

A POLICY IMPLEMENTATION OF THE FEDERAL CONSTITUTION IN NEPAL

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Introduction

Nepal, since its unification in 1776, has been a unified and centralized country in terms of governance, with a closed society ruled by the Shah and Rana oligarchies that concentrated power among a handful of rulers. Nepal adopted parliamentary democracy after the revolution of 1951; however, power was again seized by the Monarch in 1961. In 1965 the country was administratively divided into 75 districts and 14 zones, which dissolved the prevailing 35 administrative districts. Structurally, it created three-layers of government - central, zonal and local, but the authority and power remained at the centre. Nepal has experimented with different modes of decentralization, ranging from delegation, de-concentration, and currently devolution. A significant process of decentralization was initiated with the enactment of the Decentralization Act in 1982 and regulations in 1984, but this was just tokenistic. After the restoration of democracy in 1990, three separate Acts - the District Development Act, Village Development Act, and the Municipality Act were enacted in 1992. Two local elections were held in 1993 and 1998, which paved the way for the consolidation of local democratic governance in the country.

The year 1999 was a watershed in the history of Nepal with the enactment of the Local Self Governance Act (LSGA), which instituted systematic and structured local governance. The LSGA envisaged the country as a composite of self-governed local units divided into 5 development regions, 14 zones, 75 districts, 58 municipalities, and 4,913 village development committees. The municipalities and VDCs were further divided into wards, with 9 in each VDC. The LSGA institutionalized political, economic, and social norms and structures to allow the truly democratic functioning of local bodies.

Unfortunately, after the completion of the tenure of the local bodies in July 2002, no new elections could take place to execute these roles due to conflicting interests of the political parties, and the entire country became engulfed in an armed conflict unleashed by Maoist insurgents. The main target of the insurgency was the local bodies and their representatives in an attempt to create their own local governments. Consequently, the secretaries left the VDCs to work from the district Headquarters, and the local representatives vacated their villages due to security reasons. The VDCs were handed over to bureaucratic mechanisms under an all-party alliance, which resulted in the VDCs being administered from the district headquarters or safer place, not the villages and neglected the people's demand for service delivery from their own neighborhoods.

Following the peoples' movement in 2006 and the subsequent signing of the comprehensive peace accord, an interim constitution was promulgated in

January 2007, which was committed to federalism and a new republic Nepal. The Interim Constitution; however, continued the existing local structure and promised to hold local elections within six months, but the local elections failed to materialize. Instead, an all-party mechanism was quickly established to function as local bodies in the absence of elected representatives. The interim government did succeed in holding a general election in 2008 to elect the Constituent Assembly to institutionalize the republican, secular, federal and inclusive democracy system.

The assembly was mandated to write a new constitution within 2 years that accommodates the rights and interests of women, Dalits, Tharus, Janajatis, Madhesis, Muslims, other minority and marginalized communities. The constitution would also allow people to take the responsibility of the development of their country and communities through their elected representatives. The assembly was dissolved in 2012 for failing to write a constitution in the designated period of four years, including an extension. The second CA, elected in 2013, promulgated a new constitution in September 2015 with a 90% vote, but the implementation of the federal constitution was questioned from the very beginning with agitation from the Madhesh based parties. Overall, the key issues remain unresolved, including issues of identity and citizenship, proportional representation at all levels, language, and the demarcation of the provinces.

Federalism in the New Constitution: Devolution of Power

The new constitution was passed by an overwhelming majority of the CA members, even though members belonging to Madhesi parties boycotted the vote to express their dissatisfaction over the federal restructuring provisions. The new constitution did emphasize the concepts of a republic, inclusive democracy, secularism, multiparty competition, pluralism, federalism, universal adult enfranchisement, and periodic elections. Moreover, under federalism, it divided the country into three main tiers – central, provincial and local.

The Central Level: At the center, it envisages a bicameral legislature, a unitary judiciary, and a tiered branch of the executive. The legislature includes an Upper House/National Assembly with 59 members, mainly elected from the provinces; and a Lower House/House of Representatives with 275 members, 165 elected by the first past the post system (FPTP) and 110 by proportional representation (PR).

The Provincial Level: At the provincial level, the constitution envisages unicameral legislatures, High Courts under the central judiciary, and provincial executives led by chief ministers. The constitution outlines the establishment of seven provinces, and in each province, MPs will be elected by FPTP (60%) and PR (40%). However, there is no specification concerning the actual number of MPs in the respective provinces.

Under the provincial executive, the constitution has provisioned for a cabinet, led by chief minister and other ministers, and the central government will also appoint a province chief as its representative in each province.

The Local Level: At the local level, the new constitution envisages mainly two structures, the village and the municipal assembly/Gaun or Nagar Palika. The village assembly will be formed under the leadership of a chairperson and will include a vice chairperson, ward chairpersons, and four members from each ward, including 50% women members and four others nominated by the Gaunpalika to include Dalits, Janajatis etc. The ward committees comprise five elected members, including one chair and at least two women members. The municipal assembly, or Nagar Palika, will have one mayor and one deputy mayor, and four members from each ward and the ward chairpersons. It will also have five women and three other members from minority groups, which will be nominated by the municipality.

Apart from the structure, the constitution also outlines the details of their powers and functions in the Schedules. (See Table 1) The new constitution provides a range of legislative, judicial, and executive powers to the provinces and the local level. For instance, the provinces and local levels are allowed to frame laws to govern themselves, raise certain taxes, carry out development as per their own plans and priorities and administer local services including health and education.

Table 1: The Three Levels of Jurisdiction in the New Constitution

Major Subjects under the Jurisdiction of three Levels as per the Schedules of the Constitution		
Federal Government	Provincial Government	Local Government
National Security	Provincial Police Administration and Law and Order	Town Police
Central Planning	Provincial Statistics	Collection of Local Statistics and Records
Foreign Relations and Diplomatic affairs	Provincial Civil Service	Management of Local Services
International Treaties or agreements	Matters relating to the Provincial Assembly	Management of Village and Municipal Assembly
Central Taxation	House and Land Registration Fees, Tourism Tax etc.	Local Taxes (house tax, wealth tax, land revenue collection etc.)
Large Infrastructure	Province Level Projects	Local Level Development Plans and Projects
Central Universities, Standards and Regulation	Provincial Universities, Higher Education	Basic and Secondary Education, Basic Health and Sanitation
National and International Environment Management	Use of Forests and waters, Management of the Environment within the Province	Local Environment Protection and Biodiversity

Initiatives to Implement the Constitution

According to a study by the Ministry of Law, Justice and Parliamentary Affairs, in order to implement the new constitution, over 315 Acts and 270 Rules must be formulated, revised, or amended. These laws must be made compatible with the new constitution, and among the laws a total 138 areas; 110 areas are at the federal, 22 at the Provincial, and six at the local level need to be revised or updated. The Ministry formed a Steering Committee headed by the Law Secretary to identify these laws, and according to Article 296 (1) of the new constitution, these new laws have to be formulated, revised, or updated by the transformed Legislature Parliament.

In the course of implementing these constitutional obligations, the parliament has already revised 193 Acts through the Act to Amend Some Nepal Acts, which intends to ensure that these laws will now be compatible with the new constitution. Likewise, the policy the government presented to parliament specified the prioritization of the laws in the aforementioned 138 areas for formulation or revision, among them, 39 Acts have already been passed by parliament, and around 42 laws that were under the consideration of the previous parliament have also been moved for discussion in the current parliament, and consent has been given in principle to draft 34 new Acts. The constitution further specifies that laws in 52 areas need to be amended or formulated within one year; 46 within two years; 51 within three years; and another 12 as and when needed. The Ministry of Federal Affairs and Local Development has been tasked with drafting laws in the 6 areas related to the local level, and out of this total, the Ministry has already drafted bills in 3 areas. These bills are currently being considered by the cabinet, and The Ministry is working to draft the laws in the remaining three areas.

For the purpose of holding elections at the local, provincial, and central levels, the Election Commission also requires eight new laws, and among them, the Election Crime and Punishment Act; Local Level Election Act; Functions, Rights and Duties of Election Commission Act; Political Parties Act; and Voters' Rolls Act have already been passed by parliament, and the remaining laws are currently under the consideration of parliament.

In accordance with the new constitution, a Local Level Restructuring Commission was formed by the Cabinet and submitted its report in January 2017, which proposed 719 units, including 463 Gaunpalika, 4 metropolitan cities, 12 sub-metropolitan cities, and 240 municipalities, with a total of 6554 Wards. This process was participatory and bottom-up as all 75 districts had a Local Level Restructuring Technical Assistance Committee to purpose the proposal of demarcation, numbers, and names of the new local structures within the given framework. Following the submission of the report, the government formed a cabinet committee to coordinate the major political parties and gain consensus regarding the report and the restructuring of the local level units. The cabinet approved the report with some slight modifications in March 2017, and

made the report public using the Nepal Gazette, which made the new structure and bodies at the local level come into force. The new structure demarcates six metropolitan cities; eleven sub-metropolitan cities; 246 municipalities; 481 Village Palika, and 75 district coordination centers within the 6683 wards.

The Three Essential Elections to Implement Federalism and the Constitution

In order to operationalize the new constitution, all three levels of elections must be completed, local, provincial, and federal. At the time of writing, the first and second phases of the local elections in Provinces three, four, and six; and Provinces one, five, and seven respectively, were peaceful, fair, and credible and the third and final phase of the elections in Province two is planned for September 2017. This election will culminate in 36,639 new local level leaders being elected, including mayors, deputy mayors, chairpersons, and vice chairperson in village Palika and municipalities; and chairpersons and vice chairpersons of wards. According to legal provisions, at least 13,366 women will be elected, including 6683 Dalit women in various positions.

However, with the recent change in government in June 2017 and the continuing dialogue with Madhesh-based parties on constitutional amendments, Nepal may not be able to hold the planned Province and Federal Parliament elections by February 2018, and this failure would make federalism and constitutional implementation uncertain.

Challenges

The implementation of federalism and local level restructuring faces immense challenges on multiple fronts, such as political, legal, administrative, and financial. Some of the challenges are discussed below:

Political

The current parliament has a fixed term until the 21st of January 2018, and even if the local elections are successfully completed in all the seven Provinces, the government still has to conduct the Provincial and Federal elections before February 2018. However, for these elections to be conducted in a timely manner, a political settlement on the difficult issues of constitutional amendments and a power-sharing agreements is an absolutely necessity. In order to placate the Madhesi parties, the constitution has already been amended once, and now the government has already tabled a second amendment bill in parliament. However, there is still some dissatisfaction over the bill among the Madhesi parties, who are demanding more changes to the bill.

Another major political challenge is the apparent lack of political commitment among the parties to establish effective and authentic local level governance, as the central level political leaders appear to desire the continuation of their hold on the reins of power of the lower tiers of government, against the spirit of the new political dispensation. Further exacerbating the

numerous problems is the new constitution's lack of clarity concerning the establishment of local units and local governance.

Legal

In order to ensure the federal structure is correctly implemented, over 100 laws and 100 rules need to be framed. In addition, to replace the existing Local Self Governance Act, six key Acts are required, and until now, initiatives have only been made to draft 3 key Acts, which are currently being considered by the cabinet.

As far as provincial structures are concerned, the government is yet to form the Federal Commission envisaged by the constitution to determine the number of election constituencies and boundaries of the provinces. Moreover, the Election Constituency Delimitation Commission of the central parliament has not been formed, and the laws to determine the process of electing the Upper House of the central parliament are also pending.

Administrative/Financial

Apart from political and legal challenges, there are equally important issues in the area of physical infrastructure, human resources, and financial capacity. The current unitary model of the civil service must be changed to accommodate the provincial administrative mechanisms, local level mechanisms, and their subsequent financial provisions. For instance, the seven provinces will require seven capitals with seven provincial parliaments, executive buildings etc., and the same is true for local level structures, and the additional human resources required for this operation is also a key concern. These are not simple challenges, especially given the time constraint, and there is still a likelihood of further conflict regarding demarcation, names, and the capitals of the provinces and local level structures once they are finalized.

The Way Forward

The Responsibility of Political Parties

The major parties will have vital responsibilities in bringing the process of political transformation in the country to a logical and satisfactory conclusion. Currently, there is a deep distrust and polarization among the key stakeholders and the first issue that the parties must address is the dissatisfaction and demands of the Terai Madhesi Tharu and Janajati groups regarding the new constitution. Together, the parties have to create a conducive and constructive environment for a productive dialogue to solve the impasse concerning the proposed constitution amendments, and simultaneously complete all three levels of elections to institutionalize the new constitution. The political parties now need to redouble their efforts to placate agitating Madhesi parties to make the constitution widely acceptable and increase ownership.

The parties should form dialogue groups at the provincial and local levels to facilitate the transition into federalism. In addition, the parties must also come together to

implement other aspects of the constitution through a uniform approach in the parliament to pass the numerous laws required for the federal system to be successfully implemented.

The Responsibility of the Government

The government needs to take the initiative to bring all the parties together for acceptable constitutional amendments. It also needs to expedite the issue of the formulation, revision, or amendment of the various laws and rules that are required to enforce the new constitution. The priorities should be the framing of the rules for the establishment and governance of provinces and local level structures during the transitional phase, and immediately formulate the laws related to holding elections and governance of the House of Representatives and the National Assembly at the central level; Provincial Assemblies; and the local Level mechanisms.

Regarding the laws related to federalism and local level restructuring, the government must expedite the formulation of laws in the six key areas that are required for establishing local level governments, and focus on the enactment of the Political Parties Act as well as finalize the report from the Poudel Commission (Local Level Restructuring Commission).

The government has a mammoth task of mobilizing the Poudel Commission to revise its report as per the suggestions made by the committee headed by Minister Hitraj Pandey to make it as widely acceptable as possible. Once the report is finalized and accepted by the government, the existing local bodies will be automatically dissolved. Pending the election and other laws, the government will also need to manage the transitional arrangements to run these bodies. Simultaneously, the government must establish new local level bodies as per the report and provide them with financial, infrastructural, and human resource support.

The government needs to create a conducive environment to hold free, fair, and peaceful elections by bringing on board the agitating parties through generally acknowledged and accepted constitution amendments. It also has the responsibility to arrange the budget required for elections and the requisite structures at the local and provincial levels.

The government is also responsible to quickly form the various Commissions as envisaged by the Constitution, most importantly, the Commission to demarcate provinces as per Article 295 (1), as the Commission is required to fix the borders and capitals of the provinces. The government also needs to form the Election Constituency Delimitation Commission ahead of the planned parliamentary election.

Lastly, the government has to arrange the financial and human resources required for the elections, by allocating a supplementary budget and plans for the mobilization of bureaucrats and fix the dates for the planned Provincial and Central elections.

The Responsibility of Election Commission

The Election Commission must create a conducive environment for the remaining elections to also be free and fair, and constantly lobby the parliament to expedite the passage of previously submitted election bills for the purpose of quickly holding Provincial and Federal elections. Since, four such laws have already been passed; the Commission will need to frame their rules, update the electoral rolls, and prepare the necessary guidelines and code of conduct. Due to the time constraint, it will need to have facilities at the regional level to print the ballot papers, and begin negotiating with the government regarding the budget for the elections as well as the necessary human resources.

The Role of Parliament

The parliament will need to quickly pass the remaining six bills related to elections that are pending in the House. It should prepare a calendar to pass the bills in a timely and ordered manner, and can also direct the government to introduce a supplementary budget if necessary. In order to establish new local level government units as per the new constitution, over twenty laws must be passed and parliament needs to work constructively with the government for their rapid enactment. In addition, the parliament also has the responsibility to proceed with the constitution amendment bill and can lobby all the stakeholders, including the Madhesi parties, to ensure a political settlement as early as possible.

The Role of Civil Society and Voters

Civil society has an obligation to support the consolidation of inclusive democracy and the federal republic. It can carry out a number of tasks for this purpose, such as lobbying the stakeholders to facilitate the early resolution of outstanding constitutional disputes to ensure maximum ownership of the constitution and holding of free and fair elections. It can exercise pressure on the political leadership to end differences constructively, and work to build acceptance

of the revised report by the Local Level Restructuring Commission. Civil society can disseminate information to the general public, such as the basic features of the new constitution and its provisions on federalism. They can also assist the various commissions by providing feedback and helping during their consultations.

The voters, on the other hand, need to be aware of the importance of the elections, as it has been almost two decades since the last local elections, and the new voters need to ensure their names are on the electoral rolls. Voters can also pressurize the political parties into holding peaceful, free and fair elections.

Conclusion

Ultimately, the new constitution adopted the principle of federalism to ensure a cooperative partnership between the various levels of the state for the betterment of the people, and proximity of the governments, inclusive democracy, and increased ownership are the major benefits of such an arrangement. The correct implementation and management of this system should create sustainable peace, harmony, and development.

To ensure the proper functioning of such an arrangement, the concerns raised above must be addressed properly. Basically, it will require political commitment and administrative wherewithal to accomplish the task of law making, reviewing, revision, amendment and resource-distribution to allow the newly formed structures to prosper, and to institutionalize the inclusive democratic and federal system outlined in the new constitution. In summary, the operationalization of the new constitution requires a two-pronged strategy of addressing the concerns of the agitating parties through constitution amendments that are widely accepted by all Nepali citizens and holding free and fair elections at the stipulated time. This will require the combined efforts of the government, the political parties, parliament, the election commission, civil society, and the voters.

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