

स्थानीय सरकार सबलीकरण



The Asia Foundation

The Australian Government - The Asia Foundation Partnership in Nepal

Policy Dialogue on Constitutional Provisions versus Current Support & Practice of Local Government in Nepal: An Initial Assessment
(15 February 2018)

Rapporteur's Notes

A policy dialogue on the *Constitutional Provisions versus Current Support & Practice of Local Government in Nepal: An Initial Assessment* was held on 15 February 2018 at Hotel Shangri-La, Kathmandu. The dialogue was attended by 39 participants comprising of experts on local governance, constitution and legal experts, donor representatives, civil society members, and stakeholders in subnational governance.

The objective of the dialogue was to analyze how federalism is currently implemented vis-à-vis the Constitutional provisions. The discussion includes key provisions of the Constitution; current laws and policies; existing practices in the new federal context; challenges in the operationalization of the Constitution; and potential ways forward.

The discussion was led by Mr. Balananda Paudel, former chair, Local Level Restructuring Commission and moderated by Dr. Shyam Bhurtel, former member, Local Level Restructuring Commission and local governance expert. Hon. Mr. Krishna Prasad Sapkota, former lawmaker and local government practitioner delivered the opening remarks.

Understanding Federalism: Constitution, and Execution of State Powers

Krishna Prasad Sapkota

Mr. Sapkota shed light on the panel's understanding of federalism, Constitutional mandates, and its meaning in the context of the governance of the country and execution of state powers, at all three tiers of governments.

'Federalism' in Nepal's Constitution

Nepal has become a federal democratic republican state as stated in the preamble of the Constitution. It also reiterates that all forms of discriminations and oppression created by the feudal, autocratic, centralized and unitary system will be ended.

Similarly, one of the directive principles enshrined in the Constitution has provided that while maintaining relations between federal units on the basis of cooperation between them, and internalizing the principle of inclusion in the governance system on the basis of local autonomy and decentralization, it shall be the political objective of the State to establish a federal democratic republican system to ensure an atmosphere where democratic rights are utilized.

Article 57 of the Constitution has made provisions for new structure of the State and distributed State powers among the Federation, State, and Local Level: the powers of the Federation shall be vested in the matters mentioned in Schedule 5, and such powers shall be exercised in pursuant to this Constitution and the Federal law; the powers of a State shall be vested in the matters mentioned in Schedule 6, and such powers shall be exercised pursuant to this Constitution and the State law; and the powers of the local level shall be vested in matters mentioned in Schedule 8, and the exercise of such authority shall be done according to this Constitution and laws made by the local bodies.

The Constitution has distinctly divided state powers between three tiers of government, and listed in the Constitution as exclusive rights. Each government is autonomous and self-ruled and they are not subservient to one another.

As we all know that ‘one’ principle is established around the world, and that is the principle of subsidiarity. It should be guided by the principle that local government would do whatever it could in its capacity and other government would complete where local government is unable to fulfil its functions.

Based on that principle, the kind of federalism that we know is more than one level of government. Each government is not governed by any other entity. They are autonomous and self-ruled. They are not functioning based on hierarchy but as a sparing government. They are under the Constitution and not under any other government. This is shown by all the principles of federalism.

Clarity in Understanding of Federalism

There is a provision of fiscal federalism in the Constitution which cites that local bodies can exercise their rights by developing laws for fiscal federalism. Mr. Sapkota acknowledged that their understanding of three tiers of government was flawed. They realized that these governments exist in the same horizon, are not subservient and is just a sparing government. The Federation governs the same body and same geography, so do the State and Local governments – they all govern the same people and same geography with different jurisdictions.

Local government is huge with 753 units, and they have their own geography but role and jurisdiction is different. Federation should exercise its power within its own jurisdiction, State should also exercise its power throughout the country within its own jurisdiction. But they are functioning as cooperative federalism.

3 ‘C’s in Federalism

Nepal’s federalism is co-operative and is based on the principle of Co-existence, Co-operation, and Co-ordination. All tiers of government are equally autonomous and self-ruled. They all should have respect for each other. They should be accountable to the people and to the Constitution.

Implementation of Federalism

Balananda Paudel

Mr. Paudel talked about the newly formed legislations and various model Acts, and whether they would be able to match the spirit of the Constitution. He also discussed the current

challenges to move towards a framework of intergovernmental coordination (as envisioned in the Constitution) through our traditional policy making approaches and legislative processes. According to Mr. Paudel, “the reason behind reviewing the laws was because some of the legislative processes are possibly indicators of where the country is heading, and this will give a clear indication of what preparedness needs to be in place.”

He further explained that the Constitution has provided three principles of cooperation, coordination, and coexistence. The presentation tried to review how the laws should be made.

Constitutional Provision

The Constitution allows each level of government to frame necessary laws on the basis of their respective exclusive rights, and for the shared rights Federal government can enact laws to define the responsibility between all levels of government.

Even when the Federation has made the laws, State needs to enact all the laws related to local level within one year. There is a constitutional compulsion and has to be dealt with very carefully during the transitional phase.

While reviewing the recently promulgated laws, five major issues were identified:

1. Laws contradictory to the Constitution

a) Inter-Government Fiscal Management Act 2074, in Schedule 4 has a provision to transfer central fund to the District Coordination Committee (DCC) which according to the Constitution does not have the mandate to make laws on its expenditure. Hence it is unclear how such fund would be utilized in absence of governing laws.

b) Employees Integration Act 2074, says that the Federal government will conduct Organization and Management (O&M) Survey to define organizational structures of the local and provincial governments. However, the law does not require the Federal government to consult with the local or provincial governments in such exercise which would undermine their authority. There is also uncertainty in this Law whether such O&M Survey would be for just one time or could continue in future.

c) Per Schedule 8 of The Constitution, the right to operate primary and secondary level education resides in the Local Level; however, Article 11(2) (h) of Local Level Governance Act 2074 is silent on the local government’s right to govern secondary education. Where did the Federal parliament get the right to curtail the provision given by the Constitution? Constitutionally, where does it stand?

d) The Local Governance Act 2074 has missed out five issues: cooperatives, agriculture, disaster management, mines and minerals, and education, which fall amongst the 15 rights per Schedule 9 of the Constitution. Schedule 9 lists the concurrent rights of Federation, State, and Local body. If the Constitution drafters had felt that these rights were not the responsibility of Local bodies, then they would have put those under Schedule 7 which lists the concurrent powers of Federation and State.

2. Contradictory provisions among Acts

Three different acts- the Local Governance Act 2074, National Natural Resources, and Fiscal Commission Act 2074, and the Constitution 2015 have contradictory provisions pertaining to distribution of revenues.

The question raised is that the Acts are contradictory, and Local Governance Act is silent on the need for recommendations from National Natural Resources and Fiscal Commission for the revenue distribution.

3. *Unable to capture the essence of Federalism*

a) Article 5 (1) of Intergovernmental Fiscal Management Act 2074 has mentioned a sentence that, “Nepal government, State, and Local governments, two of these can raise...” Constitutionally, there is no such level which can be termed as Nepal government.

b) Article 3 (6) of Intergovernmental Fiscal Management Act 2074 has mentioned that Government can raise and collect royalty on natural resources as per the federal law. Natural resources is also included in the Schedule 9 of the Constitution which is the common rights of all three tiers of government but this provision only speaks of State government and remains silent on the recommendation from National Natural Resources and Fiscal Commission.

c) Intergovernmental Fiscal Management Act 2074 also has a provision of a formation of Intergovernmental Fiscal Council under the coordination of Ministry of Finance. The Council will have the representation of two members from each state. The representation ignores the collective representation of the Local Governments.

d) Similarly, Labor Act 2074, Right of People with Disability Act, Education act 2028, eighth and ninth amendment and Disaster Risk Reduction and Management Act, 2074 has ignored the provision of Constitution.

4. *Laws made in unauthorized area*

a) Article 12 of Local Governance Act 2074 has the provision of the roles and responsibility of ward committee and the executive have mentioned that the roles and responsibility of the ward committee will not be less than this. Whereas the Constitution has a provision of ward committee but it is silent on the roles and responsibility. Hence, the governing body is village assembly, municipal assembly, rural municipality and municipality while the ward committee is seen as a service delivery unit.

b) Similarly, the work-schedule of the Assembly has to be made by the State law but at the moment Local Governance Act has made it but the law will be null and void after one year of the formation of the State Parliament. The chapters 4 and 5 of this Act will be affected. This is not mentioned in the Act.

5. *Theoretical ambiguity*

a) Article 71 (1) of Local Governance Act 2074 has the provision of submitting the budget to the executive for the approval and if it is returned within 5 days, it can be submitted to the assembly with clarification, the budget has to be endorsed by the end

of Asar (June). Does this mean that this provision ends the rights of village assembly and municipal assembly of revisiting their decision?

b) Schedules 5, 6, 7, 8, and 9 of the Constitution for the listing of specification of rights for Federation, State, and Local Level are based on:

- Efficiency and Subsidiary
- Economics and Scale
- Externalities or other jurisdiction

There is a lack of explanation how these principles have been used, and this also contradicts the specification.

Conclusion

- While the laws are being drafted, there seems to be a lack of proper understanding about the provisions of Constitution. For example, on existing laws to remain in force—the provision is that laws in force at the time of commencement of this Constitution shall continue to be in force until such laws are repealed or amended. Provided that any law which is inconsistent with this Constitution shall *ipso facto* be invalid to the extent of such inconsistency, after one year of the date on which the first session of the Federal Parliament set forth in this Constitution is held. But it seems there is misinterpretation of this Article 301 of the Constitution.
- There is lack of clarity on the list of concurrent rights in Schedule 7 and 9 of the Constitution.

Questions, Answers, and Discussion

Capacity of local officials

- There was a huge gap between trained local elected representatives and those remaining to be trained. The trained local representatives have become even more confused.
- There is a need to define where the Constitutional literacy is needed. Is it bureaucracy, political party leaders, people or the local government? There is a lack of communication.

Formulating laws

- Interest groups played an influential role in the name of providing technical support and this has made laws very complex.
- There is a confusion among Local bodies and State representatives whether they could adopt model laws directly or not. Majority of them had understood that model laws are in fact the real laws and they had to enact it.
- Lawmaking process is exclusionary and it should be made inclusive and representative.
- It seems that model acts are prepared just for the sake of preparing only. The 429-page document was prepared without the consultation with experts.
- The loopholes and contradiction in the laws show that there might be a lack of technical knowledge while the laws were made.

Power sharing

- The handover process from the central to the local will always be a long process and it will take time. It may take up to 20 years. If this has been communicated, then it will be easier to check public's high expectations.
- It would be good if Article 57 of supremacy clause could be highlighted as well as the scope of residue power. Also, it should be established that principally all parliaments co-exist with one another.
- There is a need to look at technical/administrative; fiscal capacity and partnership in municipality because it will have direct implication in service delivery. One example is the central government recruits 4 staff to the municipality and the staff goes to office at 11 am and returns at 12 noon. Since the central government is paying the salary, who will ensure the accountability?
- Lack of clarity on the functioning of the government still exists at the local level.
- There are still lots of confusion. The administration has not been supportive to the locally-elected representatives and plenty of practical problems still exist.
- In our country, federalism is a hybrid type. It is neither close to the United States, nor India. If we look at administrative part, then if there is Chief District Officer, then it cannot be Federal but we have that provision. Similarly, our judiciary is not fully federal.
- Our country has the Local Governance Act which cannot be found in other countries. Are we promoting centralized governance system or others? Similarly, there is Provincial Governance Act prepared by a central government. If that is the case then why do we need a Federal system? For that, we already have unitary system. Whether or not we promote uniformity or we promote diversity is very crucial.
- Many deputy mayors come to us with the problem that they want to monitor non-government organizations and civil society organizations, but they cannot do it because they are not registered in the municipality. Similarly, in case of domestic industry, it is not mentioned where it will be registered. It would be good if this kind of forum could answer, and try to solve these kinds of problems.

Intergovernmental coordination

- Issues regarding District Coordination Committee (DCC) raised here might be wrong. DCC also has their own four functions and they need funds to run it. So, let us not be so biased towards DCC. Need to have faith in locally-elected representatives who have five years to prove themselves.

Fiscal federalism

- It is too early to reach to a conclusion by evaluating the work done in such a short period of 4 months. If we look at the education sector and make six months as basis for it, then it should be seen as encouraging. Local government needs to be strengthened financially and socially.
- There is a need to make people understand that government work is to facilitate, and to support local government on how to generate local resources. Civil society should work towards supporting all tiers of government in this transitional phase.

Challenges

- Cooperation, coordination, and co-existence are explicitly written in the Constitution but not implemented in reality. The Federation is seen working as a supreme institution and there are plenty of issues in federalism especially on concurrent rights.
- There is still a hangover of the unitary system and centralized mindset of public service providers needs to be changed.
- There are many federal laws that are being drafted but these laws are not in line with the Constitution.
- There is a lack of accountability related to the process of constitution implementation in the political leadership and in the bureaucracy.

Ways forward

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

- Establish integrated structures with representations from Federal, State, and Local governments—be it in the formation of fiscal management or while formulating laws.
- Implement the Constitution must through its institutions. There is a need for civil society to advocate in favor of these institutions. Civil society should work towards creating demand and creating awareness rather than involving as a service provider.
- Increase debate among public, policy makers and bureaucrats, especially at Singha Durbar.
- Enhance the functional understanding among the different governments for effective implementation of federalism.
- Address possible contradiction among the laws of the three tiers of the government.