



Distributing powers in a federal Nepal

Some powers will go to the central government, others to constituent units



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Activists of the Madhesi Mukti Morcha Party stage a protest outside the Nepalese election commission in Kathmandu. Most of Nepal's minority groups demanded the adoption of proportional representation for the Constituent Assembly election. Nepal adopted a mixed system in which half of the members are elected through a proportional system.

BY KATY LE ROY

Nepal has chosen a federal system because it is widely believed that constitutionally guaranteed shared rule and self-rule will help alleviate poverty and promote development.

It is also believed that federalism will help eradicate discrimination against oppressed minorities. But if federalism is to fulfil this promise, members of the Constituent Assembly (CA) will need to remember these goals when they decide how the federation is to be structured, how much autonomy the constituent units – Nepal's future states or provinces

- will have and how the fiscal side of federalism will operate. Among the questions that must be addressed are the powers of the constituent units and the nexus between taxing powers and spending responsibilities at each order of government. Decisions on these issues are bound to require difficult negotiations among the 25 political parties represented in the 601-member CA.

Attempting decentralization

Nepal has already made some attempts at decentralization, but progress has

been slow and uneven. While there has been some decentralization to local and district bodies, central control and supervision over such bodies has remained strong. Many of the efforts at decentralization thus far have involved administrative delegation rather than granting any degree of real autonomy or devolving power.

When it was adopted in 1999, the Local Self-Governance Act was hailed as a landmark for decentralization and participatory development in Nepal. Under

Katy Ley Roy has a long association with the Centre for Comparative Constitutional Studies at the Melbourne Law School; she is completing her doctoral thesis on constitution making and is Parliamentary Counsel in the Parliament of Nauru.

the Act, 25,000 primary schools, all sub-health posts and agriculture extension services were among the responsibilities to be transferred to local bodies in a phased manner. However, this legislation was never fully implemented. In 2007, the decentralization of activities in primary health, primary education, agriculture extension, and rural infrastructure was being implemented in 14 districts, including one district from each zone. But in most parts of the country, such decentralization has not occurred.

It might be useful for members of the CA to consider whether there are lessons to be learned from previous unsuccessful attempts at decentralization. They could attempt to build on such lessons when determining how legislative and executive powers are to be divided and what kind of support is required to enable constituent units to fulfil their role, including mechanisms to facilitate the effective implementation of the division of powers.

Placing federal design in context

Nepal has a population of about 25 million, with considerable cultural and language diversity, a very low rate of literacy and more than 80 per cent of the people living in rural areas. An estimated 30 per cent live below the poverty line and about 45 per cent of children under five suffer from malnutrition. The state has limited resources and relies heavily upon foreign aid.

Improvement in this situation will require a commitment to more equitable resource distribution and more even economic development, as well as improved delivery of, and access to, essential services. Development and service delivery could be improved through a carefully designed federal balance of powers and resource-sharing. But Nepal's demographics and low literacy level mean the capacity of constituent units to fulfil wide-ranging responsibilities in policy and service delivery might be limited.

Members of the CA and other key actors are aware of the need to meet this challenge so the purported benefits of greater regional autonomy will result in tangible improvements across the country and in all sections of society.

It is important for CA members to also be aware that if powers allocated to constituent units grossly exceed their capacity, poverty and the uneven distribution of resources might be exacerbated rather than alleviated.

Dividing powers

Given the apparent objectives of the introduction of federalism in Nepal, there are likely to be many key areas of government activity that will have to be granted to the constituent units, notwithstanding the resource and capacity constraints referred to. There is a strong case in Nepal, and strong demand, for powers over such areas as education, health and agricultural reform to be allocated to the new



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On 18 August 2008 Pushpa Kamal Dahal "Prachanda", left, was sworn in as Prime Minister. He looks on as Finance Minister Baburam Bhattarai, second left, Foreign Minister Upendra Yadav, second right, and Defence Minister Ram Bahadur Thapa, right, check their papers before being sworn into the cabinet.



constituent units. Giving such powers to the constituent units will bring government and services in these key areas closer to the people, enabling greater participation in decision-making.

However, the number, size, and territorial or ethnic basis of the constituent units are still unclear. These factors are closely interrelated with the nature and scope of the powers to be allocated to the units. The basis of representation of the constituent units at the central level is also unclear and is similarly interrelated.

One way of proceeding is to decide first on the borders of constituent units and the manner in which they will share in the central government. Then the most sensible and feasible distribution of powers could be determined, based on the size, capacity and demographic composition of the constituent units.

An alternative method of proceeding, one that might be adopted because of the difficulty in deciding how the borders of the constituent units are to be drawn, is to identify principles for the distribution of powers, then to include these among the criteria for determining the territorial boundaries.

Principles for the distribution of powers could be arrived at by asking some key questions:

- In what areas are regional and local diversity, and therefore autonomy, particularly relevant? Examples might include language, culture and education.
- For optimal service delivery, what areas require autonomous provincial decision-making and local interaction with the public? Primary health care might be one example.
- What areas should have national consistency, and therefore centralized (or concurrent) power?
- What powers typically fall under the exclusive jurisdiction of the central government in federal systems? Foreign affairs, defence and currency are clear examples.
- Are some areas clearly beyond the capability of the constituent units, however their borders are drawn?
- Would some areas benefit from the provincial management, combined

with federal oversight or coordination, which should therefore be shared with the central government, including perhaps water, transportation and agriculture?

- Are there areas in which the most feasible solution would be to divide the power between the newly created constituent units and the central government? For example, giving primary and secondary education to the constituent units and tertiary education to the federal level.
- What impact would the proposed distribution of powers have on responsibilities for spending? (It is advisable, of course, to balance fiscal powers and spending responsibilities for each order of government.)

In drafting the new constitution, the CA must consider whether taxation and spending powers are balanced, and what provision should be made for federal transfers to the constituent units, as well as for fiscal equalization. Sharing of resources is a major source of friction in all federal countries, but determining an equitable distribution of resources is also an important part of making federalism work.

Whatever the final distribution of powers, the new constitution – by virtue of its federal design – will provide greater opportunities for political participation to many groups that have been excluded. One way to maximize this is to design a constitution that is non-centralized, in terms of the spectrum of federal systems. Another option preferred by many actors in the constitution-making process is to concentrate on the shared rule aspect of federalism, maintaining a strong central government, but designing more inclusive central institutions. The latter approach seeks to take account of the resource and capacity constraints of the constituent units, as well as the dispersal of the country's diverse groups.

Determining power distribution

The technical aspects of the distribution of powers include determining whether the new constitution will provide for one, two or three lists of powers, and where to

assign such lists. Some federal constitutions list only the powers allocated to the federal order (exclusive and concurrent powers), with all other powers left to the constituent units. Others contain a list of federal powers, one for state or provincial powers and a third for concurrent or shared powers.

The detailed description of powers can be included in the main body of the constitution, or appended to it. Residual powers, those not expressly listed in the constitution, may be left to the federal level, as in India, or to the constituent units, as in Australia. Some federal constitutions also provide for flexibility in the distribution of powers, for example by specifying that one or both levels of government may refer or transfer powers to the other. The CA will also have to decide whether provincial or central government legislation will prevail in the event of inconsistency. These choices will be influenced by the general approach to the degree of centralization or provincial autonomy, and the degree of federal co-operation or competition, that is envisaged.

Whether there will be grounds for considering an asymmetrical distribution of powers – that is, granting different powers to different constituent units – will depend on how the boundaries of the constituent units are drawn and whether any individual state or province has special needs or demands.

Moving toward consensus

The CA has until May 2010 to draft a new constitution for Nepal. While there is for now a consensus among political parties, as well as a constitutional prescription, that federalism is the way forward for Nepal, this consensus might be strained when it comes to working out the details of what this actually means. At this early stage, there are still basic questions to resolve, such as deciding on the boundaries of constituent units, issues of resources and capacity, and the distribution of powers. The CA will need to rise to the challenge and negotiate the details of Nepal's federal design constructively, with a close eye on the stated objectives.