

# **Challenges and Prospects of Federalism in Nepal**

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## **Background**

Nepal is a small state tucked between India and China. It was divided into a numerous principalities and kingdoms for a long time. In the late 18<sup>th</sup> century, Prithvi Narayan Shah, the then King of Gorkha (one of the small kingdoms of Nepal prior to its unification) conquered most of the Kingdoms and principalities to constitute them in to what it is known as the Kingdom of Nepal. Since then Nepal remains a unitary state up to date. The consolidation and unification of Nepal continued for a long time even after the death of the King Prithvi Narayan Shah.

Before the unification, each kingdom and principality had its own system of government. The social and cultural autonomy and freedom of different communities continued even after unification for a long time but in the political front Nepal slowly and consistently came under centralized administration. Over a period of time the local systems were slowly annihilated or replaced by centralized and personalized governance system. Local identity, local aspirations and cultural and social diversity were systematically suppressed. It was followed by a state sponsored campaign for consolidation of Nepal as a one nation through imposition and promotion of one language, one culture and one religion (Hindu Religion). Nepal's diversity and indigenous community identity never got priority in state policy. Nepal since then has been under a strong center despite of division and re-division of country into various administrative districts, zones and regions from time to time. All these restructuring of administrative units were basically for strengthening central government's control, effective revenue collection and development planning purpose. Boundaries were drawn from Kathmandu for the convenience of government and bureaucrats – not for addressing local community aspirations and right to self determination.

Nepal's judicial system had been constituted and reconstituted from time to time through legal indictments. However, the basic concept of law and justice were guided by Hindu religious scriptures and customary practices of the ancient and medieval history of the Kingdom. Justice system had been administered under the religious, social, cultural and moral rules and traditional values. Most of the local disputes continued to be settled by people based local institutions (panchayats). However major crimes and state offenses were looked into by centrally controlled courts. Most of the time these courts remained a part of feudal and executive hierarchy and the concept of judicial independence did not find place in Nepal.

The western influence on Nepalese legal system started way back in the early 18<sup>th</sup> century when the first codified law (*Muluki Ain*) was adopted in 1853 AD. It was inspired by Napoleon Code. Nevertheless the real impact was felt after 1950s when Nepal went through a series of political upheavals. Inspired by freedom movement of India, the social elite started a peoples' movement for establishment of democracy. As an appeasement to contend growing discontentment of the people, the rulers<sup>1</sup> then adopted first written constitution in 1948. It marked the beginning of constitutionalism. Under this constitution an element of separation of power and west-minister model of governance was introduced for the first time. Nepal has had six constitutions so far. The first in 1948, second in 1951, third in 1959, fourth in 1962 and fifth in 1990 and sixth in 1963.<sup>2</sup> The present constitution is basically meant to manage the constitutional transition from a unitary state to federal state. National commitment to federalism has been incorporated in the interim constitution. Constituent Assembly of Nepal is presently struggling hard to come up with an acceptable federal, democratic and republic draft constitution. The challenges are not easy and solutions are not free from controversies<sup>3</sup>.

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<sup>1</sup> Nepal was under the autocratic family rule of the Ranas (Oligarchic Family Rule). Ranas claimed their right to rule by virtue of a legal instrument (*Panja Patra*) issued by His Majesty the King. The King continued to be the titular head where as all the powers continued to be enjoyed by Ranas (ruling family).

<sup>2</sup> The Government of Nepal Act 2004 B.S. (1948); Interim Government of Nepal Act 2007 B.S. (1951); The Constitution of the Kingdom of Nepal 2015 B.S. (1959); Constitution of Nepal 2019 B.S. (1962); The Constitution of the Kingdom of Nepal 2047 B.S.(1990) and Interim Constitution of Nepal 2063 (2007).

<sup>3</sup> The contentious issues in the Constituent Assembly

- a. What would be governance system of the country like?
- b. How would the Council of Ministries be formed?
- c. Who would be the chairperson of the Council of Ministers? The President or the Prime Minister?
- d. Would the Head of the State be executive or ceremonial?
- e. Would there be both the Head of the State and the Prime Minister (or not)?
- f. How should the Head of the State and the Prime Minister be elected?
- g. How would the Head of the State and the Prime Minister cease to be in office?
- h. Whether or not the principles of basic structures should be accepted as expressly stated?
- i. Should the Federal legislature be unicameral or bi-cameral? What should they be called? How many members should be there?
- j. What should be the elections of the Federal Legislature like? What should be the basis of the representation – (both) population and geography, or only the population?
- k. Who should have the right to define the constitution? Should Legislature be the body to appoint and remove the judges, or a separate mechanism should be made for it? What provisions should be there to appoint the chief justice of the Supreme Court? Should the appointment be made from the serving judges, or provision should also be made to appoint the CJ from outside?
- l. The Interim Constitution of Nepal 2007 has a provision of setting up a high-level commission to advise on state-restructuring , however, despite repeated requests made even before the existence of the Constituent Assembly it has not resulted in the formation of the commission, which has resulted in the preparation of a preliminary draft on it by the State Restructuring Committee. Questions regarding the setting up of the commission are still being asked. And,

## Bottom Up Process

Constituent assembly, while adopting its rules of procedure, made it very clear that it would start with zero draft and it would play its role right from the start of conceptualization to finalization of draft constitution. It, therefore, adopted a lengthy, detailed, participatory and bottom up approach. The expert involvement has been kept to the minimum to avoid preemptory over influence. Its process consisted of following major steps:

Phases	Status
Constitution of ten subject committees <sup>4</sup> (thematic committees), one constitution committee (drafting committee) and three procedural committees <sup>5</sup> to look into different components of federal constitution for Nepal.	Completed
Consultation with experts and stakeholders on various matters covered by each subject committee	Completed
Consultation with general public on the subject matter referred to each committee (field visits)	Completed
Preparation of concept paper (reports) on the subject matter referred to each committee	Completed (there are altogether eleven reports)
Preparation of consolidated draft constitution based on the recommendations of subject committees	Yet to be completed
Discussion of draft constitution and approval by full house for public deliberation on draft constitution	Yet to be started
Public deliberation on draft constitution	Yet to be started

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since that there is no unanimity on the committee's report on state restructuring, how should the way out to be found on this issue, which will be acceptable to all?

- m. Should the provincial legislature be unicameral or bi-cameral.? How many members should be there and what should be the election system?
- n. Should the Central mechanism or the province deal with the appointment and transfer of high court judges?
- o. What should be the criteria for foreign citizens to acquire Nepali citizenship who marries a Nepali citizen?
- p. Should Nepal's national languages be determined? If so, which languages should be determined as national languages?
- q. Which language should be the language of official (including the language of the law courts) business?
- r. How should the issues relating to the right to self determination and preferential right be addressed in the constitution?

<sup>4</sup> Committee on Fundamental Rights and Directive Principles of Society, Committee for Protection of Fundamental Rights of Minorities and Marginalized Communities, Committee for Restructuring of the State and Distribution of State Powers, Committee on Determination of the Form of the Legislative Organs, Committee on Determination of Form of Governance of the State, Committee on Judicial System, Committee on Determination of Structure of Constitutional Bodies, Committee on Division of Natural Resources, Financial Powers and Revenue, Committee on Determination of Basis for Cultural and Social Solidarity, Committee for Protection of National Interests.

<sup>5</sup> Committee on Civic Relation, Committee on Collection and Coordination of Public Opinions, Committee on Capacity Development and Resource Management.

Preparation of revised second draft constitution	Yet to be started
Clause wise discussion and voting	Yet to be started
Preparation of final draft	Yet to be started
Promulgation of New Constitution	Yet to be done

It is to be noted that the elected Constituent Assembly (hereinafter called CA) Members did not sit down to deliberate the ready made draft prepared by experts. They in fact sat down to draft the constitution themselves. Technical support was provided by the bureaucrats in Constituent Assembly Secretariat. CA has not even appointed any constitutional advisor so far. Non appointment of experts for constitution making process has two disadvantages. Firstly, the constituent assembly members and its secretariat staff do not have access to information and expert advice for day to day constitutional questions. Secondly, there is no role play for independent experts for mediation and negotiation in party differences over technical issues. This gap continues to remain in constitution making process and for reasons unexplained it remains to be unaddressed by Leaders in Major Party and Constituent Assembly Chairperson.

### **International Models of Federalism and Nepal's choice**

Nepal has studied different models of federalism that exist in different parts of the world. Perhaps the most referred federal systems in constitution making process of Nepal are American Model, Canadian Model, Indian Model, Swiss Model, German Model, and of course South Africa and Ethiopia also dominate the discussion time and again. Nepalese thinking seems to be divided in two camps (mainstream community<sup>6</sup> camp and excluded community<sup>7</sup> camp) and each camp has its own selfish interest to stick to their view. The main stream camp (mostly led by ruling elites) advocate for creation of Indian model quasi federal state where in central government would be superior and states would be subsidiary to national interest. This camp would advocate for restructuring of state on considerations of economy, geography, resource management, unity and territorial integrity. Local aspirations, community identity and diversity are not the priority. This view however is challenged by other camp of excluded community as a systematic design of main stream community to continue old hegemony of ruling elites. This camp has been advocating for American model federalism where center would enjoy its power on defense, foreign affairs, currency and other national subjects and rest would be left to undefined domain of provinces. They would even advocate for restructuring of

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<sup>6</sup> Mainstream community refers to ruling elites consisting of mainstream dominant national communities such as Brahmins, Chhetris and urban elites. This community constitute around 35% of total population spread over length and breadth of the country.

<sup>7</sup> Excluded community include indigenous ethnic communities, *Dalits Madhesi* and Women communities. These communities were denied equal participation in governance in the past as the Nepali Politics and society was heavily controlled by Hindu\Male>Mainstream Community. Language barrier also played role in exclusion of other community. Dalits are excluded as they were treated as untouchables in caste Hindu society. This practice made them disadvantaged in national politics and all other fronts of national development.

state based on ethnicity and community identity. Unity in diversity is the priority and end of monopoly in power of ruling elites through restructuring of state is their main goal. The tug of war between these two camps continue even today. Perhaps this will come to an end only when the constitution will ensure equal access to state power through new constitution and is finally voted for promulgation.

### **State Restructuring: A Major Challenge in Federalization of Nepal**

Nepal remained a unitary state since the time of unification of Nepal by King Prithvi Narayan Shah in late 18<sup>th</sup> Century. Nepal is now trying to become a federal state. This obviously means Nepal will need to unwind itself and restructure the state to create federal units. Restructuring of state often become a hot controversial issue when a country is going federal on the basis of desegregation. The thematic committee on state restructuring has recommended for creation of fourteen provinces based on ethnicity, region, history and other considerations. The matter however remains highly disputed and controversy continue to plague state restructuring debate. Madhesi community<sup>8</sup> want entire tarai belt to be declared as Madhes Pradesh while Congress party oppose ethnicity as a basis for creation of states. Congress party has been arguing for creation of five to seven big states on the basis of north south divide with a view to make them economically sustainable and viable. Maoist on the other hand officially support carving out states on ethnic lines for ethnic self rule. They proposed creation of fourteen states. Some of the basic features of concept paper prepared by State Restructuring Committee can be summarized as follows:

- The concept note of the Committee on Restructuring of State and Distribution of Powers aims at eliminating unitary and centralistic form of state and restructuring the state to inclusive, federal democratic republic which it believes is the process of ending all forms of discrimination prevalent in Nepal, managing social diversity and of bringing the government closer to people.
- The concept of federal Nepal is primarily based on proclamations of the Constituent Assembly, Interim Constitution of Nepal, Agreements between Government and political parties/organizations, international conventions to which Nepal is a Party, public opinions as received to the Constituent Assembly.
- The Note proposed three levels of government structure of Nepal namely the Federal, Province and Local Level. All these levels of government in the country will be autonomous and vested with the legislative, judicial and executive powers. State power has been distributed to exercise through the Federation, provinces, local levels and special structures.

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<sup>8</sup> Madhesi community include people living in Madhesh (southern tarai belt) belt. Madhesi community include all castes and religion (other than hill origin people) of tarai region mainly in Parsa, Bara, Rauthat, Saptari, Siraha, Sunsari, Morang.

- The country is restructured into 14 provinces: (1) Lumbini- Awadh-Tharuwan, (2) Mithila-Bhojpura-Koch-Madhes, (3) Khaptad, (4) Karnali, (5) Jadan, (6) Magrat, (7) Tamuwan, (8) Tamsaling, (9) Newa, (10) Narayani, (11) Sunkoshi, (12) Sherpa, (13) Kirat and (14) Limbuwan. The identity was key basis for determination of Provinces with flavors of redistribution of political powers, access to resources and means whereas feasibility was secondary basis.
- At the local Level there will be Village Committees and Municipalities, the number, boundary and name of them will be delineated by the Provinces within a year of the announcement of the constitution in accordance with the standards prescribed by the Federal Government.
- There will also be Special structure namely Autonomous area, Protected Area and Special Area. Autonomous Area means an area which is densely inhabited by a particular caste/community or linguistic group from time immemorial; Protected Area -area targeting the protection and promotion of a caste, community, cultural group which need to be protected from being vanished, Special Areas are the ones which will target an economically and socially backward community who are left in such structures. The Committee identified 23 communities which need to be provided with territorial autonomy for self rule.
- The identity, self-rule and autonomy of all Indigenous Peoples residing in Provinces, Local Level and Autonomous Zones shall be guaranteed. Indigenous People and Madhesi people shall be entitled to right to self-determination in regards to politics, culture, religion, language, education etc. The dominant ethnic group in whose name the province is to be named is to be given priority to lead the provincial government for two terms by way of compensation for past exclusion.
- The federal relations are to be based on principles of cooperation, co-existence and coordination. The powers of each structure are defined and separated from each other. There will be enumerated list for federal, province, local level government and there will also be a separate list for autonomous areas. There will also be concurrent list for shared power by federal and province level government.
- Residuary power is to be vested in the Federation. The Federation shall have power to issue instructions in regards to coordination between Units. The Head of State shall have power to caution, suspend or dissolve a provincial government and legislature upon recommendation of Federal Government in case a Province acts in a manner that would jeopardize the sovereignty, integrity and peace and order of the country. The federal rule shall be imposed on such province until the next election to provincial legislature within six months of such dissolution.
- Disputes between federal unites or federation shall be resolved by the Federal Legislature which will act on recommendation of the Inter-Provincial Council chaired by Executive Head of Federation in which federal Home Minister, Finance Minister and Head of Provinces as Members. Disputes between province, local level or special structures shall be resolved by the concerned provincial legislature.

- There will be a constitutional court to hear the disputes between Provinces or other structures which involve interpretation of constitutional provisions or powers as listed in Annexes. The bilateral or multilateral negotiation, reconciliation, coordination or mediation is also permissible as alternative dispute resolution mechanism.<sup>9</sup>

The State Restructuring Committee by wafer thin majority approved fourteen provinces for federal Nepal. There is a strong dissent over this fourteen province plan among major parties. The name and delineation of provinces proposed by the Committee are as follows:



Some of the major criticisms of the proposed plan for state restructuring were:

- a) 14 Provinces in a small country like Nepal would be costly, inefficient and unmanageable.
- b) Creation of provinces on ethnic lines might lead to communal violence and ethnic cleansing.
- c) Basis of feasibility was hardly considered when demarcating provinces on ethnic lines. Some provinces like **Jadan** hardly have resources to survive as a province.
- d) Name of some provinces are very complicated eg. Lumbini-Awadh-Tharuwan. The rational of naming a province is not equally applicable in respect of all provinces.

Some of the suggestions for state restructuring are Firstly, Nepal should constitute State Restructuring Commission first and the detailed research must be done prior to taking final

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<sup>9</sup> For details see the Concept paper of the State Restructuring Committee of Constituent Assembly

decision on state restructuring, secondly, provinces should be named after major rivers in the proposed provinces so that every body living there have sense of ownership irrespective of caste and ethnicity, thirdly, no priority right<sup>10</sup> should be recognized as that is basically unequal and undemocratic, fourthly, economic viability should not be ignored in state restructuring.

### **Federalism and Language Policy**

Language has always been a contested issue in Nepal. Nepal is basically a multi-lingual state. There are around 100 languages spoken in Nepal. Out of these ten languages, Nepali (*Khus*), Maitheli, Bhojpuri, Tharu, Tamang, Newari, Magar, Awadhi, Bantawa, Gurung and Limbu are the major languages. They constitute almost 90% of population and out of these Nepali (*Khus*) constitute almost 50% population. In fact Nepali language is spoken by more than 80 percent of population and mother tongue for almost 50% in Nepal and is a lingua franca for different linguistic groups of Nepal. Interestingly in Nepal more than 90 % speak less than 10% of total languages and less than 10% speak more than 90% of languages spoken in Nepal.

Those who do not have Nepali language as a mother tongue remains highly disadvantaged in comparative sense in different fields of national life. So the new constitution has proposed to start with multi-language policy at least at the province level. Proposal emerging in the CA for new constitution and suggestion of thematic committee on language policy may be summarized as follows:<sup>11</sup>

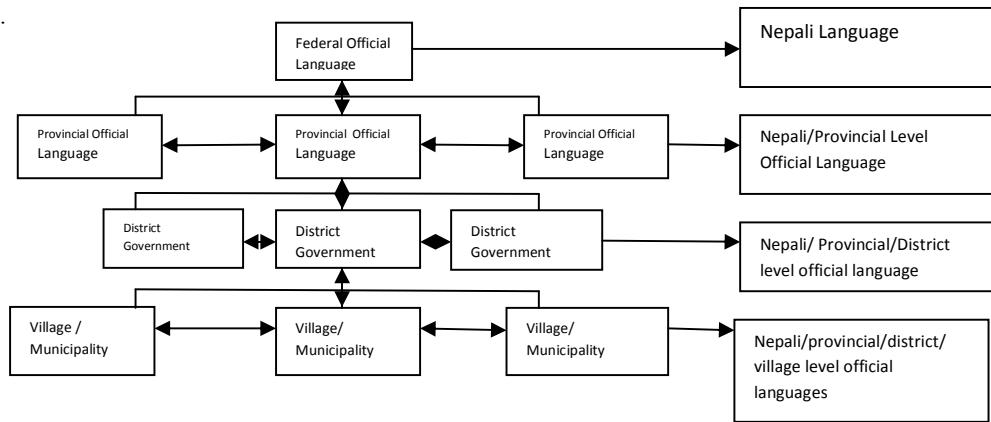
- Federal Government communicates with provinces and lower level governments in Nepali (*khus*) Language
- Provinces and lower level governments communicates with federal government in Nepali (*khus*) Language
- Provincial governments communicate with each other in the language mutually acceptable to each other. In the absence of mutually acceptable language, they communicate with each other in Nepali (*khus*) Language.
- District level government communicates with provincial government in Provincial Official Language or Nepali (*khus*) Language.

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<sup>10</sup> Dominant Ethnic Community of each province named after them have insisted on constitutional right to lead the provincial government for two terms as compensation for their exclusion from governance in the past. They argue that the community may not get the opportunity to lead the government in future if such right is not recognized as none these proposed provinces has their majority population.

<sup>11</sup> These language policies were adopted by concerned thematic committee based on presentation made to the Cultural and Social Solidarity Committee of Constituent Assembly by Professor Yogendra Pd. Yadav and Associate professor Purna Man Shakya. Also see, Yadav and Shakya, "Contemporary Language Issues of Nepal and Inclusive Language Policy" Seminar Report, "Existing Status of Nepalese Languages and Inclusive Language Policy" Social Inclusion Research Fund, SNV Nepal.

- Village or Municipality communicates with district level government in provincial official language or district level official language or Nepali (*khus*) Language.
- District Level governments communicates with each other in the language mutually acceptable to each other. In the absence of mutually acceptable language, they communicate with each other in Nepali Language or Provincial official language.
- Village or municipality level governments communicates with each other in the language mutually acceptable to each other. In the absence of mutually acceptable language, they communicate with each other in Provincial official language or Nepali (*khus*) Language.
- Notwithstanding anything above the language to be used for authoritative texts of Acts, Ordinances, Rules, Bills, Judgements, orders and notifications of Provincial Government shall be in Nepali (*khus*) and Provincial Official Language. In case of conflict in interpretation, interpretation of the text in Nepali (*khus*) Language shall be final.
- Language to be used in Parliament of Federal Government shall be Nepali (*khus*). Those who cannot speak in Nepali (*khus*) language may speak in their own mother language. Special provision however shall be made for interpretation of the language spoken by such member of parliament.
- Language to be used in Provincial legislature shall be Nepali (*khus*) or provincial official language. Those who cannot speak either of them may speak in their own mother language. Special provision however shall be made for interpretation of the language spoken by such member of parliament.
- A citizen of Nepal must have the right to petition the government in his own mother language. The government shall make necessary arrangement for translation of such petition.
- Means of education may be Nepali or English. Provinces shall determine the additional languages to be used as a means of education at the level of school.
- Formation of Language Commission to survey, study, protect and promote national languages of Nepal.
- Language to be one of the basis for state restructuring.



Some of the major criticisms of language issues raised by excluded communities are:

- Demand for multi-language policy is expensive and complicated.
- It is more of a sentimental demand and is less practical,
- Demand is less meaningful as the world is getting globalised and language barrier is looked upon as a problem.

### Federalism and Division of Power

One of the basic criticisms against the past regime was that it never had sincerity and political will in real decentralization and empowerment of people. There was no meaningful sharing of power and opportunity with excluded communities (Janajati, Madhesi, Dalit and Mahila community). Demand for federalism partly emerged as a reaction to total failure of decentralization policy in meeting local aspiration of Nepalese people for self rule and all round development. One of the major parts of federalism is division of power at different levels of government. Nepal did not go for US model of division of power. It rather preferred to go for Indian model of division of power. There is federal list, provincial list and concurrent list. Residuary power has been vested to federal government. Perhaps the unique feature of proposed concept paper on division of power is that it has listed powers for local government and special areas as well. As expected, major items of defense, foreign affairs, communication, along with national agendas and residuary power are expected to be in the federal list<sup>12</sup> where

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SN	Matters expected to be Listed in Federal List
1.	Relating to defence and military: (a) Protection of national unity and territorial integrity (b) Relating to national security
2.	Union Police, Armed Police Forces
3.	Central bank, finance policies, monetary policies. foreign grants, aid and loans.
4.	Telecommunications of the Union, allocation of radio frequency, television and posts.

5.	Customs, excise-duty, value-added tax, corporate income tax, passport, visa, postal, tourism fees, service charges, fees.
6.	Royalty from natural resources.
7.	Management of the Union civil services.
8.	Central Census.
9.	National level large electricity, irrigation and other projects.
10.	Central universities, central libraries.
11.	Central health policies.
12.	Affairs relating to Union Legislature and Union Executive.
13.	International trade, exchange, port, quarantine.
14.	International and Inter-State aviation (airways).
15.	Foreign and diplomatic affairs and United Nations Organization.
16.	International treaties, extradition and management of international borders.
17.	Management of national railways and national highways.
18.	Central intelligence and investigation.
19.	Laws relating to Constitutional Court, Supreme Court, administration of justice.
20.	Laws relating to citizenship, passports, visas and immigration.
21.	Atomic energy, air space and astronomy.
22.	Commissions of national importance including the Commission for the Investigation of the Abuse of Authority, Audit Commission, Public Service Commission, Election Commission, National Human Rights Commission, National Women Commission, Social Inclusion Commission, National Natural Resources Commission and National Finance Commission.
23.	War and defence.
24.	Arms, ammunition factories and production thereof.
25.	Establishment of standards of weight and measure.
26.	Mines and mineral development.
27.	National and international environmental management
27.	Insurance policies.
28.	Making criminal laws.
29.	Intellectual property (including patents, designs and copyrights).
30.	Any other matter not enumerated in the Union List, the State List, the List of Powers of Local Government, the List of Powers of Autonomous Area or the Concurrent List and any matter not specified in this Constitution and in the laws under this Constitution.

as matters which immediately concern day to day life of a citizen is likely to find place in provincial list.<sup>13</sup> Items such as education, industry, agriculture, health, forestry and law and order are listed in provincial list. Concurrent list include matters of common concern.<sup>14</sup>

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SN	Matters Expected to be Listed in Provincial List
1.	State police, administration and peace and order.
2.	Banks and financial institutions, cooperative institutions, foreign aid and assistance with the consent of the Union.
3.	Radio, F.M., television.
4.	Individual income tax, taxes on wealth, taxes on business, taxes on lands, taxes on remuneration, fees on the registration of house and land, taxes on motor vehicles, taxes on entertainment, taxes on advertisements, taxes on tourism and agro-income, service charges, fees.
5.	Royalty from natural resources.
6.	Management of the State civil services.
7.	State census.
8.	State level electricity, irrigation projects and other projects.
9.	Universities, higher education, libraries and museums.
10.	Health services.
11.	Matters relating to the State Assembly, Local Government and Special Structure.
12.	Intra-state trade.
13.	Inter-State air services.
14.	State railways and State highways.
15.	State bureau of intelligence.
16.	Electricity projects, irrigation projects.
17.	Physical management, human resources management and other necessary matters of courts other than the Constitutional Court and Supreme Court
18.	Management of citizenship and passport.
19.	State level commissions.
20.	Management of lands, maintenance of land records and collection of taxes on lands.
21.	Exploration and management of mines.
22.	Management and operation of insurance.
23.	Protection and use of languages, cultures, scripts and religions.
24.	Use of forests and waters within the State and environmental management.
25.	Agriculture and livestock development, factories, industrialization, trade, business, transportation, production, sale, supply and distribution of alcoholic substances.

26.	Libraries and press.
27.	Management of trusts ( <i>Guthi</i> ).

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SN	Matters Expected to be Listed in Concurrent List
1.	Civil and criminal procedure, evidence and oaths (recognition of laws, public acts and records, and judicial proceedings).
2.	Supply, distribution, price control, quality and monitoring of essential goods.
3.	Preventive detention for reasons connected with the security of a State, the management of prisons and detention centres and the maintenance of peace and order.
4.	Transfer from one State to another State of accused persons, detainees and prisoners.
5.	Laws relating to family affairs (marriage, transfer of property, divorce, persons on the verge of extinction, orphan, adoption, succession and joint family).
6.	Acquisition, requisitioning of property and creation of right in property.
7.	Contracts, partnership and agency.
8.	Matters relating to bankruptcy and insolvency.
9.	Drugs and poisons.
10.	Economic and social planning, family planning and population control.
11.	Social security and employment, trade unions, industrial and labour rights and disputes.
12.	Medical, legal and other professions.
13.	Vital statistics including registration of births and deaths.
14.	Waterways.
15.	Means of communication.
16.	Protection of archaeological sites, ancient monuments and museums.
17.	Industries and mines and physical infrastructures.
18.	Casino, lottery, motor vehicle licensing.
19.	Control of fire and natural calamity, relief and rehabilitation
20.	Tourism, water supply and sanitation.
21.	Motion pictures and cinema halls.
22.	Insurance.
23.	Poverty alleviation and industrialization.
24.	Scientific research, science and technology and human resources development.
25.	Forests, wildlife, birds, mountains, national parks and utilization of waters stretching in inter-State form.
26.	Management of the State and inter-State environment.

The division of power has been criticized as complicated and mainly focused on Central Government. There are altogether five lists and conflicts and confusions in the initial ten years period of time is very much expected. A strong and visionary constitutional court alone may resolve these challenges in future Nepal.<sup>15</sup>

### **Forms of Government and Federal Nepal**

Form of government at federal level is one area in which the major parties could not reach a consensus so far. In fact three models of government were proposed and none of them received majority support. Presidential model proposed by Maoist received 18 votes, parliamentary model proposed by Congress party received 16 votes and Mix model proposed by small parties received 3 votes. There were also individual proposal for form of government where in Prime minister would be directly elected. This proposal was moved by Mr. Narhari Acharya<sup>16</sup>. The Form of government is one issue where in the political parties have taken undue interest. Each has tried to see their hidden interest in the proposal they made. This way the matter can never be resolved. It may also be pointed out that the presidential system proposed by Maoist is theoretically contradictory. It has proposed for a directly elected executive president but cabinet appointed from parliament based on each party strength after election. Their proposal violates separation of power and check and balance which form the bedrock of presidential system. Proposal for parliament as final interpreter of constitution and provision for constitution of cabinet from among the parties in parliament does not get along with presidential system. Dispute on form of government is centered on federal level government alone. At the provincial level, the parties have agreed for parliamentary level and at the local level presidential model is agreed.

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27.	Land policies and laws relating to lands.
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<sup>15</sup> Shakya, Purna Man, "Spot Light on Major Constitutional Issues of Nepal" A seminar paper presented in Hotel Anna Purna. "Division of power has always been the soul and heart of federal polity. State restructuring committee has proposed to establish federal list, provincial list, concurrent list, special area list and local government list. Residuary power has been proposed as a federal subject. Because Nepal is transforming into a federal state through centralization and disaggregation process, it is quite natural for Center to retain the major sources of income and power. This tendency of leaders of major political parties has been criticized by excluded communities as a continuity of past tradition of denying power to the people. Madhishi and Janajati would always advocate for residuary power to provinces. The psychology of the constitution makers and communities in politics is totally misguided by a misconception that the center would remain under the control of the mainstream community and provinces would go to other communities. Federalism is not going to work that way. It is a self rule at province and shared rule at Center. Even at provinces, the government will always be multiracial and multi ethnic due to very composition of the population."

<sup>16</sup> Mr. Narhari Acharya is one of the leading think tanks of Nepali Congress and he is from academic background.

### **Structure of Judiciary in Federal Nepal**

Thematic committee of Judicial System proposed to establish three tier integrated judiciary where in there would be Supreme Court, State High Courts and Local Court. In addition there would also be local dispute settlement mechanisms and alternative dispute resolution systems. They have even proposed to recognize the traditional dispute settlement mechanisms if they exist and ensure minimum standards of justice delivery mechanisms. The proposed integrated system is inspired by Canadian and Indian model. Perhaps the most disputed part of the report (which does not conform with Canadian or Indian Model) was entrusting of judicial function to parliament and subjugating judges and judiciary to legislature. The report proposes to establish parliament as a final interpreter of constitution, judicial review of legislation, final arbiter of interstate dispute and disputes related to major political posts of the state. This proposal has been objected by community of judges, Nepal Bar and many other political parties. The proposal is against the concept of independence of judiciary, separation of power and rule of law. Maoist who initially advocated this model has backed out their previous stand and has proposed constitutional court as compromise alternative. Outside the constituent assembly, *Madheshi* community and *Adiwasi Janajati* community have advocated for dual judiciary based on American model.

### **Election Process for Legislatures in Province and Center**

Election process for constitution of Legislature has also been a contended issue. The excluded communities have been demanding double proportional representation. Proportional representation of parties based on votes caste by each party and proportional representation of different communities based on latest census. But by majority decision thematic committee has proposed to go for dual election system for the legislature. 50% would be elected by direct constituency based election in first past the post system and rest half would be elected (nominated) on the basis of proportional representation system. Each party would nominate the candidates based on proportionate representation of different ethnic communities and women. The concept paper approved mandatory one third representation of women (33.33% in the Legislature). There is also emerging demand for representation of non territorial communities such as Dalits and Muslims for purely based on their separate electorate and principle of non territorial federalism. This idea seems to be inspired by system of representation of Mauri community (aborigin people) in New Zealand Parliament.

### **Conclusion**

Nepal is a highly divided society. In the past unity was secured through monarchy. Guardianship of monarchy backed by force of Nepal army and respect for command of King backed by divine right theory played a vital role in suppressing the inherent as well as artificially created differences. The Kings of Nepal however could not understand the middle class desire for democracy, ambition of elite community to lead the nation and aspiration of common man for economic transformation. The Kings instead of facilitating the peoples' aspiration of democracy always preferred to regain the control and power over the people. Their

unwarranted interference and divide and rule politics led most of the major political parties to conclude that the monarchy should be abolished once and for all.

With the abolition of monarchy, this very bonding element was lost and people with diverse culture and interest have found freedom to ventilate their own grievances and ambitions beyond comprehension for political leadership in Nepal. Political parties, instead of managing these extremisms through sharing of vision for new Nepal based on justice and equal opportunity, unity in diversity, live and let live principles, have preferred to cash in these sentiments for their short term political ends at the cost of long term national interest. This is rapidly complicating Nepali politics and constitution making process. If the leaders fail to rise above their narrow party interest and the communities they represent, the entire social fabric will tear apart and society may plunge into multi-polar unorganized, spontaneous and violent social conflict based on hatred and animosity. The igniting point for such social conflict could be disagreement within constituent assembly for enactment of federal constitution based on self rule and shared rule. The blame game that will follow for failure of constitution making process or possible dissolution of constituent assembly may turn into nasty social conflict. Madhesi vis a vis Pahadi, Bahun Chhetri vis a vis Adiwasi Janjati, Dalit vis a vis Non Dalits, Rich vis a vis Poor, Maoist vis a vis Non Maoist are the dimensions of social and political conflict. In addition there are also dissatisfactions based on gender discriminations, regional disparities and religious sentiments. All these need to be managed through new constitution. This requires intensive and honest dialogue between community leaders and this is not happening as expected. Every thing has been left to political leaders for resolving disputed issues and this may not work if it is not based on existing reality.