

Constitution Making and the Failure of Constituent Assembly: The Case of Nepal

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Abstract

Past constitutions in Nepal were successfully promulgated but had grave persistent major deficiencies, including democratic legitimacy. The Constituent Assembly (CA), as an elected body, was institutionalized in 2008 with the aim of promulgating a democratic constitution. However, the democratic process of constitution making failed dismally. The failure of the CA of Nepal has set the country back into political constitutional anomalies. The Interim Constitution cannot govern the country for a long time so Nepal urgently needs a new democratic constitution. Against this background, this paper analyzes the reasons for the failure of the CA to learn lessons in order to strengthen the success of future democratic constitution making processes. It argues four main factors as the reasons of the failure of the CA: the redundant role of the CA, faulty discourse, the crisis of constitutionalism, and democratic deficit. It also analyzes the challenges ahead in addressing the reasons for the CA's failure. It examines the concept of ethnic federalism as one of the issues, which demands national consensus bolstered on the foundation of constitutionalism. It suggests civic identity as the guiding methodology of fostering harmony and liberal constitutionalism as the foundational idea of democratic constitution making.

Key Words: Constitution Making, Constituent Assembly, Constitutionalism, Ethnic Federalism, Civic Identity, Nepal

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1. Historical Context of the CA

The failure of the Constituent Assembly of Nepal (CA) in promulgating a constitution has set the country back into political constitutional anomalies. However, the failure of the CA has left some important historical lessons. It is true that history must not be treated as something set off by itself,¹ as Teddy Roosevelt said. History as a process involved in series of events leaves lessons for the future.² The past is thus not dead, but in some sense lives in the present.³ It influences our present and shapes the future in an important way. The passionate question before the Nepalese polity is: what could be learned from the failure of the CA, and how can the success of future constitution making be safeguarded?

As a process, the making of a constitution is a dialogue between the past and present for a better future. Constitution making in the form of 'social engineering'⁴ often demands management of both known and unknown challenges, especially while deciding what should be left out, what should be kept in, and what should be built up. In this process, a constitution practically defines and designs new institutions, abolishes old ones, and promises to live up to expectations in a new way. If a country is highly divided about defining what should be the nature of the new institution, perhaps against such a background, the CA as a replica of the larger society could not move ahead with a triumphant footstep. Old habits did not die hard in Nepal. Rather, they influenced the defining of democracy with prejudices, vested interests, and divided ideologies.

The historic demand of the Nepalese people to promulgate a constitution by their elected representatives came true on May 28, 2008, when the CA formally

1. Cited in Richard Stengel, *Why History Matters*, TIME MAGAZINE (June 26, 2006), available at <<http://www.time.com/time/magazine/article/0,9171,1207787,00.html>>.

2. See National Trust, *Why History Matters: Pass It On*, available at <<http://www.nationaltrust.org.uk/main/w-history-matters.pdf>>. The question 'why history matters' was publicly asked by National Trust, UK in 2006. In the 'why history matters' campaign, over a million people from age 6 to 90 participated. The campaign reports many interesting responses to the question. Here, I would like to draw four important responses. First, we all have a passion for the past that is why history matters. Second, through history, we understand ourselves. Third, it evidences national identity. Fourth, history helps us to choose our future. All these concepts about history are significantly relevant to Nepal, especially at the historical juncture of the failure of the CA in making a constitution.

3. A British historian, R. G. Collingwood, expressed the idea beautifully. Cited in *id.*

4. Roscoe Pound, an American legal philosopher meaningfully used the term 'social engineering', to secure maximum interests as a whole with the least sacrifice for higher and more complete human development. See Roscoe Pound, *A Survey of Social Interests*, 57 HARVARD LAW REVIEW 1-39 (1943).

took a historical decision on the abolition of monarchy. Nevertheless, the demand for a CA dates back to the Rana regime. In February 1947, Rana Prime Minister Padma Shumsher formed a grotesque prototype of a Constituent Assembly consisting of 12 elected and 12 nominated members to initiate constitutional reform in the country.⁵ However, it lacked four important features of a constituent assembly: a fully representational institution, an autonomous body to develop constitutionalism by itself, an independent forum for constitutional discourses, and the right to promulgate a constitution without the interference of any individual or institution.

The continuous demand for a CA compelled King Tribhuvan to acknowledge it formally in 1951. In his address to the nation,⁶ King Tribhuvan declared, ". . . henceforth, the government of our people be carried on according to a republican constitution prepared by a constituent assembly elected on the basis of direct universal suffrage."⁷ He made two far-reaching points in his declaration: republic Nepal and a CA to be elected by adult franchise. To get King Tribhuvan's promise realized, the Nepalese people had to suffer through the tyranny of three kings: Mahendra, Birendra, and Gynendra. Finally, King Gyanendra paid the price as monarchical totalitarianism culminated in his reign, resulting in the abolition of the institution of monarchy.

With the abolition of the monarchy, the political leaders delightedly, but intensely motivated to win the race to the populist summit, informed the people that all socio-economic, cultural, and political problems would soon be solved in the republican era, since those problems were the epiphenomena of the monarchical system in the country. However, it was not easy for the political leaders to keep their promises and, understandably, they failed. Furthermore, the crushing pace of political division in Nepalese society, aggravated by the intolerable political ideologies, schismatic party loyalties, and the emerging issue of ethnic identity, immediately brought the precision of the promises into question. Under these adverse political conditions, the task of the CA was undoubtedly a challenging one. The task of promulgating a new democratic constitution was

5. See SARDAR BHIM BAHADUR PANDE, *THE THEN NEPAL*, (Kathmandu, rep. 1982) referred in MUKUND REGMI, *CONSTITUTIONAL DEVELOPMENT: CONSTITUTION OF THE KINGDOM OF NEPAL 1990*, at 4-5 (Kathmandu, Mrs. Sitadevi Regmi 2004).

6. King Tribhuvan addressed the nation on February 18, 1951, three days after his return from India.

7. Cited in TOP BAHADUR SINGH, *CONSTITUTION OF NEPAL AND CONSTITUTIONAL LAW*, at 660 (Kathmandu, Law Book Publication Committee 1985); see also, MUKUND REGMI, *CONSTITUTIONAL DEVELOPMENT*, at 4-5.

not expected to become the prey of any political demagogue. Nonetheless, the CA became a victim of political demagoguery.

Why did the CA fail? Before we answer this important question, let us briefly survey reasons from constitutional history. Specifically, Nepalese constitutional history suggests three fiascoes: failure in the nation building process, failure in the institutionalization of democracy, and failure in fostering development. These fiascoes were aggravated by defective constitution making process in the past, which can be summarized in the following four points:

First, non-elected but nominated persons wrote the past constitutions, though experts were brought into the process of drafting.

Second, constitutions were made under the conditions of constitutionalism designed and granted by the kings. The constitution making bodies, including the Constitution Recommendation Council, 1990, had no power to define constitutionalism. In other words, the constitution making bodies were not autonomous.

Third, the people never got a chance to formulate the constitutionalism through their elected representatives. The constitution making bodies, composed of nominated individuals, had no choice but to follow the instructions given by the kings. In short, the sovereign people were deprived of designing and defining constitutionalism.

Fourth, there was no constitutional discourse. As a consequence, the ownership of the constitution and national consensus to be reflected in constitutionalism were gravely neglected. During the making of the 1990 Constitution, public consultations were carried out in a limited scale but those consultations do not deserve to be qualified as the constitutional discourses.

The CA, as the representative and autonomous body of the people, was authorized to define constitutionalism, engage in a wider and deeper level of discourse, and promulgate a constitution. Thus, it was not expected to become mired in past defects. However, past defects unfortunately persisted in the constitution making by the CA. This gives rise to the question why did the elected body (CA) become mired in the old deficiencies, causing its demise at the end of the day? The following sections of this article will analyze this question and offer alternative explanations.

2. Reasons for the Failure of the CA

The Maoist Prime Minister Dr. Baburam Bhattarai, accusing the Nepali Congress (NC) and United-Marxist Leninist Party (UML) for causing the failure of the CA, unceremoniously announced the dissolution of the CA at midnight on the 27th May 2012. The prime minister ignored the fact that the Interim Constitution does not conceive of any dissolution of the CA without the promulgation of a Constitution.⁸ Against this constitutional obligation, neither a prime minister nor the CA itself could declare the dissolution of the CA. When the CA could not accomplish the historic task entrusted to it by the sovereign people, its Chair was morally responsible to call a formal meeting of the CA and release a statement with the reasons why the CA failed. But the life of the CA was ended without taking the time to give a formal explanation to the people about the reasons for its failure. This elaborate neglect on the part of the CA cannot be justified by any measure or standard.

If flawlessness is a relative concept, the presence of the various sections, groups, ethnicities, ideologies, and classes of people in the CA of Nepal demonstrates its admirable representational advantage. Therefore, representational defect, if any, cannot be insinuated as the cause of the failure of the CA. The failure was also not caused by a lack of time, since the CA amended the Interim Constitution ten times and extended its original two-year deadline to four years. Logistic supports could also not be suggested as the reason for the failure of the CA, since both internal and external (from donor agencies) resources were mobilized stupendously. What, then, caused the failure of the CA? Political leaders argue arrogantly that it is not they but the non-cooperation of the political leaders from other political parties that caused the demise of the CA. They blame each other, grossly and irresponsibly. The blame game has repeatedly victimized the jittery Nepalese people. The leaders who were trusted by the sovereign people finally delivered neither the constitution nor any formal reasons for the failure of

8. See Article 82 of the Interim Constitution of Nepal, 2007. It provides, "On the day of the commencement of the Constitution promulgated by the Constituent Assembly, the task given to the Constituent Assembly shall come to an end. Provided that until the election of the Legislative-Parliament held in accordance with the Constitution promulgated by the Constituent Assembly, the proceedings of the Legislative –Parliament shall be conducted as specified in the Constitution promulgated by the Constituent Assembly." However, the decision of the Supreme Court of Nepal disallowed further extension of time for the CA. The Prime Minister interpreted that the Supreme Court's decision had pushed to dissolve the CA. He did not acknowledge the fact that they were obliged to accomplish the obligation of promulgating the constitution on time.

the CA, but a deep distrust and disappointment to the people. This paper argues that four main factors are the reasons for the failure of the CA: the redundant role of the CA, faulty discourse, the crisis of constitutionalism, and democratic deficit.

2.1 The Redundant Role of the CA

The 601 members of the CA were formally authorized to exercise the power of the sovereign people to institutionalize constitutionalism in settling the issues of constitutional importance, design contents of the constitution using tested jurisprudential concepts, get feedback from the people, instill confidence in the people, create an environment of the constitutional ownership by the people, and promulgate the constitution. Inopportunistly, the role of the CA members was reduced to serving political loyalties and simply waiting for party guidelines, instead of engaging jurisprudentially with democratic conviction and writing a constitution. The demand for political loyalty deprived them of any constructive role for individual conscience, knowledge-based engagement, and proliferation of unbiased and powerfully exhilarating constitutional discourse.

Indeed, the transfer of power from the king to the people was a pronounced political achievement in the political history of Nepal. It enabled the Nepalese people to have real democratic power in their hands. However, the Nepalese experience of constitution making has practically proved the robust fact that transfer of power into the hands of the people can rejuvenate its vitality only when political leaders instill belief in individual autonomy, increase the political knowledge and participation of the people, and empower people to engage in discourse with knowledge and reason. The profound opportunity in the hands of political leaders to play a catalytic role by exhibiting their unflinching faith in individual autonomy, empowerment of the people, and the institutionalization of constitutionalism faltered, unrealized.

Unfortunately, on both occasions, during 1990-2004 and after 2006, the political leaders arrogantly assumed the role of decision maker on all constitutional issues, as if they were the super-CA and constitution-givers. Preposterously, they failed to acknowledge their role in allowing the CA to function autonomously. They became mired into seeing the CA as not different from their political unit. Undesirably, political leaders demanded their CA members strictly follow their instructions and not go beyond. They repudiated knowledge and reason to be the inherent bedfellow of autonomy. Instead, the leaders presumed the role of reason-manufacturers. Anarchy thus pervaded in the form of *ad hoc* decision-making by a few political leaders to the cost and detriment

of the autonomy of the CA. The leaders who invariably reduced the CA to their personal political unit, believing in the propriety of armchair decisions (decision of a few powerful leaders) taken privately and translated into the content and structure of the constitution by complacent CA members. It was the anarchical assertiveness of the leaders that demoralized the CA, denied the autonomy and supremacy of the CA, reduced the CA to a formal fragile body, and deprived it of the public reason and wisdom to be bolstered into the constitution making process.

On occasion, when the CA members sought their autonomy, leaders found it unacceptable. Kanak Dixit observes that, "It has not been remarked enough that the entire constitution-drafting over four years was conducted under duress, amidst intimidation and threats of revolt and "state capture" by a Maoist party that was busy entrenching itself as part of the state establishment."⁹ Maoist intimidation on the one hand and, on a larger scale, the anarchical hegemonic approach of the political leaders of almost all parties on the other hand, brought the autonomy and supremacy of the CA down to the level of redundancy. The procured political habit of deference, acculturated by the *Panchayati* legacy, aggravated the anarchical hegemonic attitude of the political leaders, reminiscent of the brilliant analysis of Karl Popper of how an open society gets its enemies, who often play the leadership role, from within.¹⁰

2.2 Faulty Discourse

Sustained conceptual defects in the making of a new constitution engendered faulty discourse in Nepal. Uncertainty of constitutionalism, arguments built on defective explanations of the key concepts such as right to self-determination, unrealistic justifications of new institutions and denial of any possibilities for alternative are only a few examples. With a few exceptions, civil society discourse led by NGOs was also driven to stage the fixed ideas on federal structures designed intuitively. Top-down political instructions kept ignoring the need for

9. See Kanak Mani Dixit, *The Life and Death of the Constituent Assembly of Nepal*, XLVII ECONOMIC & POLITICAL WEEKLY 36, (August 4, 2012).

10. See KARL POPPER, *OPEN SOCIETY AND ITS ENEMIES: VOL. 1 THE SPELL OF PLATO* (Princeton University Press, 5th Rev. ed., 1971). In its Preface to the First Edition, Popper remarks that, ". . . if our civilization is to survive, we must break with the habit of deference to great men. Great men may make great mistakes; . . . some of the greatest leaders of the past supported the perennial attack on freedom and reason. Their influence, too rarely challenged, continues to mislead those on whose defense civilization depends, and to divide them. The responsibility for this tragic and possibly fatal division becomes ours if we hesitate to be outspoken in our criticism of what admittedly is a part of our intellectual heritage. By our reluctance to criticize some of it, we may help to destroy it all."

wider public education on constitutionalism and constitutional issues. Political leaders were continuously charged with the singular obsession of changing governments for power rather than engaging faithfully in core constitutional discourse. Political sneaking on tough political issues, including required reasoned discourse on diagnosing federalism and ethnic federalism, pushed the country into a state of political intolerance. These obvious instances exemplify how seriously defective the constitutional discourse process was.

What is more, the CA, which was the legitimate and authoritative platform for valid discourse, had fallen prey to the political anarchy of leaders. It was supposed to harvest penetrating, engaged discussions on the settling of the issues of constitutionalism and formulate each and every provision of the new constitution with enlightened jurisprudential discourse. A live transmission of the CA debates through the media would allow the people a chance to know how their representatives were carrying out the expected role. It would also help foster public consciousness and contribute to the stimulation of public ownership over the constitution. Furthermore, the CA could also invite experts from across the country and even from abroad to enlighten epistemic constitutional discourse. The enlightened discourse would help to build broader consensus on settling complex constitutional issues along with augmenting the constitutional knowledge of the people. The CA never had such discourse. This was the tragedy of the political hallucination of the leaders.

The failure of having deep, thought provoking, and knowledgeable discourse in the CA gave rise to faulty explanations of core constitutional concepts across the country. Explanations of ethnic federalism sustained by the justification of the 'right to self-determination' can be taken as one of many such conceptual flaws that proliferated. For example, the ILO Convention 169 was widely explained as the legitimate source of the 'right to self-determination' that would permit ethnic federalism.¹¹ The ILO Convention 169, however, mentions not a single word on the right to self-determination. The rights enshrined in the ILO 169 Convention to ethnic communities regarding maintaining and developing identities, languages, and religious practices are aimed at enabling ethnic communities to exercise human rights to the same degree as the rest of the population.¹² Furthermore,

11. See Purna Man Shakya, It's not that everything will be lost or won on May 27, April 30, 2012, available at <<http://www.ekantipur.com/2012/04/30/interview/its-not-that-everything-will-be-lost-or-won-on-may-27/353186.html>>.

12. See the Preamble of the Indigenous and Tribal People Conventions, 1989. It provides that, "Noting that in many parts of the world these peoples are unable to enjoy their fundamental

it is clearly mentioned that the enshrined rights should be exercised 'within the framework of the States in which they live.'¹³ The ILO Convention 169 is neutral on the structure of a state: federal or non-federal. It envisages the rights provided under the Convention to be achievable under both a federal and non-federal structure of state. It does not prefer federal structure to other structures. Thus, it is neither a source of ethnic federalism nor a source of federalism itself.

A rosy picture has been presented on the new organizational and institutional set up of ethnic federalism, as if the new set up would solve all socio-economic and political problems. Undoubtedly, the rosy picture successfully drew public sentiment, but the key stakeholders took hardly any responsibility to investigate the meaningful utility of the new set up. The CA was responsible to investigate the defects and strengths in the existing institutional set up objectively. However, the CA neither launched required discourse nor investigated the issues. For example, it is not known why the already existing 75 districts and institutions could not bring people closer to the state through empowering them with the necessary executive, legislative, and judicial power. There has also been no objective research into the possible response of the people when they have to bear the burden of multiple taxes such as local, provincial, and federal in the new structure. Also, there has been no analysis of the possible implications of the possible race to the bottom regarding provincial policies on the environment, conservation of natural resources and harmonious human relationships.

Could federal or ethnic federal institutions provide more rights to the people on non-discriminatory grounds? What are the rights that are not amenable to the domain of a devolutionary process? Do the Nepalese people need ethnic federalism for the guarantee, protection, and enforcement of human rights? Is it not a misconceived search of the state-people relationship beyond the premise of rights? These questions are pertinent in the context of Lijphart's argument that federalism is appropriate for societies with geographically concentrated ethnic or religious groups.¹⁴ He further examines that federalism is merely one way of group autonomy if the ethnic or religious group is homogenous. Meaningfully, the most

human rights to the same degree as the rest of the population of the States within which they live, and that their laws, values, customs and perspectives have often been eroded . . ."

13. *Id.* The Preamble provides that, "Recognizing the aspirations of these peoples to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the framework of the States in which they live. . ."

14. See AREND LIJPHART, THINKING ABOUT DEMOCRACY: POWER SHARING AND MAJORITY RULE IN THEORY AND PRACTICE 4 (London, Routledge, 2008).

important aspect of power sharing is proportional representation.¹⁵ However, it should not be forgotten how easily the proportional system could be manipulated by political leaders for serving vested political interest when the content of the proportional representation is structurally flawed.

Issues equally important to proportional representation are how best a state could scale up capabilities, rights, growth, freedom, and harmony for the benefit of an individual, society, and the nation. In the post-2006 period, these issues have unfortunately remained in the penumbra. Without deep discourse and resolution of these issues, the Nepali polity and constitution making process, hijacked by the political leaders, cannot decide far-reaching constitutional matters.

2.3 Crisis of Constitutionalism

Constitutionalism as a basic concept, guiding principle, and theory of constitution offers guidelines in making and institutionalizing a constitution. As a basic concept, it offers a meta-level explanation and justification to the constitutional structure. As a guiding principle, it offers a macro-level explanation of institutional arrangements. As a theory, it operates at a micro-level, especially in designing the socio-political and economic models to be translated into positive constitutional rules. In the constitution making process of Nepal, the issue of constitutionalism endured a continuously unsettled, widely neglected, and tragically controversial realm.

The distinctions of making a constitution under an autocratic regime and in a democratic society are unambiguously identified on the grounds of who gives or develops constitutionalism. Undoubtedly, under an autocratic regime, the king, queen, or president, whoever wields the power, hands down constitutionalism. A committee, a commission, or an elected body might prepare the constitution; nevertheless, the maker of the constitution cannot define or redefine constitutionalism. A constitution cannot be prepared beyond the scope of the handed down constitutionalism. In contrast, the beauty of democratic constitution making is that the makers of the constitution are directly elected by the people, with the autonomy to develop constitutionalism and write a constitution independent of any intervention. In the context of Nepal, there was an elected body (CA) but it hardly exercised its autonomy in developing constitutionalism, entrenching constitutionalism with the ownership of the people, and promulgating a constitution. The authority of designing constitutionalism was seized by political

15. *Id.*, at 8.

leaders, who themselves were confused and directionless until the last minute of the life of the CA.

Agency-principal dichotomy, fraught with the ideological obsessions of the political leaders, prohibited the CA from exercising its authority and autonomy in developing constitutionalism. Political leaders greedily perceived that it was their legitimate domain and authority to hand down constitutionalism and practically took the CA members to be the agency of political parties. They failed to see the CA differently from a regular parliament, and independent of the agency of political parties. The idea of the CA indeed deserves its best explanation under Rawlsian theory of original position. Constitution making, as a meta-level exercise, cannot be accomplished without transmutation of normative fixation into a positive structure.

It may be argued that the 12 Points Agreement, Peace Agreement, and other agreements concluded between the Government of Nepal and different groups could be used as sources of constitutionalism. This argument is defective both *a priori* and *a posteriori*. The government and political parties were not the constitution makers. The only legitimate constitution maker was the CA. Any decision taken by any agency and not endorsed by the CA could neither bind the CA nor be assumed as constitutionalism. From the conclusion of the 12 Points Agreement in 2005 until the end of 2011, there were almost four-dozen agreements.

Unfortunately, the CA could not develop and entrench constitutionalism during its four-year lifespan. It is a tragic reality that the Nepalese people did not deserve.

2.4 Democratic Deficit

Choosing between devolution and federalism, or ethnic identity and multiple-identities based federalism is the fundamental contractual right between the people and state. In Rawlsian terms of 'original position,' it is the choice that had to be rationally decided by the representatives of the people (CA) or, in a higher practical democratic sense, by the people themselves through referendum. The denial of the choices of the people over the structure of a state is one of the examples of the democratic deficit. The reminding question is: if citizens disagree on policies, whose views should prevail? Robert Dhal concludes that the standard answer in democratic systems is that the decision must follow the will of the

majority of citizens, or the majority of their representatives.¹⁶

Article 157 of the Interim Constitution, 2007, envisages settling any matters of national importance through referendum.¹⁷ Choosing between the devolution of power and federalism on the one hand and between multiple-identities based federalism and ethnic federalism on the other was one of the contentious issues which neither the political parties nor the CA resolved. These issues could be settled by referendum; however, the will for referendum both within the CA and political parties was grossly lacking. Political leaders remained quite myopic, serving their vested party interests, not ready to accept the decision of the people. This state of democratic deficit practically roiled the promulgation of the constitution.

UNDP observes that managing cultural diversity is one of the central challenges of our time. It suggests two important tools to manage cultural diversity: recognition of the cultural diversity and the accommodation of the diverse ethnicities, religions, languages and values.¹⁸ It champions two important perspectives. First, cultural diversity, if managed, does not necessarily lead to conflict. Second, cultural rights should not supersede the political and economic structure, which is urgent for all citizens. These perspectives might be valuable for Nepal.

3. Designing a Constitution in the Future

Unquestionably, Nepal needs a new constitution. The interim constitution cannot run the country forever. But what process should be deployed to promulgate the new constitution in light of the failure of the CA? Past constitution making processes were successful but undemocratic. The constitution making through the CA was democratic but did not succeed. Should Nepali people go back to the past or still believe in democratic constitution making through the CA? Perhaps any reversal to undemocratic constitution making seems untenable.

16. See ROBERT A. DAHL, *ON POLITICAL EQUALITY* 18 (New Haven, Yale University Press, 2006 Kindle).

17. Article 157 (1) of the Interim Constitution of Nepal, 2007 reads, "Except as otherwise provided elsewhere in the Constitution, if the Constituent Assembly decides, by its two-thirds majority of the total number of members present therein, that it is necessary to make a decision on any matters of national importance, then decision may be reached on such matters through referendum."

18. See UNDP, *Human Development Report 2004: Cultural Liberty in Today's Diverse World*, Kindle 42 (New York, UNDP, 2004).

In all likelihood, it appears that whether by a new election or by revival of the CA, the making of a new constitution invariably involves a democratic process. A recurring question arises: what may ensure the success of the democratic constitution making through the CA in the future? In the following paragraphs, we investigate this question.

As discussed above, the constitution making process in the post-2008 political landscape of Nepal was fraught with four major defects: lack of autonomy of the CA, faulty discourse, lack of constitutionalism, and democratic deficit. To get political leaders disabused of past mistakes is an absolute precondition of the success of the constitution making process in Nepal. If political leaders are ready to get rid of these defects, Nepal will definitely have a democratic constitution. Down the road, there is doubt as to whether the future CA would function autonomously when political ambience is ideologically overpowered, ethnically divided, and rationally liquidated. There seem to be four possible solutions to this doubt. They are:

- Political Consensus on the ground of Constitutionalism
- Ideology of Constitutionalism
- Civic or Citizenry Identity
- Welfare-*Grundnorm*

John Rawls argues that when citizens realize that they cannot reach agreement or even approach mutual understanding on the basis of their irreconcilable comprehensive doctrines, they need to consider what kinds of reasons they may reasonably give one another when fundamental political questions are at stake; what Rawls calls 'public reason.' In short, the idea of public reason is the conception of a well-ordered, constitutional, democratic society.¹⁹ The problem in Nepalese society is far more complex, since 'public reason' is tersely divided.

3.1 Political Consensus

The concept of 'political consensus' on the populist bandwagon in Nepal since the 12-Points Agreement and specifically in the post-Interim Constitution, 2007 regime, is understood as the agreement between a few top leaders. This idea of political consensus failed to save the CA. Since the conclusion of the

19. See JOHN RAWLS, *COLLECTED PAPERS* 573-574 (Samuel Freeman ed., Cambridge, Harvard University Press, Fourth Reprint 2001).

12-Points Agreement in November 2005, there have been more than four-dozen agreements reached between political parties and other key stakeholders. Are these agreements the replica of political consensus? If these agreements are the model of political consensus, they are already in place. Why, then, did the political consensus in place keep the political parties and leaders from facilitating an environment to enable the CA to promulgate a constitution?

The problem lies at the heart of the faulty conceptual understanding of the idea of political consensus itself. A political consensus does not mean an agreement between political parties for short-term political benefit. Neither does it mean the formation of a government by political parties cooperating with each other, motivated by being in the government nor that political parties should always keep sharing power with each other. How then can the nature of a political consensus be explained? A political consensus, in its best possible definition, can be explained in terms of constitutionalism. Indeed, constitutionalism alone constitutes political consensus in the form of its validity, legitimacy, and enforceability.

The popular rhetoric of political consensus propagated by the political leaders seems to be powerless in solving the problems unless it is derived from constitutionalism. All political relationships and behaviors demand legitimacy under the scope of constitutionalism for a national consensus. The powerful idea of constitutionalism is thus best reflected in the political conception that any politics or political ideology beyond the sphere of constitutionalism transgresses legitimacy. In a democratic polity, constitutionalism is the only valid standard of political relationships. Accordingly, political actors should compete and cooperate with each other under the premise of constitutionalism, which in its proper sense, forms political consensus. Against this background, the concept of political consensus needs an urgent reinterpretation.

The post-CA situation seems further discouraging, questioning the prospect for having constitutionalism. The quest for constitutionalism may become genuine only when the political actors earnestly realize the other three solutions mentioned below.

3.2 Ideology of Constitutionalism

What is an ideology? How does it differ from idea, thought, policy, belief, philosophy, norm, and bias? How should ideologies and a constitution interact? How should different ideologies interact with each other? Is democracy in itself an ideology? Should political parties have ideologies different than constitutionalism?

Why do a number of political parties share the same ideological root? How do the motives of the actors make a difference in the nature of ideologies? How could one know the precision of ideologies? Why are seemingly ideologically charged parties helpless when it comes to reaching power? Why do democratic societies practically reflect the concept of the end of ideology? Perhaps answering all these questions requires treatises. Yet, these issues are concisely discussed below.

Before Karl Marx wrote the *German Ideology* in 1845, Count Antonio D. Tracy wrote *Elements d'Ideologie* in 1817. The use of the term ideology has become especially popular from the early nineteenth century. The concept of ideology was in existence as a tool of political organization, undergoing a number of variations, a long time ago. Christianity in Europe, Islam in the Middle East, Dharma in the Indian sub-continent, and Ethics in Buddhist and Confucian's political doctrines were early forms of ideologies. Islam as an ideology has constantly been practiced as one of the most persuasive doctrines in many parts of the world. On the contrary, Europe and North America, since the Age of Enlightenment, realized that politics as an organization and nation-building concept should be positive. Their quest for positive institutions and structure of the state resulted in the concept of a liberal democracy, which Fukuyama presents as the end of competing ideologies and the invincible victory of the liberal democracy as a universal way of life.²⁰ Fukuyama's assessment has perhaps become more convincing after the growth of Chinese capitalism.²¹ However, there are many countries across the globe, including Nepal, those are still fighting for ideologies.

The revolutionary concept of the 'end of ideology' by Albert Camus, Daniel Bell in the 1960s²² and Raymond Aron in the 1980s, and the post-modernist idea

20. See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (New York, Free Press, 2006). Fukuyama argues, ". . . a remarkable consensus concerning the legitimacy of liberal democracy as a system of government had emerged throughout the world over the past few years, as it conquered rival ideologies like hereditary monarchy, fascism, and most recently communism. More than that, however, I argued that liberal democracy may constitute the end point of mankind's ideological evolution and the final form of human government."

21. In recent days, a plethora of literature has been produced on Chinese Capitalism. See e. g., CARL WALTER & FRASER HOWLE, *RED CAPITALISM* (Wiley, 2012); LORETTA NAPOLEONI & STEPHEN TWILLEY, *MAONO:ICS: WHY CHINESE COMMUNISTS MAKE BETTER CAPITALISTS THAN WE DO?* (Seven Stories Press, 2011); YIN-WAH CHU, *CHINESE CAPITALISM: HISTORICAL EMERGENCE AND POLITICAL IMPLICATIONS* (Palgrave Mcmillan 2010); YASHENG HUANG, *CAPITALISM WITH CHINESE CHARACTERISTICS* (Cambridge University Press, 20008).

22. See DANIEL BELL, *THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES* (Cambridge, Harvard University Press, Second Printing 2001). Bell observes, "Ideology, as I used the term, was not simply a *weltanschauung*, a cultural worldview, or a mask for interests, but an historically located belief system that fused ideas with passion, sought to convert ideas into

of the degeneration of metanarratives, have compelled to understanding of the role of ideology in the new political dynamics, though they have failed to see the changing nature of ideology in its relationship with constitutionalism. Karl Mannheim indirectly touched upon the role of regulatory intervention, arguing that, "The significance of social knowledge grows proportionately with the increasing necessity of regulatory intervention in the social process."²³ Karl Marx explained ideology as an unscientific belief, drawing a distinction between science and ideology. He portrayed science as an objective and value-free method of human knowledge to address social problems. He believed that ideology produces enslavement, irrationality, superstitions, and prejudices.²⁴ Bell defined ideology as a closed system that prefabricates answers to any questions that might be asked.²⁵

In the Nepalese context, the history of political ideology is very short. It can be specifically linked to the emergence of political parties in the 1950s. Extraordinarily, ideologies helped as the organizing concept against the Rana regime but ended up in organizational fragmentations and socio-political divisions that undesirably helped strengthen the monarchy. Immediately after the 1951 revolution, three ideologies came into play: leftist led by communists, centrist led by the Nepali Congress, and rightist led by the monarchy. After the 1990s, when democracy was introduced, the role of political ideologies was supposed to be the agency for producing public and political loyalty to constitutionalism. Instead, political parties engaged in undermining constitutionalism and intensified their ideologies for party loyalty, which hindered the process of the institutionalization of constitutionalism.

The political context of the preeminence of party loyalty over constitutionalism fragmented the country socio-politically and culturally. The growing ascendancy of the illiberal school of ethnic identity is one of its consequences. It provoked the extreme secularization of socio-political life, sharpened social antagonism and accentuated the unhealthy spirit of horse-trading and other political evils for the sake of accumulating power. It denied freethinking and autonomy of institutions, including bureaucracy, and produced a number of irrational cults.

social levers, and in transforming ideas transformed people as well. When it becomes a striking force, ideology looks at the world with eyes wide shut, a closed system which prefabricates answers to any question that might be asked."

23. See KARL MANNHEIM & LOUIS WRITH, *IDEOLOGY AND UTOPIA 2* (Kessinger Publishing, LLC, 2008).

24. See, Andrew Haywood, *Political Ideologies* 338 (Palgrave Macmillan, 4th ed., 2007).

25. See DANIEL BELL, *THE END OF IDEOLOGY*, xi.

These problems deep in the Nepalese political landscape are the products of the failure of political parties to harmonize their political ideologies compatible with the constitutionalism. In the changing context of the republican state, the political actors have inopportunately failed to develop and define constitutionalism itself, which leaves a chilling political syndrome.

The challenges ahead center around the issue of developing and defining constitutionalism with a deep sense of public ownership and bringing the political ideologies within the premise of constitutionalism. Failure in both of these spheres would undermine political stability, weaken the rule of law, and destabilize democracy. It might offer more opportunity to the illiberal school to deteriorate social harmony. Consequently, development will falter, poverty will have to be endured, intolerance will be the norm of the day, and chaos might rule the country. To get rid of these vicious circles, the political leadership should realize the importance of political loyalty to constitutionalism for a successful democracy and development in place.

Contested constitutionalism, or the lack of constitutionalism, quite often suspends the scope for political consensus. With the acceptance of constitutionalism as the source of political ideology, all political ideologies get a legitimate platform for interaction, which maintains political consensus. Amid ideological harmony with constitutionalism, political competition occupies a new height, centered on seeking solutions to the socio-political, economic, cultural, and other problems based on effective policy choices. As politics come closer to science with objectivity, policy alternatives, and governance for human development as its goal, most of the political incongruences will disappear gradually.

How to design and define constitutionalism? This question is discussed in the forthcoming publication. Briefly, the application of the methodology of welfare-*grundnorm* allows efficiency-propelled equity for welfare maximization of all key stakeholders without limiting their rights and interests. With this application, contesting concepts are harmonized to create conditions for optimal distribution and the protection of rights. However, certain conceptual consensus across the country, such as bringing political ideologies within the framework of constitutionalism, ensuring political and policy choices under the authority of constitution, the supremacy of the constitution as the means of socio-political relationships, the rule of law as governance ideal, and judicial review to bring strategic behaviors into the domain of constitutional supremacy, are minimum preconditions of defining constitutionalism.

4. Civic or Ethnic Identity?

In the post-2006 period of peace process, Nepalese society has experienced a systemic drive coupled with concepts like ethnic identity, self-governance by the indigenous people, inclusion, right to self-determination, federalism, and ethnic federalism, among others. These concepts, deeply associated with the form of polity and modality of governance, have steered the Nepalese society into a phase of indispensable transformation. In this discourse, five major perspectives have emerged, defining the nature of ethnic federalism in Nepal: Orthodox, pragmatist, illiberal, separatist, and liberal schools of thought.

In brief, the orthodox school represents the *status quo*. The liberal school espouses a democratic state built on the rule of law, constitutionalism, and citizenship derived from the rights-based approach of autonomy and non-discrimination, permissible to positive discrimination, compatible with the idea of autonomy. The challenging illiberal school supports ethnic federalism based on rights over natural resources and property to be exclusively owned and possessed by ethnic communities, resulting in the deprivation of proprietary rights of other communities, especially of Chhettris and Brahmin. The separatist school, in its extreme form, argues for the internal colonization of Nepal by a few powerful groups, and aims to liberate Nepal with the arrangements of separate ethnic states. The pragmatist, with its ostensible flip side, vacillates between liberal and illiberal thought and also resorts to the so-called practical considerations of deviousness. Among these five schools, the first (orthodox) and the fourth (separatist) seem less influential compared to other three schools (liberal, illiberal, and pragmatist).

4.1 Ethnic Identity

Theoretical reflections on ethnic identity generally match incidences resulting from being a member of an ethnic group. But who are the 'ethnic' or 'ethnic people' or 'ethnic group'? What are the valid standards that distinguish ethnic people? Should one be a member of an indigenous community to become a member of an ethnic group? These basic questions have been widely misconstrued in the Nepalese polity. Looking at the UN definition of indigenous people, one can easily come to the conclusion that in our modern world, only a few groups can claim to be indigenous people.

The UN definition (ILO Convention 169) identifies indigenous people as those people who practice distinct social, economic, cultural, and political institutions.

The historical practices of common economic and political institutions by different groups in Nepal are remarkable. In terms of social institutions, too, there are more commonalities than differences. With the standard of distinct social, economic, and political institutions, hardly any major group in Nepal would fall into the category of indigenous people. Of course, in terms of cultural institutions, many communities have their distinct cultural institutions. The 169 ILO Convention's definition of indigenous people²⁶ emphasizes some of the important features of the indigenous people as follows:

- (a) Peoples in independent countries
- (b) Lineage (the account of descent)
- (c) Inhabited in the country where they belonged at the time of conquest or colonization
- (d) Inhabitant of a geographical region to which the country belonged at the time of conquest or colonization
- (e) Inhabitant of a country at the time of the establishment of present boundaries.

While features (c) and (d) are not applicable to Nepal, features (a), (b), and (e) are relevant, and encompass all people inhabiting modern Nepal into the category of indigenous people. The often-haggled argument about the historic cut off point of indigenoussness has been settled by ILO Convention 169, in the form of the establishment of modern boundaries. Thus, all people residing in Nepal at the time of its unification are entitled to be called indigenous people under the ILO Convention. The obligation requires a state to ensure equality before the law between indigenous and other members of the population. In other words, national laws should be applied non-discriminatorily.²⁷

The idea of ethnicity appears much more limited than the concept of indigenous people. With distinct cultural features, any group can be identified as an ethnic group. From this perspective, each cultural group may maintain a certain level of cultural distinctions. Looking at the Deuba government's

26. See Article 1 of the ILO Convention 169, which reads, "Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

27. *Id.* Article 2.

categorization of ethnic communities into 59 different ethnic groups (extended to 61 later) and their exclusion of many other groups from the identity of ethnicity, one can easily find fault both theoretically and practically. Theoretically, it is incompatible with the ILO 169 Convention and major academic traditions. Practically, there are almost one hundred ethnic groups in Nepal, many of them not recognized by the Deuba government.

4.2 Ethnic Federalism

With the collapse of socialism in the former USSR and Eastern Europe, the West won the Cold War but lost the important global agenda to keep its dominant role on the global political stage.²⁸ After being the victim of colonialism, the Cold War, and ideological battlegrounds of the super-powers, and before reaching the threshold of growth, human development, and prosperity, poor countries have become mired in the politics of ethnic identity.²⁹ In Nepal, however, the Communist Party of Nepal (Maoist) had indoctrinated the idea of ethnic federalism³⁰ on the one hand, and on the other hand, donor agencies such as DFID kept promoting ethnic issues through civil society organizations,³¹ even in the face

28. In fact, Huntington rightly observes that the illusion of harmony at the end of the Cold War was soon dissipated by the multiplication of ethnic conflicts. He further observes, "In this new world the most pervasive, important, and dangerous conflicts will not be between social classes, rich and poor, or other economically defined groups, but between peoples belonging to different cultural entities. Tribal wars and ethnic conflicts will occur within civilizations." See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS*, Kindle location 322, 412 (New York, Simon & Schuster, Kindle 2011).

29. *Id.* kindle location 299. Huntington states that, "In the post-Cold War world, the most important distinctions among peoples are not ideological, political, economic. They are cultural. Peoples and nations are attempting to answer the most basic question humans can face: Who are we? And they are answering that question in the traditional way human beings have answered it, by reference to the things that mean most to them. People define themselves in terms of ancestry, religion, language, history, values, customs, and institutions. They identify with cultural groups: tribes, ethnic groups, religious communities, nations, and, at the broadest level, civilizations. People use politics not just to advance their interests but also to define their identity.

30. See Sarah Webster & Om Gurung, *ILO Convention 169 and Peace Building in Nepal*, available at <http://www.ilo.org/indigenous/Resources/Publications/WCMS_100657/lang-en/index.htm>.

31. Alan Duncan, a Minister of the UK, while visiting Nepal told the press on 25 June 2012 that he defended the financial support of DFID to some ethnic organizations in Nepal. "There have been accusations that we have been stirring ethnic conflict through our support. I have seen for myself the work that the UK has funded through DFID and I am proud of our work, which is helping to implement the Government of Nepal's own commitment to inclusion," he said. "I think it is untenable and unacceptable that any society can have a second class of citizen and I have no doubt that lasting peace will only be achieved when Nepal has a truly inclusive

of public controversies.³²

Ethnic federalism was not an agenda of either the 12 Points Agreement or the People's Movement II (*Janaandolan II*).³³ The Decision of the Meetings of the High Level Leaders of the Seven Political Parties and the Maoist, signed on November 8, 2006, pledged for progressive restructuring of the state by resolving problems related with class, ethnicity, region, and gender.³⁴ The Peace Agreement³⁵ of November 21, 2006, taken after the decisions of the High Level Leaders concluded on November 8, 2006, vowed to end the unitary structure and existing discriminatory practices in the county. Consequently, the Interim Constitution of Nepal, 2007, taken after the peace agreement, did not incorporate any provision like 'ethnic federalism.' The Interim Constitution, followed by a number of amendments specially compelled by the *Terai Movement*, formally acknowledged the agenda of 'federalism'³⁶ but not the idea of 'ethnic federalism.' On August 7,

society." Quoted in THE KATHMANDU POST (June 27, 2012), available at <<http://www.ekantipur.com/the-kathmandu-post/2012/06/27/top-story/duncan-stands-behind-aid-for-ethnic-groups/236513.html>>. See also Interview with Dominic O'Neil (Feb. 023, 2012), available at <http://archives.myrepublica.com/portal/index.php?action=news_details&news_id=41918>.

32. *Id.* The Kathmandu Post writes, "The statement comes after increasing allegations against Western donors and diplomats, including those from the UK, of stirring inter-ethnic tension through covert support for ethnic groups. Last month, protesters from the dominant groups shouted slogans against the DFID, United Nations and other donors, accusing them of instigating marginalized groups to stand in favor of ethnicity-based federalism."

33. See 12 Points Agreement between Seven Political Parties and the Maoist signed on 22 November 2005.

34. See Decision of the Meeting of the High Level Leaders of the Seven Parties and Communist Party of Nepal (Maoist) signed on November 8, 2006. Interestingly, the Seven Political Parties and the Maoist had agreed to give continuity to the institution of monarchy with no powers to be vested upon the king. However, Article 3.3 of the Comprehensive Peace Accord of November 21, 2006, clearly provided that whether the institution of monarchy should give continuity or not shall be decided by the simple majority of the first meeting of the Constituent Assembly. Article 10 of the Decision incorporated three main ideas: to end the unitary structure of the state, formation of a high level state restructuring commission, and the final decision to be taken on the restructuring of the state by the CA.

35. See Comprehensive Peace Accord Concluded Between the GoN and CPN (Maoist) (November 21, 2006) [Hereinafter, Peace Agreement]. Article 3.5 of the Peace Agreement provides, "In order to end discriminations based on class, ethnicity, language, gender, culture, religion and region and to address the problems of women, Dalit, indigenous people, ethnic minorities (Janajatis), Terai communities (Madheshis), oppressed, neglected and minority communities and the backward areas by deconstructing the current centralized and unitary structure, the state shall be restructured in an inclusive, democratic and forward looking manner."

36. See Preamble of the Interim Constitution of Nepal, 2007, which states that, "Declaring Nepal as a federal, democratic republican state upon duly abolishing the monarchy." Article 4(1)

2007, the government of Nepal entered into an agreement with different ethnic groups that recognized multiple, identity-based federalism, but not single identity-based federalism.³⁷

Although, the idea of 'ethnic federalism' was not formally recognized and agreed by political parties, especially by the NC and UML, the idea entered into the constitution-making process through the movements of ethnic communities, Maoist's initiatives, and pressure tactics from the ethnic caucuses in the CA. In the penultimate weeks, the political leaders of the major political parties (NC, UML, Maoist, and Madhesi Front) came with a model of eleven multiple-identity based, federal provinces, allowing the name to be decided by legislative assemblies of the states themselves.³⁸ Some ethnic communities did not support multiple-identities based federalism. Immediately, the Maoists denounced the agreement and lined up with single-ethnicity based federalism. The disagreement among

of the Interim Constitution provides, "Nepal is an independent, indivisible, sovereign, secular, inclusive and federal, democratic republican state." Article 138(1) of the Interim Constitution provides, "There shall be made progressive restructuring of the State with inclusive, democratic federal system of governance, by doing away with the centralized and unitary structure of the State so as to end discriminations based on class, caste, language, gender, culture, religion and region." Article 138(1a) provides, "Recognizing the desire of the indigenous peoples and of the people of backward and other area including *Madhesi* people towards autonomous provinces Nepal shall be federal democratic republican state. Provinces shall be autonomous and vested with full authority. The boundaries, number, names and structures, as well as full details of the lists, of autonomous provinces and the center and allocation of means, resources and powers shall be determined by the Constituent Assembly, while maintaining the sovereignty, unity and integrity of Nepal." Further Article 138 (3) provides, "The final settlement on the matters relating to the restructuring of the State and the form of federal system of governance shall be as determined by the Constituent Assembly."

37. See Article 4 of the Agreement between the GoN and Nepal Adivasi Janajati Mahasangha and Adivasi Janajati Samyukta, (August 07, 2007). Article 4 provides that, "A State Restructuring Commission shall immediately be formed to present to the forthcoming Constituent Assembly recommendations regarding a federal structure for the state based on ethnicity, language, geographical region, economic status and cultural characteristics while keeping national unity, integrity and sovereignty of Nepal above all. The Commission shall be composed of eminent experts from various classes, regions and communities, including indigenous nationalities, Madheshis, Dalits and women."

38. See Parties Agree on 11 States Federal Model (May 15, 2012), available at <<http://www.nepalnews.com/home/index.php/news/1/18819-leaders-agree-on-11-state-model-directly-elected-presidential-system-constitution-within-sight.html>>. Nepal News writes, "The three major political parties, UCPN (Maoist), Nepali Congress and UML together with the Madhesi Front, Tuesday reached a breakthrough on the new constitution as they agreed on 11-province federal structure along with mixed governance system. As per the agreement reached during talks held at the Prime Minister Baburam Bhattarai's official residence in Baluwatar, elected state assemblies themselves would determine the names of the provinces. The federal states would be carved out on the basis of ethnicity, geography and language."

political leaders and some ethnic groups on assigning names to the provinces blocked the whole prospect of promulgating a new constitution. In short, the disagreement between the concepts of multiple- identities based federalism and single-identity (ethnicity) based federalism brought the CA to its demise.

4.3 Major Schools of Thought & the Controversy

Pragmatism as a trend espouses conceptual understanding of all possible practical consequences. This school broadly focuses on the meaning of any idea constituted from practical consequences, ignoring the theoretical justification.³⁹ When political groups turn pragmatist, like the NC and UML among others, they overwhelmingly get concerned with the immediate party benefits, accompanied by an indifference to theoretical issues. Occasionally, they compromise for immediate benefits. Girija Prasad Koirala and his government compromised and signed many agreements, not standing on theoretical grounds but assuming that those agreements would satiate grudging demands in the short run. During the whole constitution making period of four years, the Nepali Congress and UML kept oscillating from one position to another and rarely stood in front of the people with any clear theoretical undertaking on the grave political issues faced by the country. Their pragmatism eventually turned into opportunism, becoming mired in *ad hoc* political predisposition, conceptual bewilderment, and theoretical illusion. Recently, they seem to believe in multiple-identities based federalism but their justification is unknown to the people.

The illiberal school is not a separatist one. Nevertheless, on the issue of internal colonization, the lines between illiberal and separatist seem less distinct. The illiberal school is discourse oriented, academically influential, and politically organized. However, its thought processes are esoteric. Its varied ideas can be summarized as ethnic people in Nepal being targeted by exploitation, domination, inequality, and discrimination and Chettris and Bahuns are the rulers and exploitative class. Ethnic communities were deprived of political participation and social opportunities by both royal and democratic governments. The Nepali polity has homogenized the ethnic communities and deprived them of practicing their culture. Chettris and Bahuns (especially phadiya or parbate) have internally colonized the Nepali state, depriving the ethnic people of political participation

39. See generally D. L. MURRAY, PRAGMATISM (Bibliobazar, 2009); see also James L. Webb, *Pragmatism: Classical Pragmatism and Some Implications for Empirical Inquiry*, XLI JOURNAL OF ECONOMIC ISSUES 1063-1086 (2007); LOUIS MENAND, PRAGMATISM: A READER (Vintage, 1995); WILLIAMS JAMES, PRAGMATISM (Dover Publication, 1995).

and the ethnic people are ruthlessly marginalized under the democratic polity. The illiberal school proposes inclusion and the right to self-determination as the solutions to these problems, expressed in the form of an ethnic federalism permissive to the rights of ethnic communities over all natural resources and land in their area. The idea of inclusion builds on the concept of an ethnic federalism, boosted by the right to self-determination, justified in depriving other communities of proprietary rights over natural resources and land, especially the Chettris and Bahuns.⁴⁰

For convenience, unless special attention is needed, all of these problems are termed as problems of justice. The liberal school maintains that the justice problem is a historically sustained phenomenon in the Nepalese polity. Any projection of the justice problem as the mere by-product of the democratic polity of Nepal is subjective and highly unrealistic. Furthermore, the liberal school contends that the ethnic people were not the only targeted victims of the problem of justice; but all sections of the Nepali society are victims too. Further, Dalits are far more victimized by rampant discrimination. The victimization of Dalit is not limited to the practices of Chettris and Bahuns alone, but it is equally in vogue in the practices of all ethnic communities.

The impression created by the illiberal school that Chettris and Bahuns are the ruler and exploitative class in Nepal is seriously defective. The kings were the despotic rulers of Nepal until 1990. Imprinting the rule of the king as the Chettri-Bahun's rule would simply undermine the reality that the majority of people who opposed the rule of the king, and were jailed, tortured, and killed as a result, were Chettris and Bahuns, along with people from all sections of Nepalese society. Also, the *panchayati* parliament and government consisted of people from both ethnic communities, Chettris and Bahuns, who ruthlessly suppressed and imprisoned many Nepali people who were demanding democracy. The exploitative class is not limited to Chettris and Bhauns. The powerful and rich, from the ethnic and Chettri-Bahun community, have exploited poor and powerless people, irrespective of ethnicity. The poor and neglected people belong not only to ethnic communities but equally to Chettris and Bahun communities. However, comparatively, poverty is more rampant among the Dalits.

The recorded history of Nepal, with a few exceptions in the Terai region, shows that tribal states hardly existed, especially during its modernization. Most

40. See generally Mahendra Lawoti, *Ethnic Politics and Building of an Inclusive State*, in *NEPAL IN TRANSITION* (Sebastian E., Malone D, & Pradhan S. eds., Cambridge University Press, Kindle 2012); see also Krishna B. Bhattachan, *infra* note.

of the small, self-governing entities called principalities came into existence for a short while in the sixteenth century, and were ruled by ethics (dharma) and customary practices. The Gopal, Kirat, Licchavi and Mall periods are named after who ruled the country. They mainly developed a distinct political system, atop of any tribal identity. The laws, customary practices and institutions were built on ethical human standards (dharma) and national cultural values. In its early political history, too, Nepal had fostered, though a rudimentary concept of civic state, a universal national identity of Nepali with multicultural and multi-ethnic existence, leading towards political existence and cooperation.

Generally, Nepal experienced a thorough cultural osmosis process. It consistently adopted a cultural attitude, embracing influences from the north and south.⁴¹ Especially with the advent of Ashoka (the Mauryan Emperor in India) and his adoption of Buddhism as a pacific means of political cooperation, Kathmandu Valley and most of its people were perhaps voluntarily assimilated to Buddhism. Whatever cultural belief the people of Kathmandu adopted in history, Kathmandu Valley remained the center of political and economic power. All dynasties, Gopal, Kirat, Licchavi, and Malla, ruled Nepal from Kathmandu with a certain degree of political centralization. The Licchavi dynasty (4th - 8th centuries) ruled a much larger territory than the existing Nepal.⁴² The Malla kings (12th - 18th centuries) ruled the area that is almost similar to present day Nepal, but had gradually lessened their effective power beyond Kathmandu Valley, allowing principalities to emerge. By the sixteenth century, dozens of principalities existed.⁴³ Remarkably, those principalities, though they had a short history, were not organized on ethnic belongingness but rather on the convenient geographical location and plural cultural harmony that existed for many years.

The Nepali history of ethnic dynamics somehow testifies the idea of Robert Park, a notable sociologist, who felt a compelling need to dismantle the prejudices and boundaries that separate races and people. He held that the more people of different ethnic groups mix with each other, contact, enter into healthy competition and accommodate, the more they get assimilated, breaking

41. See JAMES GRISSOM, *NEPAL – A BRIEF HISTORY* KINDLE Location 359 (Kindle Edition). Grissom observes, “One of the major themes in the history of Nepal has been the transmission of influences from both the north and the south into an original culture. During its entire history, Nepal has been able to continue this process while remaining independent.”

42. See JOHN WHELPTON, *A HISTORY OF NEPAL 2* (Cambridge University Press, 2005).

43. See JAMES GRISSOM, *NEPAL – A BRIEF HISTORY* KINDLE Location 367 (Kindle Edition).

the prejudices and boundaries.⁴⁴ Cornell and Hartman optimistically anticipate the future of multiethnic societies and identities to be integrated into a broad stream of shared culture and social relations.⁴⁵ Unfortunately, the illiberal ethnic consciousness in Nepal has posed multiple threats, escalating non-tolerance to a scale never seen before.

Looking at the wider perspective, the inherent defects of tribal belongingness had recognizably prompted the rise of nation states across the globe in different phases of history. Notably, Prophet Mohamed started the process of building a nation state with the ideology of Islam from 610 A.D. With many ups and downs, almost all nation states everywhere gradually established a national culture, national identity, and national language to maintain harmony and political cooperation among citizens. The idea of a civic state and citizenship played a key role in the growth and institutionalization of a modern nation state, culminating in the identity of citizenship.

4.4 Civic Identity

The French idea of a civic state marks a distinct history in shaping ethnic relationships in a nation state. At the time of the French Revolution in 1789, only about half of the French people could speak French, and 12-13% could speak it fairly well. Against this reality, they formed a nation state, standing on the idea of a body politic of equal citizens in an indivisible republic, where the ethnic communities could practice their customs and religion in private but had to assimilate as individuals into the French body politic and become equal citizens.⁴⁶ The French found liberty, equality, and fraternity to be the basis of solving their social, political, and ethnic problems. Since then, this French ideal of civic state over racial and ethnic divisions has continuously produced much more intellectual support and political influence across the globe as a standard political practice. Erikson argues that there are two principal reasons to disavow racial and ethnic political configurations. First, there are no fixed boundaries of ethnicity. Second, there is often greater variation in the distribution of hereditary physical traits.⁴⁷

Early in the nineteenth century, John Stuart Mill poignantly observed

44. See STEPHEN CORNELL & DOUGLAS HARTMANN, *ETHNICITY AND RACE: MAKING IDENTITIES IN A CHANGING WORLD* 5-6 (Thousand Oaks, Pine Forge Press, 1998).

45. *Id.*, at 6.

46. See Hutchinson & Smith, at 12.

47. See Thomas H. Eriksen, *Ethnicity, Race, Class, and Nation*, in *infra* note HUTCHINSON & SMITH, at 29.

that, “. . . when a people are ripe for free institutions, there is a still more vital consideration. Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion necessary to the working of representative government cannot exist.”⁴⁸ Free institutions and democratic government can function effectively when the nationalities (ethnic communities) evolve a strong sense of harmony or assimilate with each other.⁴⁹

With widespread backlashes, present day Nepal is experiencing deterioration in the civic-political idea of organizing a state and managing relationships between diverse ethnic communities. Already there are about two-dozen ethnic political parties in Nepal. In the aftermath of the dissolution of the CA, the disgruntled ethnic leaders from different political parties formed another ethnic party.⁵⁰ One could truly appreciate an ethnic political party that would stand for liberal political school. Among the existing ethnic parties, some of them have been organized underground for separate ethnic states in line with the tribal belongingness.

Where settlement is homogenous, perhaps the idea of an ethnic state might be a functional concept. Where the distribution of population is extremely heterogeneous, like in Nepal, it seems hard to conceive an ethnic state. What is more, to conceive an ethnic state on the idea of depriving proprietary rights over land and natural resources to other communities seems antagonistic to all democratic and human rights standards. The ethnic state built on extremist ideas defeats the growth of genuine discourse and destroys harmonies between people instilled for centuries.

An ethnic state is not the solution to the justice problem. Solutions to the justice problem, including the pathetic problem of untouchability associated with the caste system, can be addressed only under a liberal democratic system, where constitutionalism and the rule of law govern the country. A modern nation-

48. See JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* Kindle at 310 (New York, Harper & Brothers, 1862, Kindle 2004).

49. *Id.* at 313-314, Mill writes, “Experience proves that it is possible for one nationality to merge and be absorbed in another; and when it was originally an inferior and more backward portion of the human race, the absorption is greatly to its advantage . . . than revolving in his own mental orbit without participation or interest in the general movement of the world Whatever really tends to the admixture of nationalities, and the blending of their attributes and peculiarities in a common union, is a benefit to the human race.”

50. See Declaration of Social Democratic Plural National Party, available at <http://www.samabad.com/show.php?sn=814&atsn=33> (August 14, 2012).

state has come into existence on the commitment of political readiness by diverse groups, including ethnic groups, to live together in harmony. Ethnic groups are not the only categories or sub-categories in any society. Every society consists of different categories: religion, classes, gender, ethnicity, and professional groups among others. Most of these categories are made up of a number of sub-categories. For example, practitioners of a single religion might further be distinguished in terms of divergent tribal or ethnic affiliations. The process of distinction continues, unless a person is identified with individual autonomy. Anthropologist Clifford Geertz describes the modern nation state as a product of the search for an identity, and a demand that the identity is publicly acknowledged as having import, a social assertion of the self as being somebody in the world.⁵¹ Max Weber finds ethnicity as unsuitable for a really rigorous analysis in a political concept of a nation state.⁵²

Across the globe, harmonies have occasionally been broken when ethnic groups have happened to conflict with each other. The reasons might be many but interests are often at the core. But apart from some conflicts, ethnic relations are overwhelmingly habitually peaceful, cooperative, and harmonious. What element binds this harmonious relationship? A common language and shared perspectives bolstered by civic and rights based, political relationships become apparent.

Ethnicity is not monolithic but an evolving concept, though ethnic communities have been present in every period of human history and in every corner of the world.⁵³ The use and understanding of the idea of ethnicity differs vastly, although what these uses have in common is the idea of sharing cultural characteristics.⁵⁴ With this standard, for example, Kirat is an ethnic identity at macro-level. Within Kirat, there are dozens of ethnic variations. At micro-level, Limbu is one of the ethnic communities in the eastern part of Nepal. It does not have homogenous cultural practices. In fact, in many respects, there are heterogeneous practices, which further distinguish the Limbu into different cultural groups. Perhaps at microcosm, this distinction can rest only at a family level. In our modern age of globalization, a person from the Limbu community, born in the eastern part of

51. See Clifford Geertz, *Primordial Ties*, in ETHNICITY 41 (John Hutchinson & Anthony D. Smith eds., New York, Oxford University Press, 1996).

52. See Max Weber, *The Origins of Ethnic Groups*, in ETHNICITY 40 (John Hutchinson & Anthony D. Smith eds., New York, Oxford University Press, 1996).

53. See John Hutchinson & Anthony D. Smith, *Concepts of Ethnicity*, in ETHNICITY 3-14 (John Hutchinson & Anthony D. Smith eds., New York, Oxford University Press, 1996).

54. *Id.* at 4.

Nepal, may be educated in Kathmandu and the United States, working in France, married to a British lady and be able to speak Limbu, Nepali, English, and French, among others. What cultural characteristics do this globalized person and the family share?⁵⁵ The inherent dynamics in terms of social mix-up, cultural and linguistic sharing, and intermarriage have historically transmuted ethnic identities into the identity of a nation state or citizenship as the *grundnorm* of identity. This very reality denies the configuration of a state into ethnic lines and thus an ethnic state.

In macro terms, all Nepalese share common cultural characteristics, forming an ethnic community as Nepali. At the meta-level, many South Asians share common characteristics, forming South Asian as an ethnic community. All Hispanics or Latinos or Asians, no matter where they are from, share common characteristics and are considered an ethnic community. From the micro-level such as a homogenous ethnic community to a heterogeneous community at macro level such as a nation state; and at meta-level, communities such as Hispanics, Latinos, South Asians, Asians, Europeans, North Americans and others are evolving continuously, undermining the view of ethnic community as immemorial, discrete and persisting units.

Let us take examples from the breakdown of Yugoslavia and the United States. Why, after the breakdown of Yugoslavia, did the six different states not form ethnic states and resort to a political identity? The United States undeniably is a land of immigrants; it is a home of multi-ethnic and multi-cultural communities, and it is a castle of freedom and liberty. Why aren't there any ethnic states in the US? What has stopped the people from forming an ethnic state in the land of freedom? At a micro-level, a person demands an ethnic state in Nepal but lives in the US, works in the US, also holds US citizenship; but does not demand an ethnic state in the US. What is holding them back? The answer is clear: it is the reason and autonomy of an individual that is understandably best reflected in liberal democratic civic relationships. The answer is not the ethnic state but

55. *Id.* at 7. Hutchinson and Smith observe, "The phenomena of ethnicity are not only empirically very varied, they are characterized by paradox. On the one hand, we encounter highly durable ethnies, some of them indeed tracing their origins over several centuries, even millennia. On the other hand, we observe the rise of new ethnics and the dissolution of older ones, as well as the many transformations of culture that existing ethnies have undergone. Moreover, as we come closer to the object of investigation, we discern the many fissures in ethnies and shifts in ethnic identification; the literature is full of multiple identity, which include not only the many different affiliations of individuals with other kinds of grouping such as gender, region, class, religion, and the like, but also the many shifting identifications between different ethnies or ethnic categories."

liberal democratic civic state. Why should the same answer not be true for Nepal?

The Japanese believe in '*nihon jin des*', i.e., 'We are Japanese.' It is a powerful concept of the unity, harmony, and progress. The Japanese have some linguistic differences in every part of Japan, but they all speak Japanese. Historically they practiced cultural diversity and to a certain extent the distinctions exist to date. But amazingly, they seem a homogenous society. They don't regret it but rather they feel proud of their political identity. Japan's identity is human development or, in Amartya Sen's term, 'capability'⁵⁶ and development. Their identity is the identity of skill, competition, politeness, and excellence both at an individual level and political citizenry level. This identity has been exceptionally reflected in market goodwill. In contrast, Africa presents an example of 'growth tragedy'⁵⁷ with its oversimplified understanding and overt engagement in ethnic consciousness. At this moment of historical turmoil, Nepal should have a clear choice.

The Middle East can be another example. Anthropologists have found records of ethnic and tribal groups dating back to the third millennium B.C. and their history is full of ethnic and tribal conflicts.⁵⁸ The Prophet Mohamed saw the bitter experiences of ethnic and tribal conflicts. After Islam in 610 A.D., it is not only a religious doctrine but also a political image; Prophet Mohamed institutionalized the concept of a nation state. Within the broader scope of nation state, Arabs continue their tribal groups following the thought of Islam. Would it not be ludicrous to the proponents of ethnic states (e. g. in Nepal) to suggest that the Middle East go back to ethnic and tribal states? If we look at the modern political reality of the Middle East, there are a number of sovereign states and most of them are based on Islam. Would it not be outrageous for the proponents of the ethnic states to suggest that there should be a single state of Islam in the Middle East for those who believe in Islam?

The demand of an ethnic state often suggests an elitist instrumentalist approach, expressed in strategies for maximizing preferences in terms of wealth, power, and status by influencing the state.⁵⁹ In one extremely erroneous but singular argument, Bhattachan argues that Chettris-Bahunns have looted the

56. See WIEBKE KUKLYS, *AMARTYA SEN'S CAPABILITY APPROACH* (Germany, Springer, 2005).

57. See James D. Fearns, *Ethnic and Cultural Diversity by Country*, 8 *JOURNAL OF ECONOMIC GROWTH* 195-222, at 198 (2003).

58. *Supra* note Hutchinson & Smith, at 10.

59. *Id.* at 8-9. See also, PAUL BRASS *ETHNICITY AND NATIONALISM* (New Delhi, Sage Publications, 1991); Michael Banton, *Modeling Ethnic and National Relations*, 17 *ETHNIC AND RACIAL STUDIES* (1994).

water, jungle and land of ethnic communities, and thus the establishment of an ethnic state is the rational to get back the looted water, jungle, and land. He further argues all natural resources should come under the control of ethnic groups in ethnic states.⁶⁰ Should the deprivation of property of Chettris-Bahun be the agenda of ethnic states? Should ethnic states legitimize discriminatory institutional practices in terms of rights and duties? Can there be two or more distinct rule of law categories between ethnic and so-called non-ethnic communities after having ethnic states? What idea of justice is served by having ethnic states of a few powerful communities, leaving almost ninety other ethnic communities with no ethnic states? When the powerful ethnic groups have their ethnic states, what implications will it have for the idea of positive discrimination? In other words, can ethnic states practice the constitutional protection of positive discrimination? This question is relevant because with the institutionalization of ethnic states, these powerful ethnic groups will hold the majority in that state, leaving all other groups in a minority. In reverse, they are supposed to recognize positive discrimination to other communities but not for them. Does this not dismiss the legitimate interest of the ethnic communities? What all these questions demonstrate is the idea of ethnic state in Nepal has no epistemological foundation; rather it is procured with elitist instrumentalist approach.

4.5 Theoretical Justification of a Civic State

At different times, socio-political thinkers have used the terms ethnicity, nationality, and race interchangeably to indicate almost the same idea. The significance of the ethnic issue has constantly attracted thinkers and philosophers to inquire into its logical scope. Among others, the enthralling ideas of Karl Marx, Max Weber, and Robert Park have produced different paradigms, though in conclusion all saw the natural transmutation of the ethnic identity into national identity under a civic state.

4.5.1 Marxism

The relationship between base and superstructure is the singular most important touchstone of the Marxist explanation of social political issues.⁶¹ 'Base

60. See Krishna Bahadur Bhattachan, *Bahun-Chertri Turned Us Into Refugees by Looting Our Water, Jungle and Land*, available at <http://www.samabad.com/show.php?atsn=35&sn=817> (August, 2012).

61. See generally, KARL MARX, *A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY* (Chicago, Charles H. Kerr & Co., 1903).

determines superstructure' is the kernel of Marxism. Mode of production creates classes, unless the society is transmuted into classless communism. Feudal and capitalist modes of production deprive the labor force or proletariat of the ownership over the means of production, which Marxism considers exploitative. Under a socialist system, the proletariat, with the support of state dictatorship, will have a chance to own means of production. The union between productive force and the means of production in a socialist society is what Marxism considers equity.

All institutions in the form of superstructure serve the production system. Class-consciousness occupies the central position in measuring social cooperation. Within this Marxist framework, nationality, race, or ethnicity has no autonomous existence beyond class-consciousness. Winternitz considers that class-consciousness compels two important questions. Whether the working class should oppose or support the struggle for national independence? Whether the striving of smaller nations to form their own independent national state is a progressive tendency or whether it should be opposed in the interest of a higher unity of nations?⁶²

Marxism approaches the issues with a historical analysis, explaining national movements (ethnic movements) as isolated from the social mainstream in the light of class struggles, which in the Marxist analysis occupy a key role in the evolution of society.⁶³ Along with class-consciousness, the historical analyses focus on the distant common origin of human beings having a common heritage of blood. Furthermore, they consider that modern nations arose through the amalgamation of different tribes, clans or racial groups, living together on a common territory, speaking the same language and connected with one another by close economic ties.⁶⁴ This common heritage and the idea of modern nation-state, Marxists consider, does not justify the ethnic identity-based explanation of social problems.

The Communist Manifesto perceives ethnic issues to be artificial since class itself constitutes the nation.⁶⁵ From the classical Marxism to modern analysis

62. See J. WINTERNITZ, *MARXISM AND NATIONALITY* 7 (London, Lawrence & Wshart Ltd., 1946).

63. *Id.*, at 8.

64. *Id.*, at 9.

65. See KARL MARX & FREDERICK ENGELS, *MANIFESTO OF THE COMMUNIST PARTY* Kindle 58 (New York, New York Labor News Co., 1908, Kindle Edition). The Manifesto reads, "The workingmen have no country. We cannot take from them what they have not got. Since the proletariat must first of all acquire political supremacy, must rise to be the leading class of the nation, must constitute itself the nation, it is, so far, itself national, though not in the bourgeois sense of the word."

of Marxism, it is constantly visualized that class interest would emerge as the bedrock of collective identity and political consciousness, displacing room for ethnic identity.⁶⁶ But the hard to understand riddle in Nepal is postured by the Marxists, especially by the Maoist party, leaving everyone in the uncomfortable situation of estimating their politics of ethnic identity, which have intensified in aberration of the Marxist doctrine.

4.5.2 Max Weber and Ethnicity

For Marxists, ethnicity is a fictitious and not an autonomous social category. For Weber, ethnicity is a real social category. However, the ethnic differences, Weber finds, are produced not due to anthropological differences (racial or physical differences) but due to differences in socialization and upbringing.⁶⁷ Thus, Weber treated ethnic identity as the subjective consciousness of mutual belonging fraught with the deficiency of rational process.⁶⁸ Weber explains the 'artificial origin'⁶⁹ of ethnic identity with three logical perspectives. First, an ethnic group is formed on the sense of distinctly shared belongingness. Second, in fact, the shared belongingness does not create the ethnic community, the community creates the belief. Third, the group formation results from the drive to acquire or monopolize economic and social privileges.

Examples from China instructively support the Weberian thesis of ethnic identity. Over 90 percent of the Chinese population belongs to the Han community. Fifty-five officially recognized, ethnic minorities, slightly over 8 percent of the

66. See Cornell, at 8.

67. See MAX WEBER, *ECONOMY AND SOCIETY* 387 (Guenther Roth & Claus Wittich eds., New York, Bedminster Press, 1968).

68. *Id.*, at 387. Weber observes that, "The question of whether conspicuous racial differences are based on biological heredity or on tradition is usually of no importance as far as their effect on mutual attraction or repulsion is concerned. . . . The more or less easy emergence of social circles in the broadest sense of the word may be linked to the most superficial features of historical accidental habits just as much as to inherited racial characteristics. That the different custom is not understood in its subjective meaning since the cultural key to it is lacking, is almost as decisive as the peculiarity of the custom as such. . . . The original motives or reasons for the inception of different habits of life are forgotten and the contrasts are then perpetuated as conventions."

69. *Id.*, at 389. Weber observes that, "We shall call ethnic groups those human groups that entertain a subjective belief in their common descent because of similarities of physical type or of customs or both, . . . This artificial origin of the belief in common ethnicity follows the pattern of rational association turning into personal relationships. If rationally regulated action is not widespread, almost any association, even the most rational one, creates an overarching communal consciousness; . . ."

population, are entitled to 'special status' under Law on Regional Autonomy, 1984. With the special status, the minority groups are granted special privileges: permission to have more children (for Han people, the government has adopted the one-child policy), pay fewer taxes, obtain better education for their children, have greater access to public office, speak and learn their native language, worship and practice their religion including Shamanism (for Han people, Shamanism is banned), and express their cultural differences through the arts and popular culture.⁷⁰ With the attractions of these privileges, people who do not belong to these minorities have claimed to be the ethnic minorities. Indeed, Dru Gladney puts it, "one might even say it has become popular to be ethnic in today's China."⁷¹

Coming back again to Weber, he builds his idea of subjective construction of ethnicity with the analysis of the cases from Europe and the USA. He finds that the discrimination against African-American people was not simply due to physical differences, since the physical differences between the Caucasians, Native Americans (Indians), and African-Americans were quite visible. The discrimination was on the socially constructed institution of slavery aimed only at African-Americans. With this idea, he perceived ethnicity independent of race or physical features. The conclusion was further attributed by the existence of various tribal and ethnic groups within the Native American community as such. Indeed, Weber found 'the whole conception of ethnic construction so complex and vague that it might be good to abandon it altogether.'⁷²

Cornell and Hartmann write that Max Weber agreed that ethnicity would decline with the rationalization of human action, which is the hallmark of modernity. Ethnicity, in contrast, was a communal relationship. It was based not on the rational calculation of interest but on subjective feelings among group members. As rationalization progresses, communal relationships will lose importance. Only where rationality is not widespread, and modernization has yet to take root, will communal relationship likely continue. Ethnicity could hardly be expected to survive the great tidal wave of bureaucratic rationality.⁷³

Weber's idea of 'rationalization' consists of a civic political state with a legal

70. See Daniel A. Bell, *Beyond Liberal Democracy: Political Thinking for an East Asian Context* 186 (Princeton University Press, 2006, Kindle edition).

71. *Quoted in id.*, at 186 .

72. *Quoted in John Stone, Race, Ethnicity, and the Weberian Legacy*, 38 *AMERICAN BEHAVIORAL SCIENTIST* 391 (1995).

73. See Cornell, at 8.

order of universalistic impartial system.⁷⁴ Talcott Parson argues 'equality before the law' is doubtless very far from being able to guarantee effective substantive equality for all people, but the value of freedoms institutionalized by the idea of equality before the law creates 'equality of opportunity,' immune from and superior to invidious discrimination on the grounds of birth, individual favoritism, and ethnic or class status.⁷⁵

4.5.3 Robert Park and Assimilation to Civic State

With the growth of nation building processes in independent and sovereign states, sociologists and anthropologists formed a common belief that ethnic identities would gradually disappear and will integrate into a national identity. Robert Park and W. I. Thomas, among others, found the idea of 'common life' a necessary precondition for nation building and believed that 'common life' will be institutionalized on the basis of a common language, educational opportunities and civil liberties.⁷⁶ Robert Park found the existence of 'common life' necessary, propelled by contact, competition, and accommodation between different groups that logically lead to gradual assimilation where people share common culture.

Examples from Mauritius might be interesting. Since 1982, the government has officially abandoned ethnic category-based census to promote the national feeling and common life of Mauritianism. The census before 1982 shows the ethnic composition as: 52 percent Hindus, 16 percent Muslims, 3 percent Sino-Mauritians, and 29 percent rest of the people as General Population. Eriksen writes that the taxonomy, first used in the 1952 Census, was retained by the first government of independent Mauritius, ostensibly in order to ensure that each community be fairly represented in public bodies. It was abandoned by the 1982-83 MMM government because it allegedly served to reproduce a sense of communal (ethnic) belonging no longer seen as desirable; but in practice, it still exists.⁷⁷

The language issue in Mauritius also presents an equally interesting case. Eriksen remarks that language controversy in Mauritius is closely tied to issues

74. See MAX WEBER, *THE THEORY OF SOCIAL*, at 33.

75. See Talcott Parson, *The Modern Western Institutional System*, in *id.* at 82.

76. See Robert E. Park and W. I. Thomas, *Participation and Social Assimilation*, in Kimball Young (ed) *SOURCE BOOK FOR SOCIAL PSYCHOLOGY 47-53* (Kimball Young ed., New York, A.A. Knopf, 1927).

77. See THOMAS HYLLEND ERIKSEN, *COMMON DENOMINATORS: ETHNICITY, NATION-BUILDING AND COMPROMISE IN MAURITIUS 15* (Oxford, Berg, 1998).

of ethnicity. About 15 languages are spoken across Mauritius. Their spatial, numerical, and situational distribution is very uneven. The official language, English, is virtually absent from the linguistic repertoire of the majority of the population. It is used in official documents, academic writings, education, and to a limited extent, in the media. However, the great majority of the people speak Kreol, which in the eighteenth and nineteenth century was a *lingua franca*. Kreol is the mother tongue of a growing majority of the Mauritian population today as well. Besides Kreol, French is also widely used and spoken but neither of them are official languages. Bhojpuri, Hakka, Tamil, Telugu, Arabic, Marathi, Latin, Urdu, and Hindi are other languages spoken in Mauritius but by a limited number of people.⁷⁸

Against this backdrop, the illiberal explanation of the issue of ethnic identity in Nepal is apparently erroneous in denouncing the existence of a national identity as domination, exploitation, hegemony, internal colonialism, and cultural homogenization. A denial of the role of integrating factors for harmonious citizenry relationships, building national capability, and enabling effective political participation of individuals simply disregards the universal process of nation building.

Across the globe, the process of nation building is not free of serious challenges. Erosion on integrating factors has conceivably deteriorated the ability of a state, destabilized social harmony, and restrained the aspirations of people to grow and enjoy a better life. At the same time, denial of cultural practices, disallowing communities to practice their conscience (culture, religion, and customary values), and discriminating people based on race, sex, religion, ethnicity, or group identity among others has led to ethnic conflict and violence. In the context of Nepal, the illiberal approach is demanding discriminatory institutions in the form of privileges, access to resources, and political power to be solely confined to certain ethnic groups in the name of ethnic identity. The Nepalese state is experiencing erosion of the integrating factors as well as facing challenges of the illiberal demands. Does the Nepali state have the ability to escape from these traps with a robust solution to the problems of the erosion of integrating factors and illiberal demands? Experiences from Bosnia, Somalia, Sudan, Sri Lanka and other countries show that when societies are divided, it is a huge uphill task to unite them. The United Nations, through its peacekeeping missions, has worked to unite the divided societies in more than two-dozen countries but has failed almost everywhere. In Nepal, major

⁷⁸. *Id.*, at 15.

political parties felt the role of United Nations Mission in Nepal (UNMIN) to be biased and declined to renew its tenure; as a result, UNMIN was closed in Nepal.

The ability of the state mirrors the readiness of actors (government, political parties, ethnic groups, civil society organizations, academia, and donor agencies among others) to uphold a right concept, eschewing a normative obsession for encompassing a positive category of social individuality. The concept of 'social individuality' indicates social consciousness of individual autonomy and non-discrimination as the valid standards of cooperation and relationships. Historical and sociological conditions create other identity differences than race or physical traits. But historical and sociological conditions are logically amenable to universal and harmonized system offered by civic state with the institutionalization of individual autonomy and non-discrimination.

Racial and ethnic attitudes often sketch a tendency toward the monopolization of socio-political and economic power, honor, and entitlements, resulting into discriminatory social, political, and institutional practices. Such practices breed antipathy as the primary and normal reaction. Weber observes, "Any cultural trait, no matter how superficial, can serve as a starting point for the familiar tendency to monopolistic closure."⁷⁹ Moreover, when ethnic communities tend to become over conscious of their identity and eliminate scope for social cooperation including intermarriages, a closed society becomes the norm of the day. A closed society further alienates the group and deprives its members of the benefit of social cooperation. The more open the group and its practices, the more benefits of social cooperation it may garner. The cast systems in India and Nepal are the prime examples of such closed ethnic identities. In recent days, there have been regular attempts both through legal and social mechanisms to open up these groups but attempts have been insufficient. On the contrary, some radical social practices have also aggravated antagonistic responses, instead of encouraging them to open up.

The belief in ethnicity often delimits social circles. Ethnic practices rooted in subjective perceptions of what is correct and proper and, above all, of what affects the individual's sense of honor and dignity, develops a conviction of the excellence of one's own identity and the inferiority of others' identity.⁸⁰ Before the Nepali state, there seems to be two large issues looming on the role of the state: whether the state should take a role in defining the scope of cultural practices or adopt a hands-off approach and allow communities to define the scope of cultural practices

79. See MAX WEBER, *ECONOMY AND SOCIETY*, at 388.

80. *Id.*, at 390-91.

and cooperation on their own. Either way, danger hovers.

If the state takes the defining role, it might go to the extreme of denying rights. The *Panchayati* era from 1962-1990 is a striking example. It denied civil liberties, personal freedoms, human rights, and democratic practices among others but it did allow ethnic practices as legally guaranteed by the *Muluki Ain*, 1964 and other laws. After 1990, the civil, political rights were guaranteed by the 1990 Constitution, but adopted the same earlier pattern of *Muluki Ain*. At the practical societal level, ethnic practices, often combined with the cast system, nurtured the pathetic discriminatory practices, which the Nepalese democracy failed to address.

5. Conclusion

The failure of the Constituent Assembly of Nepal (CA) in promulgating a new democratic constitution has set the country back into political constitutional uncertainties. The setback has particularly painful because the CA missed the historic opportunity of defining and designing new institutions. Regrettably, one of the important lessons of the failure of the CA is the political pathology of highly divided societies. The post-monarchical era of political undertaking was, reasonably, expected to be smooth in its transition. However, the intolerable political ideologies, schismatic party loyalties, and the inability to manage the emerging issue of ethnic-identity based federalism immediately shattered the path of smooth transition. Under these adverse political conditions, the task of the CA was undoubtedly a challenging one though the task of promulgating a new democratic constitution was never expected to become the prey of the political demagogue. Finally, the CA became a victim of political demagoguery.

The unfortunate failure of the CA was caused by four basic factors: the redundant role of the CA, faulty discourse, the crisis of constitutionalism, and democratic deficit. The political leaders arrogantly assumed the role of decision maker on all constitutional issues, as if they were the super-CA and constitution givers. They failed to acknowledge their role to allow the CA to function autonomously. Instead, political leaders became mired into seeing the CA as not different from their political unit. Undesirably, political leaders demanded their CA members strictly follow their instructions and not go beyond. The CA, which was the legitimate and authoritative platform for valid discourse, fell prey to the political anarchy of leaders. The CA was supposed to harvest penetrating engaged discussions about settling the issues of constitutionalism and formulate each and every provision of the new constitution with enlightened

jurisprudential discourse. Another of its responsibilities was to help increase public consciousness, contributing to the stimulation of public ownership of the constitution. Such discourse was rarely carried out. This was the tragedy of the political hallucination of the leaders.

The distinction of making a constitution under an autocratic regime and in a democratic society is unambiguously identified on the ground of who gives or develops constitutionalism. The primary responsibility of the CA was to define, design, and entrench constitutionalism; but it failed miserably due to political intervention by political leaders. Against these backgrounds, democratic deficit persisted.

Unquestionably, Nepal needs a new constitution. The interim constitution cannot run the country forever. A recurring question arises: what may ensure the success of democratic constitution making through the CA in the future? To get political leaders disabused of past mistakes is an absolute precondition for the success of the constitution making process in Nepal. If political leaders get ready to rid themselves and the system of the four defects discussed above, Nepal will positively have a democratic constitution. Down the road, there is a doubt that the future CA would function autonomously when political ambience is ideologically overpowered, ethnically divided, and rationally insolvent.

Correspondingly, the widespread dissatisfactions and conceptual derogations in present day Nepal have delivered a serious blow to the very civic-political idea of organizing a state and managing relationships between diverse ethnic communities. The ethnicity-based state is illusively projected as the solution of the socio-economic and cultural problems of present day Nepal. Solutions of these problems, including the pathetic problem of untouchability associated with the caste system, could hardly be addressed by the idea of ethnic state. Only under a liberal democratic system where constitutionalism and the rule of law govern the country, could such problems be practically addressed.

The challenges ahead are set around the issue of developing and defining constitutionalism with a deep sense of public ownership, and bringing the political ideologies within the premise of constitutionalism. Failure in both of these spheres would undermine political stability, weaken the rule of law, and destabilize democracy. It will also offer more space to the illiberal school of ethnic identity, and can give rise to the orthodox school. Consequently, development will falter, poverty will have to be endured, intolerance will be the norm of the day, and chaos might rule the country. To get rid of these vicious circles, the application of the methodology of welfare-*grundnorm* will allow efficiency-propelled equity for

welfare maximization of all key stakeholders without limiting their rights and interests. With this application, contesting concepts are harmonized in creating conditions for optimal distribution and protection of rights. However, certain conceptual consensus across the country, such as bringing political ideologies within the framework of constitutionalism, ensuring political and policy choices under the authority of constitution, the supremacy of the constitution as the means of socio-political relationships, the rule of law as governance ideal, and judicial review to bring strategic behaviors into the domain of constitutional supremacy are minimum preconditions of a successful promulgation of a democratic constitution and building peace in Nepal.