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## **Concurrency in Nepali Federal System: Tool for Flexibility or Recentralization?**

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## Table of Contents

A) Introduction .....	1
B) Distribution of powers in modern federalism .....	2
1. The inevitability of concurrency .....	2
2. The typology of concurrency .....	3
3. The “curse” of concurrency.....	5
C) Understanding concurrency in Nepali federal system .....	6
1. Nepali federal design.....	6
2. Distribution of power in Nepali federal system .....	7
3. Deciphering Nepali concurrency.....	8
3.1 Are exclusive powers really exclusive?.....	8
3.2 Nature of Nepali concurrent powers.....	9
4. Concurrency as a tool for (re)centralization.....	11
D) Conclusion .....	13
References .....	14

## Abstract

In 2015, Nepal adopted a federal system of governance abandoning the previous centralized, unitary, feudal and autocratic system to address systemic exclusion and discrimination. The Constitution of Nepal devolved state power amongst three spheres of government. Entrenched into five separate lists, these powers are both exclusive and concurrent. However, many of the powers that look exclusive at the onset are essentially concurrent due to the widespread duplication of subject areas within and across these lists. Against this backdrop, I argue that the pervasiveness of concurrency in Nepal’s distribution of powers makes it constitutionally possible for the federal government to reinforce and expand its powers. Even though a holistic reading of the constitution and subsequent legal instruments suggests that Nepal’s concurrent powers are shared and/or complementary as opposed to pure or sweeping powers, there is a lack of clarity and consistency around its meaning. The ambiguity housed by concurrency has not only served the interests of the centre, but also impeded the effective implementation of federalism in Nepal.

## Keywords

Concurrency, centralization, federalization, Nepali federal system, exclusive powers, distribution of powers

## A) Introduction

When the Constitution of Nepal was promulgated in 2015 after an eight-year-long constitution-making process, some proclaimed the Nepali constitution to be the best in the world.<sup>1</sup> Within almost a decade of the implementation of the federal constitution, Nepal has made substantial progress in laying the foundation for the federal system, albeit not without hiccups. Of the several problems impeding Nepal's federal implementation, a very significant one is the ambiguity in the exercise of powers causing confusion and inefficiency in service delivery.<sup>2</sup> In November 2022, a special committee formed by the upper house of federal parliament issued a 99-point recommendation to the federal government on several issues relating to implementation of federalism. The committee's topmost recommendation was to bring clarity to the issue of competences of different spheres<sup>3</sup> of governments.<sup>4</sup> While the source of this confusion lies in the constitutional scheme of distribution of powers itself, the federal government is criticised as having leveraged it to expand and reinforce its powers and hegemony.

The Constitution of Nepal devolves the state powers symmetrically amongst three spheres of government: federal, provincial and local. These powers are entrenched in five separate lists: three exclusive (one for each sphere), and two concurrent (one to be shared between federal and provincial governments, and the other for sharing between all three spheres). These lists are further broken down into a total of 1795 implementable "functions" through a process known as functional unbundling.<sup>5</sup> This did not, however, solve the dilemma of concurrency in practice. In 2020, the federal parliament enacted the Intergovernmental Relations (Cooperation and Coordination) Act (hereinafter IGR Act) to address the operational dilemma.

Yet, concurrency forms the centrepiece of Nepal's distribution of powers, and overlapping of key policy areas is pervasive. The first tenure (2017-2022) of the federal units brought the complication and confusion of concurrency to the forefront, with some constituent units even resorting to court with jurisdictional disputes.<sup>6</sup> In this paper, I will explain the nature of concurrent powers in Nepali federal system through a holistic reading of the constitution and other laws. I will then look for answers to whether the pervasiveness of concurrency in Nepal's distribution of powers has served as a tool to recentralize powers by the federal government. I will refer to

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<sup>1</sup> See *Nepal's constitution best in the world: Sitaula*, THE KATHMANDU POST (Oct. 17, 2015), <https://kathmandupost.com/national/2015/10/17/nepals-constitution-best-in-the-world-sitaula>.

<sup>2</sup> See The Asia Foundation, *Assignment of Functions Across Levels of Government in Nepal*, iii (Aug. 2020), [Assignment-of-Functions-Across-Levels-of-Government-in-Nepal.pdf](https://asiafoundation.org/wp-content/uploads/2020/08/Assignment-of-Functions-Across-Levels-of-Government-in-Nepal.pdf) (asiafoundation.org).

<sup>3</sup> For this paper, I use spheres, orders and levels interchangeably without connotations of hierarchy amongst the subnational units.

<sup>4</sup> See National Assembly, *Federalism Implementation Study and Monitoring Parliamentary Special Committee Recommendations*, 7 (Nov. 2022), [fxkhonkmjijyawlb.pdf](https://parliament.gov.np/fxkhonkmjijyawlb.pdf) (parliament.gov.np).

<sup>5</sup> This was conducted by a committee commissioned by the Government of Nepal early into the federalization process. Of the total 1795 functions unbundled, eight hundred and seventy are for the federal government, five hundred and sixty-five for the provinces, and three hundred and sixty activities are allocated to the local governments. See Federalism Implementation and Administration Restructuring Coordination Committee, *Unbundling/Detailing of List of Exclusive and Concurrent Powers of the Federation, the State (Province) and the Local Level Provisioned in the Schedule 5, 6, 7, 8, 9 of the Constitution of Nepal* (hereinafter *Functional Unbundling Report*), OFFICE OF THE PRIME MINISTER AND COUNCIL OF MINISTERS 3 (2017).

<sup>6</sup> See Binod Ghimire, *Supreme Court delays passing verdicts after giving interim orders*, THE KATHMANDU POST (Mar. 18, 2022), <https://kathmandupost.com/national/2022/03/18/supreme-court-delays-passing-verdicts-after-giving-interim-orders>.

relevant constitutional provisions and legislative instruments including other secondary sources. My key arguments are: 1) Distribution of power in Nepali federal system lacks clarity and consistency, 2) The exclusive powers (of subnational units) are not *exclusive*, and the concurrent powers are not “common” either, but rather “shared” and/or “complementary,” and 3) This has made it easier, and constitutionally possible for the federal government to expand and reinforce its powers. The paper is divided into four sections: I will introduce my research question in the first section, build a theoretical framework to look at concurrency in the second, and use this to analyse the type of concurrency and its bearings in the centralized functioning of the Nepali federal system in the third. I will synthesize my findings and conclude my arguments in the fourth, also the final section.

Given Nepal’s adoption of federalism to do away with the centralized, unitary, feudal and autocratic system of governance, centralization of powers is antithetical to Nepal’s federal dream. After growing pressures, the federal government commissioned a committee to review the Functional Unbundling Report, however, the recommendations of this committee are not yet public. I hope this study will be useful for Nepali federal actors in comprehending the true nature of Nepali concurrent powers and charting its pervasiveness to address the problems caused by it. Besides, early learnings from Nepal may also contribute to enriching the contemporary literature on federalism, distribution of powers and concurrency itself.

## **B) Distribution of powers in modern federalism**

### **1. The inevitability of concurrency**

The constitutional distribution of powers between different orders of government is the defining feature of any federal design.<sup>7</sup> The principle of shared-rule and self-rule in federal systems demands at least some level of autonomy over some functions<sup>8</sup> to each order of government, guaranteed by the constitution. As such, federal systems are always looking to strike a balance between independence and interdependence.<sup>9</sup> The conception of “ideal” distribution of powers in classical federalism as the one where constituent units can act independently within their own watertight compartments of responsibilities is long gone.<sup>10</sup> This is the era of “marble cake” federalism: the functions are mingled inseparably and vertically rather than horizontally and neatly as in a “layered cake.”<sup>11</sup>

While assignment of exclusive responsibilities gives clarity and autonomy to different orders of governments, in practice however, “...it is virtually impossible to define absolutely, watertight compartments of exclusive jurisdiction”<sup>12</sup> due to the complex and cross-cutting nature of social

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<sup>7</sup> See Ronald L. Watts, *Comparative Reflections*, in *DIALOGUES ON DISTRIBUTION OF POWERS AND RESPONSIBILITIES IN FEDERAL COUNTRIES*, 36, 36-38 (Raoul Blindenbacher & Abigail Ostien eds., 2005).

<sup>8</sup> See Ronald L. Watts, *Comparing Federal Systems* 83 (3<sup>rd</sup> ed. 2008).

<sup>9</sup> *Id.* at 84.

<sup>10</sup> *Id.*

<sup>11</sup> Morton Grondzin, in describing the U.S. federal system in the 1960s had argued that a rainbow or a marble cake represents American federalism more accurately than the three-layer cake metaphor, because of the inseparable mixing of functions between different orders of government. See Nico Steytler, *The Currency of Concurrent Powers in Federal Systems*, in *CONCURRENT POWERS IN FEDERAL SYSTEMS* 1, 1-11 (Nico Steytler ed., 2017).

<sup>12</sup> WATTS, *supra* note 8, at 86, 87.

problems.<sup>13</sup> As a result, concurrency has become not only inevitable, but also “an important tool in the design and operation of federations,”<sup>14</sup> increasingly so in post-conflict federations.<sup>15</sup>

## 2. The typology of concurrency

One of the recent trends in federal distribution of powers is the entrenchment of powers in the constitution itself, often in the form of comprehensive lists.<sup>16</sup> This has given rise to a distinct typology of distribution of powers, often known as exclusive, concurrent, residual, and emergency powers. Exclusive powers are powers which different spheres of governments exercise “to the exclusion of the other.”<sup>17</sup> Concurrent powers are vested in more than one sphere of government in such a way “...that enables each sphere of government to legislate on the same subject matter...”<sup>18</sup> Residual powers refer to all those powers not listed in the exclusive and concurrent lists.<sup>19</sup> Emergency or override powers present specific instances where the federal government may override or curtail the powers of the constituent units.<sup>20</sup>

Of the different types of power, concurrent power seems to be the one with the most currency, mostly due to the ambiguity it entails. There are variations with the “use and application” of concurrency in different federal countries<sup>21</sup> that enriches, and sometimes complicates its meaning. According to Dziedzic and Saunders, if seen literally, the meaning of concurrency implies co-existence. But they also point out the antithetical in its variant meaning – “covering the same ground” – that acknowledges the potential for conflict, thereby precluding co-existence. In practice however, both notions have been observed by federal systems around the world, and these different manifestations of concurrency have fed into both its complexity and typology.<sup>22</sup> Concurrency can be expressed, or implied.<sup>23</sup> Counterintuitively however, it is explicit concurrent powers that lack clarity and invite confusion. The defining feature of explicit concurrent powers is the ability of multiple spheres of government to legislate on same subject matters usually referred to as “concurrent,” “joint,” or “common” competences.<sup>24</sup>

But the typology of concurrency does not end here. Such an explicit concurrency becomes a “pure” or a “complete” concurrency “when both orders have the same legislative and administrative powers over the same subject matters, at the same time and in the same territory.”<sup>25</sup> Pure concurrency, for such a broad delegation of power it is, is a breeding ground for intergovernmental conflicts. To mitigate this, some constitutions draw lines as to what extent each

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<sup>13</sup> Steytler, *supra* note 11, at 3.

<sup>14</sup> Anna Dziedzic & Cheryl Saunders, *The Meanings of Concurrency*, in CONCURRENT POWERS IN FEDERAL SYSTEMS, *supra* note 11, at 30, 12-31.

<sup>15</sup> Steytler, *supra* note 11, at 1, 2.

<sup>16</sup> WATTS, *supra* note 8, at 85.

<sup>17</sup> Steytler, *supra* note 11, at 8; Dziedzic & Saunders, *supra* note 14, at 12.

<sup>18</sup> Dziedzic & Saunders, *supra* note 14, at 12.

<sup>19</sup> Robert MacGregor Dawson, *Democratic Government in Canada* 27 (1949).

<sup>20</sup> WATTS, *supra* note 8, at 90.

<sup>21</sup> Dziedzic & Saunders, *supra* note 14, at 14.

<sup>22</sup> *Id.* at 16.

<sup>23</sup> Steytler, *supra* note 11, at 2. The United States is the example of the latter, i.e., implied concurrency, where concurrency is assumed in the power of states which is unlisted, as opposed to the explicitly listed powers of federal government. *Id.* at 8.

<sup>24</sup> *Id.* at 9.

<sup>25</sup> *Id.*

order of government may operate in a common functional area.<sup>26</sup> In contrast, “conditional” or “complementary” concurrency places conditions or qualifications on the role of the federal government in the exercise of concurrent powers by limiting its role to the enactment of “framework” legislation only.<sup>27</sup> This serves federations two purposes: prevent the federal encroachment into the power of the constituent units, and enable the constituent units to exercise their autonomy in filling out the details<sup>28</sup> suiting their interests, needs, and priorities. The framework legislation, however, has to adhere to certain norms and standards<sup>29</sup> to make sure there is enough space to be filled out by the constituent units.

Another manifestation of concurrency is seen in what the scholars of federalism call “shared” or “overlapping powers.” This is where powers are “related,”<sup>30</sup> in such a way that different orders of government can theoretically exercise different *aspects* of the same power without running into conflict. In such a scenario, normally, different orders of government have some exclusive power with regards to a particular subject, for example, environmental matters, but in order to exercise them, they need the consent of both orders (or all three in case of Nepal, depending on the subject matter) for the simple fact that neither of them has paramountcy.<sup>31</sup> Nico Steytler says such power is closely related to both the implicit and explicit forms of concurrent powers, but not the same. What differentiates “shared” powers is that even if both orders of the government operate in the same policy field, they are confined to different aspects of the same field. It can result in a high degree of overlap, making it difficult to determine the “cut-off points.”<sup>32</sup> Steytler calls such concurrency a weak one for some order of government could easily assert the listed powers as its exclusive powers. Another meaning of concurrency can be derived from its scope of authority: whether the power conferred is legislative or administrative. For example, if the federal government has legislative authority over a particular matter, the constituent units may have the authority to implement the federal legislation.<sup>33</sup> This way, even if the subject-matter is concurrent, each order of government has exclusive authority over either legislation or implementation.<sup>34</sup>

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<sup>26</sup> *Id.* at 2.

<sup>27</sup> *Id.* at 9; Dziedzic & Saunders, *supra* note 14, at 18, 19. Conditional concurrency protects the interests of the constituent units preventing the unwarranted entry of the federal government into common policy areas. Dziedzic and Saunders give the example of Germany, saying that it places “considerations of subsidiarity” or “necessity” to preclude the federal encroachment into constituent powers. *Id.* at 18, 21.

<sup>28</sup> Steytler, *supra* note 11, at 9; WATTS, *supra* note 8, at 88.

<sup>29</sup> Steytler, *supra* note 11, at 9.

<sup>30</sup> WATTS, *supra* note 8, at 88.

<sup>31</sup> *Id.* at 88-89.

<sup>32</sup> Steytler, *supra* note 11, at 9.

<sup>33</sup> *Id.* at 2.

<sup>34</sup> *Id.* at 10.

### 3. The “curse” of concurrency

Ronald Watts says concurrency provides flexibility to federations.<sup>35</sup> He says, it provides the federal government with an opportunity to prioritize the exercise of authority based on the urgency of the subject matter so that in the meantime the constituent units can exercise their autonomy.<sup>36</sup> Another advantage of concurrent power is brevity: the trouble it saves federations from breaking down the broad powers into smaller functions in constitutions itself, particularly in case such subdivisions become archaic over time.<sup>37</sup> Additionally, concurrency can also be an “attractive compromise” in areas where there is no clarity or consensus on which sphere of government should do what at the time of formation of a federation.<sup>38</sup>

However, empirical evidence as of late portrays concurrency in a rather negative light. Much of this has to do with the interpretation and application of concurrency to favour the federal reinforcement of powers. Whatever the case might be, concurrency is deliberate, inasmuch it makes the specified powers available to more than one sphere of government.<sup>39</sup> But it also precludes the exercise of a concurrent power by more than one order of government at the same time that would result in a contradiction of laws.<sup>40</sup> This is where it gets tricky, so much so that it is sometimes regarded as a “curse”<sup>41</sup> for its increasing role in the centralization of powers<sup>42</sup> and conflict generation.<sup>43</sup> The evolution of distribution of powers in federations such as the U.S., Australia, Germany, Brazil, and Mexico have displayed a general tendency towards the “reinforcement and expansion of federal powers.”<sup>44</sup> Detailed framework legislations have been used by the federal government as a tool to intrude into the spaces of constituent units.<sup>45</sup> Some have suggested, referring to South African and other African examples, that “centralization was indeed the very purpose” of such concurrent lists.<sup>46</sup> Apart from intergovernmental conflicts, lack of clarity in the assignment of roles can also result in service gaps, joint-decision traps, and burden-shifting.<sup>47</sup>

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<sup>35</sup> WATTS, *supra* note 8, at 88.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Dziedzic & Saunders, *supra* note 14, at 12. “... in Australia, central laws made in exercise of a concurrent power may be drafted so as to roll back when State laws meet prescribed standards or, more generally, to deny an intention to limit the concurrent operation of State law.” *Id.* at 17.

<sup>39</sup> *Id.* at 30.

<sup>40</sup> *Id.*

<sup>41</sup> Steytler quotes this term from the saying of a South African administrator who reportedly referred to the “curse of concurrency.” *See* Steytler, *supra* note 11, at 5.

<sup>42</sup> *Id.* at 3.

<sup>43</sup> DAWSON, *supra* note 19, at 27.

<sup>44</sup> Watts, *supra* note 7, at 37; *See* Steytler, *supra* note 11, at 3.

<sup>45</sup> Dziedzic & Saunders, *supra* note 14, at 30; *See* Steytler, *supra* note 11, at 3.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*



## **C) Understanding concurrency in Nepali federal system**

### **1. Nepali federal design**

Nepal became the youngest federal polity in 2015 after an eight-year-long constitution-building process, much to the world's surprise. The federal idea was a much contested one that divided the populace into two extremes: one that saw federalism as the panacea of all ills perpetrated by the predecessor system, and the other that saw it as a foreign ploy to split the nation: an attack on Nepali sovereignty.

The resultant federal solution Nepal adopted took a somewhat middle ground: it fared better in terms of greater decentralization and inclusion for the historically marginalized and excluded groups compared to the previous system. But it also disappointed the radical federalists who demanded ethnic-based federalism with greater autonomy of provinces. Among different propositions as to the drawing of the number of provinces that flowed during the federalism debate, Nepal eventually chose to keep it to seven. State power was divided into three levels of government - federal, provincial, and local. As one of the few and recent examples, Nepali local governments (753 in number) are constitutionally recognized as a separate autonomous sphere of government, with its power constitutionally entrenched.

Both provincial and local governments enjoy legislative, executive, and fiscal powers. The interrelationship between different spheres of governments is guided by the principles of cooperation, coordination, and coexistence. Cooperative model of federalism was a rather obvious choice for Nepal given the polarization regarding the federal idea during the constitution-making process. The competitive federal model was feared to exacerbate the differences, thereby a threat to national integrity and sovereignty.

In terms of the form of government, Nepal retained the parliamentary model with a bicameral legislature at the federal level. Executive power is vested in the council of ministers led by the Prime Minister (Chief Minister in case of provinces). Provinces also adopt a parliamentary form of government with a unicameral legislature. The head of the State is a ceremonial president with very limited powers. The judicial system remains unitary.<sup>48</sup> To adjudicate jurisdictional disputes between different spheres of the government, there is a constitutional bench within the Supreme Court. Local governments consist of two main prototypes: municipalities (that includes both rural and urban municipalities), and district assemblies. The municipalities are formed of wards – the smallest service delivery units, while the district assemblies are the vestiges of districts from earlier system with coordination as their key function.

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<sup>48</sup> However, the constitution gives some quasi-judicial power to the local governments. The Judicial Committee of local governments resolves local disputes through mediation and adjudication the decisions of which are appealable in the respective district courts. Provincial governments have the authority to draft the procedures of the Judicial Committee.

## 2. Distribution of power in Nepali federal system

The distribution of state powers in Nepali federal system is guided by the five lists entrenched in the constitution from schedule 5-9. Each sphere of government has some legislative, executive as well as fiscal powers<sup>49</sup> over the subject matters in their jurisdiction.<sup>50</sup> The federal government has exclusive power over 35 headings<sup>51</sup>, provincial governments over 21 headings<sup>52</sup>, and local governments have exclusivity over 22 areas<sup>53</sup>. However, these exclusive lists are weighed down by the concurrent lists that come with a lot of overlapping of policy areas. The federal-provincial concurrency consists of 25 subjects and the all-encompassing concurrency is 15 items long. The overlapping of powers is not only across the exclusive and concurrent lists, but also across the exclusive lists of different spheres of governments, complicating matters further. For example, radio is the exclusive competence of *both* federal and provincial governments, as is health services. “Cooperatives” is repeated in all five lists: it is an exclusive, *as well as* concurrent power of all three spheres. The table below demonstrates the degree of overlapping in Nepal’s distribution of powers:

**Table 1: Overlapping of Competences under Nepal’s Distribution of Powers<sup>54</sup>**

S. No.	Federal/ Exclusive <i>Schedule 5</i>	Provincial/ Exclusive <i>Schedule 6</i>	Local/ Exclusive <i>Schedule 8</i>	Concurrent/ Federal & Provincial <i>Schedule 7</i>	Concurrent/ Federal, Provincial & Local <i>Schedule 9</i>
1.	Service fee	Service fees	Service fee		Service fee
2.	Penalty	Penalty	Penalty		Penalty
3.	Radio	Radio	F.M. operation	Means of communication	
4.	Tourism fee		Tourism fee		Tourism fee
5.	Health services	Health services	Basic health and sanitation		Health
6.		Management of lands		Land policies and laws relating thereto	
7.	Mines excavation	Exploration and management of mines	Industries and mines and physical infrastructures	Protection of mines and minerals	Mines and Minerals
8.	National forest policies	National forests within the province	Utilization of forests, mountains, forest conservation areas and waters stretching in inter-provincial form		Forest
9.			Basic and secondary education		Education

<sup>49</sup> They can levy taxes and raise revenues on the matters included within their jurisdiction. *See* CONSTITUTION OF NEPAL [CoN] Sept. 16, 2015, art. 60 § 1.

<sup>50</sup> *Id.* art. 59 §1.

<sup>51</sup> The federal government has exclusive jurisdiction over matters such as defense, national-level planning, currency, foreign affairs, citizenship, and passport. *See* CoN, sch. 5.

<sup>52</sup> Provincial governments have exclusive jurisdiction over matters such as provincial police administration, provincial civil service, higher education, and provincial-level development activities. *See* CoN, sch. 6.

<sup>53</sup> Local governments have exclusive jurisdiction over matters such as municipal police, basic and secondary education, basic health, management of local services and local-level small development activities. *See* CoN, sch. 8.

<sup>54</sup> Democracy Resource Center Nepal, *The Interrelationship between Three Levels of Governments in Nepal’s Federal Structure*, 3 (Oct. 2020), [https://www.democracyresource.org/wp-content/uploads/2020/10/Inter-Government-Relation\\_EngVer\\_13October2020.pdf](https://www.democracyresource.org/wp-content/uploads/2020/10/Inter-Government-Relation_EngVer_13October2020.pdf). (edited for brevity).

10.			Disaster management		Disaster management
11.	Cooperatives regulation	Cooperative institutions	Cooperatives	Cooperatives	Cooperatives
12.		Agriculture and livestock development	Agriculture and animal husbandry		Agriculture
13.		Irrigation and water supply services	Water Supply	Water supply and sanitation	Water supply

As illustrated above, the duplication of policy areas in Nepali distribution of power is stark and widespread. The language used<sup>55</sup> suggests that it is also deliberate, giving the impression that the items in the concurrent lists might be subsequent additions. There are only two policy areas<sup>56</sup> (out of 15) in the all-encompassing concurrent list that are not repeated in any other list. The duplication is such that, for example, the item “royalty from natural resources” is repeated twice in the same list.<sup>57</sup> This suggests that entrenchment of powers in Nepali constitution was less deliberated and seems to have been rushed. It is said that during the constitution-making, vertical power sharing did not get much attention<sup>58</sup>, and that there was a lack of clarity in the nature of common powers.<sup>59</sup> <sup>60</sup> The constitution-makers were reported to have taken the approach of “gradual shifting of powers” citing the lack of institutional capacity of constituent units at the time of making.<sup>61</sup>

### 3. Deciphering Nepali concurrency

#### 3.1 *Are exclusive powers really exclusive?*

The exclusivity over a power is determined from the autonomy of the constituent unit(s) to exercise them, and the test of this autonomy is manifested through the supremacy clause. In the case of Nepal, even though certain subject matters are included in the exclusive lists, the fact that many of them are also repeated in one list or the other defies the very concept of exclusivity. This takes away their exclusiveness and essentially turns them into concurrent powers. The Nepali constitution is clear that in matters of concurrent powers, federal law is superior.<sup>62</sup> Even though

<sup>55</sup> The constitution uses broad terminologies for concurrent lists, such as agriculture, forest, education, health and relatively specific headings for exclusive lists, such as basic health, utilization of forests, secondary education, etc.

<sup>56</sup> These are permission of transport means and the management of landless squatters.

<sup>57</sup> See CoN, sch. 9, ¶ 6 & ¶ 14.

<sup>58</sup> The federalism debate in Nepal was characterized by extreme polarization over the choice of federal model that obscured rigorous discourse on key aspects of federalism, including the distribution of power. See Krishna Prasad Khanal, *Federalism Discourse in Nepal: An Appraisal*, in SOUTH ASIA: NATION BUILDING AND FEDERALISM, 108, 120 (Lok Raj Baral & Krishna Hachhethu eds., 2014).

<sup>59</sup> Mohan Lal Acharya, An Overview of Vertical Power Sharing in a Federal Setup: A comparative analysis with reference to the works of the first Constituent Assembly of Nepal, in THE FEDERALISM DEBATE IN NEPAL, 160 (Budhi Karki & Rohan Edrisinha eds., 2014).

<sup>60</sup> The Nepali equivalent for concurrent is “sajha”, the straightforward translation of which is common. See *Id.* at 179.

<sup>61</sup> *Id.* at 181.

<sup>62</sup> See CoN, art. 57 § 6. The constitution states that the exercise of concurrent powers should be in accordance with the constitution, and the laws of the federation, provinces (and local governments). See *Id.* art. 57 §§ 3 & 5. In such a case, the provinces should make laws that are not inconsistent with the federal government, and the local governments should make laws that are not inconsistent with both federal and provincial governments.

the constitution states that each sphere of government is free to exercise their exclusive powers by making their own laws<sup>63</sup>, since many matters are essentially repeated in one or the other concurrent list, the federal government holds supremacy over legislation in almost all matters, including the matters of exclusive competency.<sup>64</sup> Therefore, many powers looking exclusive *prima facie* are in fact concurrent powers.

### 3.2 *Nature of Nepali concurrent powers*

Another determinant question in Nepal's concurrency discourse is the type of concurrency. The broad language of the constitution<sup>65</sup> gives the impression that both or all spheres of government have the "same legislative and administrative powers over the same subject matters, at the same time and in the same territory."<sup>66</sup> Following Steytler's classification, this is the description for a "pure" or a "complete" concurrency.<sup>67</sup>

However, if we piece together the meaning from the subsequent legal instruments, it becomes clear that the powers in the concurrent lists are rather complementary and/or shared powers. Two instruments lead us to this conclusion: the Functional Unbundling Report, and the IGR Act. The Functional Unbundling breaks down the lists of power in such a way different spheres of government share *different* aspects of the *same* power.<sup>68</sup> To take an example of radio (that appears in the exclusive list of both federal and provincial governments), federal exercise is up to the formulation of "national policies, laws, standards,"<sup>69</sup> while provinces exercise the provincial aspect of policy making and other functions. For a clearer picture, below is an example of how functions are unbundled by the Functional Unbundling Report in "cooperatives" which is repeated in all five lists.

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<sup>63</sup> For example, the constitution says, "The powers of a Province shall be vested on the matters enumerated in Schedule-6 and such powers shall be exercised in accordance with this Constitution and the provincial law." CoN, art. 57 § 2.

<sup>64</sup> Another interesting point is that even though provinces and local governments do not share a concurrent list of power, and local governments are not *under* provincial governments in Nepal's federal system, neither is the setup hierarchical, provincial laws have paramouncy over local laws.

<sup>65</sup> "The concurrent powers of the Federation and a Province shall be vested on the matters enumerated in Schedule-7 and such powers shall be exercised in accordance with this Constitution, federal law and provincial law." CoN, art. 57 § 3; "The concurrent powers of the Federation, Provinces and Local Levels shall be vested on the matters enumerated in Schedule-9 and such powers shall be exercised in accordance with this Constitution, federal law, provincial law and law made by the Rural Municipal Assembly or Municipal Assembly, as the case may be." *Id.* § 5.

<sup>66</sup> Steytler, *supra* note 11, at 9.

<sup>67</sup> CoN, art. 57 § 6. The constitution tries to avoid conflict in the exercise of such power through federal supremacy of laws in areas of concurrency.

<sup>68</sup> The report states that principles such as subsidiarity, economies of scale, efficiency, economic stability, social inclusion, externalities or spillover jurisdiction, accountability and viability are observed in elaborating which sphere of government performs what works, and to what extent. See *Functional Unbundling Report*, *supra* note 5, at 3.

<sup>69</sup> It also contains some permission and renewal functions of national level radio broadcasting.

**Table 2: Functional unbundling of “cooperative”<sup>70</sup>**

Policy Areas	Functions
<b>Federal Exclusive Power</b> (Sch. 5, no. 28) “Cooperatives regulation”	<ul style="list-style-type: none"> <li>- National policy, law, standards, and regulation relating to cooperative;</li> <li>- Permission and regulation of cooperative bank established at national level;</li> <li>- Coordination and cooperation with international institutions relating to cooperative;</li> <li>- National statistics management and study and research relating to cooperatives;</li> <li>- Inter-provincial/state cooperative coordination;</li> <li>- Capacity building relating to cooperative, etc.</li> </ul>
<b>Provincial Exclusive Power</b> (Sch. 6, no. 2) “Cooperative organizations”	<ul style="list-style-type: none"> <li>- Provincial policy, law, standards, implementation, and regulation relating to cooperative institutions;</li> <li>- - Permission, operation, and regulation relating to provincial cooperative institutions, cooperative banks, etc.</li> </ul>
<b>Local Exclusive Power</b> (Sch. 8, no. 2) “Cooperative institutions”	<ul style="list-style-type: none"> <li>- Local policy, laws, standards, implementation, and regulation relating to cooperative institutions;</li> <li>- Registration, permission, dismissal, and dissolution of local cooperative institutions, etc.</li> </ul>
<b>Federal &amp; Provincial Concurrent Power</b> (Sch. 7, no. 7) “Cooperatives”	<ul style="list-style-type: none"> <li>- Included above</li> </ul>
<b>Federal, Provincial &amp; Local Concurrent Power</b> (Sch. 9, no. 1) “Cooperatives”	<ul style="list-style-type: none"> <li>- Included above</li> </ul>

As illustrated above, the Functional Unbundling Report has dissected the power of “cooperatives” into functions underlying the role of each federal unit. It grants the federal government both policymaking and regulatory role, but limits its authority up to the formulation of *national* policy and standards only. Even though the federal authority is both legislative and executive, the scope of application is limited to national aspects. The provinces formulate policies for provincial cooperatives and regulate them, while local governments exercise similar power in relation to local cooperative institutions. For better or worse, the functional unbundling has merged both exclusive and concurrent headings while fleshing out the functions, relegating the concurrent lists to almost obsolete. First, this carries huge significance for the fact that key statutes formulated to give effect to federalism later have all used this unbundling as a basis for lawmaking. Second, this reinforces the belief that the last list (schedule 9 – concurrent powers of all spheres of government) was created out of fear from a centralized mindset, almost as an insurance for any doubts of accidentally leaving out policy areas for the exclusive authority of the constituent units.

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<sup>70</sup> Functional Unbundling Report, *supra* note 5, at 3.

#### 4. Concurrency as a tool for (re)centralization

The IGR Act added new dimensions to the meaning of concurrency that expanded the federal power by reinforcing federal paramountcy as a blanket provision. Even in the implementation of exclusive powers, the Act maintains that the constituent units should adhere to the federal policies in making their own laws, and that these laws should be *in line* with, as well as help the implementation of national policies and priorities. The Act also made explicit what was implied in the constitution: if a subject is mentioned in more than one exclusive list, it is treated as a concurrent power.<sup>71</sup> The Act, therefore, extends federal legislative supremacy over the exclusive areas too, and implies that even in exclusive jurisdiction, the provincial and local governments are not really autonomous.<sup>72</sup> The Functional Unbundling Report and the IGR Act are representative examples of the federal government playing with the ambiguity of concurrency to strengthen federal powers through legislative backing.<sup>73</sup>

The inaction to devolve or facilitate the devolution of powers to subnational units and encroachment of their constitutionally granted powers are some of the common tendencies of centralization in Nepal. This hesitation is most visibly seen in the dilly-dallying of the federal government in formulating framework legislations (also known as umbrella or parent laws). Since the federal government's (share of) power constitutes national policies and standards on many of the subject areas, the delay in passing these legislations has slowed down the operation of subnational units, especially provinces. As pervasive is concurrency now in the constitution, the first step to fix this is the drafting of key umbrella legislations for the constituent units to perform their roles.<sup>74</sup> This is exacerbated by the flawed understanding of Nepali concurrent powers as sweeping powers, instead of complementing and/or shared powers. In the initial phase of federal implementation, the power of the federal government to formulate national policies, laws and standards in matters of concurrent subjects was understood by the constituent units as having no choice but to wait for the federal government to first enact umbrella legislations to be able to exercise the aspect of the power that was *theirs*. This narrative was largely fed by the federal government so much so that some constituent units who responded to federal delay by making their own laws were perceived as overstepping and undermining federal powers, at times with threats of reprimands from the federal government. The very aspect of concurrency that Ronald Watts underscored as providing flexibility to federations – that the federal government does not have to make laws, if not necessary at the time – was used to obstruct the federal implementation process. Later, the IGR Act cleared the way for the constituent units to exercise their powers on concurrent matters even without a federal framework legislation. Although this carried a high

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<sup>71</sup> “Province shall not encroach upon federal law and local level shall not encroach upon federal and provincial law while making and implementing laws on matters that overlap in the exclusive rights of federal, provincial and local level more than one.” Federal, Provincial and Local Level (Coordination & Interrelationship) Act, 2020 [hereinafter IGR Act] (Act No. 11/2020/2021) § 5 ¶ 3 (Npl.).

<sup>72</sup> The Act, however, does not restrict the provinces to make laws if the federal government hasn't made one yet. See IGR Act, § 6 ¶¶ 3 & 4.

<sup>73</sup> Also noteworthy is that both these instruments were formulated with federal high hand. The functional unbundling was commissioned through an executive decision by the federal government before the constituent units were established through election. In the formulation of the IGR Act, the National Assembly did have some consultations with the provincial governments, however it was not sufficient, and there were reported dissatisfactions with the Act, especially from the local government associations for undermining their constitutional status as separate spheres of government.

<sup>74</sup> Drafting laws necessary for the implementation of federalism is another significant recommendation provided by the special committee of the upper house. See National Assembly, *supra* note 4, at 8.

pragmatic value at that time, the Act missed the opportunity to clarify the meaning of concurrent powers altogether since this came off as a standalone provision.

The delay in transferring the assets and infrastructure to the constituent units,<sup>75</sup> is another example of federal inaction that has had considerable impact on the functioning of the provincial governments. The federal government has exhibited its centralized mindset through actions such as retaining unreasonable ratio of funds and functionaries, creating or retaining parallel institutions, thereby undermining the principles of subsidiarity, accountability, co-operation, coordination and co-existence. The “encroachment”<sup>76</sup> of the subnational powers by the federal government is another characteristic feature of Nepal’s centralization trend that sometimes exhibits in the form of withdrawal of powers once decentralized. Many cases regarding the exercise of competences have gathered in the Constitutional Bench of the Supreme Court most of which are against the federal government for its alleged encroachment of subnational power. Nine cases are sub judice in the Bench so far and the Bench has been criticized for its “sluggishness” to deliver verdict in jurisdictional disputes contributing to inefficiency in the full-fledged implementation of federal system.<sup>77</sup> Despite its reluctance in interpreting the true meaning and nature of concurrent powers, the Bench’s interim orders have however favoured the petitioners – the provinces.<sup>78</sup>

In one of the very first cases filed against the federal government, a federal ministry’s unilateral decision to merge a national forest (geographically expanding through the province) with a federal corporation was challenged by one of the provinces. Under Nepal’s constitution, “national forest within provinces” is an exclusive jurisdiction of provinces while “national forest policies” is a federal exclusive jurisdiction. However, since “forest” is a common competency of all three spheres of government, it eased and potentially justified the assertion of power in the eyes of the federal government. This case was followed by another case filed by the same province challenging the constitutionality of an umbrella Act on forest and its subsequent rules. It was challenged for its alleged interference with the provincial competences, specifically the recreation of a federal forest entity (Division Forest Office) and the reestablishment of the post of Division Forest Officer as a separate hand of federal government despite the structure already adjusted within the provincial government.

These are just a few representative examples of the federal government using concurrency as a pretext to centralize its powers at the expense of stalling the federal implementation process and weakening the constituent units. What is surprising is the seemingly absent role of judiciary in adjudicating the disputes arising from the mess of concurrent powers. In Canada, the arrangement of express concurrent powers has defied the federal supremacy through judicial interpretation: old-age pensions are an area of concurrent jurisdiction, however, in events of conflict, provincial law trumps the federal law.<sup>79</sup> The Iraqi constitution, at least in text, is similar, and more explicit:

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<sup>75</sup> Khim Lal Devkota, *Intergovernmental Fiscal Relations in a Federal Nepal*, GEORG. ST. UNI. 15 (2020), <https://ideas.repec.org/p/ays/ispwps/paper2013.html>.

<sup>76</sup> I should say that the use of the term “encroachment” itself is tricky due to the lack of clarity in the type and nature of exclusive and concurrent powers in Nepali case, and the lack of an authoritative verdict from the Supreme Court.

<sup>77</sup> See Binod Ghimire, *Federalism-related disputes pile up at Supreme Court*, THE KATHMANDU POST (Oct. 31, 2023), <https://kathmandupost.com/national/2023/10/31/federalism-related-disputes-pile-up-at-supreme-court>.

<sup>78</sup> Most of the cases have been filed by Madhesh province (then Province no. 2) that has the stronghold of regional parties contrary to other provinces whose political makeup imitates the (mainstream) federal political equation.

<sup>79</sup> WATTS, *supra* note 8, at 88.

“regional law prevails to virtually all areas of concurrent jurisdiction.”<sup>80</sup> In India and South Africa, the significance of concurrent powers withered away with time.<sup>81</sup> It is yet to see how Nepal’s concurrent powers will fare, but one thing is certain: it will affect, if not determine the course of Nepal’s federal journey towards a more decentralized or a recentralized path.

## D) Conclusion

Whether it be a copy-editing problem, or a deliberate mess, concurrency is all pervasive in Nepal’s distribution of power, despite extensive lists of exclusive power for each sphere of government. This pervasion has constricted the scope and application of exclusive powers, diminishing the very notion of self-rule.<sup>82</sup> The flexibility of concurrency has been used by the federal government at the cost of stalling the federalization process and weakening, as opposed to strengthening the constituent units. Altogether, concurrent powers in Nepal’s federal scheme of distribution of powers have served as a constitutional tool to expand and reinforce the federal powers.

While the use of concurrency’s inherent ambiguity to centralize powers is not a new phenomenon, Nepal is a classic and most recent case of what the “curse of concurrency” looks like in an emerging federation. The lack of clarity regarding the application and limits of concurrent powers created a lot of confusion among the constituent units in the initial federalization process and continues to do so. Despite a comprehensive unbundling of functions, and an IGR Act expounding on the meaning of concurrency, the ambiguity regarding its use has not subsided, if not augmented. In this paper, in trying to understand and explain the nature and extent of concurrent powers in Nepali federal system, I argued that Nepal’s concurrent powers should be looked at as complementary and/or shared powers, as opposed to sweeping common powers. This will not only give a way out to the operational dilemma, but also help put a check on the recentralizing tendencies exhibited by the federal government. To the extent that Nepali federal system impugned the previous centralized and unitary system for producing the ills that it aims to cure, centralization stands as a threat to Nepal’s federal goal. Concurrent powers provide the federal government with a playground to do exactly this.

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<sup>80</sup> Id.

<sup>81</sup> Dziedzic & Saunders, *supra* note 14, at 14.

<sup>82</sup> Steytler, *supra* note 11, at 10-11.



## References

Anna Dziedzic & Cheryl Saunders, *The Meanings of Concurrency*, in CONCURRENT POWERS IN FEDERAL SYSTEMS, 12-31 (Nico Steytler ed., 2017).

Binod Ghimire, *Federalism-related disputes pile up at Supreme Court*, THE KATHMANDU POST (Oct. 31, 2023), <https://kathmandupost.com/national/2023/10/31/federalism-related-disputes-pile-up-at-supreme-court>.

Binod Ghimire, *Supreme Court delays passing verdicts after giving interim orders*, THE KATHMANDU POST (Mar. 18, 2022), <https://kathmandupost.com/national/2022/03/18/supreme-court-delays-passing-verdicts-after-giving-interim-orders>.

CONSTITUTION OF NEPAL [CoN] Sept. 16, 2015.

Democracy Resource Center Nepal, *The Interrelationship between Three Levels of Governments in Nepal's Federal Structure* (Oct. 2020), [https://www.democracyresource.org/wp-content/uploads/2020/10/Inter-Government-Relation\\_EngVer\\_13October2020.pdf](https://www.democracyresource.org/wp-content/uploads/2020/10/Inter-Government-Relation_EngVer_13October2020.pdf).

Federal, Provincial and Local Level (Coordination & Interrelationship) Act, 2020 [IGR Act] (Act No. 11/2020/2021) (Npl.).

Federalism Implementation and Administration Restructuring Coordination Committee, Unbundling/Detailing of List of Exclusive and Concurrent Powers of the Federation, the State (Province) and the Local Level Provisioned in the Schedule 5, 6, 7, 8, 9 of the Constitution of Nepal (hereinafter Functional Unbundling Report), OFFICE OF THE PRIME MINISTER AND COUNCIL OF MINISTERS (2017).

Khim Lal Devkota, *Intergovernmental Fiscal Relations in a Federal Nepal*, GEORG. ST. UNI. (2020), <https://ideas.repec.org/p/ays/ispwps/paper2013.html>.

Krishna Prasad Khanal, *Federalism Discourse in Nepal: An Appraisal*, in SOUTH ASIA: NATION BUILDING AND FEDERALISM, 108–133 (Lok Raj Baral & Krishna Hachhethu eds., 2014).

Mohan Lal Acharya, *An Overview of Vertical Power Sharing in a Federal Setup: A comparative analysis with reference to the works of the first Constituent Assembly of Nepal*, in THE FEDERALISM DEBATE IN NEPAL, 159–186 (Budhi Karki & Rohan Edrisinha eds., 2014).

National Assembly, *Federalism Implementation Study and Monitoring Parliamentary Special Committee Recommendations* (Nov. 2022), <fxkhonkmjijyawlb.pdf> ([parliament.gov.np](http://parliament.gov.np)).

*Nepal's constitution best in the world: Sitaula*, THE KATHMANDU POST (Oct. 17, 2015), <https://kathmandupost.com/national/2015/10/17/nepals-constitution-best-in-the-world-sitaula>.

Nico Steytler, *The Currency of Concurrent Powers in Federal Systems*, in CONCURRENT POWERS IN FEDERAL SYSTEMS 1-11 (Nico Steytler ed., 2017).

Robert MacGregor Dawson, *Democratic Government in Canada* (1949).

Ronald L. Watts, *Comparative Reflections*, in DIALOGUES ON DISTRIBUTION OF POWERS AND RESPONSIBILITIES IN FEDERAL COUNTRIES, 36-38 (Raoul Blindenbacher & Abigail Ostien eds., 2005).

Ronald L. Watts, *Comparing Federal Systems* (3<sup>rd</sup> ed. 2008).

The Asia Foundation, *Assignment of Functions Across Levels of Government in Nepal*, iii (Aug. 2020), [Assignment-of-Functions-Across-Levels-of-Government-in-Nepal.pdf \(asiafoundation.org\)](#).