

**Politics of Fear: Unitary Bias of a Federal Design in Nepal**

by

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### **Author's declaration**

I hereby declare that I am the sole author of this thesis. This is a true copy of the thesis, including any required final revisions, as accepted by my examiners.

I understand that my thesis may be made electronically available to the public.

## **Abstract**

This thesis explores the reasons that have led the framers of the constitution to centralize powers in the federal government of Nepal, despite claims for accommodation by its minority groups. It contends that the centralized model is chosen to neutralize the potential risk of secession. Taking discourse analysis as its methodological approach, the thesis examines this argument in two sections. First, it develops seven measures: the recognition of minorities, the demarcation of sub-unit boundaries, the distribution of powers, the constitutional amending formula, the appointment process of the Judges in the Supreme Court, the jurisdiction of the upper house in the federal parliament, and the constitutional (a)symmetries, and applies them in the constitution. Second, it assumes that the fear of disintegration existed in the polity due to i) Maoists' interpretation of the 'right to self-determination' ii) utterances of secession threats by regional leaders and, iii) the foreign intervention in the domestic politics of Nepal. In its attempt to dampen the risk of disintegration, the current arrangement of the Nepali state fails to accommodate the demands for the 'right to self-determination' and autonomy, further augmenting the discontent among minorities. Despite the change in the structure, the thesis concludes that the present design has not lost the fundamental character of the previous unitary state that repressed diversity and claimed to maintain the territorial integrity. In order to reach this conclusion, official discourses such as the manifestos of political parties, their debates as recorded in the CA transcripts, and the official statements of the governments have been analyzed.

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## Table of Contents

<b>AUTHOR’S DECLARATION .....</b>	<b>II</b>
<b>ABSTRACT .....</b>	<b>III</b>
<b>ACKNOWLEDGEMENTS.....</b>	<b>IV</b>
<b>TABLE OF CONTENTS.....</b>	<b>VI</b>
<b>LIST OF TABLES .....</b>	<b>VII</b>
<b>LIST OF ABBREVIATIONS .....</b>	<b>VII</b>
<b>I. INTRODUCTION: RESEARCH QUESTION, LIMITATIONS AND SIGNIFICANCE OF THE STUDY.....</b>	<b>1</b>
<b>RESEARCH QUESTION .....</b>	<b>3</b>
<b>LIMITATIONS OF THE STUDY .....</b>	<b>4</b>
<b>SIGNIFICANCE OF THE STUDY.....</b>	<b>5</b>
<b>CHAPTER DIVISION .....</b>	<b>6</b>
<b>II. HISTORICAL CONTEXT.....</b>	<b>8</b>
<b>III. METHODOLOGY .....</b>	<b>19</b>
<b>IV. REVIEW OF THE LITERATURE .....</b>	<b>33</b>
<b>V. CONSTITUTIONAL ANALYSIS OF CENTRALIZATION IN NEPAL.....</b>	<b>48</b>
<b>CONSTITUTIONAL PREAMBLE .....</b>	<b>50</b>
<b>SUB-NATIONAL BOUNDARIES.....</b>	<b>55</b>
<b>DISTRIBUTION OF POWER.....</b>	<b>58</b>
<b>CONSTITUTIONAL (A)SYMMETRIES.....</b>	<b>61</b>
<b>AMENDMENT PROCESSES OF THE CONSTITUTION .....</b>	<b>64</b>
<b>ROLE OF THE SUPREME COURT.....</b>	<b>67</b>
<b>JURISDICTION OF SECOND CHAMBER IN FEDERAL PARLIAMENT.....</b>	<b>70</b>
<b>VI. FEAR OF SECESSION: AN ANALYSIS OF POLITICAL DISCOURSE .....</b>	<b>74</b>
<b>MAOIST’S INTERPRETATION OF THE ‘RIGHT TO SELF-DETERMINATION’ .....</b>	<b>75</b>
<b>EXPRESSION OF THREATS OF SECESSION BY REGIONAL LEADERS.....</b>	<b>85</b>
<b>INDIAN INTERVENTION IN DOMESTIC POLITICS .....</b>	<b>98</b>
<b>VII. CONCLUSION .....</b>	<b>108</b>
<b>REFERENCES .....</b>	<b>114</b>

<b>List of Tables</b>	<b>Page No</b>
Table 1: Constitutional Parts Used in the Analysis	19
Table 2: Official Documents by the Maoists	27-28
Table 3: Major Documents of Mainstream and <i>Madhesi</i> Parties	29
Table 4: Official Statements of MOEA	31
Table 5 : Territorial Demography of Nepal	86
Table 6: Issues in Major Parties' Manifestos	94-95

### **List of abbreviations**

ANNO	All Nepal Nationalities Organization
CA	Constituent Assembly
CBS	Central Bureau of Statistics
CPA	Comprehensive Peace Accord
CPN (M)	Communist Party of Nepal, Maoist
CPN(UML)	Communist Party of Nepal (United Marxist & Leninist)
GOI	Government of India
MOEA	Ministry of External Affairs
MPRFN	<i>Madhesi</i> People's Right Forum
NC	Nepali Congress
PDA	Political Discourse Analysis
SPA	Seven Party Alliance

## **I. Introduction: Research Question, Limitations and Significance of the Study**

This study examines why the current institutional design of Nepal is insufficient to accommodate the demands of minorities and include them in the joint state-building project. The country has pursued federal arrangements, and the federal, provincial and local governments are now in operation. The constitution divides power between the different levels of government. As in other federations, the internal borders mark provincial boundaries, the upper house in the bicameral parliament is meant to represent the interests of the regions, and the Supreme Court has been tasked with resolving jurisdictional disputes between the governments. But these provisions have not addressed the major expectations of ethnic communities- the *Madhesi*<sup>1</sup> in particular. The latter accuses that the current design entrenches the dominance of national majorities, denies them the autonomy, and retains the bias of the previous unitary state. In this background, this project investigates how Nepal's constitutional design violates the spirit of a federal system, and also examines the underlying motivations of policy makers to adopt a federal model as part of its institutional rebuilding in the aftermath of an armed conflict.

In many countries, particularly Belgium, Canada, and Switzerland, a federal system is used as a tool to resolve conflict and accommodate ethnic minorities. The institutional design of those federations allows a power-sharing between national majorities and minorities. Local communities in a federal system can have their concerns addressed through their provincial or state government while retaining the benefits of membership with the federal government (L. Anderson, 2004). Federalism is thus defined as a system that involves two levels of government - one federal and other subnational – that rule over the same people and the same territory. Their

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<sup>1</sup> This term refers to ethnic communities that live on the Southern plains bordering India, with distinct cultural, religious, linguistic characteristics.



powers are constitutionally specified and they are autonomous to make decisions in some areas without the consent of the other order of the government (Riker, 1964, p. 5). In this respect, a federal system allows a sharing of power between the governments.

Since the objective is to examine both the motives for a centralized federation in Nepal, and its consequences, the thesis relies on the theoretical perspectives developed by L. Anderson (2004), Kymlicka (1998), and others on autonomy and secession in federations. The study has used a major theoretical argument that autonomy encourages secession by providing legal, constitutional, administrative and financial resources to minority groups. It increases their confidence and prepares them to seek the right to self-determination through an independent home government (L. Anderson, 2004).

In general, multinational states adopt certain strategies of accommodation but these strategies vary in different situations. Lijphart (2004) argues that the selection of institutional arrangements depends on the specific circumstances of each society (Chaudhry, 2008, p. 19). Despite being different in circumstances, all federal arrangements should make “it possible for majority and minority communities to have exclusive control over specific political jurisdictions, such as the education system or the military, that are useful for nation-building” (Norman, 2006, p. xvii). Only then can federalism become “a tool to manage ethnic diversity in States that may be defined as multinational, as well as to prevent ethnic conflicts” (Rodrigues, 2013, p. 104).

In principle, policy makers agree that all national minorities need autonomy but in practice, they are hesitant to accept it. Autonomy has its own problems (Weller, 2010, p. 1). Some countries do not even like a federal system fearing that the latter becomes a first step towards independence (Weller, 2010, p. 2). The federal system has this paradox; the institutions that we use to accommodate diversity can also perpetuate the differences. It contributes to many

of the problems that it is meant to prevent (L. Anderson, 2004, p. 98). National majorities fear that “autonomy institutions tend to create or to keep alive conflicts” and even prepare minorities to “go their separate ways as distinct sovereignties. (Roeder, 2009, p. 208).

Undeniably, provisions for autonomy has both secession inducing and secession preventing features (Erk & Anderson, 2009, p. 192). Naturally policy makers are afraid of the former rather than the latter. They fear that federal systems “encourage ethnic groups to politically develop—furnishing careers for potential leaders, providing resources for communal organization, generating self-confidence—that they will eventually resent even that authority originally left to the center” (Enloe, 1977, p.154). When ethnic leaders’ confidence increases, they might find the existing system confining and contemplate secession. (Enloe, 1977, p. 154).

A federal system in a multinational society can be an accommodation strategy, but it should be designed in accordance with the ethnic composition of the polity and the demands raised by its minorities. It should be framed to address the injustice that minorities have suffered. Yet the basic paradox of federal system is that the measures that we introduce to accommodate diversity also encourage divisions along ethnic lines (L. Anderson, 2004). Should ethnic groups gain sympathy from other national and international kin states - states with shared ethnic ties - the possibility of secession further increases. In this context, it is important to see how Nepal’s federal model of power- sharing fails to address increasing demands for accommodation, and why such a centralized model was adopted in the first place.

### **Research Question**

This thesis aims to answer the following question: despite periodic agreements between the Government of Nepal and agitating *Madhesi* parties, why does the constitution of Nepal centralize powers in the federal government, rejecting the minorities’ demands for autonomy and

the ‘right to self-determination’? The thesis expects to find that the framers of the Nepali federal model have centralized powers with the fear that the provision of the ‘right to self-determination’ and autonomy encourages secession by providing legal, institutional, financial and human resources to agitating minorities. The ambiguous interpretation of the ‘right to self-determination’ by Maoists, the occasional utterances of threat of secession from regional political leaders, and India’s intervention on the domestic politics on behalf of the *Madhesi* minorities, have given rise to that fear.

### **Limitations of the Study**

Nepal is a multiethnic and multilingual country, with approximately 126 ethnic communities and 123 languages spoken as mother tongues in existence (CBS, 2011, p. 4). The demand for the ‘right to self-determination’ was first raised by ethnic and indigenous communities dispersed in various parts of the country. They submitted many memorandums to the Government of Nepal demanding this right, but their efforts could not secure anything other than the reservation system. Later, the same claim was raised in conjunction with a federal system by *Madhesi* minorities after the promulgation of the interim constitution in 2007. But the study does not consider the institutional design in terms of the agendas of the territorially dispersed minorities; the concentration is solely on the *Madhesi* minorities.

Likewise, the study does not concentrate on the fiscal dimensions of the current federal model. For a federal state, resource distribution is an important concern and Nepal is no exception. But most stakeholders have agreed to the current model, and issues of fiscal federalism have little to do with the risk of secession. That is why the study has not focused on this area. Similarly, it has not studied the local level of the government that has also been

provided jurisdictional competencies by the constitution; the aim here to investigate the institutional arrangements between the provinces and the federal government.

### **Significance of the Study**

The project is significant for understanding the trajectory of federalism in a previously unitary state. In particular:

- a) It is interesting to understand how the international provisions on the rights of indigenous people have become contentious matters in a nascent federal state of Nepal. Throughout eight years of deliberation<sup>2</sup> the political parties represented in the first and second CA were divided in terms of their interpretation of the ‘right to self-determination’. While minorities understood it as a claim for the democratic inclusion in the state apparatus, the traditional majorities interpreted the phrase as a secessionist provision. The ambiguity lying in the international provisions further intensified this debate. The project is significant to understanding how contradictory interpretations of the ‘right to self-determination’ has ultimately blocked minorities’ right to autonomy and inclusion in the Nepali state.
- b) The research work is equally relevant to understanding the role of geopolitical contexts in the choice of the institutional design in particular jurisdictions. The presence of India in the South, with its long open border, has added to the fear of secession in Nepal. The overt support of the ethnic minorities by their powerful neighbor has led political actors in Kathmandu to be suspect of India’s intentions.

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<sup>2</sup> The period between the election of the first CA in 2008 and the promulgation of the constitution in 2015 during which the political parties lobbied for and against right to self-determination and autonomy of the national minorities as the bases of a federal system.

- c) It is significant even to understanding how ‘holding together’ federal systems confront a hard choice between the risk of secession and the need for accommodation. As the research shows, the primacy should be given to accommodation rather than trying to prevent disintegration. If minorities are properly accommodated, their trust in the state increases and the risk of secession is neutralized. The thesis demonstrates that an excessive focus on mitigating secession risk has prevented a federal model from adopting proper and positive accommodation strategies.

### **Chapter Division**

The thesis unfolds in seven chapters. This first chapter “Introduction: Research Question, Significance and Limitation” states the research question and the central argument along with the limitations and significance of the study. The second chapter “Historical Background” presents a concise overview of the historical developments that led to the federal restructuring of the state; it surveys the post-conflict political developments besides revisiting major historical events after the unification of small states into what is known as a modern Nepal. The third chapter “Methodology” outlines seven standards to measure the centralization of powers; it also presents political discourse analysis (PDA) as the basic methodological approach of studying official documents, manifestos and the statements. The fourth chapter “Review of Literature” reviews some academic literatures to locate the current debates on Nepal’s federalism and take a departure from them. The fifth chapter “Constitutional Analysis of Centralization in Nepal” examines the major provisions of the constitution in terms of the measures developed in methods section, and concludes that the present institutional design retains the character of previous unitary state by centralizing powers and refusing to accommodate minorities’ demand for autonomy. The sixth chapter “Political Discourse Analysis” examines the political documents

such as the party manifestos, transcripts of the CA debates and the official statements of the government to show how the fear has worked as an influencing factor in the current federal design. The final chapter “Conclusion” summarizes the main arguments, and recommends that the constitution be amended to accommodate certain demands of minorities.

## II. Historical Context

To understand both the centralized design of Nepal's recent constitution and the deep-seated fear of potential secessionist threat, some background outlining the history of ethnic tensions within Nepali society and politics is in order.

Ethnic communities allege that they have been marginalized right from the founding of modern Nepal which took place with the conquest of Kathmandu valley (1768-69) and the unification of all scattered states by the Gorkha King Prithivi Narayan Shah (Bhattachan, 2003, p. 7). With this unification, Shah began the dynasty-based monarchy in Nepal; the successor of each King became the executive head of the country until 1990, and the constitutional head until 2008<sup>3</sup>. Even today, most Nepali people appreciate Shah as the creator of modern Nepal. But indigenous and ethnic communities do not share this appreciation. They argue that the unification process set the foundation for the centralized and unitary regime that made indigenous people the victims of social and cultural exclusion (Dolpo, 2015). In their opinion, the geographic unification was carried out at the expense of indigenous people. While national majorities regard unification as a national endeavor, the country's minorities regard it solely as geographic in nature; the unification further entrenched the dominance of elites and upper caste people in the polity (Rastriya Samachar Samiti, 2018).

The monarchy succeeded in perpetuating the dominance of Hindu people in the political and social spheres. This trend was reinforced, and even intensified, when Jung Bahadur Rana came to the power in 1846 by slaughtering the scions of leading families. Despite being well-known as a tyrant, he is remembered for *Muluki Ain*, a civil law created to manage state-citizen relations. Legally, it established the caste hierarchy and all the high caste Hindus were favored in

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<sup>3</sup> In 2008, the first meeting of the Constituent Assembly proclaimed Nepal a republic, abdicating the then King of Nepal, Gyanendra Shah.

political appointments. The Rana regime allowed the domination of high caste Hindus in all spheres of social and political life (Brown, 1996). In later years, the involvement of Nepali youths in the anti-colonial movement of India, and the eventual independence of India, sparked nationalist sentiments among the Nepalese people. Nepali Congress launched an anti-Rana movement in Nepal that led to the overthrow of the Rana regime<sup>4</sup> in 1951.

Since the demise of Rana regime, a democratic government was established in 1951 but the democratic experiment (1951-60) was very brief. King Mahendra sacked<sup>5</sup> the democratically elected government, jailed the Prime Minister B.P. Koirala, and began the autocratic Panchayat system in 1961 that lasted for 30 years (Gellner, 2007, p. 51).

Since the democratic government was short-lived, historians have since exonerated its failure to act on behalf of the marginalized. The Panchayat system that began in the ashes of democratic government inherited basic characteristics from Rana regime (Brown, 1996). It defined Nepal as a Hindu kingdom, with King as the executive head of the state and an incarnation of God. People were not allowed to question the King's decisions in the courts or elsewhere (Brown, 1996). The King tried to project his image as a guardian of the people and the architect of Nepali model of democracy (Gellner, 2007). In practice, he promoted and entrenched caste hierarchy that led to the exclusion of ethnic communities in the polity.

People revolted against the Panchayat system in the joint initiation of Nepali Congress (NC) and the Communist Party of Nepal, now known as CPN-UML. That movement humbled the absolute Monarch and demoted him to the position of the constitutional King (Brown, 1996). The new Constitution was promulgated in November 1990 securing the multiparty democracy

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<sup>4</sup> During 104 years of Rana regime, Prime Minister remained powerful and the Kings just stayed the nominal head of the country.

<sup>5</sup> Historians cite various reasons for this. One of the main reasons was the desire of the King to begin a direct rule.



and the constitutional Monarchy as the non-amendable bi-polar policies. Leftist parties wanted to overthrow the Monarchy but Nepali Congress believed that Nepal, as a multiethnic and multilingual society, required the King as a guardian to hold the segmented society together (Chandrasekharnan, 2003). Nepal was identified as “a multiethnic, multilingual, democratic, independent, sovereign, Hindu and Constitutional Monarchical Kingdom” (Nepal Const., 1990, art.4. cl.1). Mainstream analysts interpret this article as the recognition of diversity, but critics of the 1990’s constitution regard it as a deliberate reinforcement of the domination of one religion (Hachhethu, 2003, p.11). The constitution did not include measures to protect marginalized communities from social exclusion and backwardness. In the name of ‘unity in diversity’, it had perpetuated the internal colonization by the dominant class, caste, religion, culture and language (Bhattachan, 2003, p.7).

The new multiparty democratic system did not fulfil the economic, social and political aspirations of the people. Major outcomes of democratic regime included political instability, poverty and developmental disparities. The political system was still hierarchic and centralized. The basic injustices of the society were not addressed (Brown, 1996). Not a single government finished its whole tenure; political parties were intent on making and breaking the government. Furthermore, foreign relations remained unbalanced and state apparatuses had become weak and corrupt. These combined factors prepared the background for what became a decade-long armed struggle between 1996-2006. The Maoists had clearly stated their dissatisfaction about pressing social issues and called for the government’s immediate response to 40 different issues ranging from corruption to poor healthcare to the social exclusion of marginalized communities. They had warned if the government did not respond within two weeks, they would be compelled to

launch an armed conflict (Bhattarai,1996). Since the government paid no attention to their demands, armed conflict began in 1996.

To name just a few, the Maoists raised the issues of social inequality, poverty, unemployment, landlessness, developmental disparities, regional discrimination, social exclusion, and caste and ethnic discrimination. While some of their demands were related to the current state of governance, most had to do with the historical oppression of socially and regionally marginalized communities. The conditions for violence were present throughout Nepal's history, but Maoists were positioned to politicize it and prepare people for the collective struggle (Basnet, 2009, p.4). Maoist insurgency had awakened nationalist sentiments in almost all the socially marginalized groups. Ethnic and indigenous communities had been helping sustain the Maoist conflict by giving shelter, food and economic support to the underground insurgents. Their support helped the conflict gain a national dimension, but the parliamentary parties occupied themselves with political games of making and breaking the governments. Taking a chance, King Gyanendra suspended some of the provisions of the constitution and began the direct rule on October 4, 2002. The King stated that he could not keep watching the death of Nepalese people, and would go to any extent to save the country (Chandrasekharnan, 2003).

The direct rule by the King increased the distance between the monarch and the parliamentary parties. It helped to bring parliamentary parties known as Seven Party Alliance (SPA) and the Maoist rebels together. Maoists wanted to overthrow the Monarchy when the parliamentary parties were beset with the King's direct rule. The SPA and the rebels began an underground dialogue. The rebels convinced the parliamentary parties to acquiesce to their

demand of electing a Constituent Assembly<sup>6</sup> (CA), drafting a new Constitution, and declaring Nepal a Republic. In turn, the rebels agreed to lay down arms and accept the parliamentary democracy (Basnet, 2009). It must be noted that Maoists had been fighting not only against the King, but also against the parliamentary democracy. Thus, in the initial phase of their protest, parliamentary parties had been targets. But through dialogue, they had accepted the democratic system and later agreed to restructure the state along federal lines. They signed an historic agreement, known as the 12-Point Agreement<sup>7</sup>, to document their consensus and, as per this understanding, both sides agreed to launch a non-violent mass protest against the autocratic rule of the King.

As part of this agreement, both sides participated in mass protests that led to the abdication of the King in 2008. The rebels became part of mainstream Nepali politics. Despite these developments, there remained the serious question of restructuring the state and addressing the aspirations of the people in the changed context. The history of Nepal replicates the exclusion of national minorities, and all their hopes and aspirations were placed on a successful state-restructuring.

Some countries, in the aftermath of conflicts, have used federal restructuring as a tool to address social grievances. Bosnia and Herzegovina, Iraq, and the Democratic Republic of Congo have been experimenting with this mechanism. As in these countries, the decade long conflict had prepared the ground for a federal system in Nepal. Yet many scholars do not attribute federal

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<sup>6</sup> The Constituent Assembly, that comprised of 601 members and was elected on the basis of mixed electoral system in 2008, was tasked with a sole responsibility of promulgating the constitution and even meant to work as a Parliament after its stipulated task was done. In Nepal, the first CA was dissolved without giving the Constitution and the second CA was elected for the same purpose in 2013. The latter gave a new Constitution in 2015.

<sup>7</sup> To read the full document, see [http://www.satp.org/satporgtp/countries/nepal/document/papers/12\\_Point\\_Understanding.pdf](http://www.satp.org/satporgtp/countries/nepal/document/papers/12_Point_Understanding.pdf)

restructuring as a direct result of the conflict, as Maoist rebels had never clearly stated federal democracy as their vision (Bose & Niroula, 2015, p. 24). The rebels had raised the grievance over regional discrimination and wanted to give autonomy to the regionally marginalized communities (Bhattarai, 1996, p. 2), but it was not clear how this would occur. In most documents, the rebels had mentioned 'state-restructuring' without specifying what it meant to them. When the rebels and the government signed a Comprehensive Peace Accord (CPA) in 2006, they simply agreed to carry out an inclusive, democratic and progressive restructuring of the state (CPA, 2006, p. 4). Once the CPA was endorsed by parliament, the government and the rebels agreed that the new constitution, made by the CA, would take a final decision on state-restructuring and the interim constitution would accept restructuring as a guiding principle.

Following the spirit of the CPA, the interim constitution was promulgated in 2007 and the election of the CA was scheduled for 2008. Like the CPA, the interim constitution (2007) promised to accomplish the progressive restructuring of the state. But the ethnic minorities rejected the constitution as it did not commit to federal restructuring (Bose & Niroula, 2015, p. 23).

The *Madhesis* were convinced that only a federal system could address regional developmental disparities and social grievances by allowing, as per their demand, the formation of a single autonomous province in their homeland with the right to self-determination. They demanded that the Nepal Government, as a signatory of United Nations Declaration on Indigenous Peoples (2007), abide by the international law. As per the declaration, the right to self-determination meant the right to "freely determine their political status and freely pursue economic, social and cultural development" (United Nations, 2007, p. 401). It included their

“right to autonomy or self-government in matters relating to their internal and local affairs as well as ways and means for financing their autonomous functions” (United Nations, 2007, 401-2). Following the spirit of UN declaration, they opposed forced assimilation and integration. In the initial phase of their protest, they did not utter the threat of secession, respecting the provision that that the communities should not understand it as the right to impair or dismember the existing state (United Nations, 2007, p. 408). Since only federal arrangements could secure these requests, federalism became a central thrust of their demand (Hachhetchu, 2007, p. 2). They launched a mass protest in their homeland, compelling the state to amend the interim constitution<sup>8</sup> and accept federalism as a guiding state-building strategy (Bhatt & Murshed, 2009, p. 138). For them, the acceptance of federal system meant the guarantee of their democratic rights to social inclusion, parity and the formation of an autonomous province (Tamang, 2009).

The mainstream parties were hesitant to accept the demands for recognition and regional autonomy as they understood ‘the right to self-determination’ in a secessionist sense. The leaders of the (NC) and the (CPN-UML) did not fully embrace a federal structure. The *Madhesi* parties, on the other hand, had come to the CA with the single agenda of *One Madhesh-One Province* in the southern plains (Bose & Niroula, 2015, p. 27). They demanded that federal demarcation be made along ethnic lines, which for the mainstream parties, raised further suspicions about the federal system as a whole. Maoists, the former rebels, were sympathetic to the ethnic model.

The composition of the first CA had not given a decisive position to both Maoist and the *Madhesis*. When Maoist emerged as the first largest party, the *Madhesis* had become the fourth

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<sup>8</sup> After the King had succumbed to the pressure of the mass movement known as *Jana Aandolan* in 2006, the political parties formed an interim parliament represented by SPA and the Maoist rebels. It was an unelected but unanimously accepted interim parliament that had passed the legislation for the election of the CA. The same parliament had endorsed CPA, the interim constitution and its subsequent five amendments.

largest. For both, it was a huge achievement and had a mettle in the government formation. But NC and UML, the mainstream parties, were respectively in second and third position. When *Madhesi* made a claim for ethnic federalism, the Maoists lent their support while the other two parties rejected it. Since the promulgation of the constitution required a two thirds majority, it was not possible for the 1<sup>st</sup> and 4<sup>th</sup> party to craft the institutional design on their own. The first CA was, therefore, polarized between pro and anti-identity based parties. This polarization made consensus difficult, which caused the dissolution of the first CA (Lawoti, 2016, p. 2). But the second CA had a different composition; NC and UML, which had consistently opposed the formation of a single province, had respectively emerged as the first and the second largest parties. *Madhesi* representation was quite small; Maoists too, had their size reduced. In the meantime, Nepal saw the outbreak of a massive earthquake. In the background of this natural disaster, the second CA finalized a federal model without consensus (Lawoti, 2016, p. 2). Since the Constitution was approved by the two thirds majority in September 2015, the mainstream parties claimed it a document achieved through a consensus.

Despite the differences, the constitution of Nepal formally devolved the previous unitary state into a Federal Democratic Republic of seven provinces and 751 local levels. Nepal has chosen a ‘holding together model’ that has originated from “the devolution of power by a previously centralized unitary polity” (Shneiderman & Tillin, 2015, p. 2). The power devolution was meant to accommodate all excluded and marginalized communities (Singh, 2008, p.1). Quite opposed to this noble objective, the new constitution has angered national minorities who have demanded its amendment.

The *Madhesis* allege that the current federal model has many problems. First, it does not acknowledge a distinct identity of the national minorities (Lawoti, 2016, p. 2). Second, the demarcation of the sub-state boundaries encourages assimilation rather than accommodation by refusing their demand of a single province (Hachhethu, 2007, p.11). Twenty districts of *Madhesh* have been divided in five provinces. All but one of the districts have been joined with Hill districts<sup>9</sup>, a design that indigenous people interpret as an effort to divide them and impose a centralized rule (Rana, 2016). Third, the constitution attempts to interfere in their culture by making the provision that makes one entitled to the citizenship by descent only when both father and mother are proven to be Nepali citizens (Srivastava & Jha, 2018). They argue that this provision violates their cultural rights to marry with the persons of their own communities that are dispersed in both India and Nepal. They fear that no Indian woman will be willing to marry a Nepali man, since doing so renders her a second-class citizen. In order to address this problem, they demand an asymmetric arrangement that accepts the differences in the status and powers assigned to the different regions by the constitution (Watts, 1999, p. 66). Quite opposed to their demand, the constitution has granted equal competences to all the provinces. Fourth, they do not even agree with the current judicial system that works under the influence of the central government.

Overall, the minorities allege that the current model of federalism is centralized. Riker (1964) defines the centralized federal government as the one that has more influence than the member states in the issues of the society. In his opinion, the centralized government can take independent action in most cases, without consulting or seeking the consent of the subordinate

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<sup>9</sup> These districts are taken as the territories of the upper caste Hindus and the social elites who speak Nepali language when *Madhesis* speak *Bhojpuri*, *Maithili* and *Avadhi* language. The culture, religion and social norms and hills and the plains significantly differ.

government. Due to this strength, the subordinate governments stay under the center's influence and cannot take any independent action (Riker, 1964, p.6).

In Nepal, the minorities charge that the current central government is not any different from the government of the previous unitary state. Centralized powers benefit the social elites and upper caste people who have remained dominant in the Nepali polity since the time of unification. The constitution must be amended in order to motivate the agitating parties to take ownership of the document (Rana, 2016).

The version from mainstream parties does not correspond with this interpretation of the constitution. The major political parties hold that the constitution is the document of consensus. It has given all minorities due space and recognition. The mainstream parties argue that Nepal's minorities are ethnic or linguistic, but are not national communities – to them, Nepal has only one national community. Mainstream and minority communities are now deeply divided. The societies are said to be divided when they are “ethnically, linguistically, religiously or culturally diverse and that diversity becomes a source of social unrest (Choudhry, 2008, p. 5). The constitution has allowed those difference to become the stressors at the moment.

The present government<sup>10</sup> has agreed to amend the constitution in the areas that affect minorities the most and ensure regional autonomy as demanded (Kamat, 2018). But given the legacy of the past, it is reasonable to question whether the current agreement is meant to engage rather than bring practical changes through amendment. But the political developments do not seem to favor the ‘right to self-determination’ as demanded. Those who endorse this right are too

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<sup>10</sup> The government elected under a new constitution in February 2018.



small in terms of their size in federal parliament. With this historical context, it becomes clear why the framers of the constitution rejected minorities' demand for the 'right to self-determination' and autonomy.

### III. Methodology

This project uses Nepal as a case study to show how a centralized federal model has been used to neutralize the risk of secession that mainstream political actors had envisioned, with no regard to minorities' demand of the 'right to self-determination' and autonomy. This chapter outlines the methods that are used to substantiate this argument.

Methodologically, the research takes centralization of the powers as the dependent and the fear of secession the independent variable. It examines the central argument in two parts. The first part is the constitutional analysis, the study of the dependent variable while the second part studies the independent variable in terms of the available political documents.

In the first part, the new constitution of Nepal has been used as a primary text, but it does not study the entire document; it is limited to the analysis of those parts that are relevant to the study. In addition, it revisits some of the relevant provisions of the interim constitution 2007. The table below summarizes the documents and their parts used in the study:

**Table 1: Constitutional Parts Used in the Analysis**

Documents	Parts	Schedules	Articles
Constitution of Nepal 2015	Preamble, 2,5,8,11 &31	4,5,6,7 & 9	289
Interim constitution 2007	Preamble		

The rationale for limiting the study to certain parts is to explore only the design aspect of federal system. All the parts of the new constitution mentioned in Table 1 are related to the institutional design: Part 5 deals with the Restructuring of the State, Part 8 the Federal

Parliament, Part 11 the Judiciary, and Part 31 the procedure required for the amendment of the Constitution. In addition, the schedules 4, 5, 6, 7 & 9 are also related to the federal structure: the Schedule 4 specifies the demarcation of subunits, 5 the list of federal powers, 6 the list of provincial powers and the 7 the list of concurrent powers. Schedule 9 deals with the powers of the local level government, which this thesis does not study; it is important only to reflect on the limited jurisdiction of the provincial government. The Preamble is important for determining whether the constitution symbolically addresses the minorities' claim for recognition.

The thesis also examines Part 2 and Article 289 – Citizenship - that has no direct connection with the institutional design. Yet minorities allege that these two provisions have impacted their right to oppose the forced assimilation, blocking their ability to pursue cultural autonomy (United Nations Declarations, 2007). They argue that the citizenship provisions obstruct their right to exercise 'self-determination', and thus Part 2 and Article 289 become relevant. To some extent, these provisions are related to the matter of institutional design, as they are impacting the minorities' right to autonomy and recognition. As a consequence, they have been used as subjects of study.

The thesis also briefly revisits the 2007 interim constitution; the latter was more acceptable to minorities. This 2007 document is appreciated for its various progressive measures. Minorities charge that the new 2015 constitution is more regressive than the interim constitution, especially in terms of the recognition it provides to various sections of society. The language of the preamble in the new constitution has sparked controversy in the state. The thesis thus examines the preamble of the interim constitution to expose problems related to the language used in the new constitution.

The research examines centralization in terms of seven measures such as the symbolic recognition in the preamble, the constitutional amending formula, the appointment of judges to the Supreme Court, the jurisdiction of the Upper Chamber in the federal parliament, the demarcation of the federal subunits, the distribution of powers, and the (a)symmetric arrangement of powers. The section below analyzes these measures in detail.

First, whether the constitution acknowledges the struggles or identity of minorities can be used to measure the degree of centralization in the federal design. If accommodation is the genuine aim of the constitution, the document will recognize their identities and struggles. To obtain the loyalty of the minorities towards the central state, it should, as Berlin (1969) says, acknowledge their agentive role in the critical juncture of Nepali history (Norman, 2006, p. 7). Some states manage to earn loyalty by extending symbolic recognition to the minorities in the word choice of their national anthems or preambles, the design of the flag or national dress, official language(s), religion, and in the national symbols, coat of arms, and/or other images of social life mentioned in the constitution (Swenden, 2016). The Constitution aims at the parity of recognition or mutual recognition (Norman, 2006, p. 157). It even tries to acknowledge the worth of the minority groups in question (McEwen & Lecours, 2008, p. 222). One method of recognition could be to identify the state as 'multinational' and accept complementary identities. The recognition of Tamil and Sri Lankan, and Punjabi and Indian are some examples of acknowledgments of complementary identities (Swenden, 2016).

Second, whether a federal design is centralized or not can be measured in terms of the demarcation of sub-state boundaries. In unitary states, the boundaries are only meant for administrative convenience. But in federal states they mark the reach of authority for the subnational governments (L. Anderson, 2004). For this reason, provinces need to have

identifiable and clear borders. (Cornell, 2002, p. 253). Not only this, the demarcation should respect the demographic composition of the provinces and the Constitution should ensure that “the vast majority of the members of the group reside in provinces in which they are a majority” (Norman, 2006, p. 101). If the government forcibly changes the border to the benefit of some ethnic groups, it might become the cause of social grievances. That is why the constitution should not allow any one order of the government to make unilateral changes to provincial borders (Norman, 2006, 102).

By making such provisions, the polities address the minority nationalist desire to have their cultural community be roughly congruent with their political (provincial) unit (Norman, 2006, p. 104). The demarcation of the subunit boundaries in multinational states is related to the minorities’ right to self-determination. Minorities want to remain the majority in their home province, but if demarcations, as Kymlicka (2001) says, are made to make them minorities even in their territory, the minorities’ ‘right to self-determination’ will be undermined (Norman, 2006).

Third, the formula for amending the constitution becomes a litmus test to identify if the federal model has been centralized or not. In federations, the constitution defines the authority of each level of the government, which means neither order of the government is subordinate to the other (Watts, 1999, p. 101). If the central government can amend the constitution on its own, all provisions for autonomy become weak and uncertain. Provincial governments become subordinate to the central state. In order to avoid this situation and protect regional autonomy, the consent of the province is indispensable (Lijphart, cited in Choudhary, 2008, p. 20). Since federalism is the combination of shared-rule and self- rule, the constitutional amending formula provides the actual measure of sovereignty (Potter, 1909). The power of the regional

governments can be measured in terms of their role in amending the Constitution. Different federations adopt different measures for amending the constitution. For instance, major amendments that affect the Borneo states in Malaysia require the consent of those states (Watts, 1999, p. 102).

Fourth, to evaluate whether the system is really decentralized, we need to see how power is divided. In any federal system, the central government renounces any right to unlimited jurisdiction over regional governments (Cornell, 2002, p. 251). The central and provincial governments share the power to rule over the people. Power division is an important feature of federal systems (Norman, 2006, p. 107). Most federal systems make provisions for ‘exclusive’ and ‘concurrent’ powers. But a mere division of power is not sufficient for autonomy. For genuine autonomy, each level has at least one area of action in which it is autonomous (Riker, 1964). Autonomy of the member units can be measured in terms what they can or cannot do independently. In divided societies, the member units might demand or require more autonomy in order to accommodate diversity and address historical grievances. For instance, Quebec has jurisdiction and autonomy over the issues that are important for the survival of the francophone community. It (along with the other nine Canadian provinces) has direction over education and language policy, which is imperative to preserving and promoting francophone culture within Canada (Kymlicka, 2015 p. 119). Immigration is a shared responsibility in the Canadian constitution, and Quebec has asserted its jurisdictional weight in this regard to welcome primarily francophones and allophones into its province.

Fifth, a federal system, by its very nature, gives rise to conflicts and contradictions between provincial and federal orders of governments. The Supreme Court thus stands as a neutral arbiter of law and the Constitution, and should not be exclusively controlled by the

central government or only one level of the government (Norman, 2006, p. 133). For it to stand as a neutral umpire and obtain the trust of all communities, some federations manage to represent the provinces through their process of appointing the judges in the Supreme Court. When the provinces representing national minorities have adequate representation in the selection or appointment of the judges, their discontent dissipates. In the Canadian case, the Prime Minister can use his discretion to appoint judges (Crandall, 2013). The Supreme Court Act (1985) provides that “any person may be appointed a judge who is or has been a judge of a superior Court of a province or a barrister or advocate of at least ten years standing at the bar of a province” (Art.5). In spite of allowing the Prime Minister discretion in recommending judges for appointment to the Supreme Court, the Act has clearly outlined that “at least three of the judges shall be appointed from among the judges of the Court of Appeal or of the Superior Court of Quebec or from the advocates of that Province” (Supreme Court Act, 1985, Art. 6). This provision has given a significant share to Quebec in the Supreme Court of Canada that does “consist of a chief judge to be called the Chief Justice of Canada, and eight puisne judges” (Supreme Court Act, 1985, Art. 4.1). On the basis of these provisions, one scholar appreciates that Canada has adopted an excellent accommodation strategies in the Supreme Court as well (Schertzer, 2016, p. 544).

Sixth, (a)symmetrical arrangements of power determines how much autonomy provincial governments can exercise in their jurisdiction. Some federations in a symmetrical model give equal powers and operating rules for all provinces (Beaudoin, DeDecker & Delperee, 2000, p. 20). A federal system, especially the holding together type federalism, is born out of a genuine need to address social iniquities and persecutions. It comes into existence out of the failure of the previous unitary states to address the social aspirations of the people. Depending on

the ethnic ties and composition, some communities suffer more than others. To impose a symmetric model is to impose uniformity and expect an assimilation of the minorities (Mendes, 2007, p. 72). That is why, to recognize multinational realities and grievances, the asymmetrical model is indispensable (Requejo, 2005, p. 311). Asymmetric arrangements “recognize significant variations among the full-fledged constituent units relating to geographic size and population, their particular social and cultural composition and distinctiveness or their particular economic situation” (Watts, 2013, p. 28).

In contrast, symmetric arrangement ignores the realities of the polities that have “large dominant ethnic populations and historically settled national ethnic, linguistic or religious minorities” (Mendes, 2007, p. 72). Asymmetric arrangements grant policy autonomy to the regional government in areas such as language, education, culture, religion and many others that are critical to the survival of the community (Mendes, 2007, p.72). India, for example, has made asymmetric power arrangements with Jammu Kashmir and some newer states of distinct ethnic groups. It was done to recognize the special conditions of those states (Watts, 1999, p. 66). We can even notice such examples in the case of Canada that “has had a measure of constitutional asymmetry principally related to denominational and linguistic guarantees in education, the use of French in the legislature and the courts, and the civil law” (Watts, 1999, p. 66). Belgium presents a similar example by recognizing the different needs of the provinces. It has accepted asymmetry through the constitution (Beaudoin, Dceker & Delperee, 2000, p. 20).

Seventh, the representation of national minorities in the federal institutions becomes one important consideration when we evaluate the de/centralization of powers. Despite the self-government in homeland, all communities aspire to be represented in the federal institutions. To address this aspiration of the minorities, a bi-cameral parliament is appropriate. In a bi-cameral



parliament, the upper house, known with various names in different countries, helps to connect minorities with federal politics (Khan, 2007). This is why most federations have an upper house, with sometimes equal or lesser power vis-à-vis the lower house. If the upper house adequately represents national and ethnic minorities, it can help alleviate discontents. Belgium has presented a notable example of how its upper house – the Senate - can be used to increase the access of regions and communities to federal institutions. It has allowed the regions and communities to choose their representatives through indirect voting (Dandoy, Dodgeigne, Reuchamps & Vandeleene, 2015). This example is meant to indicate that the federal parliament can be used to counter the potential autocracy of the federal parties by bringing a significant number of MPs from the regions. Yet the inclusive representation is not sufficient to ensure the autonomy in all cases; what it can or cannot do, determines whether a certain institutional design is centralized or not. Thus the composition as well as the jurisdiction of the upper house in the federal parliament can be taken as the measure of centralization.

While the first part focuses on the centralized nature of institutional design, the second part of the analysis focuses on the motives of centralization, that is, the fear of secession. To uncover the fear, it uses political discourse analysis (PDA) as the basic methodological approach. By its etymology, the PDA is close to what is known as the discourse analysis; these two share many features.

We use language for multiple purposes, besides communication; it is used to convey our perspectives or signal the sort of relation we want to have in the society (Gee, 2005, p. 12). Discourse analysis, as a research approach, analyzes the language materials such as talk and texts (Taylor, 2013, p. 2), and tries to explore the speakers' perspectives / intents through them.

Like discourse analysis, PDA studies the language use in context; the only difference is that the former is identified by its actors, that is, the politicians ( Dijk, 1997, p. 12). It looks at the talk and texts of political actors and the institutions (Djik, 1997, p. 12), in order to identify their motives . Following this spirit of PDA, this research intends to analyze the talk and texts of the political actors of Nepal to understand their perspectives, bias, and the fear. It is through the analysis of their speeches, manifestos and other official documents, their views on the current political developments can be understood. For that reason, the PDA is a suitable methodological approach for the research that intends to examine their reluctance and other motivations.

The fear of secession is explained in terms of three variables. First, the interpretation of the ‘right to self-determination’ by the Maoist rebels invoked fear among mainstream political parties. Maoists always raised the demand of the ‘right to self-determination’, interpreting it not only as a democratic right, but also as a right to secession that people could choose as the revolt against oppression (Bhattarai, 1996). They had introduced and popularized this demand. Their interpretation was largely absorbed by minorities. In order to understand this aspect, available party and election manifestos as well as papers of this party from 1996-2013 are scrutinized. Specifically, the study has used the documents shown in the table below:

**Table 2: Official Documents by the Maoists**

<b>Party</b>	<b>Documents</b>
CPN (Maoist)	Memorandum 1996
	Nationality Question in Nepal (1996)
	Manifesto 2001
	Manifesto 2008

	Concept Paper 2010 and the transcripts of CA debates by party members
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The research uses the concept paper and preliminary draft<sup>11</sup> submitted to the CA by the *Restructuring of the State and Distribution of State Power Committee*<sup>12</sup>, for analysis; it studies only those parts that are related to autonomy, the number and the basis of making the provinces and the ‘right to self-determination’.

Additionally, the transcripts<sup>13</sup> of the meetings of the second CA have been analyzed. The first CA did not have much discussion on state restructuring, and its transcripts do not have a direct bearing on a federal design of the state. It uses only the related transcripts from the second CA. Even among those transcripts, only a selected few have been analyzed. For instance, the transcripts of 17<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup> and 28<sup>th</sup> are completely focused on state restructuring. They also include the debates by the top leaders of all parties representing the CA, so it is useful to understand their stance on autonomy and self-determination.

Finally, the research uses the transcript of the 16<sup>th</sup> meeting that is related with the distribution of natural resources. It does not directly concentrate on the distribution of resources; the focus is given only in those sections that are related to the ‘right to self-determination’. These transcripts are quite long and the study just focuses on the discussion related to the ‘right to self-determination’ and the bases of making the provinces.

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<sup>11</sup> To read the full document, see [http://www.constitutionnet.org/sites/default/files/concept\\_paper\\_restructuring\\_state\\_gtz\\_eng.pdf](http://www.constitutionnet.org/sites/default/files/concept_paper_restructuring_state_gtz_eng.pdf)

<sup>12</sup> CA had formed 12 different committees tasked with writing different parts of the constitution and all those committees were required to present their report in the full house of the CA.

<sup>13</sup> These transcripts are available in Nepali and the has used his bi-lingual competence to translate them into English.

Second, the utterances of secession threats by regional political leaders is another important variable to produce fear among the framers of the constitution. The manifestos of *Madhesi*<sup>14</sup> parties have been used to identify their demands for recognition and accommodation in the state. Major political parties were hesitant to embrace a federal system because they were afraid of secession. The study hones in on the discourse by major political parties – the NC and CPN-UML in particular - and, along with those of the *Madhesi* parties, analyzes their election manifestos<sup>15</sup>. The table below presents the documents used in the study:

**Table 3: Major Documents of Mainstream and *Madhesi* Parties**

<b>Name of the Party</b>	<b>Documents</b>
CPN (UML)	Transcripts of CA debates by its members
	Election Manifesto 2013
NC	Transcripts of CA debates by its members
	Election Manifesto 2007
	Election Manifesto 2013
<i>Madhesi</i> Parties	Election Manifesto 2013 & Agreement papers
	Transcripts of CA debates by their members

Since this study has based its arguments on the demands of *Madhesi* minorities, the documents of the regional parties are significant to scrutinize. However, this research has used only *one* manifesto representing all *Madhesi* parties. There are many reasons for doing this: the

<sup>14</sup> There are around 10 regional parties in existence; since they keep breaking and forming new parties quite often, they tend to have new names and partners among themselves.

<sup>15</sup> Of the two major parties, the manifesto of NC was available only in Nepali language and the author translated it into English using his bilingual competence.

frequent break up and re-organization of these regional parties, the similarity of the issues from which they derive common cause, and the lack of online access to their materials. The 2013 manifesto is also the most comprehensive document available from the party website; it covers almost all of the Madhesi issues and demands. In it, the focus is given only to the issues such as the ‘right to self-determination’, autonomy, recognition, citizenship, and representation in federal parliament and in the judicial system. The understandings and agreements<sup>16</sup> between the government and the minorities (mainly the 11-Points Demands, 8-Points Deal, and Agreement-2007) are also highly relevant.

The ‘right to self-determination’ is the central thrust of minorities’ demand. In particular they invoke the United Nations Declaration of 2007 as a rationale for their claims. The thesis thus examines the provisions of “United Nations Declarations on the Rights of Indigenous Peoples 2007” to identify the international measures that are meant to protect the identity, dignity and the human rights of the indigenous people. It is noteworthy that the UN document also focuses on self-determination, autonomy and secession related clauses. The UN Declaration of 2007 was based on the serious efforts of UN and its agencies to identify measures for the protection of the indigenous people. These endeavors are based on the Martinez Cob Study of 1983 that identified multiple facets of discrimination suffered by the indigenous people in different countries, and recommended strategies to reverse their marginalization. To develop the proper understanding of 2007 Declaration, the project analyzes the last chapter of Martinez Cob Study with focus on the Culture, Education, Land, Religious Rights and Practices and Language or Tongue subsections. This chapter is available on the United Nations’ website. Despite the clear rejection of the right to secession in both documents, the right to self-determination has

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<sup>16</sup> Government of Nepal and the regional parties have signed almost more than dozen agreements which reiterate almost the same points.

become a controversial issue. Scholarly articles are used to explore inherent ambiguities and contradictions.

Third, the role of India in Nepali politics and nationalist uprisings is a major variable contributing to the fear of secession in the polity. To explain this variable, the research analyzes the official statements issued from the Ministry of External Affairs (MOEA), Government of India (GOI) in the months of September, October and November 2015. The study uses the following documents from GOI shown in the table.

**Table 4: Official Statements of MOEA**

MOEA, GOI	Statement on the Situation of Nepal
	Statement by Foreign Minister
	Official spokesperson’s response to a query on Nepal 2015 and the Statement by Envoy
	Joint Statement on the Visit of Prime Minister of Nepal (2014)
	Joint Statement on the Visit of Prime Minister of Nepal (2016)
	Joint Statement on the Visit of Prime Minister of Nepal (2018)

There are approximately 200 statements about Nepal issued after 2014 but most of them are about bilateral projects, treaties and the relationships. This thesis uses only those statements that are specifically about the constitution of Nepal. Besides the statements from the MOEA, the thesis also uses the joint statements issued after the official visit of India by the Prime Ministers

of Nepal before and after the constitution. These statements are relevant to show how India has attempted to meddle in internal Nepali affairs by including a point about the domestic issue in the joint statements.

#### IV. Review of the Literature

The issue of federal restructuring in Nepal has sparked scholarly attention of late. Many critics have debated why Nepal needed restructuring, what the challenges are, and whether present arrangements work for the country. The major research works have focused on four major trends on Nepal's federalism: the significance of a federal system, the reluctance of major political parties to embrace federal restructuring, the (ir)relevance of one province / ethnic model, and the presumed or real risk of secession.

As mentioned above, some researchers have examined the importance of a federal system in Nepalese context. Bhatt and Mursheed (2009) see the relevance of this system in resolving the underlying causes of the conflict. Federalism helps to ensure the fair representation of all sub-cultural and ethnic groups in the decision-making process at all levels of government (Bhatt& Murshed, 2009, p.123). Many other scholars agree that a federal arrangement was intended to restore peace and justice in the post-conflict Nepal.

In a comparative analysis of Sri Lanka and Nepal, Edrisinha (2015) states that both countries had explored constitutional reforms, including federal options, as part of the post-peace agreement efforts to address the social grievances and promote peace and social justice. But Edrisinha (2015) contends that federal restructuring has to achieve more than peacebuilding in a multiethnic state. According to him, it had become a national agenda only out of the pressure of the mass protest by the indigenous *Madheshi* people who had demanded accommodation of their concerns. The state had accepted federalism as an accommodation strategy (Edrisinha, 2015, p. 317).

Focusing his study exclusively in Nepal, P. Sharma (2014) argues that a federal system can accommodate ethnic aspirations. With the "UN Declarations on the Rights of Indigenous



Peoples 2007” and “ILO convention 169” as part of the broader human rights framework, he contends that ethnicity cannot be ignored while crafting a federal model in Nepal. As a signatory of these international provisions, a remedial measure must be found to end the discrimination and marginalization of ethnic communities. The federal system has to find the measures of accommodation (P. Sharma, 2014, p. 19).

In line with the argument above, Ghafarzade (2016), taking a comparative perspective, mentions that Nepal has chosen 'restructuring' to address the root causes of conflict like Yemen. But Nepal's experience offers a cautionary tale in which a divided society chooses to transition from a unitary state to a traditional rather than a post-conflict federation (Ghafarzade, 2016, p. 990). Whatever it's form, the purpose was to eliminate social grievances and prevent them from flaring up into violent clashes.

Rather than discussing the significance of a federal system, other scholars examine Nepalese minorities' demand to form a single province in their ancestral land. Taking a demographic perspective, one scholar argues that 50% of the total population live in southern plain. To form a single province in the region that houses half of the population is to conceive unbalanced and poorly functioning federation (G. Anderson, 2009). Rather than allowing a single province in the entire region, this author requires that the federal institutions become inclusive. According to him, the minorities should be accommodated in the central institutions: the legislative and executive branches, the civil service, and army (G. Anderson, 2009).

Disagreeing with a single province model like Anderson (2009), Khatiwada (2007) states that there is no place which is completely inhabited by a certain caste or ethnic group (Khatiwada, 2007, p. 9). Nepal has ecological, demographic and ethnic diversity that requires appropriate accommodation in its nascent federal system (Khatiwada, 2007, p. 9).

Attention should be given to this demographic and ethnic composition of the polity and devise strategies to incorporate them. Quite in tune with this assertion, Yash (2011) mentions that there is no significant region that has an exclusive concentration of one linguistic or religious community. Nepal has a mixed habitation and, in such a context, to opt for an ethnic model is to give rise to the massive exclusion of the communities and prepare the ground for further social unrest (Yash, 2011, p. 328).

Some other scholars think that the ethnic model, the one based on a single province model leads to further conflicts and violence. Taking a sociological perspective, one author concedes that Nepal has marginalized some ethnic communities and promoted others, and to end the systemic marginalization and structural violence of this kind, an ethnic model is not suitable (J. R. Sharma, 2012, 48). In his understanding, such a model inspires ethnic conflict and social unrest. Rather he suggests the political actors to seriously attend to the marginalization and exclusion of the people within ethnic communities, and make the state apparatus more inclusive and democratic (J. R. Sharma, 2012, p. 48).

Agreeing with almost all critics above, Topperwien (2009) requires that the Nepali state stop all forms of marginalization and exclusion of ethnic communities. For that, central institutions should be inclusive, and the state should adopt accommodation strategies such as proportional representation, reserved seats, positive discrimination for vulnerable groups, and minimum standards to acknowledge differences. In addition, more power should be given in areas such as language and education (Topperwein, 2009, p. 13). This scholar does not directly answer why a single province is not an appropriate demand, but instead emphasizes making the state mechanism more inclusive. To emphasize the accommodation strategies in the central institutions is to refuse the one province model.

Writing during the moment of heated debates in Nepal, Watts (2011) answers why a single province might not be suitable. He argues that Nepal has a unique situation with 103 ethnic groups, with no single group in majority. It is very difficult to provide self-determination through self-rule in its own constituent units. Rather the central institutions - the executive branch, legislative branch, and the public service be made more representative (Watts, 2011, p. 32). Khanal (2009) echoes Watts (2011) when he mentions that most parts of the country are mixed in terms of populations and no group has a majority in the regions of the country (Khanal, 2009). In this context, it is inappropriate to devise one province, conceding to the demands of some communities. Dixit (2012) argues that Nepal is not only a multiethnic and multicultural state but also a state with mixed habitation, in which the ethnic model is not appropriate. He states that the debate about an ethnic model has prominence in the polity because of the vested interests of Maoists and India. Maoists are aware that the ethnic model does not work but cannot admit it in public. They want to use it as a tool to garner ethnic support for the party. In the case of India, multiple factors such as a security threat as well as the ethnic ties with *Madhesi* people could be factors at work (Dixit, 2012, p. 39).

Most of these positions represent those espoused by mainstream parties, social elites, and the public, but Niroula (2009) tries to see from the perspective of one of the indigenous communities of the plain known as *Tharus*. He points out that *Tharus* oppose the demand for one province, arguing that doing so would leave them excluded and marginalized by other indigenous communities. Taking the *Tharus'* objection in to account, Niroula (2009) holds that Nepal should create a federal system that identifies and delineates multi-lingual, multi-ethnic and multi-religious provinces to accommodate minorities. At a time when the *Madhesi*

minorities had been demanding a homogenous province in a multiethnic state, this position is innovative.

When a significant number of reviews concentrate on the analysis of the ethnic model, other investigations indicate the reluctance of major political parties to accept federal state restructuring. André(2014) reveals that the major political parties were reluctant to accept the *Madhesi* claim for federalism. This reluctance prevented the CA from reaching a consensus about the federal model. The weak support for the very notion of federalism made a compromise on its actual design more difficult (Andre, 2014). Parties were afraid that federalism in Nepal would lead to a slippery slope of ever-increasing demands for ethnic, linguistic and regional states (Townsend & Shneiderman, 2008, p. 45).

Scholars have used several angles to interpret the hesitation of political leaders regarding federal arrangements in Nepal. Mabuhang (2014) argues that the Nepali polity has been dominated by the mindset that does not see federalism as a viable option in a country with multiple linguistic, religious and ethnic communities. Political actors do not consider the accommodation of the minorities as an important task. Drawing a parallel between Ethiopia and Nepal, Mabuhang (2014) states that both countries are similar in terms of their landlocked geography, history of the armed conflict, the Monarchy, and the endeavors to settle conflict through a federal restructuring. Despite this similarity, Ethiopia has accepted the premise of a right to self-determination and, with it, a right to secession whereas political parties in Nepal have avoided refused to do the same (Mabuhang, 2014). This research confirms the hesitation of the major actors without explaining the reason.

There is a disagreement among scholars about why political actors are reluctant. While some see it as a fear of losing traditional dominance in the state, others interpret it as a fear of

secession. Brand (2014) mentions that there is great reluctance among the political parties to accept the federal system. The parties have already promised to ensure inclusion in the constitution, but these parties were mostly in the center with the power. They feared that the major devolutions would render them powerless, and this fear made them reluctant to embrace the federal model of state restructuring that would give power to traditionally disadvantaged groups and communities (Brand, 2014).

Writing in the context of a federal model rejected in major constitutional reform in Italy in 2001 and the dissolution of the first CA in 2012, Lecours and Arban (2015) comparatively analyze the reason that has made consensus difficult. At the time of constitutional reform, Italian political parties were convinced that federalism was not an alternative for the polity. Rather than a federal system, they opted for a more decentralized system that gave additional legislative powers to the regions. In the same fashion, political parties in Nepal could not agree on the model of restructuring that has led to the dissolution of the first CA. In the case of Nepal, the elites had dominance in social, political, economic and cultural spheres of the state. They realized that power devolution would affect that dominance. To protect their hegemonic position within the state, they denounced autonomy as unfair and dangerous to national integrity (Lecours & Arban, 2015, p. 197). For these two authors, secession risk had been used as a tool to dispel the minorities' claim for autonomy.

Many researchers do not endorse this explanation. For them, the hesitation has resulted from a misconception or presumed fear of national disintegration. Edrisinha (2015), taking India, Sri-Lanka, and Nepal as cases, examines whether federalism promotes secession. She argues that in South Asian countries, the centralizing tendencies are dominant. Countries fear that too much autonomy leads to the disintegration of the country. The history of established federations

indicates that secessionist impulses become weak after the implementation of a federal system. With a total disregard of this fact, South Asian countries have misconceived federal system as a secessionist practice. Nepal too has borrowed the similar mindset (Edrisinha, 2015). This assertion was based on her understanding of political actors viewing identity politics as a problem that must be avoided.

Continuing the theme of misconception, Thapa and Sharma (2011) hold that the parties should analyze the contexts where a federal system has been taken as a model of restructuring. The political parties' failure to fulfil people's economic and social aspirations after the 1990s multiparty democratic system lay the groundwork for restructuring along federal lines. Without realizing their own failure, they tried to convey a message that autonomy would create divisions (Thapa & Sharma, 2011, p.33). These two authors confirm that secession risk was presented as a reason for reluctance by political parties.

Similarly, Tamang (2009) explains that Nepali politicians are afraid of the demand for the right to self-determination that could be managed thorough a federal system. Granting the right to self-determination and autonomy would be, for them, to build a space for national disintegration. By avoiding federal system, they want to avoid autonomy (Tamang, 2009, p. 22). Due to this perception, political parties never gave a serious thought to a design of a federal system.

Some scholars think that the reluctance of political parties was genuine. For them, all 'holding together' federal systems come in response to a risk of secession and Nepal is no exception. A comparative analysis of Nepal, Myanmar and Sri Lanka (Breen 2017) indicates that secession risk was present in Nepal in the aftermath of its violent conflict. The uprising from the southern plains, and India's tacit support of the movement, lent credibility to secessionist

thoughts (Breen, 2017, p. 39). For Breen, the politicians had strategically chosen a centralized federal system to dampen potential separatist movements.

The risk of secession had increased even due to the nature of debates and conversations that the polity witnessed during the tenure of the CA. Acharya (2014) holds that discussions of the first and second CA centered on the self-rule aspect of federalism, ignoring the reality that shared-rule is its prominent feature too. Excessive focus had been given features of self-rule: the right to self-determination, to autonomy, and to political preferences (Acharya, 2014, p.163-164). Focusing on the shared rule aspect of a federal system, Acharya (2014) has stated that in any devolution, territorial integrity cannot be neglected. When the focus is only given to self-rule, it is likely that other stakeholders perceive it as a move for independence (Acharya, 2014, p.163-164).

Unlike the critics mentioned above, some scholars do not think the risk of secession was omnipresent. Drawing an analogy between Nepal and Spain, Urrea (2014) argues that the degree of risk of secession is different in these two jurisdictions. Federalization in Spain is driven by a strong sense of political, social and group identity that came from the Basque country and Catalonia. The latter have demanded the right to self-determination and secession. But in the case of Nepal, the separatist demands have not yet been raised. The dual sense of nationality is still strongly present in indigenous *Madhesis* (Urrea, 2014, p. 330). Political parties are saying that autonomy will lead to secession, but that fear has emanated primarily from those people who are against the devolution of power. There is little room to accept that it is often the lack of accommodation gives rise to separatism, not the provision of it (Urrea, 2014, p. 330).

Bhattachan (2005) too, agrees with this observation when he mentions that Nepal is in the need of inclusive democracy; he defines this as a system that eliminates discrimination and

hegemony, allows the distribution of power to minorities, and guarantees full participation by all its citizens. Additionally, he mentions that the marginalized communities are deprived of inclusive democracy; only the right to self-determination and autonomy would increase people's access to it. The Nepali polity has heard rumors that such rights would lead to the disintegration of the country (Bhattachan, 2005). Such rumors were spread by so-called upper caste Hindus – *Bahun* - who are afraid of losing their hold in the polity. According to him, providing the right to self-determination increases unity rather than secession (Bhattachan, 2005).

Agreeing in part, Karki (2014) holds that the institutional design of a federal system had become a victim of unnecessary advertisement. Focusing his study on Nepal, he mentions that there were two lines of thought in the public sphere. One group presented federalism as a panacea to all social evils. This group demanded federal restructuring as if it was the only issue to be fixed in new Nepal<sup>[1]</sup>. The other group viewed federalism as a cause of social unrest and tension. This second group argued that autonomy managed through a federal system would lead to the dismembering of the state and thus must be avoided to protect national integrity. Clearly both these aspirations and fears are unrealistic (Karki, 2014, p. 20). Despite declaring these understandings unrealistic, Karki's analysis helps us to understand that secession was a matter of heated discussion at the time.

Upreti (2009) argues that Nepal had undertaken state restructuring to address pressing social issues such as poverty, structural inequalities, political oppression, social exclusion, gender and ethnic discrimination, skewed distribution of resources of production, corruption and continuous failures of the government to address the structural problems. The federal restructuring had to address these structural problems while also recognizing diversity, and reducing conflict and tension. In the context of Nepal, it was even more important to adopt a



federal system. Upreti is aware of the arguments that a federal system could lead to disintegration. Despite admitting such a possibility in a federation, he maintains that it can happen in any system and much depends on the will and confidence of the political actors to eliminate social cleavages (Upreti, 2009, p. 225). Writing at the time when federalism had become a contentious issue, he suggests the political parties take bold steps and amicably tackle the pressing issues.

Some scholars do not question whether the risk of secession is real or constructed. Even if it is real, autonomy could dampen it. Forwarding his argument along this line, V.R. Sharma (2007) mentions that the minorities in Nepal are demanding autonomy, not an independent state. By subdividing the country into smaller sub-states, secession can be made practically less likely. He suggests that the arrangement can grant cultural autonomy to minorities while retaining the central state's emergency power that could be used to intervene when the activities of the state pose a threat to cultural harmony and national integrity (V.R. Sharma, 2007, pp. 15-16). For him, a federal system can help to neutralize the risk of disintegration, if there is any.

After the promulgation of the constitution, marginalized communities have launched their protest, demanding its amendment. In their claim, the new constitution has rejected their demand for democratic inclusion and recognition. Ghale (2017) too, accepts that the new constitution has not recognized people's aspirations for recognition. He outlines the reason that the people in the power viewed the aspirations of the people as the threat to national security and communal harmony (Ghale, 2017, p. 123). He does not use the word secession in his discussion, but alludes that the power holders were afraid the accommodation of demands could lead to secession.

Writing before and after the promulgation of the constitution in Nepal, many scholars have debated whether the risk of secession was real or constructed. None of them, however, discusses whether the fear of secession determined the choice of the institutional design of a federal system. Breen (2017) has briefly mentioned the South Asian tendencies to centralize power, but his analysis does not reveal if that tendency had a direct relationship with the fear of secession. Taking this gap as a major concern, this research intends to analyze the reasons that inspired such a centralized federal model in post-conflict Nepal.

Autonomy and secession are perceived as the cause and effect of the same process by the mainstream political parties of Nepal, while the minorities have condemned this correlation as forceful and baseless. This condemnation however, has not prevented the regional political leaders from uttering the threat of secession time to time. In this context, it is relevant to see what autonomy has done in practice, and how some established federations have managed the risk of disintegration and the demand for self-determination. The section below briefly reviews major endeavors and responses of stable federations like Canada, Malaysia, and India. Finally, it has reviewed the autonomy arrangements in Finland to present an example of how even a unitary state can still manage to provide a degree of autonomy to minority groups.

Canada has used its federal system to accommodate diversity, however, it is not immune from separatist movements or discontents from indigenous minorities. Scholars have studied various aspects of the federation, and the basic subfields of research on Canadian federalism can be categorized into four major groups: the purpose of the federation, accommodation strategies, a risk of secession, and response to aboriginal people's demands.

In a comparative study of federalism in Canada and the United States, one scholar notes that the purpose of the federation was to recognize the bi-national composition of the country (L.

Anderson, 2004, p.100). At the same time, Anderson is aware that the federal system by itself plants seeds of discontent and prepares the platforms of conflicts that might transform into secessionist movements. His assertions have come true in the case of Quebec; twice in Canada's history (1980 and again in 1995), the government of Quebec has asked Quebecers whether they wanted to pursue secession from Canada, and both times Quebecers voted "no". In 1980 the animating motivation was desire for equal status with Canada as a sovereign nation, and in 1995 it was the result of sheer disappointment in being unable to successfully pursue the entrenchment of distinct society status in Canada's constitution. Broadly, in both instances Quebecers felt that the terms of confederation had been violated (Russell, 1993). Since the second referendum, however, Quebec has pushed for more autonomy, although there has been very little agitation for secession.

Despite this discontent, Canada has been trying to accommodate Quebec by granting regional political autonomy and strengthening the francophone presence in Ottawa (McEwen & Lecours, 2008, p. 221). Quebec is also the recipient of a mix of concurrent and exclusive jurisdiction over a range of policy areas that are indispensable for the survival of its francophone society (Choudhry, 2008, p. 147).

While some critics appreciate the accommodation strategies, others point out that multinational states are always exposed to a risk of secession that usually happens due to the minorities' aspiration to the right to self-determination. This is the reason established democracies such as Spain or Canada encounter secessionist challenges (Zuber, 2011, p. 549). Canada's response to the separatist demand is a notable example for federations facing similar threats. The constitution does not contain an explicit right to secede, but the Supreme Court Reference on Quebec Secession in 1998 established a kind of quasi-constitutional right of

secession. It has established that when Quebec acquires a clear majority in a clear question, the rest of Canada is obliged to negotiate the terms of secession (Bihongen, 2015, p. 48).

Along the same line, (Meyerhoffer, 2014) suggests that Canada has always lived with the possibility of secession after the Supreme Court's Quebec Secession Reference was decided. People in Canada and Quebec have accepted that a vote requesting approval to move ahead with secession could happen in the future. This uncertainty or possibility has worked as a glue to hold Canada together (Meyerhoffer, 2014, p. 301). This scholar further remarks that advanced democracies do not avoid the possibility of a secessionist threat, but instead live with it and, in some cases, embrace it as part of their national experiment. Presenting this as a precedent, he suggests Nepal include the right to secession in the constitution that would increase the strength of the union and dissuade the separatists (Meyerhoffer, 2014, p. 301).

While some scholars appreciate Canada's success in accommodating the different language and culture presented within Quebec's society, many others take issue with the various governments of Canada failure to give fair treatment to the claims of its indigenous people. Autonomy is broadly associated with Quebec but it has not been the same when it comes to dealing with aboriginal rights and claims for self-government (Lacovino, 2010, p.92). Some scholars disagree that the solution lies only with the government; instead, both sides need to make an effort at consensus. Most aboriginals reject the assimilation model, and almost all Canadians reject the aboriginal sovereignty model, thus it is imperative to find a compromise between the two (Dyck and Cochrane, 2014, p. 90).

Like Canada, many other stable federations have responded to the demand for the right to self-determination, self-government, autonomy, and secession, however, all these variables have not occurred in one country at a time. The demand for the right to self-determination has been

raised even in Malaysia, especially by the indigenous community known as Orang Asli who have endured alien subjugation, domination, and exploitation after the arrival of Malay, Chinese and Indian communities, the dominant groups in the current polity of Malaysia. The arrival of these communities weakened the ability of the people to exercise their right to self-determination and autonomy. But these communities are not aspiring to secede as it is not practically viable (Nordin & Witbrodt, 2012). This example is relevant to understand that self-determination does not mean secession in all contexts; it can equally mean the claim for dignified space in the state.

The issue of self-determination has also become a matter of intense debate in India. But India presents interesting examples of how the state can respond to such demands. Hariharan (2014), studying the five regions that have seen secessionist movements, asserts that the central government's response is different in each case. For instance, Tamil Nadu does not share a land border with a neighboring nation and does not even have a dispute over the waters of the Indian Ocean that lie between India and Sri Lanka. The government in this case became more open to concession and agreed to the demand of creating a separate state there (Hariharan, 2014, p. 46). Not seeing a risk of secession, it even conceded to the demand of Mizoram, but in Punjab and Kashmir it has repressed every movement (Hariharan, 2014, p. 46). India's response teaches other federations to attend to geopolitical situations while addressing the demands for autonomy and the right to self-determination.

Federalism and autonomy have often been taken as an interrelated concept. But evidence shows that autonomy is possible even without implementing a federal system. Åland islands in Finland is one of the major examples of an autonomous region in a unitary state. Hepburn (2014) presents a brief history noting that the islands were under Swedish control for six centuries until

both of them were conquered by the Russian empire in 1809. Following the success of the Russian revolution, both became independent in 1917. At the time of their independence, Åland had to choose between Sweden and Finland. Due to Finland's agreement to accept the autonomous status of the islands, Åland had agreed to remain part of Finland (Hepburn, 2014, p. 250). Following the advice of the League of Nations in 1920, Finland conceded to Åland's demand for recognizing their right to maintain their culture, language, traditions, regional citizenship, and to enjoy a demilitarized autonomous state (Benedikter, 2009, p. 15). When all other regions are governed by a centralized system, Åland possesses its own regional assembly and regional executive with executive powers in areas such as education, health, culture, and police administration. It even elects a single representative to the Finnish parliament, with a veto power to protect the interest of the region (Hepburn, 2014, p. 468). It enjoys many features of sovereign statehood, with its own postage stamp, national flag, and citizenship laws, and enjoys a non-hierarchical relation with the central state (Hepburn, 2014, p. 468).

In sum, Finland has shown that autonomy reduces the risk of secession. If it had not agreed to autonomy, Åland would not have joined the country. Indian experience instructs the rulers to become sensitive to the geopolitical realities. Malaysia has illustrated that the 'right to self-determination' does not mean secession in all contexts, while the Canadian federation has taught that the legal provisions for secession could dissuade would-be secessionists with strict process technicalities. Canada is also useful in another way; the successful accommodation of one minority culture does not make it a champion in accommodating the demands of other minority cultures within its midst – the indigenous people are a clear example here. All these lessons remain useful as Nepal begins to implement its federal design.

## V. Constitutional Analysis of Centralization In Nepal

This chapter examines some of the prominent centralizing tendencies inherent in the constitution<sup>17</sup> of Nepal, simultaneously exploring how they have denied agitating *Madhesi* minorities the right to self-determination and autonomy. It is the movement of the *Madhesi* people that compelled the political actors to choose a federal system; however, mainstream parties and the then rebels had already agreed to pursue the project of the state-restructuring. The polity has taken a federal path but the major principles of federalism have been compromised. Contrary to the demands and the agreements with the agitating minorities, the constitution centralizes power in the federal government, which is unitary in everything but name.

This centralized federal design has produced discontent among the *Madhesi* minorities. The ethnic minorities want to pursue their political and social destinies on their own, rejecting social, political, economic, and cultural oppression by the social elites and the state representing them. In this context, Kymlicka (2007) is of the opinion that the gradual democratization of societies has made the minorities more assertive of their rights. The congruence of the ethnic demands with the basic principles of democracy and human rights has led polities to accept minority nationalisms (Kymlicka, 2007, p. 39). Minorities in Nepal had been claiming for social inclusion and justice through the provision of autonomy and thus the state had no alternative but to listen to the minorities' concerns and explore adequate accommodation strategies. What compelled the polity to agree to the demands of the minorities, at least in principle, were the mounting pressures from the minorities' identity politics and the state's commitments to

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<sup>17</sup> To read the full document, see <http://www.constitutionnet.org/vl/item/constitution-nepal-2015-official-english-translation-ministry-law-justice-and-parliamentary>

international treaties in particular – the ILO convention 169 and the United Nations Declarations on the Rights of Indigenous Peoples.

As noted, the state's pursuit of federal restructuring had emerged from the acceptance of the rights of minorities. Mainstream political parties and the agitating *Madhesis* had expected to secure their concerns through a federal model of power-sharing. When mainstream parties wanted to utilize the federal system to protect territorial integrity, minorities perceived this as a tool to guarantee their right to self-determination, with policy autonomy in areas crucial to their collective existence (L. Anderson, 2004, p. 89). Yet the mere installation of a federal system cannot protect the minorities' right to autonomy; much depends on its design.

The established trend shows that countries are not always supportive of minorities' requests for recognition. Focusing his analysis on Asian states, Kymlicka (2007) observes that countries have often tried to suppress ethnic demands. When the repressive strategies fail to contain ethnic movements, governments have opted for accommodation. Yet even when a federal system is installed as a power-sharing mechanism, autonomy and the right to self-determination are not the inevitable outcomes in all situations. Even in this system, minorities can be denied self-government through the centralization of power (Kymlicka, 2007, p. 48). Nepal's federal design has taken a centralized path which has denied the right to self-government. This chapter analyzes how the centralized federal model has blocked the right to self-determination and autonomy; the analysis of the motives for this centralization appears as a separate chapter.

Centralization stands for a constitutional arrangement that allows the central government to retain vital state-building powers. Giacomo and Flumian (2010) argue that some constitutions



make the federal government predominant over provincial governments (Heinz, 2012, p. 119). In such contexts, the federal government makes decisions in most areas, leaving very little to the jurisdiction of constituent units. Riker (1964) presents centralization as a matter of influence. For him, it is an arrangement that leaves one order with influence over the other. If the most powers are lodged with the central government, the constituent units are likely to be influenced by the central state. In such a context, the centralized federation functions like a unitary government or an empire (Riker, 1964, p. 7). Following Riker's argument, this study contends that a federal system in Nepal has not transformed the fundamental character of the previous unitary state. It has analyzed the centralizing forces of the constitution, applying seven measures; the recognition of minorities in the preamble, the demarcation of sub-state boundaries, the distribution of power, the constitutional (a)symmetries, the constitutional amending formula, the appointment of the Judges to the Supreme Court, and the legislative powers of the upper chamber.

### **Constitutional Preamble**

The recognition of minorities in the preamble of the federal constitution provides the measure of centralization or the absence thereof. Constitutional recognition does not bring an immediate impact in the lives of the marginalized people, but it transfers a feeling of honor, whether or not it can affect the judicial interpretation of constitutional cases. The constitutional recognition informs as well as consolidates citizens' status in the polity.

Respecting this need for recognition, federal constitutions employ a number of strategies of accommodation; they come, however, in either symbolic or tangible forms. The preamble is a major platform to recognize the worth and the status of minorities. Many constitutions, whether federal or not, manage to recognize minorities symbolically through the choice of the words in

the preamble. Orgad (2010) argues that the preambles might not have legal effects like other provisions of the constitution, but they set down the basic structures of the society and its constitutional faith. They encourage cohesion or exacerbate divisions; they can express the constitutional identity and serve as a device for national consolidation (Orgad, 2010, p. 738). The preamble can also direct how the constitution is interpreted by the judicial branch. But even where strong legal effect is lacking, the choice of words in the preamble functions as a tool of accommodation.

The preamble in the constitution of Nepal represents basic socio-political values to which the polity adheres, including the mindset of the framers at the time. Despite identifying Nepal as a multi-ethnic, multi-lingual and multi-cultural country, it does not recognize the transformative role that minorities played in different times of political history. It presents only the mainstream parties as the architect of political history.

The preamble opens with the recognition of the “people’s right to autonomy and self-rule while maintaining freedom, sovereignty and territorial integrity, national unity, independence and dignity of Nepal” (Nepal Const., pmbl.). It accepts that Nepal has been transformed into a federal democratic republic through the sacrifice of its people and recalls “the glorious history of historical people’s movements, armed conflict, dedication and sacrifice undertaken by the Nepalese people at times” ( Nepal Const., pmbl.). Using the phrase ‘peoples’ movements’, it recalls the non-violent mass movements that took place in 1956, 1990 and 2006. These movements challenged the autocratic rule and helped establish democratic government; however, the previous democratic experiments were unsustainable. Since the success or failure of democratic movements is largely beyond the scope of this thesis, it receives only minimal

attention, suffice to mention that the preamble of the new constitution acknowledges all these historic movements, no matter their results. It remembers all those movements that have become successful in the joint initiation of the mainstream political parties, in particular the NC, the UML and their allies.

The preamble also recalls the armed conflict that shook the traditional foundation of the polity, prepared the background for the overthrow of monarchy, instilled nationalist consciousness among the ethnic minorities, and helped to initiate the project of state-restructuring. It acknowledges the agentive role of the rebels by mentioning ‘armed conflict’. Major problem lies in the language that the preamble has used to acknowledge the contribution of some groups over others. In the transformation of the polity, the role of the *Madhesi* parties cannot be underplayed. Issues such as self-rule, autonomy and federal restructuring were made known to public out of their protests, but the preamble does not mention the *Madhesi* movement in identifiable terms. It ignores in Berlin’s (1969) words, the oppressed nationalities’ desire to have a recognition of their nation as an independent source of human activity, as an entity with a will of its own (Norman, 2006, p. 157). Basically, it tries to erase their agentive role.

Some might interpret the use of ‘people’ as an inclusive term and argue that the preamble does not ignore minorities. When it comes to the issue of recognition, a major concern is who or what else receives a special recognition in the constitution (Norman, 2006, p. 159). The major political parties and the rebels have received special recognition. The preamble records them as the agents of history, but does not identify the *Madhesi* minorities. To give special treatment to some and not to mention others is to refuse recognition. Such a treatment “dilutes the importance of national minorities” (Norman, 2006, p. 159). If their movement had been acknowledged, they

would have viewed this as being recognized in the polity which could increase the acceptance of the constitution in *Madhesh* (Srivastava & Jha, 2018).

What was lacking in the word choice can be understood by comparing the preamble of this constitution with that of the interim constitution. The preamble<sup>18</sup> of the interim constitution uses similar language, yet with a neutral stance. It recalls “the people’s mandate expressed in favor of democracy, peace and progress through historical struggles and people’s movements launched by the people of Nepal at various times since before 2007 (1951) to till the date” (Nepal Const., 2007, pmb.). It has put all movements and struggles together and the phrase ‘till date’ further adds to its neutral stance.

These two preambles indicate how significant the language of the preamble is in establishing or denying recognition. Levinson (2010) argues that a preamble should evoke what binds together the society for which the constitution is being drafted - religion, ethnicity, histories, languages or commitments to norms. Citizens can sense a tone or an image of the state in the language of the preamble. The objective of a federal state is not to eliminate diversity but to accommodate, reconcile, and manage it within an overarching polity (Watts, 2001, p. 32). For that purpose, the preamble can work as a significant technique to hold together diversified groups.

Many constitutions, whether federal or not, tend to acknowledge complementary identities in their preambles. Ukraine presents an interesting example in this matter. As Stepan, Linz and Yadav (2011) argue, after its independence there was a heated debate in Ukraine about

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<sup>18</sup> To read the full document, see [http://himalaya.socanth.cam.ac.uk/collections/rarebooks/downloads/Nepal\\_Interim\\_Constitution\\_2007\\_first\\_to\\_sixth\\_amendments.pdf](http://himalaya.socanth.cam.ac.uk/collections/rarebooks/downloads/Nepal_Interim_Constitution_2007_first_to_sixth_amendments.pdf)

how to acknowledge the recognition of minorities in the preamble of the constitution. After much deliberation, the parliament approved the constitution “on behalf of the Ukrainian people - the citizens of all nationalities” (Stepan, Linz & Yadav, 2011, p. 182). The constitution does not identify all national communities specifically but accepts Ukraine as the multinational state. In contrast, the preamble in Nepal’s constitution projects the mainstream political parties as the sole actors of history. While this does not mean that the constitution fails to recognize minorities at all, there are numerous instances that reference minorities and their cultural specifics, but the definition of the nation that the constitution provides does not meet their demand. One of the major regional parties demanded the “ recognition of the national identity of the *Madhesi* people” (MPRFN, 2013). They wanted to be recognized as a nation within a state. But the constitution has refused this claim through the definition of the nation as follows:

All the Nepalese people, with multi-ethnic, multi-lingual, multi-religious, multicultural characteristics and in geographical diversities, and having common aspirations and being united by a bond of allegiance to national independence, territorial integrity, national interest and prosperity of Nepal, collectively constitute the nation. (Nepal Const., art. 3)

This definition indicates that the Nepali polity believes in a one nation state that does not satisfy the aspirations of the communities seeking self-determination. The major concern is whether this particular constitution has given an adequate expression to the desires and requirements of the particular society in question (Watts, 2001, p. 32). Neither parts of the constitution nor its preamble<sup>19</sup> address the aspiration of the *Madhesi* to be recognized as a nation.

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<sup>19</sup> Preamble can be just one platform for recognition. In a broad sense, the distribution of powers, the constitutional asymmetries, partnership in the amendment of the constitution, the role of the Supreme Court, and the representation in and the powers of the upper house are the integrated efforts for recognition. Since this research takes symbolic recognition as one measure among others, it has focused on preamble.

## **Sub-national Boundaries**

The demarcation of the sub-state boundaries reveals whether minorities have been awarded with autonomy. If the internal boundaries correspond with the demographic composition of the regions, minorities can exercise their autonomy and the right to self-determination. In the case of a ‘coming together’ federation, the issue of borders might not create much controversy. The pre-existing states, in general, wish to retain their existing boundaries, and the makers of the constitution possess little discretion over the determination of the borders (IDEA, 2015, p. 13). But in ‘holding together’ federations, new boundaries need to be drawn to satisfy the aspirations of both majorities and minorities. Demarcation becomes the first major step towards instituting a federal design. In the case of Nepal, the demarcation had become one of the most contentious issues in the eight-year period of making the constitution.

Many scholars suggest that sub-state demarcation needs to correspond to ethnic, cultural and religious boundaries. Kymlicka (1998) argues that, to recognize the people’s right to self-government; boundary demarcation should be based on the consideration of ethnic composition in the regions. If national minorities have territorial concentration, the boundaries of the federal subunits should allow minorities to become a majority in the sub-units (Kymlicka, 1998, p. 119). MacFarlane and Sabanadze (2013) perceive territorial boundaries as something related to the minorities’ right to self-determination. In their opinion, minorities should be able to decide on matters critical to their existence as a community. It is necessary to maintain the congruence between national and political borders (MacFarlane and Sabanadze, 2013, p. 613). Only then do minorities have an opportunity to make decisions in certain areas without the fear of being outvoted by the dominant groups (Kymlicka, 1998, p. 119). These arguments together reinforce the role of the border in establishing the minorities’ right to self-determination.

Lijphart (2004) makes a similar argument when he emphasizes homogeneity and decentralization of a federal system. In his opinion, the constituent units should be homogenous to be able to avoid the dominance by a large state (Lijphart, 2004, p. 105). Whether “the units are structured to coincide with and to reflect the ethnic lines or cross cut them” becomes an important measure of centralization and autonomy (Lijphart, 2004, p. 105).

The constitution of Nepal has provisions for seven states with clearly defined borders. It states that “the main structure of the Federal Democratic Republic of Nepal shall be of three levels namely the Federation, the State and Local Level” (Nepal Const., art. 56. cl. 1). Explaining this article, it says “there shall be States consisting of the Districts as mentioned in Schedule-4 existing in Nepal at the time of commencement of this constitution” (Nepal Const., art. 56. cl.3). The internal borders should ensure that “each national group is able to maintain itself as a distinct self-governing society and culture” (Kymlicka, 2007, p. 36), but this has not happened in the demarcation of the borders in Nepal.

In the previous unitary form, the entire *Madhesi* territory was dispersed among 20 districts that have been either lumped or segmented in five different states. State Two<sup>20</sup> is the only homogenous province that consists of eight *Madhesi* districts - Saptari, Siraha, Dhanusa, Mahotari, Sarlahi, Rautahat, Bara and Parsa. The minorities are the majority in this state, while in all other states, they are the minority groups. For instance, State One has 14 districts of which only three districts - Jhapa, Morang and Sunsari - belong to the *Madhesis*. State Three includes 12 hill districts and only one *Madhesi* district, i.e. Chitwan. A similar trend is found in State Four in which only half of a *Madhesi* district (East of Bardaghat and Susta) has been lumped with 11 hill districts. Likewise, in State Five, four and half *Madhesi* districts - Nawalparasi (West of

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<sup>20</sup> The constitution identifies states with numbers, leaving the right to choose a name in the hand of state government.

Bardaghat Susta), Rupandehi, Kapilvastu, Banke and Bardia - have been joined with other hill districts. State Seven is no exception to this trend - Kailali and Kanchanpur are the only *Madhesi* districts in the group of nine districts.

This demarcation does not meet the minorities' claim for the rights to self-determination with recognition of *Madhesh* as an autonomous province (MPRFN, 2013). The state had agreed to this demand in the following term:

Nepal will be a Federal Republican Democratic State by accepting the wish of the *Madhesi* people for an autonomous *Madhes* state and wish of people of other regions for an autonomous state with federal structure. There will be distinct power sharing between the center and the region in the federal structure on the basis of list. The regions will have complete autonomy and authority ( 8-Point Deal, 2008).

Following this agreement<sup>21</sup>, Nepal has become a federal state but the demand for a single, autonomous *Madhesh* state has ultimately been rejected. The ancestral territory of the minorities has been split in many parts. In State Two, the minorities are the majority, but their community has been divided. Consequently, they have become a small homogenous state.

Some might find such demarcation justifiable and argue that the correspondence of state boundaries with national boundaries weakens the federation and creates an opportunity for state loyalty to prevail over general loyalty (Wheare, 1964, p. 49). But the potential benefit of ethnic demarcation outweighs the risk. When the units in the federation are homogenous, the regional government becomes strong (Wheare, 1964, p. 49). The present demarcation in Nepal has not made the regional governments strong but centralized influence and power in the already dominant elites.

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<sup>21</sup> To read the full document, see <https://madhesi.wordpress.com/2008/02/28/govt-udmf-8-point-deal/>



## **Distribution of Power**

The constitutional division of powers can be used to measure the autonomy of the provincial government. A state government's jurisdiction impacts, if not determines, the everyday conduct of ordinary people. Norman (2006) presents the power division as a central tenet of federalism. Any federal constitution includes the lists of exclusively federal powers, exclusively provincial powers, concurrent powers, and a provision of a rule for exercising the residual powers (Norman, 2006, p. 107). Norman's rationale for requiring this in the constitution is to ensure both the autonomy of each order of government and its specific competencies. Nepal's constitution provides for both exclusive and concurrent lists of federal, state, and local level power<sup>22</sup>. Schedule 5 presents the "List of Federal Powers", Schedule 6 the "List of State Power" and the Schedule 7 the "List of Concurrent Powers of Federation and State" (Nepal Const.). But this allocation of the jurisdiction has not ensured autonomy to the state government.

In Nepal, the state government has been charged with limited capabilities while the federal government has been given unlimited jurisdiction. As a result, the people of the regions depend on the central government for most of their affairs. Using 'maximum' and 'minimum' as keywords, Riker (1964) examines the autonomy of the regional government in terms of its competencies. If the federal government "can make decisions without consulting the rulers of the member governments in all but one", that becomes a federation exercising maximum powers (Riker, 1964, p. 5). Conversely, in minimum powers, "the rulers of the federation can make decisions in only one narrowly restricted category of action without obtaining the approval of the

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<sup>22</sup> This research has not focused in the local level so it has not been brought in the analysis except as a passing reference.

rulers of the constituent units” (Riker, 1964, p. 5-6). Evaluating from this standard, Riker (1964) holds that the federations that have maximum powers are the centralized ones.

The allocation of the residual powers to the federal government makes it competent in maximum areas. Schedule 5 mentions that the federal government can legislate and exercise executive powers in “any matter not enumerated in the Lists of Federal Powers, State Powers and Local Level Powers or in the Concurrent List and any matter not specified in this Constitution and in the Federal laws” (Nepal Const.,). The federal system has just come into effect; many more things are yet to be developed. The federal government is already powerful and the residual power has made it even more powerful. The state is even lacking in socio-economic sophistication. The future holds many things in promise and the central state has powers in all the things that are not in sight now. The central government will be exercising power in many areas that might not be in the best interests of the regional governments. To give residual power to a central government is to presuppose the unlimited nature of power given to a federation (Watts, 1999, p. 39).

Besides residual powers, other jurisdictions have made the federal system centralized in Nepal. The federal government has been given legislative and executive powers in 35 different areas whereas the State government has been given the same authority only in 21 areas. More powers are centered in the federation, leaving only some powers at the hand of the state government. If the state government is autonomous in the areas of its jurisdiction, the list can be substantive. Since the government is autonomous only in a few areas, the list is even shorter. In the list, there are actually few things that the state government can do on its own. For instance, ‘health services’ has been placed in the jurisdiction of the State government but Schedule 5 sorts out that the federal level will have executive and legislative jurisdiction in the matters relating to

“health policies, health services, health standards, quality and monitoring, national or specialized service providing hospitals, traditional treatment services and communicable disease control” (Nepal Const.). If everything from providing services to monitoring quality falls under the federal government’s jurisdiction, it is not clear what the state government actually does on its own.

Similar problems exist in the field of education. Schedule 6 has placed higher education in the state’s jurisdiction, but Schedule 5 notes that the federal government will have power over “central universities, central level academies, universities’ standards and regulation, central libraries” (Nepal Const.). The provincial educational institutions are designed to be regulated and controlled by the central government. Despite ‘education’ being placed in its jurisdiction, the provincial government has little responsibility in matters related to the education. When it cannot oversee the progress of the higher education, it cannot do anything about the basic and secondary schools. The constitution, as mentioned in Schedule 8, provides the authority to manage the ‘basic and secondary education’ to the local level government (Nepal Const.), however, the latter does not fall under the scope of this study. This reference to local level governance is relevant to indicate that the province has, in practice, no role in the field of education.

Regarding the policies related to the language and culture, Schedule 6 states that the state government is responsible for the protection and use of these areas (Nepal Const.). With this provision, the constitution provides cultural autonomy to state governments. Notably, the provisions related to citizenship are *not* consistent with this provision on culture; the paper discusses this inconsistency in a later chapter.

It is always advantageous to give “executive responsibilities in the same fields for which it has legislative powers” (Watts, 1999, p. 36). The reason is that such arrangement not only

gives autonomy to the state government but also provides a chance to implement its own legislation (Watts, 1999, p. 37). The legislative power of the state government is not very clear. In one place, the constitution mentions that “the legislative powers of the State Assembly shall be as contained in lists of Schedule-6, Schedule-7 and Schedule-9” (Nepal Const., art. 197). From this article, it is evident that the state government has legislative power in the areas it has the executive powers. But the other provision requires that the state law be consistent with the federal law (Nepal Const., art. 57. cl.6). It leads one to suspect whether the state government was envisioned as a federal partner or just as an administrative unit.

Watts (1999) observes that in a federal system, neither order of the government is constitutionally subordinate to the other. Each derives its sovereign powers from the constitution but not from the other order of the government. Each is autonomous to deal directly with people in the exercise of its legislative, executive and taxing powers (Watts, 1999, p. 7). That is why requiring state laws to be consistent with the federal law is to centralize power in the federation. With genuine autonomy, the legislation of state government should be consistent with the constitution rather than the legislation of other order of government. Such provision makes state government subordinate to the central government.

### **Constitutional (A)symmetries**

Besides the distribution of powers, constitutional (a)symmetries can be used to measure autonomy or centralization. Different societies have varying social, economic, political and cultural needs that federal constitution should address. To respond to the diverse needs of the regions, symmetrical arrangements of power are inappropriate. Stepan (2005) argues that the symmetrical model is suitable for countries that are homogenous. Elaborating on this argument, he contends that the mono-national federations - Austria, Australia, Argentina, Brazil, Germany

and the United States- are right to choose constitutional symmetries, whereas federations like Belgium, Canada, India and Spain have chosen asymmetrical provisions (Stepan, 2005, p. 266). These examples illustrate that symmetrical arrangements are less suitable for multicultural or multinational societies.

In the case of Nepal, the constitution provides only one list of state power in Schedule 6 that equally applies to all provinces, however, it is unclear whether or not the states will use the asymmetric powers specific to their needs via informal arrangements. At the moment, the power distribution has ignored various forms of social asymmetries that require asymmetrical treatment. Asymmetries exist in all societies; the constitutional arrangements should protect people's nationalities, social, cultural and linguistic values (Behiels, 2010). These social asymmetries need protection from the state. In the regions where distinct cultures, languages and traditions exist, the state needs to develop specific policies to safeguard people's right to their cultural heritage. With this understanding, the sub-units belonging to the minority groups are given a different division of power (Karmis & Norman, 2005, p. 16). To distribute power in asymmetric fashion is to acknowledge that some federal units require greater self-governing powers than others (Kymlicka, 2005, p. 279). In multinational federations, constitutions might specify the asymmetric power and status of the constituent units (Watts, 2005, p. 245). Such allocation of powers hold the divided societies together. Thus the federations assign different linguistic, cultural and legal competences to different states (Stepan, 2005, p. 264-266).

Against this background, the constitution of Nepal has made the provision for a symmetrical arrangement of power. All states, irrespective of their regional, territorial, linguistic, cultural and ethnic specifics, have the same list of competences. Constitutional provisions give equal legislative and executive jurisdiction. The symmetric arrangement does not address some

of the culturally specific problems that the *Madhesi* minorities have suffered. This becomes evident when we examine the contradictions in state governments' right over cultural policies against the citizenship provisions of the constitution.

The constitution, as mentioned in the Schedule 6, gives the state government sole jurisdiction for the “protection and use of languages, scripts, cultures, fine arts and religions” (Nepal Const.). This statement implies cultural autonomy for the state government. But the *Madhesi* minorities believe that provisions on citizenship are inconsistent with their cultural rights. Constitutionally, Nepal provides three kinds of citizenship: descent, naturalized and honorary. Of these, citizenship by descent and naturalized citizenship have been condemned as discriminatory. The constitution states that a child “may acquire the citizenship of Nepal by descent if the child’s father and mother both are citizens of Nepal”.(Nepal Const., art. 11. cl.3). This provision has reversed the stance taken on citizenship in the interim constitution that says “any person whose father or mother was a citizen of Nepal at his or her birth” (Nepal Const., art.8. cl. b). But using the provision of the new constitution, if both father and mother are not Nepali citizens, the child cannot have the citizenship by descent even if s/he was born in Nepal. Since most young people in *Madhesh* marry across the international border, either spouse is likely to be a foreigner and their children do not obtain the citizenship by descent.

Regarding the naturalized citizenship, it is provisioned that “a foreign woman who has a matrimonial relationship with a citizen of Nepal may, if she so wishes, acquire the naturalized citizenship of Nepal” (Nepal Const., art. 6). Likewise, “in case of a person born from a woman who is a citizen of Nepal and married to a foreign citizen, the person may acquire the naturalized citizenship of Nepal” (Nepal Const., art.7). The flaws in the citizenship provision are noticed only after the analysis of other provision that says:

In order for a person to be elected, nominated or appointed to the office of the President, Vice-President, Prime Minister, Chief Justice, Speaker of the House of Representatives, Chief of State, Chief Minister, Speaker of a State Assembly, Chief of a Security Body, the person must have obtained the citizenship of Nepal *by descent*. [emphasis added] ( Nepal Const., art. 289.1)

Except in those vital posts, the naturalized citizens can pursue careers in government and non-government positions. The minorities find this provision discriminatory, arguing that naturalized citizens are considered inferior to the citizens by descent (Srivastava & Jha, 2018). The *Madhesi* minorities do not interpret this only as a form of discrimination, but also as an intervention in their cultural practices. Every *Madhesi* household is likely to have a daughter-in-law from India. Because of this provision, no girl would want to marry a Nepali boy to become a second-class citizen. It directly violates their cultural right to get married within their communities that lie dispersed in both sides of Nepal-India border (Rana, 2016).

This provision does not affect national majorities whose ethnic ties align with the people living within the international border; it has impacted only the *Madhesi* minorities. It makes the *Madhesis* “subject to the control of outsiders in the central government” (Karmis & Norman, 2005, p. 15). The federal government has exclusive jurisdiction over citizenship and immigration. Centralization of this power has become a threat to the national identity of the minorities (Kymlicka, 2005, p. 277). To lodge this power in the central state, or to withhold special power to minorities regarding citizenship, is to disregard their socio-economic realities.

### **Amendment processes of the Constitution**

In a federal system, the degree of autonomy or centralization can be measured on the basis of the procedures required for amending the constitution. Such procedures indicate whether the regional government is likely to experience intervention in domestic matters or act autonomously in its constitutional jurisdiction.

Many scholars emphasize the role of the provincial government in the amendment process of the constitution. Simeon (2009) states that the constitution must have a provision for the sub-national government to be involved in its amendment. Preventing central governments from imposing unilateral change in the constituent units is a fundamental guarantee of federalism (Simeon, 2009, p. 255). As a form of consociation, a federal system allows minorities rule over itself in the areas that are the minority's exclusive concerns (Lijphart, 1979, p. 500). Regional autonomy will be ensured only when either order of the government cannot unilaterally change the jurisdiction. For that, the central government should not be able to amend the constitution without the consent of the provinces (Lijphart, 1979, p. 502).

Both Lijphart and Simeon stress that provinces need to have a role in the amendment process of the constitution to protect their autonomy. In the absence of that role, the federation becomes centralized. Nepal's constitution does not provide any role to the state government in the amendment process. A bill to amend the constitution "may be introduced in either house of the federal parliament" (Nepal Const., art. 274. 2). It must be approved by "at least two-thirds majority of the then members of both Houses of federal parliament" (Nepal Const., art. 274.cl. 8). That means the federal government has a sole authority in changing the constitution.

In a federal system, each order of government is sovereign in its role (Norman, 2006, p. 116). To establish this in practice, many federations give a significant role to the regional governments in the amendment process, and thus the constitutional provisions cannot be unilaterally changed by one layer of the government (Norman, 2006, p. 116). This provision ensures the autonomy of the provincial governments and provides independent executive and legislative jurisdiction to both orders of the government.



Nepal's constitution has given some space to the state assembly but that does not counter the centralizing tendencies of the constitution. The federal parliament cannot change the constitution unilaterally if a Bill is related with the alteration in the borders of any state or the jurisdiction of the state government as set forth in Schedule 6 (Nepal Const., art. 274. cl.4). Such legislation must be sent to the State Assembly for its consent (Nepal Const., art. 274. cl.4). Due to this provision, some might argue that the constitution has managed to protect the autonomy of the regions.

The weakness of this provision becomes evident when we examine other provisions that makes some of the issues non-amendable. The provision is that “no amendment shall be made in this constitution in manner to be prejudicial to the sovereignty, territorial integrity, independence of Nepal and sovereignty vested in people” (Nepal Const., art. 274. cl.2). Except these things, all other constitutional articles and clauses can be amended. If the spirit of the federation is to protect regional autonomy, then its constitution cannot have an amending formula that allows the central parliament to alter the basic terms of federation (Norman, 2006, p. 117). In the case of Nepal, except the border and Schedule 6, all other provisions can be unilaterally amended. Such authority is likely to jeopardize the future of the entire federation.

Many scholars stress that constitutions need to maintain a balance between rigidity and flexibility. In order to achieve such a balance, “a constitution should not be too easy to change because the binding principles enunciated within it represent the highest law in the land” (Macfarlane, 2016, p. 4). At the same time, it should not be “too difficult to change when there is deep and broad consensus about needed reform, particularly to ensure the continued relevance of rules and institutions as a society and its governance evolve” (Macfarlane, 2016, p. 4).

Similarly, Watts (1999) argues that the constitutional amending process has to be flexible to incorporate the changing social, economic, political, technological and international pressures. At times, it has to be rigid enough to sustain the federal cohesion. One common way of achieving the balance between rigidity and flexibility is to provide different amendment procedures for the different parts of the constitution (Watts, 1999, p. 201). Nepal's constitution has managed two different procedures for the amendment of two different parts. Still, it lacks the balance between flexibility and rigidity. It is too flexible for the federal parliament and too rigid for the state governments.

### **Role of the Supreme Court**

The Supreme Court plays a vital role in protecting the autonomy of the provincial governments. Watts (1999) argues that the constitutional distribution of powers between two or more orders of government is an important feature of the institutional design in a federal system. Due to such a design, regional governments remain autonomous in their jurisdiction. Yet when a federal system begins to operate, numerous overlaps and conflicts occur. In order to resolve such disputes, federations normally turn to the judicial branch, specifically its Supreme Court, as the final adjudicator in relation to all laws, particularly for the interpretation of the constitution (Watts, 1999, p. 100). It is hoped that the Supreme Court stands as a neutral interpreter of the constitution and arbiter of justice. It can function as a disinterested umpire, with no personal stake in the dispute's outcome (Bednar, 2009, p. 120). When it is made dependent on one order of government, its impartiality is compromised. It is thus imperative to keep it independent from the influence of either order of government (Watts, 1999, p. 101-102). To do otherwise could compromise the perception of fairness in the adjudication of disputes.

The Supreme Court is projected as “the court of record that shall have the final authority to interpret this constitution and the laws” (Nepal Const., art. 128. cl.1). Regarding its composition, it is said, “the Supreme Court shall consist of a maximum of twenty judges, in addition to the Chief Justice of Nepal” (Nepal Const., art. 129. cl.1). The Supreme Court has an obligation to fairly settle the jurisdictional debates when they occur. If the sub-national units feel that their jurisdiction has been encroached, they have a recourse to the Supreme Court (IDEA, 2015, p. 17). At that time, the Supreme Court must protect their aspirations by showing adequate independence, neutrality and competence.

The constitution of Nepal emphasizes the impartial status of the Supreme Court. Despite this emphasis, the Supreme Court could be viewed as a centralizing institution in the federation because sole authority for appointments to that body rests with the federal level of government. In order to counter this state of centralization, the federal constitution should provide for shared participation in the judicial appointment process. (IDEA, 2015, p. 19). Ideally, the constituent units would have a more formal role to play in the appointment of the judges; at the very least, there should be an informal process for consultation with the state government. (Watts, 1999, p. 100-101). This is one important consideration that the constitution of Nepal has missed and, consequently lends influence to the federal level of government.

The existing appointment process is found in Article 129 of Nepal’s constitution. It states that “the President shall appoint the Chief Justice on recommendation of Constitutional Council and other Judges of the Supreme Court on recommendation of Judicial Council” (Nepal Const., art. 129. cl. 2). But the composition of both councils is centralized. For instance, the Constitutional Council consists of the Prime Minister as the Chair of the Council, with the Chief Justice, the Speaker of the House of Representatives, the Chairperson of the National Assembly,

Leader of the Opposition Party in the House of Representatives and Deputy Speaker in the House of Representatives as the members (Nepal Const., art. 284. cl.1). The state government does not have any representation in this council.

In the same manner, the Judicial Council that appoints the Judges in the Supreme Court consists of the members belonging to the federal government. The membership of the Judicial Council is comprised of the Chief Justice as Chair, the Federal Minister for Law and Justice, the Senior-most Judge of the Supreme Court, one Jurist on recommendation of the Prime Minister, and a senior advocate recommended by Nepal Bar Association (Nepal Const., art. 153. cl.1). In this council too, the state government is not represented. Both Judicial and Constitutional Councils that are involved in the appointment processes of the Judges in the Supreme Court do not include any facet of the state government as their members. This provision has come against the demand of the *Madhesi* minorities to restructure the judiciary in accordance with fundamental norms of the federal state, and appoint Judges in the Supreme Court with proportionate inclusion (Eleven Point Demand<sup>23</sup>). Without the least regard to this demand, the constitution has given discretion to the federal government in the appointment of the Judges of the Supreme Court. Such discretion produces dissatisfaction among the constituent units of the federation (Saunders, 1995, p. 67). While the relationship of the constituent units with the Court becomes weak, the federal government has an undue influence.

Watts (2011) argues that the Supreme Court should not be overruled by the legislatures of one level of government. If that happens, the federation can no longer have two or more orders of autonomous government (Watts, 2011, p. 24). The provision reveals similar traits even in the formation of the constitutional bench that settles the “disputes relating to jurisdiction between the

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<sup>23</sup> To read the full document, see [http://www.satp.org/satporgtp/countries/nepal/document/papers/11-Point\\_demand\\_of\\_UDMF.pdf](http://www.satp.org/satporgtp/countries/nepal/document/papers/11-Point_demand_of_UDMF.pdf)

Federation and a State, between States, between a State and a Local Level and between Local Levels” (Nepal Const., art. 137. cl.1). This bench is made up of the Chief Justice and four other Judges designated on recommendation of the Judicial Council (Nepal Const., art.137. cl.1). Even in the dispute resolution mechanism, the state governments are not given any representation. The states have to accept the decision without any regard to their interests.

It takes some time for a federal system to evolve. The role of the Supreme Court is indispensable in its evolution. Judicial decisions have significant impact in the evolution of federations (Simeon, 2009, 248). When all of the appointment processes are centralized, much depends on the will and honesty of the Judges, rather than the institution. If the Judges do not remain neutral, nothing will prevent them from being loyal to the federal government.

### **Jurisdiction of Second Chamber in Federal Parliament**

The representation of minorities in federal institutions, especially in the legislative branch, indicates the degree of autonomy offered to the constituent units. Most federal systems have a bicameral parliament in which the second chamber represents the interests of regional electorates (Watts, 1999, p. 95). The second chamber is a useful means for sub-national representation (IDEA, 2015, p. 18). In divided societies, it helps to sustain attachment of minorities towards the central state. It brings ethnic and national differences together in the collective state building project (L. D. Anderson, 2013, p. 15).

Like in other federal systems, Nepal has chosen a bicameral federal parliament: the House of Representatives as the lower house and the National Assembly as the upper house. It has tried to give regional representation in its composition of the National Assembly. Of the 59 members, 56 members are elected by the electoral college composed of the members of the State Assembly, Chair Person and Vice-Chair persons of the Village Bodies, and Mayors and Deputy-

Mayors of the Municipalities (Nepal Const., art. 86. cl.2.a). This provision indicates that the National Assembly in Nepal, like in most other federations, is elected by the regional representatives. While the composition of the National Assembly aligns with the spirit of federation, the responsibilities simply reiterate the powers of the federal government.

The National Assembly is weak in terms of the roles assigned to it. In a federal system, the upper chamber, as much as the lower chamber, needs power to protect territorial autonomy. The minorities do not want to be impacted by the majoritarian politics of federal parliament. In order to prevent the enactment of federal legislation that would impact the interests, identities, and concerns of the minorities at the provincial level, the upper chamber needs legislative heft (Norman, 2006, p. 112). Only then can minorities can exercise their right to self-determination without any fear of being interrupted by the central state.

Unfortunately, the National Assembly does not have substantial powers in the federal republic of Nepal. Despite its existence as a permanent body, it lacks authority to prevent the tyranny of majoritarian politics. The constitution has not given the Upper Chamber veto power or an authority of similar effect. In addition, it is weak even in the matters related to legislation. By the constitutional provision, a Bill can be introduced to any house of the federal parliament (Nepal Const., art. 110). But the National Assembly cannot introduce a 'Money Bill', legislation related to the financial matters. The 'Money Bill' can be introduced only in the House of Representatives (Nepal Const., art. 110). The National Assembly can give suggestions for improvement of financial bills, but the House of Representatives is not obligated to incorporate them.

The role of the National Assembly is not strong even in other legislation. The constitution requires that the National Assembly return a bill passed by the House of Representatives with

approval or amendments within two months (Nepal Const., art. 111.5). If not returned within that period, “the House of Representatives may present the Bill to the President for assent” (Nepal Const., art. 111. cl.5). That means the National Assembly has one of two choices: either approval or amendment; disagreement is not an option. If the National Assembly disagrees with the content of the legislation and does not return it within the stipulated time, the House of Representatives has the power to proceed with the other stages of passing the legislation.

It does not mean that the national assembly cannot reject the bill. It can, of course, do that but its rejection does not have any effect. Regarding this, the constitution says “if the House of Representatives again passes the bill rejected or amended and returned by the national assembly as it was or with amendments by a majority of the total number of its existing members, the Bill shall be presented to the President for assent” (Nepal Const., art.111. cl.8). All these constitutional provisions illustrate the weak status of the National Assembly, the body that directly represents the regional interests.

The analysis of some constitutional provisions has indicated how the National Assembly has been rendered weak in a federation. In most plural societies, federal constitutions give veto power to the upper house. Veto power over key decisions enables minorities to protect their autonomy (L. D. Anderson, 2013, p. 15). With such power, they can prevent the policy interference from the majorities. Therefore, the provision of territorial autonomy requires substantial powers and the responsibilities to the Upper Chamber (L. D. Anderson, 2013, p.15). The constitution of Nepal has not given any such power to the National Assembly. Everything has been centered to the House of Representatives in which the majoritarian politics works. The present arrangement has squashed the hope that the second chamber would bring and balance

regional interests into federal politics, act as a check on executive federalism, eventually forcing the government to listen to the minority voices (He, 2007, p. 5).

In sum, major provisions related to institutional design centralize powers in the federation. Bicameral parliament has not given minorities a meaningful role in the development and passing of the legislation. The upper chamber does not have any legislative power, and thus cannot check the tyranny of the majorities and protect territorial autonomy. Likewise, the entire judiciary is in a unitary format: the federal government has a major influence in the selection process of the Judges in the Supreme Court. In the distribution of power, the federal government is influential. The constitutional amendment process has given the federal government almost a unilateral role. The internal borders do not respect the ethnic and religious demarcations. The minorities have been marginalized in their own land. The preamble and other parts of the constitution fail to acknowledge a role minorities have played in different times throughout history, and do not recognize them as a nation. All these centralized powers prevent minorities from exercising their rights to self-determination and autonomy in their single homogenous state.



## **VI. Fear of Secession: An Analysis of Political Discourse**

A federal system shares rule between different layers of the government, and allows different communities work together; at times, it provides minorities a certain degree of autonomy in regional and local matters (Filippov, Ordeshook & Shvetsova, 2004, p. 2). It thus involves the combination of self-rule and shared rule (Elazar, 1995, p. 7). This combination helps to resolve the conflict and hold the larger federation together. With the same hope, the Nepali state was restructured along federal lines, following the armed conflict. By its very design, a federal system decentralizes power by dividing sovereignty among constituent units. But the federal constitution of Nepal exceptionally centralizes power in the federal government that is harmful to the autonomy of the provincial governments.

The previous chapter has shown how internal boundaries encourage assimilation instead of accommodation, power distribution retains the influence of federal government over the constituent units, the federal parliament possesses unilateral power to change the constitution, the upper chamber lacks substantive power, and the Supreme Court works under the influence of the federal government. Consequently, the institutional design of a federal system in Nepal does not meet the basic spirit of a federation, nor does it acknowledge minorities' demands for recognition and autonomy. While the previous chapter shows how the power has been centralized, this chapter examines the reasons behind choosing such centralizing elements in the constitution.

The framers of the constitution in Nepal were scared of the risks attached to a federal system. They were fully aware that federalism could accommodate minorities' desire for autonomy, but at the same time, it could also result in some serious complications for the larger federal project. By providing legal, political and administrative resources, self-rule could bolster the confidence

of would-be secessionists, and become a cause for secession (L. Anderson, 2004). This fear was evident when Nepal was crafting its institutional design. Political parties were fearful that autonomy would intensify regional consciousness, provide opportunity for political mobilization, and lead to the state's disintegration by making secession "a viable alternative to federalism" (Kymlicka, 1998, p.138).

Taking these arguments as the theoretical insights, this chapter explains the reasons that contributed to this fear. It contends that the fear of secession increased due to: 1) Maoists' interpretation of the right to self-determination 2) expression of threats of secession by regional political leaders, and 3) India's intervention in domestic politics on behalf of indigenous *Madhesi* people. In order to justify this argument, this thesis has taken PDA as its basic methodology. It has used the political documents such as the election manifestos, transcripts of debates in the CA, and official statements to explore that fear.

### **Maoist's Interpretation of the 'Right to Self-determination'**

The contradictory interpretation of the 'right to self-determination' by Maoists produced fear of secession among mainstream political parties. Maoists projected this right both as a tool to emancipate oppressed ethnic and regional communities, and enhance the ability of these groups to pursue a political future of their own. 'Self-determination' was sometimes employed as an equivalent to secession, and other times as something related to the peoples' right for democratic inclusion in the existing state. Their use of the term at times implied and rebuffed secessionist interpretation. Such an ambiguous interpretation was evident in their official documents such as the Memorandum 1996, Party Manifesto 2001, Nationality Question in Nepal, Election Manifesto 2008, and the Preliminary Draft and the Concept Paper submitted to the CA. Even the

party members represented in the CA presented similar views on this issue; transcripts of the CA debates are its evidences.

It is evident that the contradiction in the use of the term ‘right to self-determination’ was not specific to the Maoists’ understanding; the same happened in its explanation in the international context as well. Cassese (1995) found the concept of ‘right to self-determination’ both progressive and subversive. For him, it had both internal as well as external meanings. Internally, it could be used to ensure enfranchisement and democratic inclusion, while for secessionists (externally), it would become a key to opening the door and entering into a new statehood (Cassese, 1995, p. 6). It contradictorily meant the right to pursue democratic freedom and to part ways with the federation.

In the case of Nepal, Maoists used this term in both senses. In their first memorandum<sup>24</sup> submitted to the Government of Nepal, they claimed that backward communities should be given territorial autonomy for their emancipation (Bhattarai, 1996). They presented autonomy as a measure to increase access to state resources by marginalized communities. By providing autonomy, they wanted to accommodate minorities within the state but did not link autonomy with the right to self-determination and secession. In this respect, their memorandum stayed silent about whether autonomy meant the secession.

In subsequent political documents, Maoists provided a broader explanation of autonomy. In their demand, marginalized groups should be allowed to choose their political, cultural and social future on their own (CPN Maoist, 2001)<sup>25</sup>. This manifesto avoids the direct use of the term ‘right to self-determination’ despite an explanation that mirrors the meaning. Their position echoes the

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<sup>24</sup> To read the full document, see <http://www.satp.org/satporgtp/countries/nepal/document/papers/40points.htm>

<sup>25</sup> To read the full manifesto, see <http://archive.nepalitimes.com/news.php?id=2694#.Wz-49v2ZP-Y>

definition that the indigenous people possessing the ‘right to self-determination’ “ are able to enjoy their fundamental rights and determine their future while at the same time preserving, developing and passing on their specific ethnic identity to future generations” (Martinez Cobo & United Nations, 1983, p. 35). In Manifesto 2001, Maoists were claiming the right to self-determination without explicitly naming it.

Maoists’ position became more entrenched during the period of armed conflict in which they wanted to garner sympathies of marginalized ethnic communities. They argued that through the provision of autonomy, ethnic communities would be properly understood and recognized as a distinct nation. Recognizing them as a nation was a prerequisite to granting them the right to self-determination. Maoists identified Nepal as a multinational and multilingual state (Yami & Bhattarai, 1996). The term ‘multinational’ frightened mainstream political parties that believed in the ‘one-state, one-nation’ principle. The fear increased when Maoists asked for the recognition of *Madhesis* as a nation, and advocated for their right to choose their own political future.

Despite this advocacy, Maoists did not talk explicitly about secession, but often invoked Lenin’s principles on the rights of nationalities. Yami and Bhattarai (1996) stated that their party, following Lenin’s principles, accepted the rights of the nations to self-determination. Lenin (1954) argued that the fulfilment of economic perquisites is not sufficient to end political oppression of people; all nations should have equal rights for that purpose. If need be, nations should have “freedom of political secession” (Lenin, 1954, p. 198). Maoists adopted this argument as a guiding principle when they unfurled their vision about nationalities.

This was evident in the writing<sup>26</sup> of two leaders - Baburam Bhattarai and Hisila Yami - when they discussed regional and ethnic minorities. In the background of their writing, they referred to Lenin's concept of "right to self-determination including secession" giving a clear message that they were soft on this issue. (Yami & Bhattarai, 1996). The Maoists' leader Bhattarai offered an explanation that self-determination and autonomy could mean secession too. The desire for an independent state must be understood "as the people's right to revolt against oppression" (Tamang, 2009, p. 21). This statement established that secession could be one potential element in Maoists' demand of self-determination.

Maoists had a special concern with *Madhesi* people's historical, political, social, cultural and economic oppressions; they proposed that *Madhesi*'s ancestral homeland should be made "a separate autonomous region" (CPN Maoist, 2001). In this manifesto, they mentioned autonomy without mentioning anything about 'the right to self-determination and secession'. Two years later, they floated their ideas through their sister organization known as-All Nepal Nationalities Organization (ANNO) which demanded the right to self-determination "including the rights of secession for all nationalities" (Shrestha, 2003, p. 22). This demand represented secession as one potential element of the right to self-determination.

With the success of the peace deal, Maoists became mainstream in Nepali politics and participated in the first CA election of 2008. In their election manifesto<sup>27</sup>, they stated that the party aims to provide the right to self-determination for oppressed communities and regions (CPN Maoist, 2008). This party wanted to craft a federal system based on the right to self-determination of the oppressed ethnic groups and regions, and voluntary unity of all nationalities

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<sup>26</sup> To read the full document, see [http://www.bannedthought.net/Nepal/Problems-Prospects/bb\\_nationalq.html](http://www.bannedthought.net/Nepal/Problems-Prospects/bb_nationalq.html)

<sup>27</sup> To read the full document, see <https://archive.org/details/ManifestoOfCommunistPartyOfNepalmaoistsForConstituentAssembly>

(CPN Maoist, 2008, p.12). Major political parties feared that this right could include the right to secession. The manifesto addressed this fear noting that secession is similar to a right to divorce in marriage; marriages are stable only because either partner can walk away from it. (CPN Maoist, 2008, p. 12). This analogy accepted secession as one potential consequence to the provision of the ‘right to self-determination’.

Many scholars found that the ‘right to self-determination’ would suggest secessionist and non-secessionist meanings. In one sense, it referred to the people’s right to constitute a state and seek political associations on their own, but at times it stood for their right to pursue a life that allows a full exploration of their potential (Martinez Cobo & United Nations, 1983, p. 35). By presenting an analogy of marriage in the 2008 Manifesto, Maoists conveyed a sense that autonomy could mean both; staying together and separating from the Nepali state.

Even as CA members, Maoists were committed to their belief in the ‘right to self-determination’. The CA had formed “ Restructuring of the State and Distribution of State- Power Committee” with the Maoist leader Lokendra Bista Magar as its Chair. This committee was entrusted with the responsibility to submit a concept paper on the federal design and other matters related to the state restructuring. The paper had to provide a theoretical base for the federal constitution, proposing names, numbers and demarcation of subunits, allocate powers and sketch a federal roadmap for the country. Since Maoists had won most seats in the first CA, most members of the committee were from this party, making the latter influential in all decisions.

The concept paper<sup>28</sup> submitted to the CA proposed 14 autonomous states and 23 autonomous areas. While making this proposal, it took identity and capability as the bases of state creation, but priority was given to the former, which opposed the demands of NC and UML

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<sup>28</sup> To read the full document, see [http://www.constitutionnet.org/sites/default/files/concept\\_paper\\_restructuring\\_state\\_gtz\\_eng.pdf](http://www.constitutionnet.org/sites/default/files/concept_paper_restructuring_state_gtz_eng.pdf)

to use viability as the basis of institutional design (Constituent Assembly, 2009, p. 17). By identity, it meant ethnicity, community, linguistic, cultural and historical continuity (Constituent Assembly, 2009, p. 17). It took identity as the primary basis and capability as the secondary basis for federal state restructuring (*Sambhidhan Sabha Darpan*, 2012, p. 114). It took identity-based federal systems as a basis for ensuring the right to self-determination.

The paper also included the ‘right to self-determination’ as an important component of the constitution. In section nine, it proposed to give indigenous, ethnic and *Madhesi* people the ‘right to self-determination’ in language, politics, culture, religion, health, settlement, social security, economic activities, commerce, land, resource mobilization and the environment (Constituent Assembly, 2009, p. 125- 126). It also explained that the right should not hurt sovereignty, independence, unity and the territorial integrity of the state (Constituent Assembly, 2009, p. 126). Through these proposals, Maoists wanted to grant the right to self-determination to all the provinces and regions formed in ethnic lines but they seemed to refrain from the secessionist interpretation of the proposed right.

When this concept paper was submitted to the full CA, many political parties participated in the discussion. The leaders from the Maoist party spoke in the favor of the ethnic model of federalism and the ‘right to self-determination’. Participating in the debate, Baburam Bhattarai, the top Maoist leader, stressed that the federal demarcation should focus on common language, common geography, economy and psychology. He required that the constitution identify Nepal as a country with multiple nationalities (CA Transcript, 2013, p. 1148). According to him, an acceptance of the right of nations to self-determination required the demarcation of sub-state boundaries along ethnic lines.

Other members of the party expressed their support for the right to self-determination of all nationalities. Hitraj Pandey, a CA member from the Maoist party, noted that the right to self-determination does not lead to secession but its denial can have that effect. He suggested that territorial integrity should be made strong by ensuring the accommodation of all nationalities through the provision of the right to self-determination (CA Transcript, 2013, p. 1181).

In recent years, Maoists have become lukewarm about their claim to the right to self-determination. After they received backlash from mainstream political parties such as the NC and UML<sup>29</sup>, they retreated from their earlier stance (Mishra, 2008). Despite a change in viewpoint, Maoists could not establish the right to self-determination as an issue related to democratic transformation of society; it was instead seen in a secessionist light. Mainstream parties thus opposed it as a right to be enshrined in the constitution, and tried to avoid it as much as possible.

Since this thesis projected fear of the mainstream parties as the core argument, it was necessary to examine some of their official documents for its justification. The distrust of NC and UML for self-determination as a democratic right was evident in CA debates and the thesis thus used only those debates that in/directly opposed that right.

Ranju Kumari Jha, a member from UML, argued that a federal system includes both self-rule and shared-rule which automatically fulfil the right to self-determination. It was thus unnecessary to include this right in the constitution. If such a provision is included, she admonished, it will give different meaning in future and create a problem (CA Transcript, 2013, p. 482). In Jha's analysis, the inclusion of such a right would pose a threat to national integrity.

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<sup>29</sup> At the time of writing, Maoists and UML have formed a single communist party by merging themselves and requesting other small parties to join them. The slogan of the self-determination is in the moribund state at the moment.



Kripa Ram Rana, a member from the same party, endorsed her argument and proposed that social justice should be a criteria for resource distribution (CA Transcript, 2013, p. 508). He substituted the right to self-determination with social justice because of his distrust of the claim for self-determination.

Man Prasad Khatri, a CA member representing UML, even argued that the right of self-determination was suitable for ‘coming together’ federations. Since Nepal had a ‘holding together’ model, it was not relevant for the polity. He warned that this right could create a problem in the future, providing a background for separatist movements (CA Transcript, 2013, p. 476). He did not explain why it was not suitable for ‘holding together’ federal system of Nepal, but it was evident that he did not want to include it as a constitutional right. Some members even argued that granting this right to some and denying it to others would contradict the spirit of democracy and human rights. Kamala Ghimire mentioned that the right to self-determination to one ethnic group in particular did not accord with the principle of equality. It would give more power to some over others; no one should have special rights or recognition by the constitution. Uneven power distribution could lead to secession (CA Transcript, 2013, p. 1157).

Like Ghimire, many others feared that the ‘right to self-determination’ would bring about secession. Explaining the effect of this right, Bharat Kumar Shah asked, “what would happen if the right to self-determination was given in the CA itself? Should the whip be removed, would any party remain strong? From this example too, it is clear that self-determination is meant to divide not to unite” (CA Transcript, 2013, p. 1196). Shah rejected extending such right to any indigenous communities, arguing that the focus should instead be on development, prosperity, social inclusion, justice and progress of all communities. For him, it

was far more crucial to talk about the country's overall development than to indulge in the debate of a 'right to self-determination'.

These debates would illustrate the ideological differences between mainstream political parties such as the UML and NC, and radical forces like Maoist and the *Madhesi* parties. They differed in terms of their understanding of what the 'right to self-determination' meant. Radical parties argued that the right to self-determination should be understood as a way to accommodate cultural diversity in a multicultural state; secession could be its possible result but that is an extreme case (Tamang, 2009, p. 22). Any territorially concentrated group that desires to govern itself more autonomously enjoys the right to self-determination; secession could be the last resort (Philpott, 1995, p. 353). In Nepal, when radical parties argued that secession is an extreme possibility, mainstream parties mentioned that however remote this possibility, it always existed and thus should be avoided.

Most speakers from mainstream parties could not see the 'right to self-determination' as a democratic right. Chandra Bhandari, a member from NC, emphasized that the self-determination right should be linked with development, society, culture and language; it should not be used to partition an existing state (CA Transcript, 2013, p. 527). He likened this right with any other right of people in the polity. Like Bhandari, most CA members from mainstream parties were aware of the ultimate consequences that might flow from the 'right to self-determination', and often attempted to redefine it. They tried to give a general definition to this right, relating it to personal progress, prosperity, positive human condition, good life, self-fulfillment and control of one's individual life (Roven, 1979, p. 7). Bikram Khanal, a member of the CA from NC argued that the federal constitution should provide a clear definition of the right to self-determination

(CA Transcript, 2013, p. 526). This, he said, should not be granted as demanded; it has to be properly defined to prevent secession.

The distrust of the ‘right to self-determination’ held by political parties could be seen in their disagreement about basic institutional design. In order to find a common ground on the restructuring, Nepal government formed a nine-member State Restructuring Commission (SRC) under clause 132 (2) of the interim constitution. The commission was asked to submit its report outlining a federal design within the period of two months. Unfortunately, the members of the commission could not produce a consensus document. The majority (six members) recommended the formation of 11 states on the basis of ethnicity. The latter was taken as a prerequisite to ensure the right to self-determination. But the remaining members suggested the formation of six provinces based on viability. Since they could not reach a consensus, two different reports were submitted to the government. The NC and UML did not accept the report of the majority members, while the others refused the frameworks outlined in the minority report (Bose & Niroula, 2015, pp. 30-31). This incident also illustrated the suspicion of mainstream parties towards the ethnic model of federalism and the right to self-determination.

Due to this suspicion, the new constitution did not accept the 14 states model, nor did it take ethnicity as the denominator. It also stayed silent about the ‘right to self-determination’. The changed composition of the second CA allowed mainstream political parties to exert their influence in the constitution. In the first CA election, Maoists had won 220 seats, Madhesi Jana Adhikar Forum had 52 seats, Terai Madhesh Democratic Party were in 20 seats, and Sadbhana Party had won 9 seats (Carter Center, 2008, p. 51). Maoists and the *Madhesi* parties had a general majority and thus had a major influence in the first CA. The concept paper reflected their influence in the proposed federal model.

The composition of the second CA was totally different. Maoist had dropped to hold just 80 seats in 601 member CA, and the *Madhesi* parties had their size significantly reduced. The NC had won 196 seats and UML was victorious in 175, the total of which was more than a comfortable majority (Asian Network for Free Elections, 2013, p. 50). As a result, they were the major influence in the making of the constitution. Using this leverage, and as a response to their deep seated fear of secession, they promulgated the constitution denying the right to self-determination to the oppressed minorities.

### **Expression of Threats of Secession by Regional Leaders**

In the discourse of secession, the role of regional political leaders is significant. Regional leaders can make decisions about whether to stay with an existing state or part ways, and accordingly advance their claims. They are fully cognizant of local issues, situations, and the sentiments of people living in the region, and can thus mobilize people in support of their goals. If intent are strong, they can even advance secessionist goals with the support of the local population (L. Anderson, 2004, p. 97). One author interprets secession as “ the outcome of a series of collective decisions made by regional leaders and populations” (Hechter, 1992, p. 267). Both Anderson and Hechter underline the importance of regional leaders in secessionist movements. The latter largely depend on the activities as well as expressions of these leaders. What they say matters, and they affect the polity’s future in the region.

In the case of Nepal, the *Madhesi* parties<sup>30</sup> were fully aware of historical grievances of minorities living in the plain. These minorities argue that half of the population lives in the plain but does not receive the proper treatment from the state. The recent census gave a demographic composition in terms of territorial concentration that the table below indicates:

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<sup>30</sup> They are the regional parties with the regional agendas and demands.

**Table 5 : Territorial Demography of Nepal**

<i>Madhesh</i>	Hill	Mountain
50.27%	43%	6.73%

Self-tabulation, Source: CBS (2011)

Of 50.27% of people living in Madhesh, 34% people are of hill origin (Mainali, 2015); among the rest, the ethnic, religious, indigenous and linguistic communities collectively constitute *Madhesh*<sup>31</sup>. The latter suffered the historic, political, social, economic and cultural marginalization from the Nepali state and assumed that only the provision for the ‘right to self-determination’ could address multiple layers of exploitation. They raised this demand, and even made occasional utterances of threats of secession, which had the desired effect of scaring the mainstream political actors.

The mainstream actors knew that minorities suffered from political, cultural and economic injustice along with the practices of marginalization and exclusion (Tamang, 2009), and that they were not feeling safe in the polity. It could decrease their trust in the political union, and increase confidence in secession. (Erk & Anderson, 2009, p. 198). The repressive social practices had produced discontent among them. The ‘right to self-determination’ was raised as an antidote to this situation. Like all other oppressed groups, these minorities would identify themselves on the basis of linguistic, historical or ethnic identities, and could potentially mobilize their resources to prepare the grounds for secession (Roven, 1979, p. 14).

In Nepal’s case, the *Madhesi* minorities could not feel a strong attachment to the Nepali state. The increasing grievances prepared them to claim the right to self-determination. In order to explore their position, this chapter will primarily examine the arguments put forth by their

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<sup>31</sup> This statement is contradictory as the state has not provided a clear definition of what constitutes *Madhesh* and *Madhehsi*.

party members in CA debates<sup>32</sup>. They made this claim, with frequent invocation to international laws and declarations on the rights of indigenous people and the nationalities. Due to this reason, pertinent United Nations' declarations were used as the reference. The UN declaration states:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all people have the right freely to determine without external interference their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the charter (United Nations General Assembly, 1970).

The objective of this declaration was to assist the “speedy end to colonialism” and that is why it stated that the subjugation “of peoples to alien subjection, domination and exploitation constitutes the violation of the right to self-determination” (United Nations General Assembly, 1970). In that context, it stated:

The establishment of a sovereign and independent state, the free association or integration with an independent state or emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people. (United Nations General Assembly, 1970).

This declaration did not allow secession; it discouraged any action that would dismember an existing independent state conducting itself in compliance with the principle of the right to self-determination and equal rights (United Nations General Assembly, 1970).

Despite disallowing partition, the declaration was open to contradictory interpretations. Whether a particular state complied with the right to self-determination would become a matter of perspective. The national majorities in positions of social, cultural and political advantages would find the activities of a state compliant, while minorities might deem them oppressive. The

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<sup>32</sup> The election manifestos of these parties could not become available so only the transcripts of the CA debates that talk about the right to self-determination are used in this analysis.

same contradictory interpretation helped the *Madhesi* minorities to explain their situation in the spirit of international provisions, and project themselves as victims.

Minorities, as evident in the manifesto<sup>33</sup> of one of the regional parties, regarded themselves as being internally colonized by the Nepali state. They claimed that their cultures, traditions, languages and lifestyles were distinct and, since the geographical annexation of Madhesh by the Shah King, were being treated as a colony ( MPRFN, 2013). The Nepali state, as they claimed, has not complied with the nationalities' right to self-determination by subjecting them to internal colonization. The excessive subjection to various forms of oppression and discrimination would make them entitled to the 'right of self-determination'.

What the 'right to self-determination' was or was not, became a matter of debate in the polity. Mainstream parties were aware of the contradictory interpretation of this claim and thus wanted to supplement it with a clear definition. In order to see how mainstream parties wished to avoid accommodation of minorities, this chapter will use their debates in the CA and their election manifestos for the first and second CA as the major documents of analysis.

Mainstream parties such as the NC and UML wanted to strip the secessionist element from the right to self-determination. Prakash Jwala, a member from UML said “ we should not leave the right to self-determination undefined. Without supplementing it with a precise definition, such right cannot be included in the constitution” (CA Transcripts, 2013, p. 394). Responding to this argument, a prominent *Madhesi* leader, Ram Janam Chaudhary, a member of Forum Loktantrik, mentioned that the right to self-determination did not need any definition; it should be included as it is (CA Transcript, 2013, p. 405). The debate between these two leaders indicated the fear as well as the expression of threat. The former represented the traditional

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<sup>33</sup> To read the full document, see <https://www.facebook.com/nepalivotes/posts/583162215083339>

mindset that seeks to neutralize the secessionist meaning of the right to self-determination, and thus would prefer to give a clear definition, while the latter insisted to include it as it is. That insistence indicated not only a soft stance on secession, but also a threat of secession. Such expression from regional leaders reinforced the fear of secession, allowing mainstream political actors to assume that minorities might have wanted a federal system in order to dismember the state.

In the post-world war II era, the right to self-determination was defined as the right of the colonized states to pursue independence from colonial occupation; subsequently it was used in cases when the national communities of the non-colonized countries pursued their right to determine their political future. It allowed secession only in the case of mutual agreement between the parties involved (Tenenbaum, 2009). The right to self-determination was presented as something with or without secessionist potential. It was accepted as the right to pursue independence by colonies while it was opposed as a unilateral right in case of non-colonizing entities (Fabry, 2015, p. 488). Despite not being a unilateral right, secession existed as an inherent ingredient of a self-determination claim. When the *Madhesi* minorities projected themselves as the internally colonized subjects and demanded the right to self-determination, others sensed that they could be seeking independence.

Regional political leaders did not do anything to address this suspicion. Rather they added to it by uttering veiled threats of secession. Gopal Dhait, a prominent leader from *Terai Madhesh Loktrantik Party*, urged the CA to make the constitutional provision for the right to self-determination. The constituent units, he mentioned, needed to have the right to independence if the central state would continue its domination and intervene in the internal affair of a provincial government. In his opinion, this right should not just be limited to language,



culture, and life-styles of indigenous people; it should allow people to choose a political future on their own by pursuing a path to independence (CA Transcript, 2013, p. 1162).

Dahit is not the only leader to utter such remarks; many other leaders have made similar utterances of threat. Upendra Yadav, a prominent *Madhesi* leader, uttered similar threats in veiled form. He asked the state to recognize *Madhesh* as a nation. With their common history, common attachment to geography and culture different from their neighbors, they were the separate nation (Miller, 1998, p. 4). This nation aspired to have political autonomy and would want recognition as a distinct community. Nepal should thus be identified as a country that consists of multiple nationalities. This diversity should be reflected in the demarcation of the border, power allocation, and other provisions related to institutional design. If any attempt is made, Yadav warned “to erase their identities and block their autonomy, it will further lead to the internal colonization of the nationalities and that situation will give rise to accident. Parties having old mentality should be responsible for all the consequences arising from this” (CA Transcript, 2013, p. 1143). Yadav did not use the word secession but his expression was enough to indicate what he meant by ‘accident’. He conveyed a sense that secession would be a likely possibility if the state did not address their problems.

On the one hand, threats were coming from the regional leaders, while on the other, the southern plain was economically strong. The economic viability of the region increased the confidence of political leaders. The region had strong economic prospects with relatively better infrastructure, strong agriculture, industrial development, and easy access to India through the open border. These factors were crucial to the economy (International Crisis Group, 2007, p. i). Leaders were confident that, fiscally at least, they would survive even if secession occurred. Mainstream political parties thus feared that autonomy could provide regional leaders with

“resources for communal organization, generating self-confidence” and prepare them for secession (Enloe, 1977, p. 154). The grievances were persistent, the region was economically viable, the political leaders were projecting themselves as the colonized subjects and demanding the right to self-determination while expressing secession threats. In this background, the fear of secession increased.

Major political parties – the NC and UML in particular – became scared by the demand for autonomy and the right to self-determination. They could not be assured that the federal system strengthens unity among differences, retaining the state’s territorial integrity. They believed that autonomy leads to disintegration (Tamang, 2009, p. 22). Some scholars argued that the major political parties misconstrued people’s demand for an inclusive democratic structure in society and imposed the fear of secession (Subedi, 2015). Whether presumed or real, the fear of secession existed at the time of framing the constitution.

Due to this fear, major parties wanted to postpone, if not remove, the project of federal restructuring altogether. This mindset became a factor in the dissolution of the first CA without completing its stipulated task of creating the constitution. Major parties, as Upendra Yadav contended, wanted to avoid federalism as they could. Since it was not possible to do so indefinitely, they hesitatingly accepted it as the state-building strategy (CA Transcript, 2013, p. 1141). Despite this acceptance, the fear remained top of mind. When they could not avoid federal restructuring, they tried to avoid the accommodation of minorities. The fear can be observed in their election manifestos and CA debates.

The opening section of the UML manifesto<sup>34</sup> reiterated the party’s vision that the election of a CA is indispensable to establishing supremacy and sovereignty of people, and bring about

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<sup>34</sup> To read the full document, see [http://cpnuml.org/assets/upload/files/CAmanifesto\\_synopsis\(1\).pdf](http://cpnuml.org/assets/upload/files/CAmanifesto_synopsis(1).pdf)

stability in the country by promulgating the new constitution ( UML, 2013, p. 2). It did not refer to the content of the new constitution. Rather, it explained the party's commitment to land reforms, child protection grants, social security, people's housing programs, economic and social transformation, and various short and long-term development plans (UML, 2013). These plans and policies had little to do with the major task of the second CA. The manifesto forwarded the agenda for development, and offered little about the new constitution and the federal restructuring. In most places, the manifesto even appeared oblivious of the purpose it was supposed to fulfil.

Even in the places where the manifesto mentioned the constitution, it did not present a clear party position on the right to self-determination. The manifesto strategically replaced this right with 'right to social justice'. It stressed that the party's objective is to guarantee the right of social justice to socially marginalized indigenous groups, *Madhesi*, Muslims and other minorities (UML, 2013, p. 7). It accepted pluralism as a dominant feature of Nepali society and accepted that the minorities should have the right to protect their cultural heritage, indigenous skills, language, script, religion, land and resources (UML, 2013, p. 7). It spoke about the oppression and the grievances of the *Madhesi* people and mentioned that specific programs would be launched to bring *Madhesi* people into the mainstream by ending socio-cultural discrimination, internal oppression and exploitation against them (UML, 2013, p. 30). It indicated that this party did not accept them as a separate nation, nor did it believe in granting them regional autonomy as demanded. Rather it replaced the Maoist and *Madhesi* parties use of the terms 'nationalities' with 'mainstream nationality', which would presuppose the presence of a singular nation. The party was not willing to accommodate the indigenous people, but instead wanted to facilitate their assimilation in the mainstream nationality.

The manifesto of UML revealed assimilationist impulses among party members. Such tendencies sought to erase private and other cultural differences among citizens and promote a common public identity in whatever ways possible (McGarry, O'Leary & Simeon, 2008, p. 42). UML believed that there was one mainstream nationality to which all other communities should correspond or conform; the differences should fuse with national majorities.

By promoting assimilationist tendencies, the party tried to avoid accommodation of ethnic and national minorities. Regarding accommodation, some scholars suggest:

Accommodation, minimally, requires the recognition of more than one ethnic, linguistic, national or religious community in the state. It aims to secure the coexistence of different communities within the same state, though supporters of accommodation support secession or partition if accommodation is impossible (McGarry, O'Leary & Simeon, 2008, p. 63).

Like other mainstream parties, the UML believed that accommodation of national minorities could lead to disintegration and thus refused to adopt the strategies of accommodation.

In this manifesto, UML did not have any vision for federal restructuring; the latter had been brought just as a reference point. Even in places where the platform mentioned federalism, it was evident that the party believed autonomy would lead to disintegration. The emphasis was thus instead on prosperity, social justice and democracy rather than autonomy, self-determination, and preferential rights as demanded by *Madhesi* minorities. This party was aware of the paradox that a federal system possessed. Many writers outlined the other side of federal system that is chosen as means of accommodation. In this context, one scholar noted:

The very success of federalism in accommodating self-government may simply encourage national minorities to seek secession. The more that federalism succeeds in meeting the desire for self-government, the more it recognizes and affirms the sense of national identity amongst the minority groups and strengthens their political confidence (Kymlicka, 1998, p. 135).

In Nepal’s case, it was not possible to avoid a federal system; after the success of the *Madhesh* movement, federalism became the legal, constitutional and political focus. Yet it was possible to evade the right to self-determination and regional autonomy, and UML tried to strategically avoid these radical agendas.

A similar trend could be seen in the manifesto<sup>35</sup> of the NC, the other mainstream party that had a long-history of fighting for democracy and human rights. Its manifesto for the first CA offered a broader explanation about the federal design than its counterpart, the UML. Despite presenting an extensive discussion on federal restructuring, the party refused to address the demands of *Madhesi* minorities. In other words, it did not mention anything about their protest nor did it indicate how the party would accommodate their demands. The drafters of the NC’s manifesto seemed well-known about how the federal system would actually work but stayed silent on some vital issues. This could mean that they chose to deliberately avoid the issues of *Madhesi* minorities. Since both parties appeared the same in terms of their attitude towards minorities, a table summarizing the contents of their manifestos would be relevant here:

**Table 6: Issues in Major Parties’ Manifestos**

<b>Parties</b>	<b>Federalism</b>	<b>Right to self-determination</b>	<b><i>Madhesi</i> minorities</b>
UML	Mentions that the country would be restructured along the federal lines but does not state anything	Silent.	Sees them as one among other ethnic groups.

<sup>35</sup> To read the full document, see <http://www.nepalicongress.org/index.php?linkId=171>

	about the institutional design.		Presents a plan to bring them into the national mainstream.
NC	Very clear on federal institutional design. Calls for three levels of the government: federal, provincial and local.	Silent.	Just sees them as one among other ethnic groups. No mention about their demand for recognition and autonomy.

As presented above, the manifesto outlined the party’s objective to assist the CA to restructure the centralized unitary state in a federal model, and establish the supremacy of people (NC, 2007, p. 5). It explained that the people, through their historic movements, have given political parties a mandate to make the democratic constitution by the people’s representatives; only the CA can address their aspiration to institutionalize democracy (NC, 2007, p. 6). Despite this commitment to democracy, this party did not mention anything about the significance of the *Madhesh* movement in the country’s political transformation, nor did it recognize a cultural identity to which citizens of different regions are attached (Patten, 2008, p. 94). Some might argue that the party recognized minorities by identifying Nepal as a diverse state, but reference to diversity would not ensure recognition; it required genuine effort. Many states and political parties would pick one cultural identity and seek to systematically promote it (Patten, 2008, p. 94). The NC too, was seeking “convergence by all citizens on a single national identity and culture” (Patten, 2008, p. 27).

This party's denial of accommodation strategies was noticeable in its discussion of the institutional design of a federal system. The manifesto presented its vision for different components of a federal system such as the allocation of powers, center-province relationship, distribution of resources, layers of government, and the role of the court (NC, 2007). Acknowledging both social discrimination and historical grievances, the manifesto proposed to encourage proportional representation and social justice (NC, 2007). Regarding the basis of a federal system, the manifesto opted for economic viability, the provision of resources, political and administrative feasibility, and ethnic and regional identities (NC, 2007). Yet, it did not give separate attention to *Madhesi* minorities, nor would it expiate on the contested topic regarding the formation of a single province. Like the UML, it also avoided discussion on the right to self-determination. Accommodation required that a flexible model be adopted to recognize and empower ethnic diversity (Bertrand, 2008, p. 209).

In its manifesto to the second CA, the party did not mention anything about these contested topics. Rather it mentioned that a single ethnic or indigenous community cannot be prioritized while forming states; the provinces would be based on multiple identities of the region (NC, 2012). To oppose an ethnic base was to oppose the right to self-determination. While opposing the ethnic base, the NC defended Nepal as a plural society in which no single community was in majority. 'Pluralism' was one of the frequently used terms. Despite its frequent use, the manifesto lacked in the measures to accommodate the pluralism.

Many pluralist societies adopt a pluralist federation that is distinct from other federal systems. Such federations have internal boundaries that respect ethnicity, nationality, religion, language or other cultural markers of the region (McGarry, O'Leary & Simeon, 2008, p. 63). That the NC denied ethnicity as the basis of federal demarcation indicated its refusal to adopt a

pluralist model of federalism. Consequently, it became almost impossible to accept constitutionally entrenched autonomy of the entities (McGarry, O'Leary & Simeon, 2008, p. 63).

Besides demarcation, there could be multiple ways to accommodate pluralism. Indonesia would present an example in which ethnic demands were accommodated through some special provisions. Initially, it wanted to build a single nation from diverse peoples. The constitution of 1945 was hurriedly drafted to declare independence and prevent the resumption of colonial occupation (Bertrand, 2007, p. 577). The post-independence efforts, in the words of Bertrand, were integrationists or assimilationists. But such endeavors produced tension and conflicts, and met with special resistance from ethnic groups living in Aceh, Papua and East Timor. These groups even sought independence from Indonesia. Conceding to the demands of ethnic groups, the Indonesian government promised special autonomy to the people of Aceh and Papua, and a referendum to East Timor, as a result of which the latter parted ways while the former remained with the state, enjoying autonomous status (Bertrand, 2007). Thus, “by changing course to accommodate demands for autonomy, making special provisions for these two regions [Aceh and Papua], the Indonesian state has reduced group mobilization, military or otherwise” (Bertrand, 2007, p. 578). This case illustrated that pluralism is deserving of recognition and special measures for accommodation.

In Nepal's case, the NC frequently talked about pluralism but did not propose any measures for accommodation, fearing that the latter would inspire separatism. But such a strategy would do disservice to diversity itself. It was indispensable to learn from Indonesia that flexibility promised more stability than oppressive approach (Bertrand, 2007, p. 578).

Both the NC and UML refused to accommodate national minorities by refusing to recognize them as a distinct community. Both admitted the presence of social diversities but



neither submitted a proposal to accommodate them. Their position would remind the larger groups ignore the distinctiveness of minorities; they see minority as one variation on a common theme, rather than as a separate nation (Miller, 1998, p. 7). The NC and UML tried to avoid accommodation because of fear that the adoption of such measures would lead to disintegration.

### **Indian Intervention in Domestic Politics**

In diverse societies, it is possible that communities share ethnic ties with people living across close international borders. Such ties strengthen people-to-people relationships in normal times; at moments of ethnic tension, they can offer a fertile ground for foreign interference. The intervention does not always have to take a military form; it can come as advice, political pressure, and conditional economic support (Paquin & Saideman, 2008). The external influences not only escalate ethnic tensions, but also pose a risk to a country's territorial integrity.

Nepal and India share strong ties at the level of people, especially between those living on both sides of the international border. Following the 1950's treaty, people from both countries were allowed to move across the borders without completing any bureaucratic and technical procedures, and that strengthened cross-border relationships. Both governments often appreciated such relationships and made commitments to increase them. In his recent visit to Nepal, Prime Minister Narendra Modi issued a press statement<sup>36</sup> which reiterated that the relation between two countries “stand on the strong foundations of mutual and deep respect between its people” (MOEA, 2018). His statement reinforced already existing ties between the people.

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<sup>36</sup> To read the full document, see <http://www.mea.gov.in/Speeches-Statements.htm?dtl/29892/translation+of+press+statement+by+prime+minister+during+nepal+visit++may+11+2018>

Most of the time, the Indian establishment spoke for the Nepali people and appreciated the relationships existing at the grass-root levels of society. Despite this appreciation, India always had a special concern for the *Madhesi* people living in the south of Nepal; with them, the giant neighbor shared social, cultural, political, linguistic, religious and ethnic ties. In moments of ethnic tension, it would be natural for a state to support the position of the group who shared their own ethnic ties (Saiderman, 1998, p. 721), and India was no exception to this principle. The support of India to the *Madhesi* minorities became much more intense just before and after the promulgation of Nepal's constitution in 2015. The minorities had labeled the constitution discriminatory and exclusive; India intervened in internal affairs by taking the side of the groups with whom it shared ethnic connections.

On the eve of making the constitution, the *Madhesi* minorities boycotted the entire process of CA sensing that their concerns would not be accommodated in the new document, and launched the protest in their homeland. To support of them, India sought out strategies to find a compromise on behalf of the minority group. Just three days before the promulgation of the constitution, the Prime Minister of India sent a special envoy to Nepal with advice for Nepali politicians to “display necessary flexibility and maturity at this crucial time to ensure a durable and resilient constitution that has broad-based acceptance” (MOEA, 2015)<sup>37</sup>. While delivered in the form of “advice”, India was clearly trying to dictate the kind of the constitution that Nepal should create. Many experts familiar with this visit did not take it positively; they interpreted it as an attempt to derail the constitutional writing process. India did not want any constitution proclaimed that lacked the consent of agitating minorities; it had sent a special envoy to stop the

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<sup>37</sup> To read the full statement, see <http://www.mea.gov.in/Speeches-Statements.htm?dtl/25819/press+statement+by+the+foreign+secretary+after+visiting+nepal>

constitution that was in development despite minorities' reservations (Pandey, 2015). Since the pressure did not work, the constitution was finalized on September 20, 2015.

After the promulgation of the constitution, the international community extended their wishes and congratulatory messages to Nepal. The spokesperson for Chinese Foreign Ministry issued a statement that said "Beijing sincerely congratulates Nepal on promulgating the new constitution, and hopes that Nepal would take this opportunity to realize national unity, stability and development" (Mishra, 2015). On a similar note, Britain regarded the making of the constitution "a milestone for both the government and people of Nepal" (Mishra, 2015). All other influential countries such as the European Union, Japan, Russia, and the United States all congratulated Nepal on its constitutional feat. Of course, they had shown their concerns about the ongoing protests, but they did not refrain from sending the best wishes in Nepal's endeavor.

When most neighbors were expressing their wishes, India offered different sentiments. It neither welcomed nor congratulated Nepal on this occasion (Nayak, 2015). Rather it asked the government of Nepal to address the demands of minorities. Soon after the promulgation of the constitution, the Government of India (2015) issued a statement<sup>38</sup> entitled "Statement on the Situation in Nepal". India reduced the historic task of making the constitution by drawing attention to Nepal's political "situation"; the focus lay more on the riot (inspired by the adoption of the constitution) than on the new constitution. The statement mentioned that "throughout the process of constitution making in Nepal, India has supported a federal, democratic, republican and inclusive Constitution" (MOEA, 2015). It implied that the constitution had not come in the form that India had supported. India thus just did "note the promulgation in Nepal today of a Constitution." (MOEA, 2015). Rather than sending a message of congratulation, India issued a

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<sup>38</sup> To see the full document, see <http://www.mea.gov.in/press-releases.htm?dtl/25821/Statement+on+the+situation+in+Nepal>

note of concern, observing that “we are concerned that the situation in several parts of the country bordering India continues to be violent” (MOEA, 2015). By situation, the statement referred to the *Madhesi* protest, launched in the wake of the demand of a thorough amendment of the constitution. The statement offered the advice that “we urge that issues on which there are differences should be resolved through dialogue in an atmosphere free from violence and intimidation, and institutionalized in a manner that would enable broad-based ownership and acceptance”(MOEA, 2015). Through this statement, India was applying pressure on the government of Nepal to heed the demands of ethnic minorities. Unless the latter’s demands were addressed, India remained unwilling to extend congratulatory wishes to Nepal. In fact, it was a cold note and mild warning (Pathak, 2015).

India’s motives became obvious in a statement<sup>39</sup> that the Minister for External Affairs, Shusma Swaraj (2015) submitted to the House of Commons to inform the parliament about the situation in Nepal. She said:

The Constitution was expected to mark the culmination of Nepal’s peace process and political transition after decades of violent instability. That new Constitution established Nepal as a federal democratic republic was duly noted and recognized by us. But we could not ignore the fact that several sections of the Nepalese society felt that their interests had not been taken care of (MOEA, 2015).

This statement clearly supported the concerns of national minorities in Nepal. India believed that indigenous people were not fairly treated in the new constitution, and thus it was morally justifiable to speak on their behalf. Nepal had drafted the new constitution in order to address the grievances that plunged the country into a decade-long conflict, but that did not come in the concerns of the Indian government.

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<sup>39</sup> To read the full document, see <http://www.mea.gov.in/Speeches-Statements.htm?dtl/26104/statement+by+external+affairs+minister+on+calling+attention+motion+on+situation+in+nepal+and+state+of+indonepal+relation+in+rajya+sabha+december+03+2015>

There were also rumors that the Indian government had given a list to the government of Nepal to incorporate the issues of the *Madhesi* people through a constitutional amendment. Based on this rumor, *Indian Express Today* (2015) had written that India wanted Kathmandu to make seven amendments in the constitution for it to be acceptable to *Madhesis* and *Janjatis* (Roy, 2015). When this rumor became public, the Indian government opposed it right away but even in this statement, India did not hesitate to indicate its position. The Statement<sup>40</sup> from the official spokesperson merits attention here:

The article is incorrect. GOI has not handed over any list of specific Constitutional amendments or changes to the Government of Nepal. Without being prescriptive on specific clauses, and as already stated earlier, we continue to urge that issues on which there are differences should be resolved through dialogue in an atmosphere free from violence, and institutionalized in a manner that would enable broad-based ownership and acceptance (MOEA, 2015).

This statement echoed the demands of the agitating *Madhesi* people. *Madhesi* parties were consistently saying that they do not own the constitution that does not respect their specific needs, claims and characteristics. Using exactly the same language, India supported minorities' demands.

India's intervention did not limit the official statements at the level of a line Ministry; it was even apparent in the joint statements that were issued after the Nepali Prime Minister's<sup>41</sup> visit to India. In the joint statement, the internal political affairs of Nepal were included, but there was no mention of any domestic Indian affairs, demonstrating the one-dimensional nature

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<sup>40</sup> To read the full document, see <http://www.mea.gov.in/media-briefings.htm?dtl/25838/Official+Spokespersons+response+to+a+query+on+Nepal>

<sup>41</sup> It has become a convention for the Nepali Prime Minister to visit India in their first official visit. Since the beginning of peace process until the formation of a strong majoritarian government in 2018, the governments were changed almost every year and state visits were there from Nepal in the same ratio. Breaking the established tradition, the current Indian Prime Minister Narendra Modi has already visited Nepal thrice in his 4 years in the office.

of the intervention. When the Prime Minister of India, Narendra Modi, was engaged in a state visit of Nepal, he suggested the politicians find a consensus. The same suggestion was included as one important point of the joint statement. The statement<sup>42</sup> mentioned that “Nepal has focused its attention on drafting a new constitution through the Constituent Assembly, which will lead the country to greater stability and prosperity” (MOEA, 2014). The rest of the points in the statement included the joint projects, bilateral treaties, past agreements and other subtle nuances of the bilateral relationships. Amidst those points, Nepal’s domestic politics was also forcefully inserted.

Similar things happened in subsequent official visits of the Nepali Prime Ministers. When Prachanda visited India in his second term as the Prime Minister of Nepal, one of the points in the joint statement<sup>43</sup> (2016) stated that the Prime Minister of Nepal conveyed that the promulgation of the constitution last year is an historic event in institutionalizing federal democratic republic. He also shared the efforts made by the current Government to take all sections of society on board for the effective implementation of the constitution. It said that the Prime Minister of Nepal shared this information but, given the history of pressures and intervention, it was nothing other than an attempt to influence the internal politics of Nepal by India. The Indian side repeatedly emphasized in the terms like ‘ broad-based ownership’, ‘consensus’, ‘agreements’, ‘peaceful resolution’ etc. That these were included in the joint statements meant that India wanted Nepali issues to become the part of bilateral agreements.

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<sup>42</sup> To read the full document, see <http://www.mea.gov.in/bilateral-documents.htm?dtl/23807/Joint+Press+Statement+on+the+Visit+of+the+Prime+Minister+to+Nepal>

<sup>43</sup> To read the full document, see <http://www.mea.gov.in/bilateral-documents.htm?dtl/27407/IndiaNepal+Joint+Statement+during+the+State+visit+of+Prime+Minister+of+Nepal+to+India>

The pressure did not remain limited to advice and indirect influence; it even appeared in the form of an economic barricade. India installed an undeclared barricade along the border. Consequently, for about six months, the transport of petroleum products was blocked; as a landlocked country, Nepal did not have any other route. The original intention, as mentioned above, was to create a situation for the postponement of the constitution but when that could not become possible, India put on direct pressure on behalf of minorities by installing barricade (Tiwari, 2016). India “initiated undeclared transit trade warfare blocking Indo- Nepal border” (Pathak, 2015), but the purpose was to humble the Nepali government into accommodating minorities’ demands. It was one important form that the intervention had taken. Many types of actions could be interpreted as intervention: discriminatory economic policies, trade sanctions, and embargoes could be counted as such (Chatterjee & Scheid, 2003, p. 1). In this sense, the barricade was a form of foreign intervention to a land-locked country.

In most cases, states would not admit to intervening in the domestic affairs of other countries. The same was true for India; it never admitted to installing a barricade. The Minister of External Affairs, Swaraj, repeatedly said that “India has not imposed any blockade on Nepal” (*The Times of India*, 2015). When the discontent regarding the blockade mounted on both sides, the official spokesperson issued a statement<sup>44</sup> which claimed that the “obstructions are due to unrest, protests and demonstration on the Nepalese side, by sections of their populations” (MOEA, 2015). The Minister of External Affairs, Swaraj, also endorsed this claim of the official spokesperson, saying that the protestors in Nepal are obstructing the transport of petroleum and other goods across Nepal-India border crossings (MOEA, 2015). The first intention of the Indian side was to show that blockade was not imposed from outside; it was there from the within. The

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<sup>44</sup> To read the full statement, see <http://www.mea.gov.in/media-briefings.htm?dtl/25842/official+spokespersons+response+to+a+query+on+nepal>

protestors wanted to bow down the government by obstructing the supplies from India. When that explanation did not work, India tried to mold the rhetoric about its own security.

When countries intend to interfere in others' internal affairs, they can develop a discourse of a 'security threat' in order to justify their intervention. They could argue:

In the face of domestic unrest in a neighboring country, the right to intervene belongs as clearly and indisputably to every government which finds itself in danger of being drawn into the revolutionary maelstrom as it does to any individual who must put out a fire in his neighbor's house if it is not to spread to his own" (Klemens & Metternich, cited in MacFarlane & Sabanadze 2013, p. 613).

Self-defense is simply rhetoric to justify their intervention and prepare the ground for continuing it. India was not an exception in this case; it never accepted that it has supported national minorities. Rather it said that "instability in Nepal heightens India's vulnerability" (Haegeland, 2015). Due to an open border, India's enemy, as is often said, might find instability in Nepal conducive to cause harm to India, and the intervention should be read as India's obligation for self-defense. The Minister of External Affairs, Swaraj also mentioned the same thing in her response to the queries of MPs of India. She notified that the violent situation in *Madhesh* would directly impact the security of India (MOEA, 2015). Through this statement, she admitted that India was compelled to intervene in the domestic affairs of Nepal due to its own security being in question.

Taking this rhetoric further, Indian Prime Minister Narendra Modi tried to garner international support to influence Nepali politicians and appease *Madhesi* leaders (Pradhan, 2016). For that purpose, he motivated British Prime Minister David Cameron to include a point about Nepal in their joint statement after the former's state visit to Britain. The statement "stressed the importance of a lasting and inclusive constitutional settlement in Nepal that will address the remaining areas of concern promote political stability and economic growth"



(Pradhan, 2016). Nepal raised a serious objection to this statement. Kathmandu responded that despite respecting international support, “Nepal strongly views that the constitution making is an internal matter of the country and Nepal is capable of handling its internal affairs on its own” (Pradhan, 2016). This kind of intervention in domestic politics and overt support of the *Madhesi* issues increased the suspicion about India’s intention in Nepal’s territorial integrity.

The official statements and activities from the Indian establishment would give enough ground to consider that India wanted to secure the concerns of minorities in the constitution. The officials were even vocal about it in many instances. Responding to the queries of journalists, the Minister of External Affairs even said “we are moving forward to a solution through mutual talks so that *Madhesis* also get justice” (*The Times of India*, 2015). The statement clearly indicated the Indian concerns in the domestic politics of Nepal. The Minister wanted to mediate between the government and the agitating minorities to find a resolution but even offers of mediation and symbolic support to either party of the conflict would count as foreign interventions (Paquin & Saideman, 2008). What India offered as a solution came to Nepal as an intervention.

In the background of all those concerns and pressures, politicians in Nepal felt that India had an ulterior motive. The neighboring state would achieve some gains by meddling in other’s domestic affairs (Horowitz, 1997, p. 427). Nepal suspected that India could be making a plan to detach *Madhesh* from Nepal in order to join with India (Pillalamarri, 2015). With its strong international image, India would not be susceptible to reprimands from international communities if some parts of Nepal were joined to India (Pillalamarri, 2015). The political actors in Nepal suspected that India might have a master plan that involved partitioning Nepal to India’s benefit; this was a dominant belief among major political parties in Nepal. Nepal thus feared that the fulfilment of the ‘right to self-determination’ would facilitate their neighbor’s

plan to partition the state. Political parties in Kathmandu assumed that India would do anything to fulfill its purpose; putting pressure on behalf of minorities could be a beginning of a secessionist project.

Mainstream political parties- the NC and UML - were afraid that the provision of autonomy and the right to self-determination could lead to secession. Maoists had already raised the issue of the 'right to self-determination', including secession, and the *Madhesi* minorities and had adopted the same position. The latter's expression of threats added to the fear, while unnecessary pressures from India to amend the constitution to the satisfaction of the *Madhesi* minority intensified fear. They could not trust that India simply wanted to streamline minorities and guarantee their effective participation in all levels of economic and political life of the state (Hannun, 1998, p. 14). As a consequence, mainstream political actors responded by centralizing, rather than decentralizing, constitutional provisions.

## VII. Conclusion

Many countries, especially after periods of violence, have used federal restructuring as a tool to settle conflicts and accommodate various expectations of people living in the state. The aim of restructuring is to provide regional autonomy and maintain territorial integrity by holding differences together. In order to meet these goals, federalism makes provision for a multi-tiered government that combines shared-rule and regional self-rule (Villiers, 2012, p. 392). When the provision of self-rule provides autonomy to the regions, the shared rule aspect helps to obtain for different communities' a common resolution for state-building project.

Fascinated with this prospect, Nepal chose 'state-restructuring' as a way to manage its diversity and address the causes of its history with armed conflict. The interim constitution of 2007 presents federalism as a model to restructure the state, however, the uprising of the *Madhesi* minorities has played a key role in its design. Like other federal systems, the supremacy of the constitution, the bicameral parliament, the power-sharing provisions, the role of the Supreme Court, the internal demarcation of borders, and the procedure for amending the constitution are enshrined in the constitution. The framers of the constitution assume that these provisions will ensure a smooth transition towards the entrenchment of a democratic system, thereby resolving the conflict along the way. The conflict prevention and resolution characteristics make federalism a popular arrangement of government powers in deeply divided societies (Villiers, 2012, p. 407). From its nascent institutional design, Nepal shared this expectation.

Despite the noble intent, Nepal has yet to find a common ground between its national majorities and minorities. There are still disputes over how much autonomy minorities should actually enjoy (Amoretti, 2004, p. 2). When minorities - the indigenous *Madhesi*

people in particular - find the current institutional design inappropriate, the cultural majorities claim that the former has been given enough. Amidst these controversies, Nepal has chosen a design that centralizes powers in federal government, much to the detriment of the autonomy of provinces. This choice makes the central government powerful, relegating provincial government to the role of an administrative unit. Consequently, the latter is not able to make autonomous decisions in areas, critical to the existence of local people. Such arrangement has not fulfilled ethnic minorities' aspiration for autonomy and self-rule.

Amidst this background, this thesis examined why Nepal adopted centralizing measures in the federal constitution. It concludes that the centralized model has been chosen to prevent the risk of secession. In this claim, the centralization is a dependent variable and the risk of secession an independent variable. In order to justify the relationship between the dependent and independent variables, discourse analysis has been taken as the approach to the analysis.

This work examined the central argument in two parts: a constitutional analysis and a discourse analysis. The chapter on the constitutional analysis section analyzed the constitution in terms of seven measures developed in methods section: the appointment of the judges in the Supreme Court, the constitutional amending formula, the distribution of powers, (a)symmetries, the power of Upper chamber in bi-cameral parliament, demarcation of boundaries, and the recognition of minorities. Applying these measures in the constitution, the thesis has reached the following conclusion.

First, the Supreme Court, meant to adjudicate disputes that arise between provinces and the central government, has been placed in the shadow of the central state by giving the latter a sole authority in the appointment of the Judges. The provinces do not have any role in the

process. In the absence of legal and constitutional obligations, it is not clear how the Supreme Court will mediate dispute resolution and maintain its neutral position.

Second, the federal parliament does not need the consent of the provinces to amend the constitution. Except when changing the demarcation of boundaries, the federal parliament does not require any consent from its constituent government. Because of this, the state government remains susceptible to the unilateral decisions of the federal government; the federal parliament can even change the basic terms of the federation agreement, if it so desires.

Third, the distribution of powers has equally contributed to the centralization tendency in Nepal's federal design. Powers have been categorized as exclusively federal, exclusively provincial, and concurrent; this should have made the provincial government autonomous. But in practice, in almost all of the province's jurisdiction, the central state can intervene either in the name of monitoring or in the name of quality control; the state government thus cannot make autonomous decisions in any of the areas that are in its purview.

Fourth, the demarcation of internal boundaries does not correspond with the ethnic composition of the regions. It does not recognize the distinct identity of ethnic communities as a nation. Twenty districts of *Madhesh* have been joined in five provinces that renders minorities even more marginalized in their own regions. This kind of demarcation does not protect their right to self-determination. Rather it makes the national majorities dominant in all provinces.

Fifth, the lack of power in the upper house helps to centralize power in the federal government. The upper house of course provides regional representation; the local level bodies and provinces represent on it but the lack of veto or any other substantial power has made the upper house dysfunctional.

All these arguments justify the claim that the institutional design is centralized. The centralization is meant to minimize the risk of secession, a prospect about which the policy makers were quite afraid. The thesis concludes that the fear occurred due to three main reasons. First, the Maoists' interpretation of the right to self-determination that implied both secessionist and non-secessionist meaning is a major reason behind producing such fear. Maoists have failed to assure the public that this right is related to the democratic issues such as inclusion, fair treatment, and autonomy. Instead, their contradictory interpretations evoke fear in the framers of the constitution. Second, the role of regional political parties has played an equally unhelpful role in intensifying the fear of secession. They have often invoked international treaties about indigenous people, and projected themselves as the victim. They even utter threats that the people of the region might be willing to sever ties with the state in case, the domination continues. Third, India's open bargaining on behalf of Nepal's minorities has led political actors in Nepal to suspect that this giant neighbor could be angling for the partition of their state.

Interestingly, the centralized model has not fulfilled people's aspiration for autonomy nor has it abated the anger of national minorities. It has simply amplified "territorial cleavages"(Amoretti, 2004, p. 2). Like other divided societies, the self-conscious minority group is concentrated in a specific area of a state's territory (Amoretti, 2004). This group is demanding accommodation through the provision of autonomy and the right to self-determination. It is thus imperative to address their demands for autonomy by considering it as a claim for democratic inclusion, rather than as a motive to dismember the state. Without properly accommodating their demands, minorities' loyalty to the state cannot be obtained. National majorities and minorities should explore accommodation strategies that neutralize the fear of secession and, at times, address people's claim of autonomy. The goal of accommodation is to

reduce violence and extra-institutional mobilization, increase respect for minority civil and political rights and minimize hostility towards the state itself (Amoretti, 2004, p. 2); it has to dampen the risk of secession by increasing the confidence of the marginalized communities and groups.

In order to achieve accommodation, the thesis recommends the following:

1) The present demarcation of the boundaries must be changed; the boundaries should correspond with ethnic composition of the region in order to guarantee the rights of nations to self-determination. The formation of a single province, as claimed by minorities, does not foster balance; two to three provinces can be formed in the southern plain.

2) The right to self-determination needs a proper definition in the context of Nepal.

Minorities have used this claim as a weapon to bargain with the state. In their official documents, they have never demanded secession; the issue of secession has just come as a threat utterance. Otherwise, they are seeking greater share and democratic inclusion in state apparatus. But majorities interpret this as a pretext for independence. Without a clear definition, this contradiction is likely to impact minorities' struggle for accommodation even in future.

3) The power distribution needs a substantial change; the provincial governments must have autonomy in areas like education, health and culture. As written the constitution suggests that provinces have a role to play on these matters, but with monitoring and "quality control" in the hands of the federal government, the real provincial role is compromised. In order to increase the role of the provinces, monitoring and quality control should also come under provincial jurisdiction.

- 4) The constitution must address minorities' demands for recognition. The preamble should be amended to acknowledge the role of minorities in the country's political and social transformation; it will make them feel honored in the state. Besides, the provinces should have role in the amendment process of the constitution in order to protect autonomy of the regions.
- 5) The present arrangement has made the federal government influential in the appointment of the judges in the Supreme Court. Both judicial and constitutional councils consist of only federal officials, denying any representation to the provinces. By giving the provincial governments due representation in these councils, the influence of the federal government can be balanced.
- 6) The upper house of the federal parliament has been given due regional representation but it does not have powers that it requires to become effective. Some federations give veto power to the upper house to protect autonomy; Canada, USA, Switzerland and Australia provide absolute veto (Watts, 1999, p.94). Without a similar veto power, the upper house will remain weak vis-à-vis the lower house.

To incorporate the above given recommendations, the amendment of the constitution is the only option available to the federal government. The amendment must aim at accommodating claims of minorities and bringing them together. It is thus imperative to understand minorities' claim for the right to self-determination as something directed at making the state authority more responsive, democratic and inclusive, instead of a motive to dismember the state. To compromise with the basic spirit of federalism is to invite further discontent; the latter jeopardizes the territorial integrity of the state. The stronger the accommodation, the weaker the risk of secession.



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