

# **Federalism for Restructuring of Nation: A Jurisprudential Notion**

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## **Abstract**

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*Unitary and centralized governance system in Nepal should share the blame for the abject inequality and exclusion of people. As unitary system failed to deliver equally among the people, it has been felt in Nepal that unitary system existed in confrontation with the democratic values. Hence, restructuring of state through federalism seems to be the only choice. However, molding the concept of federalism in Nepalese context is the challenge ahead. Since Nepal has its own distinct socio-political, cultural and geographical identity, trying to fit federal model of other countries may not work. Thus Nepal should find its own model, however some universally agreed principles of democracy and human rights should be employed to give Nepalese federalism chance to succeed and address current needs of the country.*

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## **FEDERALISM**

Federalism, in general sense, is an idea of power sharing between the federal government and governments of the constituent units of Federation. Federalism serves as an alternative method of distributing the fruits and advances of democracy among the poor, marginalized, backward and geographically challenged regions. As most often unitary system fails to distribute authority, resources, opportunities, justice and dignity equally among the people. Federalism by serving as an alternative method of power sharing promotes social justice and fraternity. Moreover, Federalism is also crucial in achieving truly democratic process within a state, where it transcends unity by respecting diversity.

K.C. Wheare has long advocated that the general and regional government of a country shall be independent from each other within its sphere<sup>1</sup>. And federalism is such a system of government by which powers are divided between a national government and state governments each having its own area of substantive jurisdiction. Thus federalism can also refer to the division of sovereignty between governments at two levels one at the center and another at such defined state territory<sup>2</sup>. In this very sense, American founding fathers adapted federalism as an alternative to centralized and oppressive monarchy, which offered a new kind of balance between national and federal government. Madison, while advocating federalism proposed "residual sovereignty" of states and emphasized federalism as a means of individually composing one entire nation but not as composing the distinct and individual states to which they respectively belong<sup>3</sup>.

According to Prof. Dicey, Federalism is a means of distributing force of the state among a number of co-ordinate bodies each originating in and controlled by the constitution.<sup>4</sup> Prof. Dicey comparatively evaluated federalism with the British experience of parliamentary sovereignty and concluded federal Government is similar to the unitary government, as both possess same values of democracy.<sup>5</sup> Additionally both comprise the unitary

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<sup>1</sup> K.C. WHEARE, FEDERAL GOVERNMENT, Op Cited No.1

<sup>2</sup> See, <http://www.thinkhistory.btinternet.co.ot/whatisfederalism.htm>

<sup>3</sup> Madison, cited in Outline of US Government, 1989, Office of International Information Programs, United States Department of State, P. 35 and 36

<sup>4</sup> A.V. DICEY, AN INTRODUCTION OF THE LAW OF THE CONSTITUTION, 10<sup>th</sup> ed, Macmillan, Universal Book Traders, India, P. 157

<sup>5</sup> Id. P. 138-18

nature, however, union is framed upon the federal model<sup>6</sup> based on common national feeling of the people.<sup>7</sup> “Federal government requires substantive rule of law than the unitary, as Prof. Dicey emphasized, federalism lastly means legalism, the predominance of the judiciary in the constitution, the prevalence of a spirit of legality among people”<sup>8</sup>

At present various forms of federal government can be found in the world. Monarchical or Republic, Centripetal or centrifugal, cooperative federalism are some to name. Centripetal Federalism implies the federal government as the union of independent state. State combination within an entity creates a federal government as based on the principle of coming together of sovereign states, like USA. On the other side centrifugal<sup>9</sup> federalism implies, the division of independent country where country is divided into numbers of local/territorial state. Nepal's search for federalism seems to be in this very line. Co-operative federalism on the other hand is, as Birch stated, the practice of administrative co-operation between general and regional governments, and the practical dependence of the regional governments upon payments from the general government and the fact that the general government by the use of conditional grants frequently promotes developments in matters that are constitutionally assigned to the regions<sup>10</sup>. Therefore, co-operative is federal in form but unitary in substance and can be termed centralized federalism<sup>11</sup> e.g. India.

Indeed, whatever be the form of federalism, unlike unitary model, federalism renders dual polity, as Ambedkar stated,<sup>12</sup> "It established a dual polity with the Union at the center and the states at the periphery, each endowed with sovereign powers to be exercised in the field assigned to them respectively by the constitution. The union is not a League of states, united in a loose relationship, nor is the state the agencies of the Union, deriving powers from it. Both the union and the states are created by the constitution; both derive their respective authority from the constitution.

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<sup>6</sup> Id. P. 154

<sup>7</sup> Id. P. 142

<sup>8</sup> Id. P. 17

<sup>9</sup> See. GRANVILLE AUSTIN, WORKING A DEMOCRATIC CONSTITUTION A HISTORY OF THE INDIAN EXPERIENCE, 1999, Oxford, New Delhi P. 561

<sup>10</sup> A.H. BIRCH, FEDERALISM FINANCE AND SOCIAL LEGISLATION IN CANADA, AUSTRALIA AND THE UNITED STATES. P. 306, Op Cited No. 1. P. 187

<sup>11</sup> GRANVILLE supra note 9

<sup>12</sup> CAD. VII, P. 33 (India)

One is not subordinate to the other in its own field; the authority of one is to coordinate with the other.”

Similarly, scholars have also tried to separate federalism from unitary as a form of confederation. Where confederation would possess following features,<sup>13</sup> a) the decision of the organization is binding to all member states, b) there is majority voting; meaning that no state has veto power, c) the decision of the organization must concern with the citizens of the member states, d) the organization must have powers to implement its decisions, and e) it must possess its own financial resources.

Above explanation tells the story that federation does not possess universal standard. It has also been prescribed in various phrases, intergovernmental relation<sup>14</sup> "a form of distribution of power",<sup>15</sup> "a dual polity with the union at the center and the states"<sup>16</sup> and the constitutional division of the authority between the central and local states or the two type of government within a state.

## **NATURE & FEATURES OF FEDERALISM**

- i. Federal institutions may differ according to social and cultural environments<sup>17</sup>. Hence Federalism should be stressed on functional point rather than on institutional. In addition universally recognized principles and practices of federalism are very difficult to find, varieties of models which possess some immutable characters must be judicially assimilated with divergent needs arising out of heterogeneous traditions, culture, geographical conditions etc.
- ii. Neither unitary nor the federal governance system is the absolute model. Federalism is in that sense a method, modality or system of democratic governance, which in comparison to unitary system is

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<sup>13</sup> JAN-ERIK LANE, CONSTITUTION AND POLITICAL THEORY, 1996, Manchester University Press, UK, p.106

<sup>14</sup> Reagan, The New Federalism, 1972, cited in infra note 16, P 20

<sup>15</sup> PROF. NEUMANN, EUROPEAN AND COMPARATIVE GOVERNMENT, 1960, P. 22

<sup>16</sup> DURGA DAS BASU, COMPARATIVE FEDERALISM, 1987, Prentice Hall of India Pvt. Ltd., New Delhi, P.2

<sup>17</sup> Prof. W.T. WAGNER, FEDERAL STATES AND THEIR JUDICIARY, Op Cited No. 5, P. 16

least likely to turn into an arbitrary system due to the power diffusion in it.

- iii. The purpose of democracy is the popular participation. However, unitary government cannot offer large-scale participation, opportunities and equal recognition to all individuals. Which might lead to inequality, unequal distribution of resources and service and thus unequal development of the state. Which in turn can be addressed by the federal nature of the government. Therefore, a federal system of governance functions as a scheme of share and distributing authority, vested in the center among communities, castes, back warded and marginalized groups and individuals along with the people living in geographically challenged regions.
- iv. Federalism recognizes diversity and unity at the same time. Thus for a successful federal system of governance, emotional issues (Language, Casts, Religion, Territory, History, Geography, Color, cultural) should be closely guarded<sup>18</sup> whereby, people can feel psychosomatic unity and fraternity. Federalism, hence first recognizes and respects the diversity by which, country then creates national consensus that then builds federal structure. Primary postulation of federal government is equality in dignity, respect and participation of individuals. Thus by pushing, hating and neglecting people true federation cannot be achieved. Probably, because of this reason American Scholar Reagan has said, "federalism- old style is dead." Similarly 'fellow feeling'<sup>19</sup> as pointed out by Mills also concurs similar notion; "Among people without fellow feeling, especially if they read and speak different languages, the united

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<sup>18</sup> DICEY supra note 4 P. 141

<sup>19</sup> Even though Mill has been criticized for his concept, "if Mill is right, multinational stake Switzerland or the US could not exist. On the other land the dissolution of the Soviet Union and of Yugoslav, or the ethnic tensions in Bulgaria, Czechoslovakia or Romania carry sufficient evidence that constitution whose creator cannot refer to a pre-political collective identity-the most important being nationhood-might not be able to generated the coherence which the constitutional state needs for its functioning" ULRICH K. PREUSS, CONSTITUTIONALISM-MEANING, ENDANGERMENT, SUSTAINABILITY, Edit by Satish Saberwal and Heiko Siervers, Rules, Laws, Constitutions, 1998, Sage Publication India Pvt. Ltd., New Delhi, California & Landon, P 182 and 183

public opinion, necessary to the working of representative government cannot exit..."<sup>20</sup>

- v. Constitutionally speaking it is the constitutional sharing of power. This requires original document that distributes authority, limitation and jurisdiction between the state and federal governments along with checks and balance, judicial review and other control mechanism. Legally, federal structure recognizes the written constitution, as the agreement of fresh start as well as a means of keeping checks on the selfish states, by maintaining means such as constitutional or federal court to resolve disputes between states and state and federal government. Thus, it implies written constitution as 'must have' in a federal state. As, Hal Dane observed, "federal...describe any arrangement under which (self-contained) states agree to delegate their powers to a common government with a view to frame entirely new constitutions even of the states themselves."<sup>21</sup> Furthermore, constitution in federalism is also important as conflict of jurisdictions marks a common problem in federal set up; hence a superior law of the land is inevitable to carve clear provisions of jurisdictions.

## **BASIC PRINCIPLES OF FEDERALISM**

Unity is a basic objective of federalism. Sharing of power is a test of federal government as K.C. Wheare explained: when a system of governance embodies predominantly a division of power between government and regional authorities, each of which in its own sphere, coordinate with each other and yet are independent, then that government is federal.<sup>22</sup>

Federalism without democracy cannot serve needs of people living in the age of globalization and liberalization. Hence federalism should ventilate the easy access of public participation, popular sovereignty, responsible government, and rule of law, separation of power, independent and accountable judiciary, and constitutional supremacy, rule of law, liberty, equality and fraternity, free and fair election.

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<sup>20</sup> J.S. MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT*, 1991, Buffalo: Prometheus Books, P.16

<sup>21</sup> Lord Hal Dane, *AG for Australia v. Colonial Sugar Refining Co.*, 1914, Op cited No. 16, P. 20

<sup>22</sup> *Supra* note 1, P. 33

Swiss model of federation also preached a similar line. Swiss model of federation based on political autonomy, three tiers of the federation: federal, canton and commune means distribution of the authority, protection of the interest of minority (Catholics Cantons) and democratic constitutionalism.<sup>23</sup>

A bit different principle had been adopted in India as Ambedkar highlighted: As to the relation between the center and states, it is necessary to bear in mind the fundamental principle on which it rests. The basic principle of federalism is that the legislative and executive authority is portioned between the center and the states...The states are in no way dependent upon the center for their legislative or executive authority the states and the center are co-equal in this matter<sup>24</sup>.

US federalism has developed for a certain purposes: equality, freedom and individual rights and India agreed federalism for the sharing of power and authority. However, federalism just for the post and power will not sustain with people and upshots quarrel and fighting. By this, Nepal's experiment can institutionalize the following agendas as the guiding principle of federalism:

- a) Institutionalization of democratic practices by popular participation,
- b) Diversity and unity for national progress,
- c) Equality, fraternity and social justice,
- d) Institutionalization of good governance,
- e) Inclusiveness and empowerment of people, and
- f) Conflict management.

## **OBJECTIVES: WHY FEDERALISM?**

- a. Progressive and Inclusive Democracy: Democracy has no alternative rather than progress. Thus the failed democracy in Nepal can be mended by federalism through popular participation in local, regional and central levels making government, people oriented and responsible along with being inclusive. It systematically distributes opportunities, and ensures access and participation of marginalized, poor, back warded and exploited.

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<sup>23</sup> WOLF LINDER, SWISS DEMOCRACY, (Translated in Nepali by Top Bd. Singh) Nepali edition, 2062, IGD, Katmandu, P. 39-85

<sup>24</sup> M.V. PYLEE, CONSTITUTIONAL GOVERNMENT IN INDIA, 1<sup>st</sup> ed. 2003, S. Chand & Company Ltd. P. 403

- b. End of exploitation: Centralized governance of Nepal has created poverty, injustice, bad governance, corruption and various other social grievances. Which however can be destroyed or abolished by sharing power, resources and authority. It means abandonment of central exploitation and ineffectiveness. And in turn ensuring social justice, local development, and public participation based on inclusive nature.
- c. Diversity and Unity: In addition, federalism as being a method of power sharing and re-structuring of the state should offer benefit to those, who never became real citizen of Nepal. It should guarantee rights, along with right-based approach of development, access to resources and right to choice. Therefore, a corrupt, despotic and oligarchic past that threatened national unity and diversity should be amended by federalism.
- d. Restructuring of State: For a long period most Nepalese never became a part of Nepal rather they were pushed and exploited. Hence, notion of reconstruction of state for participatory, accountable and welfare government should be furthered by federalism. Restructuring means not only mere changes but upheavals in the political, administrative, judicial structure, inline with the need and satisfaction of people. Real restructuring of the state through federalism seeks to achieve; (i) true democracy, (ii) judicious representation of people, (iii) satisfaction of local needs and development, (iv) foster inclusiveness (v) secure social justice and (vi) unity in diversity.
- e. Conflict Management: From social problems to greater national and political problems that mark Nepal at this moment federalism must speak to them. Social problems stemming from inequality, injustice, exclusion must be addressed by such reconstruction of the state by the means of federalism. Similarly, federal system of governance should seek to transform greater national and political conflicts of the state.

## **PREMISES OF PROBLEMS AND CHALLENGES**

Federalism apart from being desirable in many grounds has some set backs too. Though politically and on its external side it has proved itself strong,

economically it is very hostile.<sup>25</sup> Similarly danger of conflicts of jurisdiction between federal and state authorities can also be quite exhausting. American, Indian and European model of federalism pose similar problems. However, aims, mission and prudence of the statecrafts and leaders can have impact on facing such problems. Others issues like the fight for natural resources, conflict between the citizens from different states, claim and interest on territory of the state, cost and expenditures of the number of government undertakings can account for lot of problems in federalism.

Nevertheless, system itself makes no demand and holds out no promises. People make demands and should keep promises. Nepal, during the two decade of modern democracy was not able to advance the country except personal development of some elite. Hence, since, culture has been of exploitation challenge may arise in power sharing even within federalism. So federalism alone can never empower poor, marginalized and backward, without transforming culture of favoritism, oligarchy, severe political polarization, obsession of power and corruption.

Similarly strength of judges and judiciary is also an important premise of federalism. Since, it is possible in federal structure, various conflicts, claims, disputes may arise among states or between states and the federal government, judges and the judiciary must be competent and prudent enough to understand the gravity of conflicts and should be able to carryout their function properly. However, little skill and ability on the part of the judges in this regard could well subvert federalism. Indeed as Alexis states, “The federal Judge must not only be good citizens and men posed of that information and integrity which are indispensable to magistrates but they must be statesmen-politicians, not unread in the signs of the times, not afraid to bare the obstacles which can be subdued, nor slow to turn aside such encroaching elements as may threaten the supremacy of the union and the obedience which is due to the laws... if the supreme court is ever composed of imprudent men or bad citizen, the union may be plunged into anarchy or civil war.”<sup>26</sup> Judges in federal Nepal should also possess necessary qualities to preserve this prized notion of federalism in Nepal.

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<sup>25</sup> Dr. Leacock, cited in V.D. MAHAJAN, POLITICAL THEORY, 14<sup>th</sup> ed, 1988, S. Chand and Company Ltd., P. 471

<sup>26</sup> ALEXIS, DEMOCRACY IN AMERICA, 1835, cited in A.C. Kooper, Selected Constitutions, 4th Ed, 1963, S. Chand & Co., New Delhi, P. 330

Another deep-rooted problem that could hinder the fostering of federalism is the nature of human itself, which feels compelled to exploit others. Which translates into corrupt, abusive psychology driven by vested interests, ultimately affecting good polity even that of federalism.

## **OMEGA**

Unequal development and exclusion is the reality of the Nepalese experience of centralized governance of Nepal. However, it cannot be cured only by the federal maps and governmental offices. Hence any effort to change the form of governance should also address corruption, exploitative mind of leadership and governmental officials, unaccountable and harassing system of court that reduces and kills the public faith by rendering injustice. Otherwise, federalism would only end up being another way of creating posts for leaders as governors, chief ministers, legislatures, and people are further burdened of all the expenses of federalism.

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