

The Constitutional Bodies: Assessing the Role of Nepal’s Fourth Branch in Supporting Federalism

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The modern executive is increasingly subject to the scrutiny not only of the legislature and the judiciary but also various non-judicial regulatory and oversight institutions. These bodies operate independently from the other branches of government and are designed to guarantee that key constitutional promises will be respected over time. Scholarship increasingly considers these bodies to constitute a ‘fourth branch’ of government — so-called because they do not neatly fit into the traditional tripartite division of the executive, legislature and judicial branches.¹ The incorporation of the fourth branch into contemporary constitutional design is now so common that it has been remarked that these institutions are now ‘considered among the core elements of modern constitutionalism’.²

Nepal’s 2015 Constitution follows this global trend of elevating the fourth branch in constitutional governance. The place of previously established bodies – the Election Commission of Nepal,³ the Commission for the Investigation of Abuse of Authority,⁴ the Auditor General,⁵ the Public Service Commission,⁶ and the National Human Rights Commission⁷ – has been maintained, while fresh constitutional roles have been designated for eight new constitutional bodies, including the National Natural Resource and Fiscal Commission⁸ as well as seven ‘Other’ commissions, which have mandates to protect and promote the rights of specific marginalised and minority groups. These are the National Women’s Commission, the National Inclusion Commission, the National Dalit

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¹ Sometimes, especially in the United States, the ‘fourth branch’ is used to refer to the media, public administration or even civil society. Nonetheless, there is growing consensus in comparative constitutional scholarship around its use to denote independent regulatory and oversight institutions. See AJ Brown, ‘The Integrity Branch: A “System”, an “Industry”, or a Sensible Emerging Fourth Arm of Government?’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press 2014); Elliot Bulmer, ‘Independent Regulatory and Oversight (Fourth-Branch) Institutions’ (International Institute for Democracy and Electoral Assistance 2019) 19.

² Charles Manga Fombad, ‘The Diffusion of South African–Style Institutions? A Study in Comparative Constitutionalism’ in Rosalind Dixon and Theunis Roux (eds), *Constitutional Triumphs, Constitutional Disappointments: A Critical Assessment of the 1996 South African Constitution’s Local and International Influence* (Cambridge University Press 2018) 370.

³ Constitution of Nepal 2015, pt 24.

⁴ *Ibid*, pt 21.

⁵ *Ibid*, pt 22.

⁶ *Ibid*, pt 23.

⁷ *Ibid*, pt 25.

⁸ *Ibid*, pt 26.

Commission, the Madhesi Commission, the Muslim Commission, the Tharu Commission, and the Indigenous Nationalities Commission.⁹

While in some regards, Nepal is at the global forefront of this constitutional innovation, Nepal is not alone in creating bodies. South Africa's so-called 'Chapter 9 institutions' is an often-cited example.¹⁰ Others include Kenya¹¹ and Sri Lanka.¹² However, it is not just in the emerging democracies of the Global South that we can observe these kinds of institutions. The Australian Electoral Commission, for example, is typically seen as a paradigmatic example of the model of independent election management.¹³

Put succinctly, following the theorisation of Tarun Khaitan, ***the purpose of these kinds of institutions is to guarantee that key constitutional promises will be respected over time.***¹⁴ So, for example, Khaitan argues, some type of election commission, operationally independent of political parties and the political executive of the day, is likely necessary to guarantee a minimal constitutional commitment to representative democracy.¹⁵

In the Nepali context, an important question that arises is whether a constitutional commitment to federalism — that is, to the entrenchment of autonomous units of government within a state — is the kind of constitutional norm that requires this kind of fourth branch guarantor support?

While theories of federalism generally understand the political process as the primary determinant of the federal balance,¹⁶ courts have long been recognised as having an important responsibility for the adjudication disputes regarding the division of powers.¹⁷ And thus, generally, through the

⁹ Constitution of Nepal 2015, pt 27.

¹⁰ See Constitution of the Republic of South Africa 1996, ss 181–194. See also, Charles Manga Fombad, 'The Role of Emerging Hybrid Institutions of Accountability in the Separation of Powers Scheme in Africa' in Charles Manga Fombad (eds), *Separation of Powers in African Constitutionalism* (Oxford University Press 2016); Fombad, above n 2; Charles Manga Fombad, 'Designing Institutions and Mechanisms for the Implementation and Enforcement of the Constitution: Changing Perspectives in Africa' (2017) 25 *African Journal of International and Comparative Law* 66.

¹¹ Constitution of Kenya 2010, ss 233, 248–254.

¹² See Constitution of the Democratic Socialist Republic of Sri Lanka (as amended up to 29th October 2020), ss 54–61F, 103–104J, 111D–111M, 153–156.

¹³ See Commonwealth Electoral Act 1918 (Cth), div 6. See Paul Kildea, 'The Constitutional Role of Electoral Management Bodies: The Case of the Australian Electoral Commission' (2020) 48 *Federal Law Review* 469; Norm Kelly, *Directions in Australian Electoral Reform: Professionalism and Partisanship in Electoral Management* (Canberra: Australian National University Press, 2012).

¹⁴ Tarunabh Khaitan, 'Guarantor Institutions' (2021) 16(4) *Asian Journal of Comparative Law* S40.

¹⁵ *Ibid.*, S54–S56.

¹⁶ For example, William H Riker, *Federalism: Origin, Operation, Significance* (Little, Brown and Company 1964).

¹⁷ Kenneth C Wheare, *Federal Government* (First American Edition, Oxford University Press 1947) 64–68; Nicholas Aroney and John Kincaid, 'Introduction' in Nicholas Aroney and John Kincaid (eds), *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press 2017); Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (Edited with an Introduction and Notes by Lawrence Goldman, Oxford University Press 2008) No. 78.

interpretation of the constitutional norms that underpin the federal system, the judiciary plays a significant role in defining — and guarding — the federal compact.

However, there are reasons to conclude that the judiciary, alone, is insufficient to protect the federal promises contained within a federal constitution. This is particularly the case as regards the regulation of financial resources within a federation — ie, fiscal federalism. Large fiscal imbalances, which are generally in favour of the centre, are common. Where this occurs, subunits are often either starved of funds and/or substantial proportions of their expenditure is constrained by conditions placed on grants from the centre — outcomes that undermine subunit autonomy. While constitutions can set out broad parameters to allocate sources of revenue among governments, these can never be precise and revenue sources can change dramatically over time.¹⁸

Placing the power to determine revenue sharing in the hands of the federal legislature is not desirable, especially in parliamentary systems where there is generally a considerable overlap of identity between the executive and the legislature, as, like the executive, it is incentivised to entrench and exacerbate its financial superiority vis-à-vis the subunits. The need for federation-wide agreement and general consistency makes it unsuitable to vest such a power with the subunits alone. Some states (eg, Germany, Ethiopia and South Africa) give the subunits a formal role in reviewing the sharing of revenue through the federal level upper chamber. The realities of the political party system, however, may not make this an effective check on centralised dominance. The task of determining the sharing of fiscal resources is too complex and too technical for generalist judges to adjudicate.

This is a concern that Nepal's 2015 Constitution is aware to.¹⁹ And thus, the National Natural Resource and Fiscal Commission was established with a mandate to be directly responsible for designing and implementing two important pillars of federalism — fiscal federalism and natural resource federalism — in a way that is insulated from the centralising politics of Kathmandu. There was an intense debate in the Constituent Assembly to ensure that the independent status of the NNRFC was maintained. The record of the Constituent Assembly Committee on Natural Resources, Economic Rights and Revenue Allocation shows that this was in response to the call from the 'pro-federalist' committee members who feared that the lack of such a body would inevitably lead to the

¹⁸ In Australia, for example, in the 1920s and 1930s federal transfers to the states comprised around 15 percent of the state's revenue sources. Today, federal transfers make up around 50 percent of total state revenue.

¹⁹ See Niti Foundation, 'The National Natural Resources and Fiscal Commission: A Custodian of Federalism in Nepal, Strengthening Constitutionalism in Nepal' (2022).

implementation of a form of fiscal federalism that would strongly favour the federal government, which in turn would be detrimental to the independence of newly created subnational units. Thus, in its own documents, the NNRFC has defined its constitutional role to be ‘the custodian of fiscal federalism’ in Nepal.²⁰

And so, my first point: ***the 2015 Constitution gives to the constitutional bodies considerable authority to implement and oversee primary elements of federalism***, in particular fiscal federalism.

How else does federalism shape and intersect with Nepal’s constitutional bodies?

Beyond the NNRFC’s direct and explicit role as a custodian of the fiscal federal norm, Nepal’s constitutional bodies shape and are shaped by federalism. Indeed, ***even where the implementation of the federalism is not primary to the constitutional bodies’ mandates, the federal norm is an important ancillary that must be accounted for in their duties***.

The Election Commission, for example, has a mandate to ensure periodic elections, thereby proving a credible guarantee to the constitutional norm of electoral democracy. It is, however, impossible to separate the commitment to democracy from the Constitution’s other normative commitments, which give substance to Nepali democracy.

Thus, the Nepali state is to be ‘an independent, indivisible, sovereign, secular, inclusive, democratic, socialism-oriented, federal, democratic, republican State’.²¹ Moreover, the directive principles set out the political objective to ‘consolidate the federal, democratic, republican, system of governance in order to ensure an atmosphere conducive to the enjoyment of fruits of democracy’.²² Article 74 sets out the form of governance, which ‘shall be multi-party, competitive, federal, democratic, republican, parliamentary form of governance based on pluralism’.²³

While being careful not to collapse many concepts into one, confounding analysis, it is clear that terms like ‘multi-party’, ‘republican’, ‘parliamentary’, and ‘federal’ provide important definitional substance to the democratic form envisaged by the 2015 Constitution. While democracy by

²⁰ See National Natural Resources and Fiscal Commission, ‘First Annual Report of National Natural Resources and Fiscal Commission 2018-19’ (2019) <http://nnrhc.gov.np/uploads/resources/2020-01-21/annual_report_final3.pdf>. For an exposition of what this custodian role requires, see Niti Foundation, above n 19.

²¹ Constitution of Nepal 2015, art 4.

²² Ibid, art 50(1).

²³ Ibid, art 74.

definition does not require republicanism,²⁴ parliamentarianism, political parties,²⁵ or federalism, without these characteristics, we would fall short of the democratic regime constitutionalised in Nepal.

In so far as guardianship of electoral democracy is concerned, in a federation an independent election management body, as is the Election Commission of Nepal, assumes the has a responsibility to guarantee the democracy norm across a multiplicity of political communities within the federation, each with their own set of independent democratic institutions. Exactly what this requires will be shaped by the context. In India, for example, Tarun Khaitan notes that apart from the political opposition, the Election Commission of India was the only state institution that resisted the BJP's move to initiate the simultaneous holding of elections for the lower chamber of Indian Parliament and state-level legislative assemblies — a move that he assesses would have supported executive aggrandisement, but which would also have altered the federal balance further towards the centre.²⁶ Where elections are simultaneous national issues are more likely to overshadow subnational issues, which generally benefits national parties at the cost of subnational/regional parties.²⁷

Turning to the National Human Rights Commission. The twin reforms of federalism and the constitutionalisation of human rights were both central to the 'progressive restructuring' of the state that guided the post-conflict constitutional moment; both are presented as important bases for the realisation of full and inclusive democracy in Nepal.²⁸ Under the 2015 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 – both opportunities and threats – for the enjoyment and protection of rights and freedoms.

²⁴ See, eg. Tom Ginsburg, Daniel B. Rodriguez, and Barry R. Weingast, 'The Functions of Constitutional Monarchy: Why Kings and Queens Survive in a World of Republics' Northwestern Public Law Research Paper No. 23-29.

²⁵ Dag Anckar and Carsten Anckar, 'Democracies Without Parties' (2000) 33(2) Political Studies 225.

²⁶ Tarunabh Khaitan, 'Killing a Constitution with a Thousand Cuts: Executive Aggrandizement and Party-state Fusion in India' (2020) 14(1) Law & Ethics of Human Rights 49, 61-63.

²⁷ Eesha Shrotriya and Shantanu Pachauri, 'Simultaneous Elections And Flexible Legislative Terms: A Constitutionally Preferable Approach' (2021) 5(1) Indian Law Review 106.

²⁸ 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).

In a Niti Foundation analysis, we argue that there are several ways that the NHRC can support the protection of rights in local government, including supporting their capacity to protect rights and helping to close the accountability gap that exists at the local level.²⁹ While not its primary objective, through supporting and upholding human rights at subnational levels of government, the NHRC can also support deepening federalism. In summary, ***constitutional bodies have considerable capacity to strengthen and sustain the federal norm.***

Beyond the implementation of their mandates, ***federalism not only provides the underlying environment to shape the institutional structure of the constitutional bodies; the federal norm ought to shape their orientation and essential functioning.***

It is perhaps clearer to see how the new federal system ought to structure the constitutional bodies as institutions – and indeed, this is where much focus has been. The various constitutional bodies have restructured their subnational office infrastructure to align with the new federal architecture, by and large establishing provincial offices in addition to their headquarters in the Kathmandu Valley.

Continuing with a focus on the NHRC, in the federated context, 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. The NHRC, for instance, must focus its powers of investigation, review, recommendation, and awareness raising across 761 increasingly distinct nodes of government and political community. No easy task for a single institution!

And here, we can highlight that institutional design does matter. 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. In the context of election management bodies, Michael Pal identifies two design approaches for federations.³⁰ First, the ‘unitary model’ where a central EMB administers both national and sub-unit elections. In contrast, in the ‘division of powers model’, separate central and sub-unit EMBs administer elections within their respective jurisdictions. Not only as regards elections, but for all fourth branch institutions, Nepal has adopted the ‘unitary model’. Australia, for example, has adopted the division

²⁹ See Hari P Dhungana and Iain Payne, ‘The Constitutional Resilience of Human Rights in New Federal States: Local Government and the National Human Rights Commission in Nepal’ in Tarunabh Khaitan, Dinesha Samararatne, and Swati Jhaveri (eds), *Constitutional Resilience in South Asia* (Bloomsbury, 2023) 109.

³⁰ Michael Pal, ‘Constitutional Design of Electoral Governance in Federal States’ (2021) 16(S1) *Asian Journal of Comparative Law* S23.

of powers model for EMBs – each state has its election commission, which manage state and local elections, while the Australian Election Commission manages federal elections. Pal highlights the advantages and disadvantages of these models, while Andrew Wolman has explored the arguments for and against the establishment of sub-national human rights institutions in federal systems.³¹

Importantly for the discussion of the intersection of the mandates of the constitutional bodies with federalism as an underlying value of Nepali constitutionalism, it is important to assess whether the design and function of the constitutional bodies is supporting the devolution of power, or whether they continue to reinforce the historically engrained centripetal tendencies of the Nepali state.

In the Niti Foundation analysis on the NHRC, we have found that it remains a very remains Kathmandu-centric institution.³² It is far more sensitive to federal concerns than to those at the sub-national level, in particular the extent to which an issue become salient in national political-legal discourse. While there are strong physical, legal, structural, and relational links between the NHRC and its officials and federal institutions and actors, there are little to no structural links 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. This analysis, I suspect, could be extrapolated to all of Nepal's constitutional bodies. This is just one example where ***the constitutional bodies may function to undermine or weaken the federal norm.***

As a final note of reflection, ***despite the constitutional bodies' direct and ancillary mandates to implement and guarantee the federal norm, and the ways in which federalism conditions their structure and orientation, the fourth branch, alone, cannot guarantee or defend federalism in toto.*** Nor should it be expected to. For one, the constitutional bodies are highly specialised institutions with very specific mandates. Even the NHRFC, which has a very explicit federalism-upholding mandate, cannot – and indeed, ought not – do more than its specific constitutional enshrined mandate.

And I want to be clear, in my previous comments on the constitutional bodies' relationship to the devolution of power, I am not seeking to put all blame at the feet of the constitutional bodies themselves. As we are all aware, they work within a very constrained broader political economy of

³¹ Andrew Wolman, 'National Human Rights Institutions and their Sub-National Counterparts: The Question of Decentralization' (2017) 6 International Human Rights Law Review 1.

³² See Dhungana and Payne, above n 29, 124-129.

federalism. Very practically, for example, many of the constitutional bodies have faced significant hurdles in obtaining authorisation from the federal Finance Ministry to expand their offices at the subnational level.³³ What I am seeking to highlight, however, what these bodies do, and how they do it, have functional outcomes for the nascent Nepali federation. While we cannot hope or expect the constitutional bodies, individually or combined, to act as guarantors of Nepali federalism, they have important roles to play to support the resilience of the federal norm in Nepal. These should not be overlooked.

³³ For example, as regards the NHRC, approval from the Ministry of Finance is required to alter the Institution's structure. See National Human Rights Commission Act 2012, Art 32.