“Nepal: Constitution Building, Federalism and Peace - Managing the Transition to Federalism and Implementation of the new Constitution”

A discussion paper

“It is not sufficient that the state of affairs which we seek to promote should be better than the state of affairs which preceded it; it must be sufficiently better to make up for the evils of the transition”

John Maynard Keynes
“Nepal: Constitution Building, Federalism and Peace - Managing the Transition to Federalism and Implementation of the new Constitution”

Summary:

The central element of Nepal’s ongoing constitutional reform are the efforts to restructure the existing centralized, unitary state into a federal democratic system which takes full account of the diversity of its population. Following a long period of upper-caste predominance and the exclusion of large parts of the population from any effective role in government and decision-making, and the gradual erosion of state institutions, the debate on the future federal structure is presently dominated by identity issues. Discussions of the proposals for state restructuring mainly centre on the names, number and boundaries of the new units, and political privileges for ethnic groups in certain areas, whereas the huge challenges of practical governance reform are either ignored or avoided. A successful transformation of Nepal into a functioning federal system crucially depends on the smooth and swift transition from the current model of governance to the one that will be prescribed in the new Constitution. A failure to move ahead on this transformation, but also a failure to implement it in a manner that brings quick and tangible results to the general public in terms of service delivery and security improvement, may well unravel the gains made in the peace process of the past three years, or may open up new fault lines of conflict.

This paper invites stakeholders in Nepal’s constitution building and state restructuring process to consider issues related to the transition following the promulgation of the new Constitution and options going forward. It has a special focus on the relationship between Nepal and its development partners. It provides an overview of what is likely to be included as core elements of the new Constitution, based on the 11 Concept Papers already presented and the guiding principles contained in the CPA and the Interim Constitution. The parameters defining the starting point, i.e. the existing structures and characteristics of government are outlined. Three main “change agendas” are identified as likely to result from the new Constitution. Together with the overarching aims of providing improved services and better public security, these form the major themes of the transition and implementation phase. Lastly, the outline of international support for this challenging process is sketched and signposts for a “road map” are discussed.

This paper presents the interim outcome of a series of interactions among CA Members, Government representatives, donors and civil society and is intended to be a working document guiding an informed discussion among relevant stakeholders while the Constitution is being finalized.
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The purpose of this paper

This paper is written for key stakeholders in the constitution building process – the Constituent Assembly, the Government of Nepal, political parties, civil society, representatives of the institutions that need to be created, and Nepal’s development partners. It has a particular focus on the how the constitution building process impacts on Nepal’s relationship with its development partners.

It outlines the challenges of constitutional transformation and state restructuring, under which substantial powers will be devolved to sub-national units. The challenges will emerge in 3 phases:

- **Phase 1: Constitution writing** (between now and the promulgation of the constitution). What should the constitution say about implementation? How can the stakeholders work together during this period to ensure that the constitution itself gives appropriate guidance to the implementation processes to come? And how can it be ensured that stakeholders who are not immediately involved in the drafting process but on whose cooperation successful implementation will vitally depend (e.g. the government generally and senior civil servants in particular and development partners) have adequate ways to contribute and are adequately informed, allowing them to make necessary preparations?

- **Phase 2: Transition** (between promulgation and the establishment of the institutions of the restructured state). What will need to be done at the national and sub-national levels in order to have a smooth, steady and orderly transition to creating the new institutions while at the same time continuing to deliver services and provide public security?

- **Phase 3: Institutional development** (between the creation of the institutions and their full functionality). What will have to be done to enable newly created institutions at the various to begin functioning so that they can be partners in restructuring while delivering improved services and provide better public security?

We discuss below the possible role of international assistance in the implementation process. There will be a shift from assistance to a unitary state to assistance to a newly federalizing state. Globally, the interrelationship between federalism and foreign aid has tended to be neglected by development policy makers and practitioners, and only little is known about the relationships between poverty reduction, sector performance and the institutional arrangements in federal settings. The interaction between federalism and donor aid instruments has also been inadequately explored, particularly in the health and education sectors of relatively aid-dependent countries, with arguably serious consequences for development outcomes and aid effectiveness.¹

In addition, there appears to be little guidance on how development partners engage with governments in the various phases in a constitutional transformation situation.

Where the democratically mandated constitution identifies a way forward to federalism, do development partners have to adjust their engagement with the ‘transitional’ government in place at the national level? If the transitional government fails to move forward with the democratically mandated agenda, what should be the development partner response?

The Paris Declaration says what development partners should do in fragile states:

> Where the state is unable to partner on an overall development plan, undertake broad consultations to ensure ownership and promote alignment at the sectoral level.

¹ Federalism, sub-national financing and aid effectiveness; Jack Eldon and Catriona Waddington; October 2007
For Nepal, new ways of working between local stakeholders and their international partners will have to be worked out without much guidance from other experience. Our analysis is that the necessary steps should be seen in broad outline as follows:

(i) Phase 1 – in absence of the draft constitution: initial dialogue on transition and implementation on areas with consensus and preparation of needs assessment in substantive areas; after draft constitution, initiate detailed planning

(ii) Phase 2: resource mobilization, detailed planning, initial implementation; and

(iii) Phase 3: long term capacity support.

**Background and context**

The popular uprising of April 2006 (*jana andolan II*) was an expression of a widely-felt need for change. The conflict was formally ended in November 2006 by a Comprehensive Peace Agreement (CPA) between the Government of Nepal, then constituted by a coalition of seven political parties, and the Communist Party of Nepal/Maoist (now UCPN/M).

Going far beyond a ceasefire accord, the CPA set out a comprehensive agenda for change, including a commitment to “to carry out an inclusive, democratic and progressive restructuring of the State by eliminating the current centralized and unitary form of the State in order to address problems related to women, Dalit, Adivasi Janajati, Madhesi, oppressed, neglected and minority communities and backward regions by ending discrimination based on class, caste, language, gender, culture, religion and region.”

The CPA continues as the foundation of the ongoing peace process. It includes as one of its main objectives the drafting of an Interim Constitution and the holding of CA elections to draft a new Constitution.

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2 The text of the Interim Constitution and the Comprehensive Peace Agreement can be found at the website of the Centre for Constitutional Dialogue at [www.ccd.org.np](http://www.ccd.org.np)
The Interim Constitution of 2007 sets the foundational principles of the new Constitution – republicanism, secularism, federalism, inclusion and democratization. These principles will guide the building of the new state and its functioning in the years to come. In 2008 and 2009, protest movements by different regional and ethnic communities aimed at a fairer distribution of political power and an end to discrimination and marginalization. That led to amendments of the Interim Constitution further deepening the commitments to these principles.

The election of a 601-member Constituent Assembly (CA) in April 2008 produced the most representative and inclusive legislative body in Nepal’s history. The CA has produced 11 Concept Papers which together lay out the ground of the new constitution. Each Concept Paper addresses the issues allocated to the Committee and provides preliminary draft language. Federalism will be a key feature of the restructured state. (See Appendix 2 for the proposed allocation of powers to different levels of government).

In 2011, Nepal’s peace process is expected to reach its formal conclusion with the adoption of a new democratic Constitution, which will effectively transform Nepal into a federal state and will fundamentally change the way the diversity of Nepal’s people is reflected in law and governance.

At the moment of promulgation, none of the institutions foreseen under the new constitution at the sub-national level and only few at the federal level will actually be in place. In accordance with the experience in other constitutions, this will necessitate clear and elaborate transition provisions in the constitution itself, as well as the drafting of detailed plans for a deliberate and orderly transition. In 2010, the project will provide targeted technical advice and policy proposals, provide related coordination services and assist in the early identification of transition and implementation challenges before and as they emerge.

UNDP has a key role to play in providing the best possible assistance to the process of drafting the Constitution, through a participatory process under the Constituent Assembly (CA), as well as in assisting a planned and orderly transition process following the new Constitution’s promulgation. The long term viability of the peace process will depend on how effectively and quickly the new Constitution, in particular the new federal state structure, will be implemented in practice.

For development partners, a key strategic issue is how to interact with a federalizing Nepal when the sub-national institutions are not yet established.

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3 The text of the Concept Papers can be found at the website of the Centre for Constitutional Dialogue at www.ccd.org.np

4 With full recognition that the Constituent Assembly might adopt a Constitution different from the proposals made in the Committee Reports, at present, any forward-looking planning for the transition and implementation phase must be based on the content of the 11 Concept Papers. This must be done with caution, however. It cannot be taken for granted that the provisions proposed by various Committees will actually be included in the new Constitution. The major parties appear to disagree over core issues such as the form of government, the electoral system, the appointment of the judiciary, the names, number and boundaries of federal units, preferential community rights at the provincial level, and, notably, arrangements for the transition and implementation period. Nonetheless, the likely challenges related to the transition and early implementation phase need to be considered at the present time to ensure optimal preparedness and adequate planning.
The Concept Papers follow the guidance of the CPA and the Interim Constitution. They contain the following basic features.\(^5\)

**Basic features**

- Definition of the State of Nepal as an independent, indivisible, sovereign, secular, inclusive, socialism-oriented and multinational republic, protecting multi-ethnic, multi-lingual, multi-religious, multi-cultural and regional diversity.

- Commitment to democratic norms and values including a system of people’s competitive multiparty democratic proportionate inclusive rule, civic liberties, fundamental rights, human rights, adult franchise, periodical elections, freedom of the press, competent, impartial and independent judiciary and the concept of the state of law.

- Sustainable peace, prosperity and development to be achieved through a system of federal democratic republican rule while ending the remains of all kinds of feudalism.

- No amendment of the Constitution if it negatively affects the norms and values of sovereignty vested in the people, the republican system, the rule of law, independent judiciary, fundamental and human rights, press freedom, pluralism, multiparty competition, adult franchise and periodic elections.

**Form of Government**

There is no agreement between political parties on whether to adopt a presidential or parliamentary system, or a uni- or bicameral parliament. The Concept Papers therefore do not provide clarity on these matters. There are, however, some elements of governance on which there is already agreement among most major parties. They include:

- **President** to serve as the Head of State (differences over degree of executive powers and modality of election), with a 5-year term, limited to two terms

- Government to be accountable to a democratically elected parliament

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\(^5\) While the major parties disagree on some details of this basic outline (such as for instance, the definitions of pluralism vs. multiparty democracy), there appears to be a large degree of agreement on the essence. However, at this point doubts continue to be expressed with regard to the major parties positions on the basic concept of the new constitutional order, with the Maoists sometimes suspected to seek a totalitarian state, and other major parties to resist fundamental change.
All representative bodies and state organs to reflect Nepal’s diversity on the basis of proportionality, and to provide for a degree of multi-lingual governance (see below for more)

Devolution of Power and Federalism

Government will be organized in three general tiers (federal, provincial and local), with the additional element of autonomous regions and other special structures in some geographic areas. The names, number and boundaries will be determined in the Constitution.\(^6\)

Each tier of government will derive its law making and executive powers directly from the Constitution.

Important powers to be devolved in whole or in part to sub-national units include

- Policing
- Health services
- Provincial civil service
- Radio and television
- University, higher education
- Banking and Insurance
- Land management\(^7\)

There will be three levels of the judiciary: Federal Supreme Court, Provincial High Court in each province and District/Local Courts. Further courts could be set up by provincial law at village, municipality or unit level, with the possibility of separate courts or benches to settle family disputes, domestic violence, child rights, untouchability, Dalits, customary practices, or disputes related to Muslim, indigenous or other minorities.

At least six new commissions are to be created as constitutional bodies.\(^8\) Some of them would also have regional offices in the provinces.

The local governments would consist of two types: Municipalities (with the subtypes of metropolis (maha nagarpalika), sub-metropolis (upamaha nagarpalika), and regular municipality (nagarpalika)) and Villages (gaun or gaunpalika). The district level (DDC), which according to the 1999 Local Self-Government Act forms the upper level of elected local self-government, is not included in the preliminary draft provisions.

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\(^6\) The Interim Constitution requires that this decision be made by the Constituent Assembly itself.

\(^7\) See annex 2 on the division of powers. While there is considerable debate on the number, names and boundaries of the proposed provinces, parties appear to be in relatively broad agreement over the future assignment of powers and competencies.

\(^8\) (Federal) Women’s Commission (WC), (Federal) Dalit Commission (DC), (Federal) Indigenous (Adivasi Janajati) Commission (AJC), (Federal) Commission for the Protection of the Rights of People with Disabilities, Minorities, Marginalized Groups and from Backward Regions (DMMC), (Federal) Madhesi Commission (MaC), and a (Federal) Muslim Commission (MuC). Other new Commissions proposed include: Language Commission, Natural Resource Commission, Fiscal Commission, Military Service Commission, Paramilitary Force Service Commission, Police Service Commission at province level, etc.
The proposed provisions also foresee the formation of the following government services (public administration): public service, judicial service, parliamentary service, health service, education service, Nepali Army, Armed Police and Nepal Police, and corporate services. If necessary, provinces and local governments could also form their own services.

**Rights**

The relevant Committee proposal foresees the expansion from 20 fundamental rights articles contained in the Interim Constitution to **31 fundamental rights articles**. Proposed additions include the rights to food, housing, consumer’s rights, rights regarding family, youth, child rights, unemployment benefits, farmers’ rights etc.

- The proposed provisions would further expand some rights contained in the Interim Constitution, including the right to health (free basic health services and access to clean drinking water/sanitation).
- Social security, adequate wages and an explicit right of workers to strike have been proposed to be added to the rights regarding labour.
- The rights of the child have been significantly strengthened in the preliminary draft, which sets out that every child shall have the right to child development, education in mother tongue, freedom from torture and child-friendly justice.
- Religious freedom: accept or not accept; profess and practice; disseminate; renounce or convert, associations and schools, management of places.

- Greater emphasis has been placed on social justice, inclusion, non-discrimination and proportional representation, with specific provisions included on women, Dalit, Madheshi, Adivasi/Janajati, minorities, disabled persons, youth and families of martyrs\(^9\), amongst others.

- Proposed introduction of ‘first rights’ ("pahilo adhikar") on preservation, promotion and investment on local natural resources for indigenous and ethnic communities, as well as local communities. This is an effort to empower local communities regarding land, water, forests and other natural resources, and would impose an obligation to consult and share benefits from resource utilization with the above-mentioned groups.

- All languages spoken in Nepal [numbering 92 according to the 2001 census] have been proposed to be national languages; state responsibility to protect and develop; Nepali in Devanagiri script to be official language of Central Government ("for now" – until Language Commission recommends otherwise and law is passed); Provincial parliaments to decide on possible additional languages to be official in province and in local bodies; Province may use own languages vis-à-vis central level; Provinces may agree to use other languages between themselves.\(^{10}\)

**No preliminary draft provisions on implementation**

The preliminary draft provides for continuation of the existing state structures after promulgation. The Committee proposals do not yet include any provisions for the implementation of the new institutions which will be central to the restructuring of the state and the delivery of the rights agenda. There could eventually be provisions dealing with the accountability for driving the constitutional transformation, the sequencing of events and specific tasks to be addressed – for example, the development of laws at the sub-national level and the holding of elections.

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\(^9\) The concept of martyrs is not defined in the Constitution itself. The term is used for victims of violence as a result of the armed conflict as well as the various popular uprisings and movements.

\(^{10}\) The English language, although widely used including in official communications, is not mentioned in the proposals.
If not addressed in the subsequent stages of constitutional drafting, such a vacuum would create a serious issue for stakeholders. For Government, it would create a lack of clarity about who is to drive the implementation agenda. For development partners, it would create uncertainty as to which is the appropriate, constitutionally mandated counterpart for which issue.

The starting point: the state of the state

Efforts to (1) decentralize power from Kathmandu to the periphery, to (2) democratize public policy making and governance, and to (3) promote inclusiveness are not new in Nepal. In one way or another, these have been the main “agendas” for political development since the end of the Rana regime in the 1950s. Following the 1990 democratic revolution, they had become part of official government policy. And yet, the subsequent conflict and renewed uprisings provide evidence for the apparent failure or at least gross insufficiency of past efforts to decentralize, democratize and make Nepal more inclusive.11

If these three agendas are now set to become the key components of the new Constitution, and if they are to fare better than their predecessors, efforts to put them into tangible reality must be based on honest analysis of past attempts, and lessons learnt from them.

As things stand, central government and political parties, who play the key driving role at the moment, enjoy little trust and fall short in democratic legitimacy. Decentralization to local government has resulted in some important improvements, but overall failed to empower local

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11 This assessment, while sobering, has been expressed by numerous Government of Nepal official documents and is not contested by the relevant key actors. This is, however, not to belittle or disrespect the significant efforts many have invested over the years to build capacity at the local level, provide basic services and empower individuals and communities.
communities in both rural and urban areas, in particular because of the absence of elected councils since 2002. Affirmative action has begun to guide recruitment and training efforts in many areas, but results have yet to become visible in relevant statistics.

**Lack of trust in the central government**

The central Government ranks low in terms of public trust compared with institutions that are closer to the people. A recent study has found that trust in public institutions in Nepal is lower in central institutions such as the central government and parliament than in local institutions such as Chief District Officers (CDOs) and Village Development Committees (VDCs)/municipalities. Service institutions such as schools and hospitals rank highest.

The implementation of Nepal’s new constitution will necessarily require the commitment and expertise of the central government. It will be the dominant institution of government at the time of entry into force of the new constitution and possibly in the foreseeable future. At the same time, in the context of building a federal and more inclusive, democratic state structure it seems problematic to rely entirely on an institution that suffers from a trust deficit among many Nepalis, rather than on those that have higher confidence levels (such as local governments).

**Issue 5: How can stakeholders cooperate to engage central government in planning the transition and implementing the constitution without accepting that it has an exclusive role?**

**Options:**
- Include central government as a key partner
- Focus on the reforms of federal institutions (for example, robust intergovernmental transfer mechanisms) that allow them to do their part under the new structure
- Focus the adjustment issues that will emerge at the national level (for example, loss of civil service positions)

**Issue 6: How can stakeholders cooperate to engage in the implementation process local governments and other institutions that enjoy more public trust? How can the yet-to-be-formed level of provinces be included in these consultations?**

**Options:**
- Engage local actors in the process from the beginning
- Promote strong roles for trusted institutions – civil service, DDCs, VDCs, etc.

**The centralized state and past decentralization efforts**

The 1990s were characterized by waves of efforts to devolve powers to local governments. These efforts culminated in the 1999 Local Self-Government Act (LSGA), which created two levels of local bodies (75 District Development Committees – DDCs, 58 Municipalities and 3,915 Village

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12 Technically, CDOs belong to the central government, rather than local government. As the highest-ranking government officers in each of Nepal’s 75 districts, they do however represent the local and more familiar face of the government for most Nepalis.

13 Trust In Public And Political Institutions In Nepal, Steinar Asvik; Ishtiaq Jamil and Tek Nath Dhakal, Kathmandu 2010 (publication forthcoming)
Development Committees – VDCs.) The LSGA equips these local bodies with significant institutional structures, powers and resources.

The conflict (1996-2006) played an important role in defeating the decentralization agenda.\(^{14}\) However, it is also clear that decentralization was poorly implemented in part because of a lack of political and bureaucratic will to see power devolve from the centre. A recent ADB study concludes that decentralization in Nepal has been weak and partial. Expenditure assignments remain unclear creating poor accountabilities for local authorities.

Central ministries continue to play a major role in determining the type and level of public goods provided to citizens. The local authorities suffer from weak capacity, both in terms of human resource and systems. The local officials in most cases are not trained in local level service planning, resource allocation or revenue generation. The reluctance of the government to decentralize more roles to the local level has resulted in a weak demand for skills from local officials. The unclear assignment of functions and the consequent weaknesses in local accountability further dampens it. Revenue mobilization systems are weak and undeveloped. In most cases the potential remains untapped. The intergovernmental transfers due to their sporadic nature have created incentives for negotiated increases diminishing reliance on own-source revenue. Due to such reasons, local government has yet to emerge as a major player in providing public goods to citizens in accordance with their preferences determined through an electoral mechanism.\(^{15}\)

A serious problem in implementing local self-government in the past was related to the failure to provide the system with a constitutional guarantee. Without a guarantee for local self-government in the constitution, the center has the monopoly to change or take back the powers granted to the local bodies. It also has plenty of possibilities to undermine the spirit of devolution by practical measures (or lack thereof), such as setting standards and procedures, holding back funds, manipulating appointments and the like. Moreover, the unclear and anomalous jurisdiction of the local bodies, especially of the DDC and VDC, in the work of drinking water, irrigation, forest, public health etc., created overlaps and duplication in many areas.

### Past Initiatives on Decentralization

- The LSGA gave a full recognition to the local body associations (ADDCN, MuAN and NAVIN)\(^{16}\) with their role in policy advocacy and decentralization.
- The LSGA also established a Decentralization Implementation and Monitoring Committee (DIMC), headed by the Prime Minister as the main committee for formulating decentralization policies.
- The committee approved ‘Decentralization Implementation Plan (DIP)’ to prepare action plans for short term and long term interventions in regards to decentralization. The District Development Fund (DDF) has been operationalised to manage funds related to revenue sharing, internal and donors funding among others.

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\(^{14}\) In July 2006, an estimated 68 percent of VDC Secretaries were displaced, mainly to district headquarters. According to the latest statistics, the internal conflict resulted in physical losses equivalent to Rs 5 billion (USD 71.4 million). The most damaged facilities due to the conflict were police posts, VDC buildings, office buildings of local level service units and communication transmissions and telephone infrastructure. During the conflict, most of the VDC level official buildings were destroyed which also badly affected the morale of VDC secretaries. Recent activities of armed criminal groups have had a similarly bad effect on the presence of VDC Secretaries in villages across the country.

\(^{15}\) ADB, Nepal’s Choices in Fiscal Federalism, 2009

\(^{16}\) Three associations of Local Bodies - Association of District Development Committees in Nepal (ADDCN), Municipal Association of Nepal (MuAN) and National Association of Villages in Nepal (NAVIN)
• District Technical Office (DTO) established in DDCs with the recommendation of Public Expenditure Review Commission.
• In 2004, the Districts received additional mandates for sectoral development in the area, in the light of Local Infrastructure Development Policy.
• Local Body Fiscal Commission (LBFC), an entity of Ministry of Local Government, was created to make recommendations to promote financial autonomy and fiscal decentralization.
• Similarly, an Immediate Action Plan (IAP) was induced to prioritize urgent planning related to decentralization.
• The Tenth Plan/The Poverty Reduction Strategy Paper (PRSP) emphasized decentralization and sectoral devolution as instrumental in strengthening the local governance system. The Tenth Plan also included decentralization as the main strategy for poverty reduction.
• Similarly, Public Private Partnership policy (directed by Private Sector Investment in Infrastructure Development and Cooperation Act, 2003) for local bodies was adopted to promote the private sector investment in the development of local bodies.
• Likewise, donors’ harmonization mechanism and support has been one of the crucial elements in strengthening decentralized governance in Nepal. Local Governance Community Development Programme (LGCDP) has been instrumental in empowering the local bodies through local participation.

The absence of elected representatives in the local bodies after 2002, the continued lower institutional capacity of local bodies as well as the conflict-related destruction of local infrastructure and delayed rehabilitation create a number of serious problems for the delivery of services at local level, and hampers the provision of essential development efforts.

Diversity and inclusion

As with decentralization, efforts to provide more inclusive governance are not new. Both the CPA and the Interim Constitution contain concrete commitments to more proportional representation and participation. The electoral quota rules for the CA election are the most salient example of these efforts. However, the state continues to suffer from unbalanced representation, and past efforts to address the issue have had only mixed results.

In public statements, the Interim Government highlighted inclusive development already in 2006 focusing on the socially excluded and oppressed groups of people in the geographical regions that are distant from mainstream development. However, concrete development programmes incorporating social inclusion have yet to be implemented and remain a challenge for the Government, mainly due to resource limitations and capacity shortcomings, poor governance structures and political uncertainties.

The lack of inclusiveness and under-representation by many sections of Nepal’s society in the bureaucracy forms an obstacle for the development of greater trust between citizens and the state. The prevalence of Brahmin/Chhetri/Newari groups among the civil service has been highlighted by a number of studies, and remains a challenge for the establishment of a more inclusive, democratic civil service. Although these groups together make up about 37 percent of Nepal’s population, they hold an estimated 80 percent of the top posts in the civil service and the judiciary. Women are also seriously underrepresented. Generally, this dominance is even more pronounced at senior and decision-making levels.

![Map 1: Caste/ethnic identity of Chief District Officers across Nepal (all male)](image)

Of the currently 363 Secretaries of the Government (September 2009), 353 (or 97.25 percent) are male, and only 10 (2.75 percent) are female. In terms of caste/ethnic distribution, 231 Hill Brahmins dominate with 63.64 percent, followed by 57 Janajatis (15.70 percent), and 55 Chettris (15.15 percent). Of the Janajatis, 75.44 percent are Newars. Nine of the 10 Madhesi Secretaries (2.75 percent) are Madhesi Brahmins. One Secretary belongs to the Marwari group. There is no Secretary belonging to the Dalit community.

**Issue 8: How can stakeholders cooperate to develop an implementation process that is inclusive?**

**Options:**
- Engage in dialogue a more inclusive group of national counterparts from the beginning.

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18 Govind Neupane, **Nepalko Jatya Prashna**, Center for Development Studies, 2000
19 With data provided by the Ministry of Home Affairs in April 2010. Due to the difficulty in determining the caste identity of individuals in Nepal, errors cannot be excluded.
20 Of the 10 female Secretaries, 60% are Brahmin, 30% Newar and 10% Terai Brahmin.
The Government’s role in the constitution building process and implementation

There is currently a lack of action from the Government in planning for the post promulgation period. There is at the moment no meaningful, coordinated, national-led planning process for tackling the major change agendas.\(^2\)

As the Government has not given clear guidance and directions to the administration, senior level bureaucrats say they are hesitant to take any initiative to prepare for implementation. Senior bureaucrats note the uncertainty over whether it is the present government or a subsequent one that will be in charge of the transition and implementation process. Privately, senior administration officials concede that there is a lack of mental preparedness for substantive changes in the governance of the country. Some government departments, however, have already started to anticipate the future federal set-up with the assistance of development partners.

Issue 9: How can stakeholders engage the Government in the implementation process?

Options:
- A high level approach seeking the designation of a government counterpart – to the Prime Minister
- A Ministerial level approach – perhaps to the Minister of Federalism, Minister of General Administration

The three main “agendas” for implementation of the new Constitution

For an overview of the scope of the implementation agenda, it is useful to consider briefly three broad themes: “federalization”, “democratization” and “proportionalization”.

I. “Federalization” or the devolution of state power

The original thrust of the CPA and the Interim Constitution was to dismantle a discriminatory, centralized system of government. However, continued advocacy by Adivasi/Janajati groups and the Madhesi uprising of 2007 led to an amendment of the Interim Constitution which explicitly designates Nepal as a federal country. This has also led to a debate on federalism that is mainly focused on identity issues, rather than aspects of practical arrangements for the transition, governance or service delivery.

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\(^2\) See, for reference and a detailed analysis, a study prepared by former Secretary of the National Planning Commission, Dr. Bhola Chalise and Dr. Pradeep Upadhyay for UNDP “The Management of the Transition towards a Federal System in Nepal – A Concept Paper”, May 2010.
Map 1: 14-province model proposed by the CA State Restructuring Committee

The CA was tasked to develop a federal structure based on fully autonomous provinces in recognition of the aspirations of Madhesis and Adivasi/Janajati people. It has prepared a decentralization scheme that will create three general tiers of government plus autonomous regions in some areas, each element with constitutionally guaranteed powers and institutional framework.

In recent months, there has been increasing polarization of political and public opinion between Madhesis and Janajati groups, whose leaders generally tend to favour a federal structure, and Brahmmins, Chettris and Dalits, among whom many tend to think of federalism as something that will not be to the advantage of their communities. While much of this is still flux, it is a prerequisite that the wholesale restructuring of Nepal into a federal system will require buy-in and cooperation from all its varied communities and social categories.

**National (federal) Government**

In any federation, the role of the central/federal government is a critical element in overall state performance. Designing and properly developing a new role for the federal government in a changed overall structure is therefore just as important as working on the entirely new provincial level of government and a modified system of local government.

According to the current proposals, the federation would be granted
- Exclusive powers over defense, central police force, foreign affairs, central banking, monetary policy, international trade, criminal laws
- Concurrent or joint powers over foreign assistance, health policy, education and others
- Residual power over matters not enumerated in the constitution
- Power to supervise and control provinces

Within the federal level, each of the powers and roles of the currently existing institutions would have to be addressed and shaped to fit into a new federal setting. This relates to the federal parliament (as the legislative and parliamentary control organ), the federal executive government (President or Prime Minister, Ministers, Ministries) and its subsidiary institutions, the judiciary (Supreme Court, Constitutional Court, special courts) and Constitutional Bodies.

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22 There are proposals that the federal government would manage relations between provinces and would be able to issue binding directives to all provinces on matters of national importance and to coordinate among the provinces. It was also proposed that if any province carries out an act that would hurt national sovereignty, integrity and the law and order of the country, the President, on recommendation of the Federal Government, could, with approval of a two-thirds majority of the federal parliament, dismiss or dissolve the provincial government and legislature.
Despite the relatively extensive proposed powers of the federal government, administratively, functions and resources would migrate from what is now the central level to the provinces, special structures and local governments. In a federal system, the role of the federal government would change from overall responsibility and operational conduct of practically all areas of governance to one where it would mainly be engaged in policy making, supervision and coordination. The role of the National Planning Commission (if one is retained) as well as the modalities for planning and monitoring would need to be thoroughly redefined. At the same time, the provinces and local governments would take up most of the administrative implementation/operational aspects. Given the current lop-sided distribution of staff and resources in favor of the central government, such reorganization would essentially mean the transfer of significant human, infrastructure and financial resources along with the political and legal responsibility from the central government to sub-national authorities.

### Issue 10: How can stakeholders work together to plan for changes required to government at the national level?

**Options:**
- Encourage the early establishment of a coordination mechanism among central government institutions and a roadmap for introducing the federal system
- Consider twinning programmes in view of transforming existing Ministries and agencies into federal level institutions

### Provincial Governments

The CA Committee on State Restructuring has proposed the creation of 14 provinces. While historical and ethnic background points to some regional particularities, the formation of provinces for a federal set-up is anything but obvious in Nepal. Few if any countries have gone from a unitary centralized set-up to a full-fledged federal system without any preexistent government structure at the sub-national/regional level. The current proposals do not foresee using the existing government structures at district level as building blocks for future provinces, but rather the formation of such provinces from scratch.

There are no general models of a federal structure, as existing federations differ in the degree to which they are based on diverse societies, the number of units, the degree of symmetry or asymmetry in size, powers and resources, the scope of allocated responsibilities, the allocation of revenues, the degree of regional input in federal policy making, and the procedures for change.

![Table 2: Rough estimates of population distribution in the proposed 14 provinces.](image-url)
A preliminary analysis of the proposed provincial boundaries demonstrates significant disparities between these units in many respects: size of population, topography, infrastructure, economy and resource availability and accessibility. This is likely to result in severe gaps in terms of economic performance and, in relation to that, the likely performance in terms of governance and service delivery.

An additional factor that complicates the establishment of provinces is the fact that the proposed provincial boundaries would cut through existing districts, on the basis of which most statistical information is available. Certain human development indicators can therefore not be determined at the proposed provincial level. Some of this challenge is, however, likely to be addressed by the upcoming census, currently planned for 2011.

**Autonomous and other Special Regions**

The proposals include the option of establishing autonomous, protected and special regions within the provinces as a special tier of government to be set up only in some areas with dense population of certain ethnic groups. Twenty-two\(^{23}\) such Autonomous Regions are proposed to be prescribed in the Constitution itself\(^{24}\) (which would make their establishment obligatory, not optional). The proposed 22 Autonomous Regions for ethnic and linguistic communities would have to be formed by the provinces through commissions within a year of the formation of the provincial government. Autonomous Regions would have elected councils, with legislative, executive and judicial authority, similar to provincial powers. Legislative power would have to be exercised in a manner consistent with provincial law, however.

![Map 2: Possible areas for Autonomous Regions for the proposed ethnic groups](image)

At this stage, there are many open questions related to the establishment of Autonomous Regions. One relates to the number, another to the identification of geographic areas falling under such structures, given that populations of the communities concerned are often dispersed, including across several different provinces, and only in rare cases form majorities at the VDC level. In terms of legal framework, the relationship between the special structures and provinces on the one side, and local governments on the other remain to be more thoroughly defined. In terms of practicalities,

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\(^{23}\) The annex of the state restructuring committee lists 23 ethnic communities for which Autonomous Regions would have to be created. However, Danuwar are listed twice, and it appears, based on unofficial sources from within the CA, that this is due to an oversight. In effect, therefore, 22 Autonomous Regions are proposed.

\(^{24}\) For a list, see Annex 2.

\(^{25}\) According to 2001 census data, except for Surel, which was not included in the 2001 census. The data for the Lepcha community in upper Mustang has been questioned, and is likely to be erroneous, but is thus included in official data.
questions arise how some of these communities, some of which constitute only several thousand people, would be able to build and run full-fledged sub-national structures and services as per the proposed constitutional framework.

The proposal also foresees that other regions can be maintained as a **Protected Region** in order to protect and promote the ethnicity/community, cultural area, declining and marginalized ethnic groups who are in the extreme minority. A third form of special structure would be **Special Regions** for backward areas or areas which have remained behind in socio-economic terms and not covered by other forms of special structure or to develop an area within a province.

**Local Governments**

As per the current proposals, local self government will gain constitutional status and the principle of local self governance will be firmly enshrined.

Local self government units will be Village Councils *(Gaunpalika)* and Municipalities *(Nagarpalika)*. The number and boundaries of local governments can be determined by the Provincial Government in accordance with standards set by the Federal Government. This will have to be done within a year of establishment of the Provincial Government and the present structure of local bodies is to be continued until the new structure for local governments is created. The stated intention is to reduce the number of currently 3,915 VDCs to around 800 and increase the number of municipalities from currently 58.

The proposed new local government structure would imply that the district local bodies (District Council/DDC) will in the future not be a constitutionally protected tier of local self government. However, the role of the 75 districts as a level of government for managing development and administrative services through the presence of district offices of line agencies and other central government bodies (i.e. through ‘deconcentration’) is not clear. It appears from the Concept Papers and the discussions at the CA that there is an intention to abolish the districts altogether. Whereas the current VDCs and Municipalities have (at least according to the law) significant own functions and finances (own revenues as well fiscal transfers), the district is currently the main level of local government in terms of staffing and planning/managing development services. Whether the district will remain as an administrative level under the provinces and ‘technical hub’ for support to local government, and the extent to which institutions and staff will be shifted down to the villages/municipalities or up to provinces remains a largely open question in transition and implementation.

The challenge is not only to reorganize the structures and boundaries of local government, but in particular in a number of rural areas, the re-establishment of any effective governance presence after many years of neglect and institutional erosion. At present, roughly a third of all VDC Secretaries, often the only visible government presence on the ground in much of the country, are either not in their duty station, or have vacated their posts due to the conflict in the past or the current security situation.

The proposed powers and functions of local government are outlined in the preliminary draft constitution. However, two fundamental issues determining whether local government can in

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26 Local Self Government has been addressed as a cross-cutting issue in the drafting process with different CA Committees dealing with the issue. However, the main elements proposed are laid out with the concept notes on *Restructuring of the State and Distribution of State Power and Forms of Government*. Most of the other papers, in turn, addresses the intergovernmental and LGS aspects from a sectoral perspective (e.g. concept note on *Natural Resources, Revenue, Distribution & Financial Rights* etc.)
practice discharge these functions will – as in most other countries – be determined by policies and actual change in the implementation phase.

At present, there are significant areas yet to be decided for provincial and local governments. Major issues of implementing state restructuring as it relates to this level, not least to achieve the objective of proportionalization and democratization, remain unclear. However, an even more formidable task will be to plan for a transition and implementation process during which the local self government system will deliver what is envisaged with the constitution and expected by the people of Nepal, and for the entire restructuring and subsequent management of affairs to contribute to peace. As much of the existing governance structure of Nepal will be uprooted with the change from a unitary to a federal state, the local bodies play a critical role as institutions which can deliver for the people of Nepal to see tangible change improving their lives. It is fundamentally unclear whether this can be achieved if too many change processes are tackled at the same time, including changing boundaries of the VDCs and reforming the district level in the first years of implementation.

If local elections were held at the beginning of the process, elected local bodies could help finding acceptable solutions for the redrawing of district boundaries, the merger of VDCs, or the establishment of Autonomous Regions.

**Issue 13: How can stakeholders work together to plan for changes required to government at the local level?**

**Options:**
- Highlight the importance of local government for service delivery and tangible sense of representation and participation
- Consider the possibility of electing local bodies on the basis of existing legal and institutional basis
- Focus institutional development and capacity building at the local level

**Human Resources – Civil Service Reform**

The Interim Constitution gives the Government (i.e. the Council of Ministers) the power to constitute the Civil Service and other government services as required in order to run the administration of the country. The constitution, operation, and terms and conditions for such services are determined by the Civil Service Act.

Nepal's civil service is large compared to other sectors of formal employment, but not overstaffed based on the population it serves. With a civil servant per population ratio of around 1/400, Nepal ranks low even by South Asian standards. The civil service suffers from poor incentives, fragmented decision-making, large numbers at the lower rank and income levels, and inflexible working practices. The Nepal Civil Service Act, first passed in 1956, was revised in 1993 and again in 2007. Due to various efforts made for downsizing, the number of civil servants now stands at around 76,600, not including the security sector. It is estimated that almost half of these are physically located in Kathmandu Valley with central level institutions, with most of the rest at the district level.

27 Whereas the Constitutional Amendments related to Panchayat Raj Institutions in India have schedules outlining the powers and functions at the different tiers, most Asian countries leave this for subsequent legislation. The proposals mirror the Indian constitution in terms of details.
The staff at regional or zonal levels are negligible, and essentially part of the security apparatus. The 58 municipalities have a total of only around 8,000 staff.

As a legacy from the conflict, the security sector is oversized, with around 100,000 members of the Army, around 56,000 members of the centrally administered Nepal Police (NP), and around 25,000 members of the Armed Police Force (APF), a paramilitary formation controlled (like the NP) by the Ministry of Home Affairs, that was created to fight the Maoist insurgency in 2001. There may be up to 19,000 Maoist combatants in cantonments, who await integration or rehabilitation. The proposed provisions foresee that the power for general security police would go to the provinces, but also that the Nepal Army, the APF and the NP would continue as government services. The implications of the new state structure on the security sector are at present hard to predict, but the impact on the police service in particular could be huge.

Whereas in the proposed provisions a provincial and local government service is envisaged, the scope (e.g. cadres managed locally) is still to be decided and, more fundamentally, the actual assignment of staff to assist local government in delivering and the possibilities for local governments of holding them accountable are all areas to be negotiated in implementation. The role in this regard of 22 Autonomous Regions, which are equipped with almost the same powers as provinces as per the proposals, is yet to be determined. As such, the real capacity for development infrastructure and the services of the future local governments Nepal is by no means guaranteed with the constitution and the lessons on past decentralization efforts suggests some major challenges ahead.

**Fiscal decentralization, fiscal federalism and equalization**

Whereas the proposed revenue authority is also addressed in some detail in the Committee proposals, local revenues only constitute a limited share of the finances needed to discharge the functions assigned. Therefore transfers from the national government will form a significant part of provincial revenues.

With the fiscal powers proposed, the own resources of provincial and local governments will constitute a share of revenues which according to the current collection amounts to maximum of approximately 10 percent of total revenues (see table). Whereas the costing of the assigned functions is still to be carried out, this is likely to be grossly insufficient for provincial and local governments as a whole, and a complex transfer system will need to be devised. Hence, whereas much discussion is currently taking place on whether some proposed provinces are ‘viable’, implementation discussions would need to focus on how to organize the right fiscal system in Nepal addressing both vertical and horizontal imbalances. This is likely to be a hard battle not only due to a general resistance to fiscal decentralization; it would also involve agreement on the distribution of funds among provinces (and local governments within them) and further development of the revenue-sharing arrangements between provinces.

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28 In virtually all countries in the world, sub-national governments as a whole are not ‘financially self-sustainable’ and any pursuance of this objective is most often meaningless for two major reasons: First, there are more functions where provincial and local governments have a comparative advantage than there are good revenue sources which can be assigned to them so there will always be a vertical imbalance to be addressed through the intergovernmental fiscal arrangement, including equalization among provinces. Second, the tax base (property, economic activity, national resource extraction etc.) is often different among individual provinces, villages and municipalities so there is a horizontal imbalance which transfers and revenue-sharing arrangements attempt to deal with.
### Types of Revenue

<table>
<thead>
<tr>
<th>Types of Revenue</th>
<th>Amount (NRs. billion)</th>
<th>Percentage (%)</th>
<th>Inclusion in list of fiscal powers (proposed)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Value Added Tax (VAT)</td>
<td>24.62</td>
<td>30.90</td>
<td>Federal</td>
</tr>
<tr>
<td>Customs Duties</td>
<td>16.12</td>
<td>20.23</td>
<td>Federal</td>
</tr>
<tr>
<td>Excise Tax</td>
<td>11.06</td>
<td>13.88</td>
<td>Federal</td>
</tr>
<tr>
<td>Income Tax</td>
<td>14.92</td>
<td>18.72</td>
<td>Federal</td>
</tr>
<tr>
<td>Foreign Cash Grants</td>
<td>13.06</td>
<td>16.39</td>
<td>Federal</td>
</tr>
<tr>
<td>Others</td>
<td>8.44</td>
<td>10.59</td>
<td>Federal, provincial and local</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>79.78</strong></td>
<td><strong>100</strong></td>
<td></td>
</tr>
</tbody>
</table>

**Projected Revenues for New Provincial Governments and Local Self Governments**

*Source: Nepal Rastra Bank, Government Revenue for the first half of the 2009/2010 Fiscal Year*

The proposed constitution has provisions for the key national institutions supporting local governance (e.g. National Fiscal Commission) but much is to be decided and implemented to have the corresponding capacity within each of the provinces for them to manage their mandated areas of LSG.

Given the low tax ratio (of around 14 percent, with only around 475,000 payers of income and property tax) and the enormous regional income disparities, it is likely that Nepal will follow a rather centralized model of revenue collection, which will require a sophisticated arrangement for subsequent formula-based equalization payments to provinces and lower tiers. At present, most of the revenues are generated either at the customs posts at the international border (a revenue that will soon expire due to WTO requirements) and in Kathmandu Valley, the centre of gravity of the country’s current consumption-driven, remittance-based economy.

**Establishing Federalism in Nepal: Some Major Issues**

*Creating the Institutions - Bringing the Infrastructure and Organizational Structure in Place* – how will the physical infrastructure and the fundamental organizational infrastructure be brought in place that facilitates the making of decisions, codifies the allocation of authority within the new regional governments and between different tiers and institutionalizes mechanisms which ensure democratic practices are legitimized and citizens’ rights are protected. This will involve both creation of new capacity at regional level and changes to the structure at district, village and municipal level.

*Human Resource Management and Development Systems* – addressing the transformation of management of civil servants and other personnel at the sub-national level. Achieving the results defined in this program area changes the incentives for civil service performance from one which focuses on completing tasks to one of serving citizens within the new structure. Management of personnel from this perspective is essential for the improvement of service delivery and achieving the vision of the new Constitution in Nepal.

*Establishing the Elected Councils and functioning local democracy* – whereas the timeframe for election of the new regional councils and re-election of the local bodies is still to be confirmed, a major task of implementation will be carve out the framework for elected sub-national bodies and ensure their election, establishment and functioning. Much of the challenge goes beyond the internal machinery of the councils and relates their interaction and accountability to people functioning and the vision of the Constitution and specific provisions agreed for inclusiveness and accountability.

*Transfer of Functions* – is core to the implementation of the Constitution as it defines (i) the responsibility and authority that will be executed through the institutional structure established and (ii) the resources that must be managed in accordance with those systems, operating procedures and practices advanced. The major challenge in the implementation phase will be to revisit arrangements but through a collaborative effort of institutions.
**Budget, Financial and Asset Management Systems** – contributes to two dimensions of the implementation of the Constitution. One, it establishes the financial systems and operating framework necessary for the management of fiscal resources (i.e. revenues and assets) and two, it defines the mechanisms for financing activities of the new regional governments and local bodies.

**Support Institutions for Regional Governments and Local Bodies** – addresses the development of the necessary institutional arrangements and strategies that will advance the implementation of the sub-national governance areas of the implementation of the constitution and enable the regional and local bodies to govern and manage effectively and sustainably.

Among these, any transition and implementation plan or framework not only needs to establish clear responsibilities and modalities, but also a time-bound sequence. The points above are not suggested in any particular order, but it needs to be emphasized that such an order would need to be determined, ideally already at the drafting stage of the new Constitution.

### II. Democratization

The Interim Constitution provides that Nepal will be a democratic state. The democratic principle, as well as the republican principle, the rule of law, human rights and other issues are listed as fundamental principles in the proposed draft preamble with the proviso that they cannot be undone through amendments.

> “Committing ourselves to build the foundation of socialism while adopting democratic norms and values including a system of people’s competitive multiparty democratic proportionate inclusive rule, civic liberties, fundamental rights, human rights, adult franchise, periodical elections, freedom of the press, competent, impartial and independent judiciary and the concept of the state of law;”

The Concept Papers contain a commitment to ensuring good governance through rule of law, fair and competent judiciary, accountability, transparency, participation, [...] political interference free administration, monitoring units, planning evaluation, [...] control of corruption, [...] and public hearings.

The proposed provisions foresee that the constitution and rules of the political parties must be democratic. The constitution must provide for holding the election of office bearers at federal and provincial levels at least once in five years. There should also be a provision for inclusive participation representing the diversity of Nepal at different levels of the party’s leadership.

In the legislative field, a new federal parliament (bi- or unicameral) will have to be established, with an effective parliamentary support service adequately equipped to support elected parliamentarians to play an effective role in the new state structure. Parliaments at the provincial level will have to be established from scratch, including the physical and administrative set-up. At the same time, the elected bodies at local government level would have to be re-established and brought to function according to the new constitutional parameters. Related to this is also the need to work on the legal framework for political parties (funding, internal democracy, etc.) as well as to develop the capacity of a large number of newly elected representatives. While at the moment, Nepal has 601 elected representatives in its entire state structure, the new Constitution will provide for the election of thousands.²⁹

²⁹ According to existing legislation, the number of members of 3,915 village councils alone would amount to more than 200,000, the number of members of 58 municipal councils more than 3000. If, as proposed, there
The inclusion of a higher number of strengthened Constitutional Bodies also indicates a commitment to move towards a higher degree of accountability and inter-institutional control.

The Nepal Army with a national character shall be constituted in accordance with the proportional, inclusive, and democratic principles.\(^ {30} \)

The signatories to the CPA “heartily urged all friendly nations and the international community including the United Nations to extend their support to Nepal in this campaign for establishing full democracy and sustainable peace in the country.”

The operationalization of the important principles of democratization will also pose significant challenges. Examples of this would be the development of the checks and balances with a shift to a ‘presidentialist’\(^ {31} \) system of local self government, democratizing the functioning of the political parties in local governance etc. The objectives of establishing both good governance and good democratic governance at local level will take major reforms to achieve.

**Elections**

One core component of democratizing governance in Nepal is to hold elections for a variety of offices and levels of government. It is possible that the new Constitution will provide for direct elections to some executive functions, such as a federal president, as has been proposed by some parties. The direct election of local government executives has already been agreed at the Committee level. In addition, legislative/parliamentary elections will have to be held at the federal, provincial, local and autonomous region level. There are also proposed provisions for a degree of direct democracy through referenda at the national and provincial level.

The operational and logistical constraints regarding the preparation of elections following the promulgation of a new Constitution are significant. A large scale voter registration project has recently been started, and will be completed by early 2011 according to present plans. If the CA passes a new Constitution by 28 May 2011, and swiftly adopts around a dozen pieces of electoral legislation, elections on the basis of the new registers could be held in late 2011 or early 2012, at the earliest. If the new Constitution is delayed further, the timing for the first post-Constitution elections would be affected accordingly.

The phasing and sequencing of the election of provincial and local councils is not established in the proposed draft. Despite provisions of the Interim Constitution to hold elections for local government bodies (district, village and municipal level), these have not been organized yet. As the existing bodies will remain the local government institutions in Nepal until the new ones have been established, there will be 14 provinces with, as proposed, a 35-member provincial assembly each, that would amount to 490 members.

\(^ {30} \) The Interim Constitution includes the following provision: “The Council of Ministers shall, with the consent of the political parties and by seeking the advice of the concerned committee of the Legislature-Parliament, formulate an extensive work plan for the democratization of the Nepal Army and implement it.” This provision is not replicated in the proposed new Constitution. “Democratization and restructuring of the army” was also included in the CPA.

\(^ {31} \) The concept note on ‘Forms of Government’ outlines a system of direct election of the chairs of the executive bodies. This is a trend seen in many countries (e.g. Pakistan and Thailand shifted to direct election in 2004 and 2005) and the experience suggests that the accountability mechanisms to ensure checks and balances for a far more powerful chair were not sufficiently developed (see e.g. UNDP (2005) *Presidentialism in Local Governance: More Local Leadership but at What Costs* and UNDP (2008) Practitioner’s Guide on *Designing Inclusive and Accountable Local Democratic Institutions* for more details)
established, the option remains for elections to take place for existing local bodies or at least to VDCs and Municipalities\(^{32}\) – the lowest tier which will be continued under the new dispensation. Since the new entities are to be established by each province within one year (see above), some may consider this futile. On the other hand, it is not clear when the provinces themselves will be established and it will be a major task for the provinces to comply with the constitutional provision of a one-year time-frame; and it might take significantly longer before councils can actually be elected for the new LSGs. One element of that will be the drafting of the law(s) on local elections and the actual organization of such elections. The future role of the (federal) Election Commission is as yet unclear and will need to be determined in the new Constitution.\(^{33}\)

### III. “Proportionalization” or ensuring proportional inclusion and representation

The basic principle of proportional representation and participation, already laid down in the CPA and the Interim Constitution, is included in all 11 Concept Papers.\(^{34}\) It is incorporated in the proposed preamble, state policies, arrangements for elected bodies, courts, commissions, state agencies and services (army, ambassadors, etc.), and at all levels. The wording and definitions of target groups differ. In some cases groups of society are listed (as in women, Madhesis, Dalits, Adivasi Janajatis, etc.) while others prescribe a wholesale proportionalism of all castes, tribes, religions, minorities, excluded communities, disabled, regions, poor, etc. The new Constitution is likely to design Nepal to become state in which its population is participating and represented in a proportional manner. While the overall message and intention is loud and clear, the implementation of this goal will be complicated when it comes to definitions and determination of numbers (except in the case of gender, of course), as well as in operationalizing such a policy.

The representational design of elected institutions is outlined in the new Constitution but the modalities through which proportionality will be achieved are left for implementing legislation. Major decisions and compromises are needed to develop a workable representational design fulfilling the requirement for proportionality along gender, linguistic, ethnic and regional lines.

The main challenges in this context will be the definition of which categories of people will be assigned what level or proportionality. Both the categorization and numbers (apart from the case of women, perhaps) are contested and difficult to ascertain. The general source of data in this regard is the most recent census of 2001. In the meantime, Nepal’s society has evolved considerably. The next census is currently planned to be conducted in 2011. Its results will be awaited with great suspense, as they are likely to be the determining factor for establishing quotas and other affirmative action instruments.

There are numerous references in the Concept Papers which would afford women fully proportional representation (i.e. 50%) and participation in all structures at every level. However, there are also some proposed provisions which foresee a minimum of 33% representation for elected legislative bodies.

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\(^{32}\) District Councils are elected indirectly through the villages and municipalities.

\(^{33}\) One question, in this respect, is whether the provinces will have the constitutional power to determine the timing and modalities of local elections in their areas independently from any federal legislation or the instructions of the federal Election Commission.

\(^{34}\) The Interim Constitution, in article 21, provides that women, Dalits, Adivasi Janajati, Madhesi communities, oppressed groups, the poor farmers and labourers, who are economically, socially or educationally backward, shall have the right to participate in state structures on the basis of principles of proportional inclusion. Art. 33 creates the responsibility of the state to enable Madhesi, Dalits, Adivasi Janajati, women, labourers, farmers, the physically impaired, disadvantaged classes and disadvantaged regions to participate in all organs of the State structure on the basis of proportional inclusion.
bodies. This apparent contradiction has already been in place since the elections to the Constituent Assembly in April 2008. The Interim Constitution foresees that political parties have to take the principle of inclusiveness into consideration while selecting candidates for the 240 First-Past-the-Post (FPTP) seats and, when compiling the lists of candidates for the 335 Proportional Representation (PR) seats, shall ensure the proportional representation of women, Dalits, oppressed communities/indigenous groups, backward regions, Madhesis and other groups, in accordance with the law. In practice, the quotas were only applied to the PR part of the election, which resulted in a total percentage of women of 33 percent.

Another related challenge will be to change the makeup of existing bodies and institutions (in particular the civil service and security forces) which do not meet the requirements of full proportionality. Understandably, the people represented at a level exceeding their proportion of the overall population will approach this issue with only limited enthusiasm. Ways and means need to be found to allow a transition from the current, disproportionate representation and participation to one that is fully proportional, which meets the criteria of fairness to the incumbents, a continuation of governance and services at a level not inferior to the present, and a steady and credible process of delivering on the new Constitution’s promise.

Constitutional guarantees of proportional representation for a wide or open category of people will certainly be highly complex to organize and administer. Groups will overlap (as in e.g. Madhesi Dalit women) and many identities and categories are fluid. For women and Dalits, internal proportionality has been proposed, which would mean that

- The proportionate representation of hilly Dalit, Madhesi Dalit and Dalit women will be made in all rights received by the Dalit community.
- The proportionate representation of Madhesi women, indigenous nationality women, and minority and Dalit women will be made in all rights subjected to women.

However, internal proportionality within groups is likely to be an issue also for other categories, such as Madhesis and Adivasi/Janajatis.

Cross-cutting objectives for state restructuring: service delivery and peace

In addition to the three “change-agendas” mentioned above the new Constitution will have to lead to a situation where service delivery and public security is noticeably improved. The demand for services and peace has been a recurrent dominant issue resulting from series of public consultations related to the constitution building process. In other words, people may at the end of the day not care all that much about the division of powers between different levels of government, as long as effective state presence and government services are provided.

As Nepal moves towards transition to the new constitutional order and implementation of state restructuring it will need to address the two core state-building challenges facing post-conflict societies – delivering basic goods and services for recovery and development, and reduction of the

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35 NC and UML have proposed a mixed electoral formula, which, similar to the election law for the 2008 CA elections, would guarantee only a quota of 25% to women in the elected parliament.
36 It is a widespread misunderstanding that 2008 election guaranteed 33 %. That happened to be the result but the guaranteed minimum was around 25 % (due to the ten percent deviation and the 26 appointees without quotas).
37 See the proposals of the Committee on State Restructuring and Distribution of Powers.
risk of a recurring country-wide conflict as well as local conflict management (for instance over the use of natural resources). Focussing on structural (inward-oriented) government reform only without planning for and actually ensuring effective delivery on development and peace would repeat some of the mistakes of the past.

Transition and Implementation: Planning for Immediate Delivery

How to ensure delivery on the first of the two objectives - improving basic services? The new federal system and the new provincial governments and local self-governments will be central to this effort. As the proposals for the new constitution stand, the responsibility for the bulk of basic administrative and development services for social development and in support of peoples’ livelihood will be in the hands of the future village councils and municipalities. This includes for example primary and secondary education, basic health and sanitation, local roads, local courts (and mediation and arbitration), agriculture and animal husbandry as well as the majority of administrative services with an immediate impact on peoples’ livelihoods. The remainder of the main development functions (e.g. tertiary education, some agricultural development functions etc.) will be in the hands of the provincial governments.

As noted above, governance reforms were carried out to establish local self-governance in the past. However, the local bodies were not developed as institutions delivering on the intended role in development. As concluded in 2004, it proved 'necessary to review and initiate new policies,

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38 Cited from Collier, Hoeffler & Soderbom (2008). Note that the authors suggest that post-conflict societies face two distinctive challenges: economic recovery and reduction of the risk of a recurring conflict (using indicators of per capita income and per capita income growth as indicators of the former). The present paper applies a broader understanding of recovery going beyond economic growth, notably to include social development.


strategies and actions in keeping with the citizens’ expectations for effective service delivery through local governance. It is also necessary to [identify] policy, programme and activities that impede decentralization policy and re-tune them as per the principles of devolution.\footnote{Decentralization in Nepal; Paper prepared for the Nepal Development Forum 2004.} The provincial and local governments need to have a radically different policy and actual operating frameworks for them to deliver on people’s expectations in their mandated areas following the new constitution. As specified in the transition provisions of the proposed draft constitution, institutions will continue to function according to existing legislation until the new ones are put in place. This probably implies that LGs will continue to operate with the limited role as present for the first years after promulgation (which is notably below the standards set by the Local Self-Government Act).

As outlined in the previous section, several options exist for election of local councils immediately or later. Currently, delivery rates for grants to local bodies are low primarily due to lack of agreement on allocation within the interim bodies (and with informal decision-makers). The elected political body will, therefore, be key to ensuring delivery after promulgation. Once the ‘pandora’s box’ of defining the entities and boundaries for new VDCs within each province is opened, it might further complicate the entire local delivery system. Hence, very careful attention would need to be paid to how the district offices of line agencies and the local bodies will be ‘transitioned’ and integrated into the new federal state structure.

The proposed boundaries of the 14-province model would ‘cut through’ 29 of the 75 districts. This would in all likelihood mean that people living in areas of those districts would be assigned to different services centres, as they would be ‘cut off’ from their existing district headquarters. This would, according to the proposed map, affect people in 496 of the 3,915 VDCs across the country, and may require considerable degree of effective communication and management.

How to ensure delivery on the second of the two objectives – a peaceful transition, with governance institutions capable of managing and mitigating conflicts while they are being restructured? Devolution through the federalist variant is not a panacea guaranteed to establish peace and address all root causes of conflict. While it holds great promise for empowering and giving voice to disadvantaged and excluded groups, the manner in which devolution is structured and local governance practiced have great implications for whether or not traditionally excluded groups are...
actually represented in the public arena, and whether the arrangement contributes to peace-
building efforts.\textsuperscript{42}

### Public security/peace

Much of the potential for peace-building of a federal system is inherent, not only in the devolution of power in symmetric or asymmetric federations, but in how it is structured and managed at the local level. If the arrangements and mechanisms of devolution replicate and reinforce social patterns of exclusion and inequity, and furthermore do not allow for the representation and empowerment of marginalized groups a federal structure will fail as a peace building tool.

In other words, an important part of the equation is the question of who manages the powers devolved through federalism, and how. The pattern of representation and the accountability of councils to various groups and individuals is a product of a number of different factors (including e.g. the electoral systems for provincial and local councils and the choice between direct and indirect election, the functioning of political parties, affirmative action policies etc.) – most of which is not or only very loosely laid out with the proposed draft constitution. Independent of the final balance between ethnic groups and caste, the use of \textit{agradhikar} and a range of other decisions with the final agreed constitution, the actual operationalization of the principles aimed to guarantee peaceful co-existence will only happen with the transition and implementation when policies, laws, guidelines and practices are developed.

The constitutional debate in Nepal centred around ethnicity and other elements of identity is a powerful reflection of past injustices in a society where people were often excluded from influence and resources due to their identity. Hence, the political institutions due to be developed following the adoption of a new constitution need to ensure avenues are available to advance the rights of the relevant identity-based groups under a common and accepted vision of a democratic Nepalese identity. At the same time, likely minorities within proposed provinces are already uncertain about their future in ethnically divided entities whether political preferential rights/prerogatives are introduced or not.

Much of the transition period will thus need to be geared towards nurturing state formation and addressing the risks of new conflicts emerging. Identities are not fixed or established with the final agreement on the constitution, and one of the key post-constitutional challenges will be for existing identities to be mobilized in ways which contribute to an emerging democratic Nepal enshrined in the values of the Constitution. The establishment of the various Commissions as constitutional bodies as well as, possibly, the constitutional court will be a very important element of establishing national capacity to address grievances.

Part of the effort to ensure delivery on the two major objectives will thus need to focus on developing the capacity across the new government system. Processes for assessment and strong national institutions supporting capacity at federal, provincial and local level would need to be brought in place.

Issue 16: How can stakeholders work together to plan for changes required to address the cross-cutting challenges service delivery and security improvement/peace-building?

Options:
- Mainstream questions on service delivery and security management/peace building into all efforts aimed at establishing new structures and mechanisms on the basis of the new Constitution.

New Institutions and Changes at All Levels of Government: Who Will Deliver?

Present
- Central Government
- Dormant 5 Regions and 14 Zones
- 75 DDCs
- IIakas (service centres)
- 3,915 VDCs, 58 Municipalities
- Wards

New Constitution
- New Federal Government - Transfer major functions to P & LSGs
- 14 (?) New Provincial Governments
- No District Governments (administrative level?)
- IIakas?
- New Village Governments (700+ only)
- More Municipalities
- Wards?

Note: The levels highlighted in orange are the tiers of government (proposed to be) established by the new Constitution. The new Constitution may also foresee an additional level, of special structures (e.g. Autonomous Regions) which would be below the provincial government level. These are not reflected in this graph.

International support

Foreign aid has always played a major role in Nepal’s development. Donors coordinate development aid policy through the Nepal Development Forum comprised of donor countries, NGOs, development banks, and inter-government organizations including the UN. The development banks, the World Bank (WB) and the Asian Development Bank (ADB), are the largest donors to Nepal. Nepal’s largest bilateral aid donors are Japan, the United Kingdom (UK Department for International Development – DFID), Denmark, Germany, Switzerland, Norway, the Republic of Korea, India, China and the United States.43

Since the early 1970s, multilateral assistance programmes have played a significant role in development planning for Nepal. Among multilateral institutions, the ADB and WB as the major multilateral donors provide both loans and grants for Nepal. The ADB and the WB prioritize their assistance to the sectors of financial services, natural resources, energy, industry, trade and transportation.

43 Ministry of Finance
International donor contributions total around one quarter of Nepal’s annual government budget. In the past years, ODA to Nepal has steadily increased, from about USD 430 million in 2004 to USD 578 million in 2007, and an expected USD 640 million this fiscal year (2008/09).

Designing and implementing a strategy for the use of aid instruments is neither simple nor straightforward, and involves a complex set of judgments. In federal countries, with multiple levels of government, the situation is even more complicated and raises additional concerns. Federations require additional costs for aid. For example, donors may need offices in several regions to maintain the level of dialogue needed with key state stakeholders.

Depending on the volume of aid relative to national budgets, donor financial assistance provided directly to the federal level can have centralizing tendencies vis-à-vis sub-national government. Where fiscal decentralization is weak, general budget support provided to the federal level can have the effect of undermining state and local government, and can focus attention on capacity development at central level whilst ignoring lower levels of government.

In the case of sector budget support, evidence suggests that there are frequently tensions between individual sectors and state and local governments, and that how donors choose to provide assistance affects these tensions. There is a growing literature on the relationships between Sector Wide Approaches (SWAps) and decentralized governance, assessing the extent to which SWAps have a tendency to recentralize decision-making. A key issue is whether SWAps should be developed at the federal and/or sub-national level. Vertical federal programmes – large sector programmes designed at, and managed from, the federal level, are mainly implemented through sector ministries, with provincial and district ministry staff having little real horizontal accountability to provincial and district governments. This could contradict the stated commitment to devolution. Vertical programmes in for example Pakistan have undermined state and local government credibility, authority and accountability, create incentives for centralization.

Care needs to be taken to avoid donor investments that are not congruent with the devolution process and that a broad policy dialogue needs to focus on such questions.

**Issue 17:** How can stakeholders work together to develop aid mechanisms that are aligned with the new constitutional order based on a federal structure?

**Options:**
- Learn from experiences in developing countries with federal structures elsewhere.
- Engage with the (future federal) Government, as well as the emerging provinces and local governments to develop appropriate mechanisms and procedures.

**Signposts for the road ahead**

The plan to guide Nepal’s transition and implementation of the new constitution will need to assess options along different dimensions. The sequential order of actions in support for implementation along each of these lines would need to be subject

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44 The provision of sector budget support to state/province level also risks aid delivery.

45 Ibid.
to considerable consideration, recognizing also the iterative nature of government reform and the interlocking nature of government operations and systems.

The steps to be taken could be considered along the following major lines:

- **By branches of government** – identifying the major changes and sequence for the executive, legislative, judiciary, and constitutional bodies.

- **By tiers of government (center/periphery)** – analyzing the road ahead along the vertical lines of government, i.e. federal level, provincial level, autonomous region level, local level (current districts and VDC/municipality).

- **By steps and instruments** – identifying the major policies, legal and regulatory framework, operating procedures etc. which need to be developed.

- **By phases** - each of the above would identify plans for (1) immediate transition (until the first elections), (2) medium-term implementation (until all institutions are formally established) and (3) long-term implementation of the new constitutional order to achieve the goals of state policies and directive principles contained in the Constitution, primarily through capacity building.

- **By thematic area** - civil service, police, finance etc. Some key areas for development of the implementation programme for the specific implementation of federalism if adopted as proposed with the interim constitution and concept notes are provided as example in the box below.

It is important to recognize that each individual and each of the different institutions which are part of the constitution-building process in Nepal are likely to conceptualize the subsequent implementation challenges from one or more individual perspectives. Hence, the development of a road map and implementation plan needs to accommodate the different perspectives on change.

Planning for these phenomenal tasks ahead would probably need to start very soon taking as a basis the expectations for what the constitution might lay out but allowing sufficient flexibility to accommodate any option eventually adopted by the CA. Planning and national dialogue on transition and implementation would have two major objectives – each with their different time frames:

- Provide input for the Constitutional Assembly to develop the implementation provisions of the new constitution, including assessing the feasibility of different options and possible sequencing.

- Prepare the ground for actual transition and implementation following promulgation.

- Communicating effectively with the public about the process.

As such, the following timing and milestones could guide the sequencing of a national dialogue on implementation challenges:

(i) **Phase 1** – in absence of draft constitution: initial dialogue on transition and implementation on areas with consensus and preparation of needs assessment in substantive areas; after draft constitution, initiate detailed planning.
(ii) Phase 2: resource mobilization, detailed planning, initial implementation; and

(iii) Phase 3: long term capacity support.

The time available following a draft constitution and before promulgation of the final document might be very limited. Hence, much of the preparation would need to start based on the available concept notes with the caveat that some of the proposals are widely contested.

One, or possibly two, high level national forums could be envisaged. If considered useful for national partners, a forum in the immediate future or as soon as a draft is available could focus on achieving consensus on the main challenges, including categories of issues which need further technical assessment and organization of national partners to address. An additional major forum would follow immediately after the promulgation focusing on detailed planning and development partner commitment for support to implementation.

Technical support for assessment of transition and implementation challenges for the overall roadmap and in key areas identified could be agreed from a range of national and international partners in line with comparative advantages and possibilities to commit support.

As there will be a significant need for good coordination, both at the national and the international (development partner) level, it might be advisable if stakeholders could agree early on the formation of a coordination and consultation mechanism. The coordination mechanism facilitated by UNDP in the context of support to the constitution building process could serve as a reference and basis for such future coordination efforts.

Conclusion and outlook

The prospect of federalization presents new challenges for Nepal and its development partners. New sub-national units hold the promise of government that is closer to the people and more concerned with advancing the social inclusion agenda. With this could come economic and social benefits if provinces, reorganized local governments and autonomous regions become engines of growth and drivers of social accountability.

At the same time, whatever form devolution may take, it will not be a panacea. It will come with some major challenges:

- **Political Reluctance**
  Widespread acceptance of the inclusion agenda has made inclusion the policy commitment of the major political parties. However, it will need to be delivered through a restructured state. One lesson of Nepal’s earlier effort to decentralize may be that those with power at the centre may not wholeheartedly support the major devolutions of power contemplated by the current proposals before the CA. If federalism fails, so will the principal mechanism designed to implement the inclusion agenda.

- **Uncertainty**
  There is still uncertainty around basic issues. How will the national government be restructured? Who will be responsible for the creation and capacity development of sub-national units? How many units will there be? Over what period will they be functional? Will there be interim structures? This uncertainty leads to reticence among both national and international actors to
launch even a provisional planning process for fear of being seen to interfere in a sovereign matter falling exclusively within the mandate of the Constituent Assembly.

- **Scale**
The challenge will be to work with a newly structured state to improve governance and to advance Nepal’s inclusion agenda at all levels – national/federal, provincial, local and within autonomous regions. Each level of government will have its own constitutionally mandated powers with its own legislative, judicial and executive institutions. The provincial and regional autonomous structures will be entirely new and the national/federal and local ones will need to be substantially reformed. In each case, there will be an unprecedented need for provisional and long-term infrastructure, human and financial resources and systems.

- **Lack of Precedent**
There are modern examples of states moving from unitary to federal structures. There may also be much to be learned from recent experience in regionalization, as states around the world pursue the goals of subsidiarity. There seems to be no example of restructuring on the scale contemplated in Nepal given the complete absence of governmental structures at the level to which the bulk of sub-national governance ought to be transferred.

- **Instability**
Implementation will likely be phased in, with fully functioning sub-national institutions several years and several election cycles away. Capable institutions are even farther in the future. As state restructuring can never fulfill the aspirations needs of all stakeholders, even orderly restructuring carries some risk of instability. Weak implementation could lead to disruption of government services across the country, damage to the inclusion agenda and widespread instability.

- **Donor Engagement and Coordination**
The concept paper of the CA Committee on State Restructuring proposes for the exercise of powers in matters of development assistance at all levels of government – national, provincial, local and autonomous regions. It envisages a lead role for the national government. At the same time, the concept paper provides for devolution of some or all state power from the national government to new sub-national governments in many of the sectors where development partners are most active. These include health, education, roads, agriculture, water and forestry.

It is not yet clear how all of this will work in practice. Eventually, development assistance in Nepal will require some new arrangements, with some new partners and stakeholders. It may emerge that the strongest drivers of change are at the sub-national level, with a more cautious approach being shown by those at the centre whose powers are to be devolved. The experience of decentralizing local government may offer some guidance. Nepal’s development partners will be challenged to respect a constitutionally mandated process the very essence of which is to devolve sovereignty from the centre to the regions. At the same time, it will be important to bear in mind that successful state restructuring will depend in part on initiatives that must be taken at the centre to support the restructuring process or, in some cases, to remove barriers to restructuring in areas such as financial and human resource management.

Many of Nepal’s international partners have been here for a long time. They have their own plans, programs and priorities. While their work has always required some coordination, the coordination that will be required to implement state restructuring will be more demanding because of the scope of the enterprise and because of its political sensitivity.
The UNDP’s overall mandate is not just limited to the actual constitutional drafting process in the narrower sense, but it has a clear global UN mandate on democratic governance and peace building support. Until all newly created bodies are duly established and consolidated, UNDP will therefore need to continue to focus on the process and link it into its other development activities.

Constitution building consists of more than the simple drafting and promulgation of a constitution. To achieve lasting peace and inclusive development, a longer term process to implement the constitutional provisions needs to be facilitated and supported. This entails building into the constitution provisions on a transition process that does not create major instability and insecurity, and leads to effective and tangible implementation of the new constitutional provisions.
Asia Regional and International Experiences

The shift from a unitary to a federal system and creation of 14 new regional governments presents a phenomenal set of implementation challenges. The Asia region and countries beyond have undertaken major reforms of sub-national governance over the last 10-15 years which can provide a very important starting point for Nepal to map out the road ahead. They could also be potential partners for development at but national level or directly province-to-province. These would include:

The experiences of federalism in India as enshrined in the Constitution of 1950 and the implementation of the 73rd and 74th Constitutional Amendment Acts (1992) which gave Constitutional status to the third tier of government at sub-State level, thereby creating legal conditions for, and making mandatory, the development of a system of elected local governments (Panjayat Raj Institutions) at village, block and district level with devolved powers within each State.

The devolution process in Pakistan initiated within a federal system in 2000 which involved both central-to-provincial devolution to four provincial governments with elected Provincial Assemblies and provincial-to-local devolution of power to elected Union, Tehsil, District and Municipal governments.

The implementation of the so-called ‘big bang’ devolution in Indonesia following the decision in 2002. With national unity as the prime consideration, the 2002 decision was primarily to empower the district level (except in Aceh and Papua which have special autonomy arrangements) but currently policy/legal changes are being considered to create stronger provincial governments46.

The experiences from implementation of the 1987 Constitutional Amendment in Sri Lanka which created Provincial Councils within a unitary system with district, village and municipal governments (elected councils at village and municipal level). The provincial councils and their role have been subject to much debate, most recently during all-party negotiations ultimately deciding to maintain the provincial structure.

The process of Decentralization and Deconcentration in Cambodia (unitary) as laid out with the Strategic Framework on Decentralization and Deconcentration (2005) and implemented over the past five years. This has included the creation of the first ever elected Provincial and District councils in 2008. The National Programme for Sub-National Democratic Development (2010-19) is one of the most comprehensive implementation plans in Asia with assessment of government implementation requirements, including need for assistance from development partners. The process for developing the plan/programme might also be relevant for Nepal.

Also, the experiences from developing the (unitary) local government system in Bangladesh, including the establishment of elected Upazila Councils in 2009 (average population approximately 250,000) might be relevant.

Beyond the Asia region, South Africa has been a point of reference for the constitution-building process and would also have important lessons on implementation of a new constitution and a

46 See e.g. The Missing Link: The Province and Its Role in Indonesia’s Decentralization; Policy Issues Paper; May 2009; UNDP.
federal system. Prior to 27 April 1994, South Africa was divided into four provinces and ten so-called ‘homelands’, four of which were considered independent by the South African Government. Both the interim constitution and the new 1997 constitution abolished this system and laid out a structure with nine provinces. Each province has an elected legislature and chief executive. Although in form a federal system, in practice the nature of the relationship between the central and provincial governments continues to be the subject of considerable debate, particularly among groups desiring a greater measure of autonomy from the central government. A key step in defining the relationship came in 1997 when provincial governments were given more than half of central government funding and permitted to develop and manage their own budgets.

The experiences from Macedonia on post-constitutional changes of the territorial division of local governments might also be particularly relevant for the proposed changes to the numbers and boundaries of the VDCs and Municipalities in Nepal. Macedonia has continuously worked to address ethnic issues and the concerns of the majority as well as the ethnic Albanian (approximately one quarter) and minority population while also striving to achieve sizes of local government supporting efficient and effective service delivery.47

In addition, while highly unique, the implementation in Bosnia and Herzegovina – a federation since 1995 in which one entity is also a federation - might also serve as a source of experience, including on addressing equality of peoples within the Cantons. Also, Ethiopia which is an ethnically highly diverse federation might be relevant. Mali, formally a unitary state, has experiences with large scale decentralization in particular through a powerful mission de decentralisation. While the central state and provinces in e.g. Germany (which established new provinces from scratch in the former GDR after reunification in the 1990s), Austria and the four federal states in Latin America (Brazil, Argentina, Mexico and Venezuela) could be useful on issues on management within federations, actual reform processes changing from a unitary state, the countries above offer more relevant experiences on recent reform processes in developing countries. As federations, Belgium and Canada might be less relevant. Regional governments in e.g. Italy and Spain, which introduced quasi-federal structures in the 1970s and 1980s, are very active in international development and could be potential partners for provinces in Nepal.48

47 For a brief overview see e.g.: http://www.sigmaweb.org/dataoecd/63/11/36492692.pdf
48 The United Nations recognizes the increasingly important role of regional and local governments in the field of development. In September 2005, the United Nations Development Programme (UNDP) established, within its Liaison Office in Geneva, the Hub for Innovative Partnerships, aiming at recognizing the role of regional and local communities and supporting them in facing development challenges. http://www.undp.org/geneva/hub.html
Aid Effectiveness in Nepal

In 2008, Nepal took part for the first time in the OECD DAC-sponsored Survey on monitoring the implementation of the Paris Declaration. Among the challenges thrown-up by the survey was the Medium-Term Expenditure Framework (MTEF) is not providing a strong bridge between plan and budget. Thus, the budget is not serving as the central tool to translate national priorities into investments that meet address the key challenges in reducing poverty and achieving the MDGs.

Other challenges include the fact that at least a quarter of development assistance is not captured in the national budget, and only 14% of technical cooperation by donors is coordinated with government – partly reflecting the lack of a national or sectoral capacity development strategies with which donors can align. Although some progress has been made, national systems are often bypassed by donors reflecting, on the one hand, a lack of confidence in public financial management, procurement and audit systems and, on the other hand, a reluctance of some donors to use national systems irrespectively.

Sector-wide approaches have been implemented in education and health and are emerging with respect to local development, and in these ministries dialogue with donors on policy and on external investments is measurably stronger. However, overall dialogue with donors needs reinforcement at the top level (the Nepal Development Forums occur irregularly), at the macro level (the Local Donors Meeting mechanism operates but preparation and follow-up could be strengthened), and at the sector level (in many sectors no mechanism exists). More critical still is to strengthen collaboration and coordination on sector planning, budgeting and aid management within government and between Ministry of Finance, National Planning Commission and sector ministries. Positively, the Government, with UNDP support, has conducted a capacity needs assessment in five ministries with a view of strengthening aid management capacities and introducing a Nepal Development Coordination Committee to improve intra-governmental coordination.

The government is seeking to address these and other challenges by updating its 2002 Foreign Aid Policy and developing a National Action Plan on aid effectiveness. However, this work has been ongoing for several years, and the finalized policy and action plan have been long delayed due to political factors.

While aid management competencies exist, there is a need to build a larger and stronger team within Ministry of Finance, and the Foreign Aid Coordination Division in particular, and to improve inter-ministerial collaboration and engagement on aid effectiveness. The relative weakness of collaboration across ministries at the central level, suggests that engagement with sub-national bodies at district level, and preparedness to engage on aid effectiveness in the anticipated provincial level is likely to be extremely weak. It will be essential for government to think through internally, and then with development partners, what will be the division of labour between central government and provincial and district level government. Furthermore, even central government lacks knowledge, except at the most senior level, of which kinds of aid modality are best suited for each context. Government and development partners will need to undertake analysis and engage in extensive dialogue to identify which mix of aid modalities (general budget support, sector budget support, SWAPs, project aid and technical assistance) will work best as part of preparations for the transition to federal government.
The emerging features of the federal structure

The Constituent Assembly’s State Restructuring Committee has drawn up four separate lists which delineate the powers held at federal (central), provincial and local level, as well as the level of Autonomous Regions. Many of the competencies are shared across the three levels, with different aspects of the powers to be addressed at the respective level (e.g. legislation, implementation):

- **Powers retained at federal level** include the following:
  - Defence and army; Central police force
  - Foreign affairs, central bank, fiscal policy, monetary policy, foreign grant, assistance and loans
  - International treaties, extradition and international border management
  - Atomic energy and space (research)
  - Large scale hydro plants of central level and other projects
  - Immigration
  - Weapons and matters relating to arsenal and production of arms and ammunition
  - Formulation of criminal laws

- **Powers attributed to the provincial level** are the following:
  - Provincial constitution
  - Police, administration and law and order
  - Banking and financial institutions
  - Cooperative, foreign donors’ grant and assistance with the consent of the centre
  - Radio, FM, television
  - Management of provincial civil service
  - Provincial statistical bureau
  - Provincial level hydro electricity, irrigation project and other projects
  - University, higher education, library, museum
  - Health service
  - Provincial legislation relating to local government and special structures
  - Inter-provincial trade
  - Provincial aviation
  - Provincial railways and provincial highways
  - Provincial investigation bureau
  - Provincial court, family court and minor court
  - Citizenship and passport management
  - Provincial level commissions
  - Land management, documentation of land and determining land revenue
  - Mine research and management
  - Insurance management and operation
  - Protection of language, culture, script and religion and use
  - Utilization of forest, water within the province
  - Agriculture and animal husbandry, development of industries, industrialization, transport, production of alcoholic products, buy and sale of construction products
  - Book and printing
  - Management of Trusts

- **Powers attributed to the local level** are the following:
  - Town police, community police
The draft also lists numerous concurrent powers of the centre and provinces (provinces can legislate on the basis of principles, standards and framework legislation determined by the federation), which would include:

- Criminal and civil proceedings, as well as related issues
- Management of security-related matters of the State (preventive detention, prison and custody, and maintaining law and order)
- Law relating to family matters
- Supply, distribution, price control, standardization and monitoring of essential goods
- Property and contractual rights
- Bankruptcy and insolvency
- Medicine and pesticide
- Tourism, drinking water and sanitation facilities
- Poverty alleviation and industrialization
- Scientific research
- Management of national and inter-provincial eco-system, as well as use of inter-provincial forests, wildlife, birds, mountains, national parks and waters

As concerns powers relating to autonomous regions, special regions and protected regions, the proposed draft sets out that the competencies would depend on the nature and objectives of these entities. The autonomous region can make laws that are not inconsistent with provincial laws.

- Autonomous Regions (Swayatta Chhetra) (for ethnic and linguistic communities); Autonomous Regions would have elected councils, with legislative, executive and judicial authority. Legislative power would have to be exercised in a manner consistent with provincial law.
- Protected Regions (for other communities and marginalized groups who form extreme minorities); and
- Special Regions (for economically and socially backward areas).

The paper lists 23 Autonomous Regions (see table below) to be formed by the provinces through commissions within a year of the formation of the provincial government. The list of autonomous regions could be amended by a two-thirds vote in the federal parliament. Protected and Special Regions can be changed by a majority in the Provincial Assembly.
Powers attributed to the Autonomous Regions would be the following:

- Police
- Cooperatives
- Management and operation of FM and Television
- Primary, secondary education, library and museum
- Health service
- Autonomous elected council
- Roads
- Hydro power, irrigation project and other development projects
- Citizenship/ passport management
- Documentation of land/ certificate of land and house ownership
- Mine excavation and management
- Protection of language, culture, script and religion
- Natural resources and their utilization
- Agriculture, animal husbandry, business, entrepreneurship
- Management of services
- Statistics and gathering of documents
- Court
- Other rights as determined by the provincial government

With regard to the financial procedures the Natural Resources Committee proposed provisions related to the enactment of financial laws, budget and distribution of sources of revenue.

- Deficit management and financial discipline to be determined in federal laws.
- Federal government will monitor the provincial governments’, and provincial governments will monitor local governments’ development activities in terms of effectiveness and will provide skills and capacity building.
- The budgetary procedures (timing, management, etc.) of federal, provincial and local budgets will be determined by federal laws.
- Financial sources (taxes) of federal, provincial and local governments are listed in three lists (see below), and the federal government can specify unlisted sources.
- Federal revenue is to be made subject of meaningful distribution between central, provincial and local governments by the federal government, upon recommendation by the Finance Commission.
- Provincial revenues will be distributed among local governments based on specific criteria.

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Danuwar is listed twice.
Federal laws will determine the modalities for provinces and local governments to take loans. Provincial and local governments will have to follow federal accounting standards and classifications.

- All revenues and other sources of income received by the Federal Government shall be credited to the National Consolidated Fund. The draft sets out which expenditures are to be covered from the Fund, as well as the relevant procedures.

- A three-member National Commission on Natural Resources is to settle disputes between the federal government and provinces, as well as between provinces. The Commission shall also advise the Government on such issues.

- A three-member Finance Commission is proposed to prepare general outlines for sharing revenues, to recommend an equalization grant to be provided to provincial and local government from the National Consolidated Fund, and to settle disputes related to distribution of revenues, amongst others.

- Consensus was found on the allocation of most taxes among the different levels of government.50
  - Personal income tax was assigned to the federal government, which would also collect customs duties, value added tax, corporate income tax, casino tax and a carbon trade fee.
  - Service charges, royalties from natural resources and fines would be collected by all three federal, provincial and local governments, while excise duty would be collected by both the federal and provincial governments. Entertainment tax and land registration fees will be collected by both provincial and local governments. Vehicle tax falls under the provincial government, while property tax and business tax will fall under the local government according to the proposal.

- Foreign trade will fall under the central government. Currency, monetary policy, banking, insurance and financial policy have been put under the jurisdiction of the central government. Regulation of foreign investment in business and trade will be the responsibility of the central government, management of business and trade of the provincial governments, and the management of small and cottage industries of the local governments.

- The concept paper contains a list on the allocation of proposed economic rights between federal, provincial and local level. Some rights are shared between the levels - the Committee e.g. recommended giving the authority to establish mega-hydropower projects to the federal government, medium-scale hydro-projects to the provincial governments and small and micro-hydro projects to the local governments.51

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50 The State Restructuring Committee also included a list of resources in the lists proposed in its Concept Paper. It assigns some revenues differently from the Natural Resources Committee. At the same time, the Natural Resources Committee included lists of “economic rights” which appear to be lists of powers of different levels of government, which are different from those proposed by the State Restructuring Committee.

51 The powers allocated to various levels of government were listed in the report of the State Restructuring Committee.