

Federalism

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1. Federalism in general

1.1 Definition

Federalism is

- a system of government
- in which sovereignty is constitutionally divided
- between the central governing authority and constituent political units.

Unlike in a unitary state, sovereignty in federal political orders is

- non-centralized,
- mostly constitutional,
- between at least two levels so that units at each level have final authority and can be self governing in some issue area.

Citizens thus have political obligations to, or have their rights secured by, two authorities (Føllesdal, Andreas, "Federalism", *The Stanford Encyclopedia of Philosophy* (Spring 2014 Edition, <<http://plato.stanford.edu/archives/spr2014/entries/federalism/>>).

1.2 Differentiation

The majority of countries does not have a federal system. Out of 192 member states of the United Nations 164 are solely central and 28 are federal states. Therefore, over 60% of the world's population do not live under federalism. On the other hand, many countries like Argentina, Austria, Australia, Belgium, Bosnia and Herzegovina, Brazil, Canada, Comoros, Ethiopia, Germany, India, Malaysia, Mexico, Micronesia, Nepal, Nigeria, Pakistan, Russia, Saint Kitts and Nevis, South Africa, Spain, Switzerland, United Arab Emirates, USA, and Venezuela operate through federalism.

The key aspect that makes **federal systems** unique from other forms of decentralised arrangements is that within federations the existence of multi-tiered governments and their powers are defined and protected in a written, entrenched **constitution** (for example USA, Germany, Belgium, Australia etc.).

(1) In the countries of **unitary system** the total state power lies in the central government as a constitutional provision. In the unitary system, principally no limitation is placed upon the sovereign power over central authority by any lawmaking bodies belonging to smaller parts of the state. Local government may have the right of self administration, but there is no restriction upon central government to override the local authorities. Non-federal nations usually provide for **regional autonomy** in an **act of Parliament**, and therefore it is possible for Parliament to expand, amend, override or revoke regional autonomy by a simple majority at any time. In some unitary countries, though, like France, Italy and Japan there are more powerful departments or regions. In the UK, more powers have devolved to the Scottish parliament and some to Wales and also to

Northern Ireland; there it is being increased after the unsuccessful vote of the Northern Irish people for independence from the UK.

(2) “**Confederations**” have a political order with a weaker center than a federation. Typically, in a confederation

- a) member units may legally exit,
- b) the center only exercises authority delegated by member units,
- c) the center is subject to member unit veto on many issues,
- d) center decisions bind member units but not citizens directly,
- e) the center lacks an independent fiscal or electoral base, and/or
- f) the member units do not cede authority permanently to the center.

(3) The European Union is more than a confederation, but less than federal unit. It can be called a “**quasi-federal or federal-like system**”. The EU is a state compound (Staatenverbund) based on a dynamic development that is positioned between a state confederation (Staatenbund) and a federal state (BVerfGE 89, 155, 181 – Maastricht). Other authors look at the EU as a **supranational organization on a high level of integration**:

- The **sovereign powers** given to the Union are **limited**. The EU competences are exercised according to the principles of subsidiarity and proportionality (art. 5 (1) 2, (3) TEU).
- There is **no „people“** of the European Union and therefore also **no „EU nationality“**.
- Usually the prevalence of the law of the European Union to the simple national law is not denied, but there are different opinions about the **precedence of the law of the European Union before the national constitutional law**. Some national constitutions contain so-called **prevailing clauses of constitution**, by which the basic constitutional contents are withdrawn from European integration, or so-called **clauses of securing structure**, which create obligations of the union to maintain certain principles (art. 23 GG).
- There are **no European laws**, because the terms of the law acts like regulations and directives stayed the same (art. 288 TFEU), also the European Parliament and the Council are operating as „legislator“ of the EU (art. 14, 16 TEU).
- The commission has regularly the exclusive right of the **law initiative**. The EP and the member states therefore lack an elementary democratic competence on the European level.
- The European Union has according to the treaty of Lisbon **no government of its own**. The competences of the commission are not sufficient enough, in order to take the position of the government in a parliamentary democracy.
- The union cannot employ **means of coercion** in the military, police and judicial fields of and therefore cannot exercise its actions by force. For „enforcement“ the EU regularly needs the help of the member states. Only if fundamental basics are hurt by a member state, the Council can decide with a qualified majority (art. 7 (3) TEU) to discontinue certain rights of the EU treaties.

The strongest advocates of European federalism have been Germany, Italy, Belgium and Luxembourg while those historically most strongly opposed have been the United Kingdom and France. Some would consider states as

federalists such as Spain, Portugal, Greece, and Hungary. In recent times, the French government has become increasingly pro-EU. The UK, however, decided to vote about the EU membership in 2017.

1.3 Necessary elements of constitutional law

Federalism is a covenant according to which the relationship between the national and regional units is characterised by partnership, trust, pursuance of common objectives, sharing and cooperation between spheres of government. Partnership implies ultimate trust, joint objectives, and respect for separate identities (Bertus de Villier).

There is not necessarily a gap between national unity and diversity. Federal diversity is often viewed with suspicion and as a possible threat to national unity, while in federal dispensations the very nature of the organisation of authority and decision-making allows for diversity not only to exist but even to flourish. There are quite some states that manage diversity, while at the same time promote national unity (like Switzerland, Canada, India, Malaysia, Brazil, Belgium, South Africa, Mexico and Russia).

The Federation should have in place:

- (1) a written, entrenched **constitution**,
- (2) a **Parliament** on the central level elected by all citizens of the country and Parliaments in each provincial state elected by their citizens.
- (3) Each sphere of **government**, central and local, is served by elected, responsible and accountable institutions on the basis of democratic principles.
- (4) an independent **judiciary**, needed as an arbiter of the constitution in case of disputes between the centre and the regional units or among the constituent units,
- (5) **representation** is provided for regions within the national parliament,
- (6) Formal and informal arrangements are made for institutions, policies and processes that facilitate **intergovernmental cooperation** between the spheres of government.

Federations are of enormous variety, more centralised or more decentralised, parliamentary, and presidential, with many of you units. For the federation to be functional the following fundamentals must be clear (Shimkhada 2013 p 63):

- nature and names of the constituent units
- numbers
- constitutionally defined divisions of powers and functions
- acceptance of diversity, minority rights and rule of law
- fiscal arrangements and economic viability
- the legal regime.

2. Division of power

2.1 Principle of division of power

The state powers are divided between the sub-units and the centre. The principle seeks to accommodate “**unity in diversity**” by distributing power in a manner constitutionally safeguarding so that divided authority exists at each level of government (Bogdanor 1987).

- Neither the centre nor the constituent units are subordinate.
- Each is empowered to deal directly with the citizens and each is directly elected.
- It is distinguishable from a unitary centralised government, where units derive the powers from the centre, and a configuration, where the centre derives its powers from the units, as the powers are divided from the constitution.
- Each level of government constitutes an autonomous sphere of authority guaranteed and protected by the constitution to take final decisions on various policy areas of the state. The division of power between the member unit and the centre may vary. Typically, the centre has powers regarding defence and foreign policy, but member units may also have international roles. The decision-making bodies of member units may also participate in central decision-making bodies.
- But none of the members of the federalist state can unilaterally modify the federal structure. Therefore, the federal political system is the best means of accommodating all kinds of political differences and diversity is to constitutional arrangement and appropriate division of separate constitutional units. It is more applicable to manage the unity in diversity, constitutionally accommodating the minorities rights and issues are and just for distribution of power to all the ethnic and nationalities in a multicultural society.

2.2 Possibilities to compose a federal system

2.2.1 Principle of subsidiarity or dominance of central state

There are two possibilities to compose a federal system for the basic principle of dividing the powers between central state and member states:

- (1) Powers not explicitly granted to the central state are retained by the member states (for example USA, Germany and the EU), the so-called **principle of subsidiarity**,
- (2) Powers not explicitly granted to the member states are retained by the central state (dominance of central state, for example Canada, India).

2.2.2 Dual federalism or integrated federalism

- (1) **Dual federalism** is a political arrangement in which power is divided between the federal and state governments in clearly defined terms, with state governments exercising those powers accorded to them without interference from the federal government (**'layer cake'**).
- (2) In contrast, **integrated federalism** is based on the sense of partnership in many of the competitive areas. The government of the federal state executes the program and law enacted or made by both, the central and federating units (**'marble cake'**).

That means, dual and cooperative federalism are also known as 'layer cake' and 'marble cake' federalism, respectively, due to the distinct layers of layer cake and the more muddled appearance of marble cake.

2.3 Division of power in legislature, executive and jurisdiction

The horizontal separation of power within legislature, executive and jurisdiction leads in a federal system also to a division of power. In all these three areas between the central state and original states. The distribution of power can be different from country to country.

	Central federal state	Regional states
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Legis- lature	Currency, defence, treaty approval, main physical infrastructure, health service, federal budget central and joined taxes	Police Often: education local self-government state budget, state and joined taxes
Exe- cutive	Federal government exterior policy central state administration federal bank border police Army	regional state government regional state administration regional bank police
Juris- diction	Supreme Court	Local courts courts of appeal

There are trends of the distribution of the state power in the federal legislature, which are not clearly defined, being sometimes equal, joint or on partnership basis (**concurrent powers**, for example (Kharel p. 68):

- Commerce
- main physical infrastructure
- income security, pension
- mineral resources
- agriculture
- environment
- some taxes like income tax, corporation tax, and excise tax can be central state law, but the revenue from these taxes is divided between central state and regional states.

In the **USA** for **example legislation** competences are divided as follows:

- Exclusive powers of **United States Federal Government**:
 - To regulate commerce between states and international trade
 - To coin money and regulate the value thereof
 - To declare war
 - To establish an army and navy
 - To enter into treaties with foreign governments
 - To establish post offices and issue postage
 - To make laws necessary to enforce the Constitution
- Exclusive powers of **state governments**:
 - To regulate intrastate commerce
 - To conduct elections
 - To ratify amendments to the U.S. Constitution

2.4 Questions about the division of power

The division of power usually rises some questions (Stanford):

- How should the powers be allocated, given that they should be used, but may be abused?
- How to ensure that neither member units nor the central authorities overstep their jurisdiction?
- How to maintain sufficient democratic control over central bodies when these are composed by representatives of the executive branch of member units?
- Who shall have the authority to revise the constitutionally embedded division of power?

There are quite some different solutions and federalist countries.

3. Federalism in other countries

3.1 USA

The shape of US federalism changed over the years. The dispute of the “Anti-Federalists” in the constitution making process of the 1780s is well known, but the Antifederalists and Federalists agreed on one thing: the future of the nation was at stake in the contest over the Constitution. The modern US federal apparatus owes its origins to changes that occurred during the period between 1861 and 1933. For a hundred years, there was a **dual federalism** that favored equally strong national and state governments. Dual federalism is a political arrangement in which power is divided between the federal and state governments in clearly defined terms, with state governments exercising those powers accorded to them without interference from the federal government. The 1920s saw Washington expand its role in domestic law enforcement. By 1933, the precedents necessary for the federal government to exercise broad regulatory power over all economic activity and spend for any purpose it saw fit were almost all in place. The Great Depression marked an abrupt end to Dual Federalism and a dramatic shift to a strong national government (President Roosevelt’s “**New Deal**”). Another movement calling itself “**New Federalism**” appeared in the late 20th century and early 21st century, characterized by a gradual return of power to the states, was initiated by President Ronald Reagan with his “**devolution revolution**” in 1980 - 2001.

3.2 Russia

According to the Russian Constitution, the Russian Federation consists of republics, krais, oblasts, cities of federal importance, an autonomous oblast, and autonomous okrugs, all of which are equal subjects of the Russian Federation. Three Russian cities of federal importance have a status of both city and separated federal subject. Every subject of the Russian Federation has its own president/governor/head (executive branch), regional parliament (legislative branch) and regional constitutional/charter court (higher judicial branch in a region).

3.3 Canada

Canada is a federation with 11 distinct jurisdictions of governmental authority: the country-wide federal Crown and the 10 provincial Crowns. All are generally independent of one another in their respective areas of legislative authority and each derives its sovereignty and authority from the monolithic Canadian Crown; each jurisdiction includes the Queen-in-Parliament, the Queen-in-Council, and the Queen-on-the-Bench. Shared sectors include agriculture and immigration, but most are either entirely within federal jurisdiction, such as foreign affairs and telecommunications, or entirely within provincial jurisdiction, such as education and healthcare.

3.4 India

The government of India is based on a tiered system, in which the Constitution of India delineates the subjects on which each tier of government has executive powers. The Constitution originally provided for a two-tier system of government, the central Union Government, and the State governments. Later, a third tier was added in the form of Panchayats and Municipalities. Part XI of the Indian constitution defines the

division of power between the federal government and the provincial states in India. The power is divided between legislative, administrative and executive powers. The legislative section is divided into three lists:

- **Union list** (100 items) with exclusive power of central state legislation, including: defense, armed forces, arms and ammunition, atomic energy, foreign affairs, war and peace, citizenship, extradition, railways, shipping and navigation, airways, posts and telegraphs, telephones, wireless and broadcasting, currency, foreign trade, inter-state trade and commerce, banking, insurance, control of industries, regulation and development of mines, mineral and oil resources, elections, audit of Government accounts, constitution and organization of the Supreme Court, High Courts and union public service commission, income tax, custom duties and export duties, duties of excise, corporation tax, taxes on capital value of assets, estate duty, terminal taxes.
- **Provincial states list** consists of 61 items. Uniformity is desirable but not essential on items in this list: maintaining law and order, police forces, healthcare, transport, land policies, electricity in state, village administration, etc.
- **Concurrent list** consists of 52 items (previously 47 items). Uniformity is desirable but not essential on items in this list: Marriage and divorce, transfer of property other than agricultural land, education, contracts, bankruptcy and insolvency, trustees and trusts, civil procedure, contempt of court, adulteration of foodstuffs, drugs and poisons, economic and social planning, trade unions, labour welfare, electricity, newspapers, books and printing press, stamp duties.
- **Administrative powers:** The Union and states have independent executive staffs fully controlled by their respective governments and executive power of the states and the Centre are extended on issues they are empowered to legislate.

Residual powers remain with the Centre, as with the Canadian federal government.

3.5 China

Much of the Constitution is modelled after the 1936 Constitution of the former Soviet Union, but there are some significant differences. For example, while the Soviet constitution contained an explicit right of secession, the Chinese constitution explicitly forbids secession. While the Soviet constitution formally created a federal system, the Chinese constitution formally creates a **unitary multi-national state**. The current Constitution of the People's Republic of China was declared in 1982 and was several times amended, at last in 2004 protecting private property and human rights.

China is not quite a democratic and federal state. However, democratization does not encompass all aspects of political reform. Compared with the past three principal factors have changed to a great extent:

- First, not only has political decentralization enhanced the powers of local government, but it has also altered central-local government relations in several critical ways that are difficult, though not impossible, to reverse.
- Second, a major shift in ideology underpins the reforms, with the CCP moving from a dogmatic emphasis on the Maoist version of Marxism-Leninism to a

pragmatic, market-oriented approach. The antimarket, anti-private initiative, anti-private gain focus has been removed.

- Third, China has opened its economy and is engaged today almost all over the world (see: Gabriella Montinola/YingYi Qian/Barry Weingest, Federalism, Chinese style - The Political Basis for Economic Success in China).

3.6 Australia

On 1 January 1901 the six Australian self-governing colonies federated as the Commonwealth of Australia, and Australia remains to this day of federation of six "original States" under the Commonwealth Constitution. The desire was to create a minimally centralized union. Australia is the fourth oldest federation in the world after the United States (1789), Switzerland (1848) and Canada (1867). In formal constitutional terms, little has changed since Australians made that decision over a century ago; in practice, however, Australian federalism has changed enormously over the intervening years. The most significant respect in which it has changed is in the degree to which the Commonwealth government has assumed a position of dominance (see John Hirst, *The Sentimental Nation: the making of the Australian Commonwealth*, Oxford University Press, 2000).

3.7 European countries

Several federal systems exist in Europe, such as in Switzerland, Austria, Germany, Belgium, Bosnia and Herzegovina and the European Union. Germany and the EU offer the only examples in the world where members of the federal "upper houses" (the Bundesrat and the Council) are neither elected nor appointed but comprise delegates of the governments of their constituents.

3.8 Germany

Modern Germany abandoned federalism only during Nazism (1933–1945) and in East Germany during from 1952 to 1990. Adolf Hitler viewed federalism as an obstacle to his goals of dictatorship. Accordingly, the idea of a strong, centralized government has negative associations in German politics, although prior to 1919 or 1933, many social democrats and liberals favored centralization in principle.

The state of the "Basic Constitutional Law" (GG) aims at the balance of power between the federal government and the federal states; neither should the upper state compared to the member states to be given strong overweight (in contrast to the unitary state of the Weimar Republic), nor should the countries dominate the federal government. The principle of federalism of the GG writes a mix of federal government and the member states, as well as from both excessive independence of the member states from centralisation. The independence of the countries is safeguarded by the fact that they keep the statehood, the constitutional order in the limits of the federal responsibilities and rights to participate in the exercise of power. The independence of the member states is limited by the GG and the member state constitutions and laws in many areas. The perception of the central state power excludes the exercise of the member states power in the law areas that the GG provides for the central state. The responsibilities of the Federal Government and the states are determined separately from GG, but can be changed by the federal constitutional legislature by people's vote and constitutional amendment (art. 29 GG). Only the basic structure of the Federal Government and the grassroots participation in the federal legislation of the member states enjoy increased protection and cannot

be changed at all (art. 79 Para. 3 GG).

3.9 Spain

The Spanish constitutional Supreme Court interdicted a referendum about independence of the region of Catalonia from the central state of Spain reasoning that the unity of the country is taken as a fixed constant in the Spanish constitution. Other than in Northern Ireland, where the unsuccessful ballot about independence took place with the consent of the central UK government, the Catalanian vote was not constitutionally covered. Nevertheless, in November 2014 over 80 % of the voters of Catalonia voted in a therefore non-binding ballot for the secession of their region from the central state of Spain, and only 4.6% voted against independence. The vote had no legal consequences. The Catalonians have their known language and culture as well as extensive autonomous rights. Under Franco's dictatorship (1939-1975) they were not allowed to talk in Catalanian language in public. Today it is an official language like Spanish.

4. Limits on legislative power in federalism

Outside of the questions of ultra vires and compliance with the Human Rights and Freedoms, there are a few absolute limits on what the Parliament and the various provincial legislatures can legislate.

- Neither the provincial legislatures nor central Parliament can enact legislation that removes part of the core or inherent jurisdiction of the superior courts.
- The federal principle as such, once constitutionally laid down, is a core element of the constitution and cannot totally be removed without consequences for the further existence of constitution. As a special regulation in Germany for example, the number and shape of the federal states can well be changed, and in doing that due regard has to be given to regional, historical and cultural ties, economic efficiency, and the requirements of local and regional planning (art. 29 GG); but the federal system cannot be abolished completely. At least two states must be left, otherwise a new Republic with a new constitution is required (art. 79, 3 GG, so-called "eternity clause").

5. Federalism in Nepal

5.1 History: major political shifts in modern Nepal

Since the time of unification of Nepal in 1768, the rulers tried to develop the country as homogeneous, monolithic and unitary state providing protection to one language (Nepali) and one religion (Hindu), ignoring the reality of diversify and pluralistic character of the Nepali society. The legacy of the highly centralised governance of the Sha and Rana periods continued even under the democratic governments of the 1990s.

- The hill high caste Bramin-Chhetri, Thakuri and Newar have long been in privileged position, since the unification of Nepal.
- Other groups, that are the janajati, madheshya and dalit, are generally marginalised.

It is within the context of this sociopolitical date that the Communist Party of Nepal, Maoist (CPNM-M) launched the "People War" in 1996, with the aim "to smash the existing semi-feudal and semicolonial state and build the People's New Democratic State." The government did not respond to the Maoists demands at all. Political change became clearer with a Maoists demands to abolish the monarchy when they started their armed struggle. The monarchy had remained without any alternative symbol of unity for all linguistic, ethnic nationalities and cultural groups for about 238 years. However, things started to change after the Royal massacre in 2001. King Gyanendra to go over the power by dismissing the elected government in 2002. therefore political parties, that strongly supported multi-party democracy, felt they needed to rethink their political ideology because of the Kings step. On February 1, 2005 the King to go over absolute state powers and assumed the role of the chairman of the Cabinet. This led political parties to form an alliance with the Maoist rebels. In November 2005 a 12 point agreement was signed. The first objective of the agreement was to end the violent conflict and restore peace in the country. This agreement provided the Maoists with an opportunity to participate in a peaceful democratic process by suspending the armed movement. For sustainable peace, there are conditions to be fulfilled, good governance, full phase of democracy and social justice. In this regards, political parties, civil society and professional associations agreed to abolish an active monarchy, to establish democracy and to restructure the state system. The people finally forced the king to relinquish date control on April 24, 2006. on May 18, 2006 parliament formally stripped the King of his powers and proclaimed Nepal a democratic secular state.

All these drastic political changes, ethnic conflicts and sectarianism surfaced. Different ethnic groups built their own local political institutions and started demanding their own territories. These ethnic groups started raising separate militias, who primarily supported the general political objectives of the populations they came from. Within the Nepal political debates, the term federalism emerged as a fresh, astonishing and miraculous one a few years ago, when it was first introduced by the Maoists. It was meant as an instrument intended to address all ethnic, linguistic and territorial problems, and the overall political conflict within the country after the People's War (Khanal 2008). The Nepal nation-state came into existence through a successful exercise in military conquest. The state restructuring and nation building work are interlinked with peace building and constitution making process simultaneously (Simkhada 2013 p 70).

5.2 Diversity

The 1990s political change had great impact in Nepal society, broadening the rights of freedom of speech. Various ethnic, linguistic, class and caste groups started to organise in order to claim recognition of their distinctive identity. The process and discourse of federalising Nepal began after the Maoists declared the people war in 1996.

The legacy of history is well reflected in an equal distribution of socio-economic resources of the country and in representation of political power structure of the country. The establishment of a federal system is expected to offer a solution to the traditional political exclusion, slow and uneven development and as a means of

supporting democratisation, reducing social and political conflicts and ensuring the protection and preservation of cultural, linguistic ethnic diversity.

There are both challenges and opportunities for the future of federalism in Nepal. Social diversity constitutes its unique identity. It is a country of diverse caste, ethnicity, language, religion and culture.

According to Min Bahadur Basnet (Federalising Nepal, 2012) there are 103 castes, indigenous nationalities and religious groups:

- largest are the Chhetris with a population of 3.5 million (15,8 %)
- smallest are the Kusunda with only 164 members

Several leaders belonging to different parties have contributed to create the demand of federalism, assuming that it is the best possible solution to manage ethno-political conflict and to introduce a system of direct democracy for excluded ethnic, linguistic, territorial and national minorities.

There are 123 official languages. Kirat alone has 25 different languages. It is 60% of the whole population that speak Nepali, and it is the majority language of 54 from 75 districts. However, Nepali is the mother tongue only of 48.9% of the population, mainly Brahmans, Chhetris and Thakuris.

5.3 Federal discourse

Nepal is a **unique special case** in the world:

- It is a historically unitary centralised country.
- It has never been colonised.
- It has never faced the problems of secession and separatism.

The **challenges** in restructuring the state are threefold (Amit Dhaka, 2007):

1. secularisation of the state
2. making the state inclusive (because the disparity in terms of political participation, income, education, and inclusion in different state structures is very wide as a result of the unitary system of governance).
3. recognising identity and fostering belonging nests to the Nepali nation.

There are various federal **proposals** that have been made so far:

- Some of them suggest **territorial** subdivision,
- whereas some others recommend **cultural** subdivision of the country.
- Some support **single-identity** states,
- whereas others would only accept **multi-ethnic** identity.

Examples that will have relevance to Nepal, though there are not easily replicable:

- In India, the mixed identity model applying nationality (Bengal, Punjab, Tamil Nadu) and regional identity (Uttar Pradesh, Madhya Pradesh etc.) have worked relatively well. Such a mixed model, so highly relevant in Nepal's context, may not satisfy the aspirations of identity of Nepal's Madeshi, Janajatis and other marginalised and excluded groups.

- In Pakistan, the federally administrated tribal areas (FATA) provide a unique model, but they are not without problems.

There are many **questions**:

- Which of the proposals offers a greater **promise for durable peace and stability** of Federation as well as greater **economic efficiency** in the delivery of governmental services?
- How can federalism **manage to solve socio-political conflict**, and introduce a full phase of **democracy**? Can democracy minimise the danger of war? Can federalism contribute to peace building by preventing or stopping internal conflicts (through holding-together-federalism) or by becoming powerful enough to prevent outside aggression (through coming-together-federalism)?
- What will be the **nature and structure** of the future federal Nepal, and how will the states or constitutional units be delineated? How will their **number, size and name** be? What will be the **demarcation of boundaries**?
- Will **ethnic and social diversity be successfully transferred** into the political institutions or will it become the everlasting political trauma in Nepal?
- Will the federalism provide mechanisms for the **protection of nationalities' identity** and for **ensuring the rights** to those who have been oppressed throughout history?
- Can the foremost aim of federalisation in Nepal ensure the **proportional representation of all ethnicities, nationalities and excluded minorities** at the mainstream politics and government be reached?
- How will be guaranteed that a new democratic system is **more inclusive, proportional and participatory**?
- How will be the **basic federal principle of self-rule and share rule** applied?
- How will be the **principle of division of powers** applied?
- Will a federal Nepal state the **stronger as a nation** or weakened?

Summarizing, there are three **main issues**:

1. Nepal is a diverse and plural state in terms of case, ethnicity, linguistic and religious composition of population.
2. The advent of democracy has enabled various groups to raise their voices to be no more silent.
3. Democracy has generated the hope within minorities and deprived sections of society that the state, unlike the previous authoritarian regime, will be responsive to their needs and interests.

5.4 The interim constitution 2007

The issue about restructuring of the Nepali state was established among the politically conscious mass that has taken it as the only resolution of the social and political problems. It seemed that the restructuring of the state has been taken as synonymous of federalising or a federal political system. The Interim Constitution has already made Nepal a federal republic. However, federalism was not incorporated in the interim constitution 2007 by the interim legislator Parliament that consisted of members from all the parties that led the People's movement 2006. Contrary to the people's mandate expressed through people's movement, political parties were still continuing the same

unitary system of multi-party democracy so far. It indicates that a vast gap between expectations of the people and the political leaders who are said to represent the people voices. In art. 33. Obligations of the State of the Interim Constitution 2007 there is only written down:

“The State shall have the following obligations:....(d) To make an inclusive, democratic and progressive restructuring of the State, by ending the existing centralized and unitary structure of the State...”

Though the first sitting of the newly elected CA declared the country as a “**federal democratic republic**”, it was not elaborated in the constitution so far.

5.5 Advantages of federalism

(see also the list of “Reasons for Federalism” in:

<http://plato.stanford.edu/entries/federalism/> Chapter 3)

- **Access to politicians’ knowledge of government activities** is easier on the lower level of the member states.
- There is **more closeness of decisions to the authorized organs**, when they are on the regional level.
- On the regional level there is **more closeness of parliamentary and administrative work** in the member states to the citizens. The smaller and nearer the government, the more likely the **participation of the people** is to be meaningful and therefore voluntary.
- Regional governments are **accountable** directly to the region and levels of government are accountable to each other. As the government is closer to the people, more opportunities emerge for it to be held accountable.
- A federal system can offer more **responsiveness**. Another advantage of federalism is its ability to deliver government that is more **local, more accessible and more responsive**, and thus to **enhance democracy** (Saunders 2002, p 36).
- **Human rights and liberties**, due to the distribution of powers between levels of government, are **more likely to be protected** in federalism.
- Each level of government will act as a check against and with each other (**vertical division of power**).
- Federalism also causes more **horizontal division of power** on the centre level by conjoined legislation of the centre and the sub-units, accomplished either by **two Houses** of legislature on the central level, one being constituted by representatives of the regional level (like in USA, Germany) or by the **participation of representatives of the regional level in the one House** on central level with the constrained power balance coordination and cooperation.
- The **dispersal of power protects people** on the possibility of tyranny (Stanford 2008).
- **Economic efficiency** will be better matched with increased mobility and choice between lower-level governments, services and allocation, and citizens will be better able to keep check on the government (for corruption, inefficiency etc.).
- **Investment and taxation competition** (where assigned to lower levels) also encourages competition and thereby efficiency.
- The coming together of units **removes internal barriers to trade** and helps to **develop economies of scale** (Stanford 2008).

- Harmony can increase, if the territorial groups are granted the **exercise of autonomy or self-determination** on matters regarding their identity, culture and governance, and without domination by the majority group. A federal system will **limit the power of the majority** to impose its will on the minorities. as well as, the basic principle of federal system places **limits on the minorities veto** towards majorities.
- The federal system can create a friendly environment to form **law and order** up to making fiscal policy and its implementation, as well as **development planning** and its monitoring. That can provide the right opportunity to receive and deliver the **social justice** (Breed 2008). In the federal system, there will be variations in the distribution and mobilisation of resources accordingly to ethnic, linguistic, cultural and geographical position, which will foster peace and well-being by providing equal opportunity for all.
- In federal countries, **high-level conflicts (rebellions) are reduced**, while low-level conflicts (protests) are increased. These low-level conflicts are manageable at regional level - due to autonomy - and therefore they do not manifest at the national level.
- It will be easier to **control criminal and extra judiciary activities** at the regional level.
- If problems appear at state level, the solution can take place in a **two-layer process**: first state government will try to solve its own problems by itself; second, and whenever a state is unable to manage problems, they could also be dealt with at the federal level by the federal government. Thus, federalism **reduces the burden of central or federal government**, which would be able to concentrate more effectively on foreign affairs and security (Basnet p 32).
- Federalism allows for **experimentation or piloting at the local level policies and programmes** that would not be possible on a countrywide basis. If policies are successful in one or some states, begin also be adopted by the central government and or other regional governments (Devkota 2006).
- Similarly, there would be possibilities to **disintegrate the area of specialisation in economic production and industrialisation among the states** as their potentiality or viability of resources. For example, the south region of Nepal has potential for cash crops, rice, timber forest and manufacturing industry, whereas mountain regions and Western Hill area has potential for tourism business and herbal medicine, and Hill area has basically potential for hydropower and dairy products (Basnet 2012 p 32).
- In the end, federalism can pave the path for **faster development** than the previous unitary system. Due to the competitive achievement among the states, it would not only offer healthy competition, but it can also be fruitful in achieving the goal of overall development and cooperation among the states by **sharing new experiences, knowledge and technology** among the states and with the federal government.

5.6 Challenges of federalism in Nepal

Opportunities and challenges are two sides of the coin; they always come together.

- Building federalism **requires a lot of time**. Failure to recognise this cardinal problem led to failure of Nepal's first elected constituent assembly in writing a new constitution (**evolving process**). Even if the constitution provides a strong

foundation, federalism is best described as “**work in progress**” (Raghavan 2013 p 53).

- Federalism is **not the solution to all problems**. As the only political structure, it is not sufficient. It needs to address the issues of good governance, rights of development and equal access to justice as the most important aspects to institutionalise the democracy in Nepal.
- The **size of the member states** will be a problem. The smaller the unit the more likely it is to be captured by the elite. A smaller government is also more likely to be unequal and promote unequal development (Saunders 2002 p 36).
- **Asymmetrical federalism** will be difficult to manage (Raghavan 2013 p 54). If one state or some states have much more population than the rest of the states, can this lead to political friction. For example, the rising influence of Nepal’s provinces in the Terai is likely to be important economically, but can be challenging politically in a federal set up, in which several Hill provinces will have to depend upon the Terai provinces on a number of counts.
- Federalism cannot be completed without considering **national security**. Issues of cross-border crime and terrorism, which may fall in the jurisdiction of central government, cannot be resolved without active involvement and cooperation of the states (Acharya, in: Raghavan, Nepal as a federal state, 2013, p 44). Nepal’s open border allows room for unscrupulous elements to commit crimes in one country and seek sanctuary in the other. This brings the question of mutual legal assistance. For example Nepal’s Terai, with 17% of their country’s area and 40% of population, has extensive social contacts, relations and movements bordering Indian states. any conflict that may arise on either side of the border has potential of spilling over to the other side causing concern on foreign affairs, which the bordering states alone cannot handle, arousing security concerns (Acharya p 58).
- Nepal is a small country in terms of territory and population, but it is very large regarding its **social diversity**. Ethnicity and language based federalism could lead the country into disintegration.
- One of the critical challenges in Nepal federalism debate is the **fear of backlash and alienation** of some groups, if their interests are compromised.
- Though the first sitting of the elected CA declared the country as a “**federal democratic republic**”, it was not clear as to what would be the model of federalism to be adopted. The Maoists, the Madhesi and the Janajatis who had membership across major parties, supported **single-identity states**, while Nepal Congress and other traditional parties would only accept **multi ethnic identity**. This makes consensus more difficult.
- There is no single prescription model on federalism that can be replicated in Nepal. In **vertical federalism**, the centre retained substantive and exclusive authority on certain issues, including foreign policy. **Horizontal federalism** allows states some regulatory powers that may affect foreigners in relation to their movement (immigration), business (trade and investment), which entails uniformity and coordination problems.
- The balance between local autonomy and central authority for self-rule within shared rule is a complex issue in nation building experiences historically everywhere in the world, but more so in Nepal because of its diversity and location.

- Being a small economic country Nepal as great challenges to manage the country's **federal administrative budget**. Federalism could increase the administrative expenditure caused by more provinces.
- The federal system might suffer from the **lack of sufficient budget**. The support by the centre towards financial sustainability of the states will be an inevitable question in a federal set up. Most Nepal federal provinces will need **massive support from the centre**, at least for a period of time, in order to sustain themselves financially (Acharya p 51).
- There is a debate on **capacity**. While the principal aim of federalism is to make the local governments capable of owing and executing their own priorities, the limited natural resource distribution makes them dependent on the centre. As more resources will be required in the newly created states to meet the expectations for the needs of socioeconomic development, their independence upon foreign assistance will be further entrenched and will siphon the already weak tax base available for the centre as well as for the provincial governments. this debate is unanswered so far as most of Nepal's revenue is currently collected from only three districts, including the capital. The issue of capacity of states or provinces is likely to impact the sustainability of federalism, as creation of states with low capacity almost certainly leads to a strong central government, which defies the purpose of federalism as the division of power between the centre and the periphery (Acharya p 51/52).
- Some parts of Nepal suffer from a **lack educated human resources**. In such areas, it would take longer to establish the state apparatus. A federal system requires more institutions and bureaucracy and so the management capacity of the people becomes crucial.
- In the case of different parties rolling at centre and professional levels are there might not be **proper intergovernmental coordination and cooperation**. Such anomalies contain the seeds of conflict (Gurung 2007).
- There is a need of **cooperative federalism**. The states should cooperate with each other and with the centre as a mutually complementary part of a single governmental mechanism. In cases of **competitive federalism**, where the states are in competition with the centre, the political results can become weak and cause several problems, though competitive federalism is not necessarily a wrong thing, as it encourages competition among states on issues like attracting investment and businesses.
- In the case of an **ethnic based federalism** it would face dual problems of disintegration and ethnic competition (Ghai 2007). The probability of secession is comparatively higher in a democratic regime than in an autocratic regime. Therefore, federalism can lead to **increased claims for autonomy and secession**. This may particularly be the case in a competitive fiscal federal system where revenue generation is a constituent unit of responsibility. On the other hand autonomy often satisfies most of the demands of minorities and so the pressure for secession is reduced (Sharma 2007).
- Some political parties and non-ethnic groups do not want "**single-identity federalism**", which they discount as "ethnic federalism". They fear it will undermine Nepal long-standing social harmony and national unity. They also claim that it will pose a security threat and jeopardise Nepal's external relations with neighbouring countries, which have overlapping population along either side of the border with similar ethnic, linguistic and cultural backgrounds (Acharya p 49).

- If single-identity-based federal states are agreed upon, there are **dangers of backlash from the mainstream high-caste and non-ethnic people**. After the dissolution of the constituent assembly in May 2012, the Bahun and Chhettr groups have already staged a nationwide protest asking separate recognition for each and the constitution and opposing the single ethnic model of federalism. so did the people of the far western region and the Muslims. The ethnic violation of the Janajatis and Tharus launched separate agitations asking for single-identity states (Acharya p 50).
- If demands made by certain groups are accepted, others will be **losers**. In such situation, creating a win-win situation for all is a big challenge, which requires a lot of political maturity, wisdom and pragmatism.
- It is argued that the federal structure might **weaken national unity** and especially in case of conflict of ethnic groups. Nepal government has failed to ensure the security of people's property in the past. This shows that it will be a challenge to maintain security for the federal and state level. In the federal states the situation of law and order might worsen.
- By distributing sometimes overlapping roles, **responsibilities** are also **fragmented**. This can lead to a **culture of blame** across tiers and unwillingness to solve problems on their own. Accountability of the public is similarly affected.

5.7 Key features

For a federal system to be successful in Nepal, it will have to contribute to (Basnet 2012 p 46):

- ensure appropriate devolution of powers
- acknowledge diversity and allow for more local and responsive government
- remove the Kathmandu centric domination of the "hill elites"
- support the transition to democracy
- ensure more even development across geographically remote and culturally diverse areas.

The key features of Nepal federalism are the following (Basnet 2012 p 46-47):

- a unitary constitution with the constitutional protection of cultural rights
- territorial federalism supplemented by parallel (non-territorial) structures for minorities and ethnic groups; it is not possible to delineate ethnic units with majorities
- a powerful upper house of parliament in the centre to protect both cultural and constituent units rights
- legislative responsibility at the centre and the constituent units, with a clear delineation of powers that sees most powers initially retained by the centre, but with a constitutionally guaranteed transition
- cooperative federalism and fiscal equalisation, measured by some revenue responsibility for the tiers and a gradual transition towards more internal competition and constituent units you autonomy
- a relatively large number of small states approximately equal in size, to limit the potential for domination and secession.

6. Conclusion

Finally, it is up to the Nepali people, the political parties and the constituent assembly to decide on the final structure for the “Federal Democratic Republic of Nepal”. The discourse on federalism should be transparent and inclusive and should address the issues of identity and capacity (Acharya 2013 p 62). Backroom negotiation among top leaders of major political parties alone cannot dispel the apprehension of those who are afraid of losers and winners in the issue of federalism. It requires a wide participation of traditionally excluded groups as well as of the civil society and the academic community. Everyone involved in this process should understand that there will be no quick fixes. Neither can a template or model be borrowed from elsewhere, though Nepal can learn from the best suitable practices.

7. Annex: The Interim Constitution of Nepal, 2063 (2007)

Date of Authentication and publication 2063-10-01 (15 January 2007)

33. Obligations of the State:

The State shall have the following obligations:

....

(d) To make an inclusive, democratic and progressive restructuring of the State, **by ending the existing centralized and unitary structure of the State** so as to address the problems including those of women, *Dalit*, indigenous people, *Madhesi*, oppressed, excluded and minority communities and backward regions, while at the same time doing way with discrimination based on class, caste, language, gender, culture, religion and region;

8. Annex: Basic Law for the Federal Republic of Germany

in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by the Act of 11 July 2012 (Federal Law Gazette I p. 1478).

Article 29 [New delimitation of the federal territory]

(1) The division of the federal territory into Länder (federal states) may be revised to ensure that each Land be of a size and capacity to perform its functions effectively. Due regard shall be given in this connection to regional, historical and cultural ties, economic efficiency, and the requirements of local and regional planning.

(2) Revisions of the existing division into Länder shall be effected by a federal law, which must be confirmed by referendum. The affected Länder shall be afforded an opportunity to be heard.

(3) The referendum shall be held in the Länder from whose territories or parts of territories a new Land or a Land with redefined boundaries is to be established (affected Länder). The question to be voted on is whether the affected Länder are to remain as they are or whether the new Land or the Land with redefined boundaries should be established. The proposal to establish a new Land or a Land with redefined boundaries shall take effect if the change is approved by a majority in the future territory of such Land and by a majority in the territories or parts of territories of an affected Land taken together whose affiliation with a Land is to be changed in the same way. The proposal shall not take effect if within the territory of any of the affected Länder a majority reject the change; however, such rejection shall be of no consequence if in any part of the territory whose affiliation with the affected Land is to be changed a two-thirds majority approves the change, unless it is rejected by a two-thirds majority in the territory of the affected Land as a whole.