

Subtheme

The Functioning of Local Governments in Federal Systems

Work Session 11: Should Local
Governments be Constitutionalized?

Work Session 23: Do Direct Federal-
Local Government Relations
Undermine Federalism?

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1. Constitutionalized Local Governments

Constitutionalism is the universally accepted, and probably the most essential feature of federalism. As system of governance, the first premise of federalism is the codification of state-society relationship in order to provide democracy a constitutionally protected and documented space to safeguard the interests and integrities of both polities and societies. In such a process of codification, it is quite logical that the units of governments and administration not only have a constitutional sanction of prerogatives, but also they have a constitutional origin.

Having constitutional origin and sanctity amounts to continued existence of local governments. This is not possible when they

are the creation of any other tier of government. They do not have to depend on the political will of the federal or regional governments. Constitutionalization of the local government has manifold advantages so far as the federal governance in multicultural society is concerned. We should not be oblivious of the fact that the local government in a multicultural context is an exercise in self government of the people. It is a process through which institutionalization of diversity takes place. Also being a part and parcel of the process of decentralisation or non-centralization, it is always imperative that the units of administration have constitutionally defined ambit of powers and functions.

As the order of government closest to its constituents, local governments are often best-placed to deliver services customized to local preferences and conditions, as well as provide opportunities for enhanced democratic participation in local affairs and for innovation. The status of local government varies by country. In some federations, local governments have constitutionally entrenched authority; in others, local governments are creations of provinces or states and subordinate to their authority in many or most areas. With increasing urbanization, local governments play a growing role in the lives of citizens, and are taking on greater responsibilities—though many argue they lack the fiscal levers and other sources of authority they need to do so effectively. Most participants were of the view that the constitutional entrenchment of local governments help them better realize their democratic potential and meet their responsibilities, even though this would add a further layer of complexity to intergovernmental coordination in federal states. Of the three cases considered—Brazil, Canada and India, except Canada the other two countries constitutionally recognize the existence and role of local governments as a third order of government.

In Brazil, local government is constitutionalized under Article 18 of the constitution as one of three autonomous levels of government: the Union, states and municipalities (which number over 5,500). Each municipality is thus autonomous within its own jurisdiction and hierarchically independent from the other levels. The Constitution under Article 29 sets out detailed rules for municipal governance. Each local government is expected to have a

legislative council, a mayor and an “organic law” (municipal constitution) approved by a qualified majority of its council. Articles 153–159 also identify the taxes available to municipal (and other) levels of government and procedures for the sharing of tax revenues between the Union, the states and municipalities.

In Canada, all legislative powers are constitutionally assigned to the federal and provincial orders of government—with responsibility for municipal affairs falling under exclusive provincial jurisdiction. Municipalities are thus subordinate to provincial governments: the only sources of authority and revenue available to them are those specifically granted by provincial legislation, and their boundaries and powers can be altered by provincial legislation. As Canadian cities grow in size, they are taking on greater responsibilities—and many have argued that they lack the fiscal and other tools they need to meet those responsibilities. Problems are particularly pronounced in Canada’s major metropolitan regions which now house the majority of the population in some provinces. As a result, the umbrella organization for Canadian municipalities (Federation of Canadian Municipalities) has sought constitutionalization as a way of securing guaranteed access to the fiscal resources needed to meet their responsibilities. Those opposed to conferring constitutional recognition or powers on municipalities argue that this would add yet another level of complexity, thereby increasing the existing challenges to intergovernmental relations.

Since the process of constitutional reform in Canada is quite complex—the general amending formula requires the consent of Parliament and of seven of ten provincial legislatures representing at least half the country’s population—many Canadian municipalities have also been pursuing alternatives. These measures include, lobbying for greater fiscal transfers from both provincial and federal governments, particularly in areas of infrastructure; and pressuring provincial governments for legislative changes to the provincial-municipal relationship. While all of these efforts fall short of fundamental constitutional reform, they represent pragmatic approaches for local governments to cope with increasing responsibilities. An additional facet of local government in Canada is the Aboriginal “First Nations”, who have demanded recognition as a third order of government in line with the Constitution Act, 1982 which

affirms “existing aboriginal and treaty rights”. Several Aboriginal groups in Canada have self-government agreements that would be constitutionally protected and that would effectively entrench concurrent powers to enact laws and regulations of a local nature for the good governance of their land. Many more groups are in negotiations to obtain these same rights.

The 73rd and 74th Amendment to the Constitution of India is a milestone in the process of establishing democratic decentralized administration through local bodies. The amendment suggested a list of twenty-nine subjects to be transferred by the states to the municipalities. While these changes (which required state legislation before they could come into effect) are not mandatory, they have been substantially implemented by all states. Later amendments (in 1996) have also extended provisions for autonomous councils to tribal areas, notably in the north-eastern part of the country. It has been a decade since the passage of the 73rd and 74th Amendment, which empowers panchayati raj institutions (rural) and urban municipalities as bodies of self-government. The amendment generated lots of hope and enthusiasm throughout the country as it was looked upon as a bold step towards strengthening democratic and decentralized governance in rural areas. But the process has not been as successful as it was expected. In particular, capacity issues remain with respect to transfer of funds, functions, and functionaries to panchayati raj bodies across the country. States have been reluctant to abdicate responsibilities and provide unconditional funds to local governments. So while constitutionalization has certainly provided a place for local government in this multi-tiered federation, numerous factors continue to hinder its successful implementation.

2. Federal-Local Government Undermine Federalism

The classical—legal approach to federalism conceptualizes a dual polity where each unit is independent and autonomous of other; usually federal and state. As the local governments across federations have assumed critical significance in the context of public policy management and they have proved to be effective instruments of

strengthening of democracy, development and good governance, it may be necessary for federal and local government to deal directly with one another.

The debates in this session revolved surrounding the potential for marginalization of states/provinces and the consequent strengthening of federal or central authority due to a perceived weakness on the part of local governments. Generally the local governments are the creations of the regional governments which devolve powers, functions and authorities on them. Any such direct federal-local relations must also protect the authority and autonomy of the regional governments. Given the complexity of the issue, the best practice that is now emerging is maintaining autonomy balance among the three layers on functional-index basis, where collaboration is functionally elaborated and legally codified. Each layer retains the autonomy of decision and action on mutually agreed distribution of competencies.

In practice, the federal or central governments of some countries—particularly those pursuing devolution and decentralization agendas—have sought to influence the design and governance practices of local governments and to strengthen them (sometimes at the expense of their states and provinces) with a view to achieving particular development objectives. This is because even where local governments are constitutionally entrenched, capacity imbalances between them and other orders of government put the former at a disadvantage.

The Indian presenters highlighted their country's recent movement from a highly centralized form of federalism in recent years toward a more decentralized model. This has included constitutional amendments adopted in 1992 that have significantly empowered local governments. Prior to them, local governments effectively functioned as agencies of state governments within a two-tier federal structure. As a result, India now has more than a quarter million local government jurisdictions—the vast majority of them “panchayats” at the village level, with only about 3000 local governments in urban areas.

While state governments are expected to provide their local governments some tax and fee raising capacity (and share some of their own revenues with them) under the country's Constitution,

most have been reluctant to do so, leaving many local governments with limited flexibility or autonomy in the provision of local services.

The presenter for Bosnia-Herzegovina noted that Bosnia is a very decentralized federation of two ethnically-based entities—a Bosnian-Croat federation and the Serbian Republika Srpska—established by the 1995 Dayton Accord that formally ended the Bosnian civil war. The central government gained more fiscal independence with the introduction of a new value added tax (VAT) in January 2006, but generally remains weak, with limited fiscal and other responsibilities. The two main entities—and, to varying degrees, their respective cantons and municipalities—retain a high degree of autonomy, enabling local officials (mayors, police officials, etc.) to exercise a great deal of authority. Local government is organized differently in the two entities:

- Republika Srpska is more centralized: its only subdivisions are individual municipalities.
- The Bosnian-Croat federation's municipalities are grouped into ten cantons, each of which has a more substantial government structure (e.g. its own prime minister and other ministers).

Given its general weakness, the country's central government itself has limited involvement with its local governments. However, the High Representative for Bosnia and Herzegovina (a post established in the Dayton Accord to serve as the country's *de facto* governor) continues to exercise significant powers. In practice, the High Representative has frequently intervened—at the level of local government, the two entities and for the country as a whole—to press (or impose) needed reforms and policies in the wake of an intercommunity (and sometimes intracommunity) political vacuum. The central role played by the unelected High Representative has led to criticism that his continuing role contributes to a culture of dependency, preventing representatives of the different Bosnian communities from coming to grips with the common challenges facing them by developing governance capacity at all levels of government within the country.

The Nigerian presenter mentioned that there are 774 constitutionally recognized Local Government Areas (LGAs) in Nigeria.

Both states and local government authorities are assigned responsibility for the delivery of basic public services in Nigeria—though there is no clear demarcation between the respective roles and responsibilities at the states and local level.

Given the country's overall reliance on petroleum revenues as a source of government funding (both at the federal level and, through large transfers, at the state and local level), local governments in Nigeria make very little use of own-source revenues and, in both law and practice, have limited access to both tax revenues and non-tax revenues, such as user fees (the ability to generate revenues from the latter source being limited by the poverty of many of their residents).

The fiscally centralized nature of Nigerian federalism—reflected in large petroleum-financed federal transfers that flow to both state and local governments—gives the federal government significant influence over them, leaving them with minimal autonomy.

Indonesia, though not a federal country, has significant decentralization of responsibilities to local governments—by-passing the provinces (several of which are home to secessionist movements) and may be cited as an example of a close relationship between central and local governments as undermining the “middle” (state/provincial) level of government in countries with multi-level governments.

Canada's provinces have exclusive jurisdiction over municipal affairs and exercise significant authority over their local governments (which remain “creatures of the provinces”). As a result, the federal government has historically had limited direct involvement with local governments. While the federal-municipal relationship remains modest, it has developed somewhat in recent years—generally with the support of provinces—given:

- Canada's high degree of urbanization;
- the growing importance of cities in fostering economic growth; and

the importance of key federal policies (notably in the areas of immigration, housing/homelessness, the environment, trade and commerce, and transportation infrastructure) to those cities and the provinces in which they are located.