



ETHNIC FEDERALISM IN ETHIOPIA AND BOSNIA AND HERZEGOVINA: LESSONS  
FOR NEPAL

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## Abstract

Ethnic Federalism is fast becoming one of the popular demands of ethnic minorities in divided societies such as Nepal. To ensure such demands, it is vital to include them as the basis for State restructuring in the constitution making process. Both Ethiopia and Bosnia and Herzegovina have a constitutional design based on the clear acknowledgment of ethnic rights. Thus, they provide a comparative assessment for the challenges of such structures. This thesis analyses the Ethiopian model and certain aspects of the Bosnian model to review the challenges faced in the practical application of ethnic federalism.

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## Introduction

Ethnic identity is one of the factors that has seen a renewed focus in many different countries around the world, especially with regards to constitution writing. This focus is seen especially in the demands for access and representation, and for the appropriate place for ethnic identity in the Constitution. One of the ways of managing this diversity has been in acknowledging and accepting the existence of ethnicity in the constitution. The exact magnitude of the proper role is however undefined, and in many ways, dependent on the specifics of the country.

The often preferred solution for guaranteeing rights to all groups in an ethnically diverse country is to have such rights enshrined in the constitution of the country. This is usually not contentious. What is contentious, however, is the type of rights or solutions to be enshrined. Ethnicity based federalism often emerges as the preferred solution, especially in contrast to decentralization or the granting of local autonomy, which might end up perpetuating the existing hegemony of certain groups.

The Nepalese constitutional history has been one of exclusion, and that has fuelled the ethnic debate and the subsequent demands for ethnic federalism as a solution. As the exclusion suffered by Nepal's ethnic minorities has often found itself in the constitution. Thus, the expectations for a constitutional solution are huge and immense. Yet, it is only in the past decade or so, that these demands have received a favourable political space and the possibility of giving it a constitutional cloak. This process has however been fraught with disputes and debate, as seen by the demise of the First Constituent Assembly without the production of a Constitution. One of the main reasons behind this was the inability of political actors to locate the appropriate space of ethnicity in the proposed federal structure. Is it to be the basis of federalism or is it to be acknowledged

as one of several other factors including economic viability and national unity? This is still a question to be decided by the current constitution writing process.

It is in this context, that I have looked to the federal arrangement in Ethiopia and Bosnia and Herzegovina (BiH). Both of these constitutions were formed after conflicts and have enshrined differing federal structures, and can serve to give pointers to the Nepali polity. This thesis does not look to provide a complete set of guidelines for the basis of federalism in Nepal. Instead, based on the experience in Ethiopia and BiH, it points to challenges and conditionality inherent in the acceptance of a federalism based on ethnicity. Thus, this thesis aims to highlight the challenges that Nepal's constitution makers will have to contemplate before they decide upon the future structure of the State.

## I. Federalism in Divided Societies

Wheare defined the federal principle as ‘*the method of dividing powers so that the general and the regional governments are each, within a sphere, co-ordinate and independent.*’<sup>1</sup> Similarly, on the issue of a national home, Wheare suggested that, ‘*there should be areas or an area in which each nationality was at least in a majority, so that there could be a State or States in the federation to which each nationality could look to as a motherland or national home*’.<sup>2</sup>

Riker looks at federalism as the ‘*outcome of institutional bargaining among politicians*’<sup>3</sup> which is inherently tilted to either the State or the Central government due to the instability of the compromise reached.<sup>4</sup> On the other hand, King looks to federalism, simply as a desire for regional autonomy.<sup>5</sup> This idea has been expanded by Watts, who looks to the essence of federalism as “*the perpetuation of both union and non-centralisation at the same time.*”<sup>6</sup> Thus, Watts defines a federation as:

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<sup>1</sup> Kenneth Wheare “Federal Government” as cited in Dr Soeren Keil, *Multinational Federalism in Bosnia and Herzegovina* (Ashgate Publishing, Ltd., 2014), 11.

<sup>2</sup> Michael Burgess, “Multinational Federalism in Multinational Federation,” *Multinational Federalism: Problems and Prospects*, 2012, in Michel Seymour and Alain-G. Gagnon (eds.), *Multinational Federalism: Problems and Prospects* (Palgrave Macmillan, United Kingdom, 2012), 28.

<sup>3</sup> Mikhail Filippov, “Riker and Federalism,” *Constitutional Political Economy* 16, no. 2 (2005): 95.

<sup>4</sup> Ibid.

<sup>5</sup> Soeren Keil, *Multinational Federalism in Bosnia and Herzegovina* (Ashgate Publishing, Ltd., Surrey, 2014), 11.

<sup>6</sup> Ronald L. Watts, “*Comparing Federal Systems*” (Institute of Intergovernmental Relations, Montreal, 2008), 6.



A federation is a compound polity combining constituent units and a general government, each possessing powers delegated to it by the people through a constitution, each empowered to deal directly with the citizens in the exercise of a significant portion of its legislative, administrative and taxing powers, and each directly elected by its citizens.<sup>7</sup>

The issue of ethnic federalism straddles diverse nations throughout the world. More often than not, these revolutionary structures are the end results of violent conflicts. Kymlicka notes that ‘*political settlements are more likely to be the result of force rather than peaceful or democratic change*’,<sup>8</sup> especially so because of the inherent suspicion of ethnicity amongst many political actors in the developing world. Yet, there seems to be no other way to manage ethnic diversity, except to turn it to ‘*an integrative asset, rather than a liability to national survival*’.<sup>9</sup>

Chaudhry notes that ‘*in a divided society, political claims are refracted through the lens of ethnic identity, and political conflict is synonymous with conflict among ethnocultural groups*’.<sup>10</sup> It might be argued that one way to manage ethnic differences would be to assist in its disappearance, and thus create a single national identity. However, as Choudhry explains, this view is not accepted by either Lijphart or

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<sup>7</sup> Ronald L. Watts, “Federalism, Federal Political Systems, and Federations,” *Annual Review of Political Science* 1, no. 1 (1998): 121.

<sup>8</sup> Will Kymlicka, “Western Models of Multinational Federalism: Are They Relevant for Africa?” in David Turton, *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (James Currey, London, 2006), 53.

<sup>9</sup> Rotimi Suberu, “Federalism & the Management of Ethnic Conflict: the Nigerian Experience” in David Turton, *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (James Currey, London, 2006), 91..

<sup>10</sup> Sujit Choudhry (ed.), *Constitutional Design for Divided Societies: Integration or Accommodation?* (Oxford University Press, Oxford, 2008), 5.

Horowitz, who dismiss such attempts as naïve and dangerous.<sup>11</sup> However, this view has been countered by integrationists, who suspect the cause of ethnic mobilization, and point that not all differences are intractable.<sup>12</sup> However, it can be agreed upon that once ethnic mobilization is achieved, it becomes almost impossible to go back to integration approaches without the risk of significant conflict.

Kymlicka looks at three conditions to point towards the increase in minority activism, especially in the West; namely an increase in numbers, increase in rights consciousness and possibilities for safe political mobilization.<sup>13</sup> This view is directed towards multinational federalism, which shows us another way to manage a divided society. The Ethiopian model clearly seeks to manage the ethnic diversity, within the Ethiopian federation, despite the constitutional right to secession, and its multinational character. However, as Kymlicka puts it, multinational federations do not seek to unite divided societies.<sup>14</sup> Bosnia and Herzegovina (BiH) is an example of such a multinational federation.

In the Nepali context, there is an agreement on the acknowledgement of ethnicity, and thus towards accommodation.<sup>15</sup> The question that remains is to the extent of this accommodation within the constitutional design.

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<sup>11</sup> Ibid., 26.

<sup>12</sup> Ibid., 27.

<sup>13</sup> Will Kymlicka, “Western Models of Multinational Federalism: Are They Relevant for Africa?” in Turton, *Ethnic Federalism*, 38.

<sup>14</sup> Ibid.

<sup>15</sup> This acknowledgment can be seen in the idea of a federal structure in the Interim Constitution and the proposal of different models based on ethnicity by the First Constituent Assembly.

## II. Nepal: Identity, Constitutions and Legal Exclusion

The demand for inclusion in the state structure by the different ethnic groups and minorities is not a new demand. It is only in the process of writing a constitution for a ‘New Nepal’ that these demands have finally found a safe space to articulate and press for their demands, especially given the consistent domination and hegemony of the Parbatiya elite,<sup>16</sup> since the origin of the modern Nepali nation. To understand this persistent sense of exclusion through the ‘Nepali’ identity, it is necessary to understand the origins of the current Nepali nation and the exclusionary set of laws drafted throughout history.

The Nepali nation can be traced back to the expansion of the Gorkha kingdom under King Prithvi Narayan Shah (1723-1775), who expanded the kingdom to include the current Kathmandu valley. This process was continued by his descendants, until the Anglo-Nepal war (1814-16) limited Nepal’s territories to the rivers between Mechi in the east, and Mahakali in the west. The only additions were 4 districts of the Western plains, gifted by the British in return for Nepali help during the Sepoy Mutiny (1857). The Shah monarchy spoke Khas Bhasa (Gorkhali/Nepali) and was aided by the Parbatiya elite during this process.<sup>17</sup>

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<sup>16</sup> The Parbatiya group is composed of the Hill Brahmin (Bahun), Hill Chettris and other groups based in the hills of Nepal, and primarily speaking Nepali as their mother tongue. However, Parbatiya elite mostly refers to the combination of the Hill Brahmin, Chettris, Thakuris and associated castes, who were at the higher end of the Hindu caste hierarchy.

<sup>17</sup> The bulk of King Prithvi Narayan Shah’s forces were the indigenous Magars, but his commanders were more often than not, part of the Parbatiya elite.

## Early Years

The early years of the Nepali nation, put the Shah monarchy at the centre of the nation; one that embodied the unity of the country.<sup>18</sup> This idea can be best embodied in the *Divya Upadesh* (Divine Advice), attributed to King Prithvi Narayan Shah in 1774:

This will not be my painfully acquired kingdom but a garden of all sorts of people. But if everyone is alert,...this will be a true Hindustan of the four varnas and thirty six castes. Do not leave your ancient religion. Don't forsake the salt of the king.<sup>19</sup>

Thus, it is clear from the outset that Nepal was a diverse country, but one that focused on the Hindu religion and loyalty to the monarchy. The early years of the Gorkha kingdom was occupied by constant military expansion, and hence focus was mostly on raising revenue, without forcing integration amongst the various districts within the new nation.<sup>20</sup> Local structures thus still represented a pre-unification political system. This constant military expansion was checked after the loss to the British in the Anglo-Nepal War (1814-16), which ended after the treaty of Sugauli. The treaty used the term *Nipal*, for the first time, thus substituting the Gorkha state with Nepal,<sup>21</sup> and gave it a permanent border, thus creating the idea of a nation.<sup>22</sup> This led to internal strife in the palace leading to the emergence and consolidation of the Ranas (1846-1951) who ruled

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<sup>18</sup> John Whelpton, *A History of Nepal* (Cambridge University Press, Cambridge, 2005), 112.

<sup>19</sup> Baburam Acharya and Yogi Naraharinath, *Bada Maharajdhiraj Shree Panch Prithvi Narayan Shahko Dibya Upadesh* (Pairavi Prakashan, Kathmandu, 2061 (2004), 51. [Nepali Text]

<sup>20</sup> Mara Malagodi, *Constitutional Nationalism and Legal Exclusion: Equality, Identity Politics and Democracy in Nepal (1990-2007)* (Oxford University Press, New Delhi, 2013), 73.

<sup>21</sup> *Ibid.*, 76.

<sup>22</sup> *Ibid.*, 74.

as hereditary Prime Ministers for the next hundred years.<sup>23</sup> These years were crucial in the building of the Nepali identity and the introduction of exclusionary policies.<sup>24</sup>

## Creating the Nepali Identity

### Nepali Language

Language is often a bone of contention in federal States, especially when the language of a particular group is overtly dominant and imposed at the cost of other groups. Nepali is the primary language of Nepal, understood by over 90% of the population, despite being the mother tongue of just under half the population.<sup>25</sup> Even in the inclusive spirit of the Interim Constitution, 2007 Nepali is the sole official language.<sup>26</sup> Thus, Nepali clearly enjoys a privileged position in a country with over languages.

The Nepali language was originally the language of the Parbatiya elite and was known as Khas or Gorkhali. Only, in 1933, Gorkhali was officially renamed as Nepali, and this followed the adoption of the term ‘Nepal’ for the entire country in 1909.<sup>27</sup> As Benedict Anderson noted, language has often been used as an important tool for nationalism, as it

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<sup>23</sup> The Ranas (1846-1951) were hereditary Prime Ministers, who held actual power, reducing the Shah monarchy to a titular and symbolic presence, whose sanctity was reinforced, but actual powers were hugely reduced.

<sup>24</sup> Besides the introduction of limited modernity and laws, the Ranas were firm allies with the British. The British had already started recruiting Gurkha (Nepali) soldiers after the Anglo-Nepal war. However the Ranas also provided them with help during the First World War. Thus, the Ranas also managed to get the British to recognise the complete independence of Nepal, through a treaty signed in 1923.

<sup>25</sup> See Annexure 1 for the percentage population of different mother tongues in Nepal.

<sup>26</sup> Article 5 (2), Interim Constitution of Nepal. However Article 5 (2) of the Interim Constitution of Nepal, 2006 states that, “*All the languages spoken as mother tongues in Nepal are the languages of nation.*”

<sup>27</sup> David Gellner, “Ethnicity and Nationalism in the World’s Only Hindu State” in David Gellner, Joanna Pfaff-Czarnecka, and John Whelpton (eds.), *Nationalism and Ethnicity in a Hindu Kingdom: The Politics and Culture of Contemporary Nepal* (Routledge, Oxford 2012), 2.

allows the imagination of a community within the speakers of the language, and thus helps in the creation of an identity allied with nationalism.<sup>28</sup> Thus, Nepali was used in the creation of the Nepali identity, through its identification with the State.

By its privileged position as language of the elite, Nepali became the language of governance, and received a massive boost through the introduction of printing press in 1851.<sup>29</sup> In addition, as Malagodi explains, throughout the Rana period, the State granted privilege to just Nepali, and in some measure Sanskrit,<sup>30</sup> through state sanctioned attempts at literature and newspapers.<sup>31</sup> Interestingly, Nepali also served as the lingua franca for the democratic groups in exile, especially in neighbouring India, in their opposition to the Rana regime in Nepal. Thus, Nepali language became a unifying factor for the diverse groups in exile,<sup>32</sup> and inextricably came to be tied to the idea of a Nepali identity.

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<sup>28</sup> This theory on the relationship between print capitalism and imagined communities is explained in Benedict Anderson's book on imagined communities. See, Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, London, 2006).

<sup>29</sup> The first printing press was brought to Nepal by Janga Bahadur Rana, the first Rana Prime Minister, post his visit to England and France. See Malagodi, *Constitutional Nationalism and Legal Exclusion*, 79.

<sup>30</sup> However Sanskrit was never a language spoken by the masses, and hence was never a challenger to Nepali in its role as the central language in Nepali society.

<sup>31</sup> Malagodi, *Constitutional Nationalism and Legal Exclusion*, 81.

<sup>32</sup> This effect can still be seen in India, where different ethnic groups originating from Nepal, use Nepali as a common language. This enabled Nepali to be enshrined in the 8<sup>th</sup> Schedule of the Indian Constitution as one of the official languages of India in 1991. See "Lhotshampa, Madhesi, Nepamul: The Deprived of Bhutan, Nepal and India," *Himal Mag*, accessed March 23, 2014, <http://old.himalmag.com/himal-feed/56/1023-lhotshampa-madhesi-nepamul-the-deprived-of-bhutan-nepal-and-india.html>.

## Hinduism and Monarchy

In addition to the Nepali language, the Rana period also ushered in legal codes based on Hinduism and the caste system, which included non Parbatiya ethnic groups, into the lower hierarchy of castes.<sup>33</sup> The monarchy continued to be used as a symbol of unity, and the traditions and culture of the Parbatiya group reflected the traditions of Nepal. Thus by the end of the Rana period [1951], the sense of Nepali identity was built around Nepali language, Hinduism, the monarchy and the culture and traditions of the Parbatiya group. This was reflected into the legal framework as well, which institutionalized this sense of exclusion.

## Legal Exclusion

### Muluki Ain [1854]

The *Muluki Ain* (law of the country), introduced by the first Rana Prime Minister was the first legal code of modern Nepal, and thus remains an important document in the creation of laws in Nepal.<sup>34</sup> However, it was based on Hinduism and reflected the caste bias in its provisions, clearly favouring the Parbatiyas.<sup>35</sup> As all the ethnic were amalgamated into the caste system in a position lower than the Parbatiyas, this code reflected the bias of the State and contributed to the growing sense of exclusion among

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<sup>33</sup> Not all the ethnic groups were Hindus. However, they were brought into the caste system at the lower spectrum, thus denying them access to State resources and continuing the Parbatiya domination.

<sup>34</sup> The *Muluki Ain*, in a significantly amended form, sans the requirements of caste and religion is still a central part of the basic law of Nepal. See Malagodi, *Constitutional Nationalism and Legal Exclusion*, 83.

<sup>35</sup> András Höfer, *The Caste Hierarchy and the State in Nepal: A Study of the Muluki Ain of 1854*, vol. 13 as cited in Malagodi, *Constitutional Nationalism and Legal Exclusion*, 85.

these groups. As Malagodi notes, this document clearly showcases the differences between the different ethnic and caste groups, with the Parbatiya elite at the top.<sup>36</sup>

### First Constitutional Attempt [1948]

With the independence of India, and the growing agitation against the Rana rule in Nepal, the Rana Prime Minister Padma Shamsheer introduced the *Nepal Sarkar Vaidhanik Kanoon*, as a pre-emptive response.<sup>37</sup> This constitutional attempt looked away from Hinduism and sought its legitimacy on modern political institutions, based on a limited form of representative democracy.<sup>38</sup> It also included fundamental rights of a wide ranging nature including equality, liberty, worship and press freedoms.<sup>39</sup> However, it did not compromise on other forms of Nepali identity and the primacy of the Nepali language.<sup>40</sup> However, this constitution was never implemented.

### Interim Government of Nepal Act, 1951

The fall of the Rana government through a popular revolt, in co-operation with the monarch King Tribhuvan and Indian support resulted in a new political situation. While the King had earlier proclaimed that the new Constitution would be ‘*framed by the constituent assembly elected by the people*’<sup>41</sup>, the interim Act was promulgated by the

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<sup>36</sup> Mara Malagodi, “Forging the Nepali Nation through Law: A Reflection on the Use of Western Legal Tools in a Himalayan Kingdom,” *Studies in Ethnicity and Nationalism* 8, no. 3 (2008): 40.

<sup>37</sup> Malagodi, *Constitutional Nationalism and Legal Exclusion*, 85.

<sup>38</sup> Malagodi, “Forging the Nepali Nation through Law,” 40.

<sup>39</sup> Bhuwan Chandra Upreti, *Nepal: Transition to Democratic Republican State: 2008 Constituent Assembly* (Gyan Publishing House, Kathmandu, 2010), 30.

<sup>40</sup> Article 44, Nepal Sarkar Vaidhanik Kanoon, 2004 B.S (1948).

<sup>41</sup> Hari Bansh Tripathi, *Fundamental Rights and Judicial Review in Nepal: Evolution & Experiments* (Pairavi Prakashan, Kathmandu, 2002), 25. This was also used as a basis for the Maoist party during the civil war for their demands of a Constituent Assembly.



King. This document was heavily influenced by the Indian Constitution,<sup>42</sup> with the aim of being replaced by a definitive document after two years. In that, this closely parallels the beginnings of the Interim Constitution of Nepal, 2007, which was supposed to be a temporary document. In the true sense of an interim document, the question of both the Hindu character of the State and the status of the Nepali language was left open.<sup>43</sup> Thus, this constitution can be said to have been more accommodative in character and a realization of the need to understand diversity and ethnic differences, especially with regards to a unitary state structure. Thus, it is clear that even in 1951, the need for an inclusive identity was understood.

### Constitution of Nepal, 1959

The interim document that was supposed to last for two years instead lasted for eight. It also saw a new monarch. King Mahendra,<sup>44</sup> who was more assertive, and hence the new constitution of 1959 was formed without a constituent assembly.<sup>45</sup> In the context of

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<sup>42</sup> Bishal Khanal, *Regeneration of Nepalese Law* (Bhrikuti Academic Publications, Kathmandu, 2000), 34.; Also see Bhuwan Lal Joshi and Leo E. Rose, *Democratic Innovations in Nepal: A Case Study of Political Acculturation* (Cambridge University Press, Cambridge, 1966), 488, who have criticized this approach.

<sup>43</sup> The statute is silent on language, while religion is covered under the aspect of non-discrimination, equality and access to electoral roll under Articles 15, 16 and 70 respectively.

<sup>44</sup> King Mahendra is seen as a strong nationalist, especially due to his move to assert Nepal's independence and the policies of asserting a Nepali identity through language and culture and tying it to the monarchy.

<sup>45</sup> This constitution was drafted by Sir Ivan Jennings, the famous British constitutional expert, who suited it to a particular Nepali model, which revolved around the monarchy as the only stable State institution. See Mara Malagodi, "An Archival Investigation into Sir Ivor Jennings' Constitutional Legacy in South Asia," available at [http://sas-space.sas.ac.uk/5111/1/Mara\\_Malagodi-2014-LIM-Oriental\\_Jennings.pdf](http://sas-space.sas.ac.uk/5111/1/Mara_Malagodi-2014-LIM-Oriental_Jennings.pdf), last accessed on March 23, 2014.

King Tribhuvan's earlier declarations regarding a constituent assembly, this is a significant deviation, and definitely brings about questions of legitimacy. This constitution provided for ultimate sovereignty to be retained with the monarch, including residuary and emergency powers.<sup>46</sup> More significantly, it continued with the concept of 'Nepali identity' and had three important provisions. First, the right to religion was limited, through the definition of religion as handed down by ancient times and the prohibition against proselytization.<sup>47</sup> This sought the continued primacy of the Hindu character of the State. Second, it declared Nepali to be the national language,<sup>48</sup> and third, it provided a central role to Nepali history and tradition.<sup>49</sup> Thus, the constitution acted to exclude ethnic groups who would not fit into the narrative of the Nepali identity, which was effectively a Parbatiya Hindu identity, given constitutional sanction.

However, the 1959 constitution had the provisions of a parliamentary system, which was suspended by King Mahendra in 1960 through the use of emergency powers, and ultimately replacing it with a new Constitution.<sup>50</sup> This has a parallel with the actions of King Gyanendra with regards to the 1990 constitution, when in 2002; he used similar

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<sup>46</sup> Article 55 and Article 68, Constitution of Nepal, 1959.

<sup>47</sup> Article 5 stated that: Every citizen having regard to the current traditions may practice and profess their own religion as handed down by ancient times. However, no one shall be entitled to convert a person to another religion. (My translation from the original Nepali text)

<sup>48</sup> Article 70 states that: Nepali language in the Devanagari script shall be Nepal's national language. (My translation)

<sup>49</sup> This could be seen in the Preamble, and the definition of the monarch in Article 1. This was central to King Mahendra's nationalist position, and the definition of Nepali nationalism as one of exclusion.

<sup>50</sup> Malagodi, *Constitutional Nationalism and Legal Exclusion*, 88.

emergency provisions in the 1990 constitution to effectively suspend the parliamentary system.

### Constitution of Nepal, 1962

King Mahendra continued his nationalistic scope into the writings of this Constitution. Though clearly based on Nepal's traditions,<sup>51</sup> it accepted the existence of diversity. The definition of Nepali people was inclusive to use words such as "*irrespective of religion, race, caste or tribe*" to constitute the nation.<sup>52</sup> However the prerogatives of the Shah Monarchy and Hinduism, alongwith the Nepali language continued. The king had emergency powers,<sup>53</sup> and Nepal was legally proclaimed as a Hindu State,<sup>54</sup> and Nepali continued to be the language of the nation<sup>55</sup>. However the State did continue efforts to withdraw legal discrimination, which could be seen in the formulation of the new *Muluki Ain, 1963*, which removed formal inequalities based on caste or religion, and also recognised customs of different groups.<sup>56</sup> Despite these changes, there was a continuing description of Nepal in the exclusive terms of Parbatiya culture, Nepali language and Hinduism.

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<sup>51</sup> Richard Burghart, "The Political Culture of Panchayat Democracy," *Nepal in the Nineties: Versions of the Past, Visions of the Future*, (Oxford University Press, Oxford, 1994), 1.

<sup>52</sup> Article 2 (1), Constitution of Nepal, 1962.

<sup>53</sup> Preamble, Constitution of Nepal, 1962.

<sup>54</sup> Article 3, Constitution of Nepal, 1962 states that, "*Nepal is an independent, indivisible and sovereign monarchical Hindu State.*"

<sup>55</sup> Article 4, Constitution of Nepal, 1962

<sup>56</sup> Leo E. Rose and Margaret W. Fisher, *The Politics of Nepal: Persistence and Change in an Asian Monarchy* (Cornell University Press Ithaca, 1970), 89; Also see Malagodi, "Forging the Nepali Nation through Law."

## Constitution of Nepal, 1990

After over 29 years of rule through the partyless Panchayat system, the 1990 Constitution was drafted on the backdrop of a popular People's Movement, which forced the King to allow for a multiparty democracy, and a new Constitution. This Constitution was however drafted by a committee, and not by a popularly elected Constituent Assembly.<sup>57</sup> This was finally the moment where Nepal's ethnic minorities believed that the era of constitutional exclusion was over. However, this was just a chimera. Despite looking at over 150 constitutions throughout the world,<sup>58</sup> the outcome was that of a homogenizing constitution, in terms of ethnic diversity. Thus, a document focused on maintaining the unity of the nation, over any 'minority approach' was prepared.

While Article 6 (2) did state that "*All the languages spoken as mother tongues in the various parts of Nepal are the national languages of Nepal*", it was a token representation, especially as Article 6 (1) established Nepali as the official language, and apart from Article 18, there was no real results to the establishment of languages other than Nepali.<sup>59</sup> In the era of disintegrating nations, especially in the post-

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<sup>57</sup> The Constitution Drafting Committee was composed of 3 members chosen by the King, 3 by the Nepali Congress and 3 from the Leftist parties. This 9 member committee was entirely male, with 6 Bahun members.

<sup>58</sup> Malagodi, *Constitutional Nationalism and Legal Exclusion*, 114.

<sup>59</sup> It is interesting to note the case of *Adv. Lal Bahadur Thapa and Others v Kathmandu Metropolitan City and Others* Writ No. 2931/2056 (1999), where the Supreme Court of Nepal upheld the status of Nepali, as per Article 6 (1) to be the only official language of the country, and thus declared void the efforts of the local municipalities to declare Newari and Maithili as co-official languages. Thus, Nepali continued to enjoy a privileged position, at the expense of other local languages.

Communist era, disintegration was a fear, and thus language was still seen to be one of the sole unifying factors, providing Nepali its continued privileged position.<sup>60</sup>

Apart from language, the 1990 Constitution continued the previous constitutional narrative of a ‘unity in diversity’ with its focus on Hinduism and the monarchy. Article 4(1), defining the Kingdom read as: “*Nepal is a multiethnic, multilingual, democratic, independent, indivisible, sovereign, Hindu and Constitutional Monarchical Kingdom*”

In addition, articles like Article 112 (3) also did not allow for the recognition of political parties ‘*formed on the basis of religion, community, caste, tribe or region*’. The most important mark of exclusion was also seen in Article 9, which was a direct copy of the previous constitution, and allowed for citizenship only through patrilineal descent.<sup>61</sup> While, this was clear gender discrimination, the real aim was to deny citizenship to Madheshis<sup>62</sup> who had a contiguous community and matrimonial relations across the political border with India. The focus again was on a Nepali identity and unity of the nation.

### Current Events

Thus, the 1990 constitution continued the token recognition of diversity, while continuing to maintain a unitary State structure and a Nepali identity based on the

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<sup>60</sup> This idea of Nepali as a unifying factor can also be seen in a 1955 report of the National Education Planning Commission, which recommended the switching of children to the exclusive use of Nepali for gradual disappearance of other languages and the resultant greater strength and unity. See Martin Hoftun, William Raeper, and John Whelpton, *People, Politics & Ideology: Democracy and Social Change in Nepal* (Mandala Book Point Kathmandu, 1999) at 311.

<sup>61</sup> Article 9, Constitution of Nepal, 1990.

<sup>62</sup> The Madheshis are a group living in the Terai (Madhesh), who have been historically marginalized by the State due to their ethnic kinships with similar groups across the border in India.

monarchy, Hinduism and Nepali language, which was a clear reflection of the *Parbatiya* elite's hold on institutions and the political structure. As a result, exclusionary politics continued, leading to the armed conflict (1996-2006) with the Communist Party of Nepal-Maoists. In 2002, the monarch suspended parliament and seized power. Only after an agreement between the political parties and the Maoists, and massive street protests in 2006, the country returned on a track to peace. Things moved swiftly after that with election to the First Constituent Assembly in 2006, the subsequent removal of the monarchy, and the embracing of the term 'federal' and 'secular' in the Interim Constitution, 2007. This was again the time of promise to the excluded groups to press for a solution to their demands.<sup>63</sup> Thus, Hinduism and monarchy were removed from the Nepali identity. What remained was the hegemony of the *Parbatiya* elite, with regards to access to government resources, and the cultural hegemony in terms of language. Further, the issue of ethnic federalism arose, and was debated upon. However, the Constituent Assembly failed to agree on a constitution, especially given the acrimonious debates over ethnic federalism.

### State Restructuring in the First Constituent Assembly

Nepal is currently divided into 75 districts and 14 zones. In 2012, there were two models proposed by the State Restructuring Commission (SRC) of the Constituent Assembly regarding the future federal model of Nepal.<sup>64</sup> The SRC was appointed after the State Restructuring Committee failed to reach a consensus, and was therefore

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<sup>63</sup> The Preamble of the Interim Constitution includes the sentence, "Pledging to accomplish the progressive restructuring of the State in order to solve the problems existing in the country relating to class, ethnicity, region and gender".

<sup>64</sup> State Restructuring Commission Report, February, 2012, available at, <http://www.can.gov.np/en/publications/view/68>, last accessed on March 23, 2014.

expected to provide a compromise solution.<sup>65</sup> These two models reflected the lack of consensus among the members split mostly along party lines. The majority model had 11 provinces based on ethnic groups, whereas the minority model had six nameless provinces. Thus, we clearly see that ethnicity as a marker for federalism in Nepal is not a clearly settled issue.

The 11 province model is almost identical to the 14 province model suggested by the Committee on State Restructuring, but it has omitted 2 provinces and combined one to contain 11 provinces.<sup>66</sup> It is interesting to see the ethnic breakup in the 14 province model, where we see that almost all the proposed provinces have a mixed settlement, and in some the ethnic group whose name has been given to the region is not even a majority.<sup>67</sup> The provinces have been named as Karnali-Khaptad, Madhes-Abadh-Tharuwan, Magrat, Tamuwan, Narayani, Newa, Tamsaling, Kirat, Limbuwan and Madhes-Mithila-Bhojpura. Thus, they have clearly agreed with the Ethiopian idea of providing a name for the dominant ethnic group, as 8 of the provinces have names that can be identified with ethnic/linguistic groups. In addition, they have provisions for a non-territorial Dalit State.

The minority report has clearly eschewed the notion of ethnicity in the idea of State restructuring and instead has proposed a six province model, based on economic

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<sup>65</sup> “Eight Member State Restructuring Commission Formed”, available at, [http://ncf.org.np/ca-archives/ca\\_updates6.htm](http://ncf.org.np/ca-archives/ca_updates6.htm), last accessed on March 28, 2014.

<sup>66</sup> This model omitted the Sunkoshi and Sherpa province and combined Karnali and Jadan provinces from the 14 state model.

<sup>67</sup> See Annexure II.

viability.<sup>68</sup> Their model envisages two provinces in the Terai plains and four in the hilly plus Himalayan regions of the country. This logic is the torchbearer of the unity and nation building argument, as can be seen in the existing administrative division of the country.

It is interesting to note that the six members who prepared the majority report are all non-Parbatiya and thus members of ethnic groups with grievances against the current State structure. In addition, two of the three minority members belong to the Parbatiya group. This shows a clear ethnic divide with regards to the support of ethnicity based federalism. Even more interesting was the party divide on this issue. The nominees of the Maoist and Madheshi parties supported the ethnic model, while the Nepali Congress nominees voted for the economic model, while the CPN-UML nominees were equally divided, according to their ethnicity. In the context of the second Constituent Assembly, where the Maoists have been reduced to a third party, and the Madheshis have been reduced to a much lower position, this could be an important indicator of the direction of the ethnic debate. This is especially so, as the Nepali Congress and the CPN-UML jointly hold a two thirds majority in the current Constituent Assembly.

### Other Issues

Despite opting for ethnic names, the majority report is not as revolutionary as might have been expected. As expected, the right to self-determination explicitly excludes secession, and in fact preferential political rights for the majority community have also been suggested only for one term.<sup>69</sup> Similarly, it was clarified that there would be no

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<sup>68</sup> Minority Report, State Restructuring Commission Report, February, 2012, available at, <http://www.can.gov.np/en/publications/view/68>, last accessed on March 23, 2014.

<sup>69</sup> State Restructuring Commission Report, February, 2012, available at, <http://www.can.gov.np/en/publications/view/68>, last accessed on March 23, 2014.



provincial constitutions; just a single federal constitution.<sup>70</sup> They also provide for the possibility of autonomous regions based on ethnicity or language within the province, provided they have a demographic majority or a significant presence.<sup>71</sup> Thus we see that the accommodation debate was still not at the extreme end of demands, and the set of demands for exclusion were quite reasonable, and designed to assuage the fears of division of the country.

The Nepali State has already started introducing policies designed to foster inclusiveness and provide greater access to State structure and representation for the marginalized communities.<sup>72</sup> Thus reservations exist in the civil service and governmental education institutions for women, indigenous people, Madheshis, Dalits, disabled people and people from remote regions.<sup>73</sup> Currently, the second Constituent Assembly has been elected, and the issue is still open for debate; what remains the best way to manage ethnic concerns and provide for effective management of this ethnic diversity.

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<sup>70</sup> Ibid.

<sup>71</sup> Ibid.

<sup>72</sup> 2<sup>nd</sup> Amendment, Civil Service Act 1993. [2007]

<sup>73</sup> Ganga Datta Awasthi and Rabindra Adhikary, “Changes in Nepalese Civil Service after the Adoption of Inclusive Policy and Reform Measures” available at [http://www.ccd.org.np/publications/Changes\\_In\\_Nepalese\\_Civil\\_Service\\_ENG.pdf](http://www.ccd.org.np/publications/Changes_In_Nepalese_Civil_Service_ENG.pdf), last accessed on March 25, 2014.

### III. The Ethiopian Experience

Ethiopia is a country with an ancient history, with different religions and multiple linguistic groups.<sup>74</sup> In short, it reflects a lot of the differences existent in Nepal, and more importantly has had an ethnicity based federal system enshrined in the Constitution since 1995.<sup>75</sup> Thus, it is important to know how Ethiopia reached this point of ethnic federalism, and more importantly, whether the system has succeeded in assuaging the demands of the diverse populace.

#### Brief History

Ethiopia's history is varied and diverse, but for the focus of this thesis, I will only briefly recount the modern period (1855 onwards), which formed the basis of the modern Ethiopian state.<sup>76</sup> It is generally accepted that the modern Ethiopian empire (State) began with the centralization policies of Emperor Tewodros II (1855-68),<sup>77</sup> and was expanded upon by later emperors. While Emperor Yohannes IV allowed for a greater degree of regional autonomy, even while expanding his territory, and thus was described as being '*liberal and almost federal in practice*'<sup>78</sup> Emperor Menelik II(1886-) took stronger measures to expand the powers of the central government, and further

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<sup>74</sup> Fasil Nahum, *Constitution for a Nation of Nations: The Ethiopian Prospect* (The Red Sea Press, Asmara, 1997), 3.

<sup>75</sup> Constitution of the Federal Democratic Republic of Ethiopia, Addis Ababa, 1995. [Henceforth Ethiopian Constitution, 1995]

<sup>76</sup> Thomas P. Ofcansky and LaVerle Berry eds., *Ethiopia: A country study*, (Federal Research Division, Library of Congress, 1993) at xxv.

<sup>77</sup> Bahru Zewde, *A History of Modern Ethiopia, 1855-1991* (James Currey Publishers, 2001), 123.

<sup>78</sup> *Ibid.*, 124.

expanded the kingdom southwards, giving rise to the present size and diversity of Ethiopia.<sup>79</sup> This policy of centralization was continued by the new monarchs, and was also seen in the first written constitution of 1931.<sup>80</sup> In between 1931 and the end of the monarchy in 1974, there were multiple movements by peasants, and most notably by students, who prominently raised the issue of land rights and the right of nationalities to self-determination.<sup>81</sup> In 1974, a military government, known as the *Dergue* came to power, through a military revolution.<sup>82</sup> This regime did address certain issues of land reforms, but did not address issues of self-determination, and in fact acted as a dictatorship with widespread violence.<sup>83</sup> As a result, there were multiple armed groups, including the Eritrean People's Liberation Front (EPLF), Tigray People's Liberation Front (TPLF), Oromo Liberation Front (OLF) and Ethiopian People's Revolutionary Party (EPRF), who finally overcame the dictatorship in 1991, setting the ground for the current constitution and the ethno federal model.<sup>84</sup>

### Brief Background to Ethiopia's Ethnic Movements

The major ethnic groups in terms of their numerical size in Ethiopia are the Oromo (34%) and the Amhara (27%) who make over 60% of the country's population.<sup>85</sup> They

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<sup>79</sup>Solomon Negussie, *Fiscal Federalism in the Ethiopian Ethnic-Based Federal System* (Wolf Legal Publishers, Utrecht, 2006), 15–16; Yonatan Fessha, *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia* (Ashgate Publishing, Ltd., Surrey, 2013), 159.

<sup>80</sup> Nahum, *Constitution for a Nation of Nations*, 17–24.

<sup>81</sup> Nahum, *Constitution for a Nation of Nations*, 29.

<sup>82</sup> Nahum, *Constitution for a Nation of Nations*, 30.

<sup>83</sup> Andargachew Tiruneh, *The Ethiopian Revolution 1974-1987: A Transformation from an Aristocratic to a Totalitarian Autocracy* (Cambridge University Press, Cambridge, 1993).

<sup>84</sup> Nahum, *Constitution for a Nation of Nations*, 33-39.

<sup>85</sup> Grover Hudson, "Ethnic Group and Mother Tongue in the Ethiopian Censuses of 1994 and 2007," *Aethiopica* 15 (2013): 204–18.

are then followed by the Somali (6.2%), Tigray (6.1%), Sidama (4%), Gurage (2.5%) and Welayta (2.3%) groups who combined make up a little over 20 percent.<sup>86</sup> The 2007 census showed a total of 85 ethnic groups and 87 mother tongues.<sup>87</sup>

The main group behind the expansion of modern Ethiopia was the Amhara,<sup>88</sup> and so Ethiopia for a long time was represented through the Amharic language and as a Christian state despite the presence of a diverse population.<sup>89</sup> It is of course impossible to lay down the complex, and often contested history<sup>90</sup> behind the interactions of the State and different ethnic groups within the scope of this paper. However, it suffices to say that one of the difficult issues is one regarding the over representation of the Amhara identity as the representation of the Ethiopian national identity. It has been succinctly put as:

Ask anybody what Ethiopian culture is? Ask anybody what the Ethiopian language is? Ask anybody what is the national dress? It is either Amhara or Amhara-Tigray!!.....In short, to be an Ethiopian, you will have to wear an Amhara mask,,<sup>91</sup>

This is directly analogous to the exclusion felt by non Parbatiya group in Nepal. In fact, if one were to replace Amhara with Parbatiya, it could be a representation of the anguish felt by non-Parbatiyas. The question, therefore is to what degree has the Ethiopian

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<sup>86</sup> Ibid.

<sup>87</sup> Ibid.

<sup>88</sup> Assefa Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia: A Comparative Study* (Wolf Legal, 2006), 11–22.

<sup>89</sup> Fessha, *Ethnic Diversity and Federalism*, 165. The government prohibited the use of language other than Amharic.

<sup>90</sup> Ibid., 162.

<sup>91</sup> Quote by Wallelgn Mequkananet; Ibid., 169. Also see Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia*, 72. .

model succeeded in managing conflicts and aspirations among the various ethnic groups in Ethiopia, thus providing a model from which Nepal could learn in its efforts to manage ethnic diversity.

### Examining Ethiopian Federalism

Article 1, of the Ethiopian Constitution defines the State as the Federal Democratic Republic of Ethiopia.<sup>92</sup> This is similar to the terminology employed by the Interim Constitution of Nepal, 2007 which also defines the State as a federal democratic republican State.<sup>93</sup> Ethiopia is divided into nine autonomous regional states namely Tigray, Afar, Amhara, Oromia, Somali, Harari, Benishangul-Gumuz, Gambella and Southern Nations, Nationalities and People's Region [SNNPR].<sup>94</sup> The first six are named after majority ethnic groups residing in those regions (with the exception of Harari). In addition, there are two chartered cities; namely Addis Ababa (capital) and Dire Dawa.<sup>95</sup>

### Nation, Nationality and People

The Ethiopian Constitution has followed the idea of different political units, i.e. the nation, nationality and people, in the constitutional text.<sup>96</sup> The theoretical justification and the practical significance of the definition is however not very clear. As defined in Article 39 (5) of the Ethiopian Constitution

A 'Nation, Nationality or People', for the purpose of this Constitution, is a group of people, who have or share a large measure of a common culture or similar customs,

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<sup>92</sup> Article 1, Ethiopian Constitution 1995.

<sup>93</sup> Article 4 (1) of the Interim Constitution of Nepal, 2006 states that "*Nepal is an independent, indivisible, sovereign, secular, inclusive and federal democratic republican State.*"

<sup>94</sup> Article 47(1), Ethiopian Constitution 1995.

<sup>95</sup> Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia*, 214.

<sup>96</sup> Preamble, Ethiopian Constitution, 1995.

mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and one who inhabit an identifiable, predominantly contiguous territory.<sup>97</sup>

The Constitution thus seems to follow a hierarchy with regards to Nations, nationality and people. Thus, the bigger ethnic groups seem to constitute a nation, which can be seen with states named after them. Despite this possible construction, the Constitution is formally silent on this. However, it is clear that such a definition would be welcomed by the ethnic minorities in Nepal, as the Nepali nation still relies on a nation building mentality. This can be seen in Article 8 of the Interim Constitution, which defines Nepal as:

Having multiethnic, multilingual, multireligious and multicultural characteristics with common aspirations and being united by a bond of allegiance to national independence, integrity, national interest and prosperity of Nepal, all the Nepalese people collectively constitute the nation.<sup>98</sup>

This can be contrasted with the Preamble of the Ethiopian Constitution, which states:

We, the Nations, Nationalities and Peoples of Ethiopia: Strongly committed, in full and free exercise of our right to self-determination, to building a political community founded on the rule of law and capable of ensuring a lasting peace, guaranteeing a democratic order, and advancing our economic and social development.<sup>99</sup>

Thus, the Ethiopian constitution clearly recognises the differences in the country, and embraces the right to self-determination. This can be seen in the existence of the right of states to have their own Constitution,<sup>100</sup> and more importantly, in the right to secede.<sup>101</sup>

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<sup>97</sup> Article 39 (5), Ethiopian Constitution, 1995.

<sup>98</sup> Article 8, Interim Constitution of Nepal, 2007.

<sup>99</sup> Preamble, Ethiopian Constitution, 1995.

<sup>100</sup> Article 52 (b), Ethiopian Constitution, 1995.

This is a revolutionary right, and yet it has been argued that it is merely symbolic, and exists so as to get the different parties to agree to the constitution.<sup>102</sup> How is this right to be exercised in practice? Article 39 (4) provides for the procedure, but the conditions for exercise of this right are non-existent, in contrast to the Transitional Charter, where rights had to be denied, abridged or abrogated for the exercise of secession rights.<sup>103</sup> It is unlikely that the current federal government in Ethiopia will allow for a State to secede. Practically it is a right, which might be utilized only by the larger ethnic groups such as the Oromia or the Somali. Yet, the federal State is engaged in conflict with separatists such as the OLF.<sup>104</sup> A test case could emerge in the unlikely scenario of a loss of dominance of the EPRDF coalition. However, it cannot be denied that this right to secede has immense symbolic value.

This right to secede has often been contrasted with similar rights in the USSR and Yugoslavia, despite analogous levels of control between the EPRDF and the Communist party.<sup>105</sup> Assefa rightly points out that these federations did not operate as a federation, but were federation merely ‘in form’<sup>106</sup> and the collapse of Soviet federalism

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<sup>101</sup> Article 39 (1) reads as, “Every Nation, Nationality and People in Ethiopia has an unconditional right to self- determination, including the right to secession.”

<sup>102</sup> , available at <http://publius.oxfordjournals.org/content/35/2/313.full.pdf+html>, last accessed on March 26, 2014.

<sup>103</sup> Article 2 (c), Transitional Period Charter of Ethiopia No.1, 1991.

<sup>104</sup> Alem Habtu, “Multiethnic Federalism in Ethiopia: A Study of the Secession Clause in the Constitution,” *Publius: The Journal of Federalism* 35, no. 2 (2005): 329.

<sup>105</sup> Assefa Fiseha, “Theory versus Practice in Ethiopia’s Ethnic Federalism” in David Turton (eds.) *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (James Currey, London, 2006), 137.

<sup>106</sup> Ibid.

cannot be attributed to the secession clause.<sup>107</sup> The Ethiopian model has a strong constitutional grounding, and the existence of structures designed to promote inclusiveness and manage ethnic diversity. It also has existing challenges, in the form of independence demands from certain groups.<sup>108</sup> In addition, it is faced with the prospect of a breakdown in case the electoral space transforms itself into a true multiparty system. This electoral challenge can be a game changer. Yet, despite the challenges, the Ethiopian federation is clearly more advanced than the Soviet model and is a federal system in its intent and for most aspect of its operation.

It is highly unlikely that the Nepali model will have such a significant clause of secession, especially because there is no popular demand for it. Infact ethnic groups are wary of espousing such a demand, as it could lead to a loss of support for any form of governance which recognises ethnic identity. This could be seen in the majority report of the State Restructuring Commission, which despite opting for a ethnicity based federalism advised for a right to self-determination without the right to secede.<sup>109</sup>

### House of Federation

The House of Federation is the second chamber in the Ethiopian federal structure of governance. It is a representation of the different constituent units within Ethiopia and thus seems like a normal second chamber. Yet, it is a completely unique institution, with regards to its functions and powers. It is reflective of the numerical strength of the constituent ‘Nation, nationality and People’.<sup>110</sup> However, there are certain anomalies,

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<sup>107</sup> Habtu, “Multiethnic Federalism in Ethiopia,” 317.

<sup>108</sup> Ibid.

<sup>109</sup> Fessha, *Ethnic Diversity and Federalism*, 217–218.

<sup>110</sup> Article 61, Ethiopian Constitution, 1995.



which might leave certain groups unrepresented.<sup>111</sup> While, it does not have the powers of law making, it has other important powers such as constitutional interpretation and resolving disputes between States.<sup>112</sup>

This model of the Ethiopian House of Federation can serve as a useful model for Nepal, especially with a few modifications. It would be necessary to provide the HoF with powers of legislative approval, especially in matters concerning ethnic relations and federalism. Thus, such a body would then provide effective ethnic representation, as well as protect state jurisdictions. It would however be better to leave the role of constitutional interpretation to a dedicated Constitutional court to avoid the politicization of constitutional issues.

### Language Policy

Article 5 of the Ethiopian Constitution provides for equal state recognition to all Ethiopian languages, while providing for Amharic to be the working language of the Federal Government.<sup>113</sup> Most importantly, it provides for members of the federation the powers to determine their respective working languages as well.<sup>114</sup> Similarly, Article 39 (2) provides for linguistic rights in stronger terms, providing the right for groups without their own State within the Federal structure.<sup>115</sup> However, with regards to

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<sup>111</sup> Fessha, *Ethnic Diversity and Federalism*, 320.

<sup>112</sup> Article 62; Also see, Fessha, *Ethnic Diversity and Federalism*, 209. In case of secession procedures, it can also demand motivations for secession from the relevant council, though there is no constitutional obligation for the council to comply.

<sup>113</sup> Article 5, Ethiopian Constitution, 1995.

<sup>114</sup> Article 5 (3), Ethiopian Constitution, 1995.

<sup>115</sup> Article 39 (2) states, “Every Nation, Nationality and People in Ethiopia has the right to speak, to write and develop its own language; to express, to develop and to promote its culture; and to preserve its history.”

application, especially in terms of primary education, there is sufficient variation, with local languages being balanced with Amharic, and English.<sup>116</sup> In Ethiopia, it has been seen that ethnicity is not always represented by language, and that Amharic has been adopted by various groups.<sup>117</sup> In addition, Amharic has been used as the official language in four other States.<sup>118</sup> Furthermore, it can be seen that not all the languages have been equally developed, and the promotion of local languages can often lead to further marginalization of the minorities within these States. It can be argued that development of these languages can lead to the loss of language competence amongst the local people, especially with languages used in the federal level;<sup>119</sup> this might not always be the case. In fact, local people are more than likely to be multilingual, thus actually securing an advantage for themselves with regards to public service jobs.

It has been stated that not many Amharic people learn other Ethiopian languages,<sup>120</sup> Nepal is not a highly multi lingual society with regards to local languages, especially in the case of the Nepali speakers.<sup>121</sup> However, in any divided society, it is necessary to recognize and accommodate local languages, in order to avoid the feelings of

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<sup>116</sup> Gideon Cohen, “ The Development of Regional & Local Languages in Ethiopia’s Federal System” in Turton, *Ethnic Federalism*, 167.

<sup>117</sup> Ibid.

<sup>118</sup> Amharic is used in Gambella, SNNPRS, Benshangul/Gumuz, Afar and is one of three languages in Harari, apart from being used in Amhara State.

<sup>119</sup> Turton, *Ethnic Federalism*, 21.

<sup>120</sup> Sarah Vaughan, “ Responses to Ethnic Federalism in Ethiopia’s Southern Region” in Turton, *Ethnic Federalism*, 201.

<sup>121</sup> This is based on the author’s own understanding of Nepali society, where Nepali speakers do not learn other local languages.

exclusion.<sup>122</sup> In addition, as Gideon Cohen argues in the case for local language usage in Ethiopia, the usage of mother tongues in primary education is beneficial to the overall development of the children.<sup>123</sup> This has been a long standing demand of the different ethnic groups, who have felt that the usage of Nepali in primary school has hampered the educational growth of children with different mother tongues.<sup>124</sup> Thus, the State needs to provide for resources to fulfill this need, instead of just providing for the constitutional right. Irrespective of the future State structure; either a decentralized model or a federal model, the Nepali state can no longer be identified as only promoting a single language.

The new approach therefore has to be more realistic and accommodative. The Interim Constitution already provides some insight into that direction. Article 5 (3) envisages the usage of mother tongues in local bodies, thus nullifying the decision of the Supreme Court, based on the 1990 constitution.<sup>125</sup> It is extremely unlikely that any future State in Nepal would immediately move to use a single local language as the sole language of governance. Such a move would not only shut out the non-local groups but also be a disadvantage to the members of the same ethnic group who might not be proficient in the language due to existing State policies in favouring Nepali. Thus, it is likely that the

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<sup>122</sup> Gideon Cohen, “The Development of Regional & Local Languages in Ethiopia’s Federal System” in Turton, *Ethnic Federalism*, 167.

<sup>123</sup> Ibid.

<sup>124</sup> Ramawatar Yadav, “The Use of the Mother Tongue in Primary Education: The Nepalese Context” *Contributions to Nepalese Studies* 19, no. 2 (1992): 179, available at [http://himalaya.socanth.cam.ac.uk/collections/journals/contributions/pdf/CNAS\\_19\\_02\\_02.pdf](http://himalaya.socanth.cam.ac.uk/collections/journals/contributions/pdf/CNAS_19_02_02.pdf), last accessed on March 26, 2014.

<sup>125</sup> *Adv. Lal Bahadur Thapa and Others v Kathmandu Metropolitan City and Others* Writ No. 2931/2056 (1999).

future idea would be one of a dual language, with special incentives to increase the reach of the local language. However such a decision could contribute to the continuing hegemony of the Nepali language, given the lack of development of the local language, and hence some incentives might be added to the knowledge of the local language. This would reflect a genuine effort at maintaining ethnic balance, while also giving space to the existing lingua franca of the country. On the federal level, just like Amharic in Ethiopia, it is highly likely that Nepali will continue to be the working language of the federal government.

### Conflicts within the Federal State

The idea of a ‘predominantly contiguous territory’ has seen the exacerbation of ethnic conflicts in Gambella and the SNNPRS. While Gambella has seen a competition between two groups,<sup>126</sup> the conflict in SNNPRS is essentially for the creation of ethnic zones within the State.<sup>127</sup> In addition, the Harari State is an important case study in exclusionary politics.. This is important given the mixed demographic structure of Nepal, and the absence of a clear majority in most of the proposed ethnic States.

### Gambella Regional State

The Gambella Regional State consists of five indigenous groups,<sup>128</sup> namely the Nuwer (47%), Anyiwak (21%), Mejenger (4%), Upo and Komo (0.4%), in addition to Amhara

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<sup>126</sup> Dereje Feyissa, “The Experience of Gambella Regional State,” *Ethnic Federalism. The Ethiopian Experience in Comparative Perspective*, 2006.

<sup>127</sup> Sarah Vaughan, “ Responses to Ethnic Federalism in Ethiopia’s Southern Region” in Turton, *Ethnic Federalism*, 181-208.

<sup>128</sup> Dereje Feyissa, “The Experience of Gambella Regional State,” in Turton, *Ethnic Federalism*, 209.

(8.5%), Oromo (5%) and other Ethiopian ethnic groups.<sup>129</sup> The creation of the Gambella Peoples' National Regional States (GPNRS) has been argued to be a positive step in the integration of hitherto neglected region.<sup>130</sup> However, this region has also witnessed conflicts, especially between the locals and the highlanders, despite the existence of policies such as affirmative action for the locals.<sup>131</sup> In addition, there exist conflicts between the Anyiwak and the Nuwer. Whereas the Anyiwak claimed to be historical natives, the Nuwer have their own competing claims, in addition to being demographically superior.<sup>132</sup> Infact the census figures show the Nuwer increasing from 40% in the 1995 census to 47% in the 2007 census. Thus, there has been retort to claiming specified territories for certain ethnicity within the GPNRS to stop the conflict.<sup>133</sup>

The ethnic makeup of GPNRS can be used as a caution to various proposed federal States in Nepal as opponents of ethnic federalism could pick this up as another reason not to follow an ethnic model. Thus, it is important to have clearer policies in multi ethnic regional States, as it is clear that the same narrative of mother State might not be applicable in such cases.

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<sup>129</sup>The Population and Housing Census of Ethiopia, 2007, available at [http://www.csa.gov.et/newcsaweb/images/documents/surveys/Population%20and%20Housing%20census/ETH-pop-2007/survey0/data/Doc/Reports/Gambella\\_Statistical.pdf](http://www.csa.gov.et/newcsaweb/images/documents/surveys/Population%20and%20Housing%20census/ETH-pop-2007/survey0/data/Doc/Reports/Gambella_Statistical.pdf), last accessed on March 23, 2014.

<sup>130</sup> Dereje Feyissa, "The Experience of Gambella Regional State," in turton, *Ethnic Federalism*, 213.

<sup>131</sup> Feyissa, "The Experience of Gambella Regional State," 216.

<sup>132</sup> Ibid; Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia*, 267–270.

<sup>133</sup> Feyissa, "The Experience of Gambella Regional State," 224.

### Southern Nation, Nationalities and People's Region [SNNPRS]

The SNNPRS has 3 main ethnic groups; the Sidama, Gurage and Welayta, along with over 45 other officially recognized ethnic groups.<sup>134</sup> This region has seen multiple conflicts, especially centered on language.<sup>135</sup> In addition, Vaughan suggests, using North Omo zone as an example, the importance of ethnic mobilization has resulted in the creation of smaller ethnic sub-units, part of which could be for the completion of resources.<sup>136</sup> However, the creation of smaller sub-units has also been explained as a check to political control by any single group over the entire State.<sup>137</sup>

This is a worry for Nepal which is contemplating ethnic federalism, especially given the lopsided resource availability throughout the country, and even within the same geographical region. Increased competition for resources using ethnicity as a tool could be the recipe for increasing ethnic conflicts. In addition, the breakup into smaller units could lead to a loss of social harmony, as well as being economically unproductive thus bringing into question the usage of ethnic federalism as a means for ethnic diversity management.

### Harari

Harari is a multi-ethnic city State, in which the Harari ethnic group are a minority, behind the Oromia and the Amhara.<sup>138</sup> However, they along with the Oromia are the co-owners of the State, and as such, this leaves a large minority excluded from the political

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<sup>134</sup> Sarah Vaughan, "Responses to Ethnic Federalism in Ethiopia's Southern Region," *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective*, 2006, 181–207.

<sup>135</sup> Ibid.

<sup>136</sup> Vaughan, "Responses to Ethnic Federalism in Ethiopia's Southern Region", 192.

<sup>137</sup> Dereje Feyissa, "The Experience of Gambella Regional State," in Turton, *Ethnic Federalism*, 213.

<sup>138</sup> Fiseha, *Federalism and the Accommodation of Diversity in Ethiopia*, 275.

structure of the State.<sup>139</sup> This sort of exclusionary politics can be used as a cautionary tale in Nepal, where historical home grounds of ethnic groups are now populated with outsiders. Thus, Harari's policies of exclusion are unlikely to feature in any ethnic setup of Nepal. It is important to realize that Harari has a unique historical status, which thus makes it a bad example to caution against ethnic federalism. However, it is likely that certain positions may be reserved for a particular group in a future Nepali model, and that might serve to perpetuate a new sense of discrimination.

### Other Constitutional Provisions

The Ethiopian federation clearly goes beyond other federations, in its constitutional provisions, especially with the right to secede. In addition, there are a lot of other powers given to the States, powers which have been described as 'overwhelming'.<sup>140</sup> However, it is clear that the relationship between the federal government and the States has an overwhelming tilt towards the federal government, despite the lack of clear constitutional principles towards such a role.

It has been observed, by a number of commentators that the EPRDF, through its constituent and allied parties rules all the different States.<sup>141</sup> What this has done, is create a unity of policies that make it difficult to differentiate between federal and state policies. This might have had a positive effect, but this is generally not the feature of a federal structure, especially not one with such substantial powers as the Ethiopian Constitution provides for. As identified before, this could lead to possible problems

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<sup>139</sup> Asnake Kefale, "Federalism and Ethnic Conflict in Ethiopia: A Comparative Study of the Somali and Benishangul-Gumuz Regions," 2009, 105.

<sup>140</sup> Assefa Fiseha, "Theory versus Practice in Ethiopia's Ethnic Federalism" in David Turton (eds.) *Ethnic Federalism: The Ethiopian Experience in Comparative Perspective* (James Currey, London, 2006), 145.

<sup>141</sup> *Ibid.*, 146.

with regards to practice, once the effective stranglehold of the EPRDF in Ethiopian politics ends.

### **The Electoral Challenge**

The electoral space in Ethiopia seems to be continually shrinking and yet the ruling EPRDF has not been short of challengers. While the 2005 elections were the first competitive multiparty elections, it was subsequently followed by similar elections in 2010 as well.<sup>142</sup> However, on a comparison of the two elections, it is clear that democratic space is shrinking, and it seems unlikely that the fragmented opposition will mount a credible challenge, given the close identification of the EPRDF with the State.

The changed dynamics of the second Constituent Assembly in Nepal make it highly unlikely that any single party will be able to claim ownership of the Constitution, and thus it is highly unlikely that there will be a lack of political space in Nepal, especially given the country's electoral history over the past sixty years. Hence, any federal structure created by the Constitution is unlikely to be challenged with a change in the ruling party combination.

### **Defining Features of Ethiopian Federalism**

After looking at the different features of Ethiopian federalism, it can be seen that there are certain distinct features, which can be clearly identified, such as:

- i) The naming of the States after the dominant ethnic group
- ii) The dominance of mostly one group in a particular State, so as to avoid the dominance of that group in more than one State.
- iii) The idea of autonomous sub-units seems to have followed a top down approach; although there seems to have been some level of popular demand

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<sup>142</sup> Elliott Green, "Decentralization and Political Opposition in Contemporary Africa: Evidence from Sudan and Ethiopia," *Democratization* 18, no. 5 (2011): 1094.



for the same. Thus, this seems to point towards the need for a democratic mobilization as a necessity for the establishment of an ethnic federal structure.<sup>143</sup>

In Nepal, an indigenous movement has existed, since the 1950s and has gained much larger presence post the 1990 constitution, which failed to satisfy the demands of the different ethnic groups.<sup>144</sup> In addition, the demands of the different groups were espoused by the Maoists in their decade long civil war, and were also in focus during the Madhesh movement of 2007. Thus there is the presence of both academic and practical examples to suggest that there was ethnic mobilization within the Nepali democracy for the sake of a changed state structure, with adequate reference to ethnicity. This movement has finally come to the logical demand of an ethnic structure, especially as past constitutions have continued to foster legal exclusion and stopped short of fulfilling specific demands.

In this regard, all the three features of Ethiopian federalism as outlined above can find a place in the Nepali scenario, provided they can overcome opposition of the Parbatiya elite, and find their way into the constitutional structure. Even the symbolic naming of a province after indigenous groups can go a long way in reducing the previously homogenizing and exclusionary nature of the Nepali identity.

### **Perspectives on the State**

The perspectives on the Ethiopian State reflect to a large extent the issue of a divided history, especially with regards to nation building. 3 particular approaches stand out, as

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<sup>143</sup> Mahendra Lawoti and Susan Hangen, *Nationalism and Ethnic Conflict in Nepal: Identities and Mobilization After 1990*, vol. 58 (Routledge, Oxford, 2013).

<sup>144</sup> Ibid.

identified by Merera in the Ethiopian discourse.<sup>145</sup> The first one looks at the need for the initial nation building and emphasizes the need for a dominant language, culture and religion for the emergence of the Ethiopian state. The second one looks at oppression, but from within, and this can be reflected in the explanation of Ethiopia as ‘*a prison house of oppressed nationalities and classes*’.<sup>146</sup> Thus this position looks to Amhara dominance. Solution to this position has often led to calls for independence, especially by the Oromo and Somali groups, which is the third view.<sup>147</sup>

Nepal has a clear identification with the first and second view, especially with regards to nation building and the role of the Parbatiya elite. However, there have never been serious calls for secession. In that regards, it can be agreed that ethnic management provisions should be implemented to prevent such demands for coming across.

In addition, Ethiopian federalism has clearly not reached the level of democratic mobilization and participation required to ensure the stability and continuity of the current Constitution. The domination by a single party vision can be a future source of conflict, especially with more democratic mobilization. In addition, the focus on the ethnic aspect of federalism has led to a loss of democratic space. The EPRDF is in control of the legal agenda, economic planning, judiciary and civic space.<sup>148</sup>

### Issues of Legitimacy

In the preceding section, we talked about the constitutional basis and strengths of the Ethiopian federal system. We also discussed the possible challenges to this system;

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<sup>145</sup> Merera Gudina, “Contradictory Interpretations of Ethiopian History: in Turton, *Ethnic Federalism*.

<sup>146</sup> Ibid., 126.

<sup>147</sup> Ibid., 128.

<sup>148</sup> Jon Abbink, “The Ethiopian Second Republic and the Fragile Social Contract,” *Africa Spectrum*, 2009, 23.

chief among them the possibility of a collapse of the federal system in the event of the EPRDF losing its hegemonic hold on the Ethiopian state. Yet, there is another important consideration. It has been argued that were the EPRDF to lose its hegemonic control over the Ethiopian political space, there might be demands for a change in the current system, especially given the apparent lack of legitimacy of the Ethiopian constitution in terms of its drafting.<sup>149</sup> However, Gedion Hessebon argues that this lack of initial legitimacy ought to be rectified through constitutional reforms, thus preserving the existing constitutional structure, especially as the Constitution derives huge support and legitimacy with regards to the portions on self-determination.<sup>150</sup>

The issue of legitimacy is almost moot with regards to Nepal's constitution drafting. At the outset, this is a constituent assembly that has been elected as part of a free and fair election. In fact, the change in the party composition of the second Constituent Assembly can be said to be a part of this legitimization process. Thus, Nepal faces no constitutional legitimacy challenge, if the future Constitution is to be the product of the current Constituent Assembly. Even if one were to look at sociological legitimacy, as utilized by Gedion Hessebon,<sup>151</sup> the Nepali constitution writing project seems to be on a strong footing, with acceptance of the project being based neither on sanction nor reward, but instead on the need to right historical wrongs and to have a 'new Nepal'. In addition, the Nepalese constitution writing space has been a keenly contested space over

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<sup>149</sup> Gedion T. Hessebon, "The Precarious Future of the Ethiopian Constitution," *Journal of African Law* 57, no. 2 (2013): 218–221.

<sup>150</sup> *Ibid.*, 228.

<sup>151</sup> *Ibid.*, 216–219.

the course of two constituent assemblies. Even within the overwhelming support for federalism, there are voices both for and against ethnic federalism.<sup>152</sup>

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<sup>152</sup> This can be seen in the majority and minority reports of the SRC in the First Constituent Assembly.

## IV. Bosnia and Herzegovina [BiH]

### Brief History

The federation of BiH was formed in 1995, the same year as the current Ethiopian constitution. It is mainly composed of three main communities or ‘constituent people’<sup>153</sup> Bosnian Muslims, Bosnian Serbs and Bosnian Croats and two entities; the Federation of Bosnia and Herzegovina (Muslims and Croats) and the Republika Srpska (Serbs).<sup>154</sup> As reflected in the name, BiH has a federal part in the Federation, while Republika Sprska follows a unitary structure.<sup>155</sup> It is important to note that despite the existence of such equal structure, the groups do not have equal numbers. The last census, which was conducted in 1991 showed that Bosniacs constituted 44%, while the Serbs and Croats constituted 31% and 17 % of the population respectively.<sup>156</sup> The residual power is provided to these two entities, thus in effect leaving the entities in control of their own policies.<sup>157</sup>

It is important to note that the current constitution of BiH was not designed by the people of BiH, but was part of the conclusion of a peace process.<sup>158</sup> BiH was the result of a compromise; a ‘forced together’ federation, which is now being ‘held together’ by the existence of weak federal structures, and the Office of the High Representative.<sup>159</sup> Thus the mechanisms existent in the BiH Constitution are chiefly designed to facilitate

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<sup>153</sup> Preamble, Bosnian Constitution, 1995.

<sup>154</sup> Article I, 3, Bosnian Constitution, 1995.

<sup>155</sup> Burgess, “Multinational Federalism in Multinational Federation,” 33.

<sup>156</sup> Keil, *Multinational Federalism in Bosnia and Herzegovina*, 75.

<sup>157</sup> Article III, 3 (a), Bosnian Constitution, 1995.

<sup>158</sup> Keil, *Multinational Federalism in Bosnia and Herzegovina*, 78.

<sup>159</sup> Burgess, “Multinational Federalism in Multinational Federation,” 41.

peace, and not to change historical inequalities as the Ethiopian constitution. Thus, constitutional reforms are difficult to achieve, given the complete lack of discussion among the shareholders. This is instructive to the Nepali experience, where the first Constituent Assembly not only had sufficient time for discussion, but was also extremely participatory in terms of marginalized groups. This shows that while a participatory process is important, it is not the only indicator of a successful constitutional design process.

However, unlike the Ethiopian federation, the federal government in BiH does not have the advantage of revenues to maintain control over the entities.<sup>160</sup> This lack of revenue points to BiH as a sum of two entities, rather than as a single State. This is very different to Ethiopia, where despite the federal structure, the feeling of Ethiopian is still strong.

### Multiple Constitutions

Just like Ethiopia, the two entities in BiH have their own constitutions, and are autonomous in almost all respects.<sup>161</sup> Infact the Bosnian Federation has constitutions in all of its cantons as well, thus reflecting a high degree of decentralization.<sup>162</sup> This approach seems complicated and could be said to encourage inefficiency, especially given BiH's population of four million. However, with regards to constitutional design and self-determination, having different constitutions would allow the constituent units to have a higher degree of control. However, it might also tend to exacerbate differences. This might possibly be the reason why Nepal's constitution writing mechanism has not seen demands for multiple constitutions.

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<sup>160</sup> Ibid.

<sup>161</sup> Keil, *Multinational Federalism in Bosnia and Herzegovina*, 125–175.

<sup>162</sup> Soeren Keil, "Building a Federation within a Federation," *L'Europe En Formation*, no. 3 (2013): 114–25.

## House of Peoples

The House of Peoples is the second chamber in a bicameral legislative, and like Ethiopia represents the ethnic composition of the country. This body has 15 delegates; 5 from each of the ethnic groups.<sup>163</sup> The House of People has to pass the decisions just like the House of Representatives,<sup>164</sup> thus allowing it a great measure of power, which is unlike the Ethiopia second chamber. There is an emphasis on consensus which can be seen by the ability of one single group to effectively veto the meetings, through the quorum requirement.<sup>165</sup> However, it is important to note that the delegates have to come from their respective entities.<sup>166</sup> Thus, like the Ethiopian second chamber, the Bosnian House of Peoples represents ethnic groups, rather than the constituent units.

## Significant Characteristics

The Bosnian model has two essential characteristics that make it similar to the Nepali quest for a federal system. Firstly, it was the end result of a peace agreement, with the focus on peace. This is analogous to the Nepali situation, where the current phase of constitution writing can trace itself back to the agreement between the political parties and the Maoists. Second, it focuses on power sharing and ethnic federalism as the basis of the new constitutional structure, which can be seen in its structure.

The power sharing at the federal level envisages a rotating position for the Presidency, which is composed of 3 members, one from each constituent people.<sup>167</sup> In addition, there

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<sup>163</sup> Article IV, 1, Bosnian Constitution, 1995

<sup>164</sup> Keil, *Multinational Federalism in Bosnia and Herzegovina*, 101.

<sup>165</sup> For an effective quorum, there has to be 9 members, provided at least 3 members of each group are present. Article IV, 1 (b), Bosnian Constitution, 1995.

<sup>166</sup> Article IV, 1 (a), Bosnian Constitution, 1995.

<sup>167</sup> Article V, Bosnian Constitution, 1995.

is focus on consensual politics<sup>168</sup> with the further existence of a ‘vital interest’ veto.<sup>169</sup> This idea of proportional representation is found throughout the structure of the Bosnian government, including in the Council of Ministers, which is however a reflection of agreement among the political parties.<sup>170</sup> However, the House of Representatives shares the principle of proportionality,<sup>171</sup> and further have the concept of an ‘entity veto’.<sup>172</sup>

The Constitutional Court is one of the few structures in BiH to not have a veto provision. In this, it is helped by the existence of three international judges, who are appointed by the President of the European Court of Human Rights.<sup>173</sup> The Court has issued an important judgment with regards to power sharing within the entities of the BiH, resulting in the existence of quotas to guarantee representation for all three ethnic groups within the two entities.<sup>174</sup>

### **Mutual Veto and Ethnic Territoriality**

The BiH structure has the existence of the ‘mutual veto’ makes it complicated to have effective governance.<sup>175</sup> This thus requires the consent of all the three constituent people. This should be taken into account by Nepal’s constitution makers, where the focus on consensus politics has led to gridlock and a lack of progress on contentious issues. It has to be understood that it is impossible to find consensus on contentious

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<sup>168</sup> Article V, Bosnian Constitution, 1995.

<sup>169</sup> Article V.2 (d), Bosnian Constitution, 1995.

<sup>170</sup> Keil, *Multinational Federalism in Bosnia and Herzegovina*, 100.

<sup>171</sup> Article IV.2, Bosnian Constitution, 1995.

<sup>172</sup> Article IV.3 (d), Bosnian Constitution, 1995.

<sup>173</sup> Article VI.1 (a), Bosnian Constitution, 1995.

<sup>174</sup> Burgess, “Multinational Federalism in Multinational Federation,” 38.

<sup>175</sup> Keil, *Multinational Federalism in Bosnia and Herzegovina*, 133.



issues of State restructuring, and that was the reason for the failure of the first constituent Assembly to promulgate a constitution.

In addition, the elections to State institutions in BiH reflect the principle of ‘ethnic territoriality’ which has resulted in the violation of rights of other minorities who do not belong to the ‘constituent people’, as well as individuals from the opposite ethnic group in the ‘wrong entity’. Infact, this issue has reached the European Court of Human Rights, where in the case of *Sejdic*,<sup>176</sup> the Court upheld that such rules violated the rights of the petitioners. Thus, this model can bring across issues of ethnic conflict, and there seems to be little incentive at all for the creation of a united identity.

This is an important argument used by opponents of ethnic federalism in Nepal, where the focus on group rights leads to a loss of individual rights, as well as rights of other groups. This model will clearly not work in Nepal, where there is the presence of a strong Nepali identity. Any opposition to the identity is to the constituent of such an identity, but not to the existence of that. Thus, the search for the constitution drafters is for a model which will accommodate ethnic diversity, but also create a greater sense of bonding for the nation.

The demographics and its distribution in Nepal show that no ethnic group can have a realistic dream of a separate nation. While a united Madhesh province has been used to scare people, as a possibility of a future secession, such a demand is neither realistic nor popular.<sup>177</sup>

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<sup>176</sup> *Sejdić and Finci v. Bosnia and Herzegovina* ECHR, Applications nos. [27996/06](#) and [34836/06](#)

<sup>177</sup> Although there are some armed movements in the Terai plains, they are not a serious threat to the Nepali state and do not have the mass following as accorded to mainstream Madheshi parties.

## Problems in Constitutional Reform

As we have seen, the Bosnian Constitution first sought to achieve peace through the use of self-governance, thus leading to a weak central structure. There have been various proposals put forward to change the model. The European Stability Initiative (ESI) argued for abolishing the federation of Bosnia and Herzegovina and changing the entire country into cantons.<sup>178</sup> The Venice Commission instead focused on changing the idiosyncratic provisions of the Constitution, such as multiple Presidents and the cumbersome process of consent of entities in the voting process.<sup>179</sup> However, these reforms have not been implemented.

It is clear that there are significant difficulties to changing the structure of the BiH due to the complicated constitutional design, although the Constitution does envisage the possibility of Constitutional amendment.<sup>180</sup> Thus, there has been a complete absence of any sort of unified identity. While the complete homogenization of identity as initially developed in Nepal is not appropriate, a complete lack of common identity makes it an unwelcome precedent for the Nepali constitution makers. Thus, the example of BiH can be used to showcase the difficulties of ethno-territorial federalism.

However, one needs to look at the historical significance behind the structure of BiH, and it is clear that such extreme federations are not possible in Nepal, especially given the history of mixed demographics of the different ethnic groups. Thus, BiH serves as a warning against the extreme spectrum of accommodation in the federal experiment.

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<sup>178</sup> Keil, *Multinational Federalism in Bosnia and Herzegovina*, 141.

<sup>179</sup> Ibid.

<sup>180</sup> Article X, Bosnian Constitution, 1995.

## Conclusion

The salience of ethnicity in a divided society has not been lost on constitutional makers. This has now culminated in the process of constitutional borrowing where constitution makers look to similar societies or systems to understand future challenges and complications. Yet, every instance of constitution writing is different. The initial euphoria of a participatory constitution led Nepal on the path of a federal structure, one in which the ethnicity seemed destined to play a prominent role. However, the delay in constitution writing has allowed opposition views to become stronger. As the Ethiopian experience shows, such a revolutionary change requires almost complete domination by a single party. In its absence, the Nepali constitution writing process is destined to be a compromise.

The Ethiopian experience has shown that despite problems of legitimacy, it is necessary to answer the genuine aspirations of historically marginalized groups. Yet, the challenges faced by the Ethiopian experience show a need for Nepal's constitution makers to carefully analyse their choices. On the other hand, the Bosnian experience shows the possibility of a weak centre, when there is over focus on consensus and peace building. Both these systems are unique; however they both show the difficulties in changing a system that has been chosen once, thus raising the stakes for the system that the Nepali Constituent Assembly will ultimately choose.

Although it might be too early to offer an assessment on the success of the two systems, it is clear that Ethiopia, at least with the provisions of self-determination has showed the way with regards to management of ethnic diversity. However, this experience is shrouded with a loss of democratic space. Thus Nepal's constitution makers have to walk a tightrope between recognizing ethnicity in the constitution, and ensuring the

availability of democratic space and continued existence of ethnic rights. As the comparative assessment showed, they have a wealth of tools to use in this regard, such as second chambers, liberal language policies, autonomous zones, and the currently used concept of inclusive action. These tools could be used even if ethnicity is rejected as the main basis for state restructuring.

Either way, there is no ignoring ethnicity in the new Constitution. The ethnicity genie is out of the nation building bottle, and there is no way to put it back again in the same bottle. The only way forward is to accept its existence, and try to work through it.

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## Annexure I

### Population of Major Groups in Nepal/ 2011 Census

| S.N | Group        | Percentage |
|-----|--------------|------------|
| 1   | Chhetri      | 16.6       |
| 2   | Bahun (Hill) | 12.8       |
| 3   | Magar        | 7.12       |
| 4   | Tharu        | 6.55       |
| 5   | Tamang       | 5.81       |
| 6   | Newar        | 4.58       |
| 7   | Muslim       | 4.39       |
| 8   | Kami         | 4.75       |
| 9   | Yadav        | 3.98       |
| 10  | Rai          | 2.34       |
| 11  | Gurung       | 1.97       |
| 12  | Limbu        | 1.46       |

### Population by Mother Tongue/ 2011 Census

| S.N | Language | Percentage |
|-----|----------|------------|
| 1   | Nepali   | 44.64      |
| 2   | Maithili | 11.67      |
| 3   | Bhojpuri | 5.98       |
| 4   | Tharu    | 5.77       |
| 5   | Tamang   | 5.10       |
| 6   | Newar    | 3.19       |
| 7   | Magar    | 2.97       |
| 8   | Abadhi   | 1.89       |
| 9   | Gurung   | 1.23       |
| 10  | Limbu    | 1.29       |
| 11  | Urdu     | 2.61       |

## Annexure II

Ethnic breakup of the 14 province model as proposed by the Constituent Assembly  
State Restructuring Committee<sup>181</sup>

| S. N | Proposed Province                | Population | Area [Sq km] | Hill caste | Indigenous People | Madheshi | Other | Majority Group | Target Group    |
|------|----------------------------------|------------|--------------|------------|-------------------|----------|-------|----------------|-----------------|
| 1    | Limbuwan                         | 933,000    | 9,000        | 34         | 64                | -        | 1     | Hill caste     | Limbu (27)      |
| 2    | Kirat                            | 896,000    | 8,000        | 38         | 59                | -        | 1     | Hill caste     | Rai (34)        |
| 3    | Sherpa                           | 89,000     | 5,000        | 21         | 78                | -        | 1     | Sherpa         | Sherpa (36)     |
| 4    | Mithila-Bhojpur a- Koch Madhes h | 6,940,000  | 14,000       | 15         | 24                | 49       | 12    | Madheshi       | Madheshi (49)   |
| 5    | Sunkoshi                         | 699,000    | 5,000        | 47         | 51                | 2        | -     | Hill caste     | Chhetri (26)    |
| 6    | Tamsaling                        | 1,419,000  | 10,000       | 35         | 65                | -        | -     | Hill caste     | Tamang (44)     |
| 7    | Newa                             | 1,702,000  | 1,000        | 40         | 56                | 1        | 2     | Hill caste     | Newar (36)      |
| 8    | Narayani                         | 1,76,000   | 8,000        | 54         | 43                | 2        | 1     | Hill caste     | Brahmin (27)    |
| 9    | Tamuwana                         | 571,000    | 12,000       | 47         | 50                | 2        | -     | Hill caste     | Gurung (32)     |
| 10   | Magarat                          | 2,012,000  | 15,000       | 56         | 41                | 2        | -     | Hill caste     | Magar (34)      |
| 11   | Lumbini - Awadh-Tharuwan         | 3,765,000  | 15,000       | 33         | 36                | 23       | 8     | Hill caste     | Tharu (26)      |
| 12   | Karnali                          | 987,000    | 18,000       | 80         | 15                | -        | 4     | Hill caste     | Chhetri (42)    |
| 13   | Jadan                            | 48,000     | 15,000       | 60         | 35                | -        | 4     | Hill caste     | Bhote Lama (35) |
| 14   | Khaptad                          | 1,151,000  | 14,000       | 95         | 1                 | -        | 3     | Hill caste     | Chhetri (54)    |

<sup>181</sup> “Federalism Dialogue Series – Proposed Limbuwan province”, available at

[http://www.ccd.org.np/publications/01\\_Limbuwan\\_English.pdf](http://www.ccd.org.np/publications/01_Limbuwan_English.pdf) , last accessed on March 28, 2014.