

Intergovernmental Natural Resource dispute
Resolution Framework in Federal Nepal, with
reference to international practices:

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LIST OF ABBREVIATIONS:

GoN: Government of Nepal

NNRFC: National Natural Resource and Fiscal Commission

ABSTRACT:

Nepal has successfully evolved from a unitary structure of governance to a federal one with devolution of power to federal, provincial and local units. Given the limited amount of natural resources in the country, competition over use and sharing of resources among the three tiers of government is inevitable, leading to disputes over the same. This paper deals with the intergovernmental dispute resolution framework for managing disputes productively keeping in mind long term sustainability and short term economic feasibility

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1. INTRODUCTION/ BACKGROUND:

Nepal with a geographical division of the Himalayans, Hilly and *Terai* hoards wide varieties of the natural resources, from Perennial River to dense forests to mines and minerals, animals, herbs etc. which are integral part of the human life and are connected with the economy and prosperity of the people's life and nation.

In Nepal, there are about 6000 rivers in Nepal having drainage area of 191000 sq. km with total discharge of 150 billion metric cube, 74 % of which lies in Nepal alone, which has the hydropower potential of 83,000 MW (Water and Energy Commission Secretariat, 2011). Forest occupies a total of 5.96 million ha which is 40.36% of the total area of the country. Other wooded land is 0.65 million hector which makes 4.38% of the land area. They together make 44.74% of the total area of the country (Ministry of Forestry and soil conservation, 2015).

There are 63 different types of minerals identified in Nepal (Department of mines and Geology, 2015) with 85 mines and quarries for 15 different minerals of limestone and gem mines. Hence Nepal has loads of minerals mainly limestone, coal, talc, red clay, granite, marble, coal, gold and precious and semi-precious stones(like tourmaline, aquamarine, ruby and sapphire) and other minerals like aggregate, sand, gravel, decorative stones, roofing slates etc.(Office of Investment Board, GoN, 2017)

Nepal is both gifted with natural and social diversity. Social diversity is marked by difference in caste, culture, religion, ethnicity etc. In order to end all forms of discrimination and oppression of the centralized unitary system of the governance and to address the multi-ethnic, multi-lingual, multi-religious and diverse regional characteristics and to protect and promote social, cultural solidarity, tolerance and harmony and ensuring the economic equality, prosperity and social justice(Preamble of the constitution of Nepal, 2015) and has transitioned from unitary governance to the federal governance with three tiers of government i.e. Federal, Provincial and Local government as per the constitution which was promulgated by the Constituent Assembly in 2015 AD.

In the changed political context it is very inevitable to ensure the just and equitable distribution of the natural and fiscal resources among the three tiers of the

government of Nepal for the effective implementation of the federal system (NNRFC. 2018). For this constitution has provision relating to the National Natural Resources and Fiscal Commission (NNRFC) as a constitutional body.

Article 251, of the Nepalese constitution has mandated the various functions, duties and powers of the NNRFC and among them 251(i) has a provision that NNRFC can do study and research work in the possible disputes that may arise between the Federation and the States, between the States, between a State and Local Levels and make suggestions to act in a coordinated manner for the prevention of such Disputes. The most challenging part of the federalism, in practice is distribution of the natural resources in equitable and fair manner which are limited in number while everyone's want is to enjoy the fair share of the advantages incurred from the natural resources which gives rise to a conflict and dispute over the natural resources and pushes issues from geographical division to the political division.

Often the dispute over the natural resources intensifies, when there is a competition over the natural resources among the various groups. (USAID, Conflict over the Natural Resources at the Community Level in Nepal, Including Its Relationship to the Armed Conflict, 2006). Chances of conflict rising becomes more prominent when these issues are not solved productively and suppressed by the use of political power. Therefore dispute resolution in a participatory manner is a must in natural resources.

2. POWER DYNAMICS AND INTERGOVERNMENTAL NATURAL RESOURCES MANAGEMENT IN NEPAL:

Water, Mines and Minerals and forest etc are crucial natural resources of Nepal. Water as natural resources is directly linked with the human civilization, wellbeing and livelihood. Water resources utilization ranges from the hydroelectricity, irrigation, water tourism, industrial development and other. In Nepal, rivers are divided into first grade, second grade and third Grade Rivers on the basis of the volume of the water and its origination. Water resources Act, 1992 AD is the umbrella Act governing the water resources management followed by Water resources Regulation, 1993 AD and there are many laws interconnected

with water namely electricity related laws, irrigation related laws, and other laws devised for the protection of the environment.

Minerals are classified on the basis of the nature and importance of the minerals. On the basis of the nature minerals are metallic and non-metallic and on the basis of importance minerals are classified into very precious mineral, precious or valuable minerals and ordinary minerals, as per the Mines and Minerals Act, 1985 of Nepal. Forest is important natural resources to meet the basic needs of the people in general. It helps in the social and economic development and healthy environment. Nepal has different types of forest namely government managed forest i.e. national forest, protected forest, community forest, leasehold forest, religious forest and private forest, as per the forest Act of Nepal, 1993 AD.

In the unitary governance system in Nepal, the ultimate power resided on the central level government to control the important natural resources and central government owned many of the natural resources. But after the Country is formally going through the federal mechanism, powers are shared between the governments. For time being constitution 2015 has listed the powers of the three tiers of the government as below in the natural resources:

Nepalese constitution has listed the powers of the Federal, provincial and local government and concurrent powers of three tiers of the government of Nepal in its Schedule. Under the concurrent powers of the three tiers of government includes forests, wildlife, birds, water uses, environment, ecology, bio-diversity, mines and minerals and **royalty** from those natural resources which are economically important.

Natural Resources	Federal Power	Provincial Power /State Power	Local Power
Water	Policies relating to the conservation and multiple uses of the water resources,	power for the province level water use and management including province level electricity,	Power of the water supply, small hydropower projects

	Inland and inter provincial electricity transmission lines, Central level large electricity, irrigation and other projects.	irrigation and water supply services, navigation	and alternative energy and protection of the watersheds.
Mines and Minerals	Mines Excavation	exploration and management of the mines	protection and conservation of the mines and minerals
Forest	National forest policies and carbon services including National parks, wildlife reserves and wetlands including national and international environment management	Use of the forest and management of the environment within the province	Protection of wildlife.

Table1: Power sharing on the natural resources between the governments

To realize the Local level government's powers and right for inclusive, accountable and transparent service delivery to people, Local Government Operation Act, 2074 was enacted as per the constitution.

Local Government Operation Act, has elaborated the Rights, Duties and Function of the Local government in Section 11 (Pa), of the Act has devised that Local government will carry out the function of the conservation and monitoring of the natural resources, collection of the information and statistics on the mines and minerals, and has power of survey, excavation and use of mines related permission, renewal, management and termination as well as collection of the local tax from the stone, aggregate, Sand, Salt, Soil, *Kharihunga*, Slate related mines etc. This Act has given power to publish geological map to local.

Intergovernmental Fiscal Management Act, 2017 has a provision on the benefits sharing from the natural resources among the three tiers of the government. Among the concurrent power of the local it has power of collection, coordination and monitoring of the royalty obtained from the natural resources, excavation of the mines and minerals, and royalty from the community forest.

3. INTERGOVERNMENTAL RELATIONS AND DISPUTE SETTLEMENT

MECHANISM IN NEPAL :

Nepal with central government, seven provinces and 754 local governments has their separate and concurrent rights, powers and jurisdiction over the natural resources for realization of the federalism in true sense. Relationship between the federation and province and local are based on the principles of cooperation, co-existence and coordination and same does applies while dealing with the natural resources. There is constitutional provision which intertwined with the relationship between the governments regarding the natural resources management and dispute settlement which comes forward as we venture towards the more democratic practice of federalism in Nepal.

Federalism is created with a notion to give local people better access to the resources of their territory. Management and sharing of those are very important aspect of natural resources of government. If intergovernmental dispute keeps on escalating on the natural resources, then it will form chaotic situations. Natural resources are the important aspect of the state income and state interest has to be prevailing in it thus the role of the NNRFC in dispute resolution is paramount and sensitive. NNRFC, as a separate commission has a coordinating role in case dispute among the government surface regarding the natural resources disputes. And facilitate on prevention and resolution of the dispute relating to investment and benefit sharing from the natural resources among the governments.

There is also provision of the formation of the constitutional bench in Supreme Court (Article 137, Constitution of Nepal) for settling the dispute relating t the

jurisdiction federation and state and between state or provinces, between state and local level and between the locals.

There is provision regarding the Inter-state Council (Article 234) for settling the political disputes arising between the three tiers of the government, comprising of the Prime minister, Home minister, Finance minister and chief minister of the concerned province and can meet as per the requirement.

4. INTERNATIONAL PRACTICES ON INTERGOVERNMENTAL RELATION WITH FOCUS TO NATURAL RESOURCES DISPUTES:

i) South African practice of Intergovernmental relationship :

South African constitution has provision under section 41(3) "Duty to Avoid Litigation", maintains that in case of intergovernmental disputes, there must be every reasonable effort to settle dispute by means of mechanisms and procedure provided for that purpose, and must exhaust all other remedies before approaching to the court for resolving the disputes.

South Africa also has Inter Governmental Relation Framework Act, which is more facilitative than compulsive in nature, where parties can request for the assistance of the intermediaries who can help them in reaching with agreement. Hence for a dispute to fall under the intergovernmental relation framework must fulfill the criteria that dispute has to be a legal nature, claim of one of the party to be refused, counterclaimed and denied by the other party, dispute has to be created while exercising the power mandated by the constitution between the various tiers of the government by promoting the conciliatory relations and avoiding the adversarial process as much as possible. (Omolabake Akintan and Annette Christmas, Cape Storm Dispute Paper, January 16th)

ii) United States:

The constitution of US allocates sovereign power between government in horizontal and vertical way. Vertical relationship establishes the authority (Erbsen Allan, 2008) between the federal and state authority and horizontal coordinate the relationship between the states.

Hence, for the management of the natural resources also states enter into the equitable sharing compact and receive consent from the Congress. For example the Alabama-Coosa-Tallapoosa River Basin Compact, 1997 between Alabama, Georgia and the U.S with a aim to promote the inter-state agreement for removing all controversies and equitable appropriation of the water.

iii) INDIA:

Federal government plays the role of the facilitation during the interstate cooperation and conflict. If the state themselves cannot arrive at the agreement, they will refer to the central government and it will act.(Alan Richards & Nirvikar Singh, 2001). As for example in the Interstate water dispute Act, 1959 negotiation and agreement are the prioritized dispute settlement mechanism and those which cannot be settled from the negotiation are brought before a tribunal.

Country	Disputing party	Issues	Dispute resolution mechanism
US A	Between Kansas and Colorado over the Arkansas river compact violation	Kansas in 1985 claimed that Colorado was diverting millions of gallon water through the violation of the compact entered into.	Dispute resolution by Court a decade later that groundwater pumping by Colorado was unlawful which was rightfully belonged to the Kansas and paid for the damages.
India	Kaveri River between Karnataka Tamil Nadu and Pondicherry, on sharing of the waters.	The fertile delta state of Tamil Nadu wants more water. The upper riparian state feels it needs more water for its farmers. Tension, demonstrations, and violence follow.	The Cauvery Water Disputes Tribunal (formed at 1990 and date of award: 2013
India	Godavari river disputes between Chattisgarh, Andhra Pradesh, Madhya Pradesh, Karnataka and Orissa	sharing the water	Godavari water dispute tribunal Formed: 1969 Date of award: 1980
India	Krishna river dispute between Maharastra, Karnataka and Andhra	Dispute over the sharing of water	Krishna water dispute tribunal Formed: 1969

	Pradesh		Date of award: 1976
India	Narmada river dispute between Rajasthan, Madhaya Pradesh, Gujrat and Maharastra	Sharing of water between states, and construction of Sardar Sarover Dam	Narmada water dispute Tribunal Formed: 1969 Date of Award: 1979

Indian experience in the interstate water disputes has revealed that delays caused in the formation of the tribunal and passing the awards, making a plans for the decisions and judicial review by the Supreme Court has contributed in the bitterness and friction between the states involved in the disputes and has further impacted in the underutilization of the water resources and hindering the timely development of the country. Experience of India in dispute resolution has provided us with a preliminary outcome that the long processes of litigation can give rise to the violent form of the conflict

5. DISPUTE SETTLEMENT MECHANISMS IN NATURAL RESOURCES:

It has become increasingly very important to sort out the new mechanisms and institutions to manage the conflict on the natural resources and resolve them productively keeping in mind the long term sustainability and short term economic feasibility.(Stephen R. Tyler, policy implications in the natural resources conflict)

There are various processes in the dispute management over the natural resources ranging from the proactive engagement of all the stakeholders and capacity building of them to facilitation, mediation, negotiation to the litigation by the specialized bench including various long term approaches. Thus, Natural resources dispute resolution framework has to be peaceful, participatory and in equitable to all the stakeholders.

Four broad approaches to conflict management may be discerned: formal dispute resolution, informal dispute resolution, dispute avoidance and popular dispute resolution. (Crommelin Michael, 1999) The experiences of the federal countries in the world have used the given below dispute resolution framework.

- a) Through the Court or the Formal dispute resolution:
- b) Alternative dispute resolution or thorough the negotiation and mediation and arbitration between the parties.
- c) Tribunals
- d) And Intergovernmental contract and agreement for the larger projects.

6. MANAGEMENT of TENSION AND CONFLICT IN NATURAL RESOURCES THROUGH THE JUDICIARY IS LIMITED:

In US dispute over the natural resources are dealt by the judiciary and in India particularly water disputes are resolved by the special commission or tribunals. (Dhavan Rajeev, 2008) But judicial resolution of the disputes is limited and can never be the exclusive method of resolving the federal disputes. The traditional method of leaving matters of constitutional interpretation and dispute settlement to the judiciary has proved to be inadequate.

Legislative solution also does not guarantee the solutions to the problems of the conflict, rather than many states have looked for the answers from the executive based process and solutions, sometimes intergovernmental councils are also created by the constitution and they have also proved to fail in setting concrete agendas or evolving results. In other cases, more informal and semi-formal methods that bring the executives of the Union and state governments together have worked better than judicial mechanism.

7. INTERSTATE AGREEMENT AS A MEANS OF SETTling THE NATURAL RESOURCES DISPUTES:

Dispute resolution refers to the specific mechanisms, procedures, institutions and guidelines established in an inter-state agreement to solve conflicts between the signatories. The mechanisms and procedures to solve disputes vary from agreement to agreement. Some agreements set as a goal: “removing the causes of

present and future controversies,” without including formal dispute-resolution mechanisms.

The flexible agreements between the interstate governments reflect the needs of the parties and render them a preferable option to arbitration or eventual adjudication of inter-state and inter-province interests by the highest federal courts (Burchi Stefano, 2017)

8. RESEARCH METHODOLOGY:

A. Research Problem :

- What are the basic Intergovernmental Natural resources Dispute Settlement in federalism and what Nepal can learn from the international practices?

B. Limitation Of The Study:

- This study will only focus on the intergovernmental dispute settlement mechanism of the international practices and lessons that Nepal can learn from.

C. Methodology:

- This research will be based on the exploratory and analytical research design

D. Tools And Technique Of Data Collection:

- Secondary data would be extensively explored and collected and inference will be drawn from that.

9. FINDING and CONCLUSION:

- **Clear legal provision and power sharing between and among three tiers of the governments :**

The distribution of power provokes a variety of disputes and can be best avoided a priori through clear legal provisions and power sharing. If there is vagueness and grey areas in power sharing and creates problem during the implementation of those rights and powers between the governments, it creates the conflict.

For example, the constitution has provided local government with the power of protection and conservation of natural resources, province level government is provided with power of management and exploration of the province level natural resources and central government with power of excavation, and formulation of national level policies on natural resources. However the Local Government Operations Act, 2074, has elaborated the power enshrined in the constitution, and has added that local government has power of providing permission, renewable, management and termination for survey, excavation mines related to sand, stone etc and collection of the royalty from the mines excavation. This gives a glimpse of the overlapping jurisdictional rights among the different levels of government which can lead to conflict.

- **Dispute resolution by negotiation, mutual understanding agreement between governments and arbitration:**

Dispute over smaller natural resources and sharing of project benefits and costs should be resolved through mutual discussions and negotiations. For major natural resources, intergovernmental agreements are required for dispute avoidance and peaceful dispute resolution. These agreements can have specific measures to be taken for the dispute resolution between the governments and the role of the Central government/ NNRFC can be to monitor and evaluate.

- **Dispute resolution through the Tribunal and Court:**

When intergovernmental disputes cannot be settled amicably through negotiation, mutual understanding, agreement and arbitration, they are brought before the court or Tribunal.

Tribunals are commonly used in India for interstate water conflict resolution often led by retired judges. Kauvery, Narmada, Krishna, and Godavari rivers disputes and took many years for resolving.

Similarly, Arkansas River dispute between Kansas and Colorado State in USA took 24 years of litigation, and later on a compact was agreed upon to stop further litigation and settling the disputes through alternative ways.

Hence, avoiding litigation and other time and money consuming mechanisms of dispute settlement must be priority in intergovernmental natural resources dispute settlement.

10. RECOMMENDATION

- Inter-governmental natural resources management laws should be formulated to address the issues of benefit sharing and access over the natural resources and solving any dispute that may arise between the governments.
- Constitutional Bench in the Supreme Court should be last option in intergovernmental dispute settlement in natural resources and should exhaust all other alternative framework of dispute settlement before the formal judicial mechanisms through court.
- Inter-state Council and NNRFC can collaboratively work for amicable intergovernmental dispute resolution in natural resources to stop further escalation of the conflict between and among governments.

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