

## Federalism, Ethnicity and Human Rights in Nepal. Or: Althusius meets Acharya

Andreas Føllesdal\*

Professor of Philosophy, and Director of Research, Norwegian Centre for Human Rights,  
University of Oslo, Norway

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### Abstract

The article addresses one of the difficult tasks of the Nepal Constituent Assembly: how to translate the idea and mechanisms of federalism in ways that are faithful to the best interests of the Nepal people into a constitution of a democratic, human rights-respecting Nepal republic. The reflections concern four varieties of federal elements, discussing arguments in favour and against each drawn from an interpretation of other states' experiences. Two of the four are territorial: constitutional: an entrenched split of powers, and political: decentralised autonomy. Two are non-territorial: minority rights and minority representation in common decision making bodies. Some of these arguments and lessons may be helpful also for Nepal's challenges, two features of which are especially noteworthy: there are very many different groups that must be accommodated fairly. And members of these groups very often live side by side on the same territory. Human rights protections combined with federal elements of Nepal's new Constitution must serve to prevent future domination, especially by the centres, over these many ethnic groups and castes.

### Key words

Nepal; federalism; ILO 169; minorities; Dalits

### 1. Introduction

One of the many intriguing and important tasks of the Nepal Constituent Assembly (CA) concerns *federalism*. Not only must the CA write a constitution that secures equal dignity and respect for all Nepali citizens, regardless of ethnicity and caste. But the voters also clearly supported parties that seek to create a *federal* Nepal. So the question is not whether Nepal should be a federal state, but rather *what sort* of federal state Nepal should be.

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The task of the CA is now how to translate this idea of federalism into a constitution – the ‘operating system’ – of a democratic, human rights-respecting Nepal republic. For instance, should the federal borders of Nepal reflect ethnicity and geography, as the Maoists urged? Or should the CA follow the CPN (UML) and Nepali Congress manifestos, and create provinces based on geography, natural resources, language or culture? Indeed: how many provinces should there be? Eleven, as the Maoists called for? Should there be one united province for the Tarai, as the Madhesi Janadhikar Forum insists?

How can the CA's choice of federal institutional design elements be faithful to the best interests of the Nepal people? This is an important challenge, since there are many different ways that the institutions of a state can be democratic, ensure human rights – and embody federal features. There is clearly no ‘best’ institutional blueprint for all states: that depends on the national histories and memories, geography and cultures. And any assessment of appropriateness is most legitimately made by the informed and reflective citizenry themselves.

The following reflections by an ‘outsider’ are therefore limited to a reminder of four varieties of federal elements, combined with arguments in favour and against each drawn from an interpretation of other states’ experiences. Two of the four are territorial: Constitutional and Political. Two are non-territorial: Minority Rights and Minority Representation. Some arguments and lessons may also be helpful for Nepal's challenges.<sup>1</sup>

Two features of the people – or rather *peoples* – of Nepal are especially salient for this discussion. The poet Madhav Prasad Ghimire said of the national poet Bhanubhakta Acharya (1814–1868) that he “braided the people of Nepal into a national string”. The metaphor of a *braid* is helpful and appropriate in this context: Nepal firstly consists of *very many different groups*. Numbers vary, but Nepal is said to have well over 100 caste and ethnic nationalities, 70–90 languages, nine religious groups, often overlapping. And secondly, members of these groups often *live side by side*: few if any ethnic groups are the sole inhabitants of any geographical area, and many castes and ethnic groups live fully dispersed among each other.

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<sup>1</sup> The taxonomy and discussion of the strengths and weaknesses of each version draws on A. Follesdal, ‘Federalism’, *Stanford Encyclopedia of Philosophy* (2010), <plato.stanford.edu/entries/federalism/>, visited on 21 June 2010; and central contributions to and overviews of federal thought include W. H. Riker, ‘Federalism’, in R. E. Goodin and P. Pettit (eds.), *A Companion to Contemporary Political Philosophy* (Blackwell, Oxford, 1993) pp. 508–514; D. J. Elazar, *Federalism as Grand Design: Political Philosophers and the Federal Principle* (University Press of America, Lanham, MD, 1987); R. L. Watts, ‘Federalism, Federal Political Systems, and Federations’, *1 Annual Review Political Science* (1998) pp. 117–137; D. Karmis and W. Norman, *Theories of Federalism* (Palgrave, 2002).

## 2. The Puzzle: If Federalism Is the Solution, What Is the Problem?

One helpful way to assess federal institutional alternatives is to explore why so many Nepali citizens and their political parties urged federalism. If they see this as the solution, what do they regard as the problem?

Many observers seem to agree that one reason for the calls for federalism was a widespread perception that the central authorities had long *dominated* many of the other ethnic groups and castes of Nepal. Calls for federalism thus sought to convey that the power of the centre with its dominating castes must be constrained or removed, to end domination and to secure a more fair distribution of opportunities and living conditions. Human rights constraints and federal features have historically often been used for this very objective: to *prevent domination by the centres*.

## 3. European History of Federalism

A brief historical reminder helps identify four different federal features that the CA might draw from.

Johannes Althusius (1557–1630) is regarded as the “father of federalism” in Europe.<sup>2</sup> Living in the German city Emden, he sought protection for his own Calvinist minority religion within Emden, and protection for the city itself. His group faced two sources of domination: from the ‘Local Centre’ – the Lutheran provincial Lord – and from the ‘Central Centre’: the Catholic Emperor. He argued that these central authorities should grant religious freedom to his and other groups, among peoples living side by side in the realm, to avoid violent upheavals. Two lessons are particularly relevant: 1) federal thought has long been concerned to *prevent domination* from several power sources; 2) the history of federalism recognised several different means to combat domination – not only territorial subdivisions. One common arrangement has been local autonomy – immunity from interference by the centre – with regard to religion. Another example is ‘consociational’ arrangements.<sup>3</sup> These different segments of a society, split along religious or ethnic lines, nevertheless cooperate by each having a share in the exercise of central powers.

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<sup>2</sup> J. Althusius, *Politica Methodice Digesta* (Liberty Press, Indianapolis, 1995); T. O. Hueglin, *Early Modern Concepts for a Late Modern World: Althusius on Community and Federalism* (Wilfrid Laurier University Press, Waterloo, Ontario, 1999).

<sup>3</sup> A. Lijphart, *Patterns of Democracy: Government Forms and Performance in Thirty-Six Countries* (Yale University Press, New Haven, 1999).

#### 4. Four Federal Features

Let us now consider four different institutional arrangements within this federal tradition. All of them can sometimes serve to reduce conflict and domination. This is partly because they reduce the need for complete agreement among individuals: people who disagree about some issues can instead agree to decide separately on these contested policies. And these arrangements can protect from interference and thus *remove domination, at least in some circumstances*.

Note also that all of them require attention to two central contested issues: 1) How to determine the composition of the sub-units, be they geographical or demographic. In the case of territorial regions: where should the borders be drawn? In the case of ethnic or other group based division: who decides on the appropriate group divisions, and who decides contested cases of membership? Two conflicting concerns might guide these decisions: either to allow those who share ethnic or religious bonds to form separate units that enjoy various forms of political control over that area or the alternative is to deliberately promote diversity within each unit so as to foster more interaction and cooperation across such boundaries; 2) Which powers should these sub-units have: should they for instance have the final say over school curriculum, taxation, official language or holidays, agricultural policies, cultural subsidies, water management, and/or land reform?

##### 4.1. *Territorial Constitutional Federalism*

In this version, the constitution divides the country into territorial regions, and grants some power to them, and some power to the centre. This is typical of federal states, such as the USA, India and Germany.

The benefit of such entrenchment of a division of power is that it can reduce or remove fears that the centre will dominate the regions. An ‘ethnic federation’ could thus consist of geographical provinces with boundaries that allow one ethnic group to dominate within each unit, and where the constitution grants that group various privileges.

This approach may unfortunately not prevent domination of ethnic groups when the territorial borders fail to match those of ethnic groups. There are at least two cases relevant for Nepal: Since there will be minorities within any area of Nepal, these will continue to risk domination from the ‘Local Centre’ where decisions will reflect the interests of the local majority. Thus former Local Development Minister Dev Gurung rejected calls for a separate province for the Tarai, since that would infringe on rights of indigenous groups, and give some groups monopoly of power. One response to this conundrum might be to establish autonomous regions *within* these provinces. But such a response will at best be a very complex political structure with nested sites of political autonomy. A second

weakness of territorial constitutional federalism concerns widely dispersed and disadvantaged groups. This kind of arrangement does little to such groups, for instance the Dalits in Nepal. Human rights protections will still constrain both local and central authorities, but the territorial federal arrangement will not benefit the Dalits. To the contrary, territorial federalism will leave members of such groups at risk of being subject to domination by their provincial authority, in addition to risking domination by central authorities in Kathmandu.

In short: Territorial Constitutional Federalism does not guarantee the end of domination of ethnic minorities, but may simply create more sites of ‘local’ domination in the various sub-units, especially when different ethnic groups and castes live intermingled.

Such constitutional federalism also has several disadvantages. The entrenched division of powers is by design difficult to change, but should not be completely out of reach, otherwise future challenges may be impossible to handle. How to design the requisite balance between stability and flexibility is a major challenge. Some also fear that this sort of arrangement may fuel calls for secession, though that risk may be alleviated by several factors. Firstly, the regional authorities also enjoy a share of the central powers, which they would lose by secession. Secondly, the attraction of full secession may be reduced by international insistence that any new state would have to protect the human rights of its own minorities – which might limit the benefits obtained for the majority group. Another risk of such federalism is that it may also hinder a shared ‘national identity.’ Finally, note that such arrangements may hinder equalisation of living conditions across regions, since richer regions may question why they should take responsibility for the poorer areas.<sup>4</sup>

#### 4.2. *Territorial Political Federalism: Decentralisation*

An alternative territorial arrangement is one where the central parliament grants local authorities autonomy over specific issues. Such arrangements allow the local communities more control over matters important to them. These solutions also avoid the rigidity problems of constitutional entrenchments.

However, this benefit also has its drawback: Such arrangements may not provide as strong safeguards against future domination, since the central authorities may at any time withdraw the powers they have granted. And with the added possibilities of dynamic change of borders and allocation of powers comes the risk of political manipulation for inappropriate objectives. Finally, the ethnic and

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<sup>4</sup> Y. Ghai, ‘Constitutional Asymmetries: Communal Representation, Federalism, and Cultural Autonomy’, in A. Reynolds (ed.), *The Architecture of Democracy* (Oxford University Press, Oxford, 2002) pp. 141–171; A. Follesdal, ‘Human Rights, Democracy and Federalism – Part of the Problem or Part of the Solution? Securing Stability in the European Union and the People’s Republic of China’, 17 *Current Politics and Economics of Asia* (2008) pp. 211–236.

other minorities that live within each region face similar risks of domination under this system as they face in a unified state with centralised power. The only difference is that domination is now perpetrated by a regional majority.

We now consider two ‘non-territorial’ federal features that may reduce domination of ethnic groups. They give various ethnic groups more protection, or more power – without tying these privileges to a specific territory over which the groups exercise control. The arrangements instead concern a variety of other interests individuals have, such as urgent and important matters of religion, language, culture, education or even some forms of taxation, but do not include claims to territorial control. And the arrangements can ensure that representatives of such groups have voice and votes in common decision-making bodies, but these persons do not represent specific territories.

#### 4.3. *Non-territorial Minority Rights*

A third institutional arrangement does not involve territorial areas, and thus not rights concerning use of land, *etc.* Instead it is what Althusius urged for his own religious group: collective rights and other human rights for groups who otherwise face risks of domination. Such rights may be freedom from interference, or more substantive autonomy. These rights can typically concern crucial issues such as religious practices or language teaching in the schools. Rights to territorial control are not part of these clusters of rights, since there may be members of several such groups who live side by side. We find expression of some such rights in ILO Convention No. 169 on Indigenous and Tribal Peoples.<sup>5</sup> Other such rights may include measures of ‘reverse discrimination’, *etc.*, to alleviate the impact of past and present injustice and oppression.

A benefit of such arrangements is that they can greatly help minorities who live geographically dispersed or intermingled with other groups.

Yet there are also some drawbacks. For instance, the appropriate set of rights may have to be carefully tailored to the specific needs and histories of each group, and a too extensive system of such special rights may hinder a national sense of unity and solidarity. Many also point to the risks that special rights can pose to vulnerable persons among this minority. For instance, special care must be taken to protect women from harmful elements of some traditional cultures and practices. Many human rights can provide some safeguard against these sources of domination.

Other problems arise for efforts to alleviate past injustice: Many supportive measures, extra resources, *etc.* will tend to benefit the most privileged members of

<sup>5</sup> International Labor Organisation, *Convention 169 on Indigenous and Tribal Peoples* (1989), <[www.ilo.org/ilolex/cgi-lex/convde.pl?C169](http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169)>, visited on 21 June 2010. See Peris Jones and Malcolm Langford, ‘Between Demos and Ethnos: The Nepal Constitution and Future Parliaments of Nepal’, 18(3) *International Journal on Minority and Group Rights* (2011) 371–388, this issue.

disadvantaged groups, rather than the worst off members. It may also be important to have clear targets for when to end such measures. Insofar as membership criteria and benefits is a matter of political debate there is obviously the risk of manipulation: scarce resources may not reach those ethnic groups and castes, and especially those members thereof whose claims are most urgent.

There are also challenges with regard to the kinds of powers and immunities that may be granted to each group while preserving sufficient opportunities for common responses to shared problems and opportunities, and to avoid unintended domination over those groups that do not enjoy such privileges.

A final challenge to attempts at implementing such solutions in Nepal is the sheer number of groups that may reasonably make claims to such autonomy and immunity rights: the contested claims of more than 100 groups must be handled responsibly, and it is a major challenge to any constitutional committee to identify, coordinate and predict the benefits and risks of all these bundles of political authority and immunity both for members of each group and for other members of Nepal society.

#### *4.4. Non-territorial Minority Representation*

The fourth kind of arrangement also does not involve territorial areas and claims to control land. Instead, these systems grant various groups representation in the regional or central bodies that make common decisions – while each group may not be tied to different specific territories. One example is the consociational system mentioned above, where various social groups are represented and may even enjoy veto over common decisions.

Mechanisms may include quotas or designated seats in legislatures for specified minorities. These arrangements may be especially important in ‘first-past-the-post’ systems, but also in systems with proportional representation (PR) that can create severe risks that no one represents the urgent interests of small minorities.

Other measures include the deliberate over-representation of certain minorities, to ensure that they not only have voice but also some real clout when decisions come to a vote. Other helpful arrangements of this kind regulate the composition of political party slates. For instance – as has been the case in Nepal – there may be legal requirements to secure a sufficient number of women and other specified groups within each party group in parliament.

Among the benefits of such arrangements, when properly crafted, is that they give voice and political influence to previously dominated groups, to ensure ongoing recognition and concern for their situation.

Some disadvantages also merit mention. One important concern is how to determine which of many groups need such representation in common bodies, and how to fine-tune the extent of over-representation, if any. Another challenge is to ensure that these measures do not entrench existing conflicts, or prevent

solutions to new injustices. Thus there must be ways to revise lists of ‘deserving’ groups over time, as new injustices arise or are discovered. But this of course adds to the risk of manipulation. And arrangements must be prevented that merely buttress groups that already are powerful. A final concern is that some of those elected as representatives of these groups may not act in the groups’ best interests, partly because they themselves may well be among the more privileged segment of the minority.

There are several important issues that one must consider when designing such non-territorial arrangements. When many groups have legitimate need for representation, it may make sense to not insist on specified quotas but rather require a minimum threshold of representatives. This may be particularly helpful when the vulnerable segments of society overlap, such as women in certain castes or ethnic groups. Another fundamental question is whether such quotas or thresholds should be applied to the principal chamber, or to a chamber of peoples with specified powers.

## **5. Conclusion**

These reflections have sought to illuminate some aspects of the opportunities open to the Constituent Assembly when it seeks to include federal features in the new, human rights-respecting Constitution.

Human rights protections combined with federal elements of Nepal's new Constitution must serve to prevent future domination, especially by the centres, over the many ethnic groups and castes. I have pointed to benefits and risks of four different federal elements culled from the European federal tradition: Constitutional and Political Territorial arrangements, Minority Rights, and systems of Minority Representation.

To select, fine tune and combine some of these federal features into a sustainable and just constitution that is recognisably federal is one of the important obligations of the Constitutional Assembly. It must braid a constitution that will protect and promote the best interests of the braid that is the Nepali people and peoples; a constitution that helps create a Nepal free from domination from all centres of power, central as well as regional.