

# Legislators' Engagement in Policy-making and Post-legislative Scrutiny in Nepal Since 1991

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## Abstract

Parliament enacts legislation and has a role to evaluate the implementation of legislation in meeting the intended outcomes. Post-legislative scrutiny (PLS) identifies defective legislation and rectifies it. As such, it contributes to better legislation and implementation of legislation objectives. However, this requires a strong commitment by the parliamentarians in the legislation process and policymaking. Along with a range of structural factors, including lack of expertise and experience and time constraints, the main reasons for the ineffective post-legislative review in Nepal stem from the Member of Parliaments' (MPs) shallow engagement in policy-making and legislative review processes and stronger focus on expanding expenditure related to building roads, schools, and other vital infrastructure. For example, the Constituency Development Fund (CDF) provided to MPs has been continuously increased in consecutive elections since 1991. MPs appear to prioritize the political benefits of engaging with their electorate on funding and development projects, over their role in reviewing or scrutinizing legislation. This paper argues that the shallow engagement of MPs in the policy-making process and ineffective post-legislative review has resulted in not only defective and unsustainable policies but also defective legislation. This has created problems in the rule of law and accountability. This paper largely draws from reviewing contributions of delegated legislation committee for rule of law, evaluates the implementation of the committee recommendations in improving legislation and analyse the effects of noncompliance of committees' recommendations in people's justice.

Keywords: *Post-legislative Scrutiny, Legislation, Democracy, Parliament*

## I. INTRODUCTION

A parliament forms policies and enacts legislation and has an important role in overseeing the implementation of legislation and assessing whether the legislation has achieved intended outcomes.<sup>1</sup> Post-legislative scrutiny (PLS) helps to identify the practical shortcomings or flaws within the enacted laws or policies and hence helps to improve future legislation. However, due to the lack of commitment among Nepali legislators to improve policy-making, and their relative focus on executive activities (development activities), Nepali legislation often contains flaws that become apparent upon implementation.<sup>2</sup> Defective legislation not only affects the development works but can also significantly impact the rule of law and consolidation of democracy.

Examining a number of case studies in Nepal since 1991, this article argues that MPs' shallow engagement in policy-making and the lack of periodic reviews and assessments are the reasons for flawed and unsustainable policies. MPs appear to prioritise the political benefits of engaging with their electorate on funding and development projects over their role in reviewing or scrut-ising legislation. Similarly, the level of exposure, both expertise (education and experiences) and level of interactions (consultations with publics)-among MPs often results in defective policies. This article begins by surveying the existing forms of PLS in Nepal, followed by an analysis of the MPs involvement in policy-making jobs and its review.

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- 1 Franklin De Vrieze & Victoria Hasson, *POST-LEGISLATIVE SCRUTINY: Comparative Study of Practices of Post-Legislative Scrutiny in Selected Parliaments and the Rationale for its Place in Democracy Assistance* (London: Westminster Foundation for Democracy (WFD), 2017); Victoria Hasson, "Establishing a Legislative Scrutiny Framework The Case of Delegated Legislation in the Parliament of South Africa" (2019) 2 Eur J Law Reform; Michelle Zimbalist Rosaldo & Louise Lamphere, *Women Culture and Society*, Michelle Zimbalist Rosaldo & Louise Lamphere, eds. (Stanford, California: Stanford University Press, 1974); Lydia Clapinska, "Post-Legislative Scrutiny of Acts of Parliament" (2006) 32:2 Commonw Law Bull 191-204; HOR, *Pratinidhi sabhā kānuna, n'yāya tathā sansadīya vyavasthā samitīkō vāṛṣika pravivēdana 2057 (Annual Report of House of Representatives: Law Justice and Parliamentary Management Committee 2000)* (Kathmandu: House of representative, Law Justice and parliamentary Management Committee, 2000); HOR, *Pratinidhi sabhā kānuna, n'yāya tathā sansadīya vyavasthā samitīkō vāṛṣika pravivēdana 2058 (Annual Report of House of Representatives: Law Justice and Parliamentary Management Committee 2001)* (Kathmandu: House of representative, Law Justice and parliamentary Management Committee, 2001); NA, *Rāṣṭriya Sabhā Pratyāyōjita Vyavasthāpana Samitīkō Tēśra PratiBēdan 2056 (National Assembly: Delegated Management Committee - III Report 2000)* (Kathmandu: National Assembly Parliament Secretariat, Delegated Management Committee, 1999); NA, *Rāṣṭriya Sabhā Pratyāyōjita Vyavasthāpana Samitīkō c Cauthō Pravivēdana 2058 ((National Assembly: Delegated Management Committee - IV Report 2001)* (Kathmandu: National Assembly Parliament Secretariat, Delegated Management Committee, 2001).
  - 2 FEG-Nepal, *Improving the Constituent Development Program: Practices from the Three Districts: Sunsari, Kaski and Sindhupalchowk*. (Kathmandu: Federation of Good Governance (FEG-Nepal), 2016); Clapinska, *supra* note 1; Lydia Clapinska, "POST-LEGISLATIVE SCRUTINY A Consultation Paper" (2005) Law Comm Consult Pap No 178; Hasson, *supra* note 1.

## II. CONCEPT OF POST-LEGISLATIVE SCRUTINY

Vrieze and Hassan<sup>3</sup> define PLS as "[t]he act of evaluating laws that a parliament has passed" (Pg. 7). It is the legislators' duty to oversee whether the laws passed by the parliament are being implemented, if they are effective, and identify flaws. A thorough review process highlights potential improvements to legislation and subsequently the formation of sustainable policies. Most importantly, the PLS provides valuable lessons for the legislators for better policy measures.

The basic tenet of the PLS is that every legislation, once it has been brought into force, should be reviewed. This helps to address any problem quickly and cost-effectively.<sup>4</sup> Every year a large number of legislations are put into a force that might not be well assimilated into the practice. The majority of legislation generates regulations in the form of secondary legislation. All legislation must be reviewed once it has been implemented.<sup>5</sup>

The purpose of the PLS is, firstly, to ensure acts are formed under the principle of the constitution for democratic governance.<sup>6</sup> Secondly, PLS helps to identify the unintended consequences of new legislation over time. Thirdly, it supports the evaluation system by assessing efficacy and addressing problems. Finally, it improves future legislation by providing valuable lessons.

One school of thought argues that legislators have prior knowledge of the PLS scrutiny that every legislation will be reviewed. However, another school of thought argues legislators must have anticipated the prospective effects of the legislation. The UK Law Commission identified PLS as a broader concept. Most of the scholars outlined two types of PLS: a) Broad Legislative Review and b) More Focused Review.<sup>7</sup> The Broader Legislative Review assesses whether the acts of the parliament have achieved their intended effects. The narrow forms of PLS focus on the legal aspects and the effects of legislation. For example, whether the laws are formed guided by the constitution and the acts. It also looks for the unintended legal consequences and its impact on the existing legal body.

Clapinska (2006) pointed out two avenues for PLS—pre-planned review and post-enactment review. Pre-planned PLS assumes that the bills are subject to review, whereas post-enactment assumes that PLS is not a timeline phenomenon, rather it assumes that parliamentary committees are already capable of reacting to any defective legislation and undertake a review which was not foreseen in the early stage.

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3 *supra* note 1.

4 Clapinska, *supra* note 1.

5 MOLJCAPA, *Sarvōcca adālabāṭa amān'ya ra badara gari'ekā kānuūi vyavasthāharukō adhyayana (A Study of Defective and Invalid Law by the Supreme Court)* (Kathmandu: Ministry of Law, Justice, Constituent Assembly and Parliamentary Affairs, 2013); AGON, *Annual Report of the Auditor General of Nepal* (Kathmandu: Office fo the Auditor General of Nepal, 2018).

6 Vrieze & Hasson, *supra* note 1; Clapinska, *supra* note 1; NA, *supra* note 1; NA, *supra* note 1.

7 Clapinska, *supra* note 2; Franklin De Vrieze, *Principles of Post-Legislative Scrutiny by Parliaments* (London: Westminster Foundation for Democracy (WFD), 2018).

The pre-planned PLS comprises of commitment to review, departmental review and parliamentary control. All Bills and acts that are passed by the parliament are subject to review. Similarly, the relevant departments have better access to the data required for review, and hence the department can prepare for the review of the legislation. Central governments often oversee the legislation and prepare for the review report. Finally, departmental reviews are submitted to the parliament and parliamentary committees who control the legislation.

The post-enactment PLS requires the involvement of the central government, parliamentary committees and external bodies. The central government oversees programme implementation and therefore is a crucial source of information as to whether legislation is functioning appropriately. Similarly, different parliamentary committees themselves decide to undertake PLS. Most importantly, the external bodies such as bar associations, consumer society, and civil society often perform PLS by reviewing acts and providing feedback to the legislators.

PLS is a continuous learning process that enhances knowledge among MPs and assists in forming better policies. The continuous evaluation process provides insight to the executives and legislatures as to which laws are effective and which are ineffective. This provides MPs with an oversight to form better policies and effective legislation.

The PLS improves the accountability of the government. The legislators often form laws and think that they have fulfilled their duties. But the PLS also identifies which legislation is working and not working in practice that helps to address the need and demands of the citizens. However, it is equally important to ensure the voices of the citizens are represented while reviewing legislation and addressing the demands of the citizens.

The criteria for PLS depend upon the nature and complexity of laws, cost (both in time and money), complexities arising during the implementation of the laws, etc.<sup>8</sup> The parliament often sets the criteria for PLS; for instance, the Canadian Standing Committee sets the criteria for revision of secondary legislation.<sup>9</sup> However, within multicultural and diverse society, the criteria of PLS should go beyond the nature, complexities and cost of the review. Therefore, it is often worth hearing the views and voices of communities on the values of the legislation and the impacts of their rights while doing PLS.

Nepal is a multicultural and diverse society with 125 different ethnic groups spread across mountain, hill and Tarai (plain area). Therefore, the implementation of laws often faces multiple challenges and threats. Multilingual policy is a pertinent

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8 Franklin De Vrieze, *Post-Legislative Scrutiny: Guide for Parliaments* (London: Westminster Foundation for Democracy (WFD), 2017); Vrieze, *supra* note 7.

9 Vrieze & Hasson, *supra* note 1.

example of this.<sup>10</sup> For example, the Government failed to implement Tharus language as a medium of instruction and language of administration in areas where Tharus are the majority population. In such a diverse society, voices of the community should be heard while reviewing the legislations.

The domination of high-caste Hindu male elites in policy-making often exclude women, as well as Janajati, Dalits, Madhesi, Muslims and other minority groups in Nepal.<sup>11</sup> For example, only five percent of women were elected in the parliament in the 1990s.<sup>12</sup> Voices of marginalized groups are rarely heard and accommodated in policies and policy-making process. Therefore, the perspectives of the communities should be considered as criteria for effective and participatory PLS in Nepal.

### III. NOTES ON THE RESEARCH METHODOLOGY

This paper is based on a qualitative method of data collection, analysis and interpretation. Most of the data is collected from secondary sources. We have reviewed reports of the parliamentary committees, departments, ministries and other external bodies related to PLS and MPs involvement in policy-making and their review. We have also collected the videos of parliamentary discussions, interviews of MPs, and news related to PLS from the newspapers.

### IV. POST-LEGISLATIVE SCRUTINY IN NEPAL

Reviewing the legislation and its intended and unintended effects often demands a democratic setting, rule of law and provision of check and balance of power.<sup>13</sup> The formation and enactment of the constitution, rule and regulations in the autocratic

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10 Bal Krishna Sharma & Prem Phyak, “Neoliberalism, linguistic commodification, and ethnolinguistic identity in multilingual Nepal” (2017) 46:02 Lang Soc 231-256; Vishnu S Rai et al, *Multilingual Education in Nepal: Hearsay and Reality?* (Kathmandu: UNESCO, Kathmandu, 2011).

11 Deepak Thapa & Bandita Sijapati, *A Kingdom Under Siege: Nepal's Maoist Insurgency, 1996 to 2004*. (London: Zed Books, 2004); Ramesh Sunam, *समावेशीताको बहस (Discourse of Inclusion)* (Kathmandu: Samata Foundation, 2017); Arjun Guneratne, *Many Tongues, One People: The Making of Tharu Identity in Nepal* (New York: Colombia University Press, 2002); Mahendra Lawoti, *Towards a Democratic Nepal: Inclusive Political Institutions for a Multicultural Society* (New Delhi: Sage Publication, 2005).

12 Stéphanie Tawa Lama-Rewal, “Political Participation of Women in Nepal” in *State Leadersh Polit Nepal* (Kathmandu: Center for Nepal and Asian Studies, 1995) 171; Sanjaya Mahato, Bimala Rai(Paudyal) & Nandita Baruah, “Women in Public Life in Nepal” in Deepak Thapa, ed, *Polit Change Reflect Contemp Nepal* (Kathmandu: Himal Books for Social Science Baha and The Asia Foundation, 2019) 54.

13 BBC-Nepali, “Interview with Ram Narayan Bidari”, (2019), online: *BBC Nepali Serv* <[https://www.bbc.com/nepali/multimedia/radio\\_programmes](https://www.bbc.com/nepali/multimedia/radio_programmes)>; Ganesh Timelsena, “सांसदले फाइल बोकेर कोठा-कोठा घाउनुपर्ने अवस्थाको अन्त्य हुनुपर्छ”, (2019), online: *Natl Assem* <<http://na.parliament.gov.np/np/news/file-carrying-situation#>>>; Pradip Giri, *Budget Speech Comments by Pradip Giri* (Nepal, 2019).

political setting either in the absolute monarchy or in the communist government is often made in the interest of the ruler, and hence the rule of law is directed in the interests of the ruler(s). Thus, the revision of the legislation is not envisioned in such a political environment<sup>14</sup>, and if any, the revisions are made to serve the interest of the ruler(s). Therefore, balance of power, rule of law and PLS were neither envisioned nor provisioned.

In the Nepali history, until the end of Rana regime and democratic transition in 1951, Nepal was ruled by the Shah Kings and Rana Oligarch. Both Shah and Rana rules were autocratic and Rana regime was more totalitarian than the Shah rule. During that time, most of the rules and regulations were issued to serve the interests of the ruler guided by Hindu philosophy.<sup>15</sup> Therefore, the system of rule of law and check and balance of power was not there. Hence the issues of traditional forms of PLS did not exist until the first democratic constitution of Nepal 1951.<sup>16</sup>

The anti-Rana movement abolished the Rana oligarchy and issued the Nepal Interim Government Act 1951 that guaranteed a rule of law, an independent judiciary and made provisions of court for legal review. Similarly, the act provisioned other constitutional bodies that could review legislations such as auditor general, independent courts, etc. However, during the nascent democratic phase, the political focus was on convening the Constituent Assembly, draft and promulgate a new constitution and hold the parliamentary and municipal elections. Unfortunately, due to the inter- and intraparty conflict and tussles between the King and Nepali Congress Party, the Constitution Assembly (CA) was never formed.<sup>17</sup> However, after negotiating with the king, the constitution of the Kingdom of Nepal 1959 was promulgated which was the first democratic constitution that ensured rule of law, fundamental rights, and independent judiciary and checks and balances of power.<sup>18</sup> Similarly, the constitution provisioned other constitutional bodies to review legislations.

The democratic achievements came to end when the king Mahendra undertook the royal coup, dismissing the elected government in mid-December 1960, suspending the 1959 constitution of Nepal, outlawing all the political parties. The king issued another Constitution of the Kingdom of Nepal in 1962, concentrating more power on him. Despite fundamental rights, provisions of an independent judiciary, auditor general (article 76) and provision of court for legal review, it was basically seen a charade and people could not enjoy the constitutional rights.

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14 Bhuwan Lal Joshi & Leo E Rose, *Democratic Innovations in Nepal: A Case Study of Political Acculturation* (Kathmandu: Mandala Book Point, 2004).

15 Sunam, *supra* note 11.

16 HMG, *The Interim Government of Nepal Act 1951* (Kathmandu: Nepal Law Commission, 1951); GON, *The Constitution of Nepal 2015* (Kathmandu: Nepal Law Commission, 2015).

17 Jagat Nepal, *Pahilō Sānsad BP-Mahēndra Takarāw (First Parliament BP Mahendra Collision)* (Kathmandu: Sangri-La Books, 2016).

18 HMG, *The Constitution of the Kingdom of Nepal 1959* (Kathmandu: Nepal Law Commission, 1959).

The people's mass movement in 1990 helped to restore democracy and led to the promulgation of the Constitution of the Kingdom of Nepal 1990 that ensured fundamental rights, an independent judiciary, periodic elections, check and balance of power. The constitution provisioned to form parliamentary committees (article 64) and review of legislation. However, only a few reviews were done by the parliamentary committees and they were focused on defective legislation, not on the consequences (intended and unintended) of legislations.

The restoration of democracy in 1990 provided a civil space for many social, cultural and political movements.<sup>19</sup> The Janajati movements emerged as both cultural and identity politics, demanding their cultural rights, recognition of their identity and their proportional participation in the state apparatus.<sup>20</sup> Similarly, the women's movement demanded equal property and citizenship rights and their equal participation in the state structure<sup>21</sup> provided more space for democracy and revision of existing legislation to address those demands. The Maoist insurgency that started in 1996 further questioned the existing exclusionary structures and laws that further provided for the better foundation of effective reviews of legislations.

The 2006 mass movement forced the King to give up his power and reinstate the parliament. The movement was a watershed moment in ensuring the rights of marginalized groups with a review of legislation. The Interim Constitution of Nepal 2007 laid the foundation for inclusive democracy and inclusive State structures, providing legal space for women, Janajati, Madhesi, Muslim, Dalit and other excluded groups. The constitution further provided a space for external bodies for reviews of legislations such as civil society organizations that could review the legislation and provide comments and recommendations to the parliament.

The Constitution of Nepal 2015 has mandated to form parliamentary committees (article 97 and 193) and provisioned monitoring functions for the committees in article 293.<sup>22</sup> Article 54 provides the right of the parliament to monitor the implemented policies. Similarly, the constitution also mandated to form independent constitutional bodies (Article 239, 252, 255, 258, 261, 262, 263, 264, and 248) for legislative reviews. The constitution also provides enough civil space for the emergence of civil society organizations for the review of legislation as external

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19 Susan Hangen, *The Rise of Ethnic Politics in Nepal: Democracy in the Margins* (New Delhi: Routledge, 2009); Guneratne, *supra* note 11; Lawoti, *supra* note 11; Krishna Hachhethu, "Political Parties of Nepal" (2006) 1-65 Baha Occas Pap 1.

20 Hangen, *supra* note 19.

21 Seira Tamang, "The Politics of Conflict and Difference or the Difference of Conflict in Politics: The Women's Movement in Nepal" (2009) 91:1 Fem Rev 61-80; Meena Acharya, "Women and the Economy: The Key Issues" in Laxmi Keshari Manandhar & Krishna B Bhattachan, eds, *GenD Democr Nepal* (Kathmandu: Central Department of Home Science Women's Studies Program Tribhuvan University & FES Nepal, 2001) 24; Lama-Rewal, *supra* note 12; Binda Pandey, *Women Empowerment in Politics: A Feminist Inquiry of Communist Party of Nepal- Unified Marxist Leninist (CPN-UML)* Kathmandu University Dhulikhel, Nepal, 2017) [unpublished].

22 GON, *supra* note 16.

bodies. Thus, the opening of different social, cultural and political spaces has further provided a democratic space and the effective use of PLS.

## V. EXISTING FORMS OF POST LEGISLATIVE SCRUTINY IN NEPAL

Like, Caplinskas' framework of PLS, in Nepal the pre-planned review and post-enactment of PLS are in practise. Different departments formed under different ministries and commissions are the first avenue (pre-planned) stage of PLS. Central government (Council of Ministers) and the office of the Prime Minister, parliamentary committees formed under the National Assembly and House of Representatives and other external bodies such as the bar associations are the other existing forms of the second avenue (post-enactment) for Post-legislative scrutiny.

The Constitution of Nepal 2015 has mandated for PLS in Nepal. Article 97 has mandated to form parliamentary committees as necessary for different parliamentary processes. Based upon article 97, the National Assembly (NA) has formed the Legislation Management Committee for management and review of legislation and parliamentary research endeavors.<sup>23</sup> Other parliamentary committees are mandated to review legislation, however, these are not mandatory like the Legislation Management Committee. But there are several other external bodies involved in reviewing legislation and providing feedback, comments and recommendation to the parliament and concerned government bodies.

### EXISTING FORMS OF POST LEGISLATIVE SCRUTINY IN NEPAL<sup>24</sup>

1) First Avenue (Pre-planned Post-legislative Scrutiny)					
1.1) commitment to review, departmental review and parliamentary control			1.2) Different departments of the concerned ministries		
2) Second Avenue (Post-Enactment Post-legislative Scrutiny): central government, parliamentary committee and external bodies					
2.1 Central Gov.	2.2 Parliamentary Committee		2.3 Constitutional Bodies		External Body
	House of Representative	National Assembly	Courts	Commissions /Auditor General	
Office of the Prime minister	Industry, Commerce, Labour and Consumer	Sustainable Development and Good Governance Committee	Supreme Court	Commission for the Investigation of Abuse of Authority	Civil Society organization

23 NA, *Rāṣṭriya Sabhā Niyamāvalī 2075 (National Assembly Regulation 2017)* (Kathmandu: National Assembly Federal Parliament, 2017).

24 Constitutions of Nepal 2015

	Interest Committee				
Council of Minister	Finance Committee	Legislation Management Committee	High Court	Auditor General	Nepal Bar Association
Ministries	Agriculture, Cooperatives and Natural Resources Committee	Delegated Legislation and Government Assurances	District Court	Public Service Commission	Consumer Society
	Law, Justice and Human Rights Committee	National Concern and Coordination Committee		Election Commission	
	Public Accounts Committee	Parliamentary Hearing Committee		National Human Rights Commission	
	State Affairs and Good Governance Committee	State Directive Principle, policy and responsibility		National Natural Resources and Fiscal Commission	
	International Relation Committee	Implementation and Monitoring Committee		National Women Commission:	
	Women and Social Committee			National Dalit Commission:	
	Development and Technology Committee			National Inclusion Commission	
	Education and Health Committee			Indigenous Nationalities Commission	
	Parliamentary Hearing Committee			Madhesi Commission	
	State Directive Principle, policy and responsibility			Tharu Commission	
				Muslim Commission	

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Implementati on and Monitoring Committee
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## VI. MPs IN THE EXECUTIVE ROLE

All the democratic constitutions of Nepal have adopted the UK Westminster model of democracy with parliament adopting the bicameral legislature. The Constitution of the Kingdom of Nepal 1959 and 1991 adopted a bicameral parliament - Upper House (National Assembly) and Lower House (House of Representatives). But the Interim Constitution of Nepal 2007 mandated the Constituent Assembly, functioning both as a parliament and constitution-drafting body. But again the Constitution of Nepal 2015 adopted a bicameral parliament; House of Representatives (Lower House) and National Assembly (Upper House).

Thus, the new federal legislature also has two houses, the House of Representatives and the National Assembly. The House of Representatives consists of 275 members with 165 members elected through the first-past-the-post (FPTP) electoral system with one being elected from each electoral constituency of 165 election constituencies and 110 members through proportional representation (PR) system with the whole country being considered a single electoral constituency. The parties must ensure proportional representation from women, Dalit, Janajati, Khas Arya, Madhesi, Tharu, Muslim and backward regions<sup>25</sup> while fielding and nominating candidates.

The National Assembly is a permanent house that consists of 59 members, 56 elected through single transferable votes, ensuring at least three women, one Dalit and one from persons with disabilities or minorities from each State by an electoral college. The Electoral College consists of the members of the state assembly, mayor and deputy mayor of the municipalities, chair and vice-chairpersons of rural municipalities with different weightage of votes by a member of the state assembly, chair, vice-chair, mayor and deputy mayors. Three members of the National Assembly are nominated by the President on the recommendation from the Council of Ministers with at least one woman. The term of the members of the National Assembly is six years.

The executive comprises the President, the Prime Minister, the Council of Ministers (Cabinet), constitutional and statutory bodies and the bureaucracy. The

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<sup>25</sup> The Government of Nepal listed Bajura, Bajhang, Kalikot, Humla, Achham, Jajarkot, Rolpa and Mugu districts as a backward districts of Nepal as their Human Development Index is measured the lowest.

bureaucracy comprises officials of the government recruited through the Public Service Commission and other government bodies directly. The president is a ceremonial head and is not involved in day-to-day functions of the government. The cabinet is the highest executive body that issues directives for managing day-to-day functions such as public services, development activities, etc. In this article, MPs in executive roles implies the involvement of MPs in certain development activities which are principally the job of bureaucracy.

Like other Westminster parliaments, the executive is a part of the parliament in Nepal. Deputy Prime Minister, ministers, state ministers and assistant ministers can take part in both Upper and Lower Houses and any parliamentary committees (Constitution of Nepal 2015, Section 8, article 96). The opposition is also a part of the parliament and sits within the parliament and plays a key role in undertaking the scrutiny of legislation. Moreover, the opposition plays a vital role in making the executive accountable to the citizens. They often raise questions in parliament about the functioning of the government and protest against defective policies. The parliamentary committees can summon ministers and top bureaucrats to answer the concerns of the legislators related to public interests to make the executive accountable to the public.

The involvement of legislators in executive roles (development activities) in many developing countries is not a new phenomenon.<sup>26</sup> But their dual role has not only raised questions on the formulation of fair and sustainable policies but also the devolution of power and issues of an independent legislative.<sup>27</sup> For example, MPs involvement in the executive role cannot fully engage in their business of policy-making, and hence the probability of formulating unsustainable and flawed policies is higher. Most importantly, their executive roles often overlap and challenge legislative roles.

The first Communist Party of Nepal-United Marxist Leninist (CPN-UML)-led government headed by Man Mohan Adhikari first institutionalized the legislators' involvement in development activities (executive roles) in 1994. Bharat Mohan Adhikari, the finance minister, officially allocated budgets for MPs (Members of House of Representatives (HOR)) for their constituency development which is popularly known as Constituency Development Fund (CDF). The rationale behind the allocation of CDF was to strengthen and boost local development.<sup>28</sup> The Constituency Development Fund has been dispersed through the District Development Committee. The MPs make plans as they see fit, select areas and

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26 Harry Blair, "Constituency Development Funds in India Do They Invite a Political Business Cycle?" (2017) LII:31 Econ Polit Weekly 2 99-105; Christina Murray, "Budget Brief No.12 - Constituency Development Funds: Are They Constitutional?", (2011), online: <<https://www.internationalbudget.org/wp-content/uploads/2011/04/brief12.pdf>>.

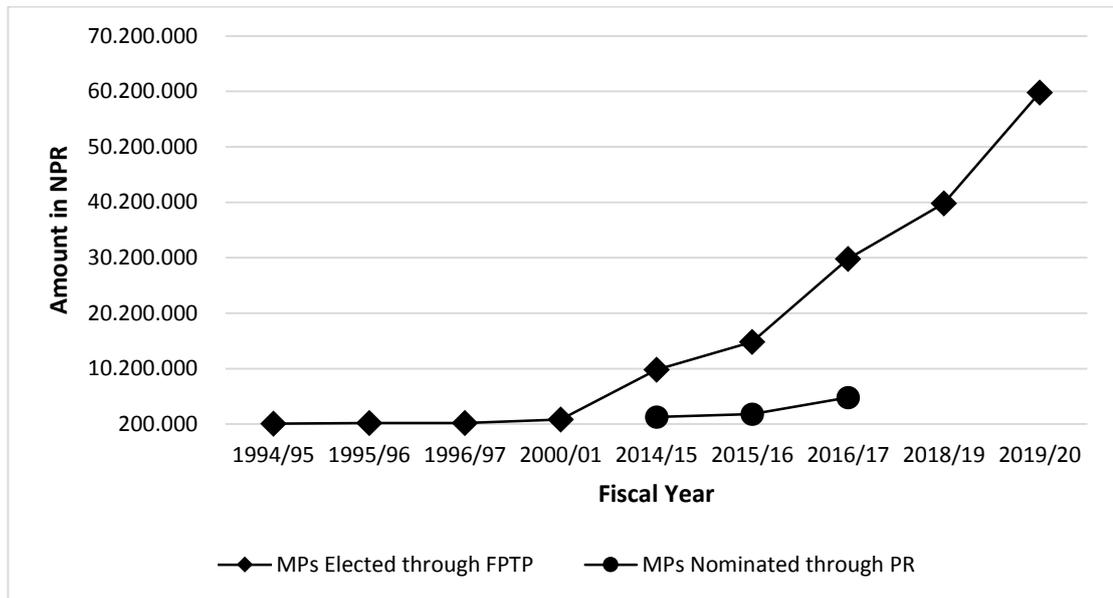
27 FEG-Nepal, *supra* note 2; Blair, *supra* note 26.

28 MOF, *Budget Speech 1994/95* (Kathmandu: Government of Nepal Ministry of Finance, 1994).

activities and allocate the budget. The MPs often allocate the budget to the areas where they received higher votes and are under the influences of their party cadres.

The policy of financial spending by MPs was given continuity by the succeeding government headed by Nepali Congress Party in 1996. Ramsharan Mahat, finance minister, continued the programme and allocated NPR 400,000 NPR for each Member of Parliament. The amount of CDF increased to NPR 1,000,000 during the time of Mahesh Acharya, the finance minister from the Nepali Congress party in 2001. The CDF was not allocated during the Maoist insurgency after 2001, the direct rule of the king from 2005 to 2006 and the transitional phase after the people's movement 2006. The programme was again restarted by Ramsharn Mahat, the finance minister from Nepali Congress, in 2010 with an increase of funds to 10 million to each member of the Constituent Assembly who is elected through FPTP and 1.5 million to each member of the Constituent Assembly who was nominated through PR.

This programme has continued by consecutive governments with increases in the amounts. In 2011, Ramsharan Mahat further increased the amount of CDF to 15 million to each member of the Constituent Assembly who was elected through FPTP and 2 million to those through the PR. The amount of CDF further increased to 30 million to each MP elected though FPTP and 5 million to each MP nominated through PR in 2012/13. After the promulgation of the new Constitution of Nepal in 2015, and the election of the House of Representatives in 2017, the new government headed by KP Sharma Oli again continued the programme with an increase of fund to 40 million to each MP who is elected via FPTP in 2018. The government only allocated the fund to the MPs who are elected via FPTP and stopped the fund to the MPs of the National Assembly and nominated through PR. The amount was further increased to 60 million in 2019.



*Figure 1: Constituency Development Fund Spending Per Member of Parliament 1994 - 2019.*<sup>29</sup>

The trend of providing financial incentives to MPs has continued in the newly formed state governments as well. Except for Gandaki state, all the states have allocated funds to the state MPs for their constituency development. Scaling funds for state MPs indicates pork-barreling has become an unavoidable phenomenon in parliamentary affairs.

Karnali state has allocated the highest amount for the CDF for each MPs. Karnali and state 2 have allocated 50 million NPR for each MPs. State 2 has allocated 25 million NPR for each MPs. Similarly, state 1 and Sudur-Paschim state have allocated equal 20 million NPR for each MP. Bagmati state has allocated 10 million to each MP. Thus the CDF has been a part of newly formed state government. This has not only promoted clientelism but strengthened the ties between client and patron.<sup>30</sup>

<sup>29</sup> Budget Speech 1994/95, 195/96, 1996/97, 2000/01, 2014/15, 2015/16, 2016/17, 2018/19 and 2019/20.

<sup>30</sup> FEG-Nepal, *supra* note 2; Kristie Druzca, "The Politics Behind Social Protection in Nepal" (2017) XX:X Asian J Comp Polit 1 25.

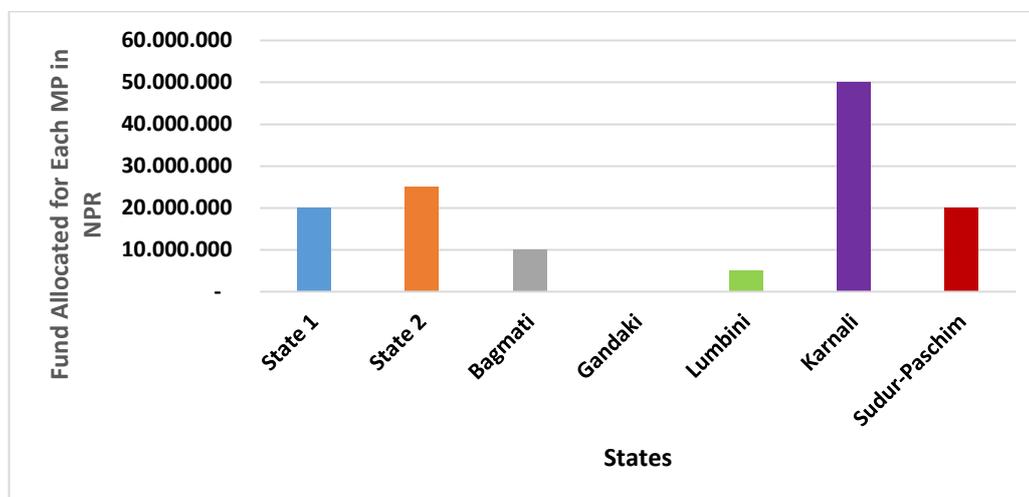


Figure 2: Fund Allocated for each MP in States<sup>31</sup>

Pitambar Sharma, a planning expert argues the CDF will increase in consecutive upcoming years.<sup>32</sup> The increase in funds to the legislators has helped to centralize the resources and hence helped deinstitutionalise federalism in Nepal. The federal states have been receiving lower budgets because the legislators are getting more funds that often overlap with the local budget in the local bodies.

The CDF allocated for development projects often overlap with the development projects of the local bodies – municipalities. For example, CDF has been allocating funds for road construction, construction of irrigation canals etc. and municipalities are also allocating the funds for similar projects. This has created the conflicts and confusions between the locally elected officials (Mayors, deputy mayors, ward chairs and members) and MPs of the federal and state parliaments. Ram Narayan Bidari, a chair of Delegated Legislation and Government Assurances Committee, National Assembly remarked: “if the MPs have interests to involve in an executive role, they should contest for local election”.

Providing CDF to MPs also contests the devolution of power. Ideally, the legislators make the policy and locally elected officials (Mayor, deputy mayor, ward chair and ward members) including bureaucrats implement the policy at the local level. For example, the CDF has helped to centralize the resources and power. The CDF is allocated in central level. Moreover, the fund push MPs to exercise their power locally with their involvement in local development projects through the CDF.

31 Provincial Budgets Fiscal Year 2019.

32 Krishna Acharya, “Sānsadakō Hātāmā Vikāsa Bajēṭakō 5% (5% Budget in the Hands of Member of Parliament)”, *The Kantipur* (4 June 2019) 1.

The involvement of Nepali legislators in executive roles has been increasing every year.<sup>33</sup> The volume of CDF has continuously increased over time since the government formally allocated budgets for MPs as SDF in 1994. The government allocated 0.25 million Nepali Rupees which was doubled in 1996 to 0.5 million Nepali Rupees. The CDF received one million in 2000. The programme was dissolved during the direct rule of the King 2002 - 2006 and political transitional period 2006 - 2013. The CDF program again initiated in 2014 by the finance minister Ramsharan Mahat to the amount of 10 million NPR. The amount increased to 15, 30, 40 and 60 million in the fiscal years 2015/16, 2016/17, 2018/19 and 2019/20 respectively.

The continuous increase in the amount of CDF indicates an increase of MPs involvement in the executive role. The increase of MPs executive roles demonstrates a decrease in their role as legislators. Meaning they are engaging less in policy making and their periodic reviews. Thus, PLS processes have been impacted by CDF.

The increasing trend of involvement of MPs in development activities has increased absenteeism in Parliament (National Assembly and House of Representatives).<sup>34</sup> Many MPs often visit their constituencies for development work. The chair of National Assembly Ganesh Timelsena states "It is a real piety that half of the chairs of the National Assembly are often empty".<sup>35</sup> Many times it has been challenging to meet quorum and pass laws.

MPs attendance in parliament is not satisfactory. A record of parliament reveals that one-fourth of MPs are not regularly attending meetings which is not a good sign for policy making.<sup>36</sup> Martin Chautari's briefing paper of 2014 shows the average attendance of MPs in the 2008 Constituent Assembly was 62 percent and 76 percent in the CA 2013. It is reported MPs attend the house late and leave early.<sup>37</sup> This a lack of commitment by MPs in regard to policy making and reviewing legislation.

One of the reasons for MPs' decreasing interests in parliamentary affairs is party leadership often intervenes in policy making processes by putting a whip to their MPs to vote for or to vote against the policy.<sup>38</sup> For instance, despite some reservations in

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33 MOF, *supra* note 28; MOF, *Budget Speech 1995/96* (Kathmandu: Government of Nepal Ministry of Finance, 1995); MOF, *Budget Speech 1996/97* (Kathmandu: Government of Nepal Ministry of Finance, 1996); MOF, *Budget Speech 2000/01* (Kathmandu: Government of Nepal Ministry of Finance, 2000); MOF, *Budget Speech 2014/15* (Kathmandu: Government of Nepal Ministry of Finance, 2014); MOF, *Budget Speech 2015/16* (Kathmandu: Government of Nepal Ministry of Finance, 2015); MOF, *Budget Speech 2016/17* (Kathmandu: Government of Nepal Ministry of Finance, 2016); MOF, *Budget Speech 2018/19* (Kathmandu: Government of Nepal Ministry of Finance, 2018); MOF, *Budget Speech 2019/20* (Kathmandu: Government of Nepal Ministry of Finance, 2019).

34 Martin Chautari, "Sanvidhāna sabhā 2 mā upasthiti ra prakriyā (Attendance and Process on Constituent Assembly II)" (2014) 11 Brief Pap.

35 Timelsena, *supra* note 13.

36 Chautari, *supra* note 34.

37 *Ibid.*

38 Mahato, Rai(Paudyal) & Baruah, *supra* note 12.

the Constitution of Nepal 2015 related to the inclusion of marginalized groups, restructuring state and secularism, amongst the legislators, they followed the party whip to vote for the promulgation of the Constitution of Nepal 2015. The MPs are vulnerable to the party leadership due to the anti-defection law in Nepal. The law does not allow MPs to switch partie(s) or be independent.<sup>39</sup> The party can dismiss their MPs if they do not follow party decisions. The anti-defection law in Nepal has demoralised an independent parliament and independent decisions of the legislators and hence meaningful PLS.

Similarly, top political leaders often form separate apex political committees to resolve problems and disagreements amongst the parties and within the party that often bypass and minimise the roles of parliament and MPs.<sup>40</sup> Real decision-making occurs 'behind the close door' and outside of the public parliamentary view. For example, major political parties formed an apex political committee to solidify consensus on federalism.<sup>41</sup> The formation of apex political bodies has not only influenced the policy making but also minimizes the role of independent parliamentary committees. This un-democratic process often minimizes the legislators' role in policy-making and reviews.

The stronger clientelistic political structure further forced MPs to engage in executive jobs. The more they engage in immediate results oriented and development jobs at the local level the higher the chances of getting elected for the next term. Therefore, MPs tends to become involved in executive jobs. Manish Kumar Suman, a senior leader of Rasthya Janata Party and a current MP in the federal parliament remarked "people's expectations and priorities on development work forced us to engage in executive jobs". But the justification of Manish on their engagement with executive jobs is a weak stand principally and practically. They can facilitate development jobs by forming better public policies and reviewing them periodically.

In many developing countries, the clientelistic political structure has forced MPs to become increasingly involved in executive jobs.<sup>42</sup> To institutionalize clientelism, legislators often allocate a separate budget for legislators for development activities based on their preferences. This trend is increasing parallel to the costs of the election. The MPs' involvement in executive jobs has often pushed them for political corruption with diluting their roles as an independent policy maker.

Top official bureaucrats during an informal conversation said that there is a conflict of interest between Executives (Ministers and bureaucrats) with legislative (Members of Parliament). Legislative members often engage in different

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39 ECN, *Political Party Act 2016 (3rd Amendment in 2019)* (Kathmandu: Election Commission of Nepal, 2016).

40 Mahato, Rai(Paudyal) & Baruah, *supra* note 12.

41 Kamal Dev Bhattarai, "Prickly Statute Issues Land in Dialogue Panel", *Kathmandu Post* (11 June 2014) 4.

42 *Informal Talk*, by Manish Kumar Suman (Kathmandu, 2019).

development activities other than policy jurisdictions.<sup>43</sup> At the same time, executives often try to engage legislators in an executive role (such as development activities) to minimize them playing an active role in monitoring and checking their financial irregularities and corruption. Therefore, the executive often tries to engage legislators in executive jobs and minimize their role and influence the review of legislation.

MPs' involvement in the executive role has contested the virtue of an independent legislature and the principle of checks and balance between the legislature and executive. Recently, there is a trend with legislators visiting various ministries lobbying requesting allocations of higher budgets for their constituencies.<sup>44</sup> This minimizes their watchdog duties as Parliamentarians. Corruption continues to rise in Nepal due to inefficient monitoring of the executive by the legislature.<sup>45</sup> Timalsina (2019) urged all MPs to halt door-to-door visits to request increases of their constituency budgets.

Ram Narayan Bidari affirmed engaging legislators in executive roles is fundamentally wrong. He remarked:

Providing money to the MPs as the CDF fundamentally wrong in three ways: ideally, constitutionally and legally. PMs are legislators and have three main jobs - form system, policy and government. Legislators pass the budget and its implementation, making field plans, selecting development plans are not their job.

Due to the Maoist insurgency and post-Mao the peace process particularly after 2006, the State focused on peace and the constitution-making process by holding the Constituent Assembly Election. In the meantime, local bodies (municipalities) were without elected representatives from 2002 hence headed by bureaucrats. At that time providing CDF to the legislators seemed practical and started to provide CDF in 2014 after the second CA election 2013 which continued in the following years to provide pace to local development. But after the local body election in 2017, there was discourse as to why legislators should be directly involved in development jobs.

Ram Narayan Bidari, a member of National Assembly urged all MPs to contest elections at the local level if they are interested in CDF. MPs are elected not just to represent particular constituencies they are the representatives of the country and are designated to improve public policy in Nepal.

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43 Samuel P Huntington, "Congressional Responses to the Twentieth Century" in David B Truman, ed, *Congr Am Future*, 2nd ed (Englewood Cliff: Prentice-Hall, 1972) 5; Bert A Rockman, "Legislative-Executive Relations and Legislative Oversight" (1984) 9:3 *Legis Stud Q* 87-440.

44 Timelsena, *supra* note 13.

45 AGON, *supra* note 5.

## VII. EXPOSURE OF THE LEGISLATORS

The level of exposure entails both engagements and interactions in political activities that matter for policy making and PLS.<sup>46</sup> For example, the frequency and quality of MPs engagement in political activities helps policy formulations and updates the functionality of the legislations. “The ground updates are essential inputs for better policy formulations and reviews on legislations”.<sup>47</sup> It is challenging for the legislators to switch back and forth to their respective constituency and attending parliamentary affairs.

The engagements in political activities are higher amongst those MPs who were elected from the First Past the Post (FPTP) electoral system as opposed to the MPs who were nominated through the Proportional Representation (PR) and Member of National Assembly systems. The MPs who are elected through the FPTP focus more on their constituency and are involved at the micro level political management process in municipalities to maintain good relations with their voters; which helps MPs to be re-elected for the next term. Many scholars argue that more political activities at the local level help to strengthen a strong patron-client relationship.<sup>48</sup> Maintaining close relationships at the local level aids MPs to remain updated on realities at the grassroots and reflect these in their policy roles. Furthermore, the grassroots level updates help them identify which legislation is competent to meet the needs of locals.

Engagement in political activities by MPs is often determined by the proximity of the parliamentary office. The MPs often visit constituencies that are closer to Kathmandu and other respective State parliamentary offices and engage in local political activities (including development activities). Geography plays a key role in their engagement and interactions with local people. For instance, MPs from the Tarai region frequently visit their constituencies and engage in political activities more so than MPs from remote hills. When MPs from remote hills visit their districts, the interactions mostly center around the headquarter of the district. The MPs from the remote hill district, Jumla remarked “*Geography matters for the frequency of political activities in the constituency. I hardly traveled more than six times a year whilst I was a member of the Constituent Assembly. Visiting the constituency helps to update me on policy needs and observe which policies work and which do not*”.

The level of exposure further illustrates the MPs willingness and interests of interactions with different stakeholders. Unfortunately, the interactions with

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46 Josefina Erikson & Cecilia Josefsson, “Does Higher Education Matter for MPs in their Parliamentary Work? Evidence from the Swedish Parliament” (2019) 55:1 J Represent Democr 65–80.

47 *Personal Interview for Post Legislative Scrutiny*, by Surendra Prasad Chaudhary (Birjung, 2019).

48 *Personal Interview*, by Devendra Raj Pandey (Kathmandu, 2015); Dhruba Kumar, *Electoral Violence and Volatility in Nepal* (Kathmandu: Vajra Publications, 2010).

concerned stakeholders and experts are seriously lacking in public policy making processes. The public is often discarded whilst making policies in Nepal. For example, despite the provision of civic space in parliament to participate and discuss the policy-making process, parliament seldom facilitates public participation. Similarly, the parliamentary committees fail to organize consultations with civil society pertaining to policy making process.

Discarding public consultations during policy making process fosters tension between parliament and civil society. For example, due to a lack of consultation for the *Guthi* Bill in June 2019, there was a mass protest, the Bill was considered defective and failed to address the issues of *Guthi*.<sup>49</sup> Janak Rai, a Professor of Anthropology stated, “*The culture of interactions is seriously lacking among the legislators which is a part and parcel of their exposure*”. Legislators are not interested in public consultations during policy making and subsequently in their review.

Rajendra Dahal, a chief editor of the *Sikshak* magazine argues that indifference amongst the legislators regarding public interaction demonstrates inadequate exposure that often leads to domination of certain interest groups in the policy making and PLS. According to him, due to the limited exposure of legislators to deal with different stakeholders and to hear them, the policy formulation process is often deviated and diverted. He provided an example of the education; “*The government decided to change and update the 11 and 12<sup>th</sup> grade prospectus, but the textbook printed without any prospectus*”.<sup>50</sup> This example illustrates how interest groups play a role in policy formulation without any consultation with any concerned stakeholders.

PLS provides input for evidence-based policy, founded upon public consultations. Public consultations provide details from the ground, diverse views, highlight implications of policies and their intended effects. Therefore, consultations with a range of stakeholders during policy-making forms the basis for PLS and evidence-based policies.

## VIII. POLICY MAKING PROCESS

The standard law-making process in Nepal entails preliminaries, introduction of a Bill, second reading, debate (clause by clause), third reading and assent of Bill's by the President. With the approval of parliament, the Speaker may “fast track” a bill by suspending the rules. An ordinance can be promulgated with the recommendation

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49 Anup Ojha, “In Biggest Protest Since the 2006 People’s Movement, Thousands of Protesters Gather to Oppose the Guthi Bill”, *Kathmandu Post* (19 June 2019); ALJAZEERA, “Thousands in Nepal Protest against Cultural ‘Guthi’ Bill”, *Aljazeera* (19 June 2019); THT, “Protests against Guthi Bill to Continue in Kathmandu Valley”, *Himal Times* (14 June 2019).

50 *Personal Interview*, by Rajendra Dahal (Kathmandu, 2019).

of the cabinet to take immediate action if the Houses are not in session. However, the ordinance must be tabled when the Houses are held and if not passed by both Houses, it shall ipso facto be ineffective.

At the preliminary stage, an MP intending to introduce a Bill should state its rationale to the parliamentary secretariat. Bills that require delegated or subordinate legislation for execution must be accompanied by a memorandum stating the nature and limitations and reasons for having delegated or subordinated legislation. MPs may seek assistance from the parliament secretariat in drafting Bills. However, government Bills such as money Bill and other Bills related to security such as police Bills are drafted by the concerned departments. The copies of the Bill are made available to the MPs 48 hours before the motion. An MP seeking to introduce the Bill and MPs who oppose the Bill are allowed to make brief statements in the house. The speaker then provides a motion to introduce the Bill. The legislative process begins if the parliament votes yes.

The second reading of the Bill begins when an MP introduces a Bill and proposes whether it be considered immediately or circulated for public comments whereas other options may be proposed by other members. The rationale and objectives are discussed amongst the MPs and are allowed 72 hours to provide any suggestions and amendments to the proposed Bills. If the option for public comments is adopted, the Bill is published in the *Nepal Rajpatra (Nepal Gazette)*, an official printing press of the government to publish official documents such as acts, laws or other media.<sup>51</sup> The speaker determines the time for public comments. The MP assigned to collect and compile public opinion and submit for discussion. After a general discussion, the MP may propose the Bill be discussed in the parliament or referred to the Legislative Committee.

Usually, most of the Bills are sent to the Legislative Committees for clause by clause discussions. After the discussions, the committee submits its report to the parliament. The Bill is then considered by the parliament or the Bill will be sent back to the Legislative Committee for consideration. At this stage, a member who introduces the Bill may withdraw the Bill. The Bill passes if the majority votes for it and sends it to other houses as soon as possible and if passed by the receiving house then the Bill is presented to the President for assent.

The fast track approach has been frequently used after 2008.<sup>52</sup> The fast track ways of making policies skips the law making process and increases the probability of making defective policies. The fast track method of making policy avoids public

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51 FPS, *Saṅghīya Sansada Pratinidhi Sabhā Niyamā walī, 2075 (Regulations of Federal Parliament 2017)* (Kathmandu: Federal Parliament Secretariat, 2017).

52 TAF, *A Guide to Government in Nepal: Structures, Functions, and Practices* (Kathmandu: The Asia Foundation Nepal, 2012).

consultations and other legal, social and political processes. Avoiding policy consultation in the parliamentary committees and public consultation is a serious defect in the policy-making processes and hence PLS and quality of democracy in Nepal.

Fast track ways of making public policy avoid important democratic processes. Pradip Gir, politician and current member of the House of Representative argues that a fast track method of making policy avoids serious democratic norms.<sup>53</sup> According to Giri, democracy entails some unavoidable processes and procedures. According to him, the parties promulgated the constitution of Nepal 2015 through the fast track method - avoiding the democratic process and the outcome of which has now become obvious. The constitution cannot be a binding document for all social groups in Nepal. Madhesi, Tharu, Janajati, Muslim and other deprived social groups are still demanding amendments to the constitution relating to inclusive clauses and restructuring the federal states. The constitution has provided reservations to Khas Arya who are one of the most privileged social groups of Nepal by almost doubling their privileges. Similarly, deprived social groups are demanding ethnic-based federalism to address their social identity and consider the demarcation of the federal states which are not scientific according to them. However, the parties made a separate constitution drafting committee comprised of four people that avoided the participation of the members of the Constituent Assembly for the constitution drafting process and discussions on the above issues. Therefore, he argues that policymakers should not avoid the fundamental steps and process of policy making as can be seen it shortchanges minority groups and sidelines their interests.

Avoiding the process of policy making creates issues of public acceptability. For example, the Social Practises (Reform) Act 1976 was amended on 21 January 2010 to update and make it more contextual and timely without any consultations.<sup>54</sup> The Act made granting and taking dowry a punishable offense (article 5.1, 5.2 and 5.3). Similarly, the act made the restriction on the number of guests to be invited for *Janī* (guests invited to accompany the groom to go to bride's house for wedding) (article 7.1, 7.2, 7.3, 7.4, and 7.5); that stated no more than 51 people shall go to *Janī* including people assigned for an orchestra. Similarly, article 8 stated that no more than 51 people shall be invited to the wedding party from both the bride and groom sides. The act seems very reformative in terms of social reform in Nepali society but failed to come into practise as the act could not acknowledge the social norms, values, structures and traditions of Nepal. Most of the people neither followed the act nor could government enforce within society. This shows the avoidance of the process of policymaking makes policies unacceptable and dysfunctional.

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<sup>53</sup> Giri, *supra* note 13.

<sup>54</sup> NLC, *Social Practices (Reform) Act, 2033 (1976): Third Amendment 2010* (Kathmandu: Nepal Law Commission, 1976).

Pradip Giri ironically remarks: “*we never discuss on the policy rather we always discuss on the politicians*”.<sup>55</sup> This indicates how a person is important in the system rather than the institutions and policy. This is because the legislators seldom engage in policymaking jobs and its subsequent revisions and amendments of dysfunctional policies.

The process of policy-making creates legitimacy and a sense of ownership. The process entails discussions, debates and consultations amongst the members of the parliamentary committee, in parliament and with the people. These debates, discussions and consultations provide the space to draw conclusions based on the insights and feedback from different points of view. The participation of the people in the discussion helps them have ownership. In this way, going through the democratic process creates legitimacy and a sense of ownership.

Avoiding the public in the policy making process has serious impact on the post-legislative scrutiny (PLS). The public consultations whilst formulating policies increases PLS. The consultation during the policy-making process makes a legislator more accountable and responsible for its impact on the public. Moreover, it aids legislators to infer the impact of policies and implement plans to review legislation. In this way, public consultation whilst making policies builds the foundation for post-legislative scrutiny.

## IX. CONFLICT OF INTEREST

There is a growing trend that people from the corporate sector and interest groups are getting electoral tickets from major political parties for the plurality system of election.<sup>56</sup> Moreover, since the adoption of the mixed model<sup>57</sup> system of the election, the trend of nominations of MPs from the corporate and interest groups has dramatically increased. Businessmen are often nominated on the PR list and get elected as legislators. This creates a conflict of interest whilst making policies and hence also greatly impact the quality of PLS.

In recent days, the election has been extremely costly.<sup>58</sup> In institutionalized democracies in developed countries, the parties often receive sufficient funds from the party membership. But in developing countries, the membership levy is still not sufficient for political activities and election campaigns and parties rely on other

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55 Giri, *supra* note 13.

56 ECN, *Sthānīya Taha Nirvāchan, 2074 Kō Pariṇām Pustika (Election Result of the Local Eleciton 2017)* (Kathmandu: Election Commission of Nepal, 2018).

57 The Interim Constitution of Nepal adopted a mixed model of electoral system 40 percent of the MPs elected from First Past the Post (FPTP) system of election from the single member constituency; 56 from PR (open list) and 4 percent from the nomination from the cabinet. The constitution of 2015 made it reverse 60 percent from the FPTP and 40 percent from the PR (close list).

58 TAF, *Study on the Election Campaign Finance: Local, Provincial and Federal Elections in Nepal, 2017* (Kathmandu: The Asia Foundation Nepal, 2017); Hygor Piaget M Melo et al, “The Price of a Vote: Diseconomy in Proportional Elections” (2018) 13:8 PLoS ONE 1-13.

external sources. For example, in South Asian countries, parties often receive funding from the corporate sector. Alongside the corporate funding, political parties have been increasingly accommodating people from the corporate sector into politics. Now it has become a popular cliché that ‘money muscles and power’ are needed to win the election.<sup>59</sup>

The domination of the corporate sector in policy-making processes has raised serious concerns on conflict of interests. For instance, MPs who run large private medical colleges and hospitals often lobby to become part of health committees. Similarly, MPs who run private schools request positions on the education committee. Legislators engagement in the parliamentary committee overlaps with their interests and hence influences sustainable policies and PLS.

This issue of conflict of interests amongst the legislators is not a new phenomenon in Nepali politics. But the trend of conflict of interests has been increasing over time in alignment with the rise of election cost and political activities. This weakens both the policy making process and PLS.

In the 2013 Constituent Assembly, the composition of CA committees revealed the conflict of interest among the member.<sup>60</sup> Umesh Shrestha, Tejulal Chaudhary from Nepali Congress Party; Bamshidhar Mishra, Rajendra Prasad Pandey from CPN-UML, Laxman Rajbanshi from Nepa Rastriya Party and Baburam Pokhrel from Forum Loktantrik Party had owned and was affiliated with expensive private schools and was a Member Women, Children and Social Welfare Committee that was also responsible to form, review and oversee education affairs. Their involvement in both private education institutions and in the parliamentary committee that is responsible for overseeing education has raised the issue of conflict of interests.

Similarly, MPs who were/are also contractors and bankers were included in the Finance Committee in the last 2013 Constituent Assembly. For example, Ichha Raj Tamang from CPN-UML who is also a banker; Om Devi Malla from Nepali Congress, who is affiliated with microfinance were included in the finance committee. Similarly, Indra Bahadur Baniya from Nepali Congress and Bikram Pandey from Rastriya Prajatantra Party who were/are contractors were included in the finance committee. Raj Kumar Agrawal from Rastriya Prajatantra Party, Lyarkal Lama from Maoist party, Bimal Kumar Kediya from Sadbhawana Party and Shrawan Kumar Agrawal from Madhesi Janadhikar Forum who were/are businessman were included in the finance committee. Their involvement in the Finance Committee and their involvement in their own big business has created a conflict of interest.

Contractors and industrialists were included respectively in the Development Committee and Commerce and Consumer Protection Committee. For example, Ang Tawa Sherpa and Janardan Dhakal who were/are contractors were included in the Development Committee. Similarly, Anil Kumar Rungata, Pawankumar Sharada,

<sup>59</sup> Hachhethu, *supra* note 19; Kumar, *supra* note 48.

<sup>60</sup> Naya Patrika, “Janatākō Hōina, Aphnai Kampanikō Pratinidhikō Rūpamā Sansadmā Bōlchan Vyāpārī Sānsada (Not for People, MPs Speak for their Company in the Parliament)”, *Naya Patrika* (30 July 2019) 1; ECN, नेपालको निर्वाचन इतिहास (*History of Election in Nepal*) (Kathmandu: Election Commission of Nepal, 2016).

Mahendra Serchen, and Rajyalaxmi Golcha who were/are industrialists were included in the Commerce and Consumer Protection Committee. People who are involved in managing industry and making policy on commerce and consumer has shown the conflict of interest.

In the current parliament formed in 2017 elections, there were overlapping roles and conflicts of interest. For example, Hari Narayan Rauniar, Jip Tsering Lama and Bahadur Singh Lama who are contractors and are members of the Development Committee. Similarly, finance committee entails MPs Motilal Dugad and Juli Kumari Mahato who are industrialists. In relation to the 2013 parliament, the current Education Committee entails Umesh Shrestha and Narayan Marashini who run private schools.

Likewise, the Public Account Committee entails MPs who are contractors. For example, Mohan Acharya is a contractor and is a member of the Public Account Committee. Similarly, the Commerce and Labour Committee includes MPs who run foreign employment agencies. For example, LP Sawa Limbu is a former chair of foreign employment entrepreneur organization. He is still, directly and indirectly, involves foreign employment agencies to send workers to Middle Eastern countries.

Legislators conflict of interest affects the formulation of better public policies. For example, in 2016, the parliament submitted a Bill to amend the Bank and Financial Institution Act 2006. The Bill proposed the terms and tenure of Chief Executive Officers (CEO) and managers of the Bank. The Bill proposed that the term of the CEOs and managers of the bank and financial institutions shall be of four years and the same person can be the CEO of the financial institution for a maximum of two consecutive terms. But when the Bill was sent to Finance Committee for discussion, Iccha Raj Tamang, a member of the Finance Committee and Chair of the Civil Bank resisted against the Bill as a banker and tried to manipulate the Bill.<sup>61</sup> Hence, if the same person is involved in certain businesses and is a part of a parliamentary committee of the same interest creates a conflict of interest among the MPs which not only affects better public policy making but also PLS.

Similarly, a large number of complaints against the manpower companies including Riza Overseas Employment owned by lawmaker Kamala Devi Sharma were filed in the International Relations and Labour Committee of the Parliament. The committee formed a sub-committee to investigate the cases and take necessary action against them. Since MP Kamala Devi Sharma was a member of the International Relations and Labour Committee of the Parliament, she lobbied not to take any actions against the manpower companies. The committee made no investigation nor prepared any report.

When there is a conflict of interest, lawmakers' private interests dominate public interests. For example, the MPs who run private schools often lobby to formulate education policies reflecting their interests. CK Lal, a political analyst remarks that if there are conflicts of interests then it is rare that lawmakers stand for public goods

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61 Sagar Ghimire, "Bankers' Lawmaker Blurring Line between Corporate Lobby, Lawmaking", *My Republica* (2016); Ashok Dahal, "MPs Influencing Parliamentary Decisions in Clear Conflict of Interest", *My Republica* (11 July 2016); Naya Patrika, *supra* note 60.

and interests. MPs who have a conflict of interest most often formulate policy based on their interests.

CK Lal further remarks:

If there are businessmen and industrialists in the parliament, their private (personal) interests get priority and public interests do not get priority. The legislature which is assigned to form the policy for the country becomes the platform to promote personal interests. When there is a contestation between personal and public interests, most of the people put their interests in priority. There are hardly any businessman and industrialists who put their interests at loss and work for public interests (Naya Patrika Daily, p. 1)

The conflict of interest in the policy sphere creates an invisible mentality of not holding PLS by the parliamentary committee. The reason behind that, the policies are often formed to benefit the particular interest groups and do not want to review the legislation. In this way, the conflict of interest among the legislators adversely affects not only the policy making but also PLS.

## X. CONCLUSION

In conclusion, there is a direct relationship between the quality of policy making and meaningful PLS. This article has surveyed the history of PLS and its development over time. The PLS cannot flourish in autocratic and totalitarian regimes and systems of government. For example, during the Rana oligarchy, no provision for the fundamental rights and rule of law was maintained. The democratic transition in 1951 generated a space for rule of law and PLS. During the Panchayat regime 1960–1990 the King attempted to establish PLS, but this was an ineffective strategy as he was the Head of State. The restoration of democracy in 1990 established PLS by provisioning the parliamentary committees, commissions, auditor general and other provisions for legislation review.

Despite the provisions of PLS in the constitution and other acts, rules and regulations, the scrutiny is not effective for several reasons. The legislators deviated from their job of policymaking and their reviews, amendments and recommendations to concerned bodies. For example, legislators' engagement in the executive job has been continuously increasing since 1990. This has affected better policy formulations and post-legislative scrutiny. Since 1994 the CDF has allocated 60 million (in 2019/20) budget from 0.25 million for MPs. This indicates MPs are increasing engagement in development activities. The major reason is due to an increasing trend of clientelist politics and cost of elections.

The level of interaction with the voters' among MPs who are directly elected is higher than the MPs who are nominated through PR and are members of the National Assembly. Similarly, the interactions with voters are dependent on the proximity of their constituency and the location of parliamentary offices. The

interaction with voters to help MPs become acquainted with grassroots helps reflect on policy formulations and better PLS. Due to MPs' poor exposure (lack of interest in public consultations), meaningful PLS in Nepal is yet to be achieved.

The fast track process of formulating policies and lack of public consultations exacerbates policy defects and ineffective PLS. This approach to making public policy often skips important democratic processes and thwarts meaningful PLS. It further raises issues of legitimacy and public acceptability of legislation. Therefore, for better and meaningful PLS, democratic processes must be followed. Similarly, conflict of interests often overlaps amongst MPs that further challenges meaningful PLS in Nepal.

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