

## **Policy Dialogue on the ‘Functional Assignment Across Spheres of Government’**

30 July 2019

### **1. Background**

A policy dialogue on the ‘**Functional Assignment Across Spheres of Government**’ was held on 30 July 2019 at Hotel Annapurna, Kathmandu. The objective of the dialogue was to share findings of the study on Functional Assignment Across Spheres of Governments led by Constitutional Assembly member Mr. Krishna Prasad Sapkota along with Mr. Rudra Sapkota and Mr. Nawaraj Koirala. The report has identified contradictions, duplication, confusion and unclear jurisdiction across different spheres of government, and provides suggestions to bring more clarity in the sharing of power between and among different spheres of government for effective implementation of the Constitutional and legal mandates and for strengthening relationship among and between them.

The dialogue was chaired by Mr. Balananda Paudel – Chair, National Natural Resources and Fiscal Commission – attended by members of federal and provincial parliament, heads and deputy heads of the local government and local government associations, experts on local governance, economists, constitutional and legal experts, donor representatives, civil society members, and other stakeholders of subnational governance.

### **2. Presentation of the Study**

Mr. Krishna Prasad Sapkota, former member of Constituent Assembly and chairperson of Association of District Development Committee of Nepal shared the research findings of the report ‘Analysis of Functional Assignment Across Spheres of Government.’ The following are the key points presented:

#### **2.1 Context**

- The Constitution of Nepal 2015 has the provision of distribution of the state power between the federation, province, and local governments in a federal democratic republican state.
- There is a provision of exclusive and concurrent powers across different spheres of government in the Constitution. In some cases, there are co-exclusive powers as well. Likewise, similar powers are also included in the concurrent competencies of all three spheres of government.
- The Constitution adopts the principle of fiscal federalism and there is a provision of providing grants based on the expenditure needs and revenue capacity of the spheres of the government. The principle of fiscal federalism aspires commensuration of the fiscal

transfer in relation to the functions and responsibilities provided to the spheres of the government.

- It is thus important and pre-condition to bring clarity on division of jurisdiction and responsibility to determine expenditure need.
- The implementation of federalism is a learning phase. Some of the major achievements in implementation of federalism are noteworthy. Election at all three spheres of governments is the key milestone; it has created an opportunity for development of inclusive leadership and development in the country. The formation of structures of different spheres of government is another notable step along with enactment of legal framework for functional assignment developed during these periods, such as Local Government Operation Act, Business Allocation Regulations of the Government of Nepal and the Province Government.
- While conducting this study, all these legal foundations on allocation of power and responsibilities across spheres of government have been reviewed and analyzed.

## **2.2 Challenges**

- Despite of progress in the federalization process, the challenges of transitional management of Constitution implementation and overlapping of functional assignments across spheres of government is still exists.
- A common understanding has not been reached regarding exclusive and concurrent competencies. There is still lack of clear mandate on these issues.
- The functional assignments of Province and Local government is not clearly mentioned. The competencies of both Province and the Local government are yet to be evaluated and the powers from the Centre to both Province and Local governments are yet to be devolved.
- More practical design of fiscal transfer system and process based on the assessment of functional assignment and expenditure need of spheres of government is yet to start. The Constitution has the provision of fiscal transfer based on the expenditure need and the revenue capacity across the government. Failure to bring clarity on the functional responsibilities and workload of each sphere of government may lead to inefficient or unequitable inter-governmental fiscal transfer.
- There is duplication in planning, budgeting, and work procedures among the spheres of government. Nepal's federalism is based on the principle of co-existence, co-operation, and co-ordination but due to inadequate definition of the principle, several confusions persists in providing effective and efficient service delivery. The Inter-Governmental Coordination Bill under consideration in National Assembly can help to move things forward.

## **2.3 Methodology and Limitations**

- For the desk review, the team has focused on provisions of the Constitution of Nepal, various Federal, Provincial, and Local laws, policies and plans, provisions of fundamental

rights laws, conventions and other human rights instrument related to the sector of study. The team held consultations with government institutions such as National Natural Resources and Fiscal Commission (NNRFC), National Planning Commission (NPC) and various ministries of the GoN. Likewise, discussion with the political leadership and other officials from Province 2, Province 3, and Karnali Province and seven local governments—four municipalities and three rural municipalities.

- The team consulted with Mr. Balananda Paudel, Chairperson of NNRFC, and Mr. Somlal Subedi, Former Chief Secretary as experts.
- The focus of this report is on six thematic areas only viz. education, health, agriculture, livestock, infrastructure development (road, housing, drinking water and sanitation, energy, irrigation) and financial sector. In addition, acts related to fundamental rights along with international conventions and the obligations (to which Nepal is a party) have been studied with focus on identifying roles and responsibilities of different spheres of government for its effective implementation.
- The team has analyzed proposed bills developed to align with federal law. However, it was not possible to go through all the proposed Bills.

## **2.4 Key Findings**

### **2.4.1 Fiscal Authority and Assignment**

- The Constitution has the provision of providing grant based on the assessment of expenditure need and revenue capacity, however due to lack of clarity in functional assignments the provinces and local governments have not received resources as per expenditure need.
- Local government has the exclusive power to provide free basic health care services as fundamental rights but there is insufficient budget at local level to even procure government's listed free medicines.
- The conditional grants have been inadequate to accomplish the assigned responsibilities. In some places there were no budget for paying the salary of the staff. In FY 2075/76, the budget for Mothers' Safety Program in Kalaiya Sub-Metropolis was Rs 1.9 million to cover the 3,600 mothers giving birth in the hospital at the rate of Rs 1,000. This is 40% less than what is necessary.
- Provinces and Federation are themselves involved in implementing small projects such as providing Rs 1000 for educational learning, group formation for goat farming worth Rs 3000, establishment of birthing centers, small irrigations constructions and maintenance, etc.

### **2.4.2 Revenue Jurisdiction**

- Local Governmental Operation Act provisions for limiting the exclusive jurisdiction of local government on property tax, house rent tax, etc. Despite of the exclusive and

concurrent competency of province and local Government, federal government provisions to levy 15 %-20 % entertainment tax on foreign films.

- Pursuant to LGOA, the local government has the right to determine **and** collect vehicle tax for auto rickshaw and three-wheelers, but both the Federation and Province have fixed the tax rate of such vehicles.
- There is lack of clarity and confusion in the definition of agricultural income tax and its rate. As per the constitution, the agriculture income tax is an exclusive competency of the province, however the federal legislations have limited this by provisioning exemption clauses the Finance Act. In case of provinces, some have waived the tax while other has not collected it.
- The right to levy taxes on sand, timber, soil and *Dahattar Bahattar* is local government's exclusive power but the Province has fixed the rate, defined it as sharable tax and has mandated District Coordination Council to collect such taxes – beyond the provision of the constitution.

### **2.4.3 Education**

- Even though the Constitution has given the right to local government to operate, grant permission, regulate and merge schools up to higher secondary level, other prevailing Nepal laws such as Education Act, Essential and Free Education Act creates similar competencies for District Education Development and Coordination Unit, a federal government institution.
- Ministry of Education and Teachers Association has reached an agreement to provide authority to District Education Development and Coordination Unit (under federal government) for teacher's appointment, transfer, promotion, leave request approval, and departmental action. This creates a confusion on teacher's accountability.
- There is a lack of clarity in the definition of higher education and management. For example, classification of Federal university and Province university. There is also overlap regarding financial support to the campuses under federal government—will it be University Grants Commission or the Province or Local governments?

### **2.4.4 Health**

- There is lack of clarity on the functional assignment regarding operation and management of basic health care services. For example, vaccination is the concurrent responsibility of Federal, Province and Local government.
- Operation and management of promotional, preventive, curative and rehabilitative health care falls under concurrent responsibilities of all three spheres of government.
- Similarly, implementation of nutrition program also falls under all three spheres of government. The social protection program including health insurance falls under province and local government while the production and distribution of medicine is a concurrent responsibility of three spheres of government.

- Production and distribution of the medicine is also a concurrent responsibility of spheres government. Considering the externalities of the services, the responsibility may be efficiently fulfilled if given to the Federation and Province rather to the local government. Meanwhile, the procurement of the medicine and health equipment falls under Province and Local government but in practice, the federal government controls all the procurement process.
- School health programs too falls under both Province and the Local government, so the overlapping of assignment has created problems on who is primarily responsible for implementing school health programs.
- This shows that there is lack of clarity on which government will do what, especially in cases where all three spheres of government have been assigned for the execution of the programs.

#### **2.4.5 Agriculture and Livestock Development**

- The Constitution has mandated both province and local governments for livestock and agriculture development, and this functional overlap has further created confusion for implementation. Province and federal government are responsible for veterinary services while local government is responsible for animal health.
- There is lack of clarity on who will control health risk from animal husbandry since the responsibility has been given to all three spheres of the government.
- The livestock insurance is the competency of province and federal government has been given the responsibility of developing policy and minimum standard guideline for agriculture and livestock insurance. However, considering the success local level has achieved in the past, it should be given to the local level instead of Province.
- Apart from federal government, the province and local government too have the responsibility of registration, permission, renewal, dismissal and regulation of veterinary doctors.
- In case of small program, such as shallow pit construction, distribution of fund for small farmers, etc. responsibility should be given to local government rather than province.

#### **2.4.6 Infrastructure Development, Irrigation, Drinking Water and Sanitation**

- In case of electricity, there is a lack of clarity regarding standards of the electricity projects across government. In the case of irrigation, construction and maintenance of small-scale irrigation projects is federal and province's competencies. These responsibilities can be efficiently handled by the Local government. Related to drinking water, various federal laws create competencies similar to constitutional competency of local government. Such as, Drinking Water Tariff Determination Commission Act 2063, Drinking Water Management Board Act 2063, Nepal Drinking Water Authority Act, 2046.
- The Bill regarding to Drinking Water which is under consideration of Federal Parliament proposes continued overlapping competencies – the federal, provincial, and local level

government are responsible for conservation of water sources, which could be much efficient, if carried out by the local government.

#### **2.4.7 Roads, Urban Development, Housing and Town Development**

- There is lack of clarity regarding the definition and classification of roads and its standard. Agriculture and rural roads are the constitutional competency of the local government, however, business allocation rules of province government and project classification standards, recently issued by the GoN, authorize province for the same competency. Likewise, none of the government has been assigned to construct or maintain urban roads, and similar types of programs have been designed and implemented by federal, Province and Local governments, simultaneously.
- The provision of Town Development Committee is contradictory to the Constitutional provision; this entity is mandated to conduct the similar business that are mandated to the local government.
- Kathmandu Valley Development Authority, a competency of the provinces, is yet to be handed over to the Province government.
- Community infrastructure, urban and settlement development, housing and infrastructure development are concurrent responsibilities. However, the definition, standards and classification are not yet clear.

#### **2.4.7 Suggestions and Recommendations**

##### **A. Building shared understanding of power across spheres of government**

Because of the huge degree of concurrency through constitutional and legal mandates, spheres of government are yet to reach consensual understanding on the interpretation and use of such powers. In this context, there are following recommendations:

- Exclusive powers should be the main priority of the spheres of government. However, they are dispersing efforts on sectoral targets. In some cases, the governments are another government's exclusive powers as well.
- In case of same exclusive powers to more than one government(co-exclusivity), we can take reference of international practice and follow principles of subsidiarity to give priority of its usage to the government which is near to the people. Another sphere of government could perform the task upon the request of other sphere of government.
- Likewise, in cases where the same powers are listed as exclusive and concurrent powers, exclusive powers should prevail, and concurrent powers can be taken as a supporting power. For example, if both province and local governments have been given exclusive rights, and federal government has concurrent rights, federal government taking charge will set a bad precedence. While distribution and re-distribution of power and authority, the respective government should hold consultations with spheres of government by establishing a functional coordination mechanism. The distribution of rights can be based on principles of subsidiarity, economies of scales (efficiencies), externalities, social

security (gender and social inclusion), national priority and service delivery effectiveness, as appropriate.

#### **B. Responsibility of spheres of government for the implementation of fundamental rights**

- The specific roles of federal, Province and Local government must be defined for the implementation of specific activities/sub-activities under fundamental human rights. Now, laws mention that all fundamental rights issues will be implemented in coordination with all spheres of government instead of articulating specific roles for each tier of government.
- National plan of actions must be developed and implemented with specific obligations, roles, and responsibilities. Federal government must provide conditional grant to both province and local government for its implementation.
- Fiscal transfer of all spheres of government must be guaranteed to fulfill the specified roles and obligations.
- There is a need for strong coordination mechanism between three spheres of government and joint monitoring and reporting mechanism should be in place across spheres of government.

#### **C. Policy and legal reform**

- The remaining laws should be reformed to comply with the constitutional mandates of spheres of government.
- The amendments of the prevailing legislations should be done in line with the Constitutional mandates.
- Consultation and discussions should be carried out with different spheres of government while formulating acts.
- Inter-governmental coordination mechanism should be developed to discuss on the draft Bills that are related to two or all three spheres of the governments.

#### **D. Procedural Reform**

- National Natural Resources and Fiscal Commission (NNRFC) should take lead and coordinate inter-governmental discussions and consultations. NNRFC should provide suggestions to different spheres of government to ensure appropriate revenue to meet the expenditure need.

#### **2.4.8 Way forward**

- There is a need for shared understanding among different spheres of the government regarding functional assignments to improve service delivery and reduce blame game. The upward delegation can be done and can be recognized as well.
- Functional clarity should be carried out prior to determining expenditure need and revenue capacity assessment of government. The inter-governmental fiscal transfer will be properly managed only after gap analysis.

- Planning and budgeting across government are in isolation. There is bigger need to design joint planning (inclusive and bottom-up) and monitoring working procedures to ensure an integrated and coherence planning and budgeting across governments.
- Some sub-national government has gone to the extreme of exempting some taxes, this will have negative impact on revenue generation and on own source revenue responsibilities.

### **3. Plenary Discussion**

#### **Mr. Shankar Sharma, Former Vice-Chairperson, National Planning Commission**

- There is no single best model and one-time solution on division of powers across governments. Everything will take time and a lot needs to be done, it might take 10 more years to address all these issues. Local and province government may build on existing powers and responsibilities.
- A greater degree of power has been devolved to subnational government, therefore, it is the responsibility of each government to fulfil it responsively. It is very important to maintain self-discipline by the spheres government and be careful on not increasing recurrent expenditure, and meeting capital expenditures.

#### **Mr. Balananda Poudel: Chairperson of National Natural Resources and Fiscal Commission**

The study findings are very useful as a prerequisite for assessment of expenditure needs and revenue capacity. The NNRFC has already initiated a study to assess the expenditure need and revenue capacity across government. The following are the key points pointed out by Mr. Poudel:

- The study shows that the concurrent power across governments are extensive. The Constitution has explicitly mentioned the role of each level of government from Schedule 5 to Schedule 9 but there is still some confusion – mainly due to unitary mindset.
- This report has pointed out overlap in concurrence list, confusion over the duty, mandate and responsibility between the three spheres of government. The lack of definition of the duty of each sphere of government creates difficulty in distribution of expenditure. Even then, the clarity of their duty alone is not enough for the distribution of expenditure, it demands for standard norms to calculate the expenditure for each task. These standards have to be defined and a proper planning for each sphere of government is needed.
- There is a need for generating shared understanding across government to help develop a national standard in close coordination with different spheres of government. Furthermore, each government should be able to evaluate whether they would be able to meet and maintain the set standards or not.
- We have a huge gap between recurrent cost and development expenditure, and the situation is very alarming. There might be a situation where we might not be able to spend development expenditure at all. This needs to be analyzed.
- If the exclusive functions are given to two levels, principle of subsidiarity shall be applied while re-allocating the powers and responsibilities. We have to follow the principle of competency and efficiency as well in case of concurrent list.

- There was no need for two long concurrent lists (schedule 7 and 9). This has created many overlaps and confusions. The Constitution has given the mandate on concurrent power, such as on education, health, and forest.
- The NNRFCC wants to coordinate regarding distribution of fund but we have to first agree on the principal regarding clarity on functional allocation and distribution of fund. These kinds of issues have been raised in inter-provincial council meeting. We must discuss and shall reach a consensus.
- When it comes to re-allocation and re-distribution of concurrent power, it should be based on the principle of subsidiaries, competency, economy of scale, externalities. Local government must be treated as the front line of the service delivery. The minimum standard policy and regulatory framework shall be developed by the federal government. The province government shall concentrate more on regional development, coordination among local governments, and provisioning of services.

### *Challenges of Federalism*

- The unitary governance system is still in existence and a lot needs to be done to reform the system in order to address the discrepancies showed by the report. The cut-off point for functional allocation across three spheres of government should be based on the principle of subsidiarity. In federal governance system, the parallel structures cannot be established. There is a need to check the misuse of constituency development fund and the way the fund is distributed even at ward level.
- We still have not touched upon special autonomous area even though it was mentioned in the Constitution.
- There is no coordination within the ministries at the federal level for the implementation of federalism.
- There was a discussion of establishing a Constitution Implementation Commission which would have analyzed any of the anomalies and contradictory provisions among different spheres of the government but later it was removed. The establishment of the commission would have addressed these issues.

### **Khimlal Devkota, Former Member of Constituent Assembly**

#### *Persisting confusion regarding functional assignments*

- There is a need for constitutional clarity regarding functional assignment among three spheres of government.
- The confusion regarding the allocation of authorities is due to the reason that concurrent list is more than the exclusive lists.
- There is confusion regarding collection of house rent tax. For example, in case of institutional rent tax, the central government levy the tax while for individual houses, rent tax is collected by local government. These confusions must be addressed.

*Weak legal oversight mechanism*

- The Constitutional Bench is very weak and a case might take months and years to get settled. There is a need of Constitutional Court, but we have established constitutional bench. This too has created problem. The Constitutional Bench has to be strengthened.
- While the acts are being made, it is very important to analyze whether the proposed acts contradict with the Constitution.

*Further need of case studies*

- If there are case studies in each sector that reflect confusions regarding functional assignment across spheres of government, then it would be much easier to identify and solve it accordingly.

*Use of principle of subsidiarity*

- Even though the study stresses on making local government more resourceful and hhas focused on principle of subsidiarity, it does not seem practical at implementation level.

**Bharati Pathak, Chair, FECOFON,**

*Community forest issues being ignored*

- It is sad that the study report did not cover the community forest – the most contentious issues among and between spheres of government.
- All three spheres of government are levying taxes on the community forest. The Forest Bill is in federal Parliament and there is a need to have a detailed study to forge shared understanding.
- There should be clarity regarding which sphere/s of government could levy taxes. If the exclusive authority of levying taxes lies on the local government, then it should only be the local government collecting taxes, not multiple level the federal and province governments also enjoy the same power.

*Role of development partners*

- The development partners also need to facilitate the relationship building processes across spheres of government while implementing governance and sectoral governance program. They should ensure that they complement the policies taken by the respective governments.

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