record is uneven, especially where an element of ethnicity is involved. In India and Spain, concessions to ethnicity have undoubtedly strengthened both national unity and the flourishing of cultural diversity. In the former Yugoslavia, ethnicity questions became the fault lines along which that federation foundered. To some extent, these issues have also posed problems in the former Soviet Union, as well as in the original Pakistan federation. Today, secessionist movements are stronger in unitary states than in those that have become federal. Indeed, federalism is often seen as a way to end secessionist claims, as in the Oslo framework for Sri Lanka, and the Sudan peace agreement. It is also possible, through varied forms of division of powers, the structuring of “shared rule”, and consultative and cooperation mechanisms, to strengthen bonds between regions to the center consensually.

Minorities need reassurance and a measure of self-government, which federalism can provide. It is equally true, however, that discrimination against minorities persists in some regions in ethnic federations, generally unconstitutionally and against federal and re-

gional laws. Both Nigeria and North East India have manifested such problems. Traditionally, minorities in regions have been protected through special powers lodged in the national government. These include a veto power on regional discriminatory legislation, a strong bill of rights that is binding throughout the federation, a proactive judiciary on cases involving discrimination, and, as indicated earlier, by giving minorities self-government powers in selected areas. Political and religious leaders can also contribute significantly to the cultivation of a national ethos.

It is also true that the costs of running a federation usually exceed those of a unitary state. But the benefits, several outlined above, usually far outweigh the costs in the long term, if not sooner. It is often pointed out that the four or five leading federations are among the most prosperous and stable states. Costs and benefits can be measured neither by financial accounts nor a “zero sum” mentality.

Designing the federation and institutional arrangements

Institutional design can avert many potential problems. Professor Ronald Watts says that “the function of federations is not to eliminate internal differences, but rather to preserve regional identities within a united framework. Their function, therefore, is not to eliminate conflict but to manage it in such a way that regional differences are accommodated”.²⁸ Institutions impact the organization and behaviour of political parties, as well as the conduct of civil servants and organized interest groups, either moderating or accentuating political conflict. Structural features, of course, vary with context, but it is perhaps possible to draw some lessons from comparative experience.²⁹

Federalism is likely to succeed where there are established traditions of democracy and the rule of law. Further, it benefits from:

Minorities need reassurance and a measure of self-government, which federalism can provide

Democratic politics in a region compel regional leaders to protect autonomy as well as empower them to do so

- ▶ an independent dispute settlement mechanism;
- ▶ proper constitutional guarantees for the federal arrangements; and
- ▶ limits on central power to intervene in regional government.

It must also be remembered that democratic structures are necessary for the exercise and protection of federalism. Democratic politics in a region compel regional leaders to protect autonomy as well as empower them to do so. At the national level, they encourage the government to abide by the constitution and seek consensus with regions. Moreover, Multi-ethnic federations have better prospects of success than those that are bi-ethnic.

All in all, the preconditions for the success of the formation and functioning of federalism can be summarized as follows:

- ▶ willingness to form the federation;
- ▶ trust;
- ▶ a strong sense of a common political community and a commitment to national unity;
- ▶ basic agreement on values;
- ▶ the rule of law;
- ▶ supremacy of the constitution;
- ▶ equitable judicial interpretation and enforcement; and
- ▶ where federations have arisen out of conflict, frequent demonstrations of understanding and the cultivation of relationships.

Sometimes federations have been structured to give greater powers to some units than to others, to recognize such factors as differences in cultures, capacities, and histories (for example, Quebec in Canada and Bougainville in Papua New Guinea). Sometimes, too, within a non-federal state a region can be given autonomy (such as the German-speaking South Tyrol in Italy).

Some of these arrangements work well. Often, though, they create resentment and a demand from other units in the federation for parity (which, in the case of Spain, has led to a fairly uniform federal structure).

Some of these factors are the product of history—about which not much can usually be done. Others are institutional, which human ingenuity can adjust to the circumstances of the country. The design of a federation involves both political and technical decisions—that are not always easy to separate. As this Report has explained earlier, the political decision to federalize has already been made. It is now the responsibility of the CA to decide what kind of a federation Nepal should have. Ultimately, the Assembly must make all decisions. But even political decisions depend on technical issues, especially as there has been little public discussion on details.

The CA might well derive great benefits from setting up an expert group to make recommendations on several critical issues in the design of the federation. These include the number and size of federal units, the number of levels of government, fiscal arrangements, the distribution of powers, and the establishment of dispute settlement mechanisms. Since components of federalization affect most aspects of the constitution—among these, the very system of government—more than one committee would have to address federal issues. An expert group could also coordinate the deliberations and decisions of the various CA committees.

It is also necessary to recognize that the implementation of a federal system will take several years. The Assembly should build into the constitution, perhaps in the form of a schedule, the different stages and goals in the development of the federation, as well as the dates

by which they must be achieved. In this way the transfer of powers from the center to the regions could be phased over, say ten years, as the regions develop the institutions and personnel they need to handle these powers. It would be necessary, at least for a period of time, to send officials now working in national ministries to the regions as they establish their own local civil service bodies. This will require organizing transfers of funds. Both public servants and political leaders will also need to learn about the mechanisms of the federation. For all these purposes, the expert group or a special commission can assist a great deal, providing both technical help and ensuring that the time table provided by the constitution or issued elsewhere is observed.

To sum up...

Although federalism can help promote political and socio-economic inclusion, strengthen the economy, and increase public participation, it will by no means solve all the problems of inclusion and social justice that this Report raises. The socioeconomic diversity of Nepal, along with its marked regional differences in resources, may call for a federalism that accords different degrees of autonomy and competences to different regions with regard to particular issues. Such is the case in both Italy and Spain. This may require a strong centre. Moreover, it will be necessary to supplement federalism with specific devices, many discussed in this chapter,

which the new constitution should feature. Ample provision for them already exists in the Interim Constitution. These supplementary mechanisms have to be primarily the responsibility of the central government—and they must be formulated as national policies, although their implementation will increasingly require consultation with the regional governments.

A federation is not a neutral constitutional device. There are different kinds of federations. The adoption of one or another type will have a major impact on how Nepal develops and how its people relate to their region and to the centre. It will also affect relations between communities and thereby the identities of Nepalis.

While most countries like to call themselves democracies and many say that they have federal structure for promoting inclusion and participation, the very principles of democracy are defeated unless human development is actively fostered. Moreover, democracy goes well beyond government structures. It also involves the democratization of the private sector and of civil society.

The ultimate need is both a democratic state and a democratic society. Unless society eliminates its exclusionary practices, state transformation can do little to help individuals feel free to develop and use their capabilities to the fullest extent possible.

Although federalism can help promote political and socio-economic inclusion and increase public participation, it will by no means solve all the problems of inclusion and social justice

