

## Special Structure under the Federal System of Nepal

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### Abstract

*The present constitution of Nepal formally endorsed federal system by restructuring the state as per spirit of the Interim Constitution. Under the federal system, the constitution provisioned to have main structure – the federation, the provinces and the local levels for political powers and special structure – special, protected and autonomous regions for economic development, social and cultural preservation. The main structures have already been constituted, while the special structures have not yet been implemented. Neither constitution nor the federal law included a list of powers for special structures. There seems to be still confusion and problems regarding the forms and powers of the special structure in the federal system of Nepal. This paper explores on the foundation of debate on special structure and discusses the constitutional and legal provisions on special structure. Based on interpretative paradigm, the author used both primary and secondary information to write this paper. Descriptive and analytical methods have been adopted for the analysis and presentation of provisions on special structures. The constitution did not incorporate special structures as recommended by the CA Committee and State Restructuring Commission, any powers and authority under the constitution are not given to special structures. It is necessary to implement the constitutional provisions on special structure in order to full-fledged implementation of the constitution. The paper highlights the need for a special structure for diversity management, in a context where only the main structure under traditional federalism is studied. It also discusses on the justification for a special structure in the federal system and the constitutional and legal provisions in this regard from a new perspective.*

**Key words:** federal system, special structure, autonomous region, special region, protected areas, federalism.

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## Introduction

The 2015's constitution of Nepal formally endorsed federal system as a system of the country. The constitution provisioned two varieties of federal structures under which the first is main structures (federal, provinces and local level) and second is special structures (special region, protected area and autonomous region) to be set by the federal law. The major aim of the special structures to uphold social harmony, cultural protection and economic prosperity of all social groups. In the line of the constitution, section 99 of the Local Government Operation Act (LGOP) stipulates that the government of Nepal, in consultation with provincial governments, can maintain any area of local levels or district as a special, protected or autonomous region in order to social and culture preservation or economic development.

Although Nepal's present constitution has arranged a special structure under the federal system, there is no any other provision on the institutional body and powers of such structure. One view on this issue is that it is not a matter of the constitution, but the matter of concern to the federal law. Other aspect might be that if there is constitutional provision on main structure, it should also mention at least formation and major powers of special structure in the constitution. Nepal's Interim Constitution, 2007 paved the way for adopting a federal system to solve the problems created by a unitary state. Besides, sub-article (1) of article 138 of the interim constitution of Nepal has expressed the commitment to endorse federal system while the state is restructured. In order to fulfill this commitment, the same article mentioned that the provinces would be autonomous and empowered in accordance with the desire of various communities. The sub article (1) of article 138 states that:

*To bring an end to discrimination based on class, caste, language, gender, culture, religion and region by eliminating the centralized and unitary form of the state, the state shall be made inclusive and restructured into a progressive, democratic federal system (art. 138.1).*

*Accepting the aspirations of indigenous ethnic groups and the people of the backward and other regions, and the people of Madhes, for autonomous provinces, Nepal shall be a Federal Democratic Republic. The provinces shall be autonomous with full rights. The Constituent Assembly shall determine the number, boundary, names and structures of the autonomous provinces and the distribution of powers and resources, while maintaining the sovereignty, unity and integrity of Nepal (art. 138.1.a).*

In order to design federal structure, the CA thematic committee's report proposed to incorporate main and special structures under the federal structure of Nepal. Besides, the State Restructuring Commission, formed under sub-article (2) of article 138 of the interim constitution, also reported to have both main and special structures under the federal structure of Nepal. However, when the new constitution was promulgated, the form of special structure could not be mentioned as per the reports submitted by the CA Thematic Committee and State Restructuring Commission. Besides, the main structure has been formed under the federal structure and one term in accordance to electoral criteria has been ended, although the provisions related to the special structure have not been implemented. The government has not even shown interest in forming the special structure envisioned by the Constitution and the LGOP. The general public does not seem to be aware of the establishment and implementation of special structures under the federal scheme. In this reality, this article focuses on how to make effective the provisions (forms and powers) on special structures in operational level, in which there is no sufficient studies conducted.

### **Problems, objectives and methodology**

Nepal has a federal system with a basic structure for political power and a special structure for economic, social and cultural development. However, the provision relating to special structure has not yet been implemented in practice. In this context, this paper focuses on two-fold questions (i) what are the foundation of debate on special structure? and (ii) how did the constitution and federal laws address the issues of special structure? In order to answer these question, this paper sets two objectives – (i) exploring the foundation of debate on special structure and (ii) discusses the constitutional and legal provisions on special structure. This paper is basically based on secondary information collected through library study. From methodological aspects, this paper employs interpretive paradigm under which the provisions entrenched in the constitution and federal law are interpreted through analytical and comparative approaches. Apart from the provisions of constitution and federal law, many other literature are collected from library (physical and digital archives) and reviewed thoroughly.

### **Review of Selective Literature on Special Structure**

The constitution of Nepal entrenched two varieties of federal structures, under which the first is main structures consisting federation, province and local level, and the second is special structures consisting special, protected and autonomous regions, which have not yet been operated. In this ground, the aim of reviewing literature are to set general understanding about special structure both from theoretical and legal

perspectives. Thus, some key books written by authors, and report published by Constituent Assembly and State Restructuring Commission, constitutional and legal texts on special structure are reviewed.

### **Theoretical Aspects on Special Structures under the Federal Set-up**

Special structure has to be discussed under the broader frame of federal system of Nepal. In theoretical sense, federal system is a system of Government in which certain powers are exercised by levels of government below the national, and those powers are constitutionally guaranteed and do not depend on the national government (UNDP, 2007, p. 24). In other words, federalism is 'a constitutional device which provides for a secure, *i.e.* constitutional, division of powers between central and 'segmental' authorities in such a way that each is acknowledged to be the supreme authority in specific areas of responsibility' (Alan Smith, 1997; cited in Sakhong, 2005, pp.13). In a national conference, Ghai opined that:

*The issue of identity is more important to communities that have been marginalized because they don't feel recognized as part of the national identity of their countries. If well dealt with, ethnicity is emancipating because it promotes identity such as in language, music, literature but it also has its dark side, if it becomes divisive and especially if it leads to violence" (UNDP Nepal, 2007, p. 18).*

Many countries in world has adopted federal system for their own purpose including collective security, market expansion, balanced development and diversity management. Bulmer states that:

*Federalism provides a framework for the recognition of ethnic, religious, linguistic or other cultural communities, reflecting their desire to be recognized as a people with a distinct identity and particular interests. By guaranteeing substantial autonomy to such groups, federalism can allow them to exercise partial self-government through state, provincial or regional institutions while still sharing certain functions with other communities through federal or national institutions. By satisfying demands for autonomy and recognition, a federal constitution may protect minorities, prevent conflict, increase the legitimacy of democratic institutions and reduce pressure for secession (Bulmer, 2017, p. 7).*

There can be various patterns of creation and management of state structures in a federal system. Especially in countries that have adopted geographical federalism,

which is made up of independent states, a federal system with basic structures can be adopted. But in these countries having diverse characteristics and post-conflict countries, basic infrastructure alone may not be sufficient for diversity management, and special structures may also be required. Within the special structure, if an autonomous legal-territorial framework is created, successful conflict solution depends on the balance between all groups sharing the same homeland which does not only provide a chance for a local community to organize its self-government, but also provide an opportunity to peaceful co-existence and cooperation in areas inhabited by an ethnically mixed population or areas which are home to different social groups (Benedikter, 2007, p. 3).

Why the special structures needed under the federal system might also be one of the agenda for further discussion. In theory, a special structure or autonomous region may be a necessary for protecting the rights of minorities within a country, protecting the fundamental rights of indigenous peoples, and exercising the right to internal self-determination (Benedikter, 2007). Depending on the specific need of the country, it may be territorial, non-territorial or personal and local self-government in nature (Pan, 2003). In order to make special structure more successful, some ideas mentioned by Gross can be borrowed here which included: (1) legal design – clearly defining territory concerned and cultural dimension, (2) geopolitical and demographic aspects – governmental relation and ethnic size, (3) political and institutional aspects – organizing institutions with some degree of political powers, (4) social and economic aspects – available of social and financial support, and (5) cultural aspects – cultural preservation within the special structure (cited at Benedikter, 2007, pp. 429-430).

### **CA Committee on State Restructuring and Division of State Powers (CSRDSP) and High Level State Restructuring Recommendation Commission (HLSRRC)**

In Nepal, the decision to adopt federal system was made primarily for balanced development and accommodation of ethnic, religious, linguistic and cultural diversity by ending centralized unitary State. In order to achieve these goals, the CA decided to adopt basic two grounds to restructure State into federal form. The first is the grounds of identity which include ethnic/communal, lingual, cultural; geographical/continuity of regional identities and continuity to historical identities, while the second is the basis of capabilities, which cover economic inter-relationship and capability, infrastructure development and potentiality, availability of natural resources and means, and administrative accessibility (CSRDSP, 2010, p. 21). A country as diverse as Nepal also needed a special structure to address the identity-based issues raised after post democratic movement. Keeping this in mind, the CA Thematic Committee

and the State Restructuring Commission also recognized the need for a special structure and included it in their reports.

Report of the CA Committee on State Restructuring and Distribution of State Powers, 2010 proposed a provision may be made for the federal legislature to constitute special structures in areas of dense ethnic, linguistic, or community presence or in areas of special nature, as required, on the recommendation of the provincial assembly. The draft constitution states that (CSRDSP, 2010, p. IX):

*...apart from the main structure, an area with majority of an ethnicity/ community or linguistic community or with dense population within a Province shall be maintained as an autonomous region.*

*...any region shall be maintained as a protected area in order to protect and promote the ethnicity/community, cultural area, declining and marginalized ethnic groups who are in the extreme minority*

*The backward or areas which have remained behind in socio-economic terms and not covered by the autonomous and protected areas or to develop any subjective area within the province, any specific geographical area shall be maintained as a special zone.*

In addition to the main structure, the report also presents some important arguments for constituting the aforementioned structure. The report shows that autonomous regions have been established with the aim of enabling the people of those regions to experience self-rule when the concerns of indigenous peoples are not being addressed through the main structure. Besides, the main objective of constituting protected areas is to protect and promote highly endangered and marginalized communities within the province. Similarly, it has been mentioned that special areas have been provided for the development of areas not included in the aforementioned autonomous regions and protected areas. In this way, it appears that special areas are non-political in nature, and within them, autonomous areas are related to specific communities and geography, protected areas are related to highly endangered and marginalized communities, and special areas are related to the development of a specific geography.

The State Restructuring Committee and the High Level Commission decided to constitute special structure aiming to create political space for numerically tiny ethnic groups whose population are concentrated in a particular area with objective of doing justice to ethnic communities with smaller population (Hachhethu, 2023, p. 90). The State Restructuring Commission has also recommended a special structure to ensure

that minority and indigenous peoples can enjoy self-governance and autonomy under the federal system of governance and participate in the state with their own identity. For this, the commission had suggested the following provisions (HLSRRC, 2011):

- (1) An area within a province where there is a majority or dense presence of a single ethnic group/community or language may be constituted as an autonomous region.
- (2) Areas established within the province to protect and promote ethnic minorities, endangered and highly marginalized ethnic groups, communities and cultural areas may be designated as protected areas.
- (3) A special zone may be constituted for the development of backward, economically and socially backward ethnic groups, communities and regions or thematic areas within the relevant province not included in the autonomous region and protected area.
- (4) The autonomous regions to be constituted under the province will be as mentioned in the schedule. However, in the case of indigenous peoples who have already formed provinces on the basis of identity, autonomous regions will not be created elsewhere.
- (5) The creation of an autonomous region must be completed within one year of the formation of the provincial government for the first time.
- (6) Any alteration, addition or change in the name, number or boundaries of autonomous regions shall be made by a two-thirds majority vote of the concerned provincial legislature.
- (7) The creation of protected areas and special areas may be done by a majority decision of the concerned provincial legislature.
- (8) Other provisions relating to autonomous areas, special areas and protected areas shall be as determined by provincial law.

Although the entire commission had made a decision and submitted the report, three members<sup>2</sup> of the commission had submitted a separate report with different opinions. The three members had different opinions, mainly regarding the list of indigenous peoples, to remove the provision because the list was incomplete. Similarly, if the names of autonomous regions need to be changed, or amended, the three members' opinion suggested to do so with the recommendation of the concerned provincial legislature to be approved by a two-thirds majority of the federal legislature (HLSRRC, Three members' report, 2011). This shows that the commission's main report aims to strengthen the provinces, while the three-member led report aims to

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2 Three members of the Commission: Ramesh Dhungel, Sarba Raj Khadka and Sabitri Gurung.

strengthen the centre.

## Constitution and Federal Law

Article 56 of the present constitution of Nepal has made provisions regarding the structure of the State. In the process of restructuring the State, the constitution federalized the unitary Nepal through creation of seven provinces. Sub article (1) of article 56 of the Constitution provides for a three-tiered main structure, namely federation, provinces and local level under the main structure, to whom the constitution has granted the right to exercise state power.<sup>3</sup> Similarly, the Constitution has allocated the State power and revenue resources only among the main structures, and has also given the authority to exercise fiscal rights only to the main structure. Regarding special structures, sub article 5 of article 56 only mentions that special, protected or autonomous regions may be established for socio-cultural protection or economic development in accordance with federal law.

The Constitution leaves the issues of establishing special structures to the discretion of federal law, it does not provide any guidance on what arrangements should be made for that. Although it is said that a special structure has to be established for socio-cultural protection and economic development, neither any institutional arrangement nor any resources have been ensured for this. This provision of the constitution seems to have come with the objective of creating a dependent institution with a non-political nature. In so far as concerning to the provisions of the preliminary draft constitution (2015), sub-article 7 of article 60 of the preliminary draft constitution included a provision that special structures, including special regions, would be established in accordance with the law. The draft constitution provided for the Government of Nepal to form a Commission within six months of the date of promulgation of the constitution to determine the number and area of rural municipalities, municipalities, and special structures to be formed in accordance with the constitution. While the proposed draft constitution sets a time frame/limit for determining the special structure, the present constitution has also removed that time limit and the matter is not even mentioned in the federal law, making the operation of the provisions related to the special structures uncertain.

As a federal law envisioned in sub article (5) of article 56 of the Constitution, the Local Government Operation Act, 2017 has been formulated and implemented to

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3 The state power indicates the power relating to the executive, legislative and judiciary of the state, and includes residual power (sub article (1) (h) of article 306 of the constitution of Nepal)

regularize the arrangements related to the local level. The Act made some provisions regarding the special structures envisioned by the constitution, however, these provisions are not sufficient for the establishment and implementation of the special structures. Sections 99, 100 and 101 of the LGOA contains provisions regarding special, protected and autonomous regions as special structure. Under this, section 99 of the Act provides for the basis of incorporating special structures, section 100 for special programs and section 101 for coordination between special structures and local level. Sub section (1) of section 99 states that:

*The Government of Nepal may, in consultation with the provincial government, maintain any area as a special, protected or autonomous region by publishing a notice in the Nepal gazette for social and culture preservation or economic development:*

- (a) *One or more than one district,*
- (b) *One or more than one rural municipality or municipality,*
- (c) *Any ward or more than one ward of any rural municipality or municipality.*

If someone reads this provision, what s/he finds that the main structure under the federal system of Nepal is a political in nature, while the special structure is non-political in nature. In addition, there is a trend of including non-territorial types. On the one hand, its size seems to be almost district-like, or in some cases, ward-like or even smaller. Sub section (2) of section 99 provides for the grounds to be taken into account while establishing a special structure. According to which, the grounds to be taken for a special region are as (1) geographically remote due to lack of transportation and infrastructure, (2) percentage of population below the poverty line and poverty disparity higher than the national average, (3) the presence of a majority of economically and socially backward communities, and (4) any other basis deemed appropriate by the Government of Nepal. These basis show that the establishment of special region is to give priority in developmental change without political empowerment.

In the case of protected region, the Act states basis that cover (1) a minority, marginalized or endangered community residing there, (2) the social and economic development index of the community as per sub-section (1) is lower than the national average, and (3) any other basis deemed appropriate by the Government of Nepal, while for autonomous region, the Act mentions basis that cover (1) a dense presence and abundance of communities sharing the same language or culture, (2)

the social and economic development index of the community as per sub-section (1) is lower than the national average, and (3) any other basis deemed appropriate by the Government of Nepal.

The LGOA has not recognized the units established as special structures as separate political units, but only as economic, social and cultural units. It does not grant financial power to such unit. Section 100 of the Act clearly stipulates that the government of Nepal and the provincial government must conduct special programs or provide additional budget for the development of special, protected and autonomous regions. Besides, there is a provision in section 101, that require coordination with the District Assembly and local level when the government of Nepal and provincial government runs special programs in special, protected and autonomous regions. These provisions clearly show two messages. The first is that special structures have to be depended on federal and provincial government for resources and programs, and the second is that the special structure is not autonomous in operational level. Because, no institution can be autonomous without powers and resources which are not granted to the special structure.

### **Discussion and Findings**

The Constitution has provided for the existence of a main structure and a special structure. Constitutionally, the main structures appear to be of a political nature, while the special structures appear to be related to social, economic, and cultural protection and development. If someone look at the preamble and article 138 of the Interim Constitution (2007), it is understood that a federal system had to be adopted for inclusive and balanced development by ending the existing economic, social, cultural, and ethnic discrimination in the country. Besides, managing diversity within the country is the basic foundation of federalism. The basic principle of federalism is that the power and authority of the state should not rest only in a hand of one government in the centre. The federal system requires distribution of powers and authorities among different level of political entities.

Looking at the journey of Nepal's federal system, it seems that the country did not form a federal system by uniting independent states, but rather by dividing a unitary state into provinces. Therefore, it is natural that the political structure of a unitary state would have an impact on federal Nepal. As a result, municipalities, districts, and provinces are also understood as a continuation of the village councils, districts, and development regions under the old unitary structure, although in a unitary state system, political units did not have any powers other than those granted by the center. However, under the current federal structure, the provinces and local levels have been

recognized as governments and have been ensured of their rights and resources under the constitution. Similarly, in addition to the center, the provincial and local levels can also exercise legislative, executive, and judicial powers as governing authorities, although autonomous judicial powers at the provincial level have not been ensured in Nepal's federal system.

In the process of transforming the unitary state into a federal state in Nepal, it appears that for the first time, the thematic committee of the CA discussed the issue of establishing the main and special structures as the state structure, and the thematic committee also submitted a report accordingly. While submitting its report, the Constituent Assembly's thematic committee has emphasized the need to fundamentally involve ordinary citizens in the governance system by making them experience the benefits of the federal system. The HLSRRC (High Level State Restructuring Recommendation Commission) also submitted a report along the lines of the CA thematic committee, emphasizing the need to establish special structures for the self-recognition of social, religious, and cultural communities in addition to the main structures in the federal structure.

Although the CA's thematic committee and the State Restructuring Suggestions Commission have submitted their reports, the provisions in the report have not been effectively incorporated in the constitution. The constitution just incorporated the issues of special structures to social and cultural protection, and economic development without list of power for special structure, while the CA report and Commission's report had recommended a list of power for autonomous region (see annex below). The constitution neither entrenched a detail provisions on constituting special structures (autonomous, protected and special zones) nor listed any powers for as a part of constitutional mandates. The constitution just left these issues to federal and provincial laws. If legal authorities are not given to the special structure to be constituted under the constitution and federal law, it cannot deliver the result what the people expects. Because, there is a global consensus that when it comes to special structures, including autonomous regions, such structures cannot fulfill their duties in the absence of minimal legislative and executive powers (Benedikter, 2007, p. 76).

Considering the constitutional and legal provisions regarding the establishment and operation of the special structure, which was strongly raised by the Constituent Assembly and the Commission's report, its establishment has not yet been ensured. The Constitution provides that special, protected, and autonomous areas may be established for socio-cultural conservation or economic development only in accordance with federal law. Similarly, the Local Government Operation Act, 2017,

which is a federal law issued accordingly, provides that the Government of Nepal, in consultation with the concerned provincial government, may establish special, protected or autonomous areas by publishing a notice in the Gazette. However, even after 10 years since the promulgation of the Constitution, special structures have not been established as per the Constitution and federal laws, and it is not possible to say with certainty when they will be established. In a context where the main structure under the federal structure has been constituted and operated through elections within a few years of the promulgation of the constitution, the fact that the special structure has not yet been determined remains a challenge to the implementation of the constitution. This has created a situation where questions can be raised about the roles of stakeholders, including political parties, leadership and policy makers. Certainly, these provisions of the constitution cannot be left alone without being implemented. This could prove to be a milestone for Nepal's diversity management and balanced development. Therefore, it is necessary to conduct a detailed study and immediately implement the special structure-related provisions in order to full-fledged implementation of the constitution.

### Conclusion

Nepal is still in the process of experiencing the federal system. In addition, the creation of special structures under the federal system and its practical use are yet to be done. In Nepal, although the existing main structure is appropriate for a balanced development and exercising state's powers, the main structure alone does not seem sufficient for diversity management. Essentially, Nepal's federal structure aims to make all citizens experience the benefits of federalism through diversity management. For this, the Constitution designers have made provisions in the Constitution itself regarding special structures to put the issues related to diversity management into practical use by forming special structures in addition to the main structures.

In Nepal, there are two structures of federalism, namely the main structure and the special structure, and without the special structure being practiced, debates have begun about the purpose of federalism itself. It is certainly ironic that the special structure clearly provided for in the Constitution and further organized by federal law has not been implemented even after ten years of the implementation of the Constitution. This requires the attention of policy and law makers and the government herself. Because in the context of Nepal, a special structure for managing diversity at the local level can prove to be an important milestone, and this system in Nepal can also become a subject of study for international scholars.

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