

# स्थानीय सरकार सबलीकरण



The Asia Foundation

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## Policy Dialogue on Pertinent Legal and Regulatory Issues in Restructuring Subnational Governance in Nepal (15 June 2017)

### Rapporteur's Notes

A policy dialogue on Pertinent Legal and Regulatory Issues in Restructuring Subnational Governance in Nepal was held on 15 June 2017, at Hotel Shangri-La, Kathmandu. The dialogue was organized in collaboration with Nepal Law Society and attended by 30 participants comprising prominent experts on constitutional law and subnational governance, donor representatives, researchers, and other relevant stakeholders.

The dialogue focused on the key features of the 2015 Constitution, the laws needed for its implementation, and key legislative issues relating to subnational governance.

The dialogue was led by Madhab Paudel, Former Secretary of the Ministry of Law, Justice, and Parliamentary Affairs (MoLJPA); moderated by Purna Man Shakya, Senior Advocate and Professor of Law; and facilitated by Krishna Man Pradhan, Executive Director of Nepal Law Society.

### **Context**

*Purna Man Shakya*

The first phase of local level elections in three provinces was completed on 14 May 2017, while the second phase in provinces one, five, and seven is planned for end of June. It was announced that there will be a third phase in province two in September 2017. After these are completed, elections will be held at the provincial and federal level. It is essential that elections of all three tiers of government be completed by 21 January 2018, in line with the Constitution.

Newly elected officials are enthusiastic to deliver on the commitments made while campaigning. However, the newly-constituted local governments will face significant challenges. Local governments will need financial assistance from the central and provincial governments to conduct both development and non-development activities; however, these fiscal transfers will be insufficient. Therefore, local governments will look for support from the donor community. Figuring out how donors will engage at the local level is an important issue that needs attention – will their entry point be directly at the local level or through line ministries? It is important that donors are aware of the areas of legal competency that the Constitution gives to local governments. It is also necessary that donor agencies are mindful of local government jurisdiction to ensure that their local engagement does not interfere or hinder the work carried out by the central and provincial governments.

## **The Constitution: Laws and Legal Issues**

*Madhab Paudel*

The 2015 Constitution has four core features which can impact constitutionalism within the entire South Asian region. These are:

1. The Constitution is a document of inclusive democracy, making significant attempts at ensuring inclusion in the political process.
2. It provides for constitutional recognition and regulation of political parties.
3. It incorporates a mixed electoral system – representatives are elected through both first-past-post and proportional representation; there is a parliamentary process for the federal and provincial legislatures, while a ‘presidential-like’ arrangement has been made at the local level.
4. It constitutionally institutionalizes three tiers of government: federal, provincial, and local—providing constitutional division of powers across these tiers, and constitutional protections for local government.

### ***The need for implementing legislation***

The Constitution of Nepal is a framework-type constitution—it requires laws to be created for it to be implemented and made operational. To be able to do this, MoLJPA has identified approximately 110 laws at the national level that are needed to be legislated or amended; around 24 new laws are needed to establish the provinces; and 26 laws are required for the local level. In addition, legal provisions to ensure the fundamental rights secured by the Constitution must be in place by 20 September 2018 (Article 47).

To manage and prioritize these legislative needs, MoLJPA has formed six thematic groups:

1. Administrative laws – e.g. the *Supreme Court Act*; other laws are in the pipeline.
2. Laws required for elections – 10 laws are required, including, the *Local Level Election Act*; while a few acts relating to local level elections have been drafted, other legislation relating to provincial elections and federal issues like the national assembly are yet to surface.
3. Laws relating to constitutional agencies – e.g. for the National Natural Resources and Fiscal Commission.
4. Laws relating to income tax and financial distribution – e.g. to regulate inter-governmental financial management.
5. Laws required for civil service management – to deal with the needs of a bigger civil service that must be integrated across the three tiers of government.
6. Laws relating to fundamental rights – some of these pieces of legislation are ready to go before parliament.

According to the Parliamentary Secretariat, there are 57 bills that are currently being discussed by the parliament. However, it is important to remember that parliament is a political body and it may be difficult for all laws to be passed in a timely fashion. If some of these pieces of legislation had been passed prior to the budget, the allocation of money to the local bodies would have been different.

### ***The federal model***

The model of federalism that Nepal has adopted is slightly different from the classical model of federalism. This is manifested through the three tiers of government. Local governments are not under the purview of provincial governments but fundamental and autonomous bodies on their own. Hence, local governments are established in a unique manner, which must be kept in mind when legislating the new laws.

1. Local governments are autonomous bodies – neither the central nor provincial governments have a right to dissolve a local body (Cf. provincial governments, which may be suspended or dissolved by the central government);
2. Local governments exercise executive, legislative, and judicial powers simultaneously;
3. The federal government allocates budget directly to the local level – whilst this is also the case in Germany and Switzerland, it is not found in other federations;
4. The central, provincial and local governments relate on the principles of cooperation, coexistence, and coordination (Article 232); and
5. Select powers are constitutionally given to local governments – exclusive (Schedule 8) and concurrent with the center and provinces (Schedule 9)

Article 235 of the constitution provides the federal parliament the right to make laws to maintain coordination between the federation, state, and local level. The central parliament can draft directives for local governments. However, at this juncture it is unclear what are the possible consequences should local bodies choose not to execute centrally-issued directives.

These features can have a positive impact on the lawmaking process in the entire South Asia region. For example, a constitutional expert in the discussion commented that “we have much to learn from this Constitution.” Sri Lanka has embarked on the constitution-making process. They can learn from the design of Nepal’s local governments. Good practices, even in a small country like Nepal, can be transplanted and/or learned by those around the world.

### ***Constraints for law-making***

There are a number of issues that must be considered when thinking about law-making. First, bureaucrats are often framed as reluctant to devolve power; however, it is often the political elites who restrain bureaucrats when they attempt to reform administrative systems. Political elites make grand speeches, which paint utopian pictures, and then blame bureaucrats for lack of progress. For example, in 2007, when Madhab Paudel was Secretary at the Office of the Prime Minister and Council of Ministers, a man was arrested in Dolpa which required him to fly there to address the situation. The man’s family pleaded for his release; however, the Chief District Officer said that he was keeping him under arrest for his own security. The District Courts did not then have the power to issue a writ of *habeas corpus*; however, it was not possible for the family to go to the closest Appellate Court in Jumla. This case showed that there was a clear need for reform. Upon returning to Kathmandu, Madhab Paudel had to fight a big battle to have this power given to the District Courts.

There is now talk that the *Local Governance Act*, which has been tabled in parliament should be taken back and amended. This is another example of the political process stalling legal development and implementation.

Secondly, there are many new issues that must be considered when legislating on matters that touch the local level. For example, the right to equality. Many elected mayors have made promises regarding increasing welfare payments. However, this will turn out to be problematic. How can there be differing treatment and standards with regard to welfare from municipality to municipality. This is an example of a place where the central government can regulate for equality.

In similar vein, education is now an issue on which local governments can legislate. However, education is also a responsibility to which the central government has obligations under international law. If the right to regulate education is merely left to the local level, the central government may not be able to fulfill its international responsibilities. There is also a strong interest that local education institutions – and the certificates and degrees which they grant – can be recognized at the international level. This is another example where the interaction between national, provincial, and local laws must be considered.

Thirdly, it is clear that the current budget allocations will not be sufficient for the local bodies to fulfill their constitutionally mandated responsibilities. However, at the same time there is a large question of capacity at the local level – will local governments even be able to manage what has been given?

Lastly, in some cases, the responsibility for discharging power has changed. For example, previously, tourism licenses and fees were administered by the District who retained collected funds for their own use. However, whilst fees are still collected at the local level, under the new structure they must hold these funds on behalf of the province who will distribute as it sees fit. In this case, there is a need to ensure that the local bodies do not feel aggrieved – that resources, over which they will have a sense of ownership, are not being taken away unfairly.

## **Questions, Answers, and Discussion**

The major points arising from the discussion are highlighted below:

### ***Understanding the new local governments in Nepal***

- The newly enshrined structure of local government of Nepal is unique from that of other countries, but it also is very good. We have parliamentary models for central and provincial tiers, and at the third tier it is closer to a presidential model. The local body mayor/chairs and deputy mayor/vice-chairs are directly elected; they have fixed terms, and are not removable during their five-year tenure. They are the heads of the local legislative council, and deputy mayors/vice-chairs head the local judicial committee. Accordingly, the mayor/chair holds a blend of legislative and executive power; the deputy mayor/vice-chair holds a mixture of executive and judicial power. It is an untested model, and how this innovative government structure will operationalize at the local level is yet to be witnessed.
- The seedlings of autonomy of local governance existed before the 2015 Constitution. Local governments – VDCs – have been exercising executive and judicial powers such as periodic planning for local development, exercising royalty rights, and generating development indicators. There should be less concern regarding the ability of local bodies.
- As we have entered into a federal structure, we should not expect uniformity across local governments. Federalism favors unity in diversity. In the federal system, local governments should not be dictated by the central government, and in many areas there is no need for uniformity with other local governments. Diversity of policies and programs should be promoted. Some level of competition is inevitable – and should be encouraged – across local governments and across provinces. This does not have to conflict with the guiding principles of cooperation, coexistence, and collaboration defined in the Constitution.
- While there was concern amongst some participants about the declaration in some jurisdictions regarding increasing the social security allowance, others suggested that it should not be objected on grounds of ‘equality’ on a national scale. What mayors should do is not to discriminate against anyone within their jurisdiction, but they should be empowered to reallocate resources on their own – their constituents will judge what will be good and what is not.
- Regarding the conflict of interest and lack of check and balance at the local level, due to the bundling of executive and legislative powers and executive and judicial powers, the following should be taken as accountability systems:
  - Oppositional politics will be important to monitor the ruling parties and hold them to account at a political level.
  - The role of the court will be important.
  - Citizens will have to engage and keep close watch.
  - Local civil society will play a major role.
  - The central government can also make arrangements for enhancing accountability.

### ***Relationship between the three tiers of government***

- Elections have proceeded from the local level. There is conflicting constitutional interpretation as to whether this was the correct way to proceed with implementation. Some present argued that the Constitution envisages beginning with central level elections. For example, provincial laws are needed to govern the law-making process at the local level. However, others argued that the Constitution is not clear on this point: an electoral college made up of local and provincial representatives is required to elect the National Assembly.
- The Constitution mandates cooperation, collaboration, and coexistence between the three tiers of government. This may mean:
  - Instructions can be given by the center, according to law. They should be in terms of broad principles and not in a discriminatory manner between local governments and provinces, and must be in the spirit of the Constitution.
  - Good/best practice should be shared among local governments where laws are not explicit.
  - Nationally applicable standards should be created, where appropriate, by the central government.
- Clarity is required regarding concurrent and exclusive legislative jurisdictions. Will the federal powers prevail always; or will exclusive powers prevail over concurrent powers?
- The central government does not have competency to legislate for the local level. If it does, it can be challenged in the Supreme Court immediately. The Constitution should be amended with a transitional provision to allow local governments to operate under central government laws.
- Laws effecting local governance should not be passed by the central government without due consultation with the new elected local leaders. There is concern that there has been insufficient consultation thus far which indicates that these laws may ultimately end up getting challenged at the Supreme Court in the future.
- The Natural Resource and Fiscal Commission is a very important body to work out fiscal federalism. It is disappointing that the Act was passed without more extensive consultation and debate.

### ***Main confusions, challenges, and risks***

- The district officials in Rukum and Nawalparasi (each district has been divided such that they fall into two different provinces) have requested for clarity about the creation of the district council but the constitution has not envisioned more than 75 districts.
- There is fear that civil service personnel who are treated less favorably or considered less competent will be pushed aside and "relegated" to the local level.
- Some risks of recentralization exist. For example, newly-made provisions give the right to grant building permits to the executive secretary and not the mayor. Locally-elected leaders are unaware of these recentralization attempts.
- Because there is no provision for recalling (*pratyahwan*) of local government officials, there is a large accountability gap.
- The Constitution has made extensive commitments. However, how these will be delivered will become a significant source of contention. At the local level, problems will surface with regard to Article 52(5), which envisions autonomous regions, but these have not been determined.
- There is no provision for the representation of local governments and provinces within the Natural Resource and Fiscal Commission. It will be a challenge for its decisions to be aligned with the interests of sub-national governments.
- There is resistance within line ministries to the devolution of power. Among these ministries, there is a lack of ownership over the 14 model laws under preparation. It is important that the sectoral ministries are consulted and included in order to increase their ownership.

- Some laws which are now in the process of legislation may have been made in view of centralized arrangement of government. These require further reflection and consultation.
- Some political constituencies (especially Madhesi parties) see a problem in the direct relationship between local government and central government, which they are seeing as compromising their vision for federal structures. This problem will continue to unfold.

## **Ways forward**

The following are the main issues that emerged which may need further actions/interventions:

- There is a need to build legislative capacity and delivery of justice at local and provincial levels – especially translating the spirit of the Constitution and addressing concerns and issues in respective jurisdictions.
- At the local level, deputy mayors/vice-chairs will require training on judicial procedures to enable them to discharge their quasi-judicial authority. Without this, there is potential risk of abuse of authority.
- A system of social and public checks and balances on local government needs to be introduced and institutionalized.
- Some laws which are now in the process of legislation require further reflection and consultation as they may have components of recentralization.
- There will be a need to introduce an equalization fund – using block grants to distribute capital in a fair manner.