

Federal System

Nepal Participatory Constitution Building
Booklet Series
NO. 2



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A federal system	1
Introduction	1
The importance of cooperation	2
Dispute resolution	3
The political economy of a federal state	4
Establishing a federal system	4
Federalism in Nepal	5
Basic constitutional options	6

A federal system

Article 159(1) of the Interim Constitution declares that Nepal is a Federal Democratic Republican State. However, the Interim Constitution does not provide any detail on the nature, structure and institutions of federalism in Nepal. These matters will be decided by the Constituent Assembly (CA) and will be laid down in the new Constitution.

Federalism is a political mechanisms to

- » make a state inclusive and
- » bring government closer to the people.

Federalism exists in a variety of forms in more than 25 countries worldwide. It has developed in both small and large countries in all continents.¹

It is important to understand that federalism will not by itself guarantee that the state is inclusive or that government is closer to the people. These objectives require respect for human rights and good administration regardless of the structure of the state.

This introductory paper aims at informing the discussion which will lead Nepal to introduce its own brand of federalism and outlines the basic options to be considered.

Introduction

Nepal has already decided to adopt federalism. Therefore, the CA will have to debate and eventually decide upon what kind of federalism will be best for

1 Argentina, Australia, Austria, Belgium, Bosnia and Herzegovina, Brazil, Canada, Comoros, Ethiopia, Germany, India, Malaysia, Mexico, Micronesia, Nigeria, Pakistan, Russia, St. Kitts and Nevis, Switzerland, United Arab Emirates, United States of America, and Venezuela. Some countries are essentially federal systems but avoid the terminology for different reasons (South Africa, Spain). Several others (Iraq and Sudan) are in the process of transitioning to a federal system.

Nepal. In doing so, lessons learned and experiences from other federal systems may give useful guidance.²

In a federal state sovereignty and legislative power is constitutionally divided between a central/federal governing authority and constituent political units covering portions of territory. Their existence derives from the federal Constitution. These constituent units can be called different things (like states, regions or provinces). What they are called does not determine the level of decentralization, which needs to be specified in the Constitution.

There is no single system for dividing powers in a federal state. However, there are a number of characteristics which are common to all federal states. In a centralized federation the powers of state or provincial governments are relatively narrow; in a decentralized federation the authority of lower level units is wider. Federalism is distinguished from unitary government, in which sub-national institutions derive their authority from the central government and are therefore subordinate to it. In most federations the constituent units are not fully sovereign and cannot legally secede from the federation.

The importance of cooperation

A federal structure is a system of shared government. Its success depends on the clarity of rules defining the system and on the degree of consensus between different stakeholders. The consensus must include central and lower level governments, other state bodies, political parties and social/ethnic groups, as well as the public at large.

The Constitution guarantees the functions and competencies of the various levels of government. No change is possible without constitutional amendment.

Normally, the Constitution clearly states the supremacy (paramountcy) of federal law and federal institutions over the lower level as long as the Constitution confers competence in a given area. But that is balanced with guarantees of a

2 UNDP Nepal has translated a short summary by one of the leading authors on federalism into Nepali: George Anderson, “Federalism: An Introduction” (Oxford University Press, 2008). It is available on request.

degree of own competencies and resources to the constituent units which can only be changed through an amendment of the Constitution itself. In some countries, the lower level units have adopted their own constitutions which regulate the functioning of unit level institutions and complement rights granted by the federal Constitution.

The division of competencies between federal and lower levels is mainly related to the legislative and administrative functions of the state. Often, lower level governments are carrying out functions for and on behalf of the federal level, thus implementing federal law and applying it. That is because often the federal level will not have its own implementation structure in the field in all areas.

Typically, matters pertaining to national monetary policy, national defence, foreign policy, international trade and ratification of international treaties, and country-level infrastructure planning and development fall under the legislative competency of the central government. Basic education and health services, agriculture, environmental protection, local elections, local policing and the collection of local taxes usually fall under the legislative competency and/or administration of constituent unit governments.

Sometimes, the federal government sets standards which must be followed by lower level governments in the development of their policies for education or health or other lower level matters.

Sometimes, new areas for legislation arise and they are not clearly covered in the Constitution. The Constitution itself should specify which level of the government legislates in such matters. In legal terms these are called 'residual' powers. In some countries the Constitution gives residual powers to the central government whereas the Constitutions of other countries provide residual powers to the lower level units.

Dispute resolution

In every federal state disputes arise as to whether legislation is within the competence of the unit that created it. In many countries, a Constitutional Court settles such disputes. In others this dispute settlement function lies with the Supreme Court.

For a federal system to function well, it is essential that all governments accept the decisions of the court.

The political economy of a federal state

Federal Constitutions normally foresee that the federal and constituent unit levels must be allocated commensurate resources to effectively carry out the tasks they are assigned by the Constitution. The tax autonomy of constituent units is regulated according to a variety of models. Many countries have created a system of fiscal federalism or fiscal decentralization to allow for an equitable country-wide economic and social development as the levels of socio-economic development will differ starkly between various federal entities.

The resource allocation between levels of government can vary significantly in different federal models.

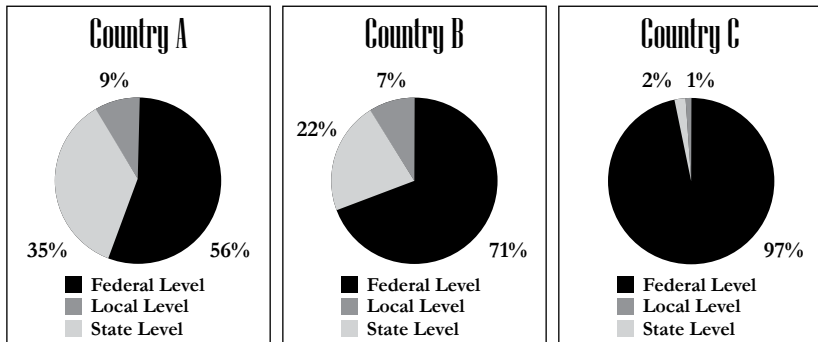


Figure 1: Tax autonomy of sub-central governments – percentage of sub-central tax revenue as % of total tax revenues in three federal countries (2002): Federal level (dark colour); state/regional/province level (light colour); local level.

Establishing a federal system

In multi-ethnic, multi-lingual and multi-cultural countries, federalism has sometimes been adopted to allow for diversity while also building national identity. However, federalism is not the only way in which a country can empower regional identity of communities and create space for diversity or inclusiveness.

Other measures may include educational policy, economic development, language policy, cultural programmes, provisions in the electoral system, reservation, affirmative action, etc. A federal system alone is no guarantee for an inclusive state.

In Nepal the process which led to the election of the CA and the adoption of the Interim Constitution in 2007 was motivated in part by a desire to bring government closer to the people. This in turn could help to make public officials more accountable to the people who elect them, empower marginalized groups, and create greater diversity in public affairs.

The drafters of the Constitution will consider several factors in defining lower level units for Nepal's federal structure: They will look at the political/historical context of caste, language and ethnic groups, demographic, geographical and socio-economic issues; and natural resources.

The size, number and proportion of constituent units vary widely across federal countries. Lower level units must have sufficient resources to perform their duties under the constitution. Federal states all experience significant changes over time, including the number and size of constituent units, and the relationship between the levels of government. A wisely designed federal system allows for some flexibility and orderly change within the overall system.

Federalism in Nepal

Nepal has been governed in a unitary, centralized system for centuries. So far, democratization has not yet led to a significant change in the basic set-up in how the country is organized. Introducing a federal structure will represent a fundamental departure from that legacy.

Traditionally, the central government governed the whole of the country as a single unit. Although the country has been divided into development regions, zones, and districts, they all are under the sole authority of the central government. These units do not enjoy an independent or autonomous status. The region and zone levels are not elected. Nor do they have any rights of their own, even though local bodies are designed as legal personalities. Powers are delegated to these existing units by the centre. They do not inherently lie with

them based on some form of constitutional guarantee. The central government can increase, decrease or revoke the powers of the regions, zones and districts.

Some issues which need to be addressed by the CA

- » Define the rights and responsibilities of the constituent units;
- » Ensure that each unit has the resources it needs to discharge its constitutional responsibilities
- » Create a federal structure that guarantees and protects basic equal human rights, freedom and security for all people in the country;
- » Design a federal structure on the basis of Nepal's diverse socio-cultural background;
- » Create a federal structure that promotes the inclusion of marginalized communities and groups in both the federal and lower level units;
- » Guarantee the rights of the indigenous ethnic groups, Madhesis, Dalits and women;
- » Provide for protection of rights of the minority indigenous ethnic groups ("minorities within minorities");
- » Decide on a model for organizing public finances under a federal structure;
- » Consider the establishment of a bicameral system of federal legislature (second chamber) to represent the units' views at country level;
- » Establish an independent, efficient and effective judicial mechanism to settle constitutional disputes;
- » Consider ways to facilitate inter-governmental relations, processes for their implementation, and inter-entity bodies;

Basic constitutional options

Some basic options for a federal structure are outlined here, but they are not exhaustive, nor are they mutually exclusive. In the end, Nepal will have to find a mixed formula which takes all the relevant factors into account.

Federal systems attain maturity over time. Nepal has no federal tradition and is still developing the capacity for democratic government. It will be natural for there to be many issues to resolve after the introduction of a federal structure.

Problems in decision making and implementation processes in the early stages should be anticipated. Similarly, inequality in economic resources and development opportunities, misunderstandings between groups claiming ethnic rights, and voices of division and disintegration could become major challenges.

It is important for everyone to understand that democracy, the rule of law and human rights are the bases for the successful working of a federal system.

A) Issues Related to the Distribution of Power

Options	Merits/benefits	Challenges/risks
1. Strong central government	<ul style="list-style-type: none"> » Decision making process is easier. » Centre can provide equal treatment/protection to all the entities. » Continued central support to the entities. » Possibility of greater devolution of power as per the need of development activities. » Protection against disintegration. 	<ul style="list-style-type: none"> » Possibility of intervention by the central government may threaten units. » Unfulfilled aspirations of identity communities may lead to renewed tensions. » Government may continue to be distant from people.
2. Strong lower level governments	<ul style="list-style-type: none"> » Identity aspirations fulfilled. » Increased accountability of local governments to its electorates. » Government closer to people. 	<ul style="list-style-type: none"> » Creation of local elites may threaten minorities within units. » Unequal application of laws/standards across territory.
3) Cooperative Federalism	<ul style="list-style-type: none"> » Sustained mutual cooperation between the central and entity governments. » Possibilities of joint projects or advancing development processes. » Continued support from the Centre. 	<ul style="list-style-type: none"> » Desire to increase the power of the central government. » Possibility of increase in dependency.

4) Identical powers for each lower level unit	<ul style="list-style-type: none"> » Self-rule and right to autonomy on equal footing. » No entity shall be subjected to discrimination on the ground of its historical or social background. » Basis for equality. 	<ul style="list-style-type: none"> » Undeveloped remote areas with weak economic and social situation may be overburdened.
5) Different powers for lower level units	<ul style="list-style-type: none"> » Devolution or distribution of power among entities on basis of their conditions, needs and consensus. » Appreciation of ability and capacity. 	<ul style="list-style-type: none"> » Possibility of central government becoming too strong. » Entities with less political power cannot negotiate with the Centre on equal footing.

B) Issues related to ethnicity, geography and resources

Options	Merits/benefits	Challenges/risks
1) Federalism based on ethnicity, language, religion, culture or identity	<ul style="list-style-type: none"> » Recognition of the identities of all ethnicities, languages, religions, cultures. » Minorities are not to be excluded or marginalized. » Local people's right to local resources. 	<ul style="list-style-type: none"> » Possible rise in communal antagonisms. » Danger of disintegration of the state with demands for secession. » Possible disenchantment among minorities within the unit.
2) Based on geographical specificities, viability of economic development and distribution of natural resources	<ul style="list-style-type: none"> » Local people's right to local resources may be better ensured. » Greater possibilities for economic development. » Continuity with existing structures. 	<ul style="list-style-type: none"> » Resource gaps could exacerbate inequality. » Possibility of exclusion and marginalization of minorities. » Failure to address the issue of ethnic/linguistic identity.
3) Combination of 1) and 2)	<ul style="list-style-type: none"> » Balances the aspirations of ethnic and identity communities with socio-economic realities and constraints. 	<ul style="list-style-type: none"> » Finding the right balance without alienating any communities or creating non-viable state structures.

About this booklet series

This series of papers is intended to provide a basic background for Constituent Assembly members and the interested public on issues related to the constitution building process. They are not position papers, proposals or intend to preempt any constitutional outcome in any other way. They are the result of a cooperative effort of Nepali and international constitutional experts, coordinated by UNDP's Support to Participatory Constitution Building in Nepal project.

These papers are living documents, and feedback and comments are strongly encouraged. The more they will lead to informed, engaged and constructive discussion and exchanges, the more will their objective be attained. As comments are received further versions of this document or additional issues may be prepared.

In translating them into some of Nepal's major national languages, all effort has been made to achieve a high level of quality standards and the correct terminology, which will be understood by a majority of the speakers of those languages. However, future debates within the various linguistic communities on the proper and correct use of terms can be expected. CCD did not want to preempt that discussion in any way, but rather sought to maximize the reach and inclusiveness of this effort by including those languages.

This booklet is part of a series of documents to be developed by the Centre for Constitutional Dialogue (CCD) on themes relevant to the constitution building process in Nepal.

The objective of this series is to engage Constituent Assembly members as well as the interested public with key constitutional concepts and issues. Each document is available in the major languages used in Nepal – Nepali, Maithili, Bhojpuri, Tharu, Magar, Tamang, Newar and English. Each document is also available in audio format as well as online.

In the first phase it is envisaged that the publication series will include the following themes: State and Religion, Federal System, Human Rights in the Constitution, Rights of Indigenous Peoples, Minority Rights, Systems of Government, Independent Judiciary, Local Self-Governance, Diversity and Social Inclusion, and Participatory Constitution Making Process.

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