

FROM BIG BANG TO INCREMENTALISM: CHOICES AND CHALLENGES IN CONSTITUTION BUILDING

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Nepal

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Nepal adopted federalism for the first time in its new constitution that was adopted on September 20, 2015, however the main claimant of the federalism, ie the Madhesi¹and the Indigenous groups, remained unsatisfied as it did not fulfill the core demand of identity based federalism. In this paper, I have analyzed the historical evolution of the demand of federalism, acceptance of federalism by popular uprising in Madhes in 2007, reactions against federalism by the dominant group of Nepal, Khas Arya,² its unwilling adoption in the new Constitution and the lack of political will to implement it in its real sense. While constitutional acceptance of the federalism has given validity to it, Nepal still has miles to go for its strengthened implementation.

Historical Perspective of Federalism and Decentralization in Nepal

Nepal has been under the unitary rule of Shah Kings from the last 240 years. There have been some experiments with political devolution with end of the Rana regime in 1951 and it took a new shape after King Mahendra dissolved parliament and took control of power in 1961. To justify his authoritarian role, he propagated the concept of decentralization. He created 5 development regions, 14 zones and 75 districts, Village Panchayat and municipalities. The whole process of decentralization was just aimed to consolidate political power of the then monarch against the principle of decentralisation that aims to transfer authority, resources, power, responsibility and accountability from the central level to local structures. After the democratic change of 1990, the local self-governance act was introduced in 1999 which to some extent tried to empower the local bodies. However, in the absence of a corruption-free political space and efficient bureaucracy, the local bodies could not deliver services/development at the local level as envisaged.

¹ Ethnic community living in plain areas launched three big street movements in last 10 years for equality, federalism and greater autonomy. They also demanded that provinces should be created in a way that Madhesi population should remain in their provinces.

² Hill high caste ruling elites having around 32 percent population but dominates more than 80 percent of state structure such as politics, business, bureaucracy, security and judiciary.

Another ugly face of the unitary system of Nepal remained prevalent in the democratic regime too - that was exclusion of Madhesi, Janajati (Indigenous), Dalits, Women and socially, culturally and religiously marginalised communities. The Khas Arya community remained dominant in all the political and administrative structures of Nepal. For that political reason, 60 years ago Bedanand Jha, a leader from Madhesi community led Terai Congress, demanded recognition of Hindi as the second official language of Nepal and Terai as a separate province. Bedanand Jha was co-opted by the Panchayat regime. The Panchayat regime ruled Nepal for 30 years with full authoritarian measures hence political leaders fought mainly against the regime and for the restoration of multi-party democracy during the Panchayat regime. The Nepal Sadbhawana Party, a political party which claimed to represent the separate identity and claims of the Madhesi population, raised the demand of federalism in Nepal after the restoration of democracy in 1990. With the evolution and expansion of Maoist armed struggle in Nepal, state restructuring and identity based federalism was one of the core agenda which was later incorporated in the Comprehensive Peace Agreement. While enacting the Interim Constitution of Nepal the agenda of federalism was again ignored and a heavy protest in Terai by the Madhesi population erupted which led the then government and all the political parties to amend the Interim Constitution and insert the agenda of Federalism, to be ensured by restricting the unitary state. Throughout the first Constituent Assembly the structure of the federal state remained the crux agenda and the first Constituent Assembly was dissolved without delivering the Constitution. The second Constituent Assembly delivered the Constitution with the seven province model of federalism which is from the very beginning contested by the main claimants for federalism, the Madhesi and the Janajatis.

Provincial Arrangements in the Constitution

The Constitution of Nepal has carved seven provinces in the Constitution. Among the seven provinces, only one province – province no 2 – was created in a way that puts Madhesi in the majority. The remaining six provinces – provinces no 1, 3, 4, 5, 6, and 7 – have been carved out in such a way that none other than the Khas Arya Community, which is historically a ruling community, can form the government under their leadership. This has betrayed the aspirations of Madhesi and Janajatis' demands for identity based provinces and self-rule by the historically marginalized communities. In the first Constituent Assembly the parties had agreed to create identity based province for those communities who have more than one per cent of population in certain areas. It is because of gerrymandering that there is 28 per cent of Khas Arya population in province no 1; 37 per cent in province no 3; 42 per cent in province no 4; 30 per cent in province no 5; 62 per cent in province no 6; and 60 per cent in province no 7. This means that the current federalism model is a quasi-federalism and basically administrative federalism which does not ensure the right to self-rule and inclusive representation.

The Constitution does not give provinces the power to choose their official languages in the provinces. The Constitution stipulated that provinces can choose other official language besides Nepali language. This also goes against the principles of federalism. Marginalised communities of Nepal, particularly Madhesi and Janajatis, demand federalism because they think that federalism could alone ensure their empowerment and protection of their identity and culture, as it will be a major departure from the past as far as the system of governance is concerned. The current model of federalism therefore does not take into account the aspirations of those communities who demanded federalism.

Result of Counter Change

As has been discussed above, despite being multi-cultural, multi-ethnic and multi-lingual, Nepal was ruled by one dominant community Khas Arya (mainly Brahamin and Chhetri caste group of hill origin) who still have more than 70% occupation in public administration, judiciary, army, security forces, politics and every sphere of public life. Nepal, which has more than 100 languages spoken, was forced run under the official language of Nepali (a mother tongue of ruling elites), ignoring the culture and dress of other communities (*Daura Surual topi* was made an official dress which is totally not comfortable in the heat of Terai). After the restoration of democracy in 1990, the 1990 Constitution valued the other languages spoken in Nepal as state language but even after that constitutional validation, when the Kathmandu municipality began on 25 July 1997 to use Newari – the dominant language of the city – as the additional official language of communication, and the Dhanusha District Development Committee on 18 November 1997 and the Rajbiraj Municipality on 25 November 1997 also began using Maithili, the dominant language of the city and the region, as an additional official language, the Supreme Court appeared as a hurdle on the way. Cases were filed against these local bodies' decision to use Newari and Maithili as additional languages of communication. The Supreme Court stayed these bodies' decision and on 3 June 2001 ruled that the use of Newari and Maithili as additional languages was unconstitutional and unlawful.

Such singular capture by one community over state resources, facilities and institutions of policy making forced Madhesi and Janajatis to believe that the only way they could end discrimination against them would be to effect changes that could bring federalism in the country. Madhesi and Janajatis were attracted by the CPN Maoist's 10 years long insurgency in Nepal for raising the empowerment of marginalized communities. The unitary and so called decentralized system could not be effective enough to provide resources and opportunity to the poor and most excluded communities. Moreover, domination of single identity of the ruling Khas-Arya was promoted as a national identity which was completely based on a false notion of "nationality". The marginalized and excluded were forced to think that it is only greater autonomy and self-determination with federalism that could recognize their identity and provide equal access in resources and participation in the state structures. After the CPN-MC joined the mainstream and signed a comprehensive peace agreement in 2006, a new Interim Constitution was promulgated sans federalism. Madhesi Janadhikar Forum, then a Madhesi non-governmental organization, raised the issue of federalism and its leader Upendra Yadav was arrested for burning the new Constitution. The CPN-MC, which had the slogan of ethnic autonomy, agreed to go with the traditional forces – the Nepali Congress and the CPN-UML – who decided to drop federalism from the constitution. The NC and the UML are the old forces that are opposed to agenda of change particularly the issues raised by marginalized communities such as Madhesi and Janajatis.

All this led to deep resentment in Madhes against the Interim Constitution. Madhesi took to the street in 2007 forcing the major three parties to amend the Interim Constitution to incorporate federalism. After death of around 50 Madhesi youth, Prime Minister Girija Prasad Koirala was forced to sign the 22 points agreement with the Madhesi forces leading to amendment of the Interim Constitution's article 138(A) which ensured federalism and autonomy for the first time in the Constitution.

In the first Constituent Assembly, where Madhesi parties and the CPN-Maoist had good representation, the CPN-M and the Madhesi forces raised the issue of identity based federalism but the NC and the UML rejected their demands. In the second Constituent Assembly, the CPN-M that had been given the slogan of federalism albeit indirectly during its 10 year insurgency, sided with the NC and the CPN-UML and agreed to reject identity based federalism. This weakened the voice of those forces who wanted to ensure identity based federalism.

Now there are seven federal units in the country, but without the identity based federalism. Madhesi and Janajatis fear that in this federal model, they cannot ensure their self-rule in their provinces, as their ethnic clusters have been divided.

The Nepali Congress and the CPN-UML often said that federalism was bad for a small country like Nepal. They cited two reasons for this: it will be expensive and it can create communal discord. Proponents of federalism said that federalism could alone empower the marginalized communities and federalism could alone end structural discrimination that the marginalized communities have been facing for long.

It was mainly because of the bickering by parties over federalism issues that the first Constituent Assembly failed to deliver a new Constitution. The Nepali Congress and the CPN-UML blocked the CPN-MC and the Madhesi forces' efforts to ensure identity based federalism in the first Constituent Assembly. In the Second Constituent Assembly, the NC emerged as the largest force and the UML the second largest force.

Madhesi and Janajatis demanded identity based federalism. Madhesi forces first demanded one Madhes province, but Tharus, which has a sizable population of Madhes, opposed the idea and demanded their own province. Madhesi parties that were championing the cause of one Madhes province later gave up their demand due to Tharus' opposition. In the first Constituent Assembly, the NC and the UML were ready to carve out two provinces in Madhes but they insisted carving six Madhes districts - Jhapa, Morang, Sunsari, Chitwan, Kailali and Chitwan – into hill province. The NC and the UML wanted to carve out these Madhes districts into hill provinces mainly because people of hill origin, who are known as Pahadis, have sizable populations in these districts. In some of these districts Pahadis have almost 60-70 per cent of the population. Janajatis said that two ethnic indigenous nationalities should be put into one province in hill provinces but their demands were ignored. The demand of Madhesi and Tharus to have two provinces across Madhes was also ignored. Madhesi and Tharus even told the NC and the UML to carve out areas south of East West Highway into Madhes province and areas north of East-West Highway into hill province but their demands were again ignored. Madhesi, Tharus and Indigenous nationalities continue to demand identity based federalism. It is important to know here that the three major political parties (NC, UML and CPN_MC) with their 16 point agreement had proceeded to issue a Constitution even without carving the boundary of the provinces, but it was the Supreme Court interim order that made them to hurriedly decide the seven provinces and its territory. During 2015, in the street protests mainly in Terai, more than 50 people were killed by security forces in the name of fast track constitution making. The Constitution was flawed from the very beginning, and this was accepted at the time of promulgation as the then Prime Minister declared that the first sitting of parliament will amend the Constitution and address the demands raised by protestors. It is also important to know that recently the current PM

of Nepal in his visit to India has officially claimed that another round of constitutional amendment will take place soon.

It is the lack of wider ownership of the Constitution that makes it a challenge for implementation. The Madhes based parties were protesting. However, amidst the protest the government has completed the two rounds of local level elections and is heading for third round where it is expected that the Rstriya Janata Party Nepal (RJPN) will also take part in the election despite their core demands of constitutional amendment not being addressed.

The political negotiation

The RJPN's demand earlier had said that it would participate in elections only when the constitution amendment bill was passed, but has now agreed to take part in polls when the bill failed in the Parliament. The UML, the principal opposition, which earlier had said it would block the process on the bill did not do so and voted against the bill. The UML said that the bill was against the national interest.

The ruling parties continued to say that they did not have the required two thirds majority to pass the bill but if the RJPN wanted to put the bill to vote, they would be ready to do that and that is what they did when they put the bill to vote in August. The RJPN eventually agreed to the ruling parties' argument and decided to participate in the third phase of local polls irrespective of the results of voting on the constitution amendment bill. Upendra Yadav led the Federal Socialist Forum Nepal which had earlier demanded rewriting of the Constitution abandoned his agenda and took part in the first and second phase of local polls.

Although the constitution amendment bill failed in the Parliament in August, the support of 64 per cent of the lawmakers in favor of the bill signifies that the constitution needs to be amended to address the concerns of Madhesi and other marginalized communities.

Those forces that were saying that there was no need to amend the constitution as it has the endorsement of 90 per cent of lawmakers do not have high moral ground to argue the same now. Since the RJPN and other marginalized communities have said that they would continue to oppose this Constitution until amendments are made to the Constitution to address their demands, it is likely that there will be conflict among the forces that are opposed to the amendment and forces that favor amendment. If the Constitution is not amended, that could lead to conflicts and instability in Nepal. Major parties need to show their magnanimity on four key issues - federalism, citizenship, representation in the Upper House of the Parliament and language – to avoid conflicts and political instability. In Nepal many fear that if the major parties do not show magnanimity to amend the Constitution to address key concerns of the agitating Madhesi and Janajati forces, then pessimism could fuel the anger of marginalized communities and some desperate groups could even launch an armed struggle. In the post 2006 popular movement, there were dozens of armed groups in Nepal fighting for separate Madhes land. The state could control their armed struggle by mainstreaming the democratic forces of Madhes and the state needs again to address genuine demands of democratic forces of Madhes that are trying to bring changes through peaceful means in the country.

The Model of Federalism

Nepal's federalism does not follow any model. It does not have any features of federalism being practiced in the USA, Switzerland and India. The major parties that bulldozed the constitution making process created the model of federalism in a way that does not ensure self-rule of the communities that are in majority in their areas. The major parties only kept giving as an example the failure of federal countries mainly of Yugoslavia saying federalism created more problems.

Constitution Implementation: A challenge ahead

Madhesi and indigenous nationalities continue to revise the boundaries of the provinces. Implementation of federalism has been left in the hands of bureaucrats who are by nature centralists. Central government has been given more power and resources and the local governments have been given the rest of the executive powers and resources. Provincial governments, which had to be given substantial powers and resources, have been left without any substantive power.

Marginalised communities demand inclusive representation in all sectors of governance, which remains to be fulfilled. Madhesi forces continued to fight for their cause for last two years but they failed to achieve the desired results. Failure of the second Constitution Amendment Bill in the parliament has left the Madhes-based political parties with no hope of an immediate solution to their demands. Failure of the Constitution Amendment Bill has frustrated and angered the Madhesi population.

There is frustration, hopelessness and helplessness across Madhes. There is a danger that frustration in Madhesi people could lead to alienation from the state. This entire situation is creating a situation of anger rather than a sense of ownership of the new constitution which could weaken federalism. There are deep fears that even the constitutionally guaranteed values of inclusion, federalism and secularism are at peril as the conservatives are dominating the government as well as the country's bureaucracy.

With hindsight, might anything have been done differently?

Constitutional issues could have been tackled differently had the Constituent Assembly acted solely as Constituent Assembly, and not as Constituent Assembly cum Parliament. It was often seen that the major three parties made constitutional issues their bargaining chip for ruling the country. The first Constituent Assembly, which was formed after the 2006 popular movement and the signing of the comprehensive peace agreement, had the authority to frame a new Constitution as per the spirit of the marginalized communities. Only the first Constituent Assembly could have truly represented the peoples' desire. The NC and the UML were not in a position to bulldoze the constitution making process in the first Constituent Assembly but they were in a position to sabotage the Constituent Assembly which eventually they did. The CPN-MC, Madhesi and Janajati forces that were in majority in the first Constituent Assembly failed to understand the conspiracy hatched by the NC and the UML.

Failure of the Madhesi and Janajati forces to push the framing of the constitution in the first Constituent Assembly was the major reason why the Constituent Assembly elections happened for the second time and the old reactionary forces won major seats. The second Constituent Assembly election was more like a parliamentary election where candidates talked of developmental issues, drinking water, roads and so on. Madhesi, Janajatis and the CPN-Maoist party lost seats also because

of incumbency factor. Madhesi and Janajati parties have a weak organizational base and therefore, it is less likely that they could win the expected number of seats in the Parliament to effect amendments in the constitution.

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