

Implementation of the Constitution, Federalism, Inclusion and Policies Related to International Relations

Chandra Kanta Gyawali*

Abstract

The Constitution of Nepal has embraced federalism, inclusiveness, a parliamentary system of governance, and policies relating to international relations. The Constituent Assembly rejected the concept of a directly elected presidential and prime ministerial system. The distribution of power among the central, provincial, and local levels of government in the federal system is clearly set out in the constitution. Central, provincial, territorial, geographical, or local governments are various forms of federal governance. Although it is often described as having two governments, two administrations, and two legislatures, Nepal has three levels of government and administration and three levels of legislature and assembly. The nature of the judiciary in a federal system can be general and federal. In Nepal's case, although the judiciary is unitary, the structure of the Constitutional Bench and the High Court is oriented toward a unified judiciary. Speaking of South Asia, the federal system of governance has been adopted especially in India, Pakistan, and Nepal. Other countries have a unitary system of government. Federalism, inclusion, and principles of non-alignment and *Panchsheel* are the basic features of Nepal's constitution. This article aims to highlight the necessity for the implementation of federalism and inclusion, as well as the principle of non-alignment in its truest sense, in accordance with the Constitution of Nepal.

Keywords: constitution, federalism, inclusion, parliament, power, international relations

Introduction

Thomas Jefferson was an American constitutionalist who believed that in order for a constitution to be alive, it must be based on constitutionalism as well as be pragmatic, futuristic, ensuring, and embracing the rights of the present and future generations (Gyawali, 2020). The status of the constitution issued by the second Constituent Assembly of Nepal depends on its implementation. The constitution issued by the Constituent Assembly is, in fact, the intention, desire, and aspiration of the people. The

* Dr. Gyawali is a Senior Advocate of the Supreme Court of Nepal.

constitution is considered to be the original instrument of ensuring the right of citizens to follow the rule of law at all levels of government bodies and organs of the state. Such a constitution has constitutional supremacy. If the supremacy of the parliament is contrary to the constitutional supremacy, then the government is helpless. Parliament is strong because the functions of the parliament are not judicially reviewed. In the United Kingdom, it is said that the parliament can do everything except make a woman a man and a man a woman (De Lolme, 2007).

In modern times, a government run according to the constitution has been taken as a limited government. The constitutions of the United States, France, Germany, Canada, India, and Nepal are the result of this. The People's Movement of 2006 was for a limited government by ending the direct and authoritarian rule of the king, and that a constitution should be made through a Constituent Assembly elected by the people (Law Commission, 2007). Based on the interim constitution, the Constituent Assembly election was held for the first time in 2064 BS for a term of two years. However, the term of the Constituent Assembly was extended for two years by the Supreme Court, but eventually it was dissolved (Law Commission, 2007).

Basis for the Implementation of Federal Rule

The constitution of Nepal was drafted by the first and second Constituent Assemblies (United Nations, 2005). The background for federalism was set by the decade-long Maoist movement, the 19-day movement of seven political parties with state restructuring as the main issue, and the Madhesh movement with federalism as the main issue. The first and fifth amendments proposed to adopt a federal democratic republican system. The Constitution of Nepal, promulgated by the Constituent Assembly, envisaged a federal government, state governments, and local governments.

Constitutional Structure of Federalism

For the first time, the Constitution of Nepal recognized the Nepali people as sovereign. The constitution stipulated that Nepal's sovereignty and state authority would be vested in the Nepali people (Law Commission, 2007). It was said that its use would be in accordance with the provisions of the constitution. In this way, the sovereignty of the people and the distribution of state power were arranged constitutionally. The basic structure of Nepal's governance system was to be three-tiered at the federal, state, and local levels. A constitutional provision was made for the exercise of state power by the federal, state, and local levels in accordance with the Constitution and the law. Although voices were raised that provinces should be formed on the basis of ethnic, religious, and cultural conditions, it did not materialize, and the provinces were formed on the geographical basis of the districts (Nepal Law Commission, 2015). Although special,

protected, or autonomous areas can be established for social and cultural protection or economic development, it is a highly debatable issue.

Distribution of State Power

The Constitution of Nepal has included the exclusive powers of the federal, state, and local governments in Schedule 5, Schedule 6, and Schedule 8, respectively (Gyawali & Raj, 2010). The concurrent powers of the federal and provincial governments are enshrined in Schedule 7, and the concurrent powers of the federal, state, and local levels are included in Schedule 9. Any remaining residual power resides with the federation. Accordingly, constitutional provision was made for the federal parliament in the federation, provincial parliament in the states, and local assembly at the local level (Law Commission, 2015).

Points Raised by India while Promulgating the Constitution of Nepal

Despite the inclusive and power-sharing provisions in the constitution mentioned above, Nepali political parties could not utter a word that India also bears ownership to the 12-point agreement signed in New Delhi (Muni, 2012). The first of the seven points raised by India while promulgating the Constitution of Nepal was the question of proportional representation on the basis of population. It was incorporated in Article 42 through the first amendment by the transformed parliament. Second, there was concern in India when it was decided that only a citizen of Nepali descent should be appointed, elected, or nominated to the posts of President, Prime Minister, and Speaker. The third was related to the formation of the National Assembly. Though the Constitution of Nepal said that the constitution should be based on the population of the provinces, in the end, it was denied, and equal representation in the national assembly of all the provinces was ensured in the constitution (Haidar, 2015).

Fourth, the intention of the Indian side to form two provinces in the Terai, including Jhapa, Sunsari, and Morang in the east and Kanchanpur and Kailali in the far west, could not be achieved. Fifth, it was regarding the constituency review. In accordance with Article 286 (2) of the Constitution, a constitutional provision was made to review it every 20 years. But even in India, population review takes place over a period of ten years. Hence, it is a matter of study as to why it was arranged for us to do the review every 20 years. The sixth was about the provision related to the adopted citizenship according to federal law. The provision that a foreign woman who is married to a Nepali citizen can obtain naturalized citizenship of Nepal if she so desires. That could not be provisioned in the constitution of Nepal (Saran, 2017). When determining constituencies by the Constituency Delimitation Commission, the provision of section 84 for determining constituencies based on geography and population was given first

priority to population and second priority to geography in section 286 (5). Some of these things were addressed through the First Amendment (Gyawali, 2020).

The government of Nepal did not comply with the pressure exerted by the Indian side to keep these points through the constitutional amendment. The then Prime Minister KP Sharma Oli declared that he would not visit India till the blockade was lifted (My Republica, 2016). India closed the customs checkpoints at the borders with Nepal and blocked the supply of liquified petroleum gas, diesel, petrol, aviation fuel, oxygen, and medicines from the third country, and essential goods and commodities coming to Nepal from India (Al Jazeera, 2015). It is still fresh in the minds of the Nepali people that their daily lives had become extremely painful due to the violation of their rights (Nepal Law Commission, 2015). Even the author filed a writ petition at the Supreme Court. The undeclared blockade was ultimately lifted after five months, following the government's diplomatic initiatives (International Crisis Group, 2016). Considering that a blockade had also taken place in 1989, the government of Nepal has the responsibility to take necessary diplomatic initiatives through bilateral talks so that the Nepali people will never have to face such a situation in the future.

The United Nations has developed international law to provide transit facilities to landlocked countries. In the case of a blockade, the parties have to abide by the treaties adopted by both countries, established practices, decisions of the Security Council, decisions of the International Court of Justice, and the rules of international law, as the treaty provides for the right of uninterrupted transit to and from the sea by any means of transportation (United Nations, n.d.). However, it cannot be said that all the treaties and agreements have been complied with. Since the direct violation of the fundamental right was due to the blockade, the treaty mentioned in accordance with the principle of *Pacta Sunt Servanda* is an international recognition of both parties. The Government of Nepal has to effectively implement and review the system requirements. In this regard, Nepal seemed to be silent on the issue (Law Commission, 2015).

Policies Related to International Relations

The Constitution of Nepal has envisaged that the policies relating to international relations are to conduct an independent foreign policy based on the Charter of the United Nations, non- alignment, principles of *Panchsheel*, international law, and the norms of worlds peace, taking into consideration of the overall interest of the nation, while remaining active in safeguarding the sovereignty, territorial integrity, independence and national interest of Nepal (Law Commission, 2015). Similarly, it pertains to reviewing and concluding treaties and agreements based on equality and mutual interest. But in the case related to the undeclared blockade by India, the Supreme

Court of Nepal issued a directive in the name of the Government of Nepal in 2074 BS, saying that the Nepali people should not have faced the blockade as per the treaties related to the law of the sea, the WTO, and the landlocked countries (Supreme Court of Nepal, 2017).

Periodic Elections for the Implementation of Federalism

In 2070 BS, the second election of the Constituent Assembly was held as per the order of the Supreme Court. Finally, the Constituent Assembly promulgated the Constitution of Nepal on Asoj 3, 2072 BS. In this context, due to the movement of Madhesi parties, Adivasi Janajatis and Tharus, and blockade by the Indian side, the first amendment of the constitution was made to allow participation in every body of the state based on inclusive proportional representation and constituency based on population and geography. Based on the new Constitution, the local level elections were held in three phases in Baishakh, Asar, and Asoj 2074 BS. The elections for the House of Representatives and the Provincial Assemblies were held in two phases in Mangsir 2074 BS (Supreme Court of Nepal, 2017).

Formation of Government

Although the constitution envisages majority, coalition, and minority governments, it does not envisage a caretaker or interim government. However, the Prime Minister, as the guardian of all governments, has to give guardianship even if the constitutional scriptures of the world do not recognize the principle of the form of government in exercising the executive power of the Prime Minister elected only by the Federal Parliament.

Unitary Judiciary

There seems to be a constitutional provision of a unitary judiciary, as the Supreme Court, High Court, and District Court, instead of a three-tier judiciary. When the government and the legislature are federal, but the courts are unitary, it seems natural to see an uncomfortable situation in the implementation of federalism (Law Commission, 2015). From a functional point of view, the court seems to be a unified court.

Constitutional Bench

Although the government and the parliament have been implemented in accordance with the principle of federalism, the judiciary seems to be very unitary. Apart from the Constitutional Court, the state-level courts cannot be said to be federal courts just by naming them as high courts. The naming of these two courts can be said to be a unified court. Federalism cannot be strengthened by placing the Constitutional Court under the

Supreme Court. Therefore, instead of a constitutional bench, the Constitutional Court must be higher than the Supreme Court of a permanent nature. This court will not come as a puppet of the Supreme Court. Giving the power of Article 137 to the Constitutional Court does not make any difference. After all, even the current constitutional session has not changed much in terms of rights. The practice of the world has shown that its purpose is of a very political nature. The issue of the dissolution of Parliament twice and its restoration was not without controversy. Therefore, the Constitutional Court should not be under the Supreme Court. The real implementation of federalism can only take place if it is kept as a separate, independent, permanent court (Law Commission, 2015).

Dissolution and Restoration of Parliament

a) Including Santosh Bhandari and Dev Prasad Gurung vs. Including the Office of the President

In the absence of the preconditions specified by the Constitution of Nepal for the dissolution of the House of Representatives of the Federal Parliament, Article 85 stipulates the essence and basic values of the parliamentary system and the practice of different countries having their own parliamentary system. The President's decision to dissolve the House of Representatives was deemed unconstitutional. Thus, the House of Representatives was restored. An order of the Constitutional Bench was issued saying that an order has been issued in the name of the respondent to make necessary arrangements for the meeting of the House of Representatives within thirteen days. The House of Representatives came into operation accordingly.

b) Sher Bahadur Deuba vs. Including President of Nepal

Sher Bahadur Deuba filed a writ petition in the Constitutional Court of the esteemed Supreme Court after the President refused to appoint the Prime Minister with the signatures of 146 MPs. The Supreme Court ordered the President to appoint Sher Bahadur Deuba as Prime Minister (Supreme Court, 2021). Only after the order of the Supreme Court was issued to reconstitute the parliament and convene a session was the parliament able to avoid a catastrophe.

When Parliament Cannot be Dissolved (Fixed Term Parliament)

If the Prime Minister cannot obtain a vote of confidence or if the Prime Minister cannot be appointed as per Article 76 (7) of the Constitution of Nepal, the House of Representatives can be dissolved by exercising its constitutional right. If a vote of confidence cannot be obtained in accordance with Article 76 (5), the minority government can exercise the constitutional right to dissolve the House of Representatives on the recommendation of the Prime Minister. But in this process, there is no constitutional right to dissolve the House of Representatives except in the case of

a vote of confidence in a majority and a coalition government, a vote of no confidence in Parliament without a vote of no confidence, or a vote of no confidence in the Prime Minister (Nepal Law Commission, 2015).

Right to Dissolve the Parliament

Even the prime minister of a coalition government does not see a constitutional right to dissolve. Only the Prime Minister of the minority and the members of the House of Representatives have the right to dissolve the House of Representatives if a caretaker government is formed after losing the vote of confidence. But as the prime minister of the majority and the prime minister of the coalition government are resigning without dissolving the House of Representatives, other governments seem to be trying to make the government stable and strong. It seems that the members of the legislature are not only active in overthrowing the government and dissolving the House of Representatives, but also play a constructive role and envisage a stable government and a stable parliament without burdening the country with repeated elections and imposing a financial burden.

Rule by Ordinance

Two ordinances were suddenly issued on the 8 Baisakh, 2077 BS. This was issued by the President on the recommendation of the Council of Ministers in accordance with Article 114 (1) of the Constitution of Nepal, stating that there was no session of the Federal Parliament (Nepal Gazette, 2007). Four days after the ordinance was issued, the government recommended withdrawing both ordinances. Both the ordinances were repealed by the President without re-establishing the amended provision, i.e., without issuing an ordinance to replace the ordinance.

However, the ordinance replacing the repealed ordinances with the repeal was also approved. Due to that, the 53 office bearers of the constitutional bodies appointed as per the ordinance would always be in danger of being removed from office. An interim order was issued by the single bench not to hear the cases of the above-mentioned constitutional body officials and not to make public their statements in the media on the issues under consideration by the legal practitioners or former judges. What will the existence of an independent judiciary be like by the act of filing a writ petition? Serious questions seem to have arisen.

The Ordinance on Political Parties (Second Amendment) Ordinance, 2078 BS was issued by President Bidya Devi Bhandari on the recommendation of the Council of Ministers. According to the ordinance, Madhav Nepal and Mahanta Thakur's party split based on a 20 percent parliamentary party and a 20 percent central committee (Election Commission of Nepal, 2021). If the purpose for which the ordinance was brought is fulfilled, then it will get constitutional and legal validity. On this basis, Madhav Nepal's

party and Mahanta Thakur's party got constitutional and legal legitimacy even though the ordinance was repealed.

Meanwhile, based on the 20 percent rule, there was a fear that the big parties might split. As per the decision of the government and the recommendation of the Prime Minister, the Political Parties (Second Amendment) Ordinance, 2078 BS, was repealed (Pyakurel, 2021). It is certain that it will be difficult for the big parties to split now. If the main parties want to split, then the question also arises whether the Political Parties Act 2073 has returned to its old state. Constitutional, legal, and our practice do not say that the old legal system can be reversed automatically. Despite the legal obligation to bring a replacement bill if the ordinance is to be repealed, the government abruptly repealed the bill without bringing a replacement bill. This can be considered a mockery of the parliamentary system.

Recommendations

For the fundamental rights to be implemented by the three-tier government based on complementary principles, the President must be given some constitutional rights to implement the constitution, republic, federalism, and inclusion, rather than a nominal president (Nepal Law Commission, 2015).

The federal parliament and the provincial parliaments should be dissolved in the same way as in the United Kingdom. The prime minister and chief minister should be given a six-month probationary period. There should be an arrangement to get it. At the local level, the first-past-the-post electoral system for the mayor, deputy mayor, and vice-president (directly elected by the people) should be arranged. If this happens, then the people will be directly accountable.

- The provision of the ordinance should be repealed as an obstacle.
- The distribution of common rights based on subsidiarity principles should be done by the three levels of government.
- There should be a constitutional provision that only parliamentarians make laws, but do not join the government.
- The Supreme Court should also be recognized as a court of record.
- The Constitutional Court should be developed as a separate constitutional court with experts.
- The appointment of the fourth organ should be done by an independent body based on public hearings.

Conclusion

If there were a clear provision in the constitution for the implementation of the constitution, federalism, and inclusion, it could be expected that the government and the political parties would be able to show constitutional ethics without violating the constitution. Since there is a lot of work to be done to find the loopholes in the constitution and to stop the violation of the constitution and treaties in accordance with the principle of *Pacta Sunt Servanda*, both parties should respect each other. The Government of Nepal has to effectively implement and review the system requirements. Therefore, the question now is whether it is time to amend the constitution by forming a High-Level Constitutional Reform Suggestion Commission.

References

- Al Jazeera. (2015, November 21). India's 'blockade' snuffs out Nepal's medical lifeline.
- De Lolme, J. L. (2007). *The constitution of England; or, An account of the English government*. (D. Lieberman, Ed.) Liberty Fund. (Original work published 1771).
- Election Commission of Nepal. (2021). Registration of CPN (Unified Socialist) and Loktantrik Samajwadi Party Nepal.
- Gyawali, C. K., & Raj, P. A. (2010). *Federalism in the World*. Kathmandu: Pairavi Prakashan.
- Gyawali, C. K. (2020). *Constitutional Law of Nepal*. Kathmandu: Pairavi Prakashan.
- Gyawali, C. K. (2020). *Constitutional Law of Nepal*. Kathmandu: Pairavi Prakashan.
- Haidar, S. (2015, September 24). 7 amendments India wants in Nepal Constitution. The Indian Express.
- International Crisis Group. (2016). *Nepal's divisive new constitution: An escalating crisis*. Asia Report No. 276.
- Law Commission. (2007). *Interim Constitution of Nepa*. Kathmandu: Government of Nepal. Retrieved from <https://www.lawcommission.gov.np/en/wp-content/uploads/2018/01/Interim-Constitution-of-Nepal-2063-2007.pdf>
- Law Commission. (2015). *Constitution of Nepal*. Kathmandu: Government of Nepal.
- Muni, S. D. (2012). *Nepal in Transition from people's war to fragile peace*. (S. v. Einsiedel, D. M. Malone, & S. Pradhan, Eds.) Cambridge University Press.
- My Republica. (2016, January 26). India visit inappropriate unless blockade ends, says Oli.
- Nepal Gazette. (2007). Constitutional Council (Functions, Duties, Powers and Procedures) Act, 2063. Nepal Law Commission.
- Nepal Law Commission. (2015). Constitution of Nepal Article 274 . Government of Nepal.
- Nepal Law Commission. (2015). Constitution of Nepal Article 76. Government of Nepal.

- Nepal Law Commission. (2015). *Constitution of Nepal. Part 5: Structure of state and distribution of state power*. Kathmandu: Government of Nepal.
- Pyakurel, U. P. (2021). Ordinance politics and its impact on constitutionalism in Nepa. *Journal of Political Science*, 21(1), 15-32.
- Saran, S. (2017). *How India sees the world: Kautilya to the 21st century*. Juggernaut Books.
- Supreme Court. (2021). Writ 077-WC-0071-SC ordered date 2078-3-2. 9. Nepal Kanoon Patrika.
- Supreme Court of Nepal. (2017). *Advocate Sunil Ranjan Singh vs. Office of the Prime Minister and Council of Ministers (Writ No. 072-WC-0017)*. Nepal Kanoon Patrika.
- Supreme Court of Nepal. (2017). Senior Advocate Dr. Chandra Kant Gyawali, vs.the Prime Minister and Council of Ministers, 2074, SC ordered date was 2074-5-19. 7. Nepal Kanoon Patrika.
- United Nations. (2005). *12-Point Understanding between the Seven Political Parties and Nepal Communist Party (Maoists)*. UN. Retrieved from <https://peacemaker.un.org/en/node/9210>
- United Nations. (n.d.). Convention on Transit Trade of Land-locked States. 597, 3. United Nations Treaty Series.