

The Constitutional Resilience of Human Rights in New Federal States: Local Government and the National Human Rights Commission in Nepal

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I. Introduction

Respect for human rights constitutes a core and fundamental commitment of modern democracies. Increasingly, states entrust this commitment to national human rights institutions (NHRIs) that posit themselves at the intersection of state and society. NHRIs are considered a standard feature of the modern democratic state,² and according to the Paris Principles are expected to have a clearly defined mandate, independence and institutional capacity required to protect and promote human rights.³ Having proliferated worldwide, mostly during the post-1990 ‘wave’ of democratisation, these relatively new institutions are seen as vanguards for human rights norms, including both those norms established in international conventions as well as those which are established within domestic law. However, while NHRIs seek to fulfil their role, they encounter not only the actors involved in organised violence and a multitude of human rights abuses, but also a landscape of contestation and struggle between and across society and state, between different branches of government, and among different governments in federal states. Accordingly, the promotion and protection of human rights in a state depends not only upon the commitment and capacity of the NHRI, but also on the ways in which the NHRI engages the actors within the state structure and civil society. Constructive engagement by NHRIs with these actors is essential

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² A Wolman, ‘National Human Rights Institutions and their Sub-National Counterparts: The Question of Decentralization’ (2017) 6 *International Human Rights Law Review* 1.

³ United Nations, *Principles Relating to the Status of National Institutions (The Paris Principles)*, adopted by the General Assembly, 48/134 of 20 December 1993, www.un.org/ruleoflaw/files/PRINCI~5.PDF.

to developing a culture of human rights and ensuring their institutionalisation within state and societal institutions.

This chapter explores this theme by looking at the possibility of achieving the constitutional resilience of human rights in newly federated states. Once established, new federations evolve dynamically and through a continual process of conflict.⁴ In addition to broad-ranging confrontation in the political arena between political parties and other groups and actors, new federations tend to have significant potential for institutionalised tussles within the constitutional framework itself, as federalised institutions pursue autonomy as well as cooperation at the same time.⁵ Even with an overarching constitutional commitment to human rights, different units of the federation may not commit equally to their realisation, as they may have different or conflicting priorities and capacities. As such, the fate of human rights as a constitutional commitment over extended periods, particularly during crises or disasters in which federalism provides an ‘additional layer of complexity’,⁶ depends on how the different units of the federation relate to the human rights agenda. This chapter focuses on the relationship between NHRIs and the state’s various federal units, and the bottlenecks and possibilities which affect the realisation of the human rights commitments enshrined in the constitution.

We elaborate on the above themes and arguments through a case study of Nepal. With the promulgation of a new Constitution in 2015, Nepal transformed itself from a centralised unitary state to a federal state. Emerging against the backdrop of the decade-long Maoist ‘People’s War’, which led to the abrogation of the 1990 Constitution, the 2015 Constitution brought wholesale change to the Nepali state, promising to bring about a more equal and inclusive ‘Naya’ (‘New’) Nepal. Among the most significant and far-reaching of these reforms is the transformation of the historically highly centralised, unitary state into a three-tiered federation. In addition, the new Constitution enshrines a more expansive package of rights to the people, including an enlarged collection of social, economic and cultural rights.

⁴ M Burgess, *Comparative Federalism: Theory and Practice* (London, Routledge, 2006).

⁵ C Colino, ‘Understanding Federal Change: Types of Federalism and Institutional Evolution in the Spanish and German Federal Systems’ in J Erk and W Swenden (eds), *New Directions in Federalism Studies* (London, Routledge, 2010).

⁶ Forum of Federations, *Emergency Management in Federal Countries. Proceedings of the Workshop on Emergency Management in Federal Countries* (2014) www.forumfed.org/wp-content/uploads/2016/02/EmergencyManagement_in_Federal_Countries.pdf.

These twin reforms – federalism and the constitutionalisation of human rights – are central to, but not the only components of, the ‘progressive restructuring’ of the state, which guided the post-conflict constitutional moment and is conceived as the basis for the realisation of full and inclusive democracy in Nepal.⁷ Both human rights and federalism are therefore important for the ongoing credibility and resilience of the 2015 Constitution and thus the maintenance of sustainable peace.⁸ Under this new constitutional dispensation, federalism and human rights will interact with each other to shape governance outcomes. Indeed, the nascent federal system will, over time, evolve in a manner to give rise to a plurality of policy, legal, administrative or programmatic priorities or approaches across the three tiers, as each tier will have its own specific needs and priorities, and will have to respond to particular political dynamics in their jurisdictions. The transition to a federal system has significant implications for the enjoyment and protection of rights and freedoms.

The National Human Rights Commission of Nepal (the NHRC, or the Commission), was established by the 2015 Constitution as an independent ‘constitutional body’, upgrading its legal status from its original founding in 2000. Despite the federalisation of the country, the NHRC has maintained a unitary structure – that is, the NHRC’s mandate encompasses all three tiers of the federation; the Constitution has not created additional subnational NHRIs at the provincial or local levels. The NHRC is expected to ensure that Nepal’s human rights laws are complied with and international commitments are fulfilled, and it bears the burden of ensuring the respect, protection, promotion and effective enforcement of human rights throughout the entire state, across all three tiers of the federation. However, as we discuss, as a centralised, unitary entity headquartered in Kathmandu, the NHRC has yet to adapt to the country’s federal structure. The emerging context of policy plurality on the side of the federation’s political institutions and the imperative for standardisation of human rights commitments on the part of the NHRC presents a unique challenge for Nepal’s constitutionalism, enforcing uniform human rights commitments while nurturing democracy in a plural society organised under the new federal structure. In this chapter, we emphasise

⁷ See, eg Interim Constitution of Nepal 2007, preamble; B Karki, ‘State Restructuring and Federalism Discourse in Nepal’ in B Karki and R Edrisinha (eds), *The Federalism Debate in Nepal*, vol 2 (Kathmandu, United Nations Development Programme, Support to Participatory Constitution Building in Nepal, 2014).

⁸ On this latter point, see L Nathan, ‘The Real Deal? The Post-Conflict Constitution as a Peace Agreement’ (2020) 41 *Third World Quarterly* 1556.

the salience of local governments in contributing to the resilience of human rights and the need for the NHRC to engage deeply at the local level.

The chapter is divided into six parts. Following this introduction, section II highlights the role of NHRIs as fourth branch institutions within federal countries. Section III discusses why strengthening human rights in post-conflict Nepal is both necessary and prioritised by the 2015 Constitution. The chapter then turns its attention to the local level. Section IV emphasises the importance of local government as a key human rights actor in Nepal's federal system, but in section V attention is drawn to the accountability and capacity challenges for rights protection at the local level. Then, looking at the NHRC, section VI identifies the role that the Commission can play in lessening these concerns and supporting local rights protection, but describes the challenges preventing it from doing so. Section VII concludes.

II. The Fourth Branch and Federal States

Constitutional authorisation for an independent, constitutional body protecting human rights places an expectation on such an institution to serve as the custodian for rights and freedoms. The constitutional resilience of human rights, accordingly, depends upon the competence of these institutions in their engagement with state institutions. This is shaped by their design, status and capacity. Scholarly literature has begun to examine the way in which federations confront the question of how to disperse the authority of independent or fourth branch institutions across multiple orders of government.⁹ For example, Michael Pal identifies two design approaches for election management bodies (EMBs) in federations. In the 'unitary model', a central EMB administers both national and sub-unit elections, while in the 'division of powers model', separate central and sub-unit EMBs administer elections within their

⁹ See C Murray, 'The Human Rights Commission et al: What Is the Role of South Africa's Chapter 9 Institutions?' (2009) 9 *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 122; T Khaitan, 'Guarantor Institutions' (2021) 16(S1) *Asian Journal of Comparative Law* S40; M Tushnet, 'Institutions Protecting Democracy: A Preliminary Inquiry' (2018) 12 *The Law & Ethics of Human Rights* 181; M Tushnet, 'Institutions Supporting Constitutional Democracy: Some Thoughts about Anti-Corruption (and Other) Agencies' [2019] *Singapore Journal of Legal Studies* 440; M Tushnet, 'Institutions Protecting Constitutional Democracy: Some Conceptual and Methodological Preliminaries' (2020) 70 *University of Toronto Law Journal* 95.

respective jurisdictions.¹⁰ A unitary design that incorporates sub-national representation, as is the case for the Independent National Electoral Commission in Nigeria, where two members of a 12-member body are drawn from each of the country's six geopolitical zones,¹¹ presents a third possible model. This general schematic can be applied to other fourth branch institutions (anti-corruption agencies, human rights institutions, audit institutions, etc).¹²

Focusing on the issue of partisan capture – a primary concern of the fourth branch literature – Pal highlights how both the unitary and division of powers models offer advantages but also pose particular dilemmas for democratic resilience. The 'unitary model of election administration empowers a national, independent institution as a check on abuses by local political majorities', which scholarship has generally understood to be a greater risk to democracy in federations, 'By pooling authority over federal and state/provincial elections into the hands of a single central institution'. However, this pooling of authority may make the possibility of institutional capture easier. As Pal notes, 'Centralization creates fewer pressure points in the system, but increases the possible harm caused by capture of the institution of election administration'.¹³ Building on Pal's insight, our discussion of Nepal's NHRC demonstrates that under the unitary model, which the NHRC adopts, the structural links established with the federation-level political branches and actors encourage fourth branch institutions to be more responsive to central concerns. Rather than acting as a force for greater decentralisation, in the long term, we expect that the unitary model institutional design of the NHRC will tend towards supporting centripetal forces within the Nepali federation.

Andrew Wolman has explored the arguments for and against the establishment of sub-national human rights institutions in federal systems – that is, the value of adopting what Pal has described as the 'division of powers model'.¹⁴ The establishment of sub-national human

¹⁰ M Pal, 'Constitutional Design of Electoral Governance in Federal States' (2021) 16(S1) *Asian Journal of Comparative Law* S23.

¹¹ See O Akinduro, 'Nigeria: Independent National Electoral Commission' in H Catt et al (eds), *Electoral Management Design*, revised edition (Stockholm, International Institute for Democracy and Electoral Assistance, 2014) 131, <http://aceproject.org/ace-en/topics/em/annex/electoral-management-case-studies/nigeria-a-need-for-modernization>. A similar kind of design is also adopted in Bosnia and Herzegovina and Pakistan, see I Payne, 'Federalism and the Fourth Branch: An Introductory Survey' Unpublished Manuscript.

¹² As Khaitan (n 9) notes, exactly what constitutes the fourth branch is dependent on constitutional context.

¹³ Pal (n 10) S39.

¹⁴ Wolman (n 2).

rights institutions, Wolman highlights, can make the institutions more proximate and accessible, which in turn will help them to provide better services and be more culturally nuanced. The creation of sub-national human rights institutions can also more robustly influence sub-national government policy and promote local innovation in human rights. On the other hand, he highlights that sub-national human rights institutions can be more financially costly for the state. They can also be less efficient and less effective if economies of scale lead to deficiencies in human, financial or technical resources. Furthermore, the creation of multiple institutions can lead to undesirable fragmentation across the units of the federation – either normatively as regards the content of rights or practically as to their implementation – resulting in undesirable inequality or disparities among citizens across the country in their enjoyment of rights. In light of these considerations, Wolman concludes that the establishment of sub-national human rights institutions is more desirable where a national institution lacks authority or legitimacy, where sub-national jurisdictions are territorially large (requiring large distances to be covered) and transport is inefficient, and where there are culturally diverse populations that are territorially concentrated. In addition to these considerations, we argue that the Nepal case study highlights the relevance of a country's basic federal dynamics, orientations and goals when making this assessment. As opposed to the well-established federations – such as the USA, Canada and Australia – which are characterised by a 'coming together' of distinct polities into a union, federalism in Nepal was introduced with the overt aim of devolving power away from a highly concentrated and centralised state. It is in this context in Nepal that the potential for the unitary model to support centripetal tendencies in the federation must be evaluated.

In addition to the structural character of fourth branch institutions, it is equally important to pay attention to how structures on paper come to life in practice, and how their capacity to act shapes the constitutional resilience of human rights. We emphasise that this requires an exploration of the NHRC's engagement and commitment at the local level, where the fruit of human rights protection is experienced by citizens. This is especially important in Nepal, where local government is a constitutionally entrenched third tier in an 'hourglass' federation and assumes a significant role in the management of public services and the protection of rights. The 2015 Constitution bestows on local governments significant human rights responsibilities, and local government performance has a substantial bearing on the enjoyment of rights by citizens within the new constitutional dispensation. However, as we

highlight, accountability and capacity concerns persist that threaten to undermine local government's ability to be a strong rights promoter and protector. We discuss how the NHRC has unfortunately been unable to provide external accountability. Institutionally, from the NHRC's perspective, this is principally an issue of constrained resources. However, we also identify this shortcoming as partly a function of the NHRC's unitary design. This organisational structure means that the NHRC is more dependent on federal political office holders and is thus more sensitive to concerns of the federal political class than the sub-national priorities and needs of, in particular, local governments and local constituencies.

III. Human Rights in Post-conflict Nepal

In Nepal's political or public discourse, 'human rights' entered with a big bang in the early 1990s, and with the beginning of the Maoist 'People's War' in 1996 the human rights agenda became more salient and grew in significance. With the resolution of the insurgency as part of the peace settlement of 2006, ensuring that the state better protects and promotes fundamental human rights is a central burden borne by Nepal's 2015 Constitution. The Constitution commits itself to civil liberties and human rights,¹⁵ and guarantees 31 fundamental rights and duties of citizens,¹⁶ far more than the 20 rights enumerated in the 2007 Interim Constitution¹⁷ and the 12 rights contained in the 1990 Constitution.¹⁸ In the 2015 Constitution, there is an emphasis on economic, social and cultural rights, which are essential components of the Constitution's commitment to:

Protecting and promoting social and cultural solidarity, tolerance and harmony, and unity in diversity ... resolving to build an egalitarian society ... [ensuring] economic equality, prosperity and social justice, by eliminating discrimination based on class, caste, region, language, religion and gender and all forms of caste-based untouchability ...¹⁹

¹⁵ Constitution of Nepal 2015, preamble.

¹⁶ See *ibid* pt 3.

¹⁷ See Interim Constitution of Nepal 2007, pt 3.

¹⁸ See Constitution of the Kingdom of Nepal 1990, Arts 11–22. On the historical development of constitutionalised human rights in Nepal, see B Adhikari, 'Constitutional Recognition of Human Rights: A Reflection on The Constituent Assembly Discourse in Nepal' in B Karki and R Edrisinha (eds), *Participatory Constitution Making in Nepal: Issues of Process and Substance*, vol 2 (Kathmandu, United Nations Development Programme, Support to Participatory Constitution Building in Nepal, 2014).

¹⁹ Constitution of Nepal 2015, preamble.

Two legacies are important in shaping the new Constitution's enlarged concern for these rights. The first is the Nepali state's long history of social, political, cultural and economic exclusion, which is recognised as a root cause of conflict, particularly the decade-long Maoist insurgency.²⁰ Inequalities in Nepal are structured along ethnic, caste, linguistic and gender lines, with corresponding regional dimensions, and have been reinforced by the state and other institutions. Different ethnic and linguistic groups have also experienced highly divergent developmental outcomes, with large disparities in access to land, food, healthcare, education and other basic needs. Thus, the Human Development Index is far higher for upper-caste Hindus (Brahmins and Chhetris), at 0.538, than for Janajatis (Indigenous) (0.482), Madhesis (0.454) and Dalits (0.434).²¹ Consequently, many groups continue to deplore the denial of equality and dignity to their person and community. Responding to these entrenched inequalities, the Maoist insurgency was a violent expression of dissatisfaction with the state's failure to ensure the equal enjoyment of core economic, social and cultural rights for its citizens. The incorporation of several of the insurgents' demands in the Comprehensive Peace Accord, the peace settlement signed between the government and the Maoist combatants in 2006, and subsequently in the new Constitution of 2015, helped to bring an end to the conflict.

Indeed, addressing the economic and social disparities central to the conflict has been central to the political agenda of the post-conflict democratic transition. In addition to agreeing to the 'progressive restructuring of the state by ending ... [its] current centralized and unitary form' (the precursor language to the adoption of federalism),²² the Comprehensive Peace Accord committed both parties 'to creat[ing] an atmosphere for the Nepali people to enjoy their civil, political, economic, social and cultural rights and ... to creating an atmosphere where such rights are not violated in the future under any condition'.²³ The parties further committed themselves 'to adopt[ing] a policy of establishing the rights of all citizens to education,

²⁰ See, eg K Macours, 'Increasing Inequality and Civil Conflict in Nepal' (2011) 63 *Oxford Economic Papers* 1.

²¹ P Sharma, B Guha-Khasnobis and DR Khanal, *Nepal Human Development Report 2014: Beyond Geography, Unlocking Human Potential* (Kathmandu, Government of Nepal, National Planning Commission and United Nations Development Programme, 2014).

²² Comprehensive Peace Accord, Government of Nepal – Communist Party of Nepal (Maoist), signed on 22 November 2006, Art 3.5. It is unclear why federalism was not explicitly mentioned in the Accord. However, as Karki notes, 'there is no prize for guessing that federalism was at the back of their minds'. See Karki (n 7) 8.

²³ Comprehensive Peace Accord, Art 7.1.2.

health, housing, employment and food security'.²⁴ While the constitutionalisation of these rights in the 2015 Constitution is an important step, the realisation of these rights requires resources and capacity on the part of the state agencies and a credible commitment to deliver them.

The human rights violations perpetrated – by the insurgents and the state's security forces – during the Maoist insurgency is a second legacy issue that makes the goal of enhanced human rights protection under the 2015 Constitution additionally important. The atrocities committed by both sides of the conflict have been well documented. A report from the UN Office of the High Commissioner for Human Rights, for instance, catalogues the various forms of rights violations that took place.²⁵ In several districts across the country, survivors, as well as the relatives of the victims of these atrocities, continue to await justice. In Madi Municipality, Chitwan District, for example, the victims of the Badarmude bus bombing incident have not received justice for the past 16 years.²⁶ More broadly, as a result of the conflict, more than 17,000 people were killed, an estimated 100,000–150,000 people were internally displaced and today 1300 'disappeared' persons remain unaccounted for. People's property was seized or destroyed. Targeted gender and sexual violence were common, and were often perpetrated by state actors; more than 2500 alleged cases of torture have been recorded, though most incidents have gone undocumented.²⁷ Moreover, the guerrilla nature of the insurgency resulted in highly localised dynamics, shaped by local power relations and disputes. Violence, from both sides, was generally calculated and targeted, exacerbating divisions within communities.

By the end of the conflict in 2006, addressing human rights issues assumed a central place in the national discourse on peace and constitution-building. This was primarily focused on highlighting the limitations of political rights, and favoured including all other economic, social and cultural rights in the constitutional framework. Indeed, social movements and

²⁴ *ibid* Art 3.9.

²⁵ United Nations Office of the High Commissioner for Human Rights, 'Nepal Conflict Report' (Geneva, UNOHCHR, 2012) 14–23.

²⁶ See RK Paudel, 'Thirteen Years On, Victims of the Badarmude Incident Await Compensation' *The Kathmandu Post* (6 June 2019) <https://kathmandupost.com/national/2019/06/06/thirteen-years-on-victims-of-the-badarmude-incident-await-compensation>.

²⁷ MV Ariño, 'Nepal: A Gender View of the Armed Conflict and the Peace Process' (Barcelona, School for a Culture of Peace, Autonomous University of Barcelona, 2008) *Peacebuilding Papers* 4.

activism, especially from the marginalised communities of Janajatis, Madhesis, Dalits and women, have focused on lobbying constitution-makers to enshrine the rights of marginalised communities in the 2015 Constitution.²⁸ Now that the formalisation of those rights into the Constitution has been achieved, the challenge lies in how state agencies – particularly the three tiers of government – work together with the NHRC to deliver them in practice.²⁹

IV. Local Government: An Important All-Weather Rights Actor

In addition to the heightened emphasis on human rights, federal restructuring in Nepal has also emerged as a tool for ending discrimination, mitigating conflict, ensuring balanced development across all regions of the country and increasing participation – especially of members of historically marginalised groups – in governance.³⁰ There is a synergistic relationship between the project of human rights and federalism in Nepal and, if well-calibrated, the two can work in tandem towards a more equal and inclusive state.

Indeed, in the new federated Nepal, it is an obligation for all 761 governments – 753 local units, seven provinces and the centre – to ensure that the rights contained within the Constitution are realised and do not become mere empty promises.³¹ Given its dominant revenue and spending capacity, and the primacy given to it in the vertical division of powers, the federal government has a principal role in this respect. Under this responsibility, the federal Parliament has enacted 16 distinct pieces of legislation specifically designed to give effect to the Constitution’s fundamental rights provisions.³² The federal Right to Food and

²⁸ See Niti Foundation, *Why Nepal’s ‘Other’ Commissions Matter for Justice and Inclusion* (2022) <https://nitifoundation.org/why-nepals-other-commissions-matter-for-justice-and-inclusion/>.

²⁹ Indeed, there is still yet to be adequate accountability for many of these atrocities, and the provisions of non-impunity in both the Comprehensive Peace Accord and the new Constitution have been criticised as merely a façade to avoid international condemnation. See R Jeffery, ‘Nepal: From Tacit Acceptance to Noncompliance’ in *Negotiating Peace: Amnesties, Justice and Human Rights* (Cambridge, Cambridge University Press, 2021) 149.

³⁰ Karki (n 7).

³¹ Constitution of Nepal 2015, Art 52.

³² These are the Social Security Act 2018, the Consumer Protection Act 2018, the Public Health Services Act 2018, the Right to Housing Act 2018, the Right to Food and Food Sovereignty Act 2018, the Individual Privacy Act 2018, the Land (Seventh Amendment) Act 2018, the Compulsory and Free Education Act 2018, the Right to Employment Act 2018, the Caste-Based Discrimination and Untouchability (Offence and Punishment) (First Amendment) Act 2018, the Rights of Persons with Disabilities (Amendment) Act 2018, the Environment

Food Sovereignty Act 2018, for example, provides a concrete legal framework to implement constitutional rights relating to food sovereignty, freedom from hunger and access to clean drinking water.³³ The provinces too, through the exercise of their legislative and executive powers given to them by the Constitution, are required to act.³⁴

Local governments must also assume a central role in ensuring that citizens experience constitutionally assured rights and freedoms. The Constitution's 'hourglass' federal system elevates local government to the role of key actors in the management of public services and the protection of rights.³⁵ Under the new federal division of power, local units can autonomously raise revenue and have greatly enhanced expenditure power. They have executive and legislative authority, which is exercised by a directly elected executive that is integrated into the local legislature.³⁶ Schedule 8 of the 2015 Constitution catalogues 22 functions that form the exclusive jurisdiction of local units, including basic and secondary education, basic health and sanitation, the management of local services such as vitals registration (births, deaths, marriage and migration), local development projects and programmes, local economic development, and the protection and development of languages and cultures. In addition, through Schedule 9, they share with the centre and provinces legislative and executive responsibility for 15 matters. Overall, local governments are responsible for around one-quarter of state expenditure, compared to around only 10 per cent for the provinces.³⁷ Local governments are thus empowered with significant powers to carry out their constitutionally mandated role of promoting economic, social and cultural rights.³⁸

Protection (Amendment) Act 2018, the Crime Victims Protection Act 2018, the Children Act 2018, the Public Security (Third Amendment) Act 2018 and the Right to Safe Maternal and Reproductive Health Act 2018.

³³ Constitution of Nepal 2015, Arts 35(4) and 36. On the Right to Food and Food Sovereignty Act 2018, see Amnesty International, *Right to Food in Nepal: Analysis of the Right to Food and Food Sovereignty Act 2018* (Kathmandu, Amnesty International, 2019) www.amnesty.org/download/Documents/ASA3101302019ENGLISH.pdf.

³⁴ Provincial powers are outlined in Schedules 6, 7 and 9 of the 2015 Constitution.

³⁵ I Payne and MG Breen, 'Hourglass Federalism in Nepal: The Role of Local Government in Post-Conflict Constitutions' (unpublished manuscript).

³⁶ See Constitution of Nepal 2015, pts 17 and 18. The constitutional framework is further elaborated in the Local Government Operations Act 2017.

³⁷ See, eg the figures for the 2019–20 financial year in Financial Comptroller General Office, *Government of Nepal Consolidated Financial Statement: Fiscal Year 2019/20* (Kathmandu, FCGO, 2021) 7, www.fcgo.gov.np/storage/uploads/reportpublication/2021-05-17/20210517185110_CFS_2019_20%20final.pdf.

³⁸ Constitution of Nepal 2015, Art 52.

Moreover, as the unit of government that is closest to the people, local government is particularly salient in the lives of citizens. During the 2017 election campaign, candidates from all parties regularly employed the popular slogan ‘singha durbarko adhikar gaun-gaunma’ (‘the power of Singha Durbar [the central administrative block in Kathmandu] in every village’), a slogan which emphasised that, under the new federal structure, government services would reach closer to the people, by forcing government from Kathmandu to the villages. High hopes have been placed on local representatives to deliver significant change.³⁹ For most Nepalis, local government is the ‘front door’ when engaging with the state, providing an immediate and accessible space for citizens to seek the fulfilment of their needs, regardless of which state agency or level of government within the federation is formally or actually responsible. Indeed, beyond its formal roles, local government represents the vast social capital of local elected members, which constituents draw on to access a whole array of government services.⁴⁰ It is thus unsurprising that an overwhelming majority of respondents in the *Survey of the Nepali People in 2020* identified local government as the arm of the state that is principally responsible for education, healthcare and the maintenance of infrastructure.⁴¹

Through its constitutionally entrenched powers and proximity to citizens, local governments have the capacity to substantially influence the enjoyment of rights. For example, across the country, local governments have been focused on making laws and implementing programmes on issues including child marriage, women’s rights, education and gender-based violence.⁴² However, the scope of local law-making is restricted to the powers enumerated in Schedules 8 and 9 of the Constitution. Further, several violations manifest locally but exist outside of local government jurisdiction.

One key example is the contravention of customary rights over natural resources, such as access to national parks or usufruct rights, as acknowledged in international human rights

³⁹ The Asia Foundation, ‘Diagnostic Study of Local Governance in Federal Nepal 2017’ (2018) 3.

⁴⁰ See, eg the discussion of earthquake relief grants discussed in B Bhusal et al, ‘Does Revolution Work? Evidence from Nepal’s People’s War’ (Center for Effective Global Action, University of California 2020) Working Paper Series No 116.

⁴¹ D Giri, U Pyakurel and CL Pandey, *A Survey of the Nepali People in 2020* (Kathmandu University, Interdisciplinary Analysts and The Asia Foundation 2020) 121, 131 and 137.

⁴² Ministry of Federal Affairs and General Administration, *Report on the Comparative Study of Laws Issued by the Local Level* (Kathmandu, MOFAGA, 2021).

instruments such as the International Labour Organization Convention 169 on the Rights of Indigenous and Tribal Peoples. For instance, in Bagmati Province's Madi Municipality, local people have been denied their customary rights of access to areas inside the Chitwan National Park, and have been subject to constant harassment and beatings by the park personnel.⁴³ Local Indigenous people in the area have been reportedly stopped from fishing, as well as restricted from collecting wild fruits, vegetables and grass. Some of the local Indigenous community's houses have been demolished by the army without due process, while others have been chased away through the deployment of elephants. In such situations, local government representatives must navigate a tension between supporting local and Indigenous peoples' demands or conforming to federal laws which impinge on the rights of the people in their constituencies. In Madi, the mayor and other elected representatives worked with the Indigenous communities to oppose the decision and helped to elevate the issue to the national media and civil society organisations. While these efforts by local officials are positive in terms of the increased representation of local concerns in the public sphere, human rights abuses by federal park authorities remain widespread across the country. More formal and legal measures are required to address the disjuncture between the top-down agenda of ecological and park conservation and Indigenous concerns about livelihoods and access to resources.

Another category of systemic human rights violations is the ill-treatment of women, particularly those accused of witchcraft, and the ill-treatment of Dalits in many different forms.⁴⁴ Conventionally, in Nepal, these have been left outside the ambit of 'human rights', which have been seen as only concerned with direct actions of the state itself. However, these forms of discrimination and oppression are endemic in society, often normalised to the extent that they are rendered invisible. For instance, while the Mayor of Beni Municipality in Gandaki Province insists that while local law-making does not consciously promote caste discrimination, the Municipality has so far been unable to effectively address this problem. Reports abound of women alleged to be witches – most often by their family members or close relatives – and, as a result, they are beaten to death, harassed or subjected to other forms

⁴³ Based on consultations held with local leaders, 2021.

⁴⁴ Dalits constitute the lowest social strata in Hindu communities in South Asia, and for centuries have been denied equal access to resources, dignity and representation in public roles as well as in the socio-cultural milieu.

of mistreatment. Criminal cases have been registered by the police in such matters; however, this has failed to effectively reduce such instances on a national scale. These cases are complex problems, pertaining to entrenched societal practices which are reproduced despite a general commitment by state actors to address them. It is most clear in these cases that local governments can take the lead in generating public discourse on the importance of securing human rights according to the vision of the 2015 Constitution.

In many other cases, it is the local governments that are the perpetrators of rights abuses. For example, most local governments have focused on bringing *bikas* (development, but often narrowly construed as road building) to their communities, with little focus on other pressing issues.⁴⁵ While, from 2002 onwards, there was provision for local governments to earmark funds for specific marginalised groups – women, Dalits, Janajatis or Madhesis – from their budget, this provision has been discontinued since federalisation.⁴⁶ Now it has been noted that local elected leaders negotiate fund allocations in a mostly wholesale manner, resulting in relatively equal budgets for mostly infrastructural work for each of the wards within the municipality. This conception of development as infrastructure-only sidelines significant social, economic and cultural issues which require immediate action in local government jurisdictions.

The prioritisation of infrastructure by local governments also often leads to significant rights violations. Widespread reports suggest that local development work, especially road construction, frequently results in encroachment on private property without adequate compensation as required by Article 25(3) of the Constitution. The powerful discourse on infrastructure has limited understanding of human rights and has silenced voices against such injustices. Sometimes, people's homes or land are appropriated. In other cases, while private property is not trampled upon in the strict sense, construction has led to significant collateral negative effects on the welfare and security of vulnerable households and communities. In the case of Dalit households in the Badimalika Municipality in Sudurpaschim Province, for

⁴⁵ J Rai, 'Status and Process of Law-Making in Local Governments: Reflections from Two Provinces' (Kathmandu, International Alert and Saferworld, 2020) 14–15.

⁴⁶ The provision for allocating public funds to marginalized groups was originally outlined in the country's Tenth Plan or 'Poverty Reduction Strategy Paper' in 2002 and subsequently included in the government guidelines on local budget formulation.

instance, a new road jeopardised an entire Dalit settlement when its construction severely increased the community's vulnerability to landslides.

Moreover, many local governments have been alleged to support the persistence of caste-based discrimination. For example, despite a constitutional guarantee in Article 24(1) that 'No person shall be subjected to any form of untouchability or discrimination in any private and public place on grounds of his or her origin, caste, tribe, community, profession, occupation or physical condition', several local governments have deployed public funds to build segregated public water taps – traditional caste-based purity practices prohibit Dalits from physically accessing water from sources used by higher castes. Local Dalit communities very much see this as state-sponsored caste discrimination.⁴⁷

Other examples could also be presented. In our interviews with elected representatives and civil society organisations in local governments across the country, we heard about cases where local government extraction of riverine materials had made nearby settlements more vulnerable to landslides, floods and other risks. Such extraction generally most severely affects Dalits and other marginalised groups who live in more disaster-prone areas. Some local human rights defenders accused government officials of hiding information about the extraction, and their support of unfair settlements with those affected. Furthermore, some local leaders have allegedly been involved in the extra-judicial settlement of rape cases, without proper recourse to justice. Local leaders have also lobbied against the registration of cases against those accused of inhuman treatment of alleged 'witch' women.

In summary, local governments have real human rights responsibilities, and their action (or inaction) will have a substantial bearing on the extent to which citizens can enjoy these rights under the new constitutional dispensation. This is not unique to Nepal's new federal context. Indeed, the importance of the connection between local government and human rights has been increasingly emphasised in the wider literature. Recently, for example, the UN Human Rights Advisory Committee has written that while central governments have the primary responsibility for the promotion and protection of human rights, 'local government has a

⁴⁷ See, eg S Prakash, 'One Source, Different Taps: Caste-Based Discrimination Still Prevalent' *The Himalayan Times* (24 April 2019) <https://thehimalayantimes.com/nepal/one-source-different-taps-caste-based-discrimination-still-prevalent>; 'Untouchability Thriving in Rural Bajura' *The Himalayan Times* (25 April 2019) <https://thehimalayantimes.com/nepal/untouchability-thriving-in-rural-bajura>; A Shrestha, D Joshi and D Roth, 'The Hydro-Social Dynamics of Exclusion and Water Insecurity of Dalits in Peri-Urban Kathmandu Valley, Nepal: Fluid yet Unchanging' (2020) 28 *Contemporary South Asia* 320.

complementary role to play’ because in many instances it is local government that can actually ‘translate national human rights strategies and policies into practical application’.⁴⁸ Indeed, ‘Local authorities are close to citizens’ everyday needs and they deal with human right issues on an everyday basis’ and thus ‘the real effect of human rights is experienced locally’.⁴⁹

What is new for Nepal in the federal context, however, is the extent to which federal devolution amplifies the opportunity for local governments to pursue divergent policy priorities and agendas according to local needs and the varying dispositions of their elected governments. This, indeed, is the core logic of establishing a federation in the first place and is the natural outcome of ‘self-rule’. Different policy agendas will have different and even conflicting consequences for rights and freedoms, positive or negative. José Woehrling shows that the governmental power in federalism may work to further the protection of rights and freedoms by providing an additional check on state power and by increasing citizen participation in political affairs.⁵⁰ However, Woehrling highlights how ‘the localisation of a substantial amount of political power can also bring negative consequences, such as a greater likelihood of sectoral tyranny through the creation of localised minorities, and the increased burden created by complex multi-level legal systems’.⁵¹ Moreover, he argues that the connection of federalism with legal constitutionalism also exacerbates the legalisation of politics and that the universalistic nature of human rights can lead those who seek to protect rights and freedoms to distrust the diversity and flexibility that federalism embraces.⁵² As Woehrling frames it, federalism and human rights are in constant tension. The challenge is to

⁴⁸ Human Rights Council Advisory Committee, ‘Role of Local Government in the Promotion and Protection of Human Rights: Final Report of the Human Rights Advisory Committee’ (United Nations General Assembly, 2015) 6.

⁴⁹ *ibid* 7–8.

⁵⁰ J Woehrling, ‘Federalism and the Protection of Rights and Freedoms: Affinities and Antagonism’ in A-G Gagnon and JM Saucá (eds), *Negotiating Diversity: Identity, Pluralism and Democracy* (Brussels, PIE Peter Lang, 2014) 106–14.

⁵¹ *ibid* 107.

⁵² AL Parrish has written, for example, that the ‘universalistic outlook [of human rights] is in tension with the idea of states as laboratories, each developing its own novel version of human rights’. See AL Parrish, ‘State Court International Human Rights Litigation: A Concerning Trend?’ (2013) 3 *UC Irvine Law Review* 25, 42.

find a path that ensures respect for human rights but not at the expense of respect for the federal principle.⁵³

Thus, as a linchpin of Nepal's federation, local governments are critical for constitutional resilience with respect to human rights. This role will manifest both through their own policies and priorities and in their collaboration with other institutions of the state, provincial and federal, as well as independent institutions like the NHRC. However, as we will discuss, current NHRC engagement has failed to capitalise on the full potential of the structuring of local government under federalism. This chapter contends that, in order to achieve resilience of human rights, the NHRC must engage local governments in a meaningful and structured manner. For this engagement, the NHRC needs a strategy and institutional arrangement for communication, monitoring, awareness-raising and capacity building with local governments, civil society, political leaders and social activists at the local level. This is an essential requisite for promoting a culture of human rights and enhancing capacity and demands for human rights 'from below' in Nepal.

V. Challenges to Human Rights Implementation at the Local Level: Accountability and Capacity

While Nepal's local governments possess significant human rights responsibilities, and much expectation has been placed on them to deliver, two issues have the potential to undermine their ability to emerge as rights-promoting institutions. The first of these issues is related to the design of local government itself, which raises concerns about ensuring governmental accountability in the protection of rights. Local accountability takes place, first and foremost, politically through the electoral process. After federalisation, local legislatures and executives were elected first in 2017, and subsequently in 2022, each to serve a five-year term.⁵⁴ Under the 2015 Constitution, local governments cannot be disbanded or have their responsibilities

⁵³ Woehrling (n 50) 117.

⁵⁴ Constitution of Nepal, Art 225. On the 2017 local elections, see Democracy Resource Centre, 'Nepal's Local Elections 2017: Final Observation Report' (2017), www.democracyresource.org/reports/nepals-local-elections-2017-final-observation-report/.

assumed by the federation's higher-order governments.⁵⁵ The second issue with the new local governance system, which introduces a directly elected executive that sits within the local legislative chamber, is that there is no mechanism to remove local executives via a vote of no confidence or motion of impeachment. Opposition parties do sit within the legislature (and, due to their direct election, in many cases also have leadership positions within the executive) and can provide at least a modicum of discursive accountability. However, it is not uncommon for local governments to be dominated by a single political party, and in some localities there is only one party represented in the entire elected assembly.⁵⁶

The basic design of local government thus presents a model that muddles the separation of powers and the role of the political opposition – both of which have the potential to undermine accountability for rights implementation. First and foremost, the Constitution and the Local Government Operation Act of 2017 do not conceive of an opposition party in the local government, primarily because most members of the executive are elected directly by the people. Representatives from different political parties can become part of the same executive, even without having been in any electoral alliance or forming any coalition for local government. The Constitution envisions local government as being driven by a more consensual decision-making process, with little partisanship. Secondly, some institutional structures have been established to provide a degree of accountability over executive action. These include primarily the 'monitoring committee', led by a deputy mayor, and public accounts and good governance committees. Depending upon local political set-ups and partisan representation structures, the effectiveness of these institutions is highly variable on a case-by-case basis. Thirdly, even while some oppositional structures may develop, it is likely that, due to quotidian relationships between different local leaders, the notions of 'separation of powers' and 'checks and balances' will not be as effective in the local context. Accordingly, the virtues of the separation of power, checks and balances, and the politics of opposition or dissent – which are considered key institutional hallmarks of modern democracies – need to be tested against the way the members of the local executive and legislature play their roles in representing citizens' concerns and raising their voice about

⁵⁵ Compare the situation for provincial governments and assemblies, which may be suspended or dissolved and brought under temporary federal rule through a presidential order, made on the ratification of two-thirds of the federal Parliament. See Constitution of Nepal 2015, Art 232.

⁵⁶ This is the case, for example, in Bhaktapur Metropolitan City. See The Asia Foundation (n 39) 22.

policies and the use of executive power. Thus, local governments need to be tested partly on the side of politics, involving the processes of deliberation and debate on citizens' concerns and the policies to respond to them, and partly on the structural or institutional set-up that sets out the roles and authorities of different actors and the relations between them.

The Local Government Operations Act 2017 is the federal umbrella legislation that expands upon the Constitution to fill out the legal framework for the local units.⁵⁷ The Act, together with the Constitution, envisages a legislature, an executive and a judicial committee in local government's overall structure. It requires local legislatures to establish at least three assembly committees: an audit committee, a legislative committee and a good governance committee.⁵⁸ The audit committees monitor the local government's financial accounts, while the legislative committees draft or review proposed legislation. The good governance committees are designed to promote good governance, transparency and accountability within local governments by, for example, measuring and publishing social and economic progress for constituents.⁵⁹ Establishing other special rights-specific accountability mechanisms, such as the creation of specialised human rights committees, is also possible under the Act;⁶⁰ however, to our knowledge, no local units have taken this path to date. Further, in many instances, even these mandatory committees are inactive or are not functioning adequately, especially in the smaller rural municipalities,⁶¹ resulting in 'a severe lack of legislative oversight bodies in local governments'.⁶²

This institutional lack of legislative oversight of local level executive power is owing to a normative assumption in the Constitution itself. It envisages consensual decision-making and

⁵⁷ Although, it should be pointed out that there are some notable inconsistencies between the Act and the constitutional provisions on local government. See, eg B Paudel and KP Sapkota, *Local Levels in Federalism: Constitutional Provisions and the State of Implementation* (Kathmandu, Swatantra Nagarik Sanjal Nepal, 2018) 17–21, <https://asiafoundation.org/publication/local-levels-in-federalism-constitutional-provisions-and-the-state-of-implementation/>.

⁵⁸ Local Government Operations Act 2017, Art 22.

⁵⁹ Ministry of Federal Affairs and Local Development, *Good Governance Promotion Strategy and Action Plan: Sample (Draft)* (Kathmandu, MOFALD, 2017) https://mofald.gov.np/sites/default/files/News_Notices/Sushasan.PDF.

⁶⁰ Local Government Operations Act 2017, Art 22.

⁶¹ Speaking of the legislative committees, Janak Rai, for example, observes that 'many of the committee members are unaware of and are not involved in the law-making process. In practice, only a few male elected members participate in the drafting of legislation'. See Rai (n 45) 5.

⁶² B Bhurtel, 'Fiscal Federalism: An Analysis of Its Initial Implementation in Nepal' (International Alert and Saferworld, 2020) No 6, 18.

far less partisanship in local government decision-making. Many of the mayors that we have consulted point out that the only effective institution to hold the executive to account was the audit committee; the others were less effective in practice. One part of the problem pertains to the capacity of the judicial committees that are mainly entrusted to mediate local-level civil cases, such as land disputes or matrimonial issues. Both their scope of jurisdiction and their members' capacity to raise human rights issues are limited. Local elected representatives who serve on the local judicial committee mediate disputes with recourse to local customs and social practicalities. These representatives neither possess the juridical sophistication expected of judges or human rights lawyers nor do they necessarily follow due process in their work. Accordingly, there will be less local judicial restraint on the local executive power.

This brings us to a second issue that threatens to undermine local government's emergence as rights-protecting institutions: capacity. The shift to federalism – especially of the three-tiered nature adopted by Nepal – is an enormous and challenging task. While significant strides have been made since 2015, there remains much to be done. In particular, administrative capacity continues to be an issue that undermines the ability of local governments to fulfil their constitutional mandates. Many local governments still do not have a full corps of administrative staff appointed, including in key positions such as legal drafting. This has proved to be one of the principal reasons preventing local governments from enacting legislation. Moreover, only a handful of Nepal's more than 35,000 local elected representatives have any experience in government. On top of this, very few of the elected officials have had previous experience engaging in human rights-related work or advocacy. Thus, the awareness of the need for rights compliance within local government remains very low. A common refrain among local civil society leaders is that local governments are insufficiently aware of their human rights responsibilities and, where there is a general understanding of the need to protect rights, knowledge of how to do so is limited. This sentiment is also generally echoed by local elected representatives, who concede that they require more training and accompaniment through capacity development as they seek to govern and make decisions. Furthermore, an even more glaring gap is the limited understanding of the decisions on 'development work' and local human rights concerns, as the local government leaders consulted for this study interpreted their mandate and preference for (infrastructure) development without consideration of rights concerns. Similarly, there

exists a high degree of confusion and lack of understanding around how federal laws and institutions can impact the rights of local and Indigenous populations, especially as local leaders find themselves required to navigate between more conservative federal laws on the one hand and the rights and interests of their constituencies on the other.

VI. The National Human Rights Commission: Guaranteeing Rights Across All Levels of the Federation

Ensuring there is accountability for the implementation of human rights by local government is not solely in the hands of local actors. Indeed, the constitutional resilience of human rights hinges upon productive links between the NHRC and all units of the federation, as well as with the wider civil society. Despite local government's entrenched political autonomy through the federal system, its accountability for the protection and promotion of rights extends beyond mechanisms housed at the local level and includes provincial and federal institutions, as well as the judiciary and the independent national constitutional bodies. Of particular interest here is the NHRC, which is the constitutional body that is mandated to ensure the respect, protection, promotion and effective enforcement of human rights throughout the entire state. Due to its national mandate – the Commission's jurisdiction is not confined merely to federal jurisdiction – the NHRC ought to have an important role to play to protect rights at the local level.

The NHRC was established in 2000, under the National Human Rights Commission Act 1997 (later replaced by the National Human Rights Commission Act 2012). It was elevated to constitutional status in the 2007 Interim Constitution,⁶³ and this was continued in the 2015 Constitution.⁶⁴ The Commission's mandate is the protection, promotion and respect of human rights.⁶⁵ It does this through investigating rights abuses and making recommendations to the government for redressal. In addition, it can, of its own accord, initiate judicial proceedings

⁶³ Interim Constitution of Nepal 2007, pt 15.

⁶⁴ Constitution of Nepal 2015, pt 25.

⁶⁵ *ibid* Art 249.

against rights violators. It also has a monitoring function, reviewing laws for their human rights compatibility and consulting with the executive.⁶⁶

There are several ways that the NHRC can support the protection of rights in local government. For one, there is an obvious need for local governments to receive external support to build their capacity to protect rights. As mentioned above, this is something that is welcomed by local elected representatives. However, local governments are – perhaps rightfully – suspicious of assistance given by the higher-order governments, particularly the centre, whose assistance is viewed as undermining their political independence and promoting a recentralising political agenda. Local government leaders complain that the federal government’s bureaucrats issue directives in a manner they used to do during the pre-2015 pre-federal period.⁶⁷ They consider these top-down communications as violations of their autonomy. They think that, rather than helping the capacity of local government, the federal government is intent on encroaching on their political-administrative autonomy. Local representatives have thus resisted the continued development of model laws for local government by the Ministry of Federal Affairs and General Administration. As a body with national reach but with independence from the central executive, the NHRC can assist and support local governments through the process of institution-building and the enactment and implementation of local legislative instruments. Given the above difficulties, the NHRC requires a more nuanced political approach to aiding local governments.

A second way that the NHRC can support rights at the local level is by helping to close the accountability gap. As discussed above, significant accountability concerns persist in local government. Interviews with local stakeholders reveal a desire for the NHRC to assume a monitoring role at the local level. As one mayor suggested to us:

We have a committee [at local government] to formulate laws. But the committee does not have subject matter expertise, as local representatives are not legal experts, and hence we cannot prepare laws according to the need of our times. Thus, the National Human Rights Commission can support us in making such committees competent and help the development of people- and human rights-friendly laws.

For promoting human rights at the local level, most advocacy in Nepal is undertaken by local civil society organisations (CSOs). However, they have neither the scale nor the institutional legitimacy that the NHRC enjoys as a constitutional body. There is an acknowledgement

⁶⁶ *ibid.*

⁶⁷ Consultation with Municipal Association of Nepal, 2021.

from both the NHRC and governments of the important role of civil society and human rights defenders. The ways in which human rights institutions can provide accountability are well discussed in the scholarly literature. Christina Murray, for example, discusses in the South African context how the country's independent institutions can provide a check on government power 'by providing a legitimate and authoritative account of government's record, which can be used by citizens and Parliament in scrutinising government's performance'.⁶⁸ Drawing on Linda Reif's framework, Murray argues that these institutions provide accountability through 'answerability' (demanding information and reasons) rather than 'enforceability' (punishing negative behaviours) and promote governmental compliance through 'cooperative control' – that is, being 'facilitative and proactive, using advice and persuasion, wherein the actors confer and dialogue to try to obtain the desired result and change behaviour'.⁶⁹ But again, human rights CSOs also face their own capacity constraints, unless they are supported by donors, the government or the NHRC. Sustaining a vibrant civil society to champion human rights remains a challenge, especially in a highly donor-dependent context. Through the collection, publication and deployment of robust evidence, the NHRC can provide discursive accountability to local governments.

While external, independent accountability and support for local government are necessary, to date, the NHRC has been unable to provide this. Indeed, aside from a few very limited interactions and discussion programmes, the NHRC has had virtually no substantive engagement at the local level.⁷⁰ The Commission normally visits localities in response to the complaints they receive, or as part of a *suo moto* case. They are known to occasionally visit local governments, as for some years the NHRC has been engaged in efforts to support human rights-friendly local governance, but these efforts are episodic and event-oriented. This lack of sustained systemic engagement has many, compounding reasons. The NHRC's lack of physical presence in local areas is the biggest hindrance. While, for the monitoring of violations, NHRC staff from the regional offices do liaise with and consult government officials and other local actors, the latter primarily assume the role of 'informants' rather than key stakeholders. In the consultations held for this study, local representatives also indicated

⁶⁸ Murray (n 9) 131.

⁶⁹ *ibid* 131–32.

⁷⁰ See, eg National Human Rights Commission of Nepal, *Annual Report: 2020* (Lalitpur, NHRC, 2021) www.nhrcnepal.org/nhrc_new/doc/newsletter/Annual%20Report%20FY%202019-20_compressed.pdf.

that NHRC engagement was very limited in their local government units. Their visits to these sites are not regular, and they tend to only visit for larger, high-profile issues that receive national media or public attention and work their way into the national political-legal discourse. In many local units, especially in remote areas, years pass between NHRC visits. And this is not only the case for those areas that are distant from NHRC offices. In Bajura and Myagdi Districts, in Sudurpaschim Province and Gandaki Province, where we consulted, local government leaders mentioned that the last visit happened two years ago. In the Khotang District in Province One, the staff at the NHRC's 'outreach office' in Diktel (one of only two such offices in the country) noted that it has been over five years since an NHRC commissioner last visited the office.

Accordingly, the NHRC's local engagement is usually reactive, and highly dependent on victims lodging complaints. While complaints can be lodged electronically or by phone, or through mobile applications, local civil societies highlight that this often does not generate a response. Thus, victims often feel compelled to travel to the nearest NHRC office to lodge an in-person petition, which is seen as a much more reliable way to ensure that the NHRC commences an investigation. This was the case recently in Navrajpur Rural Municipality in Madhesh Province, where the husband of a woman accused of witchcraft (and subsequently abused by groups within the community) was compelled to travel to the NHRC office in Janakpur (at least a whole day round trip) to ensure that the case elicited a response. Compared to many other local units, Navrajpur is relatively proximate to an NHRC office. More broadly, due to the 'normalisation' of rights violations in several localities, many victims or survivors do not know that it is the NHRC that is charged with helping to address their concerns. Given this, public education about the existence and role of the NHRC is essential.

The NHRC's limited local engagement is quite clearly, in part, a result of the physical structure of the Commission, which remains Kathmandu-centric. After the founding of its central office in Lalitpur in the Kathmandu Valley in 2000, beginning in late 2004, the NHRC began establishing regional offices, of which there are now eight in total across the country. The decision to build an office was initially based on the severity of the Maoist insurgency in the early 2000s, with areas which experienced a greater intensity of armed conflict receiving priority in NHRC office establishment. This was due to the desired goal of making the registration of complaints by victims easier, and monitoring and investigation

more effective and efficient. Later, additional offices were established so that there was one in each of the five Development Regions. In 2018, the NHRC began the process of restructuring to align its administrative structure with the new federal configuration – essentially aligning its current regional offices with the seven new provinces.⁷¹ However, approval from the Ministry of Finance, which is required before the restructuring can proceed, has yet to be given.⁷²

Another factor is the limitation of the NHRC's constrained financial and human resources. While the NHRC enjoys considerably more resources than the newly established identity-based, 'Other' commissions, which also have a rights-promoting function,⁷³ overall, it has a very meagre budget. This is particularly the case when compared to the budgets of the other constitutional bodies. The NHRC's budget is around one-third that of the Public Service Commissions and the Auditor General, and is around one-sixth of that enjoyed by the Commission for the Investigation of Abuse of Authority.⁷⁴ A more important point about the resources, however, is that the NHRC requires authorisation from the federal Finance Ministry if it is to expand offices or incur any significant expenditure. Accordingly, while it is autonomous constitutionally, its operations or its engagements with civil society or local governments may be constrained due to a lack of support from the Ministry, and by other legislation, including those related to public procurement.⁷⁵

However, these are not the only issues at play. Another important concern is that the NHRC is much more sensitive to federal concerns than to those at the sub-national level. As already noted, the Commission's engagement in local and sub-national issues is heavily shaped by the extent to which these become salient in national political-legal discourse. This is a natural product of the NHRC's centralised place within Nepal's governance imagination. For one, the struggles for human rights from which the Commission emerged – the fight against the increasingly authoritarian Shah monarchy and the Maoist insurgency – were of national

⁷¹ The Ministry of Finance has yet to give its required approval, refusing to provide the Commission with the additional finances required to expand its office presence, and thus the current structural configuration of the NHRC remains in limbo.

⁷² National Human Rights Commission Act 2012, Art 32.

⁷³ On these, see Niti Foundation (n 28).

⁷⁴ See, eg Financial Comptroller General Office (n 37).

⁷⁵ Public procurement law is attracted if NHRC engages an NGO or other actors to provide services. The law is considered cumbersome and inflexible, and is in the process of review as of late 2021.

concern. While the Maoist conflict triggered the initial decentralisation of the NHRC, compelling it to establish regional offices to investigate conflict rights violations, the work of these offices was designed to collect information that would feed into what was a national political issue. As such, decentralisation was not instituted primarily to deal with the diversity of issues present at the local and regional levels.

However, once the Maoist conflict came to a close following the Comprehensive Peace Accord in 2006, the NHRC's momentum slowed. It faced hurdles in convincing the Ministry of Finance to garner more resources, especially as government officials view the Commission as a body opposed to and critical of the government. This attitude reflects an insufficient appreciation on the part of government officials for the rationale of having the NHRC as a protector, guarantor and promoter of human rights, entrenched within the Constitution. For them, 'human rights' are principally an international agenda to which some degree of compliance is anticipated to satisfy donor countries that provide official development assistance. The human rights governance agenda is more oriented towards UN agencies than to rights that are relevant and experienced by 'ordinary' people, and thus the rights discourse tends to make more reference to international commitments than to how these translate to improve people's lives and livelihoods.

Moreover, as already noted, the Commission's physical location – in the Kathmandu Valley – has meant that its chief decision-makers (the five appointed commissioners and the senior bureaucrats) are influenced by the experiences and concerns of a Kathmandu-centric political discourse. Natural and institutional links exist between its commissioners, civil servants, federal politicians and bureaucrats, as they all inhabit a shared Kathmandu-centric political culture. More than this, through the appointment, financing and accountability process, structural links exist between federation institutions and the Commission. The commissioners are appointed by the President upon the recommendation of the Constitutional Council, a multi-partisan and inter-institutional body, all the members of which are drawn from federation-level institutions.⁷⁶ The NHRC submits its annual report to the President, who then passes it on to the federal Parliament for deliberation.⁷⁷ Like the other constitutional bodies, it is reliant on the executive branch (via the Ministry of Finance) to approve its yearly budget,

⁷⁶ Constitution of Nepal 2015, Art 248. On the Constitutional Council and the appointments process generally, see Niti Foundation, *Evaluating Constitutional Body Appointments: The Constitutional Council* (forthcoming).

⁷⁷ Constitution of Nepal 2015, Art 294.

as well as for any major organisational changes (eg opening of new offices),⁷⁸ and the enactment of its delegated legislation.⁷⁹ The three-year delay, as of 2022, to the approval of the NHRC's revised organisational structure is illustrative of the dependence on the central executive for its basic functioning. The restructuring of the NHRC entails costs such as for staff and infrastructure, and hence it requires the federal government's approval via the Ministry of Finance. In contrast, there is no structural link between the NHRC and provincial or local governments. Thus, it should not be surprising that the NHRC is more responsive to federal concerns, and while the NHRC is intended to be a national body that services all three levels of the federation, in actuality it serves much more like a federal/central body.

VII. Conclusion and Recommendations

In this chapter, we examined the constitutional resilience of human rights in newly established federations. With a focus on Nepal's National Human Rights Commission, we have presented empirical material as well as arguments about how a fourth branch human rights institution can forge links with different units in a federation, in particular local government, and wider civil society for protecting and promoting rights.

Nepal's Constitution makes a clear commitment to respect, protect, promote and effectively enforce human rights in their expansive form, including political, economic, social and cultural aspects. We have highlighted that the twin reforms of federalism and the elevation of human rights are central to the 'progressive restructuring' of the Nepalese state, which guided the post-conflict constitutional moment, and which is intended to be the basis for the realisation of full and inclusive democracy. Both federalism and human rights are therefore important for the ongoing credibility and resilience of the 2015 Constitution and thus the maintenance of sustainable peace. Furthermore, we have discussed the importance of the newly entrenched local governments as human rights actors, not least because it is through local government that Nepalis principally engage with the state. However, we have highlighted the persistence of accountability and capacity challenges, which may undermine local government's ability to be strong rights-upholding institutions.

⁷⁸ National Human Rights Commission Act 2012, Art 26.

⁷⁹ *ibid* Art 32.

As the constitutional body mandated to guarantee the respect, protection, promotion and effective enforcement of human rights, we have emphasised the supportive role that the NHRC can play to support the protection of rights in local government. Indeed, the NHRC's mandate is national, extending across all tiers of the new federation. However, we have discussed that, to date, the NHRC has been unable to provide the independent accountability and supportive accompaniment required at the local level. While the NHRC has begun to restructure itself to calibrate to the new federal context, it has not yet adapted to engage differently and independently with the three tiers of the state. Institutionally, from the NHRC's perspective, this is principally an issue of constrained resources. However, we have further argued that this is also linked to the NHRC's unitary design. The unitary nature of the NHRC's organisation creates structural and relational linkages with the federal political branches, which means that it is more sensitive to federal tier concerns than sub-national ones. Over the long term, this unitary design is expected to tend towards supporting centripetal forces within the federation, potentially acting as an additional obstacle to the Constitution's federal devolutionary intent. This is a consideration that ought to be considered when assessing the value of the unitary design of the NHRC in Nepal and assessing its ongoing performance in supporting human rights. It is insufficient for the Commission's vision to be limited to federal/central affairs; it is critical that it reaches down and is also an effective guarantor at the provincial and local levels of government.

Overall, we have argued that the structure of local government, as envisaged under Nepal's new federal Constitution, presents a unique opportunity to strengthen human rights, serving as institutions to connect human rights discourse and standards to the local social-cultural milieu and the processes of decision-making. Harnessing this potential will necessarily be a long process that will require sustained engagement between local leaders, human rights defenders and the NHRC, which necessitates the NHRC prioritising the development of institutional mechanisms to engage with local governments as autonomous actors.