**AN APPRAISAL ON PRINCIPLE OF CONFLICT RESOLUTION IN SHARING OF LEGISLATIVE POWER AMONG THE TIERS OF GOVERNMENT IN NEPAL.**

**A proposal:**

**Submitted to the Central Department of Law in the Partial Fulfilment of Requirement for Master Degree in Law**

**BY:**

**Kali Bahadur Samyu**

**Symbol no.07545013,**

**Tribhuvan University, Faculty of Law**

**Nepal Law Campus,**

**Kathmandu, Nepal.**

**2022**

Contents

[**1.** **Introduction** 2](#_Toc102984381)

[**2.** **Statement of Problem** 4](#_Toc102984382)

[**3.** **Objective of the Study** 4](#_Toc102984383)

[**4.** **Importance of the Study** 4](#_Toc102984384)

[**5.** **Limitation of the Study** 5](#_Toc102984385)

[**6.** **Literature review** 6](#_Toc102984386)

[**7.** **Research Methodology** 6](#_Toc102984387)

[**8.** **Organization of Study** 7](#_Toc102984388)

[**References:** 9](#_Toc102984389)

**AN APPRAISAL ON PRINCIPLE OF CONFLICT RESOLUTION IN LEGISLATIV POWER SHARING AMONG THE TIERS OF GOVERNMENT IN NEPAL**

# **Introduction**

Nepal has been a federal democratic republican state since May 28, 2008 (15th Jestha, 2065 BS),[[1]](#footnote-1) and the Constitutional Provision is consolidated by the Constitution of Nepal promulgated in 2015 from 8 years long effort of Constitutional Assembly. The last paragraph of preamble of the Constitution states that "do hereby pass and promulgate this Constitution, through the Constituent Assembly, in order to fulfil the aspirations for sustainable peace, good governance, development and prosperity through the federal democratic republican system of governance. As well Article 4 has provisioned that Nepal is federal democratic republican state.[[2]](#footnote-2) Division of state power among the tiers by written constitution is the essence of federalism. Such division is in respect of both the territory and topic of legislation.[[3]](#footnote-3)

Under federal system, Nepal has been divided into the federal, seven provinces, seventy seven districts and 753 local levels. Now there is a federal government with bicameral parliament, Nepal Government, each seven province has a separate government with unicameral province assembly and Province executive, 753 local assembly and local government, altogether 761 legislature and executive. But we have integrated judiciary in Nepal, the unitary with slight changes in role and jurisdiction of respective court, as the result of disaggregated federalism in Nepal. Where the Constitution with three enumerated list and two concurrent list for tiers of government is the peculiar among all the federal states in the world.

A federation consists of at least two levels of government, each of which has a degree of autonomy that is protected by the constitution. Countries with a federal system of government share powers between these levels in different ways, which affects their decision-making processes.[[4]](#footnote-4) In another words, federalism is a system of government in which entities such as states or provinces share power with a national government. The United States government functions according to the principles of federalism. Federalism is based on the assumption that its constituent parts are to a considerable degree self-organized and self-managed.

For the issues on how should conflict between tiers of government on exercise of legislative powers be resolved is very important in federalism, as there is shared, self and autonomous ruling system. If a power is concurrent, in the sense that it (tiers it) can be exercised by either level of government, there is obvious potential for the power to be exercised in a way that leads to ‘inconsistency’ or ‘repugnancy’ between laws. It is therefore necessary to provide a rule to avoid or resolve such inconsistencies or conflicts. Usually, such rules allow the union law to prevail, as in section 109 of the Australian Constitution[[5]](#footnote-5). Comparative experience shows that there can be conflicts between the operation or effect of the laws of two or tiers of government even where powers are exclusive. To resolve this problem, union law is usually considered paramount.[[6]](#footnote-6)

In order to resolve conflicts between the tiers of government, the Supreme Court remains the last resort to interpret the Constitution on jurisdiction of each level of government. The Supreme Court remains as the Constitutional Court where there is no separate Constitutional Court, and in recent practice there is high fashion of separate Constitutional Court to deal with the cases in relation to resolution of conflict between the tiers of governments. Among the amicable modes of conflict resolution, the most important and ultimate means is the resolution from the court.[[7]](#footnote-7)

The Federal Supreme Court of United States of America, and Supreme Court of India have been resolving the conflict between the tiers of government in sharing of legislative powers with establishment as the principles. These principles are pathways and references for federal democratic Nepal as well, while dealing the cases from the Constitutional Bench.

# **Statement of Problem**

The conflict among the tiers of government in sharing of legislative power is rising in Nepal, few of the writs[[8]](#footnote-8) are sued by Madhes Province, which demands the study of principles on such conflict resolution from the federal Court of Federal states as United States of America and India. These established principles are the norms, values, pathways and reference for Constitutional Bench of Nepal in resolving the disputes between the tiers of government. For this, research question of the study will be as follows:

1. How the legislative powers are divided among the tiers of government in Nepal?
2. What are the conflicts observed among the tiers of government of Nepal?
3. What are the landmark principle developed by the Indian courts and US Court in resolution of conflict on legislative power between the tiers of government?

# **Objective of the Study**

The objective of the study will be as follows:

1. To observe the pattern of division of legislative powers among the tiers of governments in Nepal.
2. To trace the conflict seen in Nepal on sharing of legislative power in Nepal.
3. To survey the developed principles on resolving the conflict on sharing of legislative power among the tiers of government from the Federal Supreme Court of United States of America and India.

# **Importance of the Study**

The beneficiaries of this study are generally the student of constitutional law, judiciary, legal professionals, law students and all those who are interested to this topic. The deeper studies on specific issues on what principles are relevant to conflict resolution in sharing of legislative power is hot cakes among the Constitutional law experts, students, politicians and even for judges of Supreme Court of Nepal, mainly the judges who are under the panel for Constitutional Bench. The findings of this study will explore some constitutional jurisprudence and insights for resolutions of federal disputes between the tiers.

# **Limitation of the Study**

The limitation of this study is confined mainly the constitutional division of legislative power, and established principles on resolution of conflict between the tiers of government on exercise of legislative power with selected case laws. The established principles with adequate and corresponding case laws to be studied will be as follows:

1. Pith and Substance Doctrine,
2. Plenary Power of the Legislature,
3. Retrospectivity,
4. Predominance of Federal Power,
5. Implied Power doctrine,
6. Principle of Colorable Legislation,
7. Doctrine of Harmonious Construction, and
8. Doctrine of Ancillary Legislation.

And the current cases under the Constitutional Bench of Nepal to be studied here will be:

1. Sagarnath Forest Project[[9]](#footnote-9) case,
2. Dispute in the Forest Act [[10]](#footnote-10) case,
3. Dispute in Police Recruitment[[11]](#footnote-11) case,
4. Dispute over Criminal Jurisdiction*[[12]](#footnote-12)* case,
5. Dispute over Irrigation Project*[[13]](#footnote-13) case,* and
6. Staff Personnel Management Case[[14]](#footnote-14)

As well it is the Thesis paper, will be conducted within the duration of six months.

# **Literature review**

The first tenure of Local Government is completed by the April, 2022, while the first tenure of Province and the Federal Government will complete by January, 2022. The experience of first five years on sharing and self-rule among the three tiers of government have not produced adequate literature on it. So, the researcher have limited literature from native perspectives and mostly depended upon the experience from USA and India with federal democratic governing system.

I have reviewed the literature asfollows:

The researcher has reviewed the part of book (p.767-834), V.N. Shukla's CONSTITUTION OF INDIA, written by Mahendra Pal Sing[[15]](#footnote-15). As this book is very influential, this portion has ideally presented the concept enriched with the case laws on every principles on conflict resolution in sharing of legislative power among the tiers of government.

A Background Paper on CONCURRENT POWERS OF LEGISLATION UNDER LIST III OF THE CONSTITUTION[[16]](#footnote-16), prepared for the Commission by Shri P.M. Bakshi, has clearly dealt with the concurrent list in India.

A book Constitutional Law and Administrative Law[[17]](#footnote-17) p. 222-224, written by Khem Raj Gyawali. This portion has suggested some the role of Court on resolving the federal disputes among the tiers of government.ss

# **Research Methodology**

The researcher will apply the descriptive research design. The research will be mostly doctrinal and complemented by non-doctrinal as well. The primary data will be gathered from the bodies of laws; Constitution and Case laws related to the conflict in the jurisdiction of division of legislative powers among the tiers of government. The researcher will adopt the purposive sampling for the more suitable case laws for respective principles laid down by the Supreme Court of India and United States of America.

To bring more comprehensiveness in study researcher will adopt interview as complementary tool for data generation with key persons as the Constitutional Law professors, veteran Justices on interpretation of constitutional law and federal experts. The interview will be analyzed with appropriate way.

# **Organization of Study**

The report of this study will be organized into five chapters as follows:

The first chapter will deal with the introduction: background of the study, statement of the problem, research question, objectives of the study, significance of the study, limitation of the study, literature review: empirical literature review and conceptual framework, research methodology and organization of the report.

The second chapter will provide conceptual framework on principle on conflict resolution of division of legislative power among the tiers of government.

The third chapter will include the Division of legislative power in federal states in United States of America, India and Nepal.

The fourth chapter will contain the current conflict between the tiers of government in Nepal. Such Cases will be Sagarnath Forest Project case, Dispute in the Forest Act case, Dispute in Police Recruitment case, Dispute over Criminal Jurisdiction case, Dispute over Irrigation Project *case,* and Staff Personnel Management Case. While other disputes not sued in courts will be Kaligandaki- Tinau Multipurpose Diversion Project:, Bheri-Babai Diversion Project Ownership Dispute between Federal, Karnali Province and Bheriganga Municipality, Conflict between the Federal government and Kathmandu Metropolitan City over building standards, Dispute between local governments over resource rights**.**

The fifth chapter will deal with the principle established on conflict resolution on exercise of legislative power among the tiers of government from the Court of United States of America and India. Those principles are: Pith and Substance Doctrine, Predominance of Federal Power, Implied Power doctrine, Principle of Colorable Legislation, Doctrine of Harmonious Construction, Doctrine of Plenary Power, Doctrine of Ancillary Legislation and so on. Along with the suitable case laws shall be dealt.

The sixth chapter will deal with Findings and Conclusion of the study. As well suggestions for concerning bodies.

There will be bibliographies at the end of this report arranged in a manner as per the rule of uniform citation of APA.

# **References:**

**Constitution**

Constitution of Nepal

Constitution of America

Constitution of India

**Case:**

Bechan Chaudhary on Behalf of Ministry of Industry, Tourism and Environment , Madhesh Province v. Office of Prime Minister and Council of Minister et al, Writ no. 076-WC-0001.

Bechan Chaudhary on Behalf of Ministry of Industry, Tourism and Environment , Madhesh Province v. Secretariat of Federal Parliament et al, Writ no. 076-WC-0010.

Chief Minister Lal Babu Raut, Madhesh Province v. Ministry of Law, Justice Parliamentary Affairs et al, Writ no. 077-WC-0001.

Law and Internal Affairs Minister Gyanendra Bahadur Yadav, Madhesh State v. Office of Police Head Quarter , Naksal, Kathmandu et al. Writ no. 077-CC-0004.

Law and Internal Affairs Minister Gyanendra Bahadur Yadav, Madhesh State v. Ministry of Law, Justice Parliamentary Affairs et al, Writ no. 077-WC-0021.

Physical Infrastructure Development Minister Jitendra Prasad Sonar on Behalf of Ministry of Physical Infrastructure Development of Madhesh Province v. Energy, Water Resources and Irrigation, Singhdurbar, Kathmandu et al, Writ no. 077-CC-0005.

**Books:**

Gyawali, K.R. (2020). Constitutional Law and Administrative Law p.223. Kathmndu: Pairabi Book House.

Mahendra Pal Singh (2015). V.N. Shukla's Constitution of India p.767. Lucknow: Easton Book Company.

1. The fourth amendment of Interim Constitution of Nepal, 2007 declared Nepal as the Federal Republic State by ending the Unitary Monarchial System in Nepal. [↑](#footnote-ref-1)
2. Constitution of Nepal, Article 4. State of Nepal: (1) Nepal is an independent, indivisible, sovereign, secular, inclusive, democratic, socialism-oriented, federal democratic republican state. [↑](#footnote-ref-2)
3. Mahendra Pal Singh (2015). V.N. Shukla's Constitution of India p.767. Lucknow: Easton Book Company. [↑](#footnote-ref-3)
4. Leroy, K. and Saunders, C. (eds.), Legislative, Executive and Judicial Governance in Federal Countries (Montreal: McGill-Queen’s University Press, 2006) at https://www.idea.int/sites/default/files/publications/divisions-of-powers-in-federations.pdf, retrieved on March 21, 2022. [↑](#footnote-ref-4)
5. Commonwealth of Australia Constitution Act. [↑](#footnote-ref-5)
6. Brouillet, E. and Ryder, B., ‘Key doctrines in Canadian legal federalism’, in P. Oliver, P. Macklem and N. Des Rosiers, (eds), The Oxford Handbook of the Canadian Constitution (Oxford: Oxford University Press, 2017) [↑](#footnote-ref-6)
7. Gyawali, K.r. (2020). Constitutional Law and Administrative Law p.223. Kathmndu: Pairabi Book House. [↑](#footnote-ref-7)
8. Sagarnath Forest Project case, Dispute in the Forest Act case, Dispute in Police Recruitment case, Dispute over Criminal Jurisdiction case, Dispute over Irrigation Project case, and Staff Personnel Management Case. [↑](#footnote-ref-8)
9. Bechan Chaudhary on Behalf of Ministry of Industry, Tourism and Environment , Madhesh Province v. Office of Prime Minister and Council of Minister et al, Writ no. 076-WC-0001. [↑](#footnote-ref-9)
10. Bechan Chaudhary on Behalf of Ministry of Industry, Tourism and Environment , Madhesh Province v. Secretariat of Federal Parliament et al, Writ no. 076-WC-0010. [↑](#footnote-ref-10)
11. Law and Internal Affairs Minister Gyanendra Bahadur Yadav, Madhesh State v. Office of Police Head Quarter , Naksal, Kathmandu et al. Writ no. 077-CC-0004. [↑](#footnote-ref-11)
12. Law and Internal Affairs Minister Gyanendra Bahadur Yadav, Madhesh State v. Ministry of Law, Justice Parliamentary Affairs et al, Writ no. 077-WC-0021. [↑](#footnote-ref-12)
13. Physical Infrastructure Development Minister Jitendra Prasad Sonar on Behalf of Ministry of Physical Infrastructure Development of Madhesh Province v. Energy, Water Resources and Irrigation, Singhdurbar, Kathmandu et al, Writ no. 077-CC-0005. [↑](#footnote-ref-13)
14. Chief Minister Lal Babu Raut, Madhesh Province v. Ministry of Law, Justice Parliamentary Affairs et al, Writ no. 077-WC-0001. [↑](#footnote-ref-14)
15. Supra note 3. [↑](#footnote-ref-15)
16. https://legalaffairs.gov.in/sites/default/files/Concurrent%20Power%20of%20Legislation%20under%20List%20III%20of%20the%20Indian%20Constitution.pdf, accessed on May 6, 2022. [↑](#footnote-ref-16)
17. Gyawali, K.r. (2020). Constitutional Law and Administrative Law p.223. Kathmndu: Pairabi Book House. [↑](#footnote-ref-17)