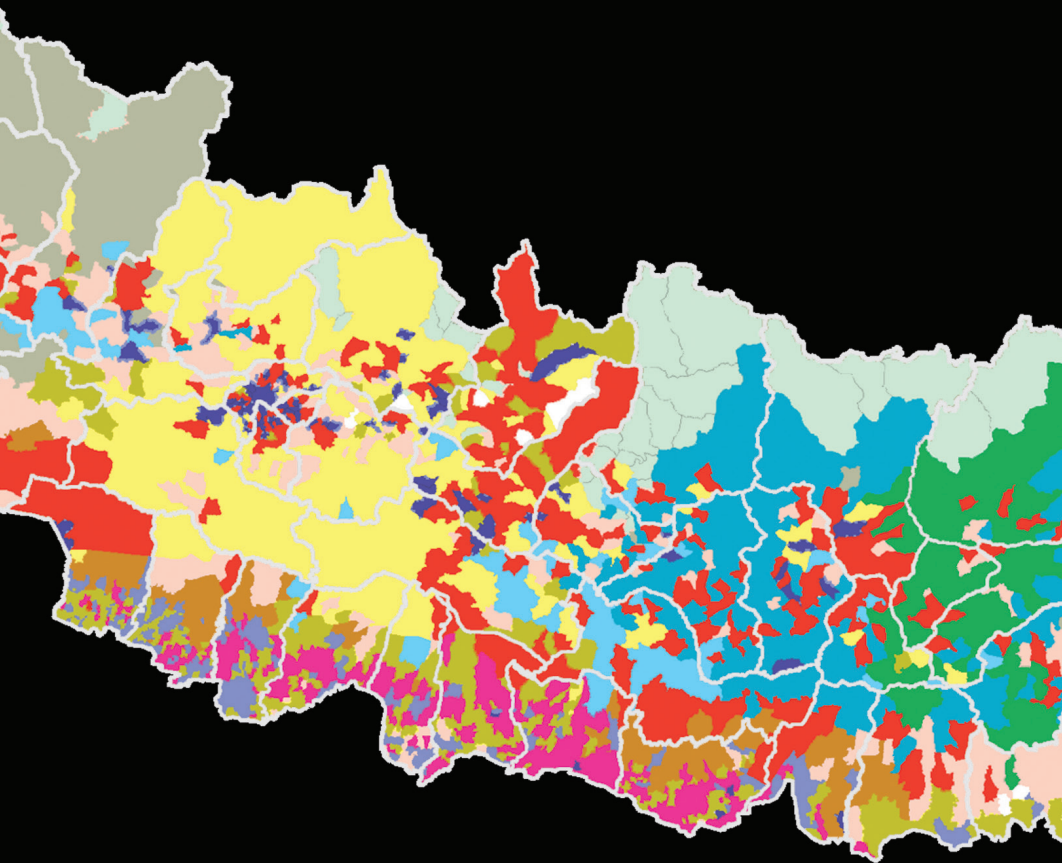


Local Levels in Federalism

Constitutional Provisions and the State of Implementation



Balananda Paudel
Krishna Prasad Sapkota

Local Levels in Federalism

Constitutional Provisions and the State of Implementation

Balananda Paudel
Krishna Prasad Sapkota



First published: July 2018

Publisher:

Swatantra Nagarik Sanjal Nepal
Maharajgunj, Kathmandu

Background

Democracy and Republicanism are popular ideas worldwide. These terms originated from the city-states of Athens and Rome in BCE 507, where directly elected democratic and republican governments were already in order. Even when autocratic and centralized governments were the global norm, local governments or entities were active in one form or another.

Looking back at Nepali history, there are no documents available on the local governance system during the rule of the Gopals and Ahirs. However, under the rule of the Kirants, Lichchavis, and Mallas, local entities were found to be functioning effectively. Later, during the Shah/Rana dynasty also, local governments were functioning in one form or another. But it was not until much later in 1976 that it was realized that a government without people's representatives could not be sustained, and Kathmandu Nagarpalika was formed, albeit under an autocratic national government. Slowly, other areas followed suit and local entities were established across different parts of the country. Even under the autocratic Panchayat system, there were attempts made to have elected local entities.

The report of the Power Decentralisation Commission in 2020 BS (1963 CE), Decentralisation Act 2039 BS (1982 CE), the Man Mohan Adhikari government-initiated 'Build your own village' programme in 2051 BS (1995 CE), the report on decentralisation and local autonomy in 2053 BS (1996 CE), the Local Self-governance Act 2055 BS ((1999 CE), and the Decentralisation Implementation Plan 2055 BS (2001 CE) are notable for their experimentation, experience, and attempts at local autonomy.

From the perspective of local autonomy, the constitution of Nepal has added a new dimension to local governance. Similar to Brazil, Spain, Russia, South Africa, and Lichtenstein, the local governments in Nepal have been established as federal units that are self-governed and can exercise state power autonomously.

Local government in federalism

Political scientist and mayor of Emden (Germany) started the discourse on federalism in 1603, and is as such regarded as the father of federalism. Its

developed form – as the federal system of government -- is practised in 30 countries covering over 40 percent of the global population and Nepal is the latest addition to the list of countries who have adopted a federal system of government.

The United States of America and a few other independent and sovereign states have adopted the 'coming-together-federalism' type, based on mutual understanding. But Nepal, like Brazil and South Africa among others, have adopted the 'holding-together-federalism' type, where power is devolved to lower levels from the unitary state. Unlike the competitive federalism of the US and Australia, Nepal has adopted a cooperative federalism as we have seen being implemented in South Africa, Germany and Switzerland.

The basis of Federalism

Every country creates their union based on their unique characteristics. For example, the basis of federalism in the US was to safeguard the population from external attacks and to create wealth by increasing trade. Similarly, in Switzerland the basis was to exercise direct participatory local democracy by establishing a representative system using the German, French, Italian, and Romansh languages. Likewise, in Brazil the basis of federation was to decentralize a centralised state.

In the same spirit, the devolution of a centralised state power to the federal, state, and local levels, establishing participatory democracy and institutionalising republicanism are the basis for Nepal's federalism. In addition, ending discrimination based on ethnicity, language, gender, religion, class, and regional and local imbalances are further factors.

Federalism has two dimensions. First is conceptual and the second is structural.

Conceptual Dimension of Federalism

First, the devolution of people's sovereignty and state powers to every level of government is conceptual. Second, if there are two or more than two levels of government, it is called structural. Third, every level of government exercises autonomous, self-governing, and collective form of government. Fourth, no level

of government is a subordinate to another level but to the constitution. Fifth, every level of government should follow the principles and structures of fiscal federalism.

The principles of fiscal federalism determine the functions and responsibilities to be fulfilled by the levels of government and collection of resources.

It provides for tax devolution after determining the jurisdiction and rates of tax, customs, and fines to collect resources to finance its responsibilities after their devolution.

If the revenue generated by the state and local government is not sufficient, the federal government will provide fiscal transfers to the state government and the federal and state government will provide fiscal transfers to the local government.

Every level of government can raise debt to fill the financing gap needed to undertake production-, employment-, and results-oriented activities.

It works to develop the institutional capacity of every level of government to fulfil their constitutional responsibility.

The Structural Dimension of Federalism

What will be the form of government in Nepal? A directly elected presidential system or mixed? Competitive parliamentary republicanism or constitutional monarchical system? One party or multiparty system? What will be the election system? Majoritarian, proportional, or mixed? How many levels of government? Two or more than two? What will be the type of governance? Competitive or collaborative? How many languages will be used? Single or multi-language? Silent on religion, or relative or religious secularism? What will be the type of economic system? State-controlled socialism, democratic socialism, welfare-oriented, mixed, or capitalism? Should the power-sharing between the state and local government be equal or unequal? And, under judicial system, should there be a dual court system or unitary court system?

The issue of form of governance, centralised or decentralised, is usually determined based on the characteristics of every country. Nepal's federalism is

not based on dual or competitive form of federalism but is based on co-existence, collaboration, and coordination. Nepal has adopted three levels of government that implement the mixed governance system at the local level and the parliamentary system at the federal and state levels. Across the levels, there is parallel voting system, inclusive governance mechanism, and recognition of multiple languages, religious secularism, socialism-oriented governance system, equal rights, participatory governance system, and a unitary court system.

Constitutional provisions and local government

Nepal's constitution provides for three main structures in the federal democratic republican setup: federal, state, and local. In addition, there is provision for federal, state, and local levels to exercise the power of the State of Nepal pursuant to the constitution and law. The local level state power is listed in Schedule-8 of the constitution. The constitution has directed that exercise of such powers will be as per the laws made by the Village Assembly or Municipal Assembly.

Schedule-9 lists the concurrent powers and directs that the laws made by Village Assembly and Municipal Assembly shall not be inconsistent with the federal law or any laws made by the state assembly. However, the laws at the federal level and by the states on the concurrent powers should be drafted keeping in mind the preamble to the constitution to “ending all forms of discrimination and oppression created by the feudalistic, autocratic, centralized, unitary system of governance” and “[t]he political objective of the state shall be...to consolidate a federal democratic republican system of governance in order to ensure an atmosphere conducive to the enjoyment of the fruits of democracy, while at the same time maintaining the relations between the Federal Units on the basis of cooperative federalism and incorporating the principle of proportional participation in the system of governance on the basis of local autonomy and decentralization” from the directive principles of the state.

Similarly, the constitution also mentions the policies of the state “to guarantee good governance by ensuring the equal and easy access of the people to the services and facilities delivered by the State, while making public administration fair, competent, impartial, transparent, free from corruption, accountable and

participatory”. It is also mentioned as policies of the state “to develop and expand harmonious and cooperative relations between the Federal Units by way of sharing of responsibilities, resources, and administration between them” and “to make community development through enhancement of local public participation”. As such, the governance system should be designed keeping in mind that local people’s participation is possible not only at the local level but in all level of governance.

The executive powers of the local level are vested with the Village Assembly and Municipal Assembly as per the constitution and federal laws. Those powers are listed under Schedule-8 and Schedule-9, which provide for functions, roles, and responsibilities of Village Assembly and Municipal Assembly, and other powers not specified by the constitution will be as per the federal laws. The local levels can formulate budgets and plans as per Schedule-8 and Schedule-9 of the constitution and take necessary decisions to specify tax rates and collect revenue. However, the constitution states that imposition of taxes and collection of revenue on matters that fall within the Concurrent List and on matters that are not included on the List of any level shall be as determined by the federal government. In addition, the constitution provides for all revenues received by the Government of Nepal to be deposited in the Federal Consolidated Fund. The fund thus collected is to be shared among the state and local governments, according to the detailed modality recommended by the National Natural Resources and Fiscal Commission.

The constitution has provisions for equalisation grants, conditional grants, complementary grants and special grants to the state and local governments depending on their expenditure needs and revenue capacity. These grants are also to be based on the modality for revenue sharing as recommended by the National Natural Resources and Fiscal Commission.

The constitution also has a provision that each state will have to distribute fiscal equalization grants out of the grants received from the Government of Nepal and revenues collected from its sources, based on expenditure needs and revenue capacity of its subordinate local level.

Also, in drafting any federal law on the sharing of revenues, the autonomy of the state and local levels, services to be rendered by the state and the local level to

the people, financial powers granted to the state and local level, and potential for revenue must all be taken into consideration.

The constitution provides the local level the right to dispense justice through management of local courts, arbitration and mediation. This will be coordinated by the vice-chairperson in the case of Village Bodies and deputy mayor in the case of municipalities. Each will have two members elected by their respected assemblies.

The constitution has given the right to manage local services to the local governments. This right has been granted with the policies of the state to guarantee good governance and ensure an accountable and participatory administration. The federal government also has the constitutional obligation to make adjustments to the civil servants serving under the central government during the transition phase to limit centralised government and to implement federalism.

Laws to be enacted by the federal government regarding local government

The constitution has granted the Village and Municipal Assembly the right to draft and enact their own laws under Schedule-8 and Schedule-9. However, there are provisions that outline cases wherein federal and state government have the jurisdiction to draft the laws. These are the laws that need to be drafted:

1. Laws related to determining the number of wards in the Village Body and Municipality, Article 56 (4)
2. Policies, standards and laws on any of the matters enumerated in the Concurrent List and other areas of financial powers as to be applicable also to the states, Article 59 (2)
3. Laws related to time for submission of budget, Article 59 (3)
4. Laws relating to the management of budget deficits and other fiscal discipline, Article 59 (7)
5. Laws relating to the imposition of taxes and collection of revenue on matters that fall within the Concurrent List and on matters that are not included on the Lists of any level, Article 60 (1)

6. Laws related to conditional grants, complementary grants or special grants, Article 60 (5)
7. Laws on other provisions relating to the local level executive not provided by the constitution, Article 219
8. Laws related to the formation of four-member ward committee including the ward chairperson in Village Body and Municipality, Articles 222 (4), 223 (4)
9. Laws related to levying of tax but that do not prejudice carriage of goods and services, capital and labour market, and the neighbouring state or local level, Article 228 (2)
10. Laws related to deficit budget financing, Article 230 (2)
11. Laws related to maintaining coordination between the federation, state and local level, Article 235 (1)

Laws to be enacted by the state regarding local government

1. Laws related to necessary procedural laws, Article 226 (2)
2. Laws related to the conduct of business of a Village Assembly and Municipal Assembly, rules of procedures of meetings, formation of committees, conditions in which the office of a member falls vacant, facilities receivable by members of the Village Assembly and Municipal Assembly, and employees and offices of the Village Body and Municipality, Article 227
3. Laws related to budget deficits, Article 230 (2)

Multilateral interrelations among federal, state, and local governments

Among the governments of the Federal Democratic Republic of Nepal, the local autonomous government is the one closest to the people. As per the constitution, the federation in Nepal is based on the principles of cooperation, co-existence, and coordination, and the relations between the federation, states, and local levels will be based on these principles.

Compared to the unitary system of government, the federal system is relatively complex in terms of management. To simplify the complexities, the principles, laws, structures and procedures of interrelation between governments should be made systematic and transparent. The interrelation is defined by methods based on policy, principles, operational, structural, and managements aspects, adopted to resolve disputes between federal, state, and local governments, or between the local government and state government, or local governments and federal government on implementing common programs.

The use of constitutional rights by the federal, state, and local governments should be free from meddling and anarchy. Necessary principles, policies, laws, structure, and procedures should be drafted to enjoy the rights. There are vertical and horizontal relations between the federal, state, and local governments. There is a vertical relation between local, state, and federal levels; and those between local-to-local levels and state-to-state level relations are horizontal.

The constitution has made provisions for the federal government to provide necessary assistance and directions -- either by itself or through state governments -- to the Village or Municipal Council as per Nepal's constitution and federal laws.

The interrelation between the federal, state, and local level is important for the rights pertaining to the national objectives and their implementation, foreign assistance, capacity development, drafting of laws, intergovernmental fiscal transfers, sites of archaeological importance and ancient monuments, land use, mobilisation of natural resources, and local-level rights.

In addition, the local-level government interrelationship is necessary for boundary rivers, common (boundary) forests, tourism areas covering boundary areas, sites of archaeological importance, construction of large infrastructure, management of large machines and devices, disaster management, transportation management, garbage management, fire brigades, technical education, specialised services, carriage of goods, mutual respect of laws, applying good practices and hospitals, among others.

Coordination between federation, state, and local levels

Article 235 of the constitution states that the federal parliament will make the necessary laws in order to maintain coordination between the federation, state and local levels. Another clause of the same Article states that the state assembly will sustain coordination between the state and village bodies or municipalities and can settle any political disputes in coordination with the concerned village body, municipality, and the District Coordination Committee. While drafting laws for such dispute settlements and coordination, three things must be considered: formation of a coordinating mechanism, the anticipation of disputes between the federation, states, and local levels and ensuring of institutional representation from all three levels depending on the type of dispute.

Structural mechanism for interrelation and coordination

The laws drafted by the legislature-parliament make it clear that elected people's representative are not the only source of legitimacy and criteria for democracy. Democracy is not only a political system based on elections; it is a collective of systems, procedures, structures, processes, and cultures.

If the ideals of democracy are not translated into our attitude and practice, and if politics isn't about principles, commitment, conduct and loyalty, the results will be naught, regardless of which political system is followed. It cannot be a coincidence that even after elected representatives have become active at the local levels under a new constitution, ordinances on education, cooperatives, disabilities and others were passed that infringe on the constitutionally provided rights of the local government. To avoid such issues, a coordinating structural mechanism should be established similar to those being practiced in other countries. Otherwise the country will enter a vicious cycle of conflict. It is necessary to determine the issues it can deal with and jurisdiction of such a coordinating mechanism.

The following countries have put in place various mechanisms to resolve the disputes and manage interrelations between various levels of government:

- In Australia, there is the intergovernmental Council of Australian government, chaired by the prime minister with representatives from the senate, local governments, states, and federation.

- In South Africa, principles of intergovernmental relations are stated in the constitution to avoid disputes among the different levels of government. There is a legal provision to hold dialogue in the South African Local Government Association or general publications while drafting laws by federation and states. A provision for fiscal interrelation has been maintained by having two representatives from the South African Local Government Association in the national Financial and Fiscal Commission.
- In the United States, legal and constitutional disputes are settled by the Supreme Court of the United States, disputes on labour and pollution by federal government, some issues by political mechanisms, and the United States Senate Committee on Judiciary on the effects of the agreement between two states.
- In Canada, there are provisions for First Ministers' conference, Annual Premier's conference, Ministerial Council, and Supreme Court. With these mechanisms, the Canadian federation is more centralised; however, local governments exercise their statutory powers through judicial reviews. To fight for the common interests and rights, Federation of Canadian Municipalities (FCM) has been active since 1901.
- There is a provision for an Inter-State Council chaired by the prime minister that will resolve political disputes between states. This Council does not have representation of local governments. This shows that while state power is exercised by all three levels of government, there is representation of only two levels in the mechanism to resolve disputes between the three levels. As such, this is not likely to resolve disputes. The responsibility to settle disputes between the local levels and between local level and states is given to the state assembly. Conflict of interest arising out of settling disputes related to the states by the state assembly should also be kept in mind. To coordinate and bring policy-level consistency, collaborate politically on project management, utilise concurrent powers, utilise and share natural resources by the state and local levels, the Local Government Operation Act 2074 provides for a committee chaired by the chief ministers and membership of all the ministers of the state, chief secretary and secretaries responsible of local

level, chief of District Coordination Committee, deputy chairperson, and chairs and deputy chairs of all the Village Councils of the state and mayors and deputy mayors. This raises the question whether such a representative body has the capacity to take decisions on any disputes.

- The legislature-parliament, as per the constitution, enacted laws in the absence of federal parliament and state assembly has made laws that should have been drafted by the state assembly. Some of these laws have been analyzed below:
 1. An Act Made for Intergovernmental Fiscal Arrangement, 2074
 2. Employees Adjustment Bill, 2074
 3. Local Government Operation Act, 2074
 4. Labour Act, 2074
 5. Disability Rights Act, 2074
 6. Education Act 2028 (Eight Amendment 2073), (Ninth Amendment 2074)
 7. Disaster Risk Mitigation and Management Bill, 2074
 8. An Act Made to National Natural Resources Commission, 2074

An Act Made for Intergovernmental Fiscal Arrangement, 2074

1. In the preamble to this Act, it is stated that this Act has been made to provide necessary provisions regarding revenue rights, revenue sharing, grants, loans, budget arrangements, public expenditures, and fiscal discipline of the Government of Nepal, the state and local levels. The following are salient of the Act.
 - a) Article 56 of the constitution states that there will be three levels of government respectively: federal, state, and local levels. But here, only two mechanisms for the state and local levels are mentioned; and at the federal level, the names of the executive structures are written. Article 75(3) of the constitution states that '[a]ll Federal executive functions of Nepal shall be performed in the name of the Government of Nepal'. This Act provides for rights to the Government of Nepal, respectively the federal, states, and local authorities to impose tax, penalties and non-tax revenue in various places. Since the Government of Nepal is mentioned only at the

federal level, it raises questions about the intention of the federal government. Constitutionally, along with the federal, the state and local levels have executive rights. They have executive, legislative, and judiciary powers and functions. But gauging by the wording that is used, it seems as if policy-makers were unwilling to accept the existence of states and the local levels in drafting this Act, which has already also been accepted by the drafters of the constitution.

- b) This Act has not internalized the role of the National Natural Resources and Fiscal Commission on revenue sharing, grants, debts and other issues.
2. Article 5(1) of this Act contains the clause ‘...tax and non- tax revenues to be collected by any two levels from among Government of Nepal, the state, or local level shall be collected’. As per the constitution, the Government of Nepal does not form/represent any part of the state. There is no provision for the Government of Nepal at any level. This provision also cannot be said to be as per the spirit of the constitution.
 3. Article 3 (6) of the Act provides for the Government of Nepal to levy on and collect royalty of natural resources in accordance with federal law. As per the Schedule-9 (14), royalty from natural resources falls under concurrent powers. This has raised the following questions:
 - a) This Act only reflects the mindset of federal government. This should have been drafted following the recommendations of the National Natural Resources and Fiscal Commission, which would have reflected the concept of three levels of government.
 - b) Schedule-9 of the constitution has given power to the local level to draft laws that do not go against the constitution and laws of the federal and states. Therefore, a conclusion should be reached on the bases of collaboration, coordination, and co-existence.
 4. Chapter 3 of this Act has provisions for revenue sharing. However, Article 251 (1a) of the Constitution states that the functions, duties, and powers of the National Natural Resources and Fiscal Commission are determine a detailed basis and modality for the distribution of revenues between the federal, state, and local governments out of the Federal Consolidated Fund in accordance with the constitution and law. Since

the detailed basis and modality for revenue sharing is to be determined by the Commission, it would seem that this act is above the constitution. This provision also does not seem to honor the spirit of the constitution.

5. Article 33 of the Act has provision for an Intergovernmental Fiscal Council to hold and maintain necessary consultation and coordination among the ^[1]_{SEP} Government of Nepal, the states and local levels on intergovernmental fiscal arrangements, with the finance minister as its coordinator. There are 14 members in this Council with two representatives at the local level as recommended by the states. If the provision had been for two representatives from among the chair or vice-chair of the Village Council or mayor or deputy mayor of the municipalities, at least they would have the legitimacy of representing Village Councils and municipalities. However, since the provision categorically seeks recommendations from the states, they are under obligation to represent the states rather than the local levels. We have experienced a unitary system of government for a long time, and this provision seems to be a legacy of that system.

The provision for representation has overlooked the following issues:

- a) Collective representation
- b) Three levels of government
- c) Leaders of local levels as an electoral college of the National Assembly

6. Note (1) on Schedule-4 of the Act has this provision:

‘The Government of Nepal, on the recommendation of the Commission, shall allocate and distribute the royalties of natural resources in proportionate ratio to the State and Local Level as affected by the use of natural resources (Concerned Local Level, District Coordination Committee).’

This is a provision through which the District Coordination Committee can also collect royalties from natural resources. As per the constitution, any collected revenue cannot be expended without depositing it in the Federal Consolidated Fund, State Consolidated Fund, or Local Consolidated Fund, now the question is: which consolidated fund handles the royalty received by the District Coordination

Committee? Funds from the consolidated fund can only be expended as per the law but the District Coordination Committee does not have the authority to draft laws. By giving the authority to collect royalties from natural resources to the District Coordination Committee, this act completely ignores the constitutional provisions.

Employees Adjustment Bill, 2074

1. Article 4 of this Act has provisions for the administrative structure and number of positions required: 'The Government of Nepal will form Operation and Management Survey Committee that would fix the administrative structure and number of civil servants for federal, state, and local levels to deliver services'. Administrative structure and employees' adjustment would be carried out based on the recommendations of this Committee. The structure of any entity is not determined by functions alone; it is determined by how those functions are carried out. Only the three levels of government can decide on how their functions are to be carried out. Therefore, cooperation and coordination between respective governments is important. However, this provision is silent on cooperation and coordination. If this issue is left out of the terms of reference for the Committee, this provision is against the spirit of federal system of government and the constitution. Article 218 of the constitution has a provision where 'allocation and conduct of business of the Village Executive and the Municipal Executive shall be carried out in accordance with the rules approved by the Village Executive and the Municipal Executive, respectively'. Under this provision, Village Executive and Municipal Executive can make their own administrative structure based on the allocation of business. Additional arrangement should be to abide this provision.
2. Article 9 (6) of the Act has provisions for transfer of the adjusted employees: 'Civil service employees adjusted to the states and local level according to this Act and having completed their tenure shall be transferred to federal government and those who served in the federal government to the state or local level as per their appropriate service, group, or sub-group as per Federal Civil Service Act'.

There should be a provision to seek respective government's agreement while carrying out transfers of employees. If there is a provision to transfer without their agreement, the respective government cannot make the employees fully accountable to them, and they will not be able to fulfil their constitutional roles.

Local Government Operation Act 2074

1. Article 12 (2c) of the Act describes in detail the operation of FM (radio stations)
 - Permission to operate, renewal, monitoring, and shut down FM stations of up to 100 watts
 - Other responsibilities regarding operation of FM (radio stations) as per the state laws.

Schedule-8 of the constitution only states operation of FM (radio stations) and had not mentioned the restriction on wattage. Schedule-6 also gives the right to operate FM (radio stations) to the states. Schedule-7 on the Concurrent Powers of the federation and state only states means of communication. While the constitution-drafters gave unrestricted rights of operating FMs to the local governments, but they seem unclear on legal bases and technical criteria to legally limit such rights.

2. Article 11 (2e) of the Act has given the task of determining the administrative structure and number of position based on the operation and management survey. However, the Employees Adjustment Act 2074 has given this authority to the federal government. If this was a provision for the initial period, it does not mention that it is a sunset provision anywhere. This can create legal uncertainties. Therefore, this provision of the Employees Adjustment Act must also be implemented with the involvement and agreement of the local governments. This will also incorporate the constitutional spirit.
3. Schedule-8 of the constitution had given the responsibility of basic and secondary education to the local government. However, Article 11 (2h) of this Act gives power over basic education only. It is unclear how the

authority to circumscribe this constitution- provisioned right through federal laws was acquired. This right cannot be limited even within the principles of federal government drafting and encouraging implementation of basic minimum national standards in this regards.

4. This Act does not define basic health, local roads, rural roads, agriculture roads, alternative energy among others. This has given rise to the suspicion that while defining national and state projects by the federation and the sates in the future, there might be infringement on the jurisdiction of the local levels.
5. This Act has also specified the Schedule-9; however, it has omitted the following items from Schedule-9.
 - a) Cooperatives
 - b) Education
 - c) Agriculture
 - d) Mines and minerals
 - e) Disaster management

Were these items omissions or omitted? We have concluded that these were omitted. Drafters of the Act must have thought that these powers have been given to the local level through Schedule-8, so there is no need to include additional items from Schedule-9. However, the constitution has not given this latitude to the drafters of the Act. Schedule-9 is a list of Concurrent Powers of federation, state, and local level. If the drafters of the constitution had thought that any item from this list was not necessary for the local levels, they would have put that in Schedule-7 because Schedule-7 is the list of Concurrent Powers of the federation and state. On top of this, disaster management is an issue that needs to be handled in cooperation among all the three levels. Therefore, this provision has not been true to the spirit of the constitution.

6. Article 12 of this Act makes provisions for ward committees and while determining function, responsibilities, and rights of this Committee by the Village/municipal executive, minimum provisions will be as per this Act. Though the constitution has provision for ward committee, it is silent on its responsibilities. Therefore, governing units are the Village Assembly and Municipal Assembly and Village and Municipal Executives.

Ward committees are accountable to the governing units in their functions. This Act states that the works performed by the ward will be through the ward office; however, this should be understood as ward offices being fully accountable to the Village/Municipal Executive.

7. Article 227 of the constitution states that the state government will draft the laws relating to the conduct of business of a Village Assembly and Municipal Assembly, rules of procedures of meetings. There is also the provision that in the absence of state assembly, the rules can be formulated by the transformed legislature- parliament. Article 296 (4) of the constitution states that if the transformed legislature-parliament has drafted any such laws, they will be inoperative after one year of the formation of the state assembly. Since this provision is applicable to chapter 4 and 5 of this Act, it would have been better to mention it. In its omission, this can be understood as if the federation should draft these laws.
8. Chapter 8 of the Act has made provisions for judicial functions, which is related only with Article 217 of the constitution, but is silent on the provision of local courts of Schedule-8. It is unclear whether this judicial committee is the local courts or the local level will draft separate laws for local courts. Laws regarding items on Schedule-8 can be drafted without contravening the constitution. Therefore, this provision has not been able to remove the above-mentioned constitutional uncertainties.
9. Article 55 of the Act has provision for unified property and land tax. Only unified property tax can be imposed after 2075 Sawan 1, for which every Village Executive and Municipality will have to update all the unified property details before that. No employees have been transferred for this work and the local levels are not allowed to update it as well. The working procedure of this is also not clear. This will have negative effect on the working of the local levels and create negative impression of locals about the local levels.
10. Article 64 of the Act has provisions for determining, collection, and sharing of tax under mutual jurisdiction. One of the rights of the local level and state is the vehicle tax. Article 5 (1) of the An Act made to Intergovernmental Fiscal Arrangement has provision that the '[s]tate shall, while collecting

motor vehicle tax, collect also the motor vehicle tax levied by local level on motor vehicle'. This is in line with the rights of the local level to determine tax rate and provides for a single-tax policy for the taxpayer and tax administration. While collecting such taxes, the level collecting the tax can keep up to 2 percent as administrative expense. This is as per the spirit of constitutional provisions.

However, Article 64 (1) of Local Government Operation Act 2074 states that 'vehicle tax will be collected by state'. But it contains a restrictive clause that states 'Village executive and municipality can set their tax rate on tanga (horse-drawn carriage, rickshaw, auto rickshaw, and e-rickshaw and can collect the tax and deposit it in its own fund'. This restrictive clause gives the impression that all other vehicle taxes will be collected by the state and the state will retain it in its fund. The state powers of two levels as provided by the constitution as their rights cannot be delimited by drafting laws. Similarly, state and local levels have the power to fix and collect house and land registration fee to be determined by the state and collected by the local level, advertisement tax to be determined and collected by the local level, entertainment tax and mode of its collection to be determined by the state and to be collected by local level. The tax thus collected with the source of revenue specified will be retained in a state-level fund. Some bases for revenue sharing from this fund are also given:

- a) On the basis of revenue source
- b) On the basis of revenue collection
- c) Area of services to be delivered by the state, Village Executive, or municipality
- d) Reduction of poverty, local regional imbalances, and inequality
- e) On the basis of other sources of income

However, Article 15 (1) of the An Act Made to National Natural Resources and Fiscal Commission has set the following criteria for distributing revenue:

- a) Demography and demographic details
- b) Area
- c) Human Development Index
- d) Necessity of expenditures
- e) Infrastructure development

- f) Effort made to collect revenue
- g) Special conditions

The law contains redundancies, ambiguities, and some provisions are in contravention of the constitution. The Local Government Operation Act 2074 does is silent on the recommendations of the National Natural Resources and Fiscal Commission on sharing of revenue.

11. Article 22 of the Act has provisions where Village Council and Municipal Council can form various committees after making laws. However, Article 227 of the constitution states that laws related to formation of committees can be made by states only. Therefore, the provisions of this Act are set to remain in force for a year from the formation of the State Assembly. This provision should be set in law.
12. Article 86 of the Act states that 'the basic principles and criteria for establishment of local services, conduct, management, conditions of services, and facilities will be as per the federal law. However, article 227 of the constitution states that 'facilities receivable by members of the Village Assembly and Municipal Assembly and employees and offices of the Village Body and Municipality shall be as provided for in the State law'. It is essential to address the differences in the legal and constitutional provisions.

Labour Act 2074

Article 10 of this Act provides for formation of an advisory council to provide suggestions to the Government of Nepal. The council does not have representation from either the state or local level. Is this issue pertinent to the state and local level, or not? If it is, how are they being heard? Were the constitutional principles of cooperation, co-existence, and collaboration followed or not? This Act has raised several such questions. This Act seems to have been drafted without keeping in mind the federal structure.

Disability Rights Act, 2074

Schedule-8 under item 16 of the constitution has given the power to the local level to make provisions regarding disabled persons and their management. Local

levels can make laws that do not contravene the constitution on this issue. There is no separate mention of the state having its own separate power on this issue, but it is mentioned under the Concurrent Powers of federation and state. Social security is in the Schedule-5 of Federation's list of federal power. Social security is also mentioned under the Concurrent Powers of all three levels of government.

However, except for three Articles on the responsibilities of local level, providing recommendations, and formation of local coordination committee, this Act has provides for all the issues to be managed by the federal government (Government of Nepal). This seems to completely ignore the fact that the constitution has distributed rights and responsibilities to all the three levels of the state. This has turned a blind eye to the letter and spirit of the constitution.

Education Act 2028 (Eight Amendment 2073), (Ninth Amendment 2074)

Both amendments of the Education Act 2028 are against the constitution as all the provisions of this Act will be inoperative in one year of the first sitting of the federal parliament. Both amendments show that instead of amending the Education Act as per the spirit of the constitution, the federation seems to have amended it as per its needs.

Disaster Risk Mitigation and Management Bill, 2074

Disaster management is listed under Schedule-9, which is a Concurrent Power of all three levels of government. Item 20 on the Schedule-8 is also disaster management, which is a power of the local level. It can make laws that do not contravene the constitution on this issue. While detailing the approved worklists, the Council of Ministers on 2073/10/18 has also stated that under disaster management under Schedule-9 and Schedule-8, there should be national policy, standards, projects, and capacity development of state and local levels, and assistance and coordination. However, besides the formation of the committee, this Act also does not seem to have followed the spirit of the constitution and seems to have been based on the acts in place before federalism.

An Act Made to National Natural Resources and Fiscal Commission 2074

1. Article 60 (8) of the Nepal' constitution has stated that the following points should be taken into consideration while drafting laws related to revenue sharing:
 - a) National policy
 - b) National requirements
 - c) Autonomy of state and local levels
 - d) Services provided by state and local level to the people ^{and} financial powers granted to them
 - e) Capacity to collect revenue
 - f) Potentiality and use of revenue
 - g) Assistance required for development works
 - h) Regional imbalance
 - i) End to deprivation
 - j) Assistance for contingency works and temporary needs
 - k) Reduction of poverty and inequality

Local Government Operation Act 2074 has listed the following bases for revenue sharing:

- a) On the basis of revenue source
- b) On the basis of revenue collection
- c) Area of services to be delivered by the state, Village Executive, or municipality
- e) Reduction of poverty, local regional imbalances, and inequality
- f) On the basis of other sources of income

However, Article 15 of this Act provides only the following criteria for revenue sharing:

- a) Demography and demographic details
- b) Area
- c) Human Development Index
- d) Necessity of expenditures

- e) Infrastructure development
- f) Effort made to collect revenue
- g) Special conditions

This Article should have mentioned the provisions of the constitution as well as other bases mentioned elsewhere in this Act. This provision has not followed the spirit of the constitution.

Detailed work list of the Local and Concurrent Powers of the federation, state, and local level under Schedule-5, Schedule- 6, Schedule-7, Schedule-8, and Schedule-9

On 2073 Magh 18, Government of Nepal (Council of Ministers) has approved this detailed work list. It is stated that this detailed work list has been done for increasing trust in and effectiveness of service delivery; fixing clear responsibilities; ending instability, confusion, and uncertainties in the intergovernmental relations; assisting in the fiscal and human resources management by ensuring necessary administrative structure and legal basis to carry out their functions. Some associated principles are also listed. For example:

- a) Efficiency and subsidiarity
- b) Economies of scale
- c) Externalities or spill-over jurisdiction
- d) Equity and inclusion
- e) Overall economic stability
- f) Issues of national priorities and objectives
- g) Accountability and capacity
- h) Collaboration, coordination, and co-existence

Though these principles are listed, it is not stated whether these principles were followed or how they were followed applied. And this detailed work list contradicts these stated principles.

Following issues have come to light based on the analysis of the laws enacted by the transformed legislature-parliament:

- a) Laws at variance with the constitution
- b) Legal provisions at variance with one another

- c) Laws not following the spirit of the constitution
- d) Laws infringing another's jurisdiction
- e) Ambiguity of principles

Way Ahead

1. Common understanding

There should be a common understanding on constitutional provisions among the three levels of the government. For this, the constitutional principles of collaboration, co-existence, and cooperation should be followed. Additional work needs to be done. By keeping the constitutional principles of collaboration, co-existence, and cooperation abstract, there will be differences in understanding, which will lead to their use and create problems among the three levels. So the following needs to be done:

- a) Making the constitutional structures effective.
 - i. National Natural Resources and Fiscal Commission, which is responsible for sharing of expenditure and revenue among the three levels of government, intergovernmental fiscal transfer, internal debt, sharing of natural resources, should be formed immediately. This should be made more professional.

2. Interstate Council

The Council to be formed under the chair of the prime minister has the responsibility of resolving disputes between states; and federation and states. Making this entity effective will solve the above problems. However, the responsibility of resolving the disputes between state and local level is given to the state by the constitution. It would be appropriate to make legal provisions for the Interstate Council to oversee the disputes between state and local level if they are not easily resolved. There also does not seem to be constitutional provisions to resolve any dispute between federation and local level. Therefore, this aspect should be included in the laws drafted by the federation for coordination among the three levels of government.

b) Shared rule and self-rule

The constitution has distributed rights among the three levels of government with a view to shared rule and self-rule. Schedules 5, 6, and 8 reflect the bases of self-rule. To implement the powers in the schedules, federation, state, and local levels can draft laws that do not contravene the constitution. Thus, the constitution has made provisions for all three levels of government to exercise state power. But Schedules 8 and 9 provide for shared rule. In regards to Schedules 7 and 9, states should draft laws that do not contravene the federal laws. And in regards to Schedule 9, local levels should draft laws that do not contravene the federal and state laws. Any laws at variance with others will be inoperative.

While drafting laws by the federation, state, and local levels, the principles of shared rule and self-rule should be kept in mind and constitutional principles of collaboration, co-existence, and coordination should be followed.

2. Increase constitutional literacy

There are 36,000 plus people's representatives in the three federal units and they are engaged in drafting laws within the limits of the constitution. At least initially, all the people's representatives from all three levels should have a common understanding.

That the transformed legislature-parliament could not follow the spirit of the constitution while drafting laws is clear from the above analysis. After the promulgation of the new constitution, it is clear that laws in contravention of the constitution cannot be drafted as per Article 304 (1): 'The Nepal laws in force at the time of commencement of this Constitution shall continue to be in force until such laws are repealed or amended. Provided that any law which is inconsistent with this Constitution shall ipso facto be invalid to the extent of such inconsistency, after one year of the date on which the first session of the Federal Parliament set forth in this Constitution is held'.

There seems to be an understanding that this provisions is only applicable to laws that are in existence at the time of the promulgation of the new constitution. This is proved by the fact that new laws contravening the new constitution are still being drafted. Therefore, there should be minimum understanding of the constitution among the lawmakers from the three levels of government.

3. Legal recourse

A common understanding of constitutional provisions will motivate the three levels of federal entities to collaborate. Each level should be encouraged to realise their limits and obligations and remain within the principles of collaboration, coordination, and co-existence. As the protector and final interpreter of the constitution, the courts will decide on these issues. However, going to the courts on each will set a bad precedent.

Federalism is not a system of government to evade responsibility by putting blame on the other levels of government. This is a system to move forward by carrying out diligently one's responsibilities and putting in place required legal provisions.

Schedule-5

(Relating to clause (1) of Article 57, and Article 109)

List of Federal Power

SN	Matters
1.	Relating to defence and military
	a) Protection of national unity and territorial integrity
	b) Relating to national security
2.	War and defence
3.	Arms and ammunitions factories and production thereof
4.	Central Police, Armed Police Force, national intelligence and investigation, peace, security
5.	Central planning, central bank, finance policies, monetary and banking, monetary policies, foreign grants, aid and loans
6.	Foreign and diplomatic affairs, international relations and United Nations related matters
7.	International treaties or agreements, extradition, mutual legal assistance and international borders, international boundary rivers
8.	Telecommunications, allocation of radio frequency, radio, television and postal matters
9.	Customs, excise-duty, value-added tax, corporate income tax, individual income tax, remuneration tax, passport fee, visa fee, tourism fee, service charge and fee, penalty
10.	Federal civil service, judicial service and other government services
11.	Policies relating to conservation and multiple uses of water resources
12.	Inland and inter-State electricity transmission lines
13.	Central statistics (national and international standards and quality)
14.	Central level large electricity, irrigation and other projects
15.	Central universities, central level academies, universities standards and regulation, central libraries
16.	Health policies, health services, health standards, quality and monitoring, national or specialised service providing hospitals, traditional treatment services and communicable disease control
17.	Federal Parliament, Federal Executive, Local Level related affairs, special Structure
18.	International trade, exchange, port, quarantine
19.	Civil aviation, international airports
20.	National transportation policies, management of railways and national Highways
21.	Laws relating to the Supreme Court, High Courts, District Courts and administration of justice
22.	Citizenship, passport, visa, immigration
23.	Atomic energy, air space and astronomy

SN	Matters
24.	Intellectual property (including patents, designs, trademarks and copyrights)
25.	Measurement
26.	Mines excavation
27.	National and international environment management, national parks, wildlife reserves and wetlands, national forest policies, carbon services
28.	Insurance policies, securities, cooperatives regulation
29.	Land use policies, human settlement development policies, tourism policies, environment adaptation
30.	Criminal and civil laws making
31.	Security printing
32.	Social security and poverty alleviation
33.	Constitutional Bodies, commissions of national importance
34.	Sites of archaeological importance and ancient monuments
35.	Any matter not enumerated in the Lists of Federal Powers, State Powers and Local Level Powers or in the Concurrent List and any matter not specified in this Constitution and in the Federal laws

Schedule-6

(Relating to clause (2) of Article 57, clause (4) of Article 162, Article 197, clause (3) of Article 231, clause (7) of Article 232, clause (4) of Article 274 and clause (4) of Article 296)

List of State Power

SN	Matters
1.	State police administration and peace and order
2.	Operation of banks and financial institutions in accordance with the policies of Nepal Rastra Bank, cooperative institutions, foreign grants and assistance with the consent of the Centre
3.	Operation of Radio, F.M., television
4.	House and land registration fee, motor vehicle tax, entertainment tax, advertisement tax, tourism, agro-income tax, service charge, fee, penalty
5.	State civil service and other government services
6.	State statistics
7.	State level electricity, irrigation and water supply services, navigation
8.	State universities, higher education, libraries, museums
9.	Health services
10.	Matters relating to the State Assembly, State Council of Ministers
11.	Intra-State trade
12.	State highways
13.	State bureau of investigation
14.	Physical management and other necessary matters of State governmental offices
15.	State Public Service Commission
16.	Management of lands, land records
17.	Exploration and management of mines
18.	Protection and use of languages, scripts, cultures, fine arts and Religions
19.	Use of forests and waters and management of environment within the State
20.	Agriculture and livestock development, factories, industrialization, trade, business, transportation
21.	Management of trusts (<i>Guthi</i>)

Schedule-7

(Relating to clause (3) of Articles 57, Article 109, clause (4) of Article 162, and Article 197)

List of Concurrent Powers of Federation and State

SN	Matters
1.	Civil and criminal procedure, evidence and oaths (legal recognition, public acts and records, and judicial proceedings)
2.	Supply, distribution, price control, quality and monitoring of essential goods and services
3.	Preventive detention for reasons connected with the security of the country, prison and detention management, and maintenance of peace and order
4.	Transfer of accused persons, detainees and prisoners from one State to another State
5.	Laws relating to family affairs (marriage, transfer of property, divorce, persons on the verge of extinction, orphan, adoption, succession and joint family)
6.	Acquisition, requisitioning of property and creation of right in property
7.	Contracts, cooperatives, partnership and agency related matters
8.	Matters relating to bankruptcy and insolvency
9.	Drugs and pesticides
10.	Planning, family planning and population management
11.	Social security and employment, trade unions, settlement of industrial disputes, labour rights and disputes related matters
12.	Legal profession, auditing, engineering, medicines, <i>Ayurvedic</i> medicines, veterinary, <i>Amchi</i> and other professions
13.	State boundary river, waterways, environment protection, biological diversity
14.	Matters related to means of communication
15.	Industries and mines and physical infrastructures
16.	Casino, lottery
17.	Early preparedness for, rescue, relief and rehabilitation from, natural and man made calamities
18.	Tourism, water supply and sanitation
19.	Motion pictures, cinema halls and sports
20.	Insurance business operation and management
21.	Poverty alleviation and industrialization
22.	Scientific research, science and technology and human resources development
23.	Utilization of forests, mountains, forest conservation areas and waters stretching in inter-State form
24.	Land policies and laws relating thereto
25.	Employment and unemployment aid

Schedule-8

(Relating to clause (4) of Article 57, clause (2) of Article 214, clause (2) of Article 221 and clause (1) of Article 226)

List of Local Level Power

SN	Matters
1.	Town police
2.	Cooperative institutions
3.	Operation of F.M.
4.	Local taxes (wealth tax, house rent tax, land and building registration fee, motor vehicle tax), service charge, fee, tourism fee, advertisement tax, business tax, land tax (land revenue), penalty, entertainment tax, land revenue collection
5.	Management of the Local services
6.	Collection of local statistics and records
7.	Local level development plans and projects
8.	Basic and secondary education
9.	Basic health and sanitation
10.	Local market management, environment protection and biodiversity
11.	Local roads, rural roads, agro-roads, irrigation
12.	Management of Village Assembly, Municipal Assembly, District Assembly, local courts, mediation and arbitration
13.	Local records management
14.	Distribution of house and land ownership certificates
15.	Agriculture and animal husbandry, agro-products management, animal health, cooperatives
16.	Management of senior citizens, persons with disabilities and the incapacitated
17.	Collection of statistics of the unemployed
18.	Management, operation and control of agricultural extension
19.	Water supply, small hydropower projects, alternative energy
20.	Disaster management
21.	Protection of watersheds, wildlife, mines and minerals
22.	Protection and development of languages, cultures and fine arts

Schedule-9

(Relating to clause (5) of Article 57, Article 109, clause (4) of Article 162, Article 197, clause (2) of Article 214, clause (2) of Article 221, and clause (1) of Article 226)

List of Concurrent Powers of Federation, State and Local Level

SN	Matters
1.	Cooperatives
2.	Education, health and newspapers
3.	Health
4.	Agriculture
5.	Services such as electricity, water supply, irrigation
6.	Service fee, charge, penalty and royalty from natural resources, tourism fee
7.	Forests, wildlife, birds, water uses, environment, ecology and biodiversity
8.	Mines and minerals
9.	Disaster management
10.	Social security and poverty alleviation
11.	Personal events, births, deaths, marriages and statistics
12.	Archaeology, ancient monuments and museums
13.	Landless squatters management
14.	Royalty from natural resources
15.	Motor vehicle permits

Balananda Poudel is the former chairman of the Local Level Restructuring Commission (LLRC) and former secretary of Nepal government.

Krishna Prasad Sapkota is the former Member of Parliament.

