



**Essays on
Constitution Law**
(Vol. 39)

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नेपाल कानून समाज
Nepal Law Society



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Publisher's Note

It is a matter of great pleasure that after a long gap, the Nepal Law Society has come up with new volume of Essays on Constitutional Law.

The Nepal Law Society was established in 1982 as a non-profit organization that acted as platform for intellectual debates, discourse and discussions on constitutional development of Nepal. Through interactions, workshops, orientations and dialogue programs, the Society carried the flag of democracy and rule of law even during the period of partyless panchayat system.

After the democratic changes of 1990, the Society seized the opportunity to engage in the open discourse on democracy, constitution, human rights, rule of law and independence of judiciary. One of the manners in which it did so was through the publication of Volumes of Essays on Constitutional Law.

In any democracy, it is important to have a regular sharing of intellectual analyses and discussions on key aspects of the democracy and the constitution so that the system is ultimately enriched through critical inputs.

From 1990 onwards, the Society regularly published the Essays on Constitutional Law by mobilizing scholars, professors, lawyers, judges, and experts. Till 2001, 38 Volumes were published that examined the constitutional development and shared domestic/international experiences and inputs on various facets.

The articles in these volumes included the one on the constitutional provisions; the state of their implementation; issues that periodically cropped up in course of constitutional operation; critical analyses of the roles played by the executive, the legislature and the judiciary; fundamental rights; and the concerns of common citizen.

The volumes also contained articles that looked at different constitutions that were promulgated at different times in the history of Nepal, and carried out their comparative analyses.

During that crucial phase of democratic and constitutional development, articles by eminent scholars such as Mr. Kusum Shrestha, Mr. Daman Nath Dhungana, Mr. Biswonath Upadhyaya, Mr. Ganesh Raj Sharma, Mr. Motikaji Sthapit, Mr. Badri Bahadur Karki, Mr. Anup Raj Sharma and others regularly featured in the Essays on Constitutional Law.

Such intellectual discourse had a salutary effect on the all-round democratic development in the country.

However, for various reasons, the Essays on Constitutional Law could not be continued after 2001. In this interregnum, Nepal has passed through huge

socio-political transformation – from a constitutional monarchy to federal secular republic. A brand new constitution has been promulgated by the elected Constituent Assembly in 2015. There have been two elections for Constituent Assembly and numerous debates and discussions on key constitutional issues in various committees of those assemblies.

The country is currently involved in the operationalization of the new constitution through newly restructured three-tiered governments.

It is high time that we restart the intellectual discourses on ground-shifting developments that have swept the country.

With this objective in mind, the Society has published the 39th Volume of the Essays on Constitutional Law. In this edition, there are articles by eminent writers and experts on issues such as the operationalization of federalism; role of the parliament; state of enforcement of fundamental rights; role of the executive; state of local governments; and the challenges in inclusion.

In subsequent editions, the Essays will look into several other critical features of the new constitution and new laws.

Finally, it has been four years since the promulgation of the new constitution. All three tiers of the government are in place. Federalism has been institutionalized. As per the constitution, there are executives, legislatures and judiciaries active in various forms and capacities at all federal, provincial and local level.

Law making is no more the exclusive right of central government. Even provinces and local level can do so in specific areas. Citizen aspirations have changed and they are looking forward to reap the fruits of democracy.

The Society urges the intellectual community and experts to become engaged in these developments through their articles and viewpoints.

Editorial Board

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CONSTITUTION-BUILDING, THE CHALLENGES OF FEDERALIZATION AND THE POTENTIAL OPTIONS

Mohan Lal Acharya¹

Abstract

Federalism addresses and reflects philosophical, ideological and empirical concerns. It is multifaceted precisely because human beings are complex. It is elusive and difficult to study precisely because it arises from and reflects this complexity.

Michael Burgess, Comparative Federalism (2006)

1. Background

The Nepali people's 60-year long mission to write a constitution through a participatory process became successful in second attempt on 20 September 2015, after the painful demise of the first Constituent Assembly on 27 May, 2012.² Nepal has just gone through a protracted political transition, but its transition into a federal state from a unitary one is still ongoing. In relation to the implementation of the Federal Constitution of Nepal, very little has been done by the Government of Nepal to prepare for this until now. Thus, Nepal is still in a state of socio-political flux, moving towards a regime that will have fully functional federated units, more respect for the rule of law, human rights, and democratic norms and values.

1. Mr. Acharya is an Advocate and works as an independent Consultant on law making process with all three tiers of the Government throughout the Country. Along with the rule of law, he has experience of working in areas related to human rights, access to justice, federalism and governance with the different tiers of the Government, as well as donor partners such as DANIDA, SDC, UNDP, GIZ, NDI, Care Nepal, NHRC, Nepal Law Society and JuRI Nepal. He has worked with the Embassy of Denmark, UNDP, IRC, NHRC, Nepal Bar Association and local NGOs on fields of governance, human rights, peace, rule of law and constitution building since 20 years in Nepal.
2. The 11th amendment of the Interim Constitution of Nepal 2007 (30 November 2011) in its Article 64 confined the terms of CA for four years and the earlier decision of Supreme Court did not allow an amendment to the Constitution for the extension of CA tenure. However, the SC provided some alternatives such as holding a Referendum, or fresh elections, or to take any other appropriate measure. But the first CA was dissolved in May 27, 2012 without opting for any option. The tenure of the first CA was fixed for two years originally but was extended four times. The 8th amendment on 28 May 2010 had extended its term by one year, the 9th amendment on 31 August 2011 extended it by three months, the 10th amendment on 31 August 2011 extended it by three months and finally the 11th amendment on 30 November 2011 extended it by six more months.

The Constitution itself is a product of the negotiation between different ideologies and interest groups. Thus, it is a consolidated version of negotiated agreement among different interest groups. As Prof. Ghai says in his writing, “negotiations mean participation, vigorous debates through the country, in numerous forms. They also mean acceptable rules for decisions on the constitution. In this way, the constitution will serve as a social contract among the multiplicities of Nepal, not merely state building, but more importantly, nation building.”³

The federal system itself is new for Nepal. We had never practiced the system and are currently in the phase of learning by doing. It was realized that the centralised unitary system was not able to address the issues of the different regions of the country. Most of the policies and plans were made either in Kathmandu or in the regional centres, but the remote regions were seldom taken on board and were always neglected in terms of their representation and allocation of resources. The Local Self Governance Act 1999 and its Rules 2000 were attempts to address some of these issues, but it was difficult to implement the law as per its objectives due to the internal armed conflict, beginning in 1996, and failure of the then government.

This article attempts to fill the information gaps by capturing the achievements made so far. Likewise, as a close observer of the entire constitution-building process, the author aims to highlight the key messages of the progress on constitution-building, the challenges of the federalization process and the potential options for the future.

2. The Importance of Participatory Constitution-Building Process

Nepal has produced seven different constitutions over the 67 years of its constitutional history, which began in 1948. All of the previous constitutions were drafted by experts and reflected the interests of the then rulers. However, the Nepali people had aspired to produce a constitution through an elected Constituent Assembly even in the 1950s, but the process was not initiated because of conflict between the then king and the political parties. A participatory process of constitution making was followed in Nepal (2008-2015) for the first time in its constitutional history. However, the constitution-making process by the Constituent Assembly (CA) was stalled when a consensus could not be reached by the allocated time during the tenure of the Constituent Assembly-I. The Constituent Assembly-II was able to produce the Constitution in 2015, consolidating the achievements made by the first CA. The process recognized the importance of the participatory constitution building, thus enhancing

3. Yash Ghai, “A Participatory Process for Making a New Constitution” in *The Himalayan Times*, see at <http://www.ccd.org.np/resources/A%20Participatory%20Process%20for%20Creating%20a%20New%20Constitution.ENG.pdf>.

ownership of the constitution by the people.

There are fundamental differences between a participatory and an expert-led constitution-making process. In the later type, the content of the constitution matters the most, whereas in the former, the process and the content are equally important. It is generally believed that a good process, one which is participatory, democratic and inclusive, leads to a good product with a strong sense of ownership by the people who participated in its making. A sense of ownership plays a vital role in the longevity of the outcome of any process, as well as in its successful implementation.

Participation encompasses the active engagement of the people in defining the agenda for reform and the instruments for social and economic change through debate, argument and consultation, not only in the centre, but throughout the whole country. A participatory constitution-making process should thus aim not only at raising awareness, but also at enabling the people to contribute to the outcome of the process.⁴

A participatory constitution-making process, as a tool for lasting peace, has been applied in several countries that have experienced conflict. The process has produced mixed results. In Kenya, which had one of the most participatory processes for constitution making, the draft had to wait for years to be promulgated. In countries like Iraq and Afghanistan, the promulgation of a new constitution did not resolve the conflict. South Africa, however, is the perfect example of participatory constitution making as a tool for conflict transformation, as they were able to settle their past conflicts by accommodating the concerns of conflicting parties in the constitution itself.

In addition to being a significant mechanism for resolving the decade-long armed conflict, the constitution-making process in Nepal also received attention as a way of accommodating a wide range of people from different sections of society in writing the nation's constitution. It is important to note that the Constituent Assembly accomplished many important benchmarks and sincerely attempted to achieve its goal. Among its achievements include establishing the federal democratic republic of Nepal to replace its unitary nature, widening fundamental rights, introducing the Constitutional Bench, extending rights-based constitutional commissions, and most importantly, bringing conflicting parties to the mainstream democratic politics.

Public consultations were another significant aspect of the participatory process adopted by the Constituent Assembly for drafting the new constitution. The objective of this process was to enable the Constituent Assembly to

4. See *Supra* Note 3 for the further detail.

garner people's views on key issues to be included in the draft constitution. Opportunities were provided to grassroots people to voice their concerns through the Constituent Assembly public outreach programme. The process created a massive awareness about the content of the Constitution, which would thus enhance the ownership among people and stakeholders. If the political masters implement it honestly, this generation will be considered as the founding members of the Constitution.

3. Federalism as a Test Case for Nepal

Nepal is currently moving from a unitary system to a federal one. There are dozens of pros and cons on the system itself. Federalism is a government structure that allows the union of regions and peoples with shared views and interests despite significant differences in culture, language, religion, race or geography. Federations promote objectives such as economic unity and prosperity, national defence and the protection of individual rights, while at the same time preserving the ability of regional governments to govern over local and cultural matters.

Federalism is considered as the blending of self-rule and shared-rule. The Constitution of Nepal (2015) internalizes the people's right to autonomy and self-rule.⁵ Competencies are usually assigned to the different levels in schedules, lists or tables that are in the constitutional text itself or attached to the annexes. South Africa does not have a federal list. It has a concurrent list and a provincial list. Both parliaments as well as the provincial legislature can create laws in respective matters per their competencies.⁶ The countries that have adopted a federal system of governance have created and fixed the tiers of governments as per the concerns of the stakeholders and the requirements of the countries concerned.⁷ There are four different types of legislative competencies, distinguished as follows:⁸

5. *As per the preamble of the Constitution,"Internalizing the people's sovereign right and autonomy and self-rule, while maintaining freedom, sovereignty, territorial integrity, independence and dignity of Nepal." For further details, please see preamble of the Constitution of Nepal 2015.*
6. *Jayampathy Wickramaratne, Proposed Application of Competencies between Levels of Government in Nepal," The Federalism Debate in Nepal, published by UNDP, volume – II, P. 193.*
7. *For further details, please see "An Overview of Vertical Power Sharing in a Federal Set Up: A Comparative Analysis with Reference to the Works of the Constituent Assembly in Nepal", Mohan Lal Acharya on "The Federalism Debate in Nepal," published by UNDP, volume II, 2014 pp 159 – 186.*
8. *Dr. Marcus Boeckenfoerde, Dr. Philipp Dann and Verena Wiesner, "Max Planck Manual on Different forms of Decentralization" Max Planck Institute for Comparative Public Law and International Law, Heidelberg, 2007 (funded by GTZ), PP – 36-37*

- I. Exclusive power, meaning competencies assigned exclusively to one level;
- II. Concurrent powers, meaning competencies that are assigned to more than one level,
- III. Residual powers, meaning competencies that have not been expressly distributed in the constitution, and
- IV. Implied powers, meaning competencies that are clearly mentioned in the constitution but developed in the case law by the Judiciary.

Similarly, there are two basic models of how to set up a court system in the federal states: (i) a separated model or (ii) an integrated model.⁹

As per the Constitution of Nepal, residual power is allocated to the centre.¹⁰ "Residual powers" are those that are left or designated to the states. In other words, everything that is "left over."¹¹In all federal constitutions, fields of jurisdiction are allocated, in one way or another, between two levels of government. However, it is quite impossible for constitution makers to provide an exhaustive list of powers; something is bound to be forgotten or new fields of jurisdiction are likely to appear in the future. Thus, it becomes necessary to provide some blanket clause that will determine which of the two levels of government is authorized to implement the new powers. This is what is usually called the residuary clause.¹²

The residual powers are devolved to a level of government by considering the character and needs of the country concerned. Countries that have left the residual powers to the states include the United States of America, Switzerland, Australia, the United Arab Emirates (all formed by the union of different states), Germany (formed by the expansion of the states), Brazil, Spain, Bosnia-Herzegovina, Mexico Venezuela, Argentina, Russia, Malaysia, Ethiopia and Iraq (all held together by transforming from a unitary to a federal structure). In comparison, in countries like South Africa and India (despite Jammu and Kashmir) the residual powers rest with the center.¹³

9. *Ibid.*

10. *Article 58 of the Constitution of Nepal. It says that, "the Federation shall have power on any matter not enumerated in the federal list, State List, List of Local level or Concurrent List or on any matter which is not so specified in this Constitution as to be exercised by any level."*

11. *For further details, please see*

<http://answers.yahoo.com/question/index?qid=20090328030936AAykBSO>

12. *For further details, please see <http://faculty.marianopolis.edu/c.belanger/QuebecHistory/federal/residual.htm>*

13. *See Committee for Restructuring of the State and Distribution of State Power: Report on Concept Paper and Preliminary Draft 2066, Kathmandu for further information.*

Residual powers in Canada were initially with the centre, but now (following the separatist movement in the state of Quebec), they are, per provisions in the Constitution, are to be provided for by law. Residual powers in Canada are exercised on the basis of mutual agreement. Likewise, following a long conflict, residual powers in Sudan have been provided for in Article 113 of the Constitution, which states that it shall be the common responsibility of both the centre and state.

Despite some technical flaws and overlapping jurisdictions, the Constitution of Nepal provides ample opportunities to each level of government to implement and exercise their powers within the ambit of the Constitution. The policy of the state is to promote the local level's wider participation and contribution to the national development process.¹⁴ Therefore, for the first time in the history of Nepal, its Constitution (in Part 5 and Articles 56 to 60) has defined a wide range of powers and functions to different tiers of the government. Part 5 states that "the main structure of the Federal Democratic Republic of Nepal shall be of three levels, namely the Federation, the Province and Local level."¹⁵ The Federation, Province and Local levels shall exercise the power of State of Nepal pursuant to this Constitution and law."¹⁶ Regarding the distribution of State power, the Constitution states that the powers of the Federation are vested in the matters enumerated in Schedule 5,¹⁷ Schedule 6,¹⁸ Schedule 7,¹⁹ Schedule 8²⁰ and Schedule 9.²¹

In relation to the exercising of power, the Constitution provides each of the units the opportunity to create laws and formulate and implement plans and policies.²² Similarly, it states that the Federation, Province and Local level shall make budget for their respective levels, and the time for the submission of the budget by the Province and Local level shall be as provided for in the Federal law.²³ Further, the policies of the state²⁴ are to develop and expand

14. As per the Article 51(F) (3) of the Constitution of Nepal 2015, policy of the state will be to enhance local public participation in the process of development works. Similarly, as per the article 51(F) (8) to update demographic statistics and linking it with national development plans.

15. Article 56(1) of the Constitution of Nepal 2016

16. *Ibid.* Article 56(2)

17. *Ibid.* 57 (1)

18. *Ibid.* 57 (2)

19. *Ibid.* 57 (3)

20. *Ibid.* 57 (4)

21. *Ibid.* 57 (5)

22. Article 59 Exercise of financial powers: (1) The Federation, State and Local level shall make laws, make annual budget decisions, formulate and implement policies and plans on any matters related to financial powers within their respective jurisdictions.

23. *Ibid* sub article (2) and (3)

24. See article 51 (b) (6) of the Constitution of Nepal 2015 for the further detail.

harmonious and cooperative relations among the federal units by way of sharing responsibilities, resources and administration among them. In addition, the Constitution also provides equal opportunity to all three levels of government to benefit from natural resources²⁵ and for the people to benefit per their share of the investment.²⁶

For the macro-economic stability of the country, the Constitution allows the Government of Nepal to obtain foreign assistance and borrow loans,²⁷ demand a federal law for the management of budget deficits and other fiscal disciplines of all three levels of government.²⁸

Per the fundamental legal norms and principles, laws by any level of the parliament/legislature cannot be created out of the blue. Legislations made by the Federal Parliament should be in line with the letter and spirit of the Constitution,²⁹ provincial laws should be enacted in line with the Constitution and federal laws³⁰ and local laws should be made in line with the Constitution and the federal and provincial laws.³¹

Even though the Government of Nepal is trying to run the transition phase smoothly, it has also come under heavy criticism by the stakeholders that it is playing a dominant role at this initial stage. It is very unclear as to whether the seemingly decentralized spirit of the Constitution will translate to a reasonable degree of autonomy of the provinces and local level. There are overlapping jurisdictions in many areas whose specifics need to be sorted out in practice and unbundling of such issues through legislations. Most of the representatives are

25. *As per the article 54 (4), (4) the Federation, State and Local level shall provide for the equitable distribution of benefits derived from the use of natural resources or development. Certain portions of such benefits shall be distributed pursuant to law, in forms of royalty, services or goods to the project affected regions and local communities.*

26. *Article 54 (5) - If, in utilizing natural resources, the local community desires to make investment therein, the Federation, State and Local level shall accord priority to such investment in such portion as provided by law on the basis of the nature and size of such investment.*

27. See article 54(6) for the further detail.

28. Article 54(7) says that, "provision relating to the management of budget deficits and other fiscal discipline of the Federation, State and Local level shall be as provided for in the Federal law".

29. Article 1(1) of the Constitution – Supra Note 7

30. Article 57(6), "Any law to be made by the State Assembly, Village or Municipal Assembly pursuant to clause (3) or (5) shall be made as not to be inconsistent with the Federal law, and any law made by the State Assembly, Village Assembly or Municipal Assembly which is inconsistent with the Federal law shall be invalid to the extent of such inconsistency.

31. Article 57(7), "Any law to be made by the Village Assembly or Municipal Assembly pursuant to clause (5) shall be so made as not to be inconsistent with the State law, and any law made by the Village Assembly or Municipal Assembly which is inconsistent with the State law shall be invalid to the extent of such inconsistency.

new and they are working in their limited capacity in terms of technical skills. The lack of framework legislation with a clear-cut coordination mechanism for the Federation, Province and Local government is another challenge, as these tiers are making plans and executing them on an ad hoc basis.

Due to lack of enough staffs at the Local and Provincial levels, plans are made on an ad-hoc basis. The Constitution makes no reference to a common/concurrent list and states that a Provincial Legislature may formulate necessary laws on the basis of the fundamental principle, standards and framework of legislation determined by the Federal Legislature. A question that arises is whether a Provincial Legislature may legislate on a subject in the common list when no framework legislation has been passed on that subject. If a Provincial Legislature cannot do so in the absence of framework legislation, the Federal Legislature can block Provincial legislation by not passing framework legislation. This is what seems to be happening in Nepal right now. Provinces, as well as the local levels, cannot make laws without obtaining certain guidelines from the Federation. The recent tussle between the Federal and Provincial Government on the Police, Education and Public Service Commission Bills are exemplary of the attitudes of different tiers of the Government in Nepal.

There are several challenges in the implementation of the federal system in Nepal. In addition to the technical flaws in the Constitution and laws, there are serious practical challenges too, creating additional implementation difficulties. People are not used to the system, and most consider it an expensive model. They are divided for and against the system itself. Most of the political leaders are not fully into the system. Political masters and bureaucrats are working with unitary mind-set. Opponents are spreading the negative messages about the system's failure. Most importantly, the system is not fully functional yet, units are suffering from lack of technical capacity and resources, and the federation is displaying its affinity to a unitary system and attempting to retain more power, against the spirit of the Constitution.

As stated above, a system is neither good nor bad in itself, and political masters could make the system workable with their charismatic leadership. Nepal is in the initial phase of the practice of the federal system. Managing this transition is, therefore, going to be of paramount importance and the development of fully functional provinces will take a lot more time than anticipated. It will also vary from unit to unit and be a contested process. It also seems that the process of

“federalization,” which entails restructuring the country and ensuring a fully functional system, will take at least a decade. Nepal has a long way to go to address the impacts of the decade-long armed conflict and socio-economic progress. We, as a Nepali citizens or as professionals, may or may not like the system, but are bound to obey the provision of the Constitution and law. For that, constructive criticism and positive feedback will assist in the smooth operation of the system. It is not only because the autHoR is fully supportive to the system but because of the fear regarding failure, as we are not in a position to bear it once more.

4. Cooperative Versus Competitive Federalism

Cooperative federalism is a concept of federalism in which the federal, state, and local governments interact cooperatively and collectively to solve common problems, rather than creating policies separately but more or less equally. In comparison, “competitive federalism” is the “powerful harnessing of our tripartite sovereignty system that allows states and local government to compete with each other over a broad range of issues to provide citizens with the best value goods and services at the lowest cost. ... Competitive federalism aims to rebalance the powers between the federation and the states that more faithfully adheres to the Constitution. It is the returning of power to the states and a proper return to the natural constitutional order.”³²

The Constitution of Nepal ensured cooperative federalism and recommended that “the relations among the Federation, Provinces and local level shall be based on the principle of cooperativeness, coexistence and coordination.”³³ This is appropriate for a country that has been practising the unitary system from the beginning and in which there is no similarity between the various units of the government in terms of development, availability of resources and capacities to run them competitively.

The Constitution guarantees cooperative federalism in Part 20; however, it demands a separate law to implement the provision relating to coordination among the three tiers. In relation to the financial and industrial matters, a Provincial Council of Ministers may make contractual agreements with foreign entities, however; they have to obtain the consent of the Government of Nepal.³⁴ Such rights are not provided to the Local Government. The Province and Local Governments have the power to constitute and operate government services as

32. See at, <http://www.yankeeinstitute.org/2013/09/competitive-federalism-in-the-states/>

33. See Part 20 and Article 232 of the Constitution of Nepal for further detail.

34. See article 278(3) of the Constitution of Nepal 2015.

required for the operation of their respective administrations.³⁵

Even though the Constitution promotes cooperative federalism, it can gradually become competitive in nature among the federal units. This practice will help the development of the units in days to come.

5. Powerful and Centralized Federalism as a Beginning

In basic terms, federalism refers to a division of jurisdiction and authority between at least two levels of government. Each level of government usually has its own particular jurisdiction. The national government will have final authority over national issues, and the provincial governments will have power over more regional issues, although this can vary widely from one country to another.³⁶ One basic idea from the international experiences on federalism is that there is shared rule, on the one hand, and self-rule, on the other. Both are complementary and, without accepting both, there will be no federal structure.³⁷ There is a misunderstanding that multiculturalism is a problem per se,³⁸ which is empirically wrong.

The countries that have adopted a federal system of governance have created and fixed the tiers of governments as per the concerns of the stakeholders and the requirements of the countries concerned. The United States was the first nation to divide authority between the federal government and the governments of the states. American-style federalism gives both levels of government (federal and state) the authority to govern in order to check the power of each.³⁹

In Australia, the Constitution provides for a two-tiered system with an executive government at the centre and the states under it. The Constitution of South Africa provides for national, provincial and local government rights that are

35. The provision says that, "the State Council of Ministers, Village Executives and Municipal Executives may by law constitute and operate various government services as required for the operation of their administration.

36. For further details, please see <http://mapleleafweb.com/features/federalism-canada-basic-framework-and-operation>

37. See at HIK, *Support to constitution making and federalism* at <https://www.google.com/search?q=verticle+power+sharing+in+Nepalese+Constitution+Building+Process&oq=verticle+power+sharing+in+Nepalese+Constitution+Building+Process&sourceid=chrome&ie=UTF-8> and also at Markus Heiniger, *Special Adviser for Peace building / Nepal of the Federal Department of Foreign Affairs, Nepal's Peace Process and Swiss Support, Switzerland July 2009*

38. Edited by Rekha Saxena, "Varieties of Federal Governance, major contemporary models," pub. By Cambridge University Press India, Cambridge House, 4381/4 Ansari Road, Daryagunj, New Delhi 110 002 (2011); P 65

39. For the further detail, please see at <http://ualawccsprod.srv.ualberta.ca/centres/ccs/issues/federalism.php>

specified in the Constitution. In India, the Constitution provides for the union and states as well as local governments or panchayats (municipalities), and their rights are enumerated in the Constitution. The German Constitution provides for four-tiers of government with the federation, Landers, counties and communes. The Belgian Constitution also has a four-tier structure consisting of a federal government, regional and community governments, provincial and communal institutions and urban entities/federations of communes.

The Constitution of Canada sets out a federal system of government by dividing the legislative and administrative powers between the federal and provincial levels of government. Federal systems divide the cost of government among several administrations while protecting regional and cultural rights. The Swiss Constitution evolved from experience. Switzerland is probably the only federation in the world whose system of fiscal federalism allows one third of the revenue to be equitably shared between the federal, cantonal and commune-level governments.⁴⁰ The cantons will participate in international negotiations in these areas if they deem it appropriate. While remaining within the scope of the powers, the cantons may also conclude treaties with foreign countries. As a rule, the federal legislator takes care not to interfere with the residual power, which is retained by the cantons.

The Belgian parliamentary federal monarchy graduated to a formally asymmetrical federal system uniquely cognisant of multinational linguistic autonomies tied to both regions and communities with complex patterns of demarcations and overlaps.⁴¹ In India, central to the institutional and financial weaknesses is the unique position of Delhi in the country's politico-administrative structure, whose growth and development functions are shared among the three tiers of government, local government and several specialised institutions, financed through a complex system of revenue assignment and grants, and a revenue-sharing arrangement between the government of Delhi and the two local governments.⁴²

The Constitution of Nepal ensures 35 lists of federal power,⁴³ 21 of provincial power⁴⁴ and 22 of the local power,⁴⁵ as exclusive power of the respective units. Twenty-five issues are listed under concurrent power.⁴⁶ The Constitution

40. *Ibid* at p 11

41. *Ibid*

42. Thomas O. Hueglin, "Federalism: An alternative Category in Political Thought? In *Varieties of Federal Governance, major contemporary models*, pub. By Cambridge University Press India Pvt. Ltd, Cambridge House, 4381/4 Ansari Road, Daryaganj, New Delhi 110 002 (2011), P 24

43. See Schedule 5 of the Constitution of Nepal for further details.

44. See Schedule 6 of the Constitution of Nepal 2015.

45. See Schedule 8 of the Constitution of Nepal for further details

46. *Ibid* Schedule 7 of the Constitution of Nepal.

ensures a unitary form of judiciary for Nepal.⁴⁷ There was no debate at all about the nature of the judiciary, except for the debate on the constitutional court during the debate in the Constituent Assembly. Similarly, the Constitution ensures eight rights-based commissions, including the NHRC, NWC, NDC, Inclusion Commission, Indigenous Commission, Tharu Commission, Muslim Commission and Madhesi Commission as a constitutional body.⁴⁸ All these commissions are of a unitary nature.

The Constitution, for the first time, gave recognition to the provincial and local bodies as a tier of the constitutional government. This is a remarkable achievement. The structure and function of the district is being debated. The powers given to the province and local levels are very limited, with most of the powers concentrated at the central level.

On many occasions, the centre will need to formulate laws for the state or federal units, while in some cases, the formulation of laws by the centre alone would be insufficient. In many issues, uniformity also needs to be maintained between the centre and the state. In relation to powers on the concurrent list, both the federation and states can formulate the law. But, as the laws formulated by the federation and states could contradict one another, the federal legislature shall develop a fundamental principle, norms and framework on the concurrent list and the provincial legislature shall follow it to formulate the necessary laws.⁴⁹

Thus, there are a lot of issues within the Constitution to promote the unitary and centralized nature of the state structure. A unitary mind-set and the attitude of the political leaders and bureaucrats are other hindrances in the implementation of the new Constitution, which may hinder the effective implementation of the newly born federal system in Nepal.

6. Potential Challenges for the Future

Nepal is presently on a normal political and constitutional course, as the government is running with two-third majority. Even though the implementation of an entirely new system given limited resources and a traditional mind-set is not an easy task, this new system is required to address the aspirations of the people. For that, Nepal needs an effective political leadership. An effective Constitution implementation requires strong political leadership, such as that enjoyed by South Africa. Ultimately, strong and dynamic leadership is necessary

47. See Article 127 of the Constitution of Nepal.

48. See part 25 and 27 of the Constitution of Nepal 2015.

49. See concept note of the State Restructuring Committee of former CA Report (page 104) at <http://www.spcbn.org.np/index.php?action=resources>

to conclude the complicated Constitution-implementation process.

While writing the Constitution by the Constituent Assembly of Nepal, considerably less attention was paid on challenging issues, such as inter-governmental relations in a federal system, functional and revenue assignments, administrative restructuring and the nature of Local, Provincial and Federal Government, among others. Raising the expectations of the public and then leaving these expectations unfulfilled left the people of Nepal frustrated and disillusioned. Promises that federalism would address all of the country's problems and the following failure to deliver on these promises are major flaws in the Constitution-implementation process.

Nepal's strategic location, fragile state institutions and unstable politics have invited competitive geopolitical pressures, which have affected the constitution-building process and political stability in the country. Different national and international stakeholders have expressed some genuine concerns about their security. However, Nepal has principally agreed to adopt democracy, rule of law, a participatory constitution-building process, respect for human rights and inclusion. While Nepal should respect the genuine concerns of its neighbours, it should not hesitate to decide on its internal affairs based on popular will and national integrity.

Frequent changes in the government exposed the degenerating nature of Nepali politics, which was in the past exposed in 'HoRse trading,' blackmail, the abduction of incumbent ministers and lawmakers, conspiracies and the manipulation of constitutional loopholes, among other things. Democracy in Nepal has suffered from weakening political norms and values, the erosion of quality leadership, power-centric intra-party and inter-party conflicts, unhealthy inter-party competition, the cynical manipulation of constitutional provisions, unstable and often changing governments, incompetent governance, excessive political intervention, particularly in the bureaucracy and educational institutions, pervasive corruption and mismanagement and irresponsibility and lack of accountability in the public sphere.⁵⁰

There are overlapping jurisdictions in many areas whose specifics need to

50. See, Krishna Hachhethu, "Nepali Politics: Political Parties, Political Crisis and Problem of Governance" at <http://www.democracy-asia.org/countryteam/krishna/Nepali%20Politics.pdf>

be sorted out in practice and unbundling of such issues through legislations. Inter-governmental coordination is one of the key challenges faced in a federal political system, and the current Constitutional provisions and practice dictate little about how Nepal intends to face such challenges. Almost all local and provincial representatives are new and working with limited capacity in terms of their technical skills and available resources. A lack of framework legislation with a clear-cut coordination mechanism for the Federation, Province and Local Government is another challenge, as they are making plans and executing them on an ad hoc basis. Currently, a Bill on Coordination among the Federation, Province and Local level is in the Federal Parliament. It is expected that, the Bill will be enacted by the Federal Parliament addressing issues relating to the coordination, cooperation and coexistence among the three tiers of government per the letter and spirit of the Part 20 of the Constitution of Nepal.

7. Recent Trends

The decentralization of power and resources from the Federal to the Provincial and Local Government level is a basic principle in Nepal's new constitution. But out in the provinces, both tiers are increasingly complaining about the exact opposite taking place.⁵¹ Most of the Provincial Assemblies are drafting laws without the section for punishment, as there is an instruction from the Federal level that, "... since Provinces do not have police to investigate cases and government attorney to prosecute such cases, keeping punishment section in the law is useless and does not have authority."⁵² The Federal and Provincial governments are in tussle now due to a number of moves from both sides. The main tussle is played out in the legislative arena. Tensions between the federal and provincial governments surfaced in October 2018 when Province 2 endorsed a Provincial Police Act before the long-awaited Federal Police Act had been finalized. The move triggered a firm response from Kathmandu.⁵³

Several federalism-related Bills the government has registered in the Parliament are against the spirit of the Constitution and federalism. The Federal Civil

51. Hans Andersen, *Centralism Under Feudalism: The Latest*, 28 January, 2019, see at <http://localnepaltoday.com/centralism-under-federalism-the-latest/>

52. *There is no formal instruction from Federal government on this issue. However, government officials from federal government claim this argument and stop Provincial Parliament to enact legislations with this section.*

53. Mireille Widmer, "Nepal's Radical Decentralization: Of Surface Winds and Deep Currents", *Institute of Development Studies*, 12 March 2019, see at <https://www.ids.ac.uk/opinions/nepals-radical-decentralisation-of-surface-winds-and-deep-currents/>

Servants Bill, the Nepal Police and Provincial Police Bill and the Peace and Security Bills drafted by the GoN can be taken as examples. Going through the provisions of these Bills, anyone can say that the federation does not want to decentralize power to the provincial and local governments. In addition, the federal government has curtailed the rights of provincial governments by appointing chief secretaries and secretaries in the provincial governments along with CDOs in the District Administration Office on its own. At least, the provincial governments should have the right to appoint secretaries, letting the chief secretaries be a bridge between the province and federal governments⁵⁴ and the CDO coordinating between the Federal and Provincial governments, either appointed by or reporting to the Provincial government. As the Bill states that the CDOs are not under the internal security ministers of the provinces, they can never be accountable to the provincial governments.

In addition, regarding the recent vacancy announced by the Public Service Commission of Nepal, lawmakers have demanded correction, saying it was against the constitution and principle of proportional, inclusive representation. Demanding to make arrangement to announce vacancy at local and province levels through the Province Public Service Commission, lawmakers stated that the incumbent has failed to carry out activities per the sentiments of the Constitution.⁵⁵ The rift between the political leadership and bureaucracy and between different tiers of government on the issues of federalism and development has adversely affected the government's functioning.⁵⁶

8. Way Forward

In fact, there is no particular formula regarding the division of power between the tiers of government. Devolution of state powers depends on the capabilities of the governments to be constituted in different federal units. Federalism has been practised as a system that guarantees freedom, equality, prosperity and human rights and cures the problems of inequality and imbalance. It has the capacity to balance the protection of individual freedom and collective identity.

Inclusive representation and fair participation is essential for a meaningful management of federalism. In this sense, federalism does not merely mean autonomy or self-rule; it also means collaboration and shared-rule. Negligence in power sharing among the tiers of the government leads towards further

54. See at <https://thehimalayantimes.com/nepal/the-government-is-against-federalism/>

55. See at <https://myrepublica.nagariknetwork.com/news/lawmakers-demand-correction-in-recent-vacancy-announced-by-psc/>

56. See at <https://thehimalayantimes.com/nepal/there-are-a-few-constitutional-complications-in-federal-provincial-government-relations/>

chaos in the country eventually. The entrenchment of Local government in the Constitution and laws would not be meaningful if the Federal government would be able to arbitrarily intervene in local decision-making and reverse decisions made by the Local and Provincial governments. The common commitment to democratic values and belief should be a uniform characteristic and a matter of priority for all the units under a federal system. Certain rights, such as foreign policy, national security, currency and foreign trade, are largely reserved for the Federal government. Considering this fact, Nepal's integrity needs to be considered while exercising federalism. It is also necessary to develop goodwill among all ethnicities, lingual communities, cultural and religious communities and geographically backward regions. In this context, Nepal's state powers should be exercised in such a way that the Federal government is strengthened and the Provincial and local Governments are empowered.

Thus, the following points can be recommended for the smooth implementation of the Constitution of Federal, Democratic Republic Nepal:

- ✓ Provisions of the Concurrent List and overlaps with the exclusive list should be clarified and resolved as soon as possible. It is known that replication always works against periphery. Such provisions should be clarified through framework legislation;
- ✓ The Federal government should formulate standard framework laws for the effective coordination and cooperation between each tier of the Government as soon as possible;
- ✓ Some items are too vague, such as 'large scale,' 'medium scale' and 'small scale' hydro power, and previous definitions of these scales might not work for forever. Such provision should be specified;
- ✓ Some other issues are also used in vague terms; one such phrase is "provincial laws on the basis of fundamental principles, standards and framework legislation determined by the federal legislature...." It is not clear from this if a province can make a law on a topic in the concurrent list in the absence of the Federal Framework Legislation;
- ✓ A Framework legislation for the Federation, State and Local Government with separate institutional arrangements for each level for the planning process would help to have effective sHoRt-term and long-term planning, budgeting and monitoring/evaluation. An integrated planning process is expected to reduce gaps and overlaps and best utilize available resources;
- ✓ A lack of Federal and Provincial Government Operation Act is a problem. Functional rules are in operation, but it was drafted by the Federal Government;
- ✓ A separate law for the implementation of the Schedules 7 and 9 of

the Constitution is necessary per Article 59(2);

- ✓ The Inter Provincial Council is not effective due to a lack of operational legislation. District council and joint structure can also be established within the Local Government on common issues. The Inter-Province Council should be strengthened with a strong Secretariat, more effective working level coordination mechanism among the Federation, Province and Local, the Province and Local, the Local, and a Local level mechanism is required in each sector of the Government;
- ✓ Fiscal Commission could have been an ideal agency to allocate resources, but it has not been formed yet. It should be formed as soon as possible;
- ✓ The Staff Adjustment Act is already in effect, but the Government is not able to manage staffs and adjust them at all levels. This issue needs to be sorted out quickly;
- ✓ Bills that are currently in the parliament need to be enacted soon, respecting the spirit of the Constitution and standard of the federal system;
- ✓ In a Federal State, a unitary mind-set is a serious problem among political actors and bureaucracy. It has to change as soon as possible. For that, massive education and advocacy-related activities need to be conducted by the State and the CSOs.

FORMS AND FUNCTIONING OF THE PARLIAMENT: SPECIFIC CONTEXT OF THE REFORMED PARLIAMENTARY SYSTEM IN NEPAL

-Khimlal Devkota¹

Abstract

This paper is a comparative study of the roles and functions of the Parliament as the highest body of the peoples' representatives in various countries and within the political systems the respective countries have adopted. The study can reveal perspectives and challenges they have faced in their part of the world. Nepal, specifically, has adopted a reformed Parliamentary System. The Constitution of Nepal has envisaged an unconventional Parliament. The pertinent question raised in this article regarding the nature of the Parliament's reforms and whether it has been reformed in terms of the law-making process, deliberation, oversight functions or otherwise.

The paper is prepared mainly based on the available texts and materials as well as some practical experiences, as opposed to British parliamentary practices. The paper also includes some recommendations of reform in the essence of the parliamentary practices.

1. Background of the Study

The main objective of the study is to explore the current status of parliamentary practices around the world. Nepali politicians have claimed that Nepal's Constitution aligns with reformed parliamentary practices that fulfil the purpose of political stability. This paper explores the question of whether parliamentary reforms are actually realized in both principle and practice. To answer this, the paper analyses features of the Nepalese parliamentary system, focusing principally on the Parliament's houses: the House of Representatives (HoR) and the National Assembly. The specific role of the HoR includes discussion about the no confidence motion, parliamentary hearings of constitutional appointment, engagement in the law making process, several functions through the committee, oversight functions and interrelationship among them. Additionally, the paper bases its conclusions on the available literature, archival documents, formal and informal discussion with the concerned stakeholders and comparison with conventional principles and practices of the United Kingdom (UK).

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2. Introduction: Forms of Parliament

Although the Parliament is constantly in the news and televised daily, much of its work remains a mystery to outsiders and is sometimes perplexing even to its own members (Walters, 2006). The paradox of our times is that we hail the victory of democracy while lamenting the fact that in many countries parliament - the central institution of democracy - is facing a crisis of legitimacy. The executive branch dominates the agenda, international cooperation and globalization have led to decision making that lacks democratic control, and people question whether current political processes are really able to produce parliaments that can represent their interests in all their diversity (Beetham, 2007). In this situation, we have to answer an important question: what is a parliament? The simple answer is that it is the highest body of the people's representative. In modern politics and history, a Parliament is a Legislative Body of the State.

Generally, a modern Parliament has three functions: representing the people, making laws, and overseeing the government via hearings and inquiries. Very recently, scrutiny² functions have been added as new practices of the Parliament. The philosophy of the Parliament is the people's representation. There are different kinds of Parliament. The kind of Parliament with constitutional monarch always has the monarch as the head of the state and head of the government is always from the member of the Parliament, like in the UK, Sweden, Denmark and Japan. It is completely different from the presidential system, in which there is a president instead of monarch. In a republic, the head of the government and the head of the State can be the same person. If this is not the case, then the head of the State will be a ceremonial position and the head of the government will always be answerable to the parliament. In terms of chambers, if a parliament is bicameral, the head of the government is elected from the lower house. In the parliamentary system, there is not much difference between the monarchy or the single or bicameral houses. Forms are not more important than essence. Therefore, the parliamentary system functions by its principles. It is always accountable to the parliament as a sovereign body of the people's representatives.

There are different parliamentary practices around the world. In the African continent, South Africa³ and Botswana⁴ have similar practices in that system, the Parliament elects the President who appoints the cabinet. In Somalia, the Parliament elects the President who then appoints the Prime Minister. The Canadian⁵ practice is different than the African one, as the leaders of the political

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2. Devkota, Khimlal. *Paper presented Legislative Scrutiny in Nepal with international Experiences at Federal Parliament organized by Legislation Management Committee, National Assembly, 2018, Kathmandu*
 3. *The Constitution of Republic of South Africa, 1996.*
 4. *The Constitution of Botswana, part II Article 42[3]*
 5. *A Consolidation of the Constitution Acts, 1867 to 1982 part III article 14.*

party that has the support of a majority in the House of Commons of Canada is appointed Prime Minister of Canada by the Governor General of Canada; the Prime Minister then appoints the Cabinet of Canada on the advice of the Prime Minister. In Asian countries, the parliamentary practices are slightly different. The President of India appoints the leader of the political party or alliance that has the support of a majority in the Lok Sabha as Prime Minister of India, who then forms the Union Council of Ministers. However, in Japan, the National Diet nominates the Prime Minister who appoints the Cabinets of Japan. In Thailand, the Monarch appoints the member of Parliament nominated by the House of Representatives. Usually the leader of the largest party or coalition. As Prime Minister, who forms the Cabinet of Thailand. But in the current junta, the appointee is nominated by the National Legislative Assembly. In Pakistan, the Parliament of Pakistan appoints the Cabinet of Pakistan.⁶

European and Nordic countries have different practices. In Denmark, the Monarch appoints, based on recommendations from the leaders of the parties in the Danish Parliament called Folketinget, the cabinet leader who is most likely to successfully assemble a Cabinet which will not be disapproved by a majority in Danish Parliament.⁷ The Finnish parliament appoints the Cabinet of Finland. However, in Germany, the German Federal Parliament, Bundestag, elects the Federal Chancellor (after nomination from the President of Germany), who forms the Cabinet. Sweden has different provisions in its Constitution. The Riksdag is the foremost representative of the people. The Riksdag enacts the laws, determines State taxes and decides how State funds shall be employed; the Riksdag examines the Government and administration of the Realm.

In Norway, the Monarch appoints the MP leading the largest party or coalition in the Norwegian Parliament called Stortinget as Prime Minister and forms the Cabinet. According to the Australian Constitution, the leader of the political party that has the support of a majority in the Australian House of Representatives is appointed Prime Minister of Australia by the Governor General of Australia, who then appoints the Cabinet of Australia on the advice of the Prime Minister. In New Zealand, the leader of the political party that has the support of a majority in the New Zealand House of Representatives is appointed Prime Minister of New Zealand by the Governor General of New Zealand, who then appoints the Cabinet of New Zealand on the advice of the Prime Minister (New_Zealand_2014). Lastly, the United Kingdom, arguably the mother of the parliamentary system, has a different tradition. The monarch appoints the MP leading the largest party or coalition in the House of Commons as Prime Minister, who forms the Cabinet.

In Nepal, the president appoints the Member of the House of Representatives as the Prime Minister who is a leader of the parliamentary party that holds

6. *The Constitution of Islamic Republic of Pakistan 1956*

7. *The Constitutional Act of Denmark of June 5, 1953.*

the majority solely or leads the coalition in the Parliament. According to the Constitution of Nepal, “the President shall appoint the leader of a parliamentary party that commands majority in the House of Representatives as the Prime Minister, and the Council of Ministers shall be constituted under his or her chairpersonship. In cases where no party has a clear majority in the House of Representatives, the President shall appoint as the Prime Minister a member of the House of Representatives who can command majority with the support of two or more parties representing to the House of Representatives...”

3. The Origin of the Parliament

The word "Parliament" comes from the French word "parler", means 'to talk'⁸ and there is evidence that citizens' assemblies were held in ancient Mesopotamia as far back as 2500 BC. (Closer Look: A sHoRt history of Parliament, n.d.). In the 14th century, the term Parliament was derived from the French term Parliament. Originally, the term referred to any discussion, conversation or negotiation through various kinds of deliberation summoned by the then Monarch. The term legislature referred to deliberative or judicial groups, often summoned by a Monarch. By the 15th century, in Britain, it had come to specifically mean the "Legislature". Since ancient times, when societies were tribal, headman custom was in practice.

Britain is arguably the mother of the parliamentary system; Thompson (1953) writes regarding parliamentary history: “Other states today have second-chamber problems: whether there should be a second chamber at all, and if so, what its powers should be, etc. But Britain, it should be remembered, has no written Constitution, no judicial review. Parliamentary sovereignty in modern times extends even to the power to amend the frame of the Government. Thus, the Lords may play a useful role in the use of the suspensory veto to check hasty or radical legislation. As an Assembly of the King’s vassals in feudal days, the Lords, of course, have a much longer history than the Commons. Only gradually did that...” (THOMPSON, F. 1953).

The democratic political history of Nepal aligns with the Parliamentary System. Presently, Nepal has the bicameral Federal Parliament, including the House of Representatives as the Lower House and National Assembly as the Upper House. The Federal Parliament of Nepal is the supreme legislative body. As per the Constitution, there shall be a Federal Legislature consisting of two Houses known as the House of Representatives and the National Assembly, which shall

8. <https://www.peo.gov.au/uploads/peo/docs/closer-look/CloserLook-SHoRt-History-of-Parliament.pdf>

be called the Federal Parliament.⁹ After the success of the April 2006 people's movement, on 15 January 2007, the previous Parliament was dissolved and replaced by the 330-member interim Legislature per the Interim Constitution of Nepal.¹⁰ The Interim Constitution was promulgated by the Legislature, and the Constituent Assembly election was held in April 2008 for the first time in the history of Nepal. The 601-member Assembly abolished the 238-year-old Monarchy and declared the Country a republic on 28 May, 2008.¹¹ Both the Interim-Legislature Parliament and the Constituent Assembly were unicameral.¹²

The second Constituent Assembly was converted into the Legislature Parliament after the promulgation of the Constitution on 20 September 2015. The earlier unicameral house was replaced by the bicameral house as per the provisions of the new Constitution. Nepal have two different chambers according to the constitution of Nepal. The House of Representatives, for a five-year term, has 275 elected members, 165 from single-seat constituencies and 110 from a proportional electoral system. The National Assembly has 59 members elected for a six-year term. Among the 59 members, three members are nominated by the President. The remaining 56 are elected from the seven provinces equally (eight each), including three females, one Dalit and one from differently able groups.¹³

The Indian Constitution also contains similar provisions regarding the bicameral Legislature. As per the Constitution, there shall be a Parliament for the Union, which shall consist of the President and two Houses, to be known respectively as the Council of States and the House of the People.¹⁴

The Parliament is the supreme Legislature with the representation of the people at large. The supreme legislative body, the federal parliament, deals with important public, national and international policy matters. With these sayings, it can be understood that the Parliament plays key roles in different capacities. The functions of the Parliament are different based on different forms of democracies. However, core roles are applied with same manner throughout the world, irrespective of the form of democracy adopted by a particular Country.

9. *The Constitution of Nepal 2015 Article 83*

10. *The Interim Constitution of Nepal, 2006.*

11. *As per the provision of the Interim Constitution the first meeting of the Constituent Assembly declared republic.*

12. *See The Interim Constitution of Nepal 2006.*

13. *The Constitution of Nepal 2015 Articles 83, 84 and 86*

14. *The Constitution of India Article 79*

4. Background Information

The Parliament is a popularly elected body of the Government that ensures responsiveness and accountability of the Government towards citizens by performing various political functions, such as engaging on political debate, forming and deforming the Government, debating on national concerns, discussing legislations and budget matters. In addition to that, the Parliament discusses governmental policies, its formulations and implementation and governance. As a sovereign body of the Country, the Parliament has a variety of functions that are crucial to a democratic society. To enable the effective discharge of these functions, the Parliament and its members have certain powers, rights and immunities that are collectively called parliamentary “privileges.”

5. Functions and Roles of the Parliament

In this age of rule of law, it is argued that each and every function of society must be governed by the law. The Parliament represents the people, not only the person but also the spirit and psychology of the masses of people. A democratic society is mainly mandated by the people’s aspirations. Therefore, the functions of the Parliament are judged by the standard of people’s mandate. Law-making is the core responsibility of the Legislature. If so, regardless of whether the law is good or bad, is it considered to be a law created to reflect the mandate of the people? Is it made for the welfare of the people or the nation? In an open and democratic society, people are encouraged to provide their input to ensure that proposals for laws are carefully considered and materialized for the people and the nation. In a representative democracy, when Parliament is in session, MPs generally spend their time working in the Parliament, whether it is a unicameral or a bicameral one. This includes raising issues affecting their constituents, attending debates and voting on new laws.

The functions of the Parliament include making laws, assuming a critical/inquisitorial role to monitor the actions and policies of the Government and scrutinizing the State’s finances.¹⁵ In democratic Countries such as South Africa, the Legislature or Parliament plays a very important role. The members of Parliament are elected to represent the people of the Country. They also act as the voice of the people. The Parliament, therefore, is accountable to the people of South Africa.¹⁶

As per the Malaysian Parliament, the functions of the Parliament have been described as followings: “The primary functions of Parliament are to make

15. <https://www.parliament.gov.sg/about-us/parliament-information/functions>

16. <https://www.parliament.gov.za/what-parliament-does>

laws, to represent the people, and to provide scrutiny and oversight of Government."¹⁷ Additionally, the Parliament is "the legislative authority for the Federation and it enacts laws to be enforced nationwide. Parliament passes Federal laws, makes amendments to existing Federal laws, examines the government's policies, approves the government's expenditures and approves new taxes.

Additionally, the Malaysian Parliament "also serves as the forum to discuss matters of public interest. To enable Parliament to undertake its responsibilities fully and effectively, the Constitution confers certain rights and legal immunities under "Parliamentary Privileges" to Members of Parliament. Each House is empowered to regulate its own procedure; each has exclusive control over its own proceedings, the validity of which may not be questioned in any court; and each House can penalize its members for breaches of the privilege or contempt of that House. In general, Members of Parliament individually enjoy immunity from civil and criminal proceedings in respect of things said or done by them in Parliamentary proceedings.¹⁸

6. Law Making

Of course, the Parliament is the supreme legislative body of as well as a major organ of the State. The formal and legal bodies, in which elected representatives assemble, debate and pass new laws or amend the existing laws. The most important function of the Parliament is law making. The Constitution is considered as the fundamental law of the land. Where there is a tradition of written Constitution, it is also made and amended by the Parliament per the rules of procedure of the Parliament. Most Parliaments practice two types of Bills: Government and private Bills. Mostly Money Bill and Bills relating to the security forces are considered as Government Bills, which can be tabled and moved forward only by the Government.

Except a money and security related Bills, any individual Member of Parliament [MP] can table and move forward any Bill in the Parliament. According to the Constitution of Nepal, "[a] Money Bill and a Bill concerning a security body including the Nepal Army, Nepal Police and Armed Police Force, Nepal shall be introduced only as a Government Bill". Subject to the provisions of Articles 109 and 117 with respect to Money Bills and other financial Bills, a Bill may originate in either House of Parliament.

Additionally, there are different traditions in practice in the law-making process. In some countries, governments take initiatives, while in others, there

17. <http://www.naurugov.nr/parliament-of-nauru/about-parliament/what-does-parliament-do.aspx>

18. https://www.parlimen.gov.my/fungsi.html?uweb=p&lang=en&_print=true

is a tradition whereby MPs take initiative to make the laws and the title of the law is also recognized by the name of the particular MP. When discussing authority, consider the arguments presented by Hobbes, Locks and Rousseau. For example, in his book *Leviathan*, Thomas Hobbes argues, "It is a real unity of them all in one and the same person, made by covenant of every man with every man. In such manner as if every man should say to every man: I authorize and give up my right of governing myself to this man, or to this assembly of men, on this condition; that thou gives up, thy right to him, and authorize all his actions in like manner."

For a long period in human history, similar practices have been carried out with some reform and update. In each and every parliamentary system, the law-making processes are almost the same. The Parliament is responsible to form the Government, and the tenure of the Government depends on the trust of the Parliament. The law-making job is the exclusive right of the legislature, but initiation has to be taken by the Government. At first, the Government has to feel an urgency for the law after research. If the Government reaches a conclusion that the existing laws are not sufficient to perform the task, then with the consent of the Council of Minister, the drafting process moves forward. After a long and rigorous process, involving consultation with concerned stakeholders, the legislation will be registered in the Parliament. In most of the parliamentary system, money Bill and Bill related with security are exclusive domains of the Government, whereas the rest of the Bill can be registered by the individual MP. The whole process of law-making and policy-making through Parliament is within the core understanding of parliamentary sovereignty. This is borrowed from the British constitutional principles debated as followings:

The idea of Parliamentary sovereignty is considered as a constitutional theory in British tradition. Two general explanations for this idea are considered: firstly, that the existence of a sovereign entity is a conceptually necessary precondition for the existence of a State or Constitution; secondly, that Parliament is sovereign, if it is, in virtue of a rule of recognition whose existence and content may be empirically determined. (Lakin, 2008)

Jeffrey Goldsworthy, in his book *Parliamentary Sovereignty: Contemporary Debates*, offers a modern defence of the doctrine of parliamentary sovereignty, although critics of parliamentary sovereignty argue that parliamentarians are imprisoned by the doctrine of sovereignty. But Goldsworthy fails to offer a sufficiently clear interpretation of the statement that the Parliament can do anything except limit its powers, a statement open to many different interpretations (Bogdanor, 2012)

In the context of the reformed parliamentary practices of Nepal, most of the legislations have been drafted by the Government authority. The provisions about private Bills in the Constitution have been rarely utilized. With a majority

in the Parliament, a Government Bill will rarely fail in the Parliament, which means that the right of legislation has unknowingly shifted towards executive. This is not a reform.

7. Budget Making

Concept: No taxation without representation is a famous statement regarding the parliamentary system originating from England. The Government executes the purse, but it is mandated by the Parliament. There is no doubt that the executive controls the money, allocates the budget and spends it per its plans, but approval has to be sought from the Parliament. The Parliament is the people's representative; thus, without approval from the people's representatives, monetary decisions cannot be made, and in the case that they are, such decisions can be called null and void. According to the Organisation for Economic Co-operation and Development (OECD) Principles of Budgetary Governance, "the budget is a contract between citizens and State, showing how resources are raised and allocated for the delivery of public services. Such a document must be clear, transparent and credible if it is to command trust, and to serve as a basis of accountability."¹⁹ According to a World Bank Group study, "trade-offs and prioritization among programs must be made to ensure that the budget fits Government policies and priorities. Next, the most cost-effective variants must be selected. Finally, means of increasing operational efficiency in government must be sought. None of these can be accomplished unless financial constraints are built into the process from the very start."²⁰

Process: The process of money Bill is quite different from other Bills. Money Bill is presented only by the Government based on policies and programs. In the phase of pre-budget discussions, priorities and principles are the focal. This tradition started per the legislative process of the Parliament. In a legislative process, there is always a chance to present amendments; however, money Bill is an exception. Money Bill will be effective then and there. Therefore, in the legislative process of money Bill, there will be no chance to move amendment as other Bills. However, as a gesture, one can register theoretical reservation. This is the unique nature of the amendment system of money Bill.

According to the Constitution of Nepal, Money Bill is considered to be a privilege of the executive. Per the constitutional provision of Article 110(2), "a Money Bill and a Bill concerning a security body including the Nepal Army, Nepal Police and Armed Police Force, Nepal shall be introduced only as a Government Bill." Again, the principle of no taxation without representation has been violated impliedly.

19. Draft recommendation of the OECD council on principles of budgetary governance 2014

20. <http://www1.worldbank.org/publicsector/LearningProgram/PEAM/DorotinskyBackCh4.pdf>

8. Deliberation

Concept: Another major task of the Parliament is deliberation. The Parliament is a sovereign body elected by the sovereign people. Individual parliamentarian represents the people in the name of voters in the Parliament. Peoples' voices have to be reflected in the Parliament as the true exercise of people's sovereignty.

More specifically, "deliberation in parliaments aspires to convey to the public the justification to general norms mandatory for all. Deliberative theory looks at the normative and empirical implications of this institutional role. In deliberative theory, parliamentary debates are supposed to transform the political discourse of the public sphere into a more controlled forum" (Tschentscher, Bächtiger, Steiner, & Steenbergen, 2010) The objective of the deliberation in the Parliament is to ensure that people's demands and voices are taken into account by the Government and that an appropriate and legitimate forum is available for discussion on the public issues that represents the people.

People at large are eagerly waiting to listen and see their representatives in the Parliament. It is a forum to ensure that parties in Parliament duly attempt to reflect the people's voices. Representation in Parliament is not only a formal business; it is beyond that. Each and every individual MP attempts to represent the people in his or her constituency with his/her language, traditions, culture and communities. It means that the people are looking for their castes, communities and regions, whether or not they voted for the said representatives. Additionally, the quality of discourse in parliamentary debate is not the only criterion of legitimating, and "deliberation in Parliament is, after all, only one relatively small feature within a number of criteria. The diversity of criteria is due to the multi-levelled concept of discursive legitimating..." (Tschentscher et al., 2010)

Process: Deliberation takes place in different modalities and each and every time elected representatives represent their voters. The Parliament is an appropriate forum to do that. Zero hour is quite an interesting time for the people and representatives both. This is because zero hour is unplanned but urgent. It links the people through the voice of the Parliament. Role playing in the Parliament through the law- and policy- making process is an indirect but a long-term, strategic type of representation. The third type of representation is a very informal way of giving guardianship, partnership and mentorship representation.

It is the practice of deliberation in the Parliament to allocate time to respective parties based on the number of members. Parliamentary parties and business advisory committees deal with the time for deliberation in the Parliament, which is entirely against the sovereignty of the Parliament, and at the same time, it is against the principles of Parliamentary System.

9. Oversight

As outlined in the Tools for Parliamentary Oversight, published by the Inter-Parliamentary Union (IPU), the key functions of parliamentary oversight can be presented as follows: to detect and prevent abuse, arbitrary behaviour, or illegal and unconstitutional conduct on the part of the Government and public agencies. This function includes monitoring the achievement of goals set by legislation and the government's own program, improving the transparency of Government operations and enhancing public trust in the Government (Yamamoto & Inter-parliamentary Union, 2007). Checks and balance and the theory of the separation of power are modern theories of democracy. Without proper checks and balances, democracy will not sustain. The objective of the oversight function given to the Parliament is to limit the Government. Limited Government is a fundamental facet of democracy. The executive has all the power to rule the country, though they are not beyond control. The Parliament has to conduct oversight of Government activities all the time on behalf of the people.

Concept: The core concept of oversight is to detect and prevent abuse, arbitrary behaviour or illegal and unconstitutional conduct on the part of the Government and public agencies. At the core of this function is the protection of the rights and liberties of citizens and holding the Government accountable with respect to how the taxpayers' money is used. It detects waste within the machinery of Government and public agencies. Thus, it can improve the efficiency, economy and effectiveness of the Government operations and ensure that policies announced by the Government and authorized by Parliament are actually delivered. This function includes monitoring the achievement of goals set by legislation and the government's own program, improving the transparency of Government operations and enhancing public trust in the Government, which is itself a condition of effective policy delivery (Yamamoto & Inter-parliamentary Union, 2007).

Process: The process of oversight is common in terms of the basic principles around the world. Observing the Government functions and maintaining appropriate checks and balance from the Parliament are normal functions of oversight. In the full house, asking the direct questions to the Ministers and Prime Minister is a normal and effective way of oversight function. Giving a speech on government actions to draw attentions of the Government and concerned agencies is also another kind of oversight function of the Parliament. Sometimes proposal of special urgent discussion in the presence of the Government is introduced on behalf of the people - as a special kind of oversight function. Oversight from the different committees of the Parliament is also another effective tool of check and balance. Parliamentary committees are considered to be mini Parliaments. Such a mini Parliament has a special privilege to investigate, observe, conduct field visit, hold discussion with the experts and

offer appropriate recommendations to the Government, all as specific processes of oversight function. Both a vote of confidence and vote of no confidence are equally important tools of Government control. A comparative study of 88 national parliaments carried out by Hironori Yamamoto stated:

When the Government or some of its members seem, in the eyes of Parliament, to be failing to carry out their duties, Parliament can initiate procedures which have the potential to replace all or part of the Government. There are two different types of procedure. One is the withdrawal of confidence in the Government or in individual ministers. The other is a decision to the effect that conditions specified in the Constitution for the removal of the office holder have been met. These measures are, in a sense, a last resort. The requirement for a certain minimum number of votes to be obtained before such motions can be initiated or passed highlights the relative strengths of the different political groups within parliament. Where the Government has a Parliamentary majority, it can usually count on that majority to block the motions... (Yamamoto & Inter-parliamentary Union, 2007).

There is ample debate about the roles and functions of the Parliament on oversight. Some wrong practices have also prevailed, such as the court stay order or interlocutory order, which have mimicked the function of the Parliament and committees in the name of oversight. In this connection, another research on Parliament library states;

... at least five types of parliamentary oversight committees can be identified: (a) legislative review committees which scrutinize government and other Bills; (b) Public Accounts Committees concerned with the supervision of public finance; (c) estimates committees to examine the appropriations of Government departments and agencies; (d) other select or standing committees concerned with the scrutiny of policy and administration; and (e) the more recently established specialized oversight committees for the supervision of independent investigatory bodies. The mandate of the first is to guard against legislative invasion of individual rights, the second to guard the public purse, the third and fourth to stand guard as watchdogs over the Executive, and the fifth to guard the guardians of integrity. ... (Griffith, New South Wales, Parliament, Library, & Research Service, 2005).

Nepal's experiences are varied. Parliamentary Committees have started monitoring by conducting field visits and issuing stay order. Such practices rarely happen in conventional parliamentary system.

10. Scrutiny

Concept: In a governmental system, each and every law has to have meaning and necessity. The meaning of the law can be assessed in practice, i.e. in its implementation. The objective of the law can be met only after effective implementation. Effective implementation can be ensured only by an appropriate law, which can be ensured only after the law is created after proper research. Therefore, pre-, in process and post-legislative scrutiny are effective tools to ensure the effective implementation of legislation. If circumstances arise because of an absence of law or inappropriate or inadequate law, the Government is directly accused because it demonstrates the ineffectiveness of the Parliament. Therefore, scrutiny is a duty of the Parliament. If the Parliament performs its duty properly, then the State will be effective and credible.

The “Principles for Post-Legislative Scrutiny by Parliament” is a policy document aimed at assisting Parliaments interested in initiating or strengthening practices of Post-Legislative Scrutiny (Post-Leg). It summarizes relevant practices based on lessons learned from parliaments in the UK and partner parliaments of the Westminster Foundation for Democracy (WFD). The Principles discusses the mandate to conduct a Post-Legislative Scrutiny in Parliament (the “why”), the scope (the “what”), the participants (the “who”), the processes (the “how”) and the timing (the “when”) (Vrieze, 2018).

Post-legislative scrutiny is a broad and undefined expression, which means different things to different people. The best approach to defining post-legislative scrutiny is to consider what its purposes and benefits should be, as described below. Once the law is promulgated, the role of the Parliament is to control the application of the law. However, there are different practices between countries with regard to post-legislative scrutiny.

Process: Pre-legislative scrutiny can be applied for proper research. By doing research, the necessity of law and its outcome can be examined. If needs and outcomes are practical, duable and affordable, then the result will be positive. For the law-making process, if such kinds of research have been conducted, then the implementation level would be high. If the implementation of the law is effective, then the impact goes to the Government, and people will perceive the Government to be effective.

11. Other Functions of the Parliament

In a Scottish parliamentary debate of 1621, it was stated that “[t]his Parliament saw two controversial Government proposals: Articles of Perth which introduced Anglican-style ceremonies into church a new tax on interest payments. A rare division list serve...” (Goodare, 1995). This is an example of a debate of

division and compromise. Only the debate and division will unite the country, and the culture of reconciliation will also prevail. Therefore, a major function of the Parliament is to protect the nation and people, rather than engage in meaningless debate and division.

In addition to the above-mentioned major functions, Parliaments have to do many other tasks as well. Forming and reforming the Government, creating laws and policies for the country and amending the Constitution and ordinances issued by the President at the recommendation of the Council of Minister. There are various ways to represent the people, including by questioning the Prime Minister and Ministers in the Parliament. There will be checks and balance of the Government and representation of the peoples and constituencies. The budget-making function is a core function of the Parliament. If the budget fails, then Government will also have to step down then and there.

Deliberation in Parliament is used for the implementation of the budget and plans of the Government. Therefore, discussion in Parliament can take any form, regardless of whether it passes or fails. Examining and approving Government budget (including taxes and spending) is important, especially considering that the Parliament holds the "power of the public purse" and the obligation to hold the executive accountable. Forming and sustaining the Government (the executive) is also another important task of the Parliament, as are holding the Government accountable and/or exercising control over the executive and redressing grievances of the people serving respected constituents/regions forming national and social identity, among others.

12. Parliamentary System in Nepal

Article 90 of the Nepalese Constitution provides criteria for the disqualification of a member of Parliament. The decision to declare disqualification of any elected member can be made by the Constitutional Bench of the Supreme Court, not any electoral tribunal. This is a unique provision for a Parliamentary System of the world. As per the provision, "if a question arises as to whether any member of the Federal Parliament is disqualified or has become disqualified under Article 87, the Constitutional Bench of the Supreme Court shall finally decide on that matter"(Constitution of Nepal). According to Article 91, "there shall be one woman out of the Speaker and the Deputy Speaker, and the Speaker and the Deputy Speaker of the House of Representatives shall be representatives from different parties." Article 93 has a provision for summoning a session within thirty days of the declaration of the final results of the election to the House of Representatives. Thereafter, "the President shall, from time to time, summon sessions of both or either of the Houses pursuant to this Constitution... provided that the interval between the two consecutive sessions shall not

exceed six months." The quorum is mentioned in Article 94 and addressed by the president in Article 95. Article 97 is for Committee System.

Provisions relating to a vote of confidence and motion of no-confidence reflects a unique management by the Nepalese Constitution to fulfil the objectives of political stability. The provision is claimed to be a reform in the Parliamentary System. According to Article 100 of the Constitution of Nepal, "the Prime Minister may, whenever he or she considers necessary or appropriate to show that he or she has confidence from the House of Representatives, table a motion to that effect in the House of Representatives for the vote of confidence." If the political party that the Prime Minister represents is divided or a political party in coalition Government withdraws its support, the Prime Minister shall table a motion in the House of Representatives for a vote of confidence within thirty days. If a motion is tabled but failed by a majority of the total number of the then members of the House of Representatives, the Prime Minister shall be relieved of his or her office. One-fourth of the total number of the then members of the House of Representatives may table a motion of no-confidence in writing that the House has no confidence in the Prime Minister, provided that a motion of no confidence shall not be tabled until the first two years after the appointment of the Prime Minister and until another one year after the date of failure of the motion of no confidence once tabled.

This is a new addition in Nepalese Constitution. Provisions relating to vote of confidence and motion of no-confidence included in article 100 are different than other parliamentary practices, as "a motion of no confidence shall not be tabled until the first two years after the appointment of the Prime Minister and until another one year after the date of failure of the motion of no confidence once tabled. A motion of no confidence to be tabled shall also indicate the name of a member proposed for the Prime Minister". According to Article 82, the business of the Government of Nepal shall be allocated and transacted in accordance with the rules approved by the Government of Nepal.

Similarly, there exist provisions stating that no question may be raised in any court as to whether or not the rules have been observed. As per the Article 81, the Prime Minister shall inform the President about the resolutions of the Council of Ministers, Bills to be introduced in the Federal Parliament, current general state of affairs of the country and matters concerning foreign relations. Article 78 has mentioned very clearly that it is not possible for a non-member of the Federal Parliament to be a Minister. The Constitution stipulated that "notwithstanding anything contained in clause (9) of Article 76, the President may, on recommendation of the Prime Minister, appoint a person who is not a member of the Federal Parliament as a Minister. However, the non-member appointed as a Minister must obtain membership of the Federal Parliament within six months from the date of taking oath. In the event of failure to obtain

membership of the Federal Parliament within the six-month period, he or she shall not be qualified to be reappointed to the office of Minister during the term of the then House of Representatives. Notwithstanding anything contained in the clause, a person who has been defeated in the election to the then House of Representatives shall not be qualified to be appointed to the office of Minister as mentioned during the term of such House of Representatives.” It is also a new clause added in the Constitution claimed as reformed Parliamentary System. It is intended as an honour to the people’s mandate.

Based on these constitutional provisions of Nepal, one can say that it is not a Continuation of traditional parliamentary systems but a reformed one. Nepal is a Federal Democratic Republican Country. Recently, the country has turned from a unitary to a federal, a monarchical to a republic, a Hindu kingdom to a secular and an exclusionary to an inclusionary type of politics. These basic structures have been specified through the Constitution. The Constitution itself is, to an extent, a by-product of the conflict transformation. The Constitution is a precious product of the Constituent Assembly. It means the Constitution is a result of rigorous negotiation. It means the Constitution is a by-product of compromise. The multiple conflicting parties were divided into two sides; earlier they were divided into status quoists and revolutionaries. Later again, they were divided into federalist and anti-federalist. Likewise, conflict between republicans and monarchists was crucial. There were also divisions among identity-based federalists and viability-based federalists. Finally, all stakeholders reached a compromised solution in the form of a Constitution. That is the reason why we have adopted a Parliamentary System, but the processes of vote of no confidence motion and dissolution of the house are not conventional. This is contradictory to the set conventional Parliamentary System.

The Nepalese Constitution has adopted a mixed electoral system as the first-past-the-post (FPTP) and proportional representation (PR) systems for the House of Representatives and Provincial Assembly, but at the local levels, it has adopted only the FPTP system. For the National Assembly, the single vote transferable system has been adopted, whereas the Electoral College elects the President and Vice President. The Constitution has adopted different electoral systems for different posts. Generally, a Parliamentary System understands parliamentary supremacy. Parliamentary process controls the executive, which means the parliament produces the executive. Once the executive loses the confidence of the Parliament, then and there, it will either resign from the post or call for fresh election by dissolving the house. The result will be executive replacement either by another Government or through fresh election.

If questions arise in Parliament, then the Government has to present proposals of confidence in the Parliament. The Government is always under the control of the Parliament. When a Government loses the confidence of the Parliament,

it is left with two choices: either to resign or to dissolve the Parliament and announce fresh election. However, Nepal's Parliamentary System is a reformed one. Due to the incessant instability in the yester-years, the new reformed system sought to ensure stability. For this purpose, the Constitution has some peculiar provisions that restrict vote of no confidence motions. No confidence motions are allowed only twice over one session's time period. The number of the Cabinet Ministers is limited to no more than 25.

13. Conclusion

Peace and security is the major concern of this time; therefore, the people are asking for the policing of the Police. In this way, the Parliament's role for good governance by policing the Police is another vital one, which has been mentioned in a popular research done by the DCAF - Geneva Centre for Security Sector Governance:

An elected Parliament is another important feature of a democratic polity. It has a mandate to represent the people and dutifully pursue matters of public interest. As democratically elected representatives of the people, among its many mandates, Parliament is tasked with overseeing the state apparatuses authorized to bear weapons for the protection of the State and its people, more specifically the military, police, intelligence services, and militias. It is Parliament's role to ensure that the security sector is effective and accountable ... (Born, 2017)

While we are talking about the forms and functions of the Parliament, there is no uniformity in the system. Except basic norms of the system, there have been different practices. Practices are developing along with their socio-economic and culture-specific values. Parliamentary democracy is the oldest and a tested democratic system of the world, though some countries are also looking for alternatives. Democracy and the doctrine of the separation of powers are considered as a part and parcel. At the same time, the separation of power and the theory of checks and balances are also other crucial developments. Checks and balances between the executive and the legislature are more important. The executive is a product of the legislature in a parliamentary system, though it is always under the control of the Legislature. The Executive has to be accountable to the Legislature for its actions. The oversight function is the real life of the Parliament. Through this life, the Parliament represents the people and controls the Executive. An oversight mechanism strengthens the Executive and always ensure a limited Government, which is fundamental to democracy. The core values upon which the Parliament stands are professionalism, integrity, independence, accountability, responsiveness, teamwork and confidentiality.

The Nepalese Parliament has added some unique features on the no confidence

motion, Parliamentary hearings and the limited number of Ministers, including special checks against defeated candidates for appointment to a ministerial post. The Nepalese Constitution has adopted some of these peculiar features in trying to reform the conventional Parliamentary System.

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FUNDAMENTAL RIGHTS IN NEPAL: SOME THOUGHTS

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1. Background

The modern concept of fundamental rights owes its origin to human rights. These rights now have been the conscience of each modern Constitution. The purpose of fundamental rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for all. The constitutional guarantee of fundamental rights basically rests on two foundations: (1) that the rights are entrenched in such a way that they may not be violated or interfered with by an oppressive Government, and (2) that the rights can only be amended by a formal process of constitutional amendment, not by ordinary legislation. It is in this way that a "Bill of Rights" confers justiciable rights to citizens that can be enforced in a court of law and constitutes a set of restrictions and limitations on Government action. This function ultimately helps establish a limited Government with liberated people.

The fundamental characters of fundamental rights can be summarized at least in the following four points.

1. Enforceable: They can be enforced through the courts against the Government.
2. Mandatory: They are binding on the part of the Government and provide remedy against the State.
3. Restrictive: They constitute restrictions and limitations on Government actions.
4. No Waiver: They cannot be voluntarily waived.

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The question, can a person waive any of his/her fundamental rights guaranteed by the Constitution, is a debatable one. Various schools of thoughts are prevalent. In India, the Supreme Court has made remarkable pronouncements in this regard. In *Behram v. State of Maharashtra*,² the Court, by dividing fundamental rights into two broad categories (i.e. rights conferring benefits to the individual and rights conferring benefits to the general public) said that fundamental rights were not included in the Constitution merely for individual benefits. The Court's verdict, thus, clearly gave the message that there were certain basic rights that could not be waived by an individual.

The question of waiver of a fundamental rights was more fully discussed in *Basheshar Nath v. I. T. Commissioner*,³ in which the Court categorically pronounced that Article 14 (of the Indian Constitution) cannot be waived, for it is an admonition to the State as a matter of public policy with a view to implement its objective of ensuring equality. No person can, therefore, by any act or conduct, relieve the State of the solemn obligation imposed on it by the Constitution. None of the fundamental rights can be waived by a person. The fundamental rights are mandatory on the State and no citizen can, by his any act or conduct, relieve the State of the solemn obligation imposed on it. The Constitution, therefore, makes no distinction between fundamental rights enacted for the benefit of an individual and those enacted in public interest or on grounds of public policy. In this case, the minority judges took the view that an individual could waive a fundamental right which was for his benefit, but he could not waive a right which was for the benefit of the general public. This was reiteration of the view expressed by Justice Venkataraman in the *Behram v. State of Maharashtra* case.

Another reference may be made to the decision of a Constitutional Bench of the Supreme Court of India in *Olga Tellis v. Bombay Municipal Corporation*,⁴ wherein it was held that there cannot be any estoppels against the Constitution and that a person cannot waive any of his/her fundamental rights conferred upon him/her by the Constitution, by any of his/her act or conduct. The Court further held that any concession given to a person to waive the fundamental rights would defeat the purpose of the Constitution.

2. Modern Trends

Life, liberty and the pursuit of happiness are the inalienable rights of the U.S. Constitution. That to secure these rights, Government is instituted among men deriving their just powers from the consent of the governed. The adoption of

2. AIR 1955 SC 123.

3. AIR 1959 SC 149.

4. AIR 1986 SC 180.

the Bill of Rights by the first ten amendments to the US Constitution executed on Dec 15, 1791 gave the basis for civil rights and civil liberties for the first time in written Constitutions' history. The contents of the Bill of Rights adopted by the amendment included freedom of religion, freedom of speech, freedom of the press, freedom of peaceful assembly and the freedom of the people to petition the Government for a redress of grievance.

The Bill of Rights, however, limited the powers of only the National Government, not the States. With the ratification of the fourteenth amendment in 1868, there was a new basis for applying (extending guarantee) the Bill of Rights to the States. Its due process and equal protection clauses provide that "no State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The fourth amendment to the U.S. Constitution guaranteed the people a right "to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." That guarantee was interpreted in *Olmstead v. United States*, 277 U.S., 438 (1928) as to not cover wiretaps because a majority of the Court limited the amendment's application to framers' conception of "unreasonable searches and seizures." This give the lowest level of generality to the amendment's principle, so as to bar only actual physical trespass by police and the seizure of tangible materials.

By contrast, dissenting Justice Louis argued for a broader conception of the amendment and a more general principle of privacy in the home that would have extended the guarantees of the amendment to cover electronic surveillance. Almost forty years later, in *Katz v. United States*, 389 U.S., 347 (1967), the Court finally embraced the broader principle of the fourth amendment: protected privacy. The fourteenth amendment guarantees "the equal protection of the laws." Its due process and equal protection clauses provide that "no State shall deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The prevailing view of the Bill of Rights in the 18th/19th century was well-stated in 1833 by chief justice John Marshall. In *Barron v. The Mayor and City Council of Baltimore*, after reviewing the history of the Bill of Rights, Marshall concluded that there was "no expression indicating an intention to apply Bill of Rights to the State Governments." *Barron* was reaffirmed in *Permoli v. New Orleans* (1845) and in *Mattox v. United States* (1894). Ratification of the fourteenth amendment in 1868, however, changed the constitutional landscape and laid a new basis for applying the Bill of Rights to the States. The American Supreme Court is credited with regard to the freedom of speech the case *Fiske v. Kansas* (1927), to the freedom of the press the case *Near v. Minnesota* (1931) and the case *Hamilton v. University of California* (1934) for the purpose of freedom of the religion.

3. Extension of the Rights of Due Process

The Court subsequently extended due process-based requirements in *Wisconsin v. Constantineau* (1974), for the public posting of the names of people deemed unfit to consume alcoholic beverages, in *Richardson v. Wright* (1972), requiring the opportunity to offer oral evidence and to cross-examine witnesses in a hearing before the termination of disability benefits, and in *Arnett v. Kennedy* (1974), holding that federal employees must be accorded minimum procedural guarantees as afforded by federal law before having their employment terminated. The court upheld for both procedural and substantive due process then.

The court, in *Vitek v. Jones* (1980) and upholding the procedural due process, ruled that a hearing was required before the transfer of prisoners to State mental health institutions for involuntary commitment. The court in *County of Sacramento v. Lewis* (1998) upheld substantive due process protection of innocent people injured by police action.⁵

4. Nepal's Context

In Nepal, the idea of a constitutional Bill of Rights as way of protecting civil liberties of the people dates back to 1948, from where the history of writing the Constitution began. The Government of Nepal Act, which was declared on 15th January of 1948, guaranteed fundamental rights for the first time, notably, the right to personal liberty, freedom of expression, freedom of publication, freedom to form an association or organisation, freedom of religion, equality in the eyes of law, affordable and timely justice, free and compulsory elementary education, to vote and to property. This Constitution was promulgated prior to the promulgation of the Universal Declaration of Human Rights in 1948.

Due to internal conflict among the Ranas, the oligarchic rulers of the time, the first Constitution collapsed without ever being enforced. In its place, King Tribhuvan promulgated the Interim Government of Nepal Act, 1951. In this Constitution, fundamental rights were contained under the directives principles

5. "Class action suits" are the new trends developed for the protection of civil rights and liberties – these suits are filed by an individual for himself and for all others who have suffered the same injury. This rule enables individuals who have suffered small monetary damages to bring lawsuits that they might not otherwise have brought because of the prohibitively high cost of litigation. See also, *Elsen v. California* (1974).

and policies of the state and, hence, were merely directives to the Government in the governance of the state, not protected rights. Accordingly, the violation of these rights could not be questioned in a court of law. The rights inserted under the directive principles of the state in the 1951 Constitution included, among others,⁶ freedom of speech and expression, freedom of peaceful assembly, freedom to form an association or organization, freedom of movement within the territory of the kingdom, freedom to reside and settle in any part of the kingdom, freedom to acquire, enjoy and sell property and freedom to practice any trade, business, occupation or profession.

The Constitution of the Kingdom of Nepal, 1959 replaced the Constitution of 1951 and was the first Constitution to guarantee fundamental rights and ensure the power of judicial review to the judiciary.⁷ The rights guaranteed to the people under this Constitution were, among others, the right to life and personal liberty, right against human trafficking, slavery and forced labour, right against the use of ex-post facto laws, the right against double jeopardy, the right against self-incrimination, right to be informed of the grounds of arrest, right to consult and be defended by a legal practitioner (if detained in custody), right to be produced before a judicial authority within 24 hours of arrest, right against preventive detention, right to equal protection of law, and right against discrimination on grounds of religion, race, caste, gender, place of birth or any of them in the application of the general law, right to religion, right to property, right to political freedom (expression and publication), right to assemble without arms and to form unions and associations and the right to move throughout the kingdom and reside in any part thereof.

The 1959 Constitution, for the first time in the history of constitutional laws in Nepal, guaranteed the right to remedy as a fundamental right of the people. The court was also granted the power to issue necessary and appropriate orders and writs, including the writs of habeas corpus, mandamus, certiorari, prohibition and quo warranto for the enforcement of the rights conferred by the Constitution.

6. Article 16, *The Interim Government of Nepal Act, 1951*

7. Preamble, *Constitution of the Kingdom of Nepal, 1959*

In 1960, the late King Mahendra suspended the Constitution of 1959 and dissolved the Parliament. He promulgated a new Constitution in 1962 based on a party-less system (the Panchayat system).⁸ The fundamental rights in this Constitution included the right to equal protection of law, right against discrimination on grounds of religion, race, caste, gender, and place of birth in the application of general law, right to life and personal liberty, right to freedom of expression and publication, right to assemble peaceably and without arms, right to form unions and associations, right to move throughout the kingdom and reside in any part thereof, right to acquire, own, sell and otherwise dispose of property, right against exile, right against exploitation, right to religion, right to property and the right to Constitutional remedy. The Constitution of the Kingdom of Nepal, 1990 diverged from all preceding Constitutions of Nepal. Compared to previous Constitutions, it was considered both a democratic and liberal Constitution.

The 1990 Constitution was replaced by the Interim Constitution of Nepal, 2007, which was promulgated by the then House of Representatives and approved by the then Interim Legislature. The Interim Constitution 2007 guarantees, among other things, the right to life, right to (criminal) justice, right against preventive detention, right against torture, right against exploitation and right against exile as basic human security rights. The Interim Constitution also established Nepal as a republic and vested state authority along with sovereignty in the Nepali people. Justice, peace and development are some of the perennial aspirations of the Nepali people that have endured throughout the saga of Nepal's existence as a nation. The Interim Constitution of 2007 aimed to bring about the desired peace and development through the restructuring of the state.

Hence, it can be seen that Nepal has constitutionally protected fundamental rights since 1948. The ideas of a Bill of Rights and forms of expression of people's fundamental rights have been evolving throughout the course of Nepal's constitutional history. This evolution continued during the drafting of the new Constitution by the Constituent Assembly in the form of the Bill of Rights.

8. *Constitution of the Kingdom of Nepal, 1962*

5. The List of Rights under the 2015 Constitution

The Constitution has provided a list of 31 fundamental rights of the people. The list of Bill of Rights embodied in the Constitution includes the right to live with dignity, right to freedom, right to equality, rights regarding mass communications, rights regarding justice, rights of victims of crime, right against torture, right against preventive detention, right against untouchability and racial discrimination, right to property, right to religious freedom, right to information, right to privacy, right against exploitation, right to environment, right to education, right to language and culture, right to employment, right to labour, right to health, right to food, right to shelter, rights of women, rights of children, rights of Dalits, right to family, right to social justice, right regarding social security, rights of consumers, right against exile and rights regarding implementation of fundamental rights and Constitutional remedy. This is the first time in the constitutional history of Nepal that such a long list of fundamental rights has been provided for to the Nepali people.

The Constitution contains a comprehensive list of fundamental rights, including some new generation rights. The most notable new rights are discussed below.

Right to Live with Dignity: The 1990 Constitution guaranteed personal liberty to the people.⁹ The Supreme Court of Nepal, in its pronouncement in *Surya Prasad Dhungel v. His Majesty's the Government* (1992), interpreted the right to personal liberty as inherently including the right to live with basic human dignity and security. The Interim Constitution of Nepal, 2007 clearly states every person shall have the right to live with dignity and that no law that provides for capital punishment shall be made.¹⁰ In the new Constitution, as a continuation of the protection of the Interim Constitution, the right to live with dignity has been guaranteed and creating any law that provides for capital punishment is prohibited.

In Nepal, the right to live with (human) dignity is a new right. This right implies that life is something more than mere animal existence, and the prohibition of the deprivation of life extends to all those limits and faculties by which life is enjoyed. The International Covenant on Civil and Political Rights 1966, to which Nepal is state party, recognises that the right to life is the supreme right

9. Article 12(1), Constitution of the Kingdom of Nepal, 1990

10. Article 12(1), Interim Constitution, 2007

from which no derogation is permitted, even during times of public emergency. It requires this right to be protected expressly by law by signatories to the Covenant. Moreover, it requires that in countries that have not abolished the death penalty, a death sentence may only be imposed for the gravest of crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the International Covenant on Civil and Political Rights or those of the Convention on the Prevention and Punishment of the Crime of Genocide 1948. It also stipulates that the death penalty can only be carried out pursuant to a final judgment rendered by a competent court.¹¹

Equal Protection of Laws and Equality in Results or Benefits: There are at least two facets of the equality in constitutional protection: equality before law and equal protection of laws. The first concept is a negative concept that ensures that no special privilege is given in favour of any one, that all are equally subject to the ordinary law of the land and that no person, whatever his or her rank or condition, is above the law. This is equivalent to the second meaning of the Diceyan concept of rule of law,¹² which has four main aspects:

1. Equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts,
2. No exemption of officials or others from the duty of obedience to the laws that govern other citizens,
3. No exemption of officials or others from the jurisdiction of the ordinary tribunals, and
4. No existence of administrative law or administrative tribunals (which means no division between private and public law and private and public courts).¹³

This meaning envisages no special treatment or protection under law of a particular class of people, but equal treatment and equal protection to all.¹⁴

The second concept, "equal protection of laws," is a positive concept. However, it does not mean that the same law should apply to all persons identically. This concept recognizes the fact that all persons are not equal by nature, attainment or circumstances, and that, therefore, the application of a mere concept of equality before the law in a mechanical way may result in injustice. Taking

11. Article 6, *International Covenant on Civil and Political Rights*, 1966

12. Dicey, AV (1885) *The law of the constitution*. London: Macmillan

13. *Ibid.*

14. See also, Acharya, B (2001) 'Are the modern states governed under the rule of law.' *Essays On Constitutional Law, Nepal Law Society, Vol 38 (2001)*

this into account, the Constitution has gone even further and specifically guaranteed equality in terms of "results or benefits." Although the basis of this right to equality in results or benefits is the equal protection clause, the clause that provides for equality in results or benefits can be interpreted as more than a guarantee of equal protection of laws. This clause could entitle people to claim the equitable distribution of resources and benefits of the state, as well as equitable access to State power. By the protection of these rights, the two basic requirements of an inclusive State are the equal distribution of resources and benefits and equal access of people to the State powers could be achieved.¹⁵

Rights of the Victims of Crime: The Constitution has, for the first time, guaranteed victims of the crime the right to information about the investigation and any action taken in the case in which he or she was a victim. By virtue of this right, the victims of crime have the right to social rehabilitation and compensation in accordance with the law. However, there is no provision for the convict to claim compensation if his/her conviction is overturned or he/she is proved innocent subsequently.

Rights Regarding Mass Communications: It was the 1990 Constitution that protected the freedom of the press as a fundamental right in Nepal. No doubt the special treatment given to this freedom is backed by Constitutional philosophy and the history of Nepal, which has seen continuous movements and struggles for the sake of this right. It is believed that if the freedom of the press and publication is not guaranteed, all other freedoms of an individual become illusory. Freedom of the press and publication, as guaranteed by the 1990 Constitution, was expanded by the Interim Constitution to include freedom of publication, broadcasting and the press. The Constitution has also enumerated freedoms regarding mass communications. Under the freedom of mass communication, the following rights have been categorically protected:

1. right against prior censorship of publication, transmission (broadcasting) or information flows or printing of any news item, editorial, article, feature or any other reading, audio, audiovisual materials by any means including electronic publication, transmission (broadcasting) and the press,
2. right against closure, seizure or cancellation of registration of radio, television, online or any other type of digital or electronic, print or other

15. *The Constitution reads: "...nothing shall be deemed to prevent the making of special provisions by law for the protection, empowerment or advancement of women, dalits, indigenous ethnic tribes (adiwasis janjatis), madhesis or farmers, workers, oppressed region, Muslims, backward class, minority, marginalized and endangered communities or destitute people, youths, children, senior citizens, gender or sexual minorities, disabled or those who are physically or mentally incapacitated and helpless people, who are economically, socially or culturally backward".*

- media or equipment of communications on account of publication and transmission (broadcasting) or printing of any materials through the medium of audio, audio-visual or electronic equipment,
3. right against closure, seizure or cancellation of registration of any newspaper, periodical (magazine) or press on account of printing or publishing of any news item, article, editorial, feature, information or any other materials, and
 4. right against obstruction of press, electronic transmission and telephone and other means of communication, except in accordance with law.

This freedom supports the right to freedom of information, as the press exists primarily to serve the governed and not the governors. People's right to know or to information is actualised only when the press is free. The people who drafted the Interim Constitution 2007 seemed particularly alert to the fact that the rulers of the earlier regime in Nepal frequently censored the press, cancelled the registration of the press and sometimes even seized and closed the press. This freedom is, thus, a response against licensing laws, against a rigid system of censorship, against state approval and against prosecutions for libel as seditious, all of which characterised the monarchical system in Nepal before 2006.

Right to Language and Culture: Under the Interim Constitution 2007, each community has the right to receive basic education in its mother tongue, the right to receive free education from the State up to the secondary level as provided for by the law and the right to preserve and promote its language, script, cultural civilisation and heritage.¹⁶ The Constitution has protected not only the right to culture and education, but also the right to language as a fundamental right of the people. Under this right, every person and community will have the right to use its own language. Every person and community will also have the right to participate in the cultural life of its community. Furthermore, every citizen will have the right to access basic education. Primary education shall be compulsory and free of cost. Every citizen will have the right to obtain free education up to secondary level.

Right to Labour: The Constitution provides every worker with the right to proper work practices, including the right to proper wages, conveniences and social security. It also provides that every worker shall have the right to form trade unions, participate in them and engage in collective bargaining and strikes in

16. Article 17, *Interim Constitution 2007*

accordance with the law. This right is guaranteed to workers engaged in any form of physical or mental labour and working in any organized or unorganized sector. Every worker shall be allowed to select a job that befits his or her will, ability, capacity and level, to pursue proper work, entertain and rest, to not be compelled to pursue hazardous work and to not be compelled to pursue substandard work. Moreover, children shall be protected from being employed as child labourers. The workplace should be dignified and disability friendly, there shall be no discrimination of any form in the workplace and work shall be pursued in accordance with a labour agreement. This provision has been made in order to ensure the provision of these rights as well as for the right of proper labour exercise.

Right to Health: It is a fundamental right of every human being to enjoy the highest attainable standard of health.¹⁷ This right has two basic components: a right to health care and a right to healthy conditions. The right to health, therefore, contains both freedoms and entitlements. The freedoms include the right to have control over one's own health and body as well as the right to be free from non-consensual treatment and experimentation. The entitlements, on the other hand, include the right to access to an equitable system of health protection.

The Constitution provides that every citizen shall have the right to free basic health services, and no person shall be deprived of emergency health services. Every person shall have the right to reproductive health, to informed health services, to equal access to health services and to access to clean (pure) drinking water and sanitation (cleanliness).

Right to Food: In line with the obligation to fulfil the basic economic, social and cultural rights to which Nepal has shown commitment before the international community by signing, inter alia, the International Covenant on Economic, Social and Cultural Rights 1966, the Constitution guarantees the right to food. Under this right, every citizen shall have the right to food, to protect himself/herself from the vulnerable conditions of life owing to the scarcity of food and to food sovereignty in accordance with the law.

Right to Shelter: The right of every citizen to access to proper accommodation has been guaranteed in the Constitution. Therefore, except in accordance with law or ordered by the court, no person shall be evacuated from his or her place of habitation (residence), and no encroachment shall be made on the same.

17. As defined by the World Health Organization in the preamble of its constitution.

Equal Rights of Women in Descent: Among others, the Constitution makes provision for the equal right to descent of women, without gender discrimination.

Rights of Dalit Community: The Constitution guarantees special rights to the Dalit community in the nature of collective rights. Among others, it protects against discrimination, humiliation and intolerant behaviour against Dalits on the ground of caste, tribe and untouchability. It further states that such an act shall be regarded as a social crime and punishable in accordance with the law. A person who is a victim of such an act shall have the right to receive proper compensation.

Right to Family: The other group of rights in the Constitution includes the right to family. Under this right, the individual is prohibited from having more than one spouse, every person has the freedom to marry and divorce in accordance with law, no marriage is allowed against the wishes of the parties being married or without their full and independent consent and each couple has the right to property and in family affairs. The Constitution also protects the common rights and responsibilities of both parents and children for the nurturing, care and all round development of the children.

Right of Consumers: Every consumer shall have the right to quality goods and services. A person who incurs a loss from substandard goods and services shall have the right to receive proper compensation.

The insertion of these fundamental rights in the Constitution is the result of the continuous struggle of the people of Nepal and the manifestation and recognition of the cravings of the people for liberty and freedom. Despite some weaknesses, the Bill of Rights establishes basic Nepalese civil liberties that the Government cannot violate. The Bill of Rights includes a wide range of protections with a common theme and purpose, i.e., to define the scope of individual freedom in Nepal and to make the political system more democratic. The comprehensive list of fundamental rights embodied in the 2015 Constitution has been the record of this type in the history of written Constitutions in the world, excluding the Constitution of Bolivia.

Rights about particular issues and rights about particular groups are special concern of the day, they primarily include: labor rights/economic rights, reproductive rights, disability rights, patient rights, victim's rights, minority rights, social security rights and compensatory rights, among others.

CITIZENSHIP ISSUES IN NEPAL: GENUINE CITIZENS SHOULD NOT BE DEPRIVED OF CITIZENSHIP

Dr.Chandra Kanta Gyawali¹

Abstract

"Citizenship" is derived from the Latin word for city. People identified themselves as belonging to cities rather than countries. If you have citizenship, you have a whole set of rights that non-citizen might not have. The focus of this paper is on non-participatory observation on how Nepali citizenship can be acquired by both Nepalis and foreigners under descent, naturalized and other different categories of citizenship, as provisioned in the Constitution of Nepal and other related laws. For that purpose, reports from as secondary data, such as books, journals, research reports and newspapers, have been used to complete the research.

Citizenship is a political matter, rather than merely a legal or constitutional right of a citizen. It is the status of being a citizen and the quality of person's conduct as a member of a community. The major categories of citizenship are consanguineous relationship, *jus soli*, naturalization and honorary. Without a citizenship, one is denied the rights to live, work, vote, pay taxes and many other rights related to his or her rights and duties.

A consanguineous relationship may be linked with the theory of a direct line of descent, immediate descent, lineal descent, maternal line descent, mediate descent and paternal line descent. A child of a citizen having obtained a citizenship of Nepal by birth prior to the commencement of the Constitution of Nepal should acquire the citizenship of Nepal by descent if the child's father and mother (parents) both are citizens of Nepal.

Genuine Nepali citizens should obtain the citizenship of Nepal, but the Government of Nepal should not provide citizenship to the foreigners. Likewise, no citizen of Nepal should be deprived of the right to obtain citizenship.

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I. Meaning and Origin of Citizenship

A citizenship is a certificate that proves a person is a genuine member of the nation. The Black Law Dictionary describes citizenship as "[t]he status of being a citizen and the quality of a person's conduct as a member of a community."² In this statement, without citizenship, a citizen has no status and quality in his or her community or nation. Therefore, without, one has no right to live, work, vote, pay taxes and perform other duties, a person has no work and status in the country. In this situation, such person falls under the stateless category and are forced to live without being able to exercise their basic rights.

The situation of being stateless is the concept of a person lacking belonging to any recognized state. A stateless person is someone having no citizenship or nationality. Statelessness may also arise at birth. If that person continues to live abroad (as a resident alien, not a dual citizen) and then has children with a person with the same status in a country that does have jus soli, their children will automatically be stateless at birth.

Citizenship is concerned with nationality rather than just the legal right. With sovereignty, people who constitute the community protect their individual as well as collective rights.³ In this regard, the Universal Declaration of Human Rights (UDHR) states:

Everyone has the right to a nationality. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.⁴

When a person born in his/her country receives a nationality and citizenship, he or she becomes a member of a nation and can use his or her political, constitutional and legal rights as well as adopt his or her nationality. The International Covenant on Civil and Political Rights envisages that "every child shall be registered immediately after birth and shall have a name. Every child has the right to acquire a nationality."⁵

Some major features of citizenship in Nepal are as follow:

1. by descent,
2. by birth converted to descent,
3. naturalized citizenship to foreign women and children,
4. honorary citizenship,
5. non resident Nepalese citizenship, and
6. citizenship with Identity of descent and gender.

2. Bryan A Garner, *Black Law Dictionary: Ninth Edition*, pp 268

3. *United States v. Cruikshank*, 92 US 542(1875) cited by Dhungel and Adhikari *Commentary on the Constitution* pp 84

4. *Article 15 of Universal Declaration of Human Rights, 1948.*

5. *Art. 24 of the International Covenant on Civil and Political Rights, 1966*

A. By Descent

Indeed, descent is related with blood, and it translates to a consanguineous relation of a person with his/her father and mother. There may be direct line descent, immediate descent, lineal descent, maternal line descent, mediate descent and paternal line descent, among others.

Law as by inheritance, the passing of intestate real property to heirs, originates the acquisition of real property.⁶ The fact or process has originated from a common ancestor. The citizenship by descent is a core feature of the citizenship in Nepal. Citizenship is always linked with the nationality, which is an ethnic, caste, racial and tribal concept. If we could not acquire nationality, we have no right to take citizenship.

The nationality of a person identifies his or her place of birth or country, but the citizenship of a person is his or her registration as a citizen by the government of the respective country. Therefore, without taking nationality, he or she could not acquire the citizenship. Nationality should be obtained through consanguineous relation and inheritance from his or her parents, which is called a natural phenomenon.

The right to citizenship does not reflect the values of the right to equality, as was seen in the case of Benjamin Peter v. Home Ministry.⁷ Even though in the name of equality, almost all human rights activists in Nepal are lobbying to provide Nepali citizenships to foreign citizens. They haven't analyzed seriously on the real impacts of nationality may arise in days to come.

For example, in the United States, the right of foreigners to vote has historically been a contentious issue. A foreigner, in this context, is an alien who is not a citizen of the United States. Federal law has prohibited non-citizens from voting in federal elections, punishing them with fines, imprisonment, inadmissibility and deportation. Naturalization is the only way for foreigners and immigrants to become citizens.

India: Citizenship of India by Naturalization can be acquired by a foreigner (not illegal migrant) who is ordinarily resident in India for 12 years (throughout the period of 12 months immediately preceding the date of application and for 11 years in the aggregate in the 14 years preceding the 12 months) and other qualifications as specified in third Schedule of the Citizen Act. One who acquires the citizenship of another country by Naturalization or registration shall cease to be a citizen of India.⁸ In India, there is no provision for dual citizenship in the Constitution. If any citizen has acquired the citizenship of

6. *Ibid* at p 510.

7. NKP,749(2048) SC, Nepal

8. Section 9(1) of the act provides that any citizen of India

another country, he or she shall cease to be a citizen of India on the basis of dual citizenship.

Nepal: The Constitution of Nepal has provisioned five categories of citizenships:

1. Citizenship on Jus-Sagunis or by Descent,
2. Citizenship on Jus-Soli or by Birth,
3. Citizenship on Matrimonial Relation or Naturalization,
4. Honorary citizenship and
5. Non-resident Nepali citizenship.

The Constitution of Nepal has assured that no citizen of Nepal may be deprived of the right to obtain a citizenship. There is a provision of single federal citizenship with State identity in Nepal. Persons who have obtained the citizenship of Nepal at the commencement of this Constitution and are qualified to obtain citizenship in accordance with this Part shall be the citizens of Nepal.⁹

A person who has his or her permanent domicile in Nepal at the commencement of this Constitution should be a citizen of Nepal by descent; such persons include (a) a person who has obtained the citizenship of Nepal by descent prior to the commencement of this Constitution and (b) a person whose father or mother was a citizen of Nepal at his or her birth.

Some relevant cases are cited as below:

Chandra Kanta Gyawali vs. His Majesty the Government of Nepal: This was a writ petition filed at the Supreme Court of Nepal which stated that in the case of a person whose father or mother is a citizen of Nepal at his or her birth, the mother should be given the right to pass citizenship by descent to her children. The Supreme Court found the clause of Article 11 of the Constitution of the kingdom of Nepal 1990 to be discriminatory. The court stated that it is in the jurisdiction of the Legislature to correct the provision. But, with the decision, a mother is equally eligible to recommend her children to secure citizenship by descent.

*Sabina Damai vs. Nepal Government:*¹⁰ The Supreme Court of Nepal issued a Mandamus order to the Government of Nepal that the writ petitioner was born to Nepali citizen Ganga Maya Damai, and that therefore, the District Administration Office should provide a citizenship from the name of her mother in accordance with the law.

9. *Art 11 (1) of the Constitution of Nepal*

10. *067-wo-0703, Decision date of Supreme Court of Nepal, 2067.*

Nakkali Maharjan Vs. Nepal Government: ¹¹ The Supreme Court ordered a mandamus to Kirtipur Municipality to provide a recommendation for citizenship by descent to the writ petitioner by the name of the father and should not discriminate on the grounds of gender and marriage.

Every minor who is found within Nepal and the whereabouts of whose father and mother are not known shall, until the father or the mother is traced, shall be provided citizenship by descent. A person who is born in Nepal from a woman who is a citizen of Nepal and has resided in Nepal and whose father is not traced shall be provided with the citizenship of Nepal by descent.

If such person's mother and father are both citizens of Nepal at the time of the acquisition of citizenship, such persons born in Nepal may acquire the citizenship of Nepal by descent.

Chhabi Peters vs. District Administration Office:¹² In this case, the citizenship of the father was not clear. A child who is found within Nepal is considered to be the child of a Nepalese father if the whereabouts of the father cannot be traced.¹³ In this case, until the father of the child is traced, the child is deemed to be a Nepalese citizen by descent.

B. By Birth Converted to Descent

The second feature of citizenship is by birth and converted to descent. The second Constituent Assembly recognized *jus soli* citizenship in Nepal for the first time in the history of Nepal. If a person was born in Nepal on 2046 BS, attained the age of 16 years in 2063 BS and assured to take citizenship by birth according to the Interim Constitution, the Constitution has also granted this right under the Article 11(3) of the Constitution of Nepal.

The Constitution of Nepal envisages that a child of a citizen having obtained the citizenship of Nepal by birth prior to the commencement of this Constitution should upon attaining the age of majority acquire the citizenship of Nepal by descent if the child's father and mother are both citizens of Nepal.

The Constitution has also envisaged that the citizenship of Nepal should be as provided for in the Federal law. The Federal law is under consideration in the House of Representatives. When the Home Ministry ordered the District Administration Offices to provide such types of citizenship more than five writ petitions filed in the Supreme Court and the latter issued stay order against the Home Ministry stopping it from providing such citizenship until the law is passed.

11. 2063 Bs, writ n. 0089, ordered date, 2065.1. 4.

12. NKP, Volume 33, 2049

13. Dhungel 1998, *Commentary on the Nepalese Constitution*, pp 89.

C. Naturalized Citizenship

Another feature of citizenship in the Constitution is the concept of naturalized citizenship.

India: Any person born in India on or after 26 January 1950, but prior to the commencement of the 1986 Act on 1 July 1987, is a citizen of India by birth. A person born in India on or after 1 July 1987 is a citizen of India if either parent was a citizen of India at the time of the birth.

In India, documents such as Voter ID Card and Passport may be considered proof of citizenship along with the birth certificate. Persons voluntarily acquiring citizenship of a foreign State cannot be citizens.

USA: While the United States Citizenship and Immigration Services (USCIS) processing time for the naturalization from is approximately six months, the complete process of applying for naturalization and becoming a US citizen will take longer than six months.

Nepal: The Constitution of Nepal has provided for three categories of Naturalized Citizenship in Nepal:

1. A foreign woman who has a matrimonial relationship with a citizen of Nepal may, if she so wishes, acquire naturalized citizenship of Nepal as provided for in the Federal law;
2. A child born from a woman who is a citizen of Nepal and married to a foreign citizen may acquire the naturalized citizenship of Nepal in accordance with the Federal law if he or she has permanently resided in Nepal and has not acquired the citizenship of a foreign country. The Government of Nepal may, in accordance with Federal law, grant the naturalized citizenship of Nepal; and
3. A foreign woman who has a matrimonial relationship with a citizen of Nepal.

a. A foreign woman who has a matrimonial relationship

A foreign woman who has a matrimonial relationship with a citizen of Nepal may, if she so wishes, acquire the naturalized citizenship of Nepal as provided for in the Federal Law.¹⁴ The Bill on Citizenship proposed that a foreign woman, who has married a Nepalese citizen, can decide whether or not she wishes to acquire the naturalized citizenship of Nepal within six month of her marriage. This provision provides discretionary power to a foreign woman regarding whether or not her previous citizenship is renounced. If she wishes to acquire the Nepali citizenship, she should submit a letter of termination of her foreign country's

14. Article 11(6) of the Constitution of Nepal.

citizenship. This is the best way to protect anyone from becoming stateless.

b. His or her father is held to be a foreign citizen converted into naturalized citizenship

The following provision in the Constitution grants citizenship of Nepal by descent, unless the acquirer's father is held to be a foreign citizen: 'A person who is born in Nepal from a woman who is a citizen of Nepal and has resided in Nepal and whose father is not traced should be provided with the citizenship of Nepal by descent.¹⁵ If his or father is held to be a foreign citizen, the citizenship of such person should be converted into naturalized citizenship as provided in the Federal law.' Concerned stakeholders have raised the question about why someone who has already been given citizenship by descent once should be converted into naturalized citizens. The logic is that when he/she is born in Nepal from a woman who is a citizen of Nepal, regardless of whether or not his/her father is traced, should be granted the citizenship of Nepal by descent.

c. Nepali woman has married to a foreign citizen

A person born from a woman who is a citizen of Nepal and married to a foreign citizen may acquire the naturalized citizenship of Nepal in accordance with the Federal law,¹⁶ if he or she has permanently resided in Nepal and has not acquired the citizenship of a foreign country. If such persons' mother and father are both citizens of Nepal at the time of the acquisition of citizenship, such persons born in Nepal are entitled to citizenship by descent.

It means that either his/her father or mother has taken citizenship before the commencement of this Constitution and has become a naturalized citizen. If so, their children will get citizenship by descent. It is expected that the Federal Bill will be able to address this matter.

In addition to that, a foreign man who has a matrimonial relationship with a woman who is a citizen of Nepal cannot acquire the naturalized citizenship of Nepal. However, if the Federal Parliament ratifies the Bill against these provisions,

15. Article (5) of 11 *Ibid.*

16. Article (7) of 11 *Ibid.*

then this Act will automatically stand against the spirit of the Constitution. There is a provision that, any citizen of Nepal may file a petition in the Supreme Court to have this Federal law declared void on the ground of inconsistency with the Constitution of Nepal. The Supreme Court will declare the matter void on the ground of inconsistency.

Mira Gurung vs. Department of Immigration:¹⁷ In this case, the Supreme Court had declared the matter inconsistent with Article 9(5) and unconstitutional. The subject was a foreign husband who could not stay in Nepal for more than four months in any year. On the other hand, the same rules allowed a foreign wife of a native husband to stay. It was a discriminatory clause of Alien Rules 1975 and inconsistent with Article 11 of the Constitution of the kingdom of Nepal 1990.

Benjamin Peter vs. Home Ministry:¹⁸ The Supreme Court of Nepal interpreted that the right to equality is a general provision of the fundamental right, but right to citizenship does not reflect the values of the right to equality and cannot be exercised against citizenship. The Bill of Citizenship issues related to naturalized citizenship have been sub-legis in the Federal Parliament. The Government of Nepal may grant citizenship in accordance with the Federal law and grant the naturalized citizenship of Nepal. It is a matter of the Federal Government.¹⁹

Likewise, Madhesh-based political parties, Janjatis and other small parties have been criticizing the provision of citizenship from the day of the promulgation of the Constitution of Nepal. They are demanding, through amendment to the Constitution, the incorporation of two states in the Terai and to allow naturalized citizen to be elected, nominated or appointed to the Office of President, Vice-president, Prime Minister, Chief of State, Chief Minister, Speaker of a state, Chief Minister, Speaker of a State Assembly and chief of a security body.²⁰

d. Honorary Citizenship

The fourth feature of citizenship is an honorary citizenship. The Government of Nepal may, in accordance with the Federal law, grant the honorary citizenship of Nepal.²¹ The honorary citizenship

17. NKP, 2051 volume 35

18. NKP, 2048, 32, 749

19. Article 11(8) *Ibid.*

20. Article 289 of the Constitution Nepal

21. Article 11(9) of the Constitution of Nepal

is matter of the Federal Government. Without promulgation of Federal law, the Federal Government could not provide honorary citizenship to foreigners. Therefore, Federal law should be promulgated by the Federal Parliament as soon as possible. The Government can provide honorary citizenship to those who have made important contributions to Nepal. Edmund Hillary was the first foreigner who became the first person in Nepal to receive the honorary Nepalese Citizenship.

Similarly, Aung San Suu Kyi of Myanmar became the first person to be entitled as honorary Canadian citizenship, but later, her citizenship was revoked over the issues of the Rohingya 'genocide'; the Canadian Parliament formally stripped Aung San Suu Kyi of her honorary citizenship for complicity in atrocities committed against Myanmar's Rohingya.

William Penn, the founder of the Province of Pennsylvania, was an English real estate entrepreneur. He is said to be the first great hero of American liberty, and he urged for a Union of all the English colonies. He was granted an honorary U.S. citizenship in 1981. As is apparent, the honorary citizenship goes alongside Governmental discretionary power as a universal phenomenon.

e. Non Resident Nepalese Citizenship

The fifth feature of citizenship is the Non Resident Nepalese citizenship. The non-residential citizenship of Nepal may be granted to a person who has acquired the citizenship of a foreign country. He or she has resided in a country other than a member State of the South Asian Association for Regional Cooperation (SAARC) and who or whose father or mother, grandfather or grandmother was previously a citizen of Nepal by descent or birth but subsequently acquired the citizenship of the foreign country. Such that the person may enjoy economic, social and cultural rights in accordance with the Federal law.²²

It means that, without Federal law, one could not get non-residential citizenship. On the other hand, such persons have no political rights; they cannot cast their votes or run as candidate in the electoral processes in Nepal.

f. Citizenship with Identity of Descent and Gender

The sixth feature of Citizenship is citizenship with identity of descent and gender. This is guaranteed by the Constitution for the first time in Nepal. A person who obtains the citizenship of

22. Article 14, *IBID*.

Nepal by descent in accordance with the Constitution may obtain a certificate of citizenship of Nepal with gender identity by the name of his or her mother or father.

g. Single Federal Citizenship with State Identity in Nepal:

The last feature of citizenship is the single Federal citizenship with state identity in Nepal. Nepal is divided into three tiers of Government: the Federation, the Province and the local levels. Definitely, in Federal countries, the issue of citizenship has been handled in different ways. For example, the United States builds on the concept of dual (Federal and the concerned State) citizenship. But in Nepal, the Constitution has provided for single Federal citizenship with provincial identity.

2. Analysis of the Draft Bill of Citizenship

The Constitution has not allowed citizenship through other means than those stated above. Moreover, if the Government of Nepal introduces other legal provisions contravening the constitutional provision on the citizenship, the Constitutional Bench of the Supreme Court may declare such provision ultra vires.

A. Basic principles of citizenship

Nepali law has adopted the international principles of providing citizenship to genuine Nepali citizens. No citizen should bear the situation of statelessness, and foreign national should not be allowed to hold citizenship certificate. It has also followed the principle that citizenship is the base for acquiring nationality and only getting nationality is not the sole basis for citizenship.

1. Citizenship by Descent:

a. Persons cared only by mothers:

Persons, who are only cared by such a mother due to forced marriage, basically from armies, government employees and teachers, shall get citizenship by descent under the Article 11 (2) (b) of the Constitution of Nepal if their father and mother are Nepali citizens.

b. Nepali woman, who is married to a foreign national, before obtaining citizenship:

Nepali woman shall get citizenship certificate by descent under the Article (11) (2) (b) in case she is divorced from the foreign husband, and her father and mother are Nepali citizens during the time of her birth.

c. Children born after getting married in foreign nation or from extra marital affairs:

Children, who are born in foreign nation, after their marriage in a foreign nation, will be eligible to get citizenship certificate on the basis of Jus Sanguinis under Article 11(2) (b) of the Constitution.

d. Children, who are denied identity by father (polygamy or due to divorce):

Persons will be eligible to get citizenship by descent under Article 11 (2) (b) of the Constitution if his/her father and mother are divorced or married to another person or are living separately by taking property.

e. Children born from the father and mother getting married in course of their work and, when her/his father died, failed to register their marriage:

Children eligible to get citizenship certificate by descent by putting his/her mother's name under Article 11 (2) (b) of the Constitution in the case that his/her father died without registering marriage certificate.

f. Children born to mothers who had gone abroad for work and compelled to return home with children or with pregnancy after being sexually exploited in the foreign land:

Children from the mothers who had gone abroad for work and compelled to return home with children or with pregnancy after being sexually exploited in the foreign land will be eligible to get citizenship of descent by putting her/his mother's name under the Article 11 (2) (b) of the Constitution. Naturalized citizenship will be issued to such mothers if it is proved that father of the child had abused.

g. Children born from rape victim: Children, who are born to a mother who is a victim of rape by a Nepali citizen will automatically get citizenship of descent under the Article 11 (2) (b). However, children born to the mother who is victim of rape by foreign national will get naturalized citizenship.

h. Children, who are denied citizenship from their father and mother:

Children who are denied citizenship from their father and mother (both of whom are Nepali citizens) in the case that the father or mother married another person after the divorce or after taking property will automatically get citizenship of descent under the Article 11 of the Constitution.

i. Citizenship Issues of British Gurkhas:

The Nepalese who were recruited in the British Gurkha army under the Sugauli Treaty subsequently received residential visas and later obtained naturalized citizenships. But, there should be constitutional and legal provisions for the continuation of the British Gurkhas, as they are Nepali citizens by descent in the real sense. Therefore, there should be provisions and an Act for the continuation of their citizenship under the descent citizenship.

In the USA, the Constitution, of course, grants Congress no express power to strip people of their citizenships, whether it is in the exercise of the implied power to regulate foreign affairs or in the exercise of any specifically granted power.²³

j. Government must prove an intent to surrender citizenship:

Therefore, the British Gurkha or NRN when or whenever they do not surrender voluntarily, the Government should not take over his or her descent citizenship.

In this regard, in the USA, in establishing a loss of citizenship, the Government must prove intent to surrender the United States citizenship, not just the voluntary commission of an expatriating act such as swearing allegiance to a foreign country. Congress does not have any general power to take away an American Citizen's citizenship without his or her 'assent.'²⁴

2. Marital Naturalized Citizenship:

- a. Children born in Nepal to a Nepali mother married to a foreigner in Nepal and living in Nepal.
- b. A foreign woman and man who want to live in Nepal should get an identity card having economic and cultural rights until they receive naturalized citizenship.
- c. Children of a woman married to a foreigner who has returned to his foreign land.
- d. Children from a foreign father and a Nepali mother, but now living in Nepal after their relation has broken down.
- e. Children of a foreign national who has not obtained citizenship from his nation of origin, but is living in Nepal and has children after marrying a Nepali woman and has since died.

In the meantime, the Supreme Court of Nepal has upheld the Government decision to distribute citizenship certificates without

23. *Afroyim v. Rusk*, 387 U.S. 253 (1967)

24. *Cyrus Vance v. Laurence j. Terranzas* (see 445 U.S. 920, 100 S.Ct. 1285)

making an amendment to the Citizenship Act. The Supreme Court has upheld the Government decision to issue citizenship through the circular of the Home Ministry in response to a writ petition filed by senior advocates Bal Krishna Neupane and Borna Bahadur Karki.

3. Conclusion

The citizenship policy of Nepal should be rigid, not flexible, due to various reasons, including the open border with India as well as its small size given its two giant neighbors with large populations. The Government cannot revoke the citizenship certificate of genuine descendent citizens until and unless he or she abandons the citizenship certificate willfully. A genuine citizen of Nepal and who has adopted the Nepali nationality should not be deprived of the rights to obtain citizenship. Similarly, the Government of Nepal should not provide a citizenship of Nepal to a foreigner.

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JUDICIAL COMMITTEES AT LOCAL LEVEL: A REVIEW

Dr. Bipin Adhikari ¹

Abstract

All Judicial Committees (JCs), instituted under Article 217 of the Constitution of Nepal as the local non-court dispute settlement mechanism at each village body or municipality (hereafter referred to as 'palikas'), now have the experience of working for more than two years.

These committees, with different understandings and depths, have experimented with the legal regime and scheme of operations provided for them under Chapter VIII of the Local Government Operations Act 2074. The Government of Nepal has been watching the operations of the JCs, and their effect as justice sector organizations, on the palikas. Therefore, a cursory review of the situation is important for all concerned parties.²

The objective of this essay is to review the current scenario of JCs, single out their problems and suggest some way out to deal with them. Notable challenges include citizen's lack of awareness about JCs, a lack of a proper case management system, training and knowledge for members of the JCs and integration with local social organizations. The article also argues that given necessary support, these committees have the high potential to bring changes in the justice relations at the grassroots (palikas) level. It concludes that JCs are a very important innovation under the new Constitution, but timely policy reforms and legal and institutional consolidation must not be delayed to keep them on the right track.

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2. *For a general overview of the context of the new system of local government, see Diagnostic Study of Local Governance in Federal Nepal 2017 (Kathmandu: The Asia Foundation, 2018) ("At this early stage, this study attempts to assess the extent to which the institutional, legal, political, and fiscal frameworks are in place and the critical issues that must be addressed in establishing these frameworks to enable local governments to discharge their constitutional mandates. The study examines the key challenges that the local governments are currently facing in this early phase of the transition and draws out a set of indicators to assess on an ongoing basis in the coming years that will provide insight into the progress being made as the transition to federalism unfolds. Finally, the study raises questions about the extent to which local governments are facilitating an inclusive environment and meeting their objectives for service delivery and provision of infrastructure, both looking at the current situation and suggesting the critical issues to track going forward.")*

1. Creation of Judicial Committees

The idea of empowering local governments in grassroots legal disputes is not new in Nepal. Even Padma Shamsher, the hereditary Rana Prime minister, who promulgated the Government of Nepal Act in 1948 as the first Constitution of the country, was concerned with this matter. The Act provided that justice shall be accessible and speedy, and village panchayats (bodies) shall administer elementary civil and criminal justice "in such manner and subject to such control and supervision as may be prescribed by law."³ Over the last seven-decade or so, Nepal experienced these efforts with varying emphasis.

The new Constitution brings the local governments to a new height, and as one of the three tiers of the Federal System, with its own entrenched constitutional powers hereunder scheduled. The Judicial Committee (JCs), which are constitutional creations, have been created in every village body or Municipality as the judicial arm of the local governments. It is not in the formal hierarchy of the law courts of Nepal, but rather, builds on earlier Nepalese traditions refurbished to fit into the scheme of the three tier federal system and supporting division of powers.

Article 217 holds that there shall be a three-member Judicial Committee to be coordinated by a Vice-Chairperson in the case of a Village Body and by a Deputy Mayor in the case of a Municipality. Such committee functions to settle disputes under their respective jurisdictions in accordance with law. The committees shall consist of two members elected by the members of the village or the municipal assemblies from amongst themselves. In this scenario, the committees comprise of elected representatives, who might or might not have knowledge and skills in the settlement of disputes.

2. Jurisdiction of Judicial Committees

JCs have two type of jurisdiction; firstly, they have the power to settle some basic type of disputes in their localities. Local Government Operations Act lists them as follows: (a) boundary of land, dams, ditches or distribution and use of water, (b) causing damage to the crops of other people, (c) pasture land, green fodder, fuel wood, (d) unpaid wages, (e) lost or found of domestic animals and birds, (f) not caring and looking after elderly citizens, (g) not providing decent food and clothing or education to minor children or husband-wife, (h) house rent and house rent facility with amount up to twenty-five hundred thousand annually, (i) planting of trees to affect other's house, land or property, (j) throwing water from one's house or verandah to others house, land or public road, (k) not leaving the area of land to be left as per the law while constructing a house

3. Article 48, Government of Nepal Act, 1948

with a window towards the land of the immediate neighbour, (l) not allowing to use or causing obstruction to a road being used publicly since ancient times even though it is under the right or ownership of any individual, way out for cattle, pasture for grazing cattle, drain, canal, pond, rest place, cremation site, religious site or any other public location, (m) other disputes designated by the Federal or Provincial law to be resolved by the local level. The Act gives complaints handling as well as decision making power to the JCs on all these issues. A bulk of the cases of economically poor peasantry at the local level have been included in this list.

Secondly, JCs also have the power to settle some disputes through mediation. They can mediate the following disputes: (a) a land other than government, public or community land owned by one is encroached by other, (b) construction of house or any structure in a land other than government, public or community land, noting belonging to the person but of others, (c) divorce between wife and husband, (d) physical assault that could be liable to a maximum of one years of imprisonment, other than those leading to dismemberment, (e) defamation, (f) looting and assault (g) leaving cattle stray or affecting others due to negligence in course of keeping animals and birds, (h) unauthorized entry to other's residence, (i) cultivating or possessing land that is in other's possession, (j) affecting neighbour with sound pollution or throwing solid waste, (k) other civil disputes filed by an individual as claimant which could be mediated as per prevalent law and criminal disputes that could lead to up to one year's imprisonment. These cases are legally more serious than those noted above under compulsory jurisdiction.

As far as disputes under mediatory jurisdiction are concerned, the potential complainant may decide to go to the concerned court instead of filing the case to the concerned JC. The jurisdiction is voluntary in this sense.

In the disputes mentioned in this provision, the complainant must file a petition before the JC (1) within the limitation period if any such limitation is prescribed to file petition before the case hearing authority in the prevalent law and (2) within 35 days of such act having been committed in case where no limitation has been prescribed.

3. Exercise of Jurisdiction

The jurisdiction of the JC is exercised by the coordinator and members of the Committee collectively. The opinion of the majority is deemed as the decision of the JC. The Act allows the coordinator and one another member to make a decision, even in the absence of the other member. Similarly, it is possible for two members of the Committee to process the case forward, even though the coordinator is absent, although they cannot declare a final decision on the

dispute. However, in the situation where the position of the coordinator falls vacant for any reason, the dispute can still be processed and settled by the remaining two members with a unanimous decision.

The Act also preserves disputes from a conflict of interest. It clearly states that where the JC coordinator or any member carries personal concern or interest in any of the disputes or if any person related to the coordinator or member is a party to the dispute, then the concerned member cannot handle and settle the case. In such a case, the members other than the concerned coordinator or member can handle and settle the dispute. If no member can handle and settle the case, then the concerned village or municipal assembly should designate three members just to handle and settle that particular case. While prosecuting and settling the dispute in this situation, the (age wise) senior-most member among the three members has to serve as the JC coordinator. This provision eases the issue of conflict of interest.

4. Justice Execution Process

The JC has to send the evidence of the petition of dispute registered before it to the concerned party after registration. While handling and settling the dispute registered before it, the JC shall encourage reconciliation and reconcile with the consensus of both parties as far as possible. If the parties do not reconcile, then the JC should process and settle the case as per the law relevant to the dispute, as mentioned in Section 47(1).

As far as mediatory jurisdiction is concerned, the JC, while carrying out reconciliation, does so through the mediators enlisted by the Committee. It should settle the case through mediation within three months from the date of arrival of the opponent. If reconciliation is not possible within the period, the concerned party should be communicated to go to court by including the same details and the documents and evidence related to it should also be sent to the concerned court. If the party presents himself/herself, then the concerned court has to handle and settle the case as per the relevant law.

In the dispute registered before the JC, if the claimant has filed a petition to (1) withhold the accounts and deposits in the name of the defendant in any bank, company, financial institution or other agency, (2) keep on hold the amount that the claimant is entitled to and not pay to anyone else or (3) stop the transfer of the ownership of any immovable property in the possession of the defendant, then the JC, if it finds appropriate to do so following an inquiry, may write to the concerned agency to withhold the financial instrument for a specified period. The communication received as such should be followed to withhold accordingly, and the judicial committee should be informed about it. Where the opponent files an application before the JC to lift the act of such withholding,

the Committee may write to the concerned agency to release such funds if it found to be appropriate to do so per the application and communication received. As such, the order should be followed to release it and the judicial committee should be informed about the release.

While exercising the jurisdiction, the JC may also issue an interim protection order to the concerned party in the dispute related to the husband and wife or of the protection of elderly citizens for the interest of their minor child or any other person dependent on the person. The JC may issue such an interim protection order in order to:

- a) allow the victim to live in the house he/she has been staying, provide food and clothing, to not physically assault and to behave in a decent and civilized manner,
- b) carry out treatment if the victim has suffered physical or mental injury,
- c) make arrangement for separate accommodation if it is deemed necessary for the victim and to make proper arrangement of subsistence in such separate accommodation,
- d) not slur, threaten or behave in an uncivilized way with the victim, and
- e) carry out other necessary and appropriate matters for the interest and security of the victim.

If any application is filed before the JC in relation to any of the disputes as above, the defendant himself/herself or his/her representative should be present before the JC along with written details (1) within the limitation if a limitation is specified for the defendant to be present before the case hearing authority in the prevalent law and (2) within fifteen days, excluding travel time, if a limitation is not specified.

The JC may constitute mediation centres in every ward for the purpose of forging reconciliation under its mediatory jurisdiction. In case of more than one mediation centre in one ward, the JC may send the disputing parties to the mediation centre they have chosen or, in case of failure of consensus among the parties, to any mediation centre of the ward in order to resolve the dispute through mediation. While handling and settling the complaint registered before it, the JC will carry out the process of registration of the petition, necessary inquiry and prosecution of the dispute, process to ensure the parties' presence, bail, time to execute the case, the procedures relating to mediation and other procedures of dispute resolution per the local law.

5. Some Core Requirements

The JC's final decision on the dispute should be provided to the concerned sides within 35 days of the decision made and must include a certified copy of the decision. Any party that is unsatisfied with the decision of the JC may appeal to the concerned District Court within 90 days of the date of the decision. The executive (Local Government) shall at once execute or cause to execute the mediation or decision by JC. Other provisions related to the enforcement of the mediation or decision by the JC shall be as per the local law. The documents related to the dispute where the mediation or decision took place and the records of the mediation or decision by the JC should be kept in an orderly and safe manner by the Village Body or Municipality. The JC shall submit through the chair or Mayor an annual report of its work to the concerned assembly.

6. Problems faced by Judicial Committees

All JC in the country are new institutions, learning by doing and being established slowly, without clear vision or adequate external support. JC are in fact social justice forums at the local level and are intended to promote social dialogue. The cases they decide upon certainly help communities build on their own strengths. Mediation is an institution that promotes social dialogue as such. JCs' value is also on enabling citizens feel that there is justice for them and that their elected representatives will ensure that the citizens' concerns are addressed. Rather than imposing punishment, the challenge is to make people feel that conflicts do not promote their familial or social interests. The following sections discuss some of the challenges that have risen since the implementation of this judicial power of the local level in Nepal.⁴

6.1. A general lack of awareness

There is a general lack of awareness in the community about what JC are, their jurisdiction, modus operandi and, precisely, how they perform. This is the reason why most of the time, citizens know about JCs' relevance only when citizens reach the stage in their cases regarding potential remedies. Complainants who have genuine issues, but for whom the JCs are not the proper forum, would only receive some consultation with the JC members or the staff members assigned to their cases at the concerned Village Body or Municipality. Usually,

4. *The autHoR has benefitted from his consultation with the officials of several JCs during his visit to Phungling (Taplejung), Diktel (Khotang), Damak (Jhapa), Dhankuta (Dhankuta), Biratnagar (Morang), Dhulikhel and Bethanchok (Kavre), Pokhara (Kaski), Butwal (Rupandehi), Tansen (Palpa), Waling (Syangja), Tikapur (Kailali), Narayan (Dailekh), Musikot (Rukum) and Simkot (Humla) during the last two years.*

the complainants tend to come with their complaints, often orally, but without related documents (which could be the basis to begin with). Initiation of the legal process in such situations is often difficult and time consuming.

The general scenario is that complaints are noted by most committees in most situations without a careful review about whether complaints fall under the jurisdiction of the Committee. Many of the complaints that have been received should have been rejected at the threshold, given the presence of a legally-trained complaints registration officer. These complaints have overwhelmed the committees. Although the situation is changing now, in the beginning, many JCs accepted complaints and granted divorce after hearing both the parties and their witnesses, because JCs thought they had the authority to rule on such decisions.

6.2. Judicial Committee Procedure Act, 2075

During 2074-75, JCs throughout the country passed their local legislation based on the model draft law on JC procedures supplied by the Ministry of Law, Justice and Parliamentary Affairs. Some JCs passed the Federal model without any changes, while others made some minor changes as required in the local situation. The model itself was a prototype of the judicial procedures being applied by the courts of Nepal hitherto this day, although efforts have been made to lessen the rigorous of the judicial procedures in the grassroots context. However, this has not helped simplify these rules as much as necessary (keeping in view the capacity of the locally-elected representatives and the jurisdiction they are to exercise). The model deals with complaints procedures, defense provisions, rules of documentation, servicing court orders, collection of evidence, hearing, testing of documents for counterfeit and forgery, examination of witness, witness statement, cause list procedures and the decision or order of the JC. It also provides the JC Secretariat with the functions, duties and powers of the complaints administrator, archive administrator and mediation procedures. These are very technical issues, and nobody is expected to know them without undergoing orientation and training. Even though it is generally observed that the JCs have settled many cases that have produced good outcomes, it exemplifies that compliance with procedures has been ineffective in many instances.

6.3. Case Management System

An important aspect of any case management system is managing caseloads, scheduling and measuring the time between case filing and disposition. Such a system allows officials to schedule hearings, arrange tasks and notifications and set meetings for themselves or others. A good case management system also helps to bring accountability, increases public trust and confidence in the committees and enhance the rule of law. Nepal is currently lacking in this scenario.

Most of the committees are without case management systems. Some of them have developed the system, but they are still weak. Generally, their data entry capabilities are unreliable. Backlogs of unprocessed cases are a major challenge for JCs with limited resources. The possibility of computerization is still remote. It is often difficult to search for cases from the docket. Due to limited staffing at the village body or municipality, complainants face issues in receiving their support and guidance. Documents are often incomplete and filed incompletely. Case workflow management is also weak, and it is difficult to track JCs' performances in many cases.

6.4. Application of interim order

One of the most crucial powers of the JC is the power to issue an interim order during the pendency of the litigation. While this helps JCs to ensure status quo, the power must not prejudice any party in the dispute. Under Section 49(6) of the Local Government Operations Act, a JC can (as mentioned above) order to (1) withhold the accounts and deposits in the name of the defendant in any bank, company, financial institution or other agency, (2) keep on hold the amount that the claimant is entitled to and not pay to anyone else or (3) stop the transfer of the ownership of any immovable property in the possession of the defendant. It can also issue an order to lift the act of such withholding.

Therefore, to ensure that none of the interests of the parties of the litigation are harmed, the Court may issue an interim order. A JC has to be judicious when deciding that there is a prima facie case in favour of the party seeking the order. If the order is not passed, irreparable damage may be caused to the party. Such damage may not be ascertained in terms of money and payable as damages, in which case the balance of convenience lies with the party requesting for the order. JCs must therefore be adequately trained about the exercise of such an important power.

6.5. Legal and Institutional Capacity

Some basic understanding of the judicial system of Nepal is necessary for all coordinators and members of Nepal's JCs. They are necessarily the first point of contact for most stakeholders in their localities, and JCs' support and guidance in helping stakeholders' access to justice is always crucial, at the JC level or beyond. When analyzing a legal question or issue, no matter how insignificant it is, JCs need to identify the primary authority (the law) that governs the question.

First, they have to consider primary authority and then look to the secondary authority. As a general rule, JCs have to rely on primary authority before considering secondary authority. JCs need to have a basic understanding of enacted law (constitutions, statutes, ordinances, regulations and so on), case law, the difference between Provincial and Federal laws, the hierarchy of primary authority and the use of persuasive authority, where there is no mandatory authority.

The specifics of legal analysis are the same everywhere. Whether it is a case before the JCs or before a law Court, it must start with statutory analysis, case law, analysis of key facts, issue identification, relating the issue to the law, case law application and even counter analysis (or looking for authority or arguments counter to one's position).

How to read a statute book is itself a technical issue that requires training. Precedents are always important. Some knowledge about the practices and problems of precedent is therefore very helpful. JC members will also be able to understand authority and authorities in law. Analogies are also important in decision-making. JCs must therefore learn the use and abuse of analogy. Some idea of common law and equity helps legal understanding of Nepal's practices. The rules of interpretation of statutes helps with application of right provision in the right cases. While the rules are clear, deciphering standards is a challenge. Determination of a fact, the law of evidence and the concept like that of the burden of proof are too important to ignore. They all introduce the basic concepts of how to think like a lawyer.

It is very clear how all these legal nuances should be considered is difficult without proper orientation regarding the basics of judicial decision-making. Additionally, providing JCs with the benefits of a legal officer who could advise on all legal issues that the JCs are to handle is vital too. With such legal advisers, the JCs could also be used for the larger context of legal literacy, human rights, gender violence, domestic violence and so on. Giving regular orientation and training to the members and staff of the JCs obviously stresses the importance of developing curriculums that fulfil such requirements.

6.6. Writing a decision

When a JC handles a case, it will deliver a decision and formalize it in writing. The decision is a declaration in favour of the successful party. The judgment sets out the obligations of the losing party. This is often an obligation for the payment of a sum of money by the losing party to the successful party. Such legal note writing requires some level of skills. As such, JCs requires training and support. Additionally, the courts of Nepal, especially the District Courts, must also develop a perspective on what they consider basic in judicial decision-making at JC level. Delivering a decision is an easy part of judicial decision making. However, most often, it is only the beginning of a long process. Although the JC declares its decision and is authorized to enforce it, it does not have adequate institutions to do so.

6.7. Capacity for enforcement of decisions

No matter how weak the performance of the JC is, its decisions' enforcement is a must if it is not to end up as show piece. At this stage, the administrative capacity of the palikas to enforce their JC decisions on their own is not practical in all cases. While they need to be smart, they also need to develop linkages with the local police, prisons and other governmental organization at the district or sub-district level. At times, JCs may benefit from the nongovernmental, social organizations working in the area.

6.8. Relation with Social Organizations

It is high time that JCs begin working with local nongovernmental or social organizations towards common objectives, rather than treating them as competitors or even as foes. These days there are hardly a district in the country without the presence of a human rights or gender justice groups. The linkages with civil society groups could be helpful for many things. Many young experts in the area of agriculture, water, cooperatives, community developments are tied to local nongovernmental sectors and are enthusiastic about assisting the JCs of their localities with the necessary training and exposure.

Currently, JCs have not been able to relate their activities with institutions around them, including local schools, colleges, businesses, health posts, children houses, orphanage and disabilities centers, among others. These are all examples of formal organizations, or secondary groups, that have goal-directed agendas and activities. Many socio-legal issues invariably require immediate remedy and long-term interventions, and mutual harmonious relations with them always

helps to problem-solve and devise remedial strategies in each case. The authority of the JC without the cooperation of these institutions indicates a lack of ability to enforce the decision despite the authority to do so. Quality informal relations with social organizations could improve JCs interventions and the execution of its decisions.

6.9. Coordination with local governmental public institutions

All machineries of the Government can assist the JCs in the related areas of their work. In fact, many committees have already benefitted from local governmental public institutions when such committees requested for their help. For example, it is possible to take the expertise of the District Court Bar Association and their access to justice programmes. Development of a complaints handling system is a challenge for most of the committees, for which local, better-fitting resources could be used as an alternative to the resources received from the Province or the Federal Government. Additionally, Local Land Administration Office may provide the necessary expertise in land-related cases.

7. Conclusion

JCs, created by the Constitution and provided for by the Local Government Operations Act, are very important institutions for the justice sector in Nepal at the grassroots level. As new bodies, their experience over the two years shows that, given some basic but critically important support, they can deliver as expected. With JCs' institutionalization, it will be possible for the Federal as well as Provincial governments to allocate to them more responsibilities and provide people at the grassroots with more opportunities for justice at their doorsteps.

The review of the JCs' current scenario illustrates some key challenges they are facing, and this article has highlighted some solutions to overcome them. Such challenges should be noted as opportunities as well, because with the necessary support, JCs have the high potential to bring changes in the justice relations at the grassroots level. While JCs are a very important innovation under the new Constitution, timely policy reforms and legal and institutional consolidations must not be delayed to keep them on the right track.

LOCAL GOVERNMENT: CONSTITUTIONAL VISION AND PRESENT PRACTICE

Krishna Man Pradhan¹

1. Introduction

Local governments are the foundations of democratic governance. They are, in the real sense, the governments of the citizens. Local governments are the governments in the neighborhood, and the governments at the doorsteps. One of the widely-articulated and accepted definitions of democracy, as propounded by US President Abraham Lincoln, states that democracy is a system of the people, for the people and by the people (Haney, J. 1944). Here, President Lincoln has placed people at the center-stage of democracy. One important way democracy has espoused this centrality is through its expansion and extension down to the local level. Some democratic countries have embraced the concept of federalism, while others have stuck to the unitary system of governance (Suhrke, 2014). However, all of them have strived to deliver democracy at the doorsteps of their communities. As such, democracy and local governance have emerged as twin concepts that are integral and complimentary to each other.

Local government is the administration of a particular county or district, with representatives elected by those who reside there. A local government is a form of public administration that, in a majority of contexts, exists as the lowest tier of administration within a given state (UK Government, 2016). The strong argument prevailing across the world is that the trend of delivering service to the people through the development and strengthening of local bodies has expanded. According to International IDEA, the forces of change fostering democratization at the local level have gathered so much momentum in recent years that they can only be resisted at one's own peril. Democracy has become the legitimate demand of all local communities. Today, more than 70 countries in various parts of the world are in the process of implementing political and administrative reforms aimed at decentralizing and strengthening local governance (Sisk, 2001).

1. *Executive Director, Nepal Law Society.*

Democracy in the true sense, therefore, is a form of decentralized system of governance. While viewing this phenomenon from a purely ideological perspective, one has to consider the challenges facing the democratic governments of today, i.e. how their responsibilities have increased day by day along with people's ever-increasing expectation of the efficiency, timeliness and quality of service delivery. One reasoning was that it is not possible for governments at the center to carry out all of their responsibilities, nor would it be practical. Therefore, instead of concentrating all functions at one level, the concept of devolving authorities has emerged. It underlines the need for functionaries at the local level to carry out functions that need to be fulfilled at that very level.

In other words, "the process of handing over the functions of the central government to the local bodies is decentralization." Analyzing from a political perspective, a state can become efficient and effective if more and more rights are handed over to the locally-elected officials and fewer and fewer rights are kept at the center. The works of public welfare and development can be better dealt by the local level in a fast and efficient manner. Governance through elected local level officials would be in keeping with the principles of democracy and decentralization as well. It improves the state of answerability and accountability and enhances public participation. It helps in local leadership development and maximum utilization of local resources, meaning that by strengthening local levels, the tenets of democracy can be taken to the people, thus aiding to attain democracy's fundamental goals.

In Nepal, too, the concept of local governance is an old one. But the nature and form of its practice have changed over time. From petty village units to full-fledged elected local governments and from the administrative outposts practiced during Kirat/Malla era to the Rana regime to decentralization, devolution and federalism, Nepal's journey with local governance has witnessed progressive changes in keeping with the global movement (Bhattarai, 2008).

Presently, local governance in Nepal has taken the shape of the modern global democratic value. After a gap of two decades, local governance in Nepal resumed through the elections in 2017. It was the first election held under the new Constitution. Mayors, deputy mayors, chairpersons, vice chairpersons and members of municipalities and rural municipalities were elected. It has been two and a half years since the new local governments have started operating. The new Constitution presents the local governments as powerful, functional and autonomous units of government. However, there are still numerous challenges in translating the constitutional provisions into practice.

2. Research Issues and Questions

There is a need to examine the role of local level government in the functioning of democracy at the grassroots. There is a need to review the development process of local level government in strengthening democracy, assess the impact of democratization on the role, responsibilities, functioning and effectiveness of local governments, evaluate the roles and responsibilities of the local level government in the changing context, the identify challenges of local governments, assess the gap in the envisioned role and actual roles of local level governments, evaluate the institutional viability of local level government in delivering constitutional obligations and duties, and recommend policy reforms in ensuring the sustainable and viable institutional development of the local level government.

3. Research Methodology

In order to examine these research issues, this study employs the method of descriptive analysis. The methodology consists of analyzing primary and secondary sources. Primary data have been collected through field discussions with the stakeholders. Discussions were held with chairperson/vice chairpersons, mayor/deputy mayor of the rural municipalities and municipalities, provincial assembly members, leaders of political parties, government officials, including officials of rural municipalities and municipalities, the Ministry of Federal Affairs and Local Development and Ministry of Law and Justice.

Secondary data have been collected through a review of available research, reports and documents, both Nepalese and international from published and non-published sources and e-research focusing on local self-governance, decentralization and democracy dealing with the theoretical perspective as well as in the specific case of Nepal. Secondary sources of information and data includes governmental and non-governmental documents, election manifestoes of different political parties, speeches given by the political leaders on the theme and informal discussions with different local government officials, bureaucrats, and political leaders.

4. Local Governments: Authority, Roles, and Functions

Democracy is a system of government where citizens exercise their power by voting. Direct democracies, wherein citizens as a whole form a governing body and vote directly on each issue, have become impractical, leading to the emergence of representative democracy, wherein the citizens elect representatives. In a liberal democracy the powers of the majority are exercised within the framework of a representative democracy, but the constitution limits

the majority and protects the minority, usually through the enjoyment by all of certain individual rights, e.g. freedom of speech or freedom of association (Watkins, 1970).

John Locke wrote, "There is no practical alternative to majority political rule – i.e., to taking the consent of the majority as the act of the whole and binding every individual. It would be next to impossible to obtain the consent of every individual before acting collectively ... No rational people could desire and constitute a society that had to dissolve straightaway because the majority was unable to make the final decision and the society was incapable of acting as one body" (Locke, 2009).

According to American political scientist Larry Diamond, democracy consists of four key elements: a political system for choosing and replacing the government through free and fair elections; the active participation of the people, as citizens, in politics and civic life; protection of the human rights of all citizens and; a rule of law, in which the laws and procedures apply equally to all citizens (Diamond, 2004). In the United Kingdom, the country that founded the Westminster system, the basic principle is parliamentary sovereignty, while ensuring judicial independence. In the United States, separation of powers is often regarded as a central attribute (UK Parliament, 2014). In India, parliamentary sovereignty is subject to the Constitution of India that includes judicial review (Daily Express News, 2 August 2013).

Local governance has evolved as a modern and integral part of democracy. The term local self-government was used for the first time in the United Kingdom and Germany. It developed between the 15th and 17th centuries. Modern local government is based on a twofold foundation of deconcentration and decentralization of central convenience and a recognition that not all authority ought to be exerted by the center. Conferring power to local levels is supported by the need for (1) intimate local knowledge and variation, (2) intensity of local interest and enlistment of loyalty and cooperation, (3) small areas for easy impact of the citizen-consumers upon officials-producers, (4) an accessible area of political education, (5) counterweight to the abuse of central power and (6) the democratic value of a plurality of political experience and confidence. The chief characteristics of local government, based on the practices at the United Kingdom, Germany, the U.S., and Russia, are (1) constitutional status, (2) areas and authorities, (3) powers, (4) finance and local freedom, (5) organization and (6) central controls (Przeworski, 1991).

More concept have developed that helps capture and assess its roles and functions. "Local Government is that part of the government, which deals mainly with local affairs administered by authorities subordinate to the state government but elected independently of the state authority by the qualified residents ... Local Government as the administration of a locality – a village,

a city or any other area smaller than the state – by a body representing the local inhabitants, possessing a fairly large amount of authority, raising at least a part of its own revenue through local taxation and spending its income on services which are regarded as local and therefore distinct from state and central services" (Shrestha, 1996 : 6-7). Additionally, "Local Government is self government involving the administration of public affairs in each locality by a body of representatives of the local community. Although subject to the central government in many ways it possesses a considerable amount of responsibility and discretionary power" (Byrne, 1981).

"Broadly speaking, the term local self government is connected with mainly two aspects – governance and development. The concept of governance is closely associated with decentralization as it is concerned with power and authority... Local institutions of villages, towns, districts, provinces, counties, etc are the sole foundations which can protect and promote the interest of a locality" (Thapa, 1998 : 2). The distinctive forms of local governance have evolved due to the practical contextual differences and practices as follows (Quoted in Khanal, 2006 : 10-12). Based on various definitions and descriptions by international scholars and authorities, local government and/or local governance may be divided into following different types.

1. Deconcentration

Deconcentration can be defined as the transfer of power and function from the central level government organizations to their respective field level agencies, enabling the latter to carry out their tasks efficiently and effectively. Kirsten (1993) argues that deconcentration is the process of redistribution of administrative responsibilities within the central government, which might be used to consolidate the central government's power through field offices. For Maddick (1963), deconcentration is 'the delegation of authority adequate for the discharge of specified function to staff of a central department, who are situated outside the headquarters.' Rondinelli (1989) holds a similar view and states that deconcentration 'merely involves the shifting of workload from central government ministry headquarters to the staff located in the offices outside of the national capital...."

Deconcentration, however, does not allow local units the freedom of decision making. Deconcentrated agencies require the consent of the central authority in making all kinds of decisions, but it does make it easier for the local people because they do not have to go to center for everything. In fact, deconcentrated agencies are only the bureaucratic arms of the central government and do not actually help in strengthening local governance.

2. Delegation

Delegation implies the transfer or creation of broad authority to plan and implement decisions concerning specific matters – a variety of activities within specific spatial boundaries transferred to an organization that is technically and administratively capable of carrying them out. Some authorities and decision-making power are delegated to local officials but the ultimate power remains with the central government; the delegated powers can be retracted by the center when it deems necessary.

3. Devolution

Devolution is the process of transferring power from the central government to a lower level. It increases the efficiency of the government in meeting the demands from special sections of a community, which may also enjoy some degree of control over its interests. It highlights "the legal conferring of powers to discharge specified or residual functions upon formally constituted local authority." Devolution is generally understood as the most extensive form of decentralization involving the creation or strengthening of independent levels and units of governments through direct assignment of decision-making responsibility.

4. Privatization

Privatization is another form of decentralization. It is the act of reducing the role of government, or increasing the role of private sector, in an activity or in the ownership of assets. Privatization also encourages the involvement of private sector in state ownership and brings about efficiency and effectiveness in the management of national economy. It provides incentive to popular participation and contributes to enhancing the overall development process.

Like these four types of decentralization, the objectives of decentralization, too, are different. The key purposes of decentralization can be summarized as follows (Lama, S. 2009 : 29-30).

1. Political Decentralization

It is the most important purpose of decentralization. It involves the process of taking the government and development closer to the people. It aims at transferring political power and authorities to the local level so that the elected representatives of the people are in the decision-making positions. Decentralization can be ensured through legal and constitutional measures.

2. Fiscal Decentralization

The purpose of this decentralization is the handover of the financial authority and resources to the local level. Without resources, no authority or power can be effectively carried out; additionally, it may be argued that decentralization without financial decentralization is a lack of decentralization. Therefore, fiscal decentralization is crucial for the success of any extent of decentralization. Financial resources should be available to local authorities in a manner that is sufficient and reliable to undertake the tasks devolved, functions and services they are supposed to carry out or deliver.

3. Administrative Decentralization

As indicated by the name itself, the purpose is limited to administrative operation. It is a mere transfer of roles and responsibilities of planning, management and resource generation of the central authority to its selected field level units of governments, semi-autonomous public authorities and regional or functional authorities outside the regular bureaucratic structure for the central government to deliver services.

4. Market Decentralization

The purpose of this decentralization is to usher in the involvement of private sector in government services and operation. It facilitates the involvement of private sector through market competition and gradually replaces the government from specific areas.

5. Country Context

Nepal is a diverse country in terms of geography and ethnicity. It is situated at Latitude – 26° 22' N to 30° 27' N – Longitude – 80° 4' E to 88° 12' E. Nepal is a landlocked country, with China in the north and India in the south, east and west. It has an area of 147,181 sq. km. Its population is nearly 30 million people, having a density of 157 people per sq. km and with a population growth rate of 1.35 percent. Average life expectancy of Nepali is around 71 years and literacy rate is 66 percent (male 65% and female 42.5%). Nepal is characterized by diverse geographical regions, including the high Himalayan mountains, trans-Himalayan region, the central highlands (hills) and the southern Terai. Over 85% of the people live in the rural areas. Nepal is a multi-ethnic, multi-lingual and multi-cultural country. There are approximately 23 Dalits castes (socially disadvantaged community or untouchable) and 59 Janajatis castes (indigenous nationalities) (CBS, 2019).

Nepal has a three-tier governance structure (one federal government, seven provincial governments, 753 local government and 77 districts).

The third tier is the local government, also known as local level. At the federal level, there is a bicameral parliament: the House of Representatives (HoR) and the National Assembly (NA). The HoR has 275 members, including 165 elected through the first past the post (FPTP) and 110 elected through proportional representation (PR) system (The Constitution of Nepal, 2015 : 41). The National Assembly has 59 members (The Constitution of Nepal, 2015: 42). At each of the seven provinces, there are unicameral assemblies. Altogether, there are 550 members in the provincial assemblies: 330 members elected through the FPTP and 220 elected through the PR system (Election Commission of Nepal, 2018 : 59-124).

There are local legislatures in each of the 753 local level units. There are Village Assemblies in the Rural Municipalities and Municipal Assemblies in the Municipalities. The Constitution has provided law-making authority to all three levels of legislatures. The Constitution provides for the formation of the structure of the Village Executive, including the election of chairperson, vice chairperson, ward chairperson and members. It also provides for the inclusion of four women members and two members from the Dalit or minority community. (The Constitution of Nepal, 2015 : 98).

6. Legal Mechanisms for Past Local Governments in Nepal

Local governments have been practiced in different forms for hundreds of years. During ancient Kirat/Malla period, they were utilized strictly for administrative and judicial purposes. The actual concept of local development through local governments started only after 1990, when democracy was restored in Nepal. Almost all of those practices were based on decisions of the central authority. It is after 1990 that one could find legal instruments specifically formulated to institutionalize sustainable elected local governance. The first major legal instrument on local government in Nepal was the Local Self Governance Act (LSGA) of 1999. It elaborated the formation, jurisdiction and procedures of the local units, such as the Village Development Committees (VDCs), Municipalities and District Development Committees (DDCs) (Local Self- Governance Act, 1999 : 11).

The chiefs and members of the VDCs and the municipalities were elected on FPTP basis. The VDCs included one chairperson, one vice chairperson, nine ward chairperson and four members from each ward. The municipalities included one mayor, one deputy mayor and different numbers of ward chairperson based on its size and four members from each ward. The DDC included the chairperson, the deputy chairperson and members who were chosen by the VDCs and municipalities concerned (Local Self- Governance Act and Regulation, 1999 : 64). During the period when the LSGA was active, there were 75 districts, 58 municipalities, 3,913 VDCs, 36,041 wards of municipalities and VDCs, as well as 927 Ilakas of DDCs. Districts were considered the focal points and were expected to work according to the concept of local development planning, implementing and monitoring to the availability of local resources as per the aspirations of the local people (Lama, 2009: 28).

Between 1999 and 2017, the local governments were run by un-elected bureaucrats or political bodies. Due to political and security situation, local elections could not be held in this period. "In the absence of elected people's representatives, the voices of people could not be heard. It is not possible for bureaucrats to understand the needs of the people. Since the established mechanism envisaged by Local Self Governance Act for the planning formulation, implementation and monitoring was absent, the Act could not be enforced as per its spirit. Bureaucrats had no pressure about planning. When plans were formulated that did not address people's needs, it was natural to see its impact on immediate implementation" (Adhikari, 2004).

In 2007, an Interim Constitution was promulgated in order to address the changed political context. For the first time, the Interim Constitution talked about the restructuring of the state and federalism. The first and fifth amendments of the Interim Constitution made drastic changes to the provisions related to state structure and local self-governance. Part 17 of the Interim Constitution (Article 138-140) was dedicated to local self-governance. Article 138 entitled "Progressive Restructuring of the State" stated that the centralized and unitary nature of the state shall be restructured into a democratic federal system of governance to end class-based, ethnic, lingual, gender, cultural, religious and regional discriminations. Article 139 entitled "Provision for Local Self Government" stated that local level elections shall be held on the basis of decentralization and devolution in order to institutionalize democracy from the grassroots and provide services to the people from the local level itself (The Interim Constitution, 2007: 67-68).

The Interim Constitution was later replaced by the new constitution promulgated by the elected Constituent Assembly - II.

7. Debates on the roles and structure of Local Governance

For the first time in the history of Nepal, the people elected constituent assemblies (CAs) to write their constitution. Two CAs were elected in 2008 and 2013. The first CA could not deliver the constitution due to deep political differences between the members on matters such as federalism and state restructuring. The second CA delivered the constitution in 2015. Both the CAs held extensive debates regarding the form and nature of local governments. There were 11 thematic committees in the first CA and only 5 in the second CA.

The first CA had one Committee on State Restructuring and Division of State Power. This Committee widely discussed the issue of local governments. It laid down two major bases of local government: Identity and viability. Identity further divided the bases into five sub-bases: ethnic/community, lingual, cultural, territorial/regional continuity and historic continuity. Likewise, capacity divided the base into four sub-bases: Economic Inter-relation and capacity, state of infrastructure and potential, natural resources and availability and administrative ease. The second CA largely owned the documents and agreements reached by the first CA (CA Committee of State Restructuring and Division of State Power, 2010 : 20-21).

In fact, the objective of the democracy is to transform the traditional character of the state into a transparent political system and to responsibly and cooperatively manage the conflicting interests through open dialogue. To maintain relative peace and order in the country and society and to stop the spread of violence and armed conflict, the characteristics of the state operation system are critical. Countries that have a democratic, representative and participatory system of governance can achieve relative peace, and causes and grounds for violence and armed conflict are largely reduced in such countries and societies (Khanal, Pradhan, Acharya, Thapa, Rijal, Giri, 2007).

8. New Constitution and the Changed Concept of Local Governance:

The Constitution of Nepal 2015 promulgated by the elected constituent assembly established the local level as full-functional local government units. Article 56 of the Constitution discusses the structure of the state and designates three tiers of governance: federal, provincial and local level. Article 56 (2) states: "The state power of Nepal shall be exercised by the federal, province and local level

as per this constitution and laws." Part 17 provides for provisions about the Local Executive, Part 18 for the Local Legislative, Part 19 for Local Financial Management and Part 20 for inter-relations among the federal, province and local levels. The local level currently has the Rural Municipal and Municipal Executive that function as the executive branch, the Rural Municipal and Municipal Assembly that function as the legislative branch and the Rural Municipal and Municipal Judicial Committees that function as the judicial branch.

Likewise, the Constitution provides for the formation of the structure of the Municipal Executive, including the election of the chairperson, vice chairperson, ward chairperson and members. It also provides for the inclusion of five women members and three members from the Dalit or minority community (The Constitution of Nepal : 99). They are expected to make laws on specified areas. Schedule 5 of the Constitution has provided a list of 35 areas in which the federal legislature has exclusive right for law-making (The Constitution of Nepal : 173). Likewise, Schedule 6 has provided a list of 11 areas in which the provincial assemblies have exclusive right for law-making (The Constitution of Nepal : 175). Schedule 7 has provided a list of 21 areas in which the federal and provincial legislatures have concurrent rights for law-making (The Constitution of Nepal : 176). Schedule 8 has provided a list of 22 areas in which the local legislatures have exclusive rights for law-making (The Constitution of Nepal : 179). Schedule 9 has provided a list of 15 areas in which the federal, provincial and local level legislatures have concurrent rights for law-making (The Constitution of Nepal : 181).

Schedule 8 of the Constitution defines the exclusive rights of the local level. It states that there will be 22 areas under such local level jurisdiction. They include city police, cooperative, local taxes, management of local service, basic and secondary education, local level development projects, basic health and sanitation, local road, distribution of land/house ownership certificate, agriculture and livestock management, disaster management and so on.

9. Restructuring of Local Government and Local Government Operations Act

After the promulgation of the Constitution in 2015, the government formed a Local Level Restructuring Recommendation Commission (LLRC) headed by Balananda Poudyal. The Commission recommended the formation of 753 local government units, including six Metropolitan Cities, 11 Sub metropolitan Cities, 276 Municipalities, 460 Rural Municipalities and 6,473 wards of local

government. The Commission identified seven major bases for the restructuring and delimitation of the local government units. The bases included minimum ceiling of population, geography and area, ethnic/lingual/cultural density, bases of geographic accessibility, natural resources, institutional infrastructure and potential of income/expenditure based on fiscal year 2015/16. The Commission mobilized its district committees in 77 districts. The Local Development Officer headed the committees called technical cooperation committees. The Commission came up with final division based on a review of the reports (LLRC Report, 2017).

The elections for these local levels were held in 2017 electing around 37,000 representatives. Out of the total, 15,000 were women and from the Dalit community. In order to ensure inclusion, the laws made it mandatory that chairperson/mayor and vice chairperson/deputy mayor of Rural Municipality/Municipality must represent different genders. It indicates the size and the overwhelming pressure that, if properly designed and implemented, could have significant impact not only in strengthening democracy but also in delivering services to the people.

In 2017, Nepal completed all three sets of elections that were necessary to institutionalize the three tiers of governance adopted by the Constitution of Nepal. The elections led to the formation of governments and legislatures at the federal, provincial and local levels. In particular, the seven provincial governments and provincial assemblies were formed as totally new structures in the history of Nepal. In the first set of federal, provincial and local level elections, the unified force of communist party gained big majority. In the federal parliament, the Nepal Communist Party formed a government with a two-third majority support. In six out of the seven provinces, the same party formed the government with either two-third or comfortable majority. The Nepali Congress became the main opposition party. Some Terai-based parties were the third force. Similarly, the NCP, the NC and the Terai-based parties won most of the seats in the local government election (Election Commission of Nepal, 2019).

A separate Local Government Operation Act, 2018 (LGOA) was formulated in 2018 after the elections. It laid down clear provisions on the formation process of the Rural Municipality and Municipality, their functions, roles and responsibilities, their rule of procedure, planning, implementation and coordination and the formation and rights of the judicial committees. These provisions have established the legislative, the executive and the judicial functions of the local

level. The LGOA has 121 Clauses that range from the number and delimitation of rural municipalities and municipalities to their formation, nature and functions (Ministry of law, Justice and Parliamentary Affairs, 2016). The LGOA states that the local level shall work in the spirit of cooperation, coexistence and coordination to promote people's participation, accountability and transparency in the delivery of quality service. It aims to ensure the proportional, inclusive and judicious distribution of democratic dividend to consolidate socialism-oriented federal democratic republican system from the local level. The main focus of the LGOA is on the development of local leadership to strengthen local governance system through the exercise of local level executive, legislative as well as judicial powers.

10. Service Delivery of Local Government

The major function of local governments is to deliver various services to the people. In the current form, there are two important units of the local government, namely Rural Municipalities and Municipalities. Interestingly, in the previous system, districts were the central units for local governance. However, they have now been replaced by the Rural Municipalities or Municipalities. The Rural Municipalities and Municipalities are the primary policy-making body of local governments, whereas the primary implementing units are the Wards. The current Rural Municipalities or Municipalities have been formed by merging four to six VDCs or municipalities. Their size and population are bigger. In fact, the current Wards are as big or slightly smaller than previous VDCs.

Previously, there used to be a single VDC secretary designated by the central government to help the administration. However now, each Rural Municipality or Municipality has joint or undersecretary level official as the administrative chief. They also have 50 to 70 staffs dispatched by the central government. Each Rural Municipality/ Municipality has formed half a dozen committees to implement different activities. The LGOA has clearly stipulated the functions, duties and rights of the local governments. It has provided executive, legislative as well as judicial functions and rights. The Rural Municipal Executive and Municipal Executive work as the local executive bodies. The Rural Municipal Assembly and Municipal Assembly work as the local legislatures. The Judicial Committees work as the local judiciary.

On the executive front, the local governments have began spending resources on service delivery as well as local development. Each

Rural Municipality has a total budget of between Rs 400 million to Rs 1 billion. Likewise, each Municipality has a total budget of between Rs 1 billion to Rs 15 billion. However, a huge portion of this budget is provided as grants by the federal and provincial governments. Most of these local governments are using maximum resources, apart from incurring regular expenditures like salary, on building roads without proper planning. In terms of service delivery, the current local governments have improved the quality and access compared to previous system. However, the fees imposed on service recipients have increased dramatically.

Chairperson of the National Rural Municipality Association of Nepal, Hom Narayan Shrestha says most of the federal budgets that are transferred to the local government are conditional grants. This limits the rights of the local government in spending resources in the areas they see fit.² General Secretary of the National Rural Municipality Association of Nepal, Bansalal Tamang says there is confusion in the spending of resources. Federal, provincial as well as local governments have been found spending money on similar kind of projects; there is no uniformity and lot of duplications.³ General Secretary of the Municipal Association of Nepal, Bhim Dhungana says the idea of providing separate fund to the MPs in the federal and province parliaments is inconsistent with the concept of local governance. There are elected local governments that can better use such resources.⁴

The responses of these local leaders reveal that both in roles as well as resources, there is a huge paucity, meaning that the local governments have not been able to deliver services as enshrined in the Constitution or as expected by the people. On the law-making front, even though they are allowed to formulate laws on 22 areas as listed in Schedule 8 of the Constitution, very few local governments have undertaken the initiative on law-making. Even among the local governments that have begun the initiative on law-making, most have relied on the model laws dispatched by the federal government. Most local governments appear confused about their rights on the Exclusive List and the Concurrent List.

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2. *Consultation Meeting with representatives of Local Government Associations organized by Nepal Law Society held on 12 May 2019 at Hotel Shangri-La, Kathmandu*
 3. *Consultation Meeting with representatives of Local Government Associations organized by Nepal Law Society held on 12 May 2019 at Hotel Shangri-La, Kathmandu*
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Chairperson of the National Assembly Ganesh, Prasad Timilsina says that the federal parliament is currently formulating a law on coordination among the federal, province and local levels. Only after it is formulated can the provinces and the local level become clear about their responsibilities in law-making.⁵ Speaker of the Province Assembly of Karnali Province Raj Bahadur Shahi says that the provinces and the local levels should be allowed to formulate laws in their appropriate time. Otherwise, it will hinder their service delivery and development. In any case, laws that are inconsistent with the federal or province laws can be annulled to the extent they are inconsistent.⁶

Chairperson of the Constituent Assembly Subas Nemwang says local governments can frame laws immediately on 22 areas in Exclusive List and 15 areas in Concurrent List. But as the Constitution says, such laws have to be annulled if they are inconsistent with the province or federal laws, to the extent they are inconsistent. Therefore, it will be appropriate for the local governments to appoint legal officers so that they can avoid such inconsistencies.⁷ Chairperson of the Singta Rural Municipality of Surkhet, Kabindra Kumar KC says that the Rural Municipalities have been working as per the LGOA, but at most points, they require laws and policies. Therefore, the primary concern should be on law-making without which local governance objectives cannot move forward⁸. They further argue for the need to resolve the inadequacy of proper laws, mandates and guidelines to ensure smooth functioning.

On the judicial front, the judiciary committees of the local governments are functional and are delivering judicial service to the local people. By providing justice through a sHoRt due process at the doorsteps, these committees have provided a huge relief to thousands of people. There is a growing trend of people approaching the committees seeking justice. In particular, people from poor communities, women

5. *Provincial level formal consultation with stakeholders organized by Provincial affairs and legislation committee of Karnali Province and Nepal Law Society on 20 August 2019, Hotel Siddhartha, Surkhet*

6. *Provincial level formal consultation with stakeholders organized by Provincial affairs and legislation committee of Karnali Province and Nepal Law Society on 20 August 2019, Hotel Siddhartha, Surkhet*

7. *Formal consultation with key stakeholders organized by Legislation Management Committee, National Assembly and Nepal Law Society, on 29 August, 2019 at Hotel Shangrila, Kathmandu*

8. *Provincial level formal consultation with stakeholders organized by Provincial affairs and legislation committee of Karnali Province and Nepal Law Society on 20 August 2019, Hotel Siddhartha, Surkhet*

and Dalits have benefitted from the new dispensation. However, out of the 753 local governments, dozens have not formed a judiciary committee yet because of political reasons. Even in local governments that have formed the committee, they lack budget, infrastructure, human resource as well as conceptual clarity.

Clause 47 (1) and (2) of the LGOA provide judicial functions and rights to the judiciary committees of the local governments. Clause 47 (1) contains 13 areas, and 47 (2) contains 11 areas. Under the first clause, the local governments can adjudicate, whereas under the second clause, they can only hold mediation. According to a study by the Nepal Law Society, most of the people approach the judiciary committee only to settle cases under Clause 47 (2).

Former Chief Justice Kalyan Shrestha says that the judiciary committees of the local government have to deliver judicial functions, which require the application of the judicial mind and the adoption of due process. If judiciary committees do not follow these norms, their decisions can be overturned by the district courts. Therefore, it is necessary to develop judicial capacity among the members of the judicial committee. An official training manual should be developed, and all of the committee members should be trained based on the manual.⁹ Chief Judge of High Court Til Prasad Shrestha says judicial committees have failed to follow due process and have had their decisions overturned by district courts. Delivering justice is not enough; it has to be delivered through due process.¹⁰

Deputy Mayor of the Mithila Municipality of Dhanusha Tara Lama Basnet says that the mayors control everything, while the deputy mayors have no power or control. There is a lack of resources to administer the judicial committee. There is no meeting place or even legal support available. There is political interference in every sphere of their work. The district court only engages with the mayors even though deputy mayors should be equally engaged due to their judicial role. Women deputy mayors require regular trainings, preferably once every three months, for their capacity enhancement. Such trainings should also include the mayors so that they understand the work of judicial committees and their importance.

9. *Policy Dialogue with Stakeholders on Support Federal policy/law making processes Related to Federal, Provincial and Local Government Relationship and Coordination organized by Nepal Law Society on 24 December 2019, Hotel Shangrila, Kathmandu.*

10. *Policy Dialogue with Stakeholders on Support Federal policy/law making processes Related to Federal, Provincial and Local Government Relationship and Coordination organized by Nepal Law Society on 24 December 2019, Hotel Shangrila, Kathmandu.*

Deputy Mayor of the Hansapur Municipality of Dhanusha Renu Devi Jha says in the absence of resources, it has become extremely difficult to work and deliver services. The deputy mayors have multiple responsibilities, from judicial committees to budget to planning as well as monitoring. However, the deputy mayors have not been able to do justice to their role. The mayors have all the facilities as well as support to run their office, but the deputy mayors have no personal assistance or any other support. Although the right to head the judicial committee is given to vice chairperson or deputy mayor, they face challenge from chairperson or mayor because most of the deputies are women. Women face cultural problem due to male domination.¹¹

The evidence further enforce weaknesses in delivering services in the judicial front, too.

5. Practical Challenges Faced by Local Governments

Through the elections in 2017, most of the positions of vice chairperson of Rural Municipality and deputy mayor of Municipality are occupied by women. The LGOA gives huge responsibilities to the vice chairperson of Rural Municipality and deputy mayor of Municipality.

Clause 16 (4) (b) of the LGOA lists responsibilities of the vice chairperson of Rural Municipality and deputy mayor of Municipality. They are given important responsibilities, such as working in the capacity of coordinator of the judicial committee and the duty of monitoring and supervising the planning and implementation. Clause 65 states that they work as coordinators of the Local Revenue Advisory Board. Clause 67 states that they work as coordinators of the Budget and Program Drafting Committee.

These clauses show that most important responsibilities are given to the vice chairperson of Rural Municipality and deputy mayor of Municipality. But given the cultural dominance by men who are in the position of chairperson or mayor, they face lots of challenges in asserting their rights.

11. *Provincial level Interaction on Practice sharing on local government judicial committee members organized by Nepal Law Society held on 15 June 2019 at Hotel Sitasaran, Janakpur.*

6. Conclusion and Recommendations

Conclusion

Nepal, despite transitioning to a federal republic with three tiers and according importance to local levels as is enshrined in the Constitution and the laws, is finding it difficult to empower the local level to become fully functional. This difficulty comes from a paucity of resources, conflict in resource distribution and further empowerment process (notwithstanding the successful conducting of elections and making of some laws). In the execution of previous laws like LSGA 1999, it encountered numerous impediments proving real decentralization to be a tough task in view of not only socio-cultural and resource context of the country but aided by a reluctant bureaucracy and the power centers that are unwilling to shed power where it is needed. Even during the federalization process, these barriers have strongly emerged. However, democracy, if it is to mean meaningful empowering of people, has to empower bodies working nearest to the people, i.e. the local levels; only this will lead to realization of the goals envisioned in the Constitution.

Presently, there have been a lot of positive developments and steps taken towards the right direction. The local governments have been elected, and they have gradually started working in law-making, service delivery as well as development. However, in each of these fields, they have faced challenges relating to capacity, knowledge and resources, implying that they have not delivered services as is expected.

Recommendations

Given the afore-mentioned gaps in the constitutional provisions and the actual practice in local governance, there are some clear recommendations that can help in addressing them. These recommendations are presented below under specific categories.

1. Policy

There is a need to have a five-year policy to implement local governance based on the Constitution and Directive Principles of the State. Based on this long-term policy, annual policy and laws should be formulated. The Local Level Assembly should pass the policy in coordination with the federal, province and local levels. Draft a policy to embrace the rights enshrined in the Schedules of the Constitution (8 and 9).

2. Legal

Laws to operationalize the 22 rights enshrined under the Exclusive List in Schedule 8 of the constitution should be formulated soon. Likewise, laws to operationalize the 15 rights enshrined under the Concurrent List in Schedule 9 of the Constitution should also be formulated quickly. To make this process clearer, the federal level should first prepare the law on coordination. The federal and provincial governments should coordinate and consult with the local level when they formulate their laws that are relevant to the local level.

3. Capacity Development

There is a need to provide adequate human resources in coordination with the federal and province governments. Trainings must be held for the elected representatives of the local level to understand and implement the Local Governance Operation Act. The staffs of the local level should also be trained on law-making, service delivery, economic policy, planning and judicial functions. The staffs of the local level should be made accountable to the local level. The officials of the Judicial Committees should be trained and provided with Guidelines on Judicial Service Delivery.

4. Institution Building

There is a need to develop physical infrastructures for the local level with a long-term vision in mind. Focus should be on building institutions of wards as centers for service delivery along with basic facilities to local level offices.

5. Human and Financial Resources

There is a need to prepare basic organizational strength at the Local Level, identify the necessary positions and fill them accordingly. Human resources should be made accountable to the local level governments. The National Natural Resource and Fiscal Commission should be effective and ensure sustainable financial resources for the local level. Volumes of the conditional and non-conditional grants for local level should be specified. Areas of local resources and their management should be identified as well.

6. Development/Service Delivery

There is a need to prepare a 5-year development strategy plan and guidelines for service delivery mechanisms. It should be ensured that citizens receive services at their doorsteps.

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PARTICIPATION OF WOMEN AND INCLUSION IN THE CONSTITUTION OF NEPAL: CHALLENGES AND OPPORTUNITIES

Arjun Kumar Khadka¹

1. Introduction

Montesquieu (1689-1755), a political philosopher, evolved the theory of the separation of power.² This popular theory has important bearings on the framework of constitutions even today. Montesquieu was familiar, more than any other writer, with the political lexicon around the world. He also published *The Spirit of Laws* in 1748.³ The book was a treatise on political theory as well as a pioneering work in comparative law;⁴ it enjoyed popularity both in the United States and the United Kingdom during the colonial period. The book developed as the basic guideline during the drafting process of the United State Constitution. Since then, the theory of separation of power has become familiar in many countries, especially in democratic countries all over the world, such as Nepal, India, Sri Lanka, Bangladesh, Germany, the Netherlands, France, South Africa, Kenya and Ghana.

The Constitution of Nepal, too, has clearly adopted this provision. For example, Parts Seven, Eight and Eleven of the Constitution, related to the executive, the federal parliament and the judiciary, respectively, follow the basic norm of a separation of powers. In the same way, the Constitution has also mentioned some provisions in term of checks and balances among the three core organs of government; for example, Article 100 of the Constitution outlines provisions relating to vote of confidence and motion of no-confidence for the prime minister at the House of Representatives. Additionally, Article 101 relates to the impeachment process for Supreme Court judges by the House of Representatives. Moreover, the Constitution of Nepal has envisaged an egalitarian society on the

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2. *Theory of Montesquieu (French Philosopher 1689-1755).*
3. *French: De l'esprit des The lois, originally selled De l'esprit des loix, also sometimes translated as the Spirit of Laws.*
4. *Ibid.*

basis of the principles of proportional inclusion and participation to ensure economic equality, prosperity and social justice by eliminating discriminations based on class, caste, region, language, religion and gender.

Given this background, this article highlights the historical developments and meanings of inclusion and the perception of gender, including initiation for an inclusive society in terms of women participation. Secondly, inclusion and women's participation are explored specifically in the context of Nepal's constitutional provisions and various practical achievements. Thirdly, this article assesses the challenges and opportunities for women's advancement, followed by conclusions.

2. Meaning and Development of Inclusion

Inclusion is the ability of an individual to participate in the basic political, economic and social functions of society and enjoy the same equal access to opportunities as other groups or individuals. The need for inclusion arises only if exclusion exists. The aim of social integration is to create a society for all in which every individual, each with rights and responsibilities, has an active role to play. Such an inclusive society must be based on the respect for all human rights and fundamental freedoms, cultural and religious diversity, social justice and the special needs of vulnerable and disadvantaged groups, democratic participation and the rule of law. The pluralistic nature of most societies has, at times, resulted in problems for the different groups to achieve and maintain harmony and cooperation and to have equal access to all resources in society. Full recognition of each individual's rights in the context of the rule of law has not always been fully guaranteed. Since the founding of the United Nations (UN), this quest for humane, stable, safe, tolerant and just societies has shown a mixed record at best.

The history of inclusion started in the seventeenth century. With the enunciation of the concept of citizenship, its progress was slow and tortuous. However, the term inclusion was not used then; in practice, by the mid-1960s, some economists referred to discrimination in the context of market as exclusion.⁵ Robert A. Dahl (1915-2014), who introduced the theory of inclusivity, is known as father of inclusion. He clarified the concept of democracy in his book *Democracy and Its Critics* (1990);⁶ he explained that modern countries do not meet the ideals of democracy, which is a theoretical utopia.

5. <https://www.un.org/development/desa/dspd/world-summit-for-social-development-1995.html>.

6. Coglianesi, Cary, *Democracy and Its Critics* (1990). University of Pennsylvania Law School, Faculty Scholarship.Paper 1241.

More specifically, he wrote about the following five criteria that are essential ideals of democracy:

- Effective participation: Citizens must have adequate and equal opportunities to form their preference and place questions on the public agenda and express reasons for one outcome over the other.
- Voting equality at the decisive stage: Each citizen must be assured his or her judgments will be counted as equal in weights to the judgments of others.
- Enlightened understanding: Citizens must enjoy ample and equal opportunities for discovering and affirming what choice would best serve their interests.
- Control of the agenda: Demos or people must have the opportunity to decide what political matters actually are and what should be brought up for deliberation.
- Inclusiveness: Equality must extend to all citizens within the state. Everyone has legitimate stake within the political process.⁷

Dahl stressed that if the above-mentioned criteria are included within a country's constitution, that country can be called a politically-advanced one, or polyarchies. Polyarchies means the presence of elected officials, free and fair elections, inclusive suffrage, rights to run for office, freedom of expression, alternative information and associational autonomy. These major factors create multiple centers of political power.

Similarly, the most comprehensive conceptualization of social exclusion was attempted by Amartya Sen, who expanded the list of the excluded by bringing in those who experienced livelihood insecurity, were subjected to chronic unemployment, had inadequate consumption levels and nutrients and had poor housing and education.⁸ Sen also considered as excluded those lacking in cultural capital, denied entitlements of citizenship, and deprived of respect and understanding by dominant groups, who did not enjoy a high quality of life. Sen further mentioned that a wide range of practices are believed to result in social exclusion.

In addition, the United Nations organized the World Summit for Social Development (WSSD) in March 1995 in Copenhagen.⁹ The Social Summit was the largest gathering ever of world leaders at that time (i.e. 117 Heads of State or Government). In this Summit, governments reached a new consensus on

7. *Ibid.*

8. Sen Amartya, 2000 *Social Exclusion: Concept, Application and Scrutiny. Social Development Paper No. 1 Office Environment and Social Development Asian Development Bank, pp.1-60.*

9. *I supra* 5.

the need to put people at the center of development. It pledged to make the conquest of poverty, the goal of full employment and the fostering of social integration as overriding objectives of development.

Moreover, governments adopted a Declaration and Programs of Action, which represented a new consensus on the need to put people at the center of development. The Summit promised to promote political and social processes inclusive of all members of society and respectful of political pluralism and cultural diversity. Furthermore, the core theme of the Summit was related to social and economic development, which cannot be secured in a sustainable way without the full participation of women and that equality; therefore, equity between women and men is a priority for the international community and, as such, must be at the center of economic and social development. The Summit reconvened in Geneva in June 2000 after five years to review what the signatories had achieved and to commit themselves to new initiatives.

3. Traditional Perception about Women

Human beings desire peace, prosperity, happiness and fulfillment. The Vedas (Hindu Theology) show the way to our ultimate goal: physical prosperity with spiritual accomplishment. All else, e.g. purse, power, position, prestige and profession, are just means to that end. However, in the course of a couple years, the eternal principles of the Vedas (Hindu Theology) have been diluted and distorted, resulting in many contradictions in social conduct, namely the malpractices of the caste system based on birth and discrimination against women, both of which are against Sanatana Dharma and concept of nature.

Historically, discrimination developed through various human activities related to the disciplines of economy and philosophy. For example, women were excluded from politics and social life, as per Greek philosophy. John Locke, for example, an influential enlightenment thinker, focused political theory on the social contract but concluded that women were not allowed the same contract. Economist Adam Smith, who made a distinction between the public (State government) and the private (market) through his renowned book *The Wealth of Nations*, 1776, excluded women and children from this discourse.

These examples demonstrate that even pertinent philosophers minimized women's roles and supported discriminatory provisions broadly in public life.¹⁰ Unequal treatment between men and women has been practiced universally from a very early stage in different forms. Such unequal treatment and behavior

10. Rodgers, G., C. Gore and J. Figueiredo (eds.), 1995. *Social Exclusion: Rhetoric, Reality, Responses*. Geneva: International Institute for Labour Studies.

are legitimized in the name of culture and religion and in the name of quality and shape, without any grounds for support.

4. Gender Issues and Inclusion Initiation

Men and women are equal, except in the biogenic role, but the biogenic role is transformed exaggeratedly into a socio-genic role (which is a social problem) and practiced to discriminate against women, especially in developing countries like Nepal. In addition, gender roles can change as per society's value and perception, as, in practice, gender roles refer to socially-constructed roles, responsibilities, norms, expectations and stereotypes accorded to women and men (e.g., in such areas as division of labour, power sharing and decision-making).

A gender-focused perspective implies analyses of social relations between women and men (girls and boys) in a given context (i.e., a culturally and historically determined context). In Nepal, for example, gender discrimination and inequality between men and women have prevailed in society from family life to the national level. Gender discrimination and inequality are persist because women remain marginalized academically, economically, socially and politically and suffer from deep-rooted discriminatory practices, especially in rural and illiterate families or societies. This is the crux of the problem of development and women advancement.

Similarly, because society considers boys/men to be breadwinners, it created gender disparities and unequal treatment between the education of boys and girls. The lack of awareness and equal participation, especially in rural areas of Nepal and in most developing countries, thus has led to weakened sustainable development; without awareness and political power, women are kept from being as capable as men generally. Thus, if women are excluded, they have less possibility of being involved in public sectors like politics, health and communication. Ultimately, women's reduced presence in public sectors creates a significant gender gap for sustainable development and creates hindrance in the peace building, peacemaking and rehabilitation processes in the country. Therefore, inclusion is the basic and primary agenda at present.

Basically, the disparity between rural and urban areas and among different communities is still a persistent problem. In Nepal, therefore, to reduce such inequality, awareness actions, especially regarding inclusion, are essential, because inclusion is an integral basis for equality and advancement of the modern world. Inclusion is helpful for maintaining social harmony, equal participation and social integration between males and females in many areas, including political and legislative spheres, national development, improving health and nutrition in the family and empowering women to participate at the decision-

making level. Likewise, inclusion helps develop gender equality holistically, by, for example, reducing illiteracy among women, improving women's access to savings, credit mechanisms and institutions, developing non-discriminatory education and training, allocating sufficient resources for and monitoring the implementation of educational reforms and promoting lifelong education for development, all of which are primary agendas throughout the world.

5. Women Participation and Inclusion through Various Process

Democratization, globalization and liberalization emerged after the Second World War, heightening after the Cold War (after 1990s) period, and emphasized equal rights for women and men. This is an issue that deserves urgent and multi-dimensional attention in all sectors, especially in developing countries like Nepal, Bangladesh and India. For example, the Beijing+5 promoted equal rights, opportunities and access to resources and the equal sharing of responsibilities between men and women in the family. Additionally, women empowerment is an essential instrument to ensure equality in holistic areas, which is one of the key agendas of the 21st century under the United Nations umbrella.

(a) Affirmative Action (Method)

Men and women are considered two sides of a single coin; as jurisprudence states, there are no men or women in society, only people. Therefore, if we uphold this view in jurisprudence, we cannot believe in gender discrimination. For example, a daughter says, "I am a woman, so I want property." However, she does not say, "I am a person; that is why I need property." Rights should be created for users, as rights do not exist in a vacuum. This is the reason for affirmative action, to make women capable of using their rights as per jurisprudence theory.

Basically, affirmative action is one of the instruments to empower women in various areas, including political leadership and representation in decision-making in many countries. However, the provision is debatable, because some feminists have argued against it. Those who favor affirmative action, argue that it aims to compensate women for past injustices in many disciplines, thus providing a level playing field, ensuring diversity and meeting the needs for female role models. Those who are against it argue that it influences the incentive to work harder, its spirit is against meritocracy, reduces general quality and represents reverse discrimination. Historically, affirmative action emerged in the

United State from executive order 10925 by President John F. Kennedy (1917-1963) and Executive order 11246 by President Lyndon B. Johnson (1908-1973). Later, women's affirmative action was included in the Civil Rights Act, 1964 (Vicky Randall, 1987).

Likewise, internationally, affirmative action was formally introduced after the Convention on the Elimination of All Forms of Discrimination against Women in 1979 (CEDAW). Since then, affirmative action has been adopted in many countries, including Nepal. For example, equal rights to men and women for ancestral property was adopted after the ratification of CEDAW in the 1990s. At present, more than 100 out of 193 United Nations member states have introduced some kind of quota provisions for women in parliamentary leadership and representation in various areas.

(b) Affirmative Action in the Nepalese Context

Nepal has adopted many legal frameworks at the national level, especially after the 1990s. Previously, there were many discriminatory provisions, like daughters lacking rights to ancestral property. In this regard, the Constitution of Nepal, 1990 articulated many provisions in favor of women, including affirmative action. The present Constitution of Nepal, 2015 has stressed that no discrimination of any kind shall be made against women. Likewise, every woman shall have the right to reproductive health and no woman shall be subjected to physical, mental or any other kind of violence. Violations of these provisions are punishable by law.

Moreover, sons and daughters shall have equal rights to ancestral property. Article 42 of the present Constitution stresses that economically, socially or educationally backward women shall have the right to take part in state structures on the basis of proportional inclusion. Beyond these constitutional provisions, many legal frameworks are also adopted, such as the Children Act 2075 and regulations respecting reproductive rights and providing privileges to women employees. Pregnant civil servants are granted maternity leave before and after delivery with full remuneration within the service period.

Furthermore, the Labor Act 2075 has made some special provisions for women workers. For example, an enterprise with more than fifty female worker needs to provide a separate room for the use of their children as well as a trained nurse, and female workers will need to be provided the necessary time to breastfeed their babies. Similarly, the Nepal Health Service Act, 2053 and Regulation 2055, previously the Local Self Governance Regulation 2056, Education

Regulation 2059 and Legislative Parliament Service Act have provided affirmative privileges to women employees in many public domains. These affirmatives provisions provide support for women and ensure gender benefits (especially for women) in various areas. In practice, affirmative action is one of the instruments to empower women in many areas, including political leadership and representation at the decision-making levels, which has positive impacts.

Furthermore, the Comprehensive Peace Agreement (2006) signed between the Government and then Maoists and the Interim Constitution of Nepal (2007) incorporated clear provisions of gender equality and social inclusion (GESI) as a move to make the governance system more inclusive in the Nepalese context. Additionally, the Approach Paper to the 14th 3-Year Plan, 2016-2019 (F.Y.2073/74-75/76 B.S.) has included Gender Equality, Inclusion and Mainstreaming¹¹ as a separate component of development under Interrelated Development Policies, which is enhanced for gender equality and women empowerment, inclusion and the empowerment of marginalized caste and groups.

In this regard, the scenario has smoothly changed, and subsequently, women have made substantial progresses in various sectors, leading to a general increase in their number in leadership positions. Especially after the promulgation of the Constitution of Nepal, 2015, tremendous progress can be seen in the securing of women's positions in the political domain, which creates an egalitarian society on the basis of the principles of proportional inclusion and participation to ensure economic equality, prosperity and social justice by eliminating discriminations based on gender.

6. Women Participation and Inclusion through Constitutional provisions

The Constitution of Nepal was promulgated on 20 September 2015, by the Constituent Assembly, and was first amended on 28 February 2016. The constitution has outlined major provisions related to women's participation, inclusion and rights. For example, the Constitution has secured women political positions in many political offices; for example, the President and Vice-President shall belong to different genders or communities (Article 70) and the composition of the House of Representatives ensures women's participation (Article 84 (2) and (8)). Similarly, composition of the National Assembly has also been made gender-friendly; there shall be 59 members in the National Assembly, including at least three women as per Article 86 (2). Moreover, either

¹¹ National Planning Commission, Nepal.

the Speaker or the Deputy Speaker shall be a woman as per Article 91 (2), and either the Chairperson or the Vice-Chairperson of the National Assembly shall be a woman as per Article 92(2). Likewise, the province assemblies have also secured women position.

Additionally, there exists a provision that the members of the municipal executive shall also include five women members elected by the members of the municipal assembly from amongst themselves under the provisions related to mayor and deputy mayor of the municipality. The District Assembly shall, pursuant to provincial laws, elect a District Coordination Committee with a maximum of nine members, including a Head and a Deputy Head, at least three women. There shall be a Village Assembly in each Village Council, and they shall have the representation of at least two women from every Ward of the Village Council.

Furthermore, per Article 252, there shall be a National Women Commission consisting of a Chairperson and four other members. In addition, Article 267 (1) and (3) highlight the provisions relating to the Nepal Army and outlines that the Army, committed to democratic principles, is inclusive in character and national in form, and the entry of women shall be ensured in the Nepal Army based on the principles of equality and inclusion as provided for in the federal law. Article 282 emphasizes the principle of inclusion in terms of the appointment of Ambassadors and special emissaries. All these provisions show that the Constitution of Nepal is fully committed for women's participation and inclusive democracy.

7. Women Participation and Inclusion Achieved through International Efforts

Women participation through international efforts has had remarkable achievements, especially after the 1960s, through the UN's initiation. For example, the Convention on the Political Rights of Women provided some legal rights for women to participate in the political realm and right to vote for women in their respective countries. Moreover, the UN played a great role in organizing the Women Conference in Mexico in 1975, in Copenhagen in 1980 and in Nairobi in 1985, and the Beijing + 5 which focused on women's participation in public place at various levels, such as the decision-making and the administration level (national bureaucracy level). These efforts also endeavored to abolish social and cultural barriers. Similarly, the International Labour Organization initiated for equal pay for equal work, non-discriminatory provisions for women and established an environment for respect to women in working spaces, especially in order to maintain social dignity and identity.

(a) Women Participation and Achievement

There is a growing body of evidence emphasizing that investing in gender equality and women's economic empowerment brings women's untapped skills and talent pool to the forefront and enhances economic efficiency and improves other development outcomes that are critical in an increasingly competitive and globalized world. Ensuring gender equality and women's right also has positive intergenerational impact, as over time, it results in more inclusive institutional and policy choices that optimize development outcomes in many countries. Data from various contexts demonstrate this.

For example, ensuring that women farmers have the same access as their male counterparts to fertilizer and other agricultural inputs would increase maize yields by 11 to 16 percent in Malawi and by 17 percent in Ghana.¹² Improving women's property rights in Burkina Faso would increase total household agricultural production by about 6 percent with no additional resources but only by reallocating resources from men to women. The Food and Agriculture Organization of the UN estimated that equal access to production resources between female and male farmers could increase agricultural output in developing countries by 2.5 to 4 percent.¹³

Positive development impacts on children and economic growth in other countries are attributed to investments in gender equality and women's economic empowerment. Data from Bangladesh, Brazil, Mexico, South Arica and the United Kingdom demonstrate that increasing the share of household income controlled by women, either through their own earnings or cash transfers, changes expenditure patterns that benefit children. For example, in Ghana, women's equal ownership and access to productive assets and land are positively associated with higher food expenditures. In India, a woman's income increases her children's years of schooling. In the context of Nepal, women's income has played a positive role in taking independent decisions and gaining equal status in households.

12. *United Nations Annual Report*

13. *Ibid.*

(b) Women Participation and Achievements in Legislation, Nepal

Women have made substantial progress and attained participation in many areas, including the parliament and workforce, compared to five decades before, especially leading to a general increase in the number of women in leadership positions in key areas such as the executive, legislative and judicial bodies. These are the key achievements in women's participation in Nepal's history. They are an encouraging sign for the future. In this regard, the following table also presents the picture about women's participation and inclusivity in legislation, which is a huge achievement.

A brief outline of Women Participation in Politics¹⁴

			Number of Women Participation in Legislation at different Year				
Year of Election (BS)	Name of Parliament	Total Member	Elected	Inclusive	Nominated	Total	Per-cent
2038	National Panchayat	75	2	0	4	6	8.0
2043	National Panchayat	75	2	0	5	7	9.3
2048	House of Representatives	205	8	0	0	8	3.9
2051	House of Representatives	205	9	0	0	9	4.4
2056	House of Representatives	205	12	0	0	12	5.9
2064	Constituent Assembly	601	30	161	6	197	32.8
2070	Constituent Assembly	601	11	162	0	173	28.8
2074	Federal Parliament(House of Representatives and National Assembly)	334	27	84	1	112	33.53
	State/Province Assembly (Seven)	550	17	172	0	189	34.36
	Local Level (753)	35,041	14,353	0	0	14,353	40.96
	Total percent of Local Level, State/Province Assembly and Federal Parliament ¹⁵						36.28

In India, Article 325 of the Constitution of India states regarding inclusion: "... there shall be one general electoral roll for every territorial constituency for election to either house of parliament or to the house or either house of

14. Federal Parliament Secretariat and Election Commission, Nepal.

the legislature of a state and no person shall be ineligible for inclusion in any such roll or claim to be included for inclusion in any such roll or claim to be included in any special electoral roll for any such constituency on grounds only of religion, race, caste, sex or any of them." Likewise, Pakistan and Bangladesh also have reservation provisions for women's participation in the parliament.

In fact, women's participation is necessary for politics because it encourages personal identity, gender balance, social justice and equal opportunity for women empowerment. It is also helpful for holistic benefits for women, basically in the three areas: increasing women seats in parliaments (local and national) for equal opportunity, increasing female legislators for formulating gender-friendly laws and increasing number of women as senior officials and managers in public organization for neutrality in decision-making level. These can be achieved through inclusion provisions.

8. Challenges and Opportunities:

Many think that due to leadership inherent in the male psyche, men are naturally more dominant and competitive than women and, therefore, more likely to gain authority roles. Thus, some argue that from private to public life, women's distinctive virtues lie in the private household, self-sacrifice, care for others, sense of proportion and lack of arrogance. But when women attend public life, these virtues would contribute to the solution of the huge public dilemmas and challenges.

It means that women in traditionally male-dominated settings often have difficulty breaking into the old boys' network and professional development opportunities (Catalyst, 2003). Isolation and exclusion are particularly likely for women in the wider sense. Thus, few women will get a chance to work outside the home. It is also a fact that while more men have taken on greater financial responsibility within the family, women continue to shoulder most of the burden. In a study involving well-educated professional women who had left the paid workforce, two-thirds cited their husbands' role in the decision, including their lack of support in childcare and other domestic tasks, and their expectation that wives should be the ones to cut back on employment (Stone & Lovejoy, 2004). Unlike most male leaders, most aspiring female leaders lack the support of spouses who are full-time homemakers or who are working only part-time. Women with families also face more constraints on travel and relocation than men. In fact, this is an example of challenge for women, which directly impacts women's progress in public life and raises barriers for women advancement.

However, such challenges may vary from country to country. In Nepal, for example, poverty is one of basic challenges because in poor households,

financial income played a vital role in limiting women power and personality within the family. It also means that the modern family gives priority for income of women. So, if women are not engaged in income generation, the family, especially, husbands, do not support their wives in the family. Second, orthodox values are another challenge for women in progress. This is because society is highly dominated by patriarchal and stereotyped values. Such things directly impede women's abilities and opportunities, especially for their enhancement such as involving in politics and other areas. Third, socio-cultural practice is another challenge; this includes early marriage, dowry and gender-based violence, which are very serious social practices against women that still continue despite the international community's efforts to eliminate them. These socio-cultural practices are real hindrances for women's personality development, dignity and social status. Next, women often experience physical or sexual violence in various places like schools and working places, thereby fueling the assumptions that women are weak.

On the other hand, women can have a great role in the society - a self-confident women can be a better-half of her husband in the real sense. Thus, women's participation and inclusive process have great value in the country. As such, the government's commitments in the international forum, the level and adoption and the implementation of international covenants relating to women are helpful in creating a favorable environment for women empowerment in public life. For example, Nepal has adopted many international covenants and has also adopted an inclusive legal framework, including the Constitution, at the national level. These are all opportunities for women's advancement. In fact, women face many challenges as well as opportunities.

Conclusion

Inclusion is not a single package deal for all the excluded social categories and communities within the polity. This is because some of them may have only a single, while other may have multiple, deprivations. In Nepal, women's inclusion is very crucial and challenging, because still there is an argument against it, and the gap is very high at various levels, including in the political regime such as in the present cabinet. However, if women are able to participate and be included in the decision-making level, they will be able to build bridges to reduce the gap in the society.

Recognizing its importance, the Constitution of Nepal has adopted very innovative and cordial provisions, such as those that favor socially backward women, Dalit, indigenous people, indigenous nationalities, Madhesi, Tharu, minorities, persons with disabilities, marginalized communities and Muslims. This way they have the right to participate in State bodies on the basis of the

principle of inclusion. Thus, such provisions are the crux of the Constitution for a holistic development of the country.

Therefore, if the provision of inclusion is sustainably promoted, society can benefit. There are, however, still some barriers in terms of women's participation and inclusion, such as orthodox socio-cultural values, weak implementation and a lack of monitoring and commitment. But, if we are able to remove all these barriers, and endeavor to fully implement the constitutional provision, certainly, it will be possible to meet the goal of the Constitution, and challenges will be minimized and opportunities will be maximized, opening the door for women's advancement.

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INCLUSIVE ELECTORAL SYSTEM FROM THE PERSPECTIVE OF EXCLUDED GROUPS IN NEPALESE CONTEXT

Shanker Limbu¹

Background

Unlike elsewhere, in the context of Nepal, the Electoral System (ES) is a key mechanism that plays a vital role for inclusive democracy. Election history dates back to 1940 when Rana Prime Minister Padma Shamsher introduced the Nepal Government Act 1948 with the concept of village and town Panchyat, but it was neither substantiated nor was it a democratic practice. The election system actually materialized only when citizens overthrew the Rana oligarchy, and the first election was held in 1959 based on universal adult franchise. The ES was the will of the people expressed through revolution in the Nepali political experience and has been a custom until now.

Lately, people, particularly from marginalized and excluded communities, are demanding a full-fledged proportional ES to ensure proportional representation for the sake of social justice, shared equal power as well as resources irrespective of caste, creed, ethnicity, race, religion, gender, nationality, social origin, language, and ideology. The election results of until 1999 show disproportionality and exclusionary in capturing the diversity of the people - a reason why excluded groups have continued demanding for electoral reform.

There were three parliamentary elections and two local elections between 1991 and 1999.² However, the ES lacked fair representation of the people in terms of caste/ethnic and social composition.³ In particular, Dalits, women and other minorities were at a great disadvantage.⁴ During this period, other than one representative in the 1991 elections, no Dalit was elected to the House of Representatives (HoR), and the representation of women remained below 6 percent.⁵ Given this exclusion, the ES adopted the principle of semi-proportional representation in order to meet the constitutional commitment of inclusion.

1. *Advocate, Supreme Court of Nepal*

2. *Creating New Constitution: A Guide for Nepali Citizens, IDEA, Editors, YashGhai and Jill Cottrell, 2008, P. 143*

3. *Ibid.*

4. *Ibid.*

5. *Ibid.*

Proportional inclusion is a belated nation-building process in the context of Nepal. Inclusion, democracy and restructuring of the nation, among others, are the key political agendas well as the agenda of peace and reconciliation of the Comprehensive Peace Accord (CPA), which ended the 10-year long conflict in November 21, 2006, concluded between then Nepal Communist Party (Maoist) and the Government of Nepal. Point no. 3.5 of the CPA recognized structural violence against women, Dalits, Indigenous Peoples (Adivasi Janajati), Madhesis and oppressed, neglected and minority communities based on class and identity (castes, social orientation, languages, gender, culture, religion) as well as territory (region and backward region).

The CPA envisaged the end of structural violence and the centralized and unitary state through the introduction of inclusive, democratic governance and restructuring of the nation. The caste system in the context of the IPs is considered to be internal colonization.⁶ After the Madheshi and Indigenous Peoples (IPs) uprising, the unitary system was superseded with the federal system, and the democratic government made a constitutional commitment to address aspirations of IPs, backwards and other regions for autonomous state (Swayetta Pradesh).⁷ This provision also honored the various agreements concluded between the State and the Madheshi as well as with the IPs. It is important to note that the federal systems of governance characteristically seek to establish constitutional structures reconciling self- and shared rule. Given the avowed objective of such systems to protect and promote self-rule, federalism inevitably relates to autonomy and its benefits.⁸ Despite this fact, this provision was neglected in the current Constitution and remains a pending agenda of the belated nation-building process.

The Constitution guarantees fundamental rights to social justice and has encapsulated the right to proportional representation of excluded groups in every state structure.⁹ The state structure mentioned in the Article 42 incorporates elected bodies of the three tiers of government: the federal, the state and the local body. The ES adopted by the country is pluralistic, i.e. mixed. This article analyzes to what extent the ES fulfills the constitutional provisions of proportional inclusion to serve the belated process of nation-building and ensure social justice for excluded groups.

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6. Dr. R.D Munda and S BasuMallick *The Jharkhand Movement, Indigenous Peoples Struggle for Autonomy in India*, IWGIA, 2003 p. 81
 7. *Article 138(1a) of the Interim Constitution, 2007*
 8. Lidija R BastaFleiner and Jean-Francois Gaudreault-Des Beins, *Federalism and Autonomy: Routledge Handbook of Constitutional Law*, Edited by Mark Tushnet, Thomas Fleiner and Cheryl Saunders, Routledge, New York, 2013 P. 143
 9. *Article 42 of the Constitution of Nepal, 2015*

Inside Story of Inclusion in the Constitution Making Process and the Electoral System

The first constitution-making process included discussions regarding an absolute proportional ES that would address and incorporate marginalized communities' interests and voices in the decision-making process, including in legislative, executive and administrative affairs. In contrast, the second Constituent Assembly (CA), to some extent, gave very limited space to excluded groups, except women and Dalits, in local government. It was a common agreement in the mixed electoral process that includes plurality in ES, proportional ES and nomination by the head of the state with recommendation of the government.

The Seven-Party Alliance (SPA) and the Maoists decided that the election to the CA was to be held on a mixed (parallel) system involving two decisions. Each voter had two votes: one for a constituency member and one for a party. After the government concluded negotiations with the Madhesi and Janajati groups, the Interim Constitution was amended to create a more proportional system.¹⁰ The will of excluded groups, particularly of Madhesis and Janajatis, for proportional representation manifested through mass movement that created a conducive environment for such a change; this change became a part of the ES and was incorporated in the Interim Constitution. It involved some changes in the geographical boundaries of the constituencies, with emphasis on re-arranging seats in the Terai and reflecting the proportion of the population that lives there.¹¹

The federal parliament fast-tracked the Constitution's promulgation by suspending some of the Parliamentary Rules. Most importantly, the process, by contracting the time-frame, did not allow space to the general public for wider discussions over the provisions of the draft Constitution. When mainstream political parties concluded on the drafting process and crafted the Constitution, the Madhesi and Indigenous Peoples had serious reservations regarding the procedure and, later, the Constitution itself; they pointed out that people were systematically excluded and their free will was suppressed, which arguably jeopardized their rights to exercise the right to existence, prosperity and live a dignified life with their distinct identities.

In its Editorial, the Himalayan Times, a national daily, underscored these reservations.¹² Prime Minister KP Oli, Nepal Communist Party Co-Chair Pushpa Kamal Dahal and the Nepali Congress president had reached an understanding to "fast-track" the passage of the bill "to meet the constitution deadline..."¹³

10. *Creating New Constitution: A Guide for Nepali Citizens*, IDEA, Editors, YashGhai and Jill Cottrell, 2008, P. 145

11. *Ibid.*

12. <https://thehimalayantimes.com/opinion/editorial-fast-tracked/visited> 10 August, 2019

13. *Ibid.*

Some lawmakers have rightly pointed out that the flawed process, without adequate debate, did not leave enough room to criticize whether or not the contents would be implemented. This, once again, reflects the centric attitude of Nepal's political actors — they are on the same page when their interests converge, and they squabble when their interests diverge.¹⁴

The Constitution-making process controlled by self-centric leaders, who represent dominant groups and interests, culminated with remarkable provisions that institutionalized the identity of the Khas Arya race and reserved seats in every state structure in the electoral process as well. On the other hand, the proposal relating to the Rights of Indigenous Peoples, submitted by the indigenous CA members, were disregarded without any official record in the history of Constitution-making process in Nepal after members were compelled to withdraw it at the last moment.

The Electoral System in Nepal

Since 1990, the reform in the ES in Nepal has always been a heated agenda that followed every political change. The Parliament under the 1990 Constitution consisted of two houses – the HoR, with 205 members, and the National Assembly (NA), with 60 members.¹⁵ Members of the HoR were elected directly by the people, based on the plurality system, from 205 single-member constituencies.¹⁶ Thirty-five members, including three women, of the NA, were all elected by the members of the HoR, based on the single transferable vote system.¹⁷ Fifteen members, three from each of the five development regions, were elected by the elected members of local bodies (e.g. VDCs, municipalities and DDCs), on the basis of the plurality model.¹⁸ The remaining members were nominated, not elected. Local elections for VDCs and municipalities were also based on the FPTP (FPTP)/Plurality model with universal franchise.

But the elections for DDCs were indirect, and the members of the VDCs and municipalities within the district had voting rights.¹⁹ This ES virtually failed to capture the diversity of the country in terms of representation in the legislative body. Nepal's 1990 Constitution prohibits the Election Commission from recognizing ethnic or regional parties; the principle apparently followed has been to deny registration only to parties whose name or constitution makes their ethnic or regional objectives too explicit. Thus, in 1991, of the parties appealing

14. *Ibid.*

15. *Creating New Constitution: A Guide for Nepali Citizens*, IDEA, Editors, YashGhai and Jill Cottrell, 2008, P. 143

16. *Ibid.*

17. *Ibid.*

18. *Ibid.*

19. *Ibid.*

specifically to the hill minorities, the Mongol National Organization and the Nepal Rastriya Janajati Party were refused recognition, and the Limbuwan Liberation Front announced a boycott of the elections in protest against the restrictions; however, the Nepal Rastriya Janmukti Party, campaigning for ethnic quotas within the political and administrative systems, was allowed to participate.²⁰

In contrast, the Mongol National Organization was allowed registration by the election commission after several years. This shows that grounds of the earlier decision were either baseless or biased towards the ethnic nationality. Article 1 of the Convention on Elimination of All Forms of Racial Discrimination (CERD), 1969 states that restriction and exclusion on the basis of ethnicity social origin that impairs (directly and indirectly) exercising political rights qualifies as racial discrimination. Based on this law, the decision to prohibit the participation in election by forming a party was against the CERD, to which Nepal is party.

The following table indicates disparity in 1991, 1994 and 1999 elections.

Table 1

Caste/Ethnicity	Percentage of the Population	No of Seats Held (%)		
		1991 Election	1994 Election	1999 Election
Hill High-Caste	7023220 (30.9)	114 (55.6)	129 (62.9)	122 (59.5)
Hill Dalit	1615577 (7.1)	1 (0.5)	-	-
Hill Ethnic	4988298 (22)	34 (16.6)	24 (11.7)	28 (13.7)
Newar	1245232 (5.5)	14 (6.8)	12 (5.8)	14 (6.8)
Inner-Tarai Ethnic	251117 (1.1)	1(0.5)	-	-
Madhesi Caste	3381852 (14.9)	18 (8.8)	22 (10.7)	29 (14.2)
Madhesi Dalit	1031292 (4.5)	-	-	-
Madhesi Ethnic	1800452 (8)	18 (8.8)	14 (6.8)	10 (4.9)
Muslim	971056 (4.3)	5 (2.4)	4 (1.95)	2 (1)
Women	11377556 (50.04)	7 (3.4)	7 (3.4)	12 (5.8)
Men	11359378 (49.96)	198 (96.6)	198 (96.6)	193 (94.2)

Source: Election Commission (Compiled from Election Results 1991, 1994 and 1999)

Not only is the ES exclusionary, but it also has brought about a rule by minority over majority population on the account of popular vote. In the 1991 election,

20. John Whelpton, *Political Identity in Nepal: State, Nation, and Community, Nationalism and Ethnicity in Nepal*, edited by David Gellner, Joanna P. Czarnecka and John Whelpton, Vajra Publication 2008 P.59

when the Nepali Congress won, it secured only 37.5 percent of popular vote, where other parties had 53. The justification of the plurality model is for a stable government and general political stability. But the Nepali Congress government failed to complete its tenure two times, both in 1991 and 1999, even though it had the majority to run the government.

Table 2

Political Party	1991		1994		1999	
	Popular Vote in %	Seats Won (%)	Popular Vote in %	Seats Won (%)	Popular Vote in %	Seats Won (%)
NC	37.75	110 (53.65)	33.38	83 (40.49)	36.14	111 (54.15)
CPN (UML)	27.98	69 (33.65)	30.85	88 (42.93)	30.74	65 (34.63)
RPP	-	-	17.93	20 (9.76)	10.14	11 (5.37)
RPP (C)	6.56	3 (1.46)	-	-	3.33	0
RPP (T)	5.38	1 (0.48)	-	-	-	-
SJMN	4.83	9 (4.39)	1.32	0	0.84	1 (0.49)
NSP	4.1	6 (2.92)	3.49	3 (1.46)	3.13	5 (2.44)
NWPP	1.25	2 (0.97)	0.98	4 (1.95)	0.55	1 (0.49)
RJM	-	-	-	-	1.37	5 (2.44)
CPN (D)	2.43	2 (0.97)				-
CPN (ML)	-	-	-	-	6.38	0
RJMP	0.47	0	1.05	0	1.07	0

Source: Election Commission (Compiled from Election Results 1991, 1994 and 1999)

Nepal's experiments over the years with the plurality model of elections have exposed the model's inherent inadequacies to provide for fair representation of the Nepali nation, especially in the context of the country's multicultural and multiethnic composition.²¹ It is a common understanding that the ES doesn't capture a multicultural society, particularly in ensuring the sharing of power and resource in the country. In addition, the legitimacy of the government has always been questioned by excluded section of society, given their dissatisfaction that the ES always favors dominant sections of society, whether that is in the autocratic Panchayat or the multi-party system or in the current republic election system. For a long time, proportional representation in Nepal was confined to academic debate.²² However, in the aftermath of the second people's movement, proportional representation became a political agenda in

21. *Ibid.* P. 144

22. *Creating New Constitution: A Guide for Nepali Citizens*, IDEA, Editors, YashGhai and Jill Cottrell, 2008, P. 144

Nepali politics. Importantly, there is common understanding that an inclusive ES is recognized and accepted on a de-jure and a de-facto basis.

The Interim Constitution, 2007 adopted a unique ES for the CA that comprised of elected and nominated members according to the mixed ES, accounting for equality of population, geographical convenience and special characteristics and, in the case of the Madhes, on the basis of the percentage of population.²³ This system determined that: one member elected, under the FPTP system, from each geographical constituency totaling 240 elected members;²⁴ 335 members elected according to the proportional representation (PR) system where votes were cast for political parties by treating the whole country as a single constituency;²⁵ and 26 members, nominated by the council of ministers on the basis of consensus from among distinguished persons and ethnic and indigenous groups that fail to be represented in the result of elections of the FPTP and PR.²⁶

This system incorporated plurality in the ES, otherwise known as the FPTP system and or a winner-takes-all system.²⁷ The CA had a fair representation of excluded groups, with free voice to some extent, even though their respective political parties often warned them to sanction with "Party Whip" if they crossed the party-line. The CA Thematic Committee reports reflect various suggestions for the new constitution regarding ensuring the rights and space for excluded groups. For example, the Concept Report of the Committee of the Protection of Rights of Minority and Marginalized Community suggested fundamental rights protecting individuals from racial discrimination and untouchability with comprehensive innovatory for excluded sections, including any individual, ethnicity, Indigenous Peoples, Terai Dwellers, Madhesis, Muslim, Person with Disability, Religion, Creed, Gender, Region, Clan, Community or Occupation.²⁸ Similarly, the Committee on Justice System suggested having a separate Bench in the Court or annexed court in cases related to domestic violence against women, juvenile rights, customary and cultural matters of Indigenous Peoples, Muslims, Dalits and other Minorities.²⁹

The idea of mixed ES, inter alia, ensuring representation of those sections that are not represented from the FPTP and the proportional representation (PR)

23. *Article 63(3) of the Interim Constitution, 2007*

24. *Article 63(3)(a) of the Interim Constitution, 2007*

25. *Article 63(3)(b) of the Interim Constitution, 2007*

26. *Article 63(3)(c) of the Interim Constitution, 2007*

27. Pippa Norris, *Choosing Electoral Systems, Proportional, Majoritarian and Mixed System*, Harvard university, for contrasting political institutions special issues of the international political science review vol. 18(3) July 1997:297-312, p. 3 file:///C:/Users/HP/Documents/NLS%20Journal/Electoral%20Online%20Materials/Choosing%20Electoral%20Systems.pdf visited 16 August 17, 2019

28. *Report of the Committee on Minority and Marginalized Rights, Committee's Secretariat, Constituent Assembly, 2066 p. 1-18*

29. *Report of the Committee on Judicial System, Committee Secretariat, Constituent Assembly, 2066 p. 109*

elections, to substantiate people's sovereignty and to draft the constitution based on the principle of right to self-determination, in other words, exercise free-determination (wisdom of people) in the constitution-making process, so that there will be greater ownership in the constitution. Therefore, the constituent power remained to sovereign peoples that included all excluded groups that considered themselves to be groups facing historical injustices, structural violence, direct and indirect discrimination.

How Inclusive is the Electoral System of Nepal?

Constitutionally, Nepal is a nation that constitutes all Nepalese People (Peoples?) with multicultural characteristics,³⁰ and the state of Nepal is secular, inclusive, and democratic republican.³¹ A nation's definition in the constitution reflects the multicultural identities of Nepalese Peoples and rectifies previous the constitutional notion that considered diversity to be a threat to national unity. The current constitution also allows legal restriction to exercise the fundamental right to freedoms of expression and association in the name of maintaining social harmony.³² This notion is a legacy of the Panchayat autocratic constitution, 1962 and is followed by the Constitution of Kingdom of Nepal, 1991.

The definition of a Nation and State within the existing Constitution has no clear meaning of the terms itself, if we are looking for the origins of the sense of political identity that is the key characteristic of groups we recognize as nations.³³ A Nation means a group of people who share a common identity, history, language, lands, exercise a distinct political system and is regulated by its own law. According to Black's Law Dictionary, a Nation is defined as a "people, or aggregation of men, existing in the form of an organized jural society, inhabiting a distinct portion of the earth, speaking the same language, using the same customs, possessing historic continuity, and distinguished from other like groups by their racial origin and characteristics, and generally, but not necessarily, living under the same government and sovereignty."

In our context, there are several groups that qualify as nations legally and politically, making Nepal a country of multi-nations. Importantly, the Constitution begins with the phrase, "We the Sovereign people of Nepal," and it also internalizes people's sovereign rights.³⁴ Sovereign rights of peoples will only be substantiated if peoples' right to self-determination is respected, allowing them to freely determine their political status and pursue economic,

30. Article 3 of the Constitution of Nepal 2015

31. Article 4 of the Constitution of Nepal 2015

32. Proviso articles of 17 (2) (a), (b), and (e)

33. Whelpton John, *Political Identity in Nepal: State, Nation and Community*, Edited by David Gellner et.al. *Nationalism and Ethnicity in Nepal*, Vajra Publication, 2008 P. 40

34. Preamble of Constitution, 2015

social and cultural rights. The international law states that Indigenous Peoples shall have the rights to exercise self-determination through autonomy and self-governance as well as the right to Free Prior and Informed Consent (FPIC). These three rights are the collective rights that can be demystified with free decision-making on political, social, cultural and other aspects that are related or concerned to a particular nation.³⁵

The Constitution of 2015 adopts a mixed ES annulling targeted provision to allocate quotas to unrepresented Indigenous Peoples as institutionalized under article 63(3)(c) of the Interim Constitution 2007. In the HoR, 165 members are elected through the FPTP system on the basis of population and geographical convenience and specificity.³⁶ One hundred ten members are elected through the proportional ES on the basis of a closed list from women, Dalit, Indigenous Peoples, Khas Arya, Madhesi, Tharu, Muslims and backward regions considering population, inter alia; regard shall also be made to geography and territorial balance.³⁷ Sec. 13 (3) (a) of the Guidelines on Proportional Election for Member of HoR, 2017 (PR Guideline) states that the Closed List shall be prepared based on the percentage of population of Dalit, Adivasi, Khas Arya, Madhesi, Tharu and Muslim; these group will be allocated the following percentage of seats:

Table 3

S.N	Group entitled to Proportional Representation	Percentage %
1	Dalit	13.8%
2	Adivasi Janajati	28.7%
3	Khas Arya	31.2%
4	Madhesi	15.3%
5	Tharu	6.6%
6	Muslim	4.4%

Section 34 (3.1) of the PR Guideline does not allow a political party to select members randomly, jeopardizing the sequence of the Closed List submitted by the respective party. But in practice, political parties often fail to do so. A Writ Petition (074-WC-0041) was filed by a PR Candidate, Ms. Sarita Chaudhari from Rastriya Janata Party (RJP), whose name was enlisted as No. 1 from the Tharu Cluster, after the party sent Ms. Amrita Agrahari, who is Madhesi and enlisted in No. 2 from the Indigenous Cluster. Thus, Ms. Chaudhari challenged the decision on the grounds of violation of proportional representation enshrined under the Constitution and election laws as well as the National Foundation for Development of Indigenous Nationalities Act, 2002. The Case is pending in the

35. Article 4 of the United Nations Declaration on the Rights of Indigenous Peoples

36. Article 84(1)(a) of the Constitution of Nepal, 2015

37. Article 84 (1) (b) of the Constitution of Nepal, 2015

Constitutional Bench of the Supreme Court.

The following table illustrates representation of castes and ethnicities from the FPTP system.

Table 4

Federal -FPTP	Caste		SN-From	SN-To	Total	%
	HBC	Hill Brahmin Chhetri	1	86	86	52.12
	HD	Hill Dalit	87	88	2	1.21
	HJ	Hill Janajati	89	124	36	21.82
	Muslim	Muslim	125	127	3	1.82
	Madhesi	Madhesi	128	154	27	16.36
	TJ	Terai Janajati	155	165	11	6.67
					165	100

Source: LAHURNIP analysis based on Election Commission Result of election 2017

From the FPTP, dominant groups (Khas Arya) hold a strong space in the HoR. They enjoy almost 53 percent of the seats, which is nearly double the proportion of their population size. Madhesis share 27 percent of the seats, and the rest of the excluded groups are underrepresented. This data demonstrates that there is serious disparity in the FPTP system.

In the proportional ES, excluded groups are in a slightly better situation.

Table 5

Federal Member of HoR (PR) Analysis by castes/ethnicities						
Federal -PR	Caste		Total	Percentage %		
	HBC	Hill Brahmin Chhetri	33	30%		
	HD	Hill Dalit	14	12.73 %		
	HJ	Hill Janajati	29	26.36%		
	Muslim	Muslim	4	3.64%		
	Madhesi	Madhesi	22	20%		
	TJ	TeraiJanajati	7	6.6%		
	TD	Terai Dalit	1	0.91%		
			165	100		

Source: LAHURNIP analysis based on Election Commission Result on Election 2017

This data shows slightly better representation of excluded groups, such as

Hill Dalit, Madhesi and Muslim. The dominant group has a virtually higher representation than expected from its population size. If we compare the two ESs, both favor dominant groups; however the PR system allocates better space to excluded groups. Another reality is that the Indigenous Peoples are not a homogenous group; they are very diverse groups in terms of identity and issues. Therefore, placing them in one basket may systematically marginalize them. The National Foundation for Development of Indigenous Nationality Act, 2002 defines them as distinct people or Adivasi Janajati who have their own mother tongues, traditional cultures, unique social structures, and written and oral histories³⁸ and are enlisted in 59 groups.

The international law ILO Convention No. 169, to which Nepal is party, characterizes Indigenous peoples as peoples in independent countries, who are regarded as indigenous on account of their descent from the populations that inhabited the country or a geographical region to which the country belongs at the time of conquest or colonisation or the establishment of the present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.³⁹ When it comes to the question of PR, for the first time ever in Nepali Constitutional history, the Khas Arya were also entitled for proportional representation with clear enumerations of Kshetri, Brahmin, Thakuri, and the Sanyasi (Dasnami) community.

This is quite interesting given that the PR system was introduced to ensure inclusion of excluded groups in the ambit of state restructuring (3.5 of the CPA), and the Khas Arya was not included in that list. Another interesting factor is that 59 Indigenous groups are considered a homogeneous group; consequently, many IPs have no representation in the HoR. On the other hand, the PR system is manipulated by political parties, and seats are allocated to leaders of dominant groups and often chosen in place of Indigenous Peoples. There are numerous cases pending at the Constitutional Bench of the Supreme Court challenging such types of discrepancies.

The National Assembly (NA) comprises of 56 elected members, consisting of at least three women, one Dalit and one person with disabilities from each State. The NA is elected by an electoral college composed of members of the Assembly, Chairpersons and Vice Chairperson of Village Bodies, and Mayors and Deputy-Mayors of the Municipalities, with different weightage of vote by members of the State Assembly. , as provided for in the Federal Law.⁴⁰ Three members, at least one of whom is a woman, are nominated by the President on the recommendation of the Government of Nepal.⁴¹

38. Sec. 2, a of the National Foundation for Development of Indigenous Nationalities Act, 2002

39. Article 1.1b of the Indigenous and Tribal Peoples Convention, 1989 (Convention No. 169)

40. Article 86(2)(A) of the Constitution of Nepal 2015

41. Article 86 (2)(b) of the Constitution of Nepal 2015

Table 6

Federal -PR	Upper House			
	Caste		Total	Percentage %
	HBC	Hill Brahmin Chhetri	34	60.71%
	HD	Hill Dalit	6	10.71%
	HJ	Hill Janajati	9	16.07%
	Muslim	Muslim	0	0.00%
	Madhesi	Madhesi	5	8.93%
	TJ	TeraiJanajati	1	1.79%
TD	Terai Dalit	1	1.79%	
		56	100	

Source: LAHURNIP analysis based on Election Commission Result on Election 2017

The ES of Upper House is highly exclusionary.

Mixed ES is adopted for the election of the State Legislature, which is unicameral and called the State Assembly (SA). There is no definite number in the SA; however, in accordance with Article 176(1)(a), the total members must be double the number of members elected to the HoR from the concerned State through the FPTP ES. In accordance with Article 176(1)(b) the number of members to be set under clause (a) shall be considered to be sixty percent, and the rest forty percent members to be elected, through the proportional electoral system. Article 176 (3) says sixty percent members of the SA shall be elected in accordance with the FPTP system and the forty percent members in accordance with proportional ES. State Legislature also has higher representation of Khas Arya, whereas the rest of the excluded groups do not have proportional ratio as stated under article 42 of the Constitution.

Table 7

State Wise Analysis of Provincial Parliament Member (Proportional Representative) by Caste and Ethnicity											
Total	Caste		State 1	State 2	State 3	State 4	State 5	State 6	State 7	Total	%
	HBC	Hill Brahmin Chhetri	9	1	15	9	16	12	13	75	34.09
	HD	Hill Dalit	2	0	2	4	6	3	4	21	9.55
	HJ	Hill Janajati	19	3	26	11	2	1	0	62	28.18
	Muslim	Muslim	1	4	1	0	2	0	0	8	3.64
	Madhesi	Madhesi	2	32	0	0	2	0	0	36	16.36
	TD	Tarai Dalit	2	2	0	0	2	0	0	6	2.73
	TJ	TaraiJanajati	2	1	0	0	5	0	4	12	5.45
			37	43	44	24	35	16	21	220	100

Local Level Government

An important aspect of federalism is the decentralization of the Singha Durbar's power of to villages, a feature politically narrated as "Singha Durbarko Adhikar Gaun-Gaun ma"; the literal sense is dispersing power close to the community. A federal structure is particularly appropriate to address a polity's social, ethnic and cultural diversity.⁴² It means that the power of the Singh Durbar should also be given to the community, so they can make their own decisions in the political, social, cultural, economic and other aspects of life. In the three tiers of government prescribed by the Constitution, apart from the federal and state levels, the local Level is also a key structure. Article 215 (3) states that the chairperson and vice-chairperson of local level are elected through the FPTP system, and there are quota allocations for women (four Seats) and Dalit and Minority (two Seats), who are elected by the members of the Municipal Assembly.⁴³ The 2016 election results demonstrate the following pattern of representation at the municipality level.

42. Lidija R BastaFleiner and Jean-Francois, *Federal and autonomy: Routledge Hand Book of Constitutional Law*, edited by Mark Tushnet et.al. published by Routledge, NY. 2013 P. 144

43. Article 216 94) of the Constitution 2015

Table 8

Caste and Ethnicity Analysis of Elected Chairperson of Rural Municipalities and Mayors of Metropolitan, Sub metropolitan and Municipalities.

Rural Municipality	Caste		SN-From	SN-To	Total	%
	HBC	Hill Brahmin Chhetri	1	220	220	48.03
	HD	Hill Dalit	221	221	1	0.22
	HJ	Hill Janajati	222	371	150	32.75
	Muslim	Muslim	372	382	11	2.40
	OBC	Other Backward Class	383	388	6	1.31
	TBC	Terai Brahmin Chhetri	389	437	49	10.70
	TD	Terai Dalit	438	438	1	0.22
	TJ	TeraiJanajati	439	458	20	4.37
				458	100	

Table 9

Municipality	Caste		SN-From	SN-To	Total	%
	HBC	Hill Brahmin Chhetri	1	161	161	54.95
	HD	Hill Dalit	162	164	3	1.02
	HJ	Hill Janajati	165	215	51	17.41
	Muslim	Muslim	216	220	5	1.71
	OBC	Other Backward Class	221	223	3	1.02
	TBC	Terai Brahmin Chhetri	224	273	50	17.06
	TD	Terai Dalit	274	275	2	0.68
	TJ	TeraiJanajati	276	293	18	6.14
				293	100	

Source: LAHURNIP analysis based on Election Commission Result on Election 2016

The representation pattern in rural municipalities shows that Khas Arya has a strong hold, Janajatis have better representation than at the state and federal levels but Dalits have less representation. In metropolitan or urban municipalities, there is huge disparity in the representation of excluded groups.

The election data articulates that the FPTP system not only gives more space to dominant groups, but also systematically marginalizes excluded groups, which is inconsistent with the principle of the people's sovereignty, autonomy and self-rule vis a vis inclusion that is institutionalized on the current Constitution.

From the excluded rights perspectives, the Constitution is discriminatory and perpetuates structural violence in many areas. For this reason, excluded groups, particularly the Madhesi and Indigenous Peoples, expressed their reservation regarding this Constitution.

Importantly, the Constitution is a dynamic document so it can be reformed, changed and amended to address concerns of people. Likewise, the disparity created from the ES can also be reformed in the coming days. This is crucial because the data shows that Khas Arya has greater space in the PR system at every level of the elected body of the state. The PR system controlled by political parties may need re-consideration in order to ensure proportional representation of all excluded groups in decision-making. Overall, it is widely believed that a more balanced representation in governance would lead to better decision-making and policy priorities that reflect the people's concerns.⁴⁴

Area of Improvement

The legitimacy and stability of any democracy depends to a large extent upon its ability to accomplish this aim. A basic premise of representation is that all those subject to policy should have a voice in its making.⁴⁵ The inclusiveness of all sections, irrespective of their identity, status, origins or ideology, among other factors, of society and nations strengthen democracy, unity, social harmony, development and prosperity and reduce conflict, which leads to a more stable nation. In terms of the ES in democracies, important changes in public policy depend critically on the presence of legislators and decision makers from disadvantaged groups, who can then use the legislative and policy arenas to bring about improvements.⁴⁶ It has been established that law and policy often play subjective and objective roles for exclusion against marginalized groups.

There are number of laws and policies that promote exclusion of certain groups in the political, social, economic and administrative spheres as well as in the service of the state. Exclusionary laws are not necessarily introduced deliberately; it happens when legislators or decision-makers are unaware about the issues facing excluded groups. For instance, the recent Guthi Bill, 2076 (Trust Bill, 2019) introduced by the Government was opposed by the Newa Community of Kathmandu valley, which held huge demonstrations, stating that the Bill would obliterate the Guthi System and would jeopardize its identity and way of life. Thus, the government was compelled to withdraw the Bill from the

44. Zoya Hasan, *Politics of Inclusion, Castes, Minorities and Affirmative Action*, Oxford University Press, 2009 P. 1

45. *ibid.* P. 126

46. Pande, Rohini. 2003. "Can Mandated Political Representation Increase Policy Influence for Disadvantaged Minorities? Theory and Evidence from India." *American Economic Review*, 93 (4): 1132-1151. <https://core.ac.uk/download/pdf/161436709.pdf> visited 20 August, 2019

NA. The Government admitted to having inadequate discussions on the Bill. Parliamentarians from the Newa community also came to the streets to join the common people, which indicates that there is no meaningful representation of parliamentarians (law makers) and that they are not free to make decisions as mandated by the Constitution with prerogative rights in the law-making process.

Meaningful, Free and Accountable Representation

The main focus of the FPTP and PR ES is effective governance and broader representation of excluded group in order to incorporate their voices in decision-making. However, representatives nominated by political parties are more accountable to their respective parties than to their constituencies (people), which raise a serious challenge for meaningful and accountable representation.

Article 25 (a) and (b) of the International Covenant on Civil and Political Rights (ICCPR) states that, respecting the principle of non-discrimination and without unreasonable restrictions, every citizen shall have the right and opportunity to take part in the conduct of public affairs, directly through freely chosen representatives and to vote and to be elected at genuine periodic elections which shall be held by universal and equal suffrage and secret ballot, guaranteeing free expression of the will of the electors.

This Article underscores that elections are a core factor of participation through representation that is freely chosen and that the elected representatives should strictly act upon the will of the people who vote for them. Article 6 (b) of the Indigenous and Tribal Peoples Convention No. 169 corresponds to establishing the means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elected institutions and administrative and other bodies responsible for policies and programs that concern them. This Article is about meaningful participation without any hindrance or barrier, which should be facilitated by pragmatic procedure. Article 18 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) states that the Indigenous Peoples have the right to participate in decision-making in matters that would affect their rights, through representatives they choose in accordance with their own procedures as well as to maintain and develop their own indigenous decision-making institutions.

Meaningful representation is a vital challenge in the current ES, both in the PR and the FPTP systems, due to control by political parties rather than people who vote for them. For example, a political party submits a closed list on the PR system, considering excluded groups. However, ultimate decisions of the winning candidate is made by the respective political party. The exemption of the rule to ensure proportional representation to political parties that fail to bag 10 percent of votes in the PR system is also inconsistent with the constitutional notion of inclusion.

Avoidance of Constituency-Gerrymandering

Gerrymandering (packing and cracking) political constituencies in order to achieve the desired result in elections is a highly contested matter in politics. Race- and ethnicity-based gerrymandering seriously impacts the representation of minority communities. Gerrymandering could be positive and negative. Negative racial gerrymandering is a process in which district lines are drawn to prevent racial minorities from electing their preferred candidates. In many cases, Indigenous Peoples have faced negative gerrymandering that systematically divides them into different political units, adversely impacting towards their representation and decision-making. Consider the example of the Baram Community, a highly marginalized Indigenous Peoples group that comprise of 8,140 (0.03 percent) of the population. Ninety percent of the Baram live in the Gorkha District in their traditional homelands. This community was divided into three local units: Bhimsen Gaupalika, Sulikot Gaupalika and Arughat Gaupalika. A Writ Petition was filed against gerrymandering and the Supreme Court, from the Division Bench, presided by Hon'ble Justice Kedar Prasad Chalise and Hon'ble Justice Purushotam Bhandari, issued a Directive Order against the Government to introduce a necessary law that ensures Special, Protected and Autonomous Region for protection of the Baram community. In order to ensure participation in legislative body, negative gerrymandering must be avoided in first place.

Rectification of Defective Electoral System through Law Reform

Obviously, the PR, FPTP and Nominated systems all have merits and demerits; however, we cannot separate the ES from democracy, human rights and fundamental freedoms. The ES must incorporate human rights to make it more friendly towards excluded peoples. In the case of LAHURNIP vs. Prime Ministeral. (Nepal Kanoon Patrika 2070 D.N.8990 Vo. 55 P. 923), the Supreme Court issued a Directive Order against the Government of Nepal. The order asks to ensure effective and meaningful participation of excluded groups, including Indigenous Peoples, in the CA in accordance with the International Human Rights and good practices. In this regard, relevant laws should be amended in line with the International Conventions to which Nepal is state party. The writ petition was filed to establish a mechanism in the CA for direct representation and to obtain FPIC in the course of passing constitutional provisions that directly affect the Indigenous Peoples and other marginalized sections of society.

List Proportional Representation (List PR)

List PR ES could be a better option for a country like Nepal, where society is deeply diverse and one group or party hegemony curtails democratic values by suppressing minority voices in decision-making. List PR is an essential component

of the constitutional engineering package known as consociationalism. Consociationalism entails a power-sharing agreement within the government, brokered between two clearly-defined society divided by ethnicity, religion and language. Consociational societies include Belgium, the Netherlands, Austria and Switzerland.⁴⁷ Nepali society is also divided into these factors and needs power-sharing among them; it has been constitutionally accepted.

Consociational has four basic elements: (i) grand coalition (executive power sharing among the representatives of all significant groups); (ii) segmental autonomy (a high degree of internal autonomy for groups that wish to have it); (iii) proportionality (proportional representation and proportional allocation of civil service positions and public funds); and (iv) mutual veto (a minority veto on the most vital issues). These four basic elements ensure that the government becomes an inclusive multi-ethnic coalition, unlike the adversarial nature of a Westminster winner-takes-all democracy.⁴⁸ Partially, we have already adopted the List PR system, so it will not be a problem to fully adopt this system. Or, we can start a discourse in the legal intellectual arena that includes universities, colleges, in syllabus of law, judges, lawyers, politicians, academics and social diasporas, among others.

Complementary Rights for Effective Participation on Governance

The ES is the main vehicle of democracy, good governance and participation on decision-making. However, it is not a panacea of all problems of excluded group. The ES is a means of exercising political rights. The end is exercising the right to self-determination so people can freely determine their political status and peruse their economic, social and cultural rights. What has become clear is that participation is not simply achieved from above with new policy statements, but requires multiple strategies of institutional change, capacity building and behavioral change.⁴⁹

On the other hand, exercising the right to self-determination through autonomy and self-governance is an important requirement; thus, the right to self-determination, self-rule and autonomy should be ground for reforming the ES. However, this should not be "the principle" for exercising political rights; it is a complementary measure for indigenous peoples to exercise and share equal rights and power. Meaningful participation as well as proportional

47. Ben Reilly and Andrew Reynolds, *Electoral Systems for Divided Societies, Democracy and Deep-Rooted Conflict: Options for Negotiators*, IDEA International, editors Peter Harris and Ben Reilly, 2003 .P196

48. *ibid.*

49. John Gaventa, *Perspectives on Participation and Citizenship*,

representation as envisaged in Article 42 of the Constitution should equally be considered with rectification of the ES to ensure full proportional representation, where every excluded group can receive a fair share based on its population.

Using the cases of the U.S. and Canada, learned scholar Will Kymlicka opines that having self-rule (Reserve areas) without participating in federal government will make minorities more vulnerable.⁵⁰ Through the Constitution and international laws, we have adopted proportional representation in state structures as well as the right to self-determination, self-governance and autonomy that should be the guiding principles for equal footing to ensure equality, equal power and resource-sharing of the nation by all peoples.

FPIC and Separate Electoral system

Article 51(j) (8) of the Constitution states that to ensure indigenous nationalities' participation in decisions concerning that community, special provisions must be created for opportunities and benefits in order to ensure the rights of these nationalities to live with dignity along with their identity. Similarly, Article 51 (b) (3) states that international treaties must be implemented. Nepal has ratified a number of international human rights instruments. These two constitutional provisions demand for complementary measures in the ES in order to have effective participation and voice in the decision-making that affects excluded groups.

The UNDRIP and ILO Convention No. 169 have mandatory provisions to obtain FPIC from indigenous peoples, when it comes to decision-making that affects them. This applies to legislative, administrative and other kinds of decision-making. Importantly, this will not only incorporate the interest and voices of excluded peoples in decision-making, but also avoid conflict and political misunderstanding relating to the ES.

One of the founding fathers of the Constitution of India, Dr. Bhim Rao Ambedkar, proposed a separate ES for dalits in order to strike down the majority's tyranny against the minority. For Ambedkar, any ES for the dalits must serve three purposes. First, it must enable the dalits to send its true representatives to the legislatures. Second, dalits must not be completely isolated politically from the majority. Third, it must enable the dalits to influence the election of the members of the majority community to the legislature. Isolation, according to Ambedkar, was the worst thing that would happen to dalits, since no matter how large a representation was given to dalits, it was bound to remain a minority.

It was very important for a minority to have as many members in the legislature from the majority community as possible, who would be under the obligation to

50. Will Kymlicka, *Politics in the vernacular*, Oxford University Press, 2001 P. 110-111

stand up and support the cause of the dalits.⁵¹ The situation faced by excluded groups in Nepal is virtually similar to that in India; thus separate quota in Parliaments chosen only by respected groups may be an alternative means for effective participation in decision-making. In New Zealand's parliament, seven seats are designated for Indigenous Peoples that ensures their voices are not undermined in the legislative process. Thus, a separate ES would be a path for to provide space to raise a free voice.

Conclusion

In the ambit of the constitutional commitment of inclusive democracy and proportional representation, mixed ES that includes FPTP, PR and Nomination by the Head of the State at the recommendation of the government are vehicles for the people's participation in decision-making in elected bodies. The FPTP is primarily targeted to ensure proportional representation of all excluded groups (nations); however election results demonstrate the disparity as a kind of legacy of past structural exclusion, and the current ES may perpetuate this situation if it runs in status quo. There is no doubt that historical injustice, structural violence, social injustice and systematic discrimination that culminated in injustice for excluded groups must be addressed as envisaged by the constitutional commitment. In this regard, the FPTP is not a panacea of all problems and requires complementary and alternative measures as well. On top of that, the ES needs rectification or reforms to make it friendlier towards excluded groups, which in turn requires legislative or constitutional reforms. As complimentary measures, absolute proportional representation, separate ES, FPIC, autonomy and self-governance will ease up the free and meaningful democratic participation of excluded groups in the decision-making process and complete the belated process of nation-building.

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