Challenges in the Nepalese Constitutional Process: Federalism, Ethnicity and Representation

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Abstract: This paper addresses the adequacy of ethnic federalism in Nepal, and the implications of such a structure for minority protection and representation. After the end of the civil war and the approval of an Interim Constitution in 2007, popular movements led to the adoption of a provision establishing federalism. Since numerous ethnic groups coexist in the country, one of the proposals for the new system is federalism based on ethnicity.

I first consider the role of ethnic groups in Nepal from a historical perspective, to examine the degree to which minorities have been represented in previous regimes. In addition, I study the social composition of Nepal to understand the meaning of "ethnic group" in the present constitutional process. Finally, I take a comparative approach to determine whether the experiences of India, Sri Lanka and Ethiopia are useful in order to frame the new Nepalese system.

Due to the difficulty of defining ethnic groups, and the risk of conflict in an ethnic federal system, I argue that territorial ethnic federalism is not an appropriate model for Nepal, and other inclusive structures focusing on personal federalism should be considered in order to achieve the integration of disenfranchised ethnic groups. In this line, the precedents of the Millet system in the Ottoman Empire and the Belgian communities provide useful guidance on how to frame a federal system in Nepal with a strong personal component.

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A. Introduction

Since the end of the civil war in 2006 Nepal is immersed in a transitional process. The former Maoist fighters are being integrated in the political process, and the political actors have ended the previous monarchical regime, established a republic, and approved an Inter-

im Constitution that outlines the pathway of the constitutional process.[2] However, many broad provisions of the Interim Constitution remain without implementation because the constituent assembly has not adopted a definite constitution since the enactment of the Interim Constitution in 2007.[3] Among the most contentious issues in the constitutional process is how to implement article 138 (1) of the Interim Constitution, which states that Nepal shall be a federal state with a vertical separation of powers between a national government and smaller autonomous political units. Specific matters such as the demarcation of federal units, the role of ethnic groups in the political system, and the strategy for implementing the federal system remain to be determined.[4] There is substantial debate about how a federal system in Nepal would look like, with disagreement among political parties about the relevance of elements such as the geography, economic structure and ethnic and social composition of the State.[5]

An important proposal is that of establishing a federation where the states will be demarcated based on the territorial distribution of ethnic groups, drawing the boundaries based on the majority groups that populate each area. In the present essay I examine the suitability of an ethnic federal system for Nepal, and the implications of such a structure in securing minority protection and representation. There are those who advocate for an ethnic federal model, which has become prominent because of the Maoists, and avow that the goal of inclusion would be better served through a division of the territory following the distri-

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2 *Krishna Hacchethu,* The Second Transformation of Nepali Political Parties, in: Lok Raj Baral (ed.), Nepal: New Frontiers of Restructuring of State, New Delhi 2008, p. 125-35; *Elisabeth Wickeri*, No Justice, No Peace: Conflict, Socio-Economic Rights, and the New Constitution in Nepal, Drexel Law Review 2 (2010), p. 427-31.

3 Several factors have hindered the achievement of consensus on a constitutional text. The Constituent Assembly was unable to promulgate a constitution within the intended time frame, which led to subsequent extensions and eventually to the dissolution of the Assembly in May 2012, when the Supreme Court declared a further postponement unconstitutional. After some delays, the elections to constitute a second assembly finally took place on November 19, 2013. The divided Nepalese political spectrum, alongside with the ongoing transition after a decade of civil conflict, complicate the task of rebuilding the state and establishing a democratic system; *Bhadra Sharma / Pranab Kharel*, Amid 'quit' calls, government declares new April-May polls, http://www.ekantipur. com/the-kathmandu-post/2012/11/20/top-story/amid-quit-calls-government-declares-new-april-may -polls/241904.html (last accessed on 25 September 2014); BBC, Nepal voting ends for new Constituent Assembly, http://www.bbc.co.uk/news/world-asia-24987573 (last accessed on 25 September 2014); *Gardiner Harris*, Voter Turnout in Nepal Is Heavy Despite Violence, http://www.nytime s.com/2013/11/20/world/asia/nepal-holds-vote-amid-scattered-violence.html?_r=0 (last accessed on 25 September 2014); *George R. M. Anderson,* Towards a Suitable Framework for Nepal, in: Bipin Adhikari (ed.), Nepal: Design Options for the New Constitution, Kathmandu 2010, p. 134-35.

4 *Anderson,* note 2, p. 134; see generally UNDP Nepal / Constitution Advisory Support Unit / German Technical Cooperation, Designing the Federal State in Nepal: Report of a Conference, Dhulikhel 2008.

5 See generally UNDP Nepal et al, note 3; *Anderson,* note 2, p. 134; *Wickeri*, note 1, p. 427-31, 479.

bution of ethnic groups.[6] On the other hand, there are those who defend a project where federalism would be informed by the territorial location of ethnic groups as one of the relevant factors, but other considerations, such as economic and geographic elements, would be equally significant.[7] I will compare the experiences of India, Sri Lanka and Ethiopia with the Nepalese process to establish the extent to which they can provide some conclusions applicable to the situation of Nepal. As a result, I argue that due to the complex social composition of the country, and bearing in mind that the correlation between ethnic identity and representation depends heavily on the definition of ethnicity that is established in the constitution, an ethnic federation could trigger problems of ethnic inequality, discrimination and inclusion, thus making it an inadequate model for Nepal. Rather, the goal of decentralization would be best served with a federal system where non-territorial components play an important role, so that tensions over geographical divisions are eased and the demand for autonomy of ethnic communities is satisfied. In a federal system with non-territorial elements, the legislation in matters of competence of the ethnic groups would apply to the members of each group rather than to the residents of a territory and would be separately administered on a group basis.[8]

B. Social structure of Nepal

In order to understand the background to the proposal for ethnic federalism, it is necessary to provide a brief introduction to the social structure in Nepal, as a comprehensive discussion of this complex topic is beyond the scope of this paper. Historically, we find a recurrent tension between centralization and demands for inclusion of minorities in Nepal.[9] A caste system has been in place since the early monarchical dynasties established a unified national regime, and the state has remained almost impervious to ethnic claims. In recent times, the push for recognition of ethnic identity in the political system has unraveled as a consequence of this historical process, and particularly, of the Maoist Party's[10] demand for

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6 *Lok Raj Baral,* Nepal: The Restructuring of a 'Neo-Patrimonial' State, in: Lok Raj Baral (ed.), Nepal: New Frontiers of Restructuring of State, New Delhi 2008, p. 23-25; *Prayag Raj Sharma,* Restructuring the State in South Asia: Some Impressions and Ideas, in: Lok Raj Baral (ed.), Nepal: New Frontiers of Restructuring of State, New Delhi 2008, p. 148-51; *Abhi Subedi,* Restructuring Organizations About Art and Literature, in: Lok Raj Baral (ed.), Nepal: New Frontiers of Restructuring of State, New Delhi 2008, p. 48.

7 UNDP Nepal, note 3, p. 7; *Anderson,* note 2, p. 134-35.

8 *Maarten Theo Jans*, Personal Federalism: a Solution to Ethno-National Conflicts? What it Has Meant in Brussels and What it Could Mean in Abkhazia, in: Bruno Coppieters, David Darchiashvili and Natella Akaba (eds), Federal Practice: Exploring Alternatives for Georgia and Abkhazia, Brussels 1999, p. 219-220.

9 For a more detailed account of the historical treatment of ethnic groups see e.g. *Isabelle Duquesne,* Nepal, Zone of Peace: A Revised Concept for the Constitution, Paris 2011.

10 The organization of the communist factions in Nepal has been in constant change. The reference to the Maoists in this paper refers to the Communist Party of Nepal as a unified front during the civil conflict and to its successor the Unified Communist Party of Nepal (UCPN) after the split of CPN-

representation of deprived groups through ethnic federalism. The Maoists had precisely en-
listed many fighters who were members of these underprivileged groups.[11] After the
Nepalese civil conflict, ethnicity has started playing a very important role in politics, to the
extent that a strong proposal for the future federal system is ethnic federalism. In this politi-
cal context, it must be noted that Nepal's social panorama is highly complex, with overlap-
ping identities such as ethnicity, language groups, religion, and castes.[12] Therefore, the use
of the concept of "ethnic group" for constitutional purposes is problematic.

It should be noted that there is a strong ethnic consciousness among the Nepalese, al-
though the extent of ethnic identity and political mobilization varies across groups.[13] The

Maoist. However, talks about unification of these two Maoist parties have been underway. It must
be noted that there are also other communist parties in the country, importantly, the Communist
Party of Nepal – Unified Marxist Leninist (CPN-UML); *Kamal Dev Bhattarai*, Nepal's Two
Maoists Parties in Unification Bid, http://thediplomat.com/2014/03/nepals-two-maoists-parties-in-
unification-bid/ (last accessed on 10 February 2014).

11 Centre for Policy Alternatives, Devolution in the Eastern Province: Implementation of the Thir-
teenth Amendment and Public Perceptions, 2008-2010, Colombo 2010, p. 8-9, 11, 13.

12 According to Nepal's 2011 census, the biggest groups are the Chhetri with 15.80% of the popula-
tion, followed by the Brahmins with 12.74%. Other groups, such as Tharu, Tamang, Newar and
Muslims each constitute around 5% of the total population, and there are numerous smaller groups
with little over 1% of the population. The language panorama is also interesting. The 2001 census
pointed to the existence of 92 languages. Nepali, the long-standing official language, is spoken by
47.8% of the population. Maithili and Bhojpuri are next, and the rest of the languages of Nepal
have around 5% or less speakers. Besides, in some other instances there is no direct association
between an ethnic group and a language group, as in the case of Chhetris and Brahmins, who do
not speak a common language among themselves.

A third difficulty is the binomial of religion and ethnicity. As the Nepalese census shows, Muslims
are considered an ethnic group, whereas Hinduism, Buddhism and Kirant religion are not classi-
fied as ethnicities. In the case of the Newar ethnic group, it comprises both Hindu and Buddhist
members. Again the categories become blurred.

The cast system is the final important factor. The entrenchment of this social structure has led to it
being an important part of identity, a factor that may hinder the disappearance of caste distinctions.
Further, levels of the caste system are identified as ethnic groups, such as in the case of Brahmin
and Chhetri castes. Nepal in Figures 2011, United Nations Development Program Nepal, http://ww
w.np.undp.org/content/dam/nepal/docs/generic/UNDP_NP_Nepal%20In%20Figures%202011%20
source%20cbs-gov-np.pdf (last accessed on 10 February 2015); Central Bureau of Statistics Gov-
ernment of Nepal, Nepal – National Population Census 2001, http://cbs.gov.np/nada/index.php/cat
alog/42 (last accessed on 10 February 2015); *Joanna Pfaff-Czarnecka*, Vestiges and Visions: Cul-
tural Change in the Process of Nation-Building in Nepal, in: David Gellner et al. (eds.), National-
ism and Ethnicity in a Hindu Kingdom: The Politics of Culture in Contemporary Nepal, Amster-
dam 1997, p. 462-63; *Hari Kishore Singh*, The Political Impasse in Nepal: Implications for India
and South Asia, in: D.P. Tripathi (ed.), Nepal in Transition: The Way Forward, New Delhi 2012,
p. 147-49; Central Intelligence Agency, The World Factbook - Nepal, https://www.cia.gov/library/
publications/the-world-factbook/geos/np.html (last accessed on 22 July 2014).

13 *John Whelpton*, Political Identity in Nepal: State, Nation, and Community, in: David Gellner et al.
(eds.), Nationalism and Ethnicity in a Hindu Kingdom: The Politics of Culture in Contemporary
Nepal, Amsterdam 1997, p. 51.

distinct ethnic groups in Nepal have different origins and histories that explain the attitude of group members towards ethnicity and the Nepalese state.[14] Whereas some groups focus on their indigenous character, others highlight their caste, language group membership, or race; and yet others do not strongly emphasize ethnicity. Consequently, a constitutional system that relies heavily on ethnic divisions to ensure inclusiveness and representation should understand what ethnicity means for the diverse groups, instead of trusting exogenous definitions that may conceal ethnic feelings.[15] It is doubtful whether the constitution should embrace a definition of ethnicity due to the difficulty of the task and the necessary asymmetry of such a system. Perhaps a cautious solution that would acknowledge the importance of ethnic identity in the Nepalese political context, while avoiding simplistic conceptions of ethnicity, would be a flexible and progressive federalization process with a mechanism to recognize communities overtime, in order to avoid the reification of the conception of ethnicity in the constitution.

C. Comparative perspectives

I. India

India and Nepal share many attributes. Both countries have a complex set of social groups, differentiated in terms of language, religion, caste and ethnicity.[16] Since these countries are quite similar in their history and social composition, it is helpful to analyze whether the federal solution adopted in India could be successful to address the issues of minority representation raised in the Nepalese constitutional process.

For most part of its history, different groups in multicultural India had been largely independent, but came under a single rule with the British occupation.[17] As a consequence of the newly centralized colonial administration, ethnic awareness increased.[18] In the struggle

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14 See generally David Gellner et al. (eds.), Nationalism and Ethnicity in a Hindu Kingdom: The Politics of Culture in Contemporary Nepal, Amsterdam 1997.

15 *Whelpton,* note 12, p. 52.

16 *Harihar Bhattacharyya*, Federalism and Competing Nations in India, in: Michael Burgess / John Pinder (eds.), Multinational Federations, New York 2007, p. 58-61; *Duquesne,* note 8, p. 97; *A.S. Narang,* Ethnic Identities and Federalism, Shimla 1995, p. 134-36; compare Central Intelligence Agency, The World Factbook - India, https://www.cia.gov/library/publications/the-world-factbook/geos/in.html (last accessed on 22 July 2014); with United Nations Development Program in Nepal, Nepal in Figures 2011, http://www.np.undp.org/content/dam/nepal/docs/generic/UNDP_NP_Nepal%20In%20Figures%202011%20source%20cbs-gov-np.pdf (last accessed on 22 July 2014).

17 *Rajeev Bhargava*, The Evolution & Distinctiveness of India's Linguistic Federation, in: Graham Smith (ed.), Federalism: The Multiethnic Challenge, New York 2006, p. 93-95; *George Mathew*, India: Unity in Diversity through an Evolving Federalism, in: Ferran Requejo / Miquel Caminal (eds.), Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases, New York 2012, p. 209.

18 *Narang,* note 15, p. 133-34.

to bring about the end of the British rule, the diverse social groups of the country united under an Indian nationalism based on the common interest of independence, even if the distinctness of the ethnic groups remained present. Hence, after independence and partition, India was facing the need to balance the autonomy demands from ethno-linguistic groups and the necessity to maintain unity.[19] In this context, the country opted for a federal system composed by states defined on a linguistic basis, and fundamental rights against discrimination and reservations for scheduled castes and tribes in government and educational institutions have been established to address the demands of the deprived sectors of society.[20]

The constitutional recognition of minority and language rights is a triumph for India, but the implementation has not been wholly satisfactory.[21] In the case of affirmative action for deprived groups, there is still domination of local politics by elites despite the achievement of political representation through reservations and other measures, and economic and social marginalization is still a key issue.[22] Furthermore, linguistic affiliation is an important indicator of ethnic identity,[23] but a federal model based on this factor has not gone without criticism. Minorities in India felt that in such system they could face discrimination by the regional majorities.[24] Given these shortcomings, statehood movements have been taking place among groups unsatisfied with the configuration of the federation, and several new states have been created in recent years.[25]

As George Mathew stresses, "[n]o matter how successful the polity is in reorganising states on an ethno-linguistic basis, the fact remains that what is mainly achieved by such reorganisation is merely a simplification of the multicultural reality."[26] It is highly unlikely that territorial restructuring in a federation achieves a division that will satisfy the wishes of all minority groups in a country with an ethnic diversity like India's, and some minorities

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19 *Bhattacharyya,* note 15, p. 57; *Mathew,* note 16, p. 210; *Narang,* note 15, p. 134.

20 *Mohammad Ashraf*, Dr. Ambedkar and His Concept of Social Justice, in: Nazeer H. Khan (ed.), B. R. Ambedkar on Federalism, Ethnicity and Gender Justice, New Delhi 2001, p. 158; *Bhargava,* note 16, p. 96-99, 101-03; *Bhattacharyya,* note 15, p. 61-62; *Stuart Corbridge,* Federalism, Hindu Nationalism and Mythologies of Governance in Modern India, in: Graham Smith (ed.), Federalism: The Multiethnic Challenge, New York 1995, p. 106; *Mathew,* note 16, p. 221-22; *Narang,* note 15, p. 143-47.

21 *Bhargava,* note 16, p. 102-03.

22 *Ashraf,* note 19, p. 158-61; *Anand Inbanathan*, Affirmative Action and Dalits: Political Representation in Panchayats, Institute for Social and Economic Change, Working Paper No. 138, 2003 (2003), p. 18-23.

23 *Narang,* note 15, p. 6.

24 *Bhargava,* note 16, p. 103; *Narang,* note 15, p. 144-45.

25 See generally *Balveer Arora*, Republic of India, in: Luis Moreno / Cesar Colino (eds.), Diversity and Unity in Federal Countries, Montreal & Kingston 2010, p. 200-226; *Emma Mawdsley,* Redrawing the Body Politic: Federalism, Regionalism and the Creation of New States in India, Journal of Commonwealth and Comparative Politics, 40 (2002).

26 *Mathew,* note 16, p. 222.

will remain under the rule of others in a federation territorially organized based on the ethnic make-up.

Whereas in India communities advocated for autonomy for linguistically defined regions,[27] in Nepal we observe a lack of correlation between language groups and other ethnic indicators. As the Nepalese census shows, almost half of the population speaks Nepali as first language, whereas there is no identified "Nepali" ethnic group,[28] and ethnic groups such as the Newar are in turn divided in terms of language.[29] This social composition seems to indicate that language is not the most powerful ethnic factor in the Nepalese context, and the territorial division based solely on linguistic criteria would not be adequate for Nepal. On the other hand, the Indian model of affirmative action could be a step forward for Nepal, since traditional low-caste groups have acquired a strong presence in the political process. Still, such measures will have to be implemented beyond the mere establishment of constitutional provisions, and it would be important to consider how traditionally dominant groups would react, to avoid discord between those favored by a quota system and those not included. On the other hand, since economic status does not necessarily follow the ethnic or caste lines, affirmative action might not end discrimination,[30] and corrective measures may be necessary. In this line, it is worth noting the Indian approach of considering economic status as well, whereby the more well off members of a group, the "creamy layer", could be excluded from a policy aiming to end discrimination.[31] In sum, India has traditionally been a model for Nepal, and the similarities in terms of social composition make the Indian system a useful precedent, but the aforementioned differences and problems in the Indian context should be considered in both the drafting and implementation stages.

II. Sri Lanka

Nepal and Sri Lanka share common issues that have been tackled differently, such as the development of a civil conflict, the multiple attempts to decentralize, the effect of the social composition in the political process and the implications of constitutional recognition of a

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27 *Bhargava,* note 16, p. 100.

28 United Nations Development Program in Nepal, Nepal in Figures 2011, http://www.np.undp.org/content/dam/nepal/docs/generic/UNDP_NP_Nepal%20In%20Figures%202011%20source%20cbs-gov-np.pdf (last accessed on 22 July 2014).

29 The Nepalese census shows the mismatch between the percentage of Newar ethnic population 5.48% and Newar language speakers 3.63%; United Nations Development Program in Nepal, Nepal in Figures 2011, http://www.np.undp.org/content/dam/nepal/docs/generic/UNDP_NP_Nepal%20In%20Figures%202011%20source%20cbs-gov-np.pdf (last accessed on 22 July 2014).

30 *Whelpton,* note 12, p. 66-67.

31 *Vikraman Nair*, The Search for Equality through Constitutional Process: The Indian Experience, Acta Juridica 2001 (2001), p. 256; *Mark Tushnet*, Interpreting Constitutions Comparatively: Some Cautionary Notes, with Reference to Affirmative Action, Connecticut Law Review 36 (2004), p. 655-666.

state religion. The study of Sri Lanka's present situation can contribute to understand how the constitutional projects in Nepal might unfold.

Like Nepal, Sri Lanka faces a transitional process in the aftermath of a civil war. However, these two conflicts have developed in different directions. In the case of Sri Lanka, ethnic polarization began after independence from British rule, when the 1972 and 1978 Constitutions established a centralized regime that failed to address the particular situation of the Tamil minority of the North-East of the island.[32] The domination of the Sinhalese majority in the public sphere prompted demands for self-determination among the Tamils, and eventually, an armed insurrection led by the Liberation Tigers of Tamil Eelam (LTTE).[33] The coexistence of ethnic groups hence became politically problematic as the minority Tamil group perceived that it was being excluded in a unitary system.

As for Nepal, the rise of the Maoists began as a mainly political movement against the 1990 Constitution, and subsequently acquired an ethnic dimension when the Maoist party recruited soldiers among deprived social groups, including demands against ethnic discrimination in their class struggle program.[34] The Maoist agenda purported to encompass a variety of traditionally disadvantaged groups as the conflict progressed. Moreover, they stimulated the rise of other parties advocating a new, more inclusive system.[35]

The difference lies in the relation between ethnic awareness and standpoint in the political process. In Sri Lanka, the communities became progressively antagonized in political terms; whereas in Nepal the political demands of the traditionally non-ethnic Maoist party utilized the ethnic language to attract supporters from the rural areas. Despite this difference, in both countries the civil conflict has brought to the forefront issues of representation and autonomy that are to be addressed at the constitutional level.

In the midst of the civil conflict in Sri Lanka, the Constitution was amended. The Thirteenth Amendment to the Constitution, passed in 1987, devolves powers to the provinces in

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32 *Asanga Welikala*, The Devolution Project in Sri Lanka: Towards Two Nations in One State?, in: Rohan Edrisinha / Asanga Welikala (eds.), Essays on Federalism in Sri Lanka, Colombo 2008, p. 67; *Rohan Edrisinha*, Conflict and Constitutional Process: Some Sri Lankan Experiences, in: Hari P. Bhattarai / Jhalak Subedi (eds.), Democratic Constitution Making: Experiences from Nepal, Kenya, South Africa and Sri Lanka, Kathmandu 2007, p. 133.

33 *Welikala,* note 31, p. 75-76; International Crisis Group, Reconciliation in Sri Lanka: Harder than Ever, http://www.crisisgroup.org/~/media/Files/asia/south-asia/sri-lanka/209%20Reconciliation%20in%20Sri%20Lanka%20-%20Harder%20than%20Ever.pdf (last visited 25 September 2014); Centre for Policy Alternatives*, note 10, p. 12; *Edrisinha,* note 31, p. 134.

34 Centre for Policy Alternatives, note 10, p. 8-9, 11, 13.

35 *Markus Heiniger,* Federalism as a Means of Conflict Mitigation in Peace Process, in: Bipin Adhikari (ed.), Nepal: Design Options for the New Constitution, Kathmandu 2010, p. 197-98; *Krishna P. Khanal,* Re-structuring the Nepali State, in: Lok Raj Baral (ed.), Nepal: Quest for Participatory Democracy, New Delhi 2006, p. 233; *Mahendra Lawoti*, Constitution as Sources of Exclusion: An Overview of the 1990 Constitution, in: Hari P. Bhattarai / Jhalak Subedi (eds.), Democratic Constitution Making: Experiences from Nepal, Kenya, South Africa and Sri Lanka, Kathmandu 2007, p. 43; *Sharma,* note 5, p. 148-49.

the context of the unitary state.[36] This reform ceded some legislative competences to the provinces, decentralized the administration of judicial power and established an executive per province, composed of the chief minister, the board of ministers and the governor.[37] Even if this modification of the Constitution can be seen as an appropriate compromise between the autonomist position of the Tamils and the unitary perspective of the Sinhalese, the Thirteenth Amendment has not fully satisfied the interests of either party. The constitutionality of this amendment was challenged and subsequently upheld by the Supreme Court.[38] The current system, as amended, has been criticized because provincial legislation is hierarchically inferior to the laws of the central government, and the Governor can participate in the provincial legislative process by approving the laws.[39] Moreover, the Thirteenth Amendment has not been fully implemented.[40] These criticisms show that the most important step in the process of decentralization has not been able to address the concerns for representation and autonomy of the Tamils. There have been subsequent proposals after the Thirteenth Amendment, but the Sinhalese have opposed them as being efforts to fracture the country.[41] At the moment, in light of the divergent opinions about devolution, the debate about a federal system for Sri Lanka has also revived.[42] Federalism was contemplated for a while after the Oslo declaration in 2003, when both the LTTE and the government considered it a feasible solution, but this compromise soon faded.[43] Given that the parties do not agree on a centralized system with devolved competences, which the Sinhalese see as a threat to unity, it seems difficult to envisage the adoption of federalism.[44]

The social structure and territorial distribution of ethnic groups are key factors in the design of a decentralized or federal system. In the Sri Lankan case, the majority is Sinhalese, and there are Tamil, Muslim and Burgher minorities.[45] The Sri Lankan society is split around the disagreements between the Sinhalese and the Tamil, and this bipolar situation has the potential effect of triggering conflict. Some authors have pointed to the insta-

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36 Centre for Policy Alternatives, note 10, p. 8-9, 11, 13; *Welikala,* note 31, p. 78.

37 Centre for Policy Alternatives, note 10, p. 45-64; *Welikala,* note 31, p. 79-81.

38 The constitutional issue was whether the 13th amendment threatened the unitary character of the state as enshrined in article 2 of the Constitution; Centre for Policy Alternatives, note 10, p. 15-20.

39 Centre for Policy Alternatives, note 10, p. 43.

40 *Rohan Edrisinha*, Federalism: Myths and Realities, in: Rohan Edrisinha / Asanga Welikala (eds.), Essays on Federalism in Sri Lanka, Colombo 2008, p. 86, 93; Centre for Policy Alternatives, note 10, p. 9, 76.

41 *Rohan Edrisinha*, Meeting Tamil Aspirations within a United Lanka: Constitutional Options, in: Rohan Edrisinha / Asanga Welikala (eds.), Essays on Federalism in Sri Lanka, Colombo 2008, p. 112-23; *Edrisinha,* note 31, p. 133.

42 *Edrisinha,* note 39.

43 Id., at 328-29.

44 Id., at 106.

45 Centre for Policy Alternatives, note 10, p. 13; Central Intelligence Agency, The World Factbook – Sri Lanka, https://www.cia.gov/library/publications/the-world-factbook/geos/ce.html (last accessed on 22 July 2014).

bility of federal regimes where only two states coexist.[46] As opposed to Sri Lanka, in Nepal there are a great number of ethnic groups, which could explain the historical low level of ethnic conflict because there is no evident opposition of one group against another.[47]

As for the territorial distribution, in Sri Lanka the Tamil minority is concentrated in the north and east of the island, which facilitates the establishment of one or more Tamil territorial units in that area.[48] Despite this neat distribution of the Tamil population, the Muslim minority also populates primarily that territory, which raises the issue of how a minority would be treated in a territory where Tamils are the majority.[49] In Nepal, the issue of minorities within minorities is even more pressing, since ethnic groups are not uniformly distributed in the territory, and the demarcation of constituent units is thus one of the contentious issues in the Nepalese constitutional process.[50]

The Sri Lankan experience shows how difficult it is to devolve powers in a traditionally centralized state where the ethnic majority fears that devolution will lead to disunity. The strong ethnic element in current Nepalese politics is crucial in order to design a new regime that will have public acceptance across social groups. Moreover, political authorities have not fully committed to the decentralization process in Sri Lanka,[51] and this fact should be born in mind from a comparative perspective, since Nepalese politicians are precisely criticized for their apathy in the constitution drafting process.[52]

III. Ethiopia

The Federal Democratic Republic of Ethiopia is a federation based on ethnicity.[53] An authoritarian government ruled the country before, and imposed the culture of one of the co-

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46 *Patrick Peeters*, Multinational Federations: Reflections on the Belgian Federal State, in: Michael Burgess / John Pinder (eds.), Multinational Federations, New York 2007, p. 37.

47 *Hari P. Bhattarai*, Making an Inclusive Constitution in a Plural State: Issues of Identity and Representation, in: Hari P. Bhattarai / Jhalak Subedi (eds.), Democratic Constitution Making: Experiences from Nepal, Kenya, South Africa and Sri Lanka, Kathmandu 2007, p. 55.

48 Centre for Policy Alternatives, note 10, p. 14.

49 *Edrisinha,* note 31, p. 135.

50 *Anderson,* note 2, p. 137; *Subedi,* note 5, p. 50; *Surya P. Subedi,* Constitutional Accommodation of Ethnicity and National Identity in Nepal, International Journal on Minority and Group Rights 6 (1998 - 1999), p. 121.

51 Centre for Policy Alternatives, note 10, p. 74-75.

52 *Lok Raj Baral,* Participatory Democracy: Concept and Context, in: Lok Raj Baral (ed.), Nepal: Quest for Participatory Democracy, New Delhi 2006, p. 12, 21; *Sharma,* note 5, p. 149.

53 *Christophe Van der Bekken*, Ethiopian Constitutions and the Accommodation of Ethnic Diversity: The Limits of the Territorial Approach, in: Tsegaye Regassa (ed.), Issues of Federalism in Ethiopia: Towards an Inventory, Ethiopian Constitutional Law Series Vol. 2, Addis Ababa 2009, p. 251.

existing ethnic groups, the Amhara.[54] Ethnic and class-based opposition to the regime increased in the 1960s,[55] and the armed group called Derg seized power and introduced a government with a Marxist-Leninist ideology focused on ending class inequality that acknowledged the multinational composition of Ethiopia.[56] Despite this recognition, the ethnic question resurfaced again and was championed by the Ethiopian People's Revolutionary Democratic Front (EPRDF) to criticize the Derg regime.[57] Ultimately, this vision led to the current ethnic federation, where the majority party, the EPRDF, understands ethnicity as an instrument to achieve unity in the state.[58] This new regime, established in 1991, is based on the right to self-determination of ethnic groups, and translates into a territorial division of the country that follows ethnic groups' distribution, in such a way that a majority group populates each unit.[59] The right to self-determination, which also includes the possibility of secession, is enshrined in article 39 of the Constitution of Ethiopia.[60] Still, there are sectors of the population that do not identify themselves with a specific group, since there have been migrations and intermarriages that complicate the picture of a clearly territorially and ethnically divided country. Besides, there are internal divisions within ethnic groups that according to some authors have not been given adequate consideration.[61] Despite these shortcomings, Christophe Van der Bekken argues that federalism in Ethiopia is truly ethnic, even if not one single group populates one state, insofar as all ethnic groups are located in a particular region, and because ethnic groups have the right to self-determination and secession to establish their own states.[62]

Initially, the main party, EPRDF, utilized ethnic politics to foster the unity of the state, but it subsequently abandoned this strategy of promoting ethnic self-determination and

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54 *Lovise Aalen,* The Politics of Ethnicity in Ethiopia: Actors, Power and Mobilisation under Ethnic Federalism, Leiden 2011, p. 4; *Van der Bekken,* note 52, p. 234-38.

55 *Aalen*, note 53, p. 27-31; *Van der Bekken,* note 52, p. 234-38.

56 *Aalen*, note 53, p. 30-32; *Van der Bekken,* note 52, p. 239.

57 *Aalen*, note 53, p. 32-36; *Van der Bekken,* note 52, p. 239-44.

58 *Aalen*, note 53, p. 37; *Van der Bekken,* note 52, p. 243-44.

59 *Aalen*, note 53, p. 5, 41; *Van der Bekken,* note 52 p. 217-20, 244-48, 259-62.

60 Article 39 details the process through which this right can materialize. The concerned nation will have to approve the request for self-determination within a state, or the demand of secession, through a two-thirds majority in its legislative council. Subsequently, that demand must be presented before the government of the federation, which will have to organize a referendum in which a majority in favor of self-determination must be obtained. Article 47 of the Constitution lists the states of the federation and establishes that "nations, nationalities and peoples" that exist in the listed states can become states as well, following the procedure laid out in this provision. The process is similar to that of self-determination, but the demand for the creation of the state must be presented before the State Council. Constitution of the Federal Democratic Republic of Ethiopia (1994), arts. 39, 47.

61 *Aalen*, note 53, p. 42, 127, 144.

62 *Van der Bekken,* note 52, p. 248-51, 267, 269.

shifted focus towards a separation of ethnic identity and administration.[63] It is important to highlight that even if ethnicity has been instrumental to political goals, it also confers identity to the members of the group. It shapes the way in which groups see themselves in relation to others and how they phrase their political claims.[64] Consequently, conflict has increased with the changed policy of the EPRDF,[65] because ethnicity plays an important role in providing identity and a sense of belonging, besides its instrumental use in politics. The uptake of ethnic language in the political and legal sphere can therefore have powerful consequences on group identity that should not be disregarded. As a result, in Ethiopia the establishment of an ethnic federation has recast the interpretation of political issues in ethnic terms and spurred the self-identification of groups as ethnicities.[66] In this line, there have been some new conflicts since the establishment of the new federal regime, but these conflicts may be characterized as "ethnic" because identity has become the key identifier in Ethiopian politics, rather than because the problematic issues are ethnic per se.[67] To have the right to self-determination groups have to be ethnic, so Lovise Aalen finds that there is an increased appeal to recognition as an ethnic group in order to achieve such right.[68] Aalen points out that the stress on ethnicity, and on specific aspects of it such as language, territory and culture, limit the flexibility of ethnic identity and downplay those other identities that are not ethnic according to the constitutional definition.[69]

Proposals for ethnic federalism in Nepal should consider the precedent of Ethiopia, notwithstanding the differences in context between these countries, because of the unique constitutional configuration in Ethiopia, based on ethnicity. If Nepal intends to adopt such a model, it will be useful to assess how it has worked in practice elsewhere. A federation based on ethnicity can appear as the best solution for a multiethnic country, but can also reduce the traditional flexibility in intergroup relations, since the adoption of a legal definition of ethnic group will reify the understanding of ethnicity and rephrase group interactions in ethnic terms.

D. The question of ethnic federalism

Article 138 (1) of the Interim Constitution, which determines that Nepal will be a federation,[70] indicates a drastic rupture with previous political systems, since Nepal has traditionally been a centralized country. There have been multiple intents to devolve power to the

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63 *Aalen*, note 53, p. 99, 106-07, 181.
64 Id., at 16, 107, 187-88.
65 Id., at 107.
66 Id., at 39.
67 Id., at 6, 180, 183, 187.
68 Id., at 39-40.
69 *Aalen*, note 53, p. 40-41, 85, 179.
70 The Interim Constitution of the Federal Democratic Republic of Nepal 2063 (2007), art. 138 (1).

districts and empower local units, but the intention has never gone as far as to establish federalism. In the current constitutional process, there is substantial debate about what shape federalism will take in Nepal once adopted in the final constitution. Different understandings of the 1990 democratic experience explain the diverging proposals.[71]

I. Arguments in favor of ethnic federalism

At the moment, there is wide support for ethnic federalism in Nepal. This model,[72] put forward by the Maoists (UCPN), has attracted the attention of other political parties whose main goal is to advance the deprived groups of society.[73] For defenders of ethnic federalism, this is the system in which traditionally underrepresented minorities can have a meaningful chance to intervene in politics.[74] The ethnic groups that populate Nepal are linked with the early history of the country, and thus some authors argue that they enshrine the identity of the country.[75]

In the period preceding the Maoist insurrection, the 1990 Constitution meant a step forward, insofar as it recognized, among others, the right to freedom, equality, religion, culture and education.[76] The right to equality included the prohibition of discrimination based on "religion, race, sex, caste, tribe, or ideological conviction or any of these."[77] As for cultural rights, article 18 established that all Nepalese had the right to promote their language and receive primary education in their mother tongue.[78] This constitution represented a modernizing and democratizing effort that allowed for participation of all social groups,[79] as opposed to the *Panchayat* Constitution of 1962, where state powers were concentrated in the hands of the king the formation of political parties was prohibited. Nevertheless, many sectors of society evaluate this experience negatively because it did not end *de facto* discrimination in the country.[80] Looking at the statistics, the majority of members in parliament and other institutions belong to the upper castes, which backs the argument for a fundamental

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71 *Heiniger,* note 34, p. 197.

72 The Support to Participatory Constitution Building in Nepal project has published comprehensive reports on how each of the provinces (fourteen under this proposal) in a federation based on ethnic lines would look like. Support to Participatory Constitution Building in Nepal, Publications, http://www.ccd.org.np/index.php?action=publication.

73 *Baral,* note 5, p. 23-25; *Sharma,* note 5, p. 148-51; *Subedi,* note 5, p. 48.

74 *Amresh Kumar Singh,* Restructuring of Nepali State: A Madhesi Perspective, Lalitpur 2004, p. 23-24; *Sharma,* note 5, p. 151.

75 *Subedi,* note 5, p. 51.

76 The Constitution of the Kingdom of Nepal 2047 (1990), arts. 11, 12, 18, 19.

77 The Constitution of the Kingdom of Nepal 2047 (1990), art. 11 (3).

78 The Constitution of the Kingdom of Nepal 2047 (1990), art. 18.

79 *Tulsi Ram Pandey,* Social Change and Political Participation, in: Lok Raj Baral (ed.), Nepal: Quest for Participatory Democracy, New Delhi 2006, p. 99-100.

80 *Baral,* note 51, p. 23; see generally *Lawoti,* note 34.

change in the conception of the state.[81] In this line, they argue that the reform subsequent to the first *Jana Andolan* (People's Movement) in 1990 did not significantly change the operation of the political system.[82]

Furthermore, symbolic elements included in the 1990 Constitution can be interpreted as upholding entrenched social inequalities. The preliminary part of this text, comprising articles one to seven, outlines the definition of the Nepali nation and its symbols. On the one hand, the document recognizes the ethnic composition of the country and the equality of all groups as part of the nation.[83] On the other hand, Nepal is defined as a Hindu nation,[84] and the cow, sacred animal for Hinduism, is included as the national animal.[85] Even though Hindus represent an overwhelming majority of around eighty percent of the population, conferring constitutional status to this religion has alienated non-Hindus, undermining the Nepali national sentiment that the 1990 Constitution purported to enhance.[86] In a similar vein, article six establishes Nepali as the official language, while at the same time it recognizes the multiple national languages spoken.[87] Whereas the nature of this preliminary part has been interpreted as unifying and cognizant of the multiethnic character of Nepal, the promotion of Nepali as the only official language has been subject to criticism.[88]

As a result of this reading of the 1990 Constitution, groups supporting ethnic federalism do not simply advocate for a return to the old democratic system, but rather, campaign for a drastic change. When the first version of the Interim Constitution was passed, maintaining the centralized system, some sectors of the population of Terai revolted to lobby for the establishment of federalism, fearing that centralization would uphold the recurrent discrimination and domination by privileged castes and ethnicities.[89] Since ethnic and caste groups in Nepal are not distinctly distributed in terms of territory, the creation of a federation would purportedly reproduce the social structure at a smaller level. These protests resulted in the amendment of the text to institute a federal system.[90] Still, the Interim Constitution and the drafting process are following the 1990 Constitution closely in some points. For instance, although the Interim Constitution eliminates references to a Hindu state, it maintains

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81 *Khanal,* note 34, p. 239-41.

82 *Hacchethu,* note 1, p. 125-29.

83 The Constitution of the Kingdom of Nepal 2047 (1990), arts. 2, 4(1); *Pandey,* note 72, p. 99.

84 *Yash Pal Ghai,* A Commentary on the Place of Minorities and Indigenous Communities in Nepal, in: Bipin Adhikari (ed.), Nepal: Design Options for the New Constitution, Kathmandu 2010, p. 234; *Lawoti,* note 34, p. 21-22.

85 The Constitution of the Kingdom of Nepal 2047 (1990), arts. 4 (1), 7 (2).

86 *Bhattarai,* note 46, p. 54; *Lawoti,* note 34, p. 21-22.

87 The Constitution of the Kingdom of Nepal 2047 (1990), art. 6.

88 *Subedi,* note 5, p. 60.

89 *Hacchethu,* note 1, p. 138; *Sharma,* note 5, p. 148-49.

90 *Ghai,* note 83, p. 232, 239.

the cow as national animal.[91] Some commentators have pointed out that this provision will cause unnecessary divisiveness by disaffecting those following other religions.[92]

The implementation of cultural and language rights is another upcoming issue in the constitutional process. Article five of the Interim Constitution rewords the treatment of languages to avoid domination of the Nepali language and to enable the use of other languages at the local level.[93] Similarly, the Interim Constitution takes up the right to equality and elaborates on it by adding a provision for the empowerment of deprived sectors.[94] The right against untouchability and discrimination is incorporated in a separate article.[95] As for the right to education and culture, it is recognized in similar terms as in the 1990 Constitution.[96] To sum up, the Interim Constitution recognizes the same set of rights as the 1990 text, notwithstanding the elaboration of some articles in light of the ethnic demands. Nevertheless, it remains uncertain how these provisions will be implemented in the future. The protection and enforceability of cultural rights represent a step forward in the recognition of pluralism, but the treatment of representation and other political rights does not seem equally satisfactory due to the restrictions imposed on the creation of political parties.[97] Ethnic federalism is thus regarded as a solution against vacuous provisions that confer rights with no foreseeable realization. A system where the constituent units would be defined in ethnic terms would in itself acknowledge the multicultural character of the state, and the devolution of competences would give such ethnic provinces the opportunity to further their constitutional rights, avoiding the uncertainty of relying on the central government to execute the constitutional mandate.

II. *Arguments against ethnic federalism*

There is broad consensus among political parties on the introduction of federalism, but they disagree over the criteria that should determine the delineation of federal states, in addition to other key issues such as the powers to be delegated to the states.[98] Some literature even casts doubt on the suitability of federalism altogether.[99] Nevertheless, with a provision in

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91   The Interim Constitution of the Federal Democratic Republic of Nepal 2063 (2007), art. 7 (2).

92   Constitution Advisory Support Unit, UNDP, *Constitution Making in Nepal,* Kathmandu 2007, p. 18.

93   The Interim Constitution of the Federal Democratic Republic of Nepal 2063 (2007), art. 5; *Hacchethu,* note 1, p. 135.

94   The Interim Constitution of the Federal Democratic Republic of Nepal 2063 (2007), art. 13.

95   The Interim Constitution of the Federal Democratic Republic of Nepal 2063 (2007), art. 14.

96   The Interim Constitution of the Federal Democratic Republic of Nepal 2063 (2007), art. 17.

97   *Ghai,* note 83, p. 232, 242-43.

98   *Anderson,* note 2, p. 134-35; UNDP Nepal, note 6, p. 7.

99   The fact that Nepal is a small country has been brought as an argument against federalism. Moreover, there are questions about the financial implications of federalism and whether Nepal will be able to bear the costs of the administrative proliferation that this system entails. In this line, Prayag

the Interim Constitution establishing a federal structure, the bulk of the debate is centered in the specifics of this model.

Many of those against ethnic federalism recognize the shortcomings of the 1990 Constitution in fulfilling the inclusion promises, although they disagree on whether ethnic federalism is the best solution to tackle representation problems.[100] Several authors recognize the failure of the centralized system because it does not effectively reach socially disadvantaged groups and peripheral regions outside the Kathmandu valley.[101] However, actors such as the Nepali Congress party (NC) are doubtful about ethnic federalism, defending the integration of minorities and the recognition of Nepal's multiethnic composition without going as far as defending the establishment of an ethnically organized state.[102]

Ethnic federalism indeed creates some problems that call for thorough consideration. First, this focus on ethnicity could trigger ethnic tensions and disunity.[103] Even though the importance of ethnic politics in the present context cannot be dismissed, it should be adequately balanced to avoid discrimination.[104] Related to this argument is the fact that there is no absolute correspondence between geographical regions and ethnic distribution.[105] As a result, an ethnic federation could transform national minorities into regional majorities, leaving minority groups under their rule. While this model could solve the problem of discrimination found in regions such as Terai, at the national level, it would offer no solution for very small and scattered ethnic groups, which, as has been mentioned above, are abundant in Nepal.[106]

Finally, drafters should also consider the economic viability of the proposed provinces and geographical criteria.[107] For instance, the program to establish north-south axes implemented in the 1970s illustrates the importance of geographic integration of the country to

Raj Sharma praises the unity of the Nepali state, which can be weakened by divisive tendencies, and deplores the hasty decision in favor of federalism as the best decentralizing solution; *Sharma,* note 5, p. 152-62; UNDP Nepal, note 6, p. 7.; *Duquesne,* note 8, p. 71.

100   See generally *Baral,* note 51.

101   *Baral,* note 6, p. 21; *Baral,* note 51, p. 28.

102   *Aditya Adhikari,* Nepal's Constituent Assembly: A Conflict between Opposing World Views, in: D.P. Tripathi (ed.), Nepal in Transition: The Way Forward, New Delhi 2012, p. 218-20.

103   *Adhikari,* note 101, p. 218-20; *Keshav Bhattarai and Darlene Budd,* Political Parties in Nepal: Opportunities and Challenges, The Journal of the Institute of Justice & International Studies 8 (2008), p. 75, 81; *Duquesne,* note 8, p. 72, 75; *Subedi,* note 5, p. 50.

104   *Nicole Töpperwien,* Sharing Powers in Federations: Some Insights, in: Bipin Adhikari (ed.), Nepal: Design Options for the New Constitution, Kathmandu 2010, p. 206.

105   *Adhikari,* note 101, p. 218-19; *Anderson,* note 2, p. 137; *Subedi,* note 5, p. 50; *Subedi,* note 49, p. 121.

106   United Nations Development Program in Nepal, Nepal in Figures 2011, http://www.np.undp.org/content/dam/nepal/docs/generic/UNDP_NP_Nepal%20In%20Figures%202011%20source%20cbs-gov-np.pdf (last accessed on 22 July 2014).

107   *Adhikari,* note 101, p. 218-19; *Ghai,* note 83, p. 251.

avoid unequal development.[108] Roughly, the Nepalese population is distributed in three geographical zones - the plains of the south, the hills in the middle, and the mountain area in the north - and population density is highly imbalanced along these lines.[109] Consequently, there are crucial economic implications related to the geography of the country that could be disregarded if ethnicity is the only or main criterion used to draw the provinces.

However necessary inclusive representation may be, the constitution of an ethnic federation in Nepal is problematic. The intricate set of identities that coexist in the country is not readily translatable into representational categories. As Surya Subedi points out, "[…] the traditional concept of a majority and minorities does not seem to apply to the situation of Nepal."[110] Krishna Khanal has also mentioned how complex it is to define identity based on cultural, religious and language elements.[111] If the classification of groups in terms of ethnicity, language, religion and caste becomes the basis for a future ethnic federation, the problem of defining ethnic groups would raise to the constitutional level.

The categorization of the Nepalese population in ethnic terms poses several problems. The connection between ethnicity on one side, and language, religion and caste on the other side, presents definitional problems that can have powerful consequences in terms of inclusion and representation. Additionally, the focus on ethnicity can trigger new types of conflict that have not been prevalent in Nepalese society,[112] like in the case of Ethiopia.[113]

The census statistics illustrate the complexity of the Nepalese social structure, which raises the challenge of dividing the country on an ethnic basis. There is a risk of neglecting some minorities in a system that advocates for inclusion. If the ethnic group is the unit from which to construct the representational system, social units that are not included in the definition could be excluded from the political process. Therefore, in a system where ethnic groups play such an important role, the definition of the concept entails vital consequences in terms of representation, protection of rights and freedoms, and ending discrimination. One repercussion of the definition used in the Nepalese context is the balancing of ethnic rights with religious freedom. The identification of ethnicity with religion, as in the case of Muslims, can lead to both greater representation and protection under the right to freedom of religion.[114] Conversely, religions that are not comprised in the category of ethnicity may receive a different treatment.

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108 *Harka Gurung,* Area Development Experience in Nepal, in: Lok Raj Baral (ed.), Nepal: Quest for Participatory Democracy, New Delhi 2006, p. 208-213; Library of Congress, A Country Study: Nepal, http://lcweb2.loc.gov/frd/cs/nptoc.html (last accessed on 25 September 2014).

109 *Hari Bansh Jha,* Madhesh and Madheshias of Nepal, in: D.P. Tripathi (ed.), Nepal in Transition: The Way Forward, New Delhi 2012, p. 303-18; *Kishore Singh,* note 11, p. 147.

110 *Subedi,* note 49, p. 121.

111 *Subedi,* note 5, p. 51.

112 *Adhikari,* note 101, p. 218-19; *Subedi,* note 49, p. 121.

113 *Aalen*, note 53, p. 6, 180, 183, 187.

114 The Interim Constitution of the Federal Democratic Republic of Nepal 2063 (2007), art. 23.

There are also interesting questions of discrimination that arise from the Nepalese census. As noted above, the census includes the two upper Hindu castes, Brahmin and Chhetri, among the ethnic groups. This addition seems problematic when at the same time the entrenched hierarchical caste system is frowned upon, especially when the Dalits, in a traditionally underrepresented position, are not contemplated as an ethnic group for purposes of the census.[115] This group is at the forefront of the political debate, demanding that the upcoming constitution adopts a more inclusive system. Therefore, if ethnic federalism is finally embraced, the situation of the Dalits in terms of representation is unclear so long as the approach of the census is maintained.

III.   Non-territorial federalism

Since Nepal is composed of a vast number of ethnic groups that are not clearly divided territorially, a federal model with non-territorial elements could be adequate because it would respect the demands for self-determination while avoiding the negative consequences of dividing the territory on an ethnic basis. In his book *Towards a Democratic Nepal*, Mahendra Lawoti has pointed to the importance of including some non-territorial elements in the future federal system. His proposal of how such a system would look like includes multiple components, some of which would be territorial, to suit the needs of groups located in particular areas of the country, and some others would be non-territorial, to protect the interests of groups that do not constitute a territorial majority.[116] In Lawoti's conception, each of the non-territorial groups would be represented in its "national council," with competences extending to education and cultural issues.[117] His proposal would thus divide the population in three categories: territorial groups, non-territorial groups, and groups with "special privilege."[118]

This categorization, although tentative, poses several problems. First, certain groups may attain territorial autonomy if they are a majority in a certain area. However, it seems like those belonging to that group but living in a different part of the country would end up

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115 United Nations Development Program in Nepal, Nepal in Figures 2011, http://www.np.undp.org/
     content/dam/nepal/docs/generic/UNDP_NP_Nepal%20In%20Figures%202011%20source%20cb
     s-gov-np.pdf (last accessed on 22 July 2014).

116 *Mahendra Lawoti,* Towards a Democratic Nepal: Inclusive Political Institutions for a Multicultural Society, New Delhi 2005, p. 250-52.

117 In this matter Lawoti refers to the Belgian and Cypriot experiences and to the treatment of indigenous peoples in New Zealand and Norway. *Lawoti,* note 115, p. 250.

118 According to Lawoti, the existing groups of Nepal would be tentatively classified as follows: "Groups that can form territorial regions: Limbu, Khambu (Rai), Tamang, Newar, Tharu, Magar, Gurung, Sherpa, Maithil, Abadhi, Bhojpuri, Muslim, Khaasa, Thakali, Bhote, Sunuwar and others;" "Non-territorial federal groups: Dalits, women, Meche, Dhimal, Chepang, Gharti/Bhujel, Thami, Yakkha, Kumal, Majhi and others;" "Groups that can benefit from sub-autonomy and special privilege: Raute, Meche, Koche, Kisan, Walung, Kusunda, Yehlmo, Hayu and others...". *Lawoti,* note 115, p. 254.

having a different level of self-determination. This degree of non-territorialism does not seem to sufficiently correct the negative aspects of a territorial system, since it could potentially situate people with the same identity in a different constitutional position depending on their residence. A second problem is the inclusion of women in the federal analysis. In this proposal women would be included in the category of non-territorial federal groups.[119] This addition of the gender dimension in federalism raises the issue of how multiple identities would be treated, since women will also be part of the other groups. Although it is widely recognized that Nepal must address the question of gender discrimination,[120] its inclusion in the federal debate seems to unduly complicate the picture. Lawoti's analysis of the importance of non-territorial elements seems appropriate in the Nepalese context, where groups are scattered throughout the territory, but a proposal combining territorial and non-territorial elements would not necessarily end all the difficulties that arise in the establishment of an inclusive federal system in a multiethnic society.

The issue of distribution of ethnic groups is indeed a pressing one, since the demarcation of proposed ethnic regions would not fully match the ethnic composition of the provinces. Several authors have pointed to the fact that in Nepal regions are not readily identified with a particular ethnic group.[121] Consequently, if the country were to be structured as an ethnic federation, each region would be peopled by majority and minority ethnic groups,[122] which could result in discrimination of minorities.[123] Interestingly, both hill Brahmins, the most pervasive caste in government, and Dalits, who strongly demand inclusion as a disenfranchised group, would not be a majority in any of the proposed states.[124]

In terms of non-territorial federalism, the Millet system in the Ottoman Empire and the Belgian communities are useful precedents. In the Ottoman Empire, the Muslim elite ruled over a multiplicity of different ethnic and religious groups, but allowed some degree of determination to the non-Muslim minorities. As a result, community leaders represented the Jewish, Armenian and Orthodox population before the Ottoman government, and these groups had certain liberty to establish their own laws.[125] Nevertheless, there are two important caveats about the scope of the Millet system. First, the agreements between the non-Muslim minorities and the Muslim rulers situated the former in a subordinate position, and

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119   *Lawoti,* note 115, p. 254.

120   See e.g. Laxmi Keshari Manandhar / Krishna B. Bhattachan (eds.), Gender and Democracy in Nepal, Kathmandu 2001.

121   *Adhikari,* note 101, p. 218-19; *Anderson,* note 2, p. 137; *Subedi,* note 49, p. 121.

122   *Anderson,* note 2, p. 137; UNDP Nepal, note 6, p. 13, 46.

123   UNDP Nepal, note 6, p. 45, 47.

124   Id., at 47.

125   See e.g Benjamin Braude / Bernard Lewis (eds.), Christian and Jews in the Ottoman Empire: The Functioning of a Plural Society, New York 1982; Thomas Fleiner (ed.), Federalism: A Tool for Conflict Management in Multicultural Societies with Regard to the Conflicts in the Near East, Zurich 2008.

as a consequence, the level of rights that they enjoyed was fairly limited.[126] Secondly, each of the three mentioned Millets encompassed a wider range of groups. This fact points to the limited character of the Ottoman Millet system, which paid attention only to religious distinctions. Overtime, the focus shifted from religion to ethnic and linguistic divisions. The mosaic of nation-states that appeared after the collapse of the Empire evidences the variety of ethnic groups that coexisted under the Ottoman rule.[127] Despite the limitations of this system, its non-territorial orientation is an interesting precedent to consider when studying the Nepalese case.

Similarly, Belgian communities are a non-territorial form of organization that can provide lessons for Nepal. The Belgian experience has been recognized as a positive example of progressive federalization, since in the last forty years the country has gradually taken steps to move from a unitary system to a federal one. In this model, two different types of federal units coexist: regions, which are territorial, and communities, defined by linguistic affiliation.[128] However, the personal element is only a part of the territorial system,[129] since in Belgium the communities almost match the territorial distribution of the ethno-linguistic groups,[130] to the extent that the Flemish community and region have merged.[131] In Nepal, on the contrary, the differentiation between ethnic composition and territorial distribution is much higher, which is indeed a reason to support a model with less territorial character. In such a system, the groups would have their own institutional structure for those matters over which they would have competence, and their authority would extend only to the members of the group.[132] Arguably, such a system would create problems of administration, reason why non-territorial powers should potentially extend solely to limited matters.

Another territorial component in Belgium is the scope of communitarian competences. The communities have powers over the institutions and the people of the region with the same linguistic composition, and only the institutions of the bilingual region of Brussels,

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126 See generally Benjamin Braude / Bernard Lewis, note 124.

127 Id.

128 *André Alen / Jan Clement*, Fédéralisme personnel et territorial en Belgique, in: Thomas Fleiner (ed.), Federalism: A Tool for Conflict Management in Multicultural Societies with Regard to the Conflicts in the Near East, Zurich 2008, p. 61; *Alexander Murphy*, Belgium's Regional Divergence: Along the Road to Federation, in: Graham Smith (ed.), Federalism: The Multiethnic Challenge, New York 1995, p. 78-84; *Wilfried Swenden*, Belgian Federalism: Means to an End?, in: Ferran Requejo / Miquel Caminal (eds.), Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases, New York 2012, p. 147; *Wilfried Swenden et al*, The Politics of Belgium: Institutions and Policy under Bipolar and Centrifugal Federalism, in: Marleen Brans et al. (eds.), The Politics of Belgium: Institutions and Policy under Bipolar and Centrifugal Federalism, New York 2009, p. 2, 7.

129 *Alen / Clement,* note 127, p. 75-79.

130 Only in the case of Brussels and the German community there is a considerable disparity between community and region; *Swenden et al.,* note 127, p. 7.

131 *Murphy,* note 127, p. 86; *Peeters,* note 45, p. 39-40; *Swenden,* note 127, p. 146.

132 *Theo Jans,* note 7.

without reaching those speakers living in the other unilingual region.[133] In Nepal, where ethnic groups are more scattered, a higher trans-regional regulatory power seems appropriate, although this accommodating solution should be tempered by considerations of how communitarian laws would be implemented in regions where the community is a very small minority.

Hence, non-territorial federalism has some features which suggest that it could be an appropriate model for Nepal. Division of territory is less relevant and former disputes over territory can become less tense,[134] since a law would be applied following personal indicators such as membership in a community. Besides, a non-territorial strategy protects minorities more satisfactorily because they obtain the right to self-regulation, thus reducing the chances that a majority group in the territory will dominate,[135] because the relations among groups are no longer understood in terms of numerical proportion within a specific territorial constituency. In such a model, minority groups would not be merely beneficiaries of minority protection rights, but rather, they would be the actors regulating their own affairs.[136]

Nevertheless, the establishment of non-territorial federalism in Nepal raises two main questions. First, the attachment of some groups to a specific territory cannot be disregarded,[137] as in the example of Terai, where despite the multiple castes and ethnicities that coexist there is a strong sense of unity.[138] If Nepal were to opt for the consideration of some degree of personal federalism, territorial demarcation would still be a fundamental issue.

Second, as explained above, in the Nepalese context ethnic groups include diverse characteristics, such as a common language, a religion or a caste.[139] Consequently, it would be essential to carefully decide which groups would be defined as ethnic groups, because once a specific definition is adopted, the constitutional conception of ethnic group would become

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133 *Alen / Clement,* note 127, p. 62-63, 70-72.

134 *Kelley Bryan,* Non-Territorial Federalism: A Panacea For Our Times?, in: Rohan Edrisinha / Asanga Welikala (eds.), Essays on Federalism in Sri Lanka, Colombo 2008, p. 281-82.

135 *Kelley Bryan*, note 133, p. 271.

136 Id., at 272.

137 Even in the Belgian case, where the linguistic communities have an important role, they are closely linked to the territory where the majority of the ethno-linguistic population lives, and establishing permanent language demarcations was a problem since the early linguistic legislation that remained unsolved until the 1960s; *Murphy,* note 127, p. 83-84; *Wilfried Swenden / Maarten Theo Jans*, 'Will It Stay or Will It Go?' Federalism and the Sustainability of Belgium, in: Marleen Brans et al. (eds.), The Politics of Belgium: Institutions and Policy under Bipolar and Centrifugal Federalism, New York 2009, p. 140; *Miquel Caminal / Ferran Requejo*, Democracy and Federalism in Plurinational Societies, in: Ferran Requejo / Miquel Caminal (eds.), Federalism, Plurinationality and Democratic Constitutionalism: Theory and Cases, New York 2012, p. 4.

138 See generally *Singh,* note 73.

139 United Nations Development Program in Nepal, Nepal in Figures 2011, http://www.np.undp.org/content/dam/nepal/docs/generic/UNDP_NP_Nepal%20In%20Figures%202011%20source%20cbs-gov-np.pdf (last accessed on 22 July 2014).

reified, and groups that are not defined as communities in the political system would be unable to dictate their own norms.

D. Conclusion

The discussion above shows how an ethnic federation may not be the panacea for Nepal. It is believed that a federal system based on ethnicity will guarantee the representation of traditionally discriminated ethnic groups by establishing their right to self-determination, but focus on ethnicity can bring about new problems, such as an increase in ethnic tensions and conflicts, and the reduction of group interactions to ethnic terms, as the Ethiopian experience shows.[140] In addition, the adoption of a definition of ethnicity for the purpose of determining which groups have the right to an ethnically based state will entail the limitation of the understanding of ethnicity to such definition. In a country like Nepal, with such a rich ethnic landscape, the recognition of the importance of ethnic identity in the political process can be more adequately achieved through the establishment of communities with some self-determination power than with territorial ethnic federalism. The system to be adopted in the Nepalese constitutional process should result from the balance between ethnic autonomy demands on one hand, and unity and inter-group cooperation within the state on the other, with consideration of issues such as the economic feasibility of a decentralized administration and the assessment of the aforementioned perils of an ethnically based federation.

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140 See generally *Aalen*, note 53.