

RESEARCH ARTICLE

Role of law to combat ecological imbalance in Nepal

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Abstract

The government of Nepal has adopted and enacted Environment Protection Act, 2019 to enforce Article 30 of the Constitution of Nepal which guarantees a breath of fresh air to every citizen (not to every person). The act embodies environmental principles like sustainable development, environment impact assessment (EIA), or polluter pays principle (PPP) to foster purposive and progressive environmentalism. These green laws mandate that there should be developments but that development should be in the closest possible harmony with the environment. In this light, the article points out the compliance mechanisms, rights of the Centre and Provinces and other legal mandates provisioned to control and abate the acts and omissions that tend to degrade the quality of the environment.

Keywords: Constitution, Environment, Nepal, Environmental law, Green democracy.

Introduction

Environment protection is an integral part of development and, therefore cannot be dealt with in isolation. A healthy environment and the economic condition of the community has close relations. The protection of environment is an issue of global concern. In order to strengthen the ecological interest in line with the Constitution, the Parliament of Nepal enacted Environment Protection Act in 2019 replacing the previous legislation for environmental protection of 1997. This green law imposes duty to both state and other actors to protect and conserve the environment.

The Act contains various provisions that focus on protecting and improving the environment. The preamble of the Act envisages that the victims of pollution would have a right to demand compensation from individual or agencies causing pollution. This arrangement is in line with the 'polluter pays principle' mentioned in Article 30(2) of the Constitution of Nepal, which guarantees victims to claim compensation from polluter. The act of 2019 under Section 2(J) defines pollution as "the activities that significantly

degrade, damage the environment or harm the beneficial or useful purpose of the environment, by changing the environment directly or indirectly as a result of wastes, chemical, heat, noise, electrical, electro-magnetic wave or radioactive ray." Likewise "harmful substances" means harmful wastes transported from one to other national boundary, as defined in Basel Convention of 1989.

The 2019 Act prohibits development work that does not comply with the Environment Study Report, Environmental Management Plan, Environment Assessment Report and Supplementary Environment Impact Assessment reports. The Act of 1997 required only an initial Environment Examination and Environment Impact Assessment (EIA). This shows, the Act puts additional restrictions to maintain proper balance between development and the environment.

The 2019 Act under Section 30(1) empowers the government to specify required places as protected areas as natural heritage site, rare wildlife, biodiversity area, and historical and cultural significance locations. The government has the authority to classify or define any area as green zone areas under Section 30(2). Also, the government [under Section 30(5)] can declare 'polluted area' and restrict people's movement around polluted areas, including locations where harmful materials or wastes are stored or disposed of. The Act under Section 28 gives the authority to government to enter into carbon trading with foreign governments/ agencies in line with international treaties. Nepal is a signatory to the Stockholm Declaration of 1972, an initiative towards pollution control.

Legal Frameworks to Protect the Environment

According to the Constitution of Nepal, right to clean environment is a fundamental right. This way, it is the

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duty of the state and individuals to protect and improve the environment. The constitution declares various rights associated with the protection of the environment. Specific provisions associated with the environment are; the right to live in a clean environment, right to clean water and hygiene right to food sovereignty; the right of state to carry out land reforms on agriculture or environment; and right of consumers to have quality foodstuffs and services. The state has to control or prevent any act or omission polluting or likely to pollute the environment. The Supreme Court and High Courts (under Article 133 and 144, respectively) can issue required direction, order or writs for this purpose. Additionally, various state agencies like provincial government and municipalities are formed to work on promoting and improving the environment.

The Constitution of Nepal (herein forth 'the Constitution') confers power relating to environment protection and ecology to all tiers of government such as central, provincial and local. In reference to the Constitution, the government of Nepal under schedule-V, entry 27 [Environment management, national parks, wildlife reserves, wetlands, national forest policies, carbon services] and provincial governments under schedule-VI entry 19 [Use of forests and waters and management of environment within the state] and both the governments under schedule-VII entries 12 [*Ayurvedic medicine*, veterinary, *Amchi* and other professions], 18 [Tourism, water supply and sanitation] & 23 [Utilization of forests, mountains, forest conservation areas and waters stretching in inter-state form] have mandates to work on the issues of ecology, sanitation, clean and healthy water, wildlife conservation and forestation. The Directive Principles of State Policy provided in part-IV of the constitution calls upon the local/ provincial governments to adopt policies for protecting and promoting the environment [Article 51, Constitution]. The government could perform this task working in partnership with private sector, NGO, and community, religious and cultural groups so that effective measures can be taken for the protection of the environment.

Principal objectives of the Environment Protection Act, 2019 include, to protect and improve environment and to mitigate the pollution; to enforce the right to clean environment; to grant compensation to victims of environmental pollution; to implement EIA, Environmental Study and Environment Examination reports; to impose fine to those committing offences under the Act; to enforce various laws dealing with environmental issues; to allow all levels of governments to monitor environmental situation; to establish environmental fund for protection and improvement of environment; to allow central government adopting measures to control climate change; to allow central government to engage in carbon trading; to allow central and provincial governments to establish

pollution test laboratories; to allow central and provincial governments to certify pollution control scales and to allow the central government to identify protected areas such as green zone and polluted areas and prohibit the development activities in those areas.

The Environment Protection Act of 2019 (herein forth the 'Act') imposes wide range of duties to the state. The duties may include setting standards to reduce and regulate emissions, hazardous wastes, vehicular pollution, industrial pollution and pollution made by the hotels, restaurants and equipment. All the activities performed against section 15 (1) would be unlawful.

As opposed to the Act of 1997, the 2019 Act makes arrangements to deal with climate change and control of greenhouse gases. Part IV of the Act deals upon the issue of climate change. Sections 23-26 of the Act make all levels of government responsible for adopting policy measures to reduce emissions, pollution and curbing omissions that adversely affect biodiversity and ecology. The central government has exclusive jurisdiction over identifying areas emitting greenhouse gases, determining their national reference level, specifying open or green areas, identifying polluted areas, preventing development activities, and participating in carbon trading with foreign governments. Additionally, the central government has power to adopt policy measures, develop strategies and action plans and their implementation. On the other hand provincial and local governments have to work as per the direction of central government. The governments have to act in reducing greenhouse gas emissions [Section 25(3)] and contribute towards mitigating adverse impacts of climate change [Section 26(1)]. Since Right to clean Environment is a fundamental right, it is necessary to adopt safety measures for clean environment.

Section 35 of the Act, 2019 constitutes the National Council for Environment Protection and Climate Change. The Council is chaired by the Prime Minister of Nepal. The members include environment minister and other three ministers, chief ministers of all seven provinces, National Planning Commission member (environment), and two experts including women. The nominated members have three year tenure. The Council shall meet at least once a year.

As stated in the Act, functions of the Council may include adopting policy guidelines for mitigating climate change and pollution. The Council may issue policy guidelines to provincial and local governments as well. The Council has to manage required resources for environmental protection and climate change.

The Environment Protection Act of 1997 (Herein forth Act of 1997 or 1997 Act) provided that developer had to comply only with Initial Environment Examination and Environment Impact Assessment (IEIA) during the work. The present Act sets additional obligations to the developer as below.

- *Environment Study Report* [a report containing brief environmental study] that may include (i) Brief Environment Study (a brief environmental study of a proposal) (ii) Initial Environmental Examination and (iii) Environment Impact Assessment (EIA). At instance of non-compliance of mandate, there could be a fine of up to 35 million under different provisions of Section 35.
- *Environment Management Plan* - The proponent must state measures/safeguards to be adopted during developmental processes to mitigate adverse environmental impacts [Section 10(2)]. Responsible agency has reason to believe that measures proposed in the plan are inadequate, the government can ask the proponent to adopt effective measures.
- *Environment Impact Assessment Report*- The proponent requires to submit report at the completion of two years (from initiating project proposal) period. Any defiance or inconsistency with EIA mandates will be subject to fine up to NRs five million.
- *Supplementary EIA*- Under Section 11 a supplementary EIA may be required in case of modification, alteration or addition for expansion of development program.

In this way it can be said that there are number of provisions in Constitution of Nepal and Act, 2019 which talks about clean environment and impose mandates upon the government to take effective step regarding clean environment.

Over the years the Supreme Court of Nepal has delivered scores judgement addressing environmental issues. Decades ago, in *Surya Dhungel v Godavari Marbles Pvt. Ltd* (1995) case supreme court observed that environmental pollution and degradation would be a threat to living beings, including human, and therefore healthy environment is a requisite for better human life and livelihood. In *Pro Public v HMG Nepal* (2006, Decision Number 758) the court held that immediate measures should be taken to decrease adverse impact of pollution coming from bricks factories located around densely populated areas, schools, cultural and touristic zones. The court directed to form a team of experts representing different ministries to identify industries that polluted the environment among others.

In *Kedar Bhaktra Shrestha v Department of Transport and Ors* case (Supreme Court Bulletin Year 10, 1997) the Supreme Court upheld policy prohibiting registration of diesel three-wheeler (tempo) vehicles in and outside Kathmandu. The court believed that every person is entitled to a clean and healthy environment as a fundamental right to life and liberty enshrined in the constitution.

In the case of *Bharatmani Gautam v HMG Nepal*, apex court held that the holy Bishnumati river originated from *Shivapuri* hills and flowing via *Budhanilantha, Basbari, Balaju, Shova Bhagvati, Teku* and converging with *Bagmati* river in Kathmandu has been excessively polluted with solid waste

dumping and untreated drainage and the state has an obligation to preserve ecology, maintain the cleanliness of rivers, ensure portable drinking water and manage waste in making environment-friendly society.

Role Of Governments

The Government of Nepal has adopted policy framework on conservation and pollution control. The central or provincial governments can map out the areas for environmental study. The government would set vehicular, industrial, hotel, restaurant, and equipment-related pollution standards.

The government would regulate on the import and export of hazardous substances. The government can designate any official as an environmental inspector to monitor the compliance of the rules. Duties and powers of the environmental inspector include imposing fine to individuals or institutions. The party dissatisfied on the inspector's decision can appeal to the Director General within 15 days.

The rising sea levels, heat waves, melting glaciers, intense drought, storms, and warming oceans are some major consequences of climate change. Chapter IV of the Act deals with uncertainties and climate change's reverse effect. The Ministry of Environment, therefore, is assigned to make a periodic study about impacts of climate change in communities, eco-system and biodiversity. Section 23(2) of the Act, 2019 provides that the central, provincial and local governments would jointly or individually take steps to execute plans and policies formulated by the Ministry of Environment.

In order to avoid adverse impact of climate change, the governments at centre, province or local levels would make implementation plans for all levels respectively. As stated above the central government would identify areas emitting greenhouse gases and determine their national reference level. The governments either jointly or independently adopt measures to mitigate impacts of climate change. For this purpose, central government can issue circulars and guidelines under section 26. The state agencies under all governments have to comply with the circular or guidelines. In addition, the central government under section 27 would determine and enforce technical standards relating to pollution and climate change. The central government therefore has exclusive mandate to determine and enforce necessary standards for urban and rural areas followed by developing technologies required to curbing adverse impacts of climate change.

Moreover, the Act specifies various role and functions to the Provincial governments. The provinces have to develop plans and polices for the protection of the environment in respective provinces. Section 3(2)(c) of the Act allows local governments to oversee related environmental study reports including EIA. Proponent not meeting

standards and conditions set by reports may be directed to stop implementation of work by concerned agencies of central, provincial or local governments. In order to ensure compliance of ESR and standards on pollution control, the provincial governments and local governments may designate any officer to work as environment inspector.

The central and provincial governments can also establish laboratories to test or analyze pollution samples under section 18. The central or provincial governments can issue pollution control certificate to industrial enterprises. The Act envisages that the provincial governments would give priority on the issues of biodiversity, climate change, strategies to mitigate pollution and developing plans and policies. To respond adverse impacts of environmental risks or climate change, central, provincial and local governments may develop adaptation plans. The central government should consult with provincial or local governments while declaring environment protection areas. However, the Act does not confer power to provincial governments on climate change, carbon trading, etc. It appears that provincial and local bodies have only secondary role.

The section 31 of the Act provides about the environment protection fund. The fund would be comprised of the amount received from all central, provincial and local governments and donations or grants from any individual, agencies, foreign governments and international agencies. The fund would be utilized on protecting and improving the environment; preventing and controlling pollution; managing climate change and protecting national heritages.

Saint Augustine has rightly observed that punishment is justice for the unjust (Gerald, 1983). The Act provides severe punishment to those who violate this law. For the non-compliance of ESR one may be fined up to Nepali Rupees (herein forth NRs) half million; for non-compliance of Initial Environmental Report one can be fined up to NRs one million and on non-compliance of EIA one can be fined up to NRs five million, under section 35 (1) of the Act. Additionally, the government can blacklist them for one to five years. At times polluter has to pay the amount set by concerned government official to restore environment and compensate victims. Also, the Director General of Environment Department may impose a fine of up to Nepali Rupees 100,000/- on an individual or agency that violates the order issued by the government to enforce this Act.

Indian Constitutional Scenario

Indian Constitution of 1949 states: "No person shall be deprived of his life or personal liberty except according to a procedure established by law." The provision contains as many as 18 words with a marginal note "Protection of life and personal liberty" of six words. But, this provision, which is scripted with a total of mere 24 words, has been hailed as "multi-dimensional" (Jain, 2016) and its the "heart of the

fundamental rights."

The concluding part of the procedure established by law seeks to ensure rule of law in one or some other way as it explicitly mandates a lawful governmental or non-governmental action. The phraseology the procedure established by law has been borrowed from the Japanese Constitution and is in no way different from the notion of 'due process of law' as explained under the US Constitution.

In the leading case of *Sunil Batra v. Delhi administration (1978)*, the Indian Supreme Court was of the opinion that the expression "procedure established by law" meant the same thing as the phrase "due process of law" used in the American Constitution. "Truly our constitution has no 'due process clause' as the VIII amendment (of the American Constitution) but in this branch of law, after *Maneka Gandhi's* case the consequence is the same," observed much-admired Justice Krishna Iyer (Pandey, 2014).

Further, "the mere prescription of some kind of procedure is not enough to comply with the mandate of Article 21. The procedure prescribed by law has to be fair, just and reasonable, not fanciful, oppressive or arbitrary; otherwise, it should not be on the procedure at all and all the requirements of Article 21 would not be satisfied. What is fair or just? A procedure to be fair or just must embody the principles of natural justice. Natural justice is intended to invest law with fairness and to secure justice," the highest court of land in India held while dispensing the landmark case of *Maneka Gandhi v. Union of India (1978)*. The Court stressed the need to observe law as reasonable laws, 'not merely an enacted piece of law.'

From the close reading of the aforementioned cases, what becomes imperative is that the right to life is not merely limited to physical act of breathing or mere animal existence. This way, the frontiers of this article has astonishingly enlarged. In yet another sense, the provision is in the nature of both substantive as well as procedural law. The wider interpretation of this constitutional guarantee secures right to live with dignity that includes the right to livelihood, health, clean and healthy environment, pollution-free society or other rights required to lead a dignified life. So, it includes all those rights required to make life meaningful, complete and worth living. Notably, a person cannot live a dignified life without a clean and healthy environment held by the Supreme Court in the case of *Subhash Kumar v. State of Bihar (1991)*.

The horizon of right to life has broadened with the wider judicial interpretation. Now, it is well-settled that all the rights required to live a dignified life fall within the right to life. This way, our life does not necessarily demand an exclusive biological presence but also the rights and amenities to live a dignified life.

In the case of *MC Mehta v Union of India (1999)*, the Supreme Court of India directed that the entire fleet of public

transport buses be run on CNG, not diesel. The Court had put a ban on running diesel buses in Delhi. In *Rural Litigation and Entitlement Kendra v. State of UP* (1985) where the Supreme Court of India for the first time held that right to life includes the right to live in a healthy environment with minimum disturbance of ecological balance. The Supreme Court of India in the case of *MC Mehta v Union of India* (1992) directed the Centre to issue directions to all the State Governments and Union Territories to enforce through authorities. A condition for license on all cinema halls to display no less than two slides/messages for free of cost on environment amid each show. Most importantly, the Supreme Court of India directed the University Grants Commission to prescribe a course on environmental education in a graded manner as a compulsory subject in college education.

Like fundamental rights provision, there is a fair corpus of provisions enshrined under the Directive Principles of State Policies (DPSP) under Part-IV of the Indian Constitution. In this regard, Article 47 casts an obligation on the state to ensure nutritious foods and public health to people. The states are empowered to prohibit the sale or consumption of intoxicating drinks or drugs which are injurious to health.

Similarly, Article 48A obliges the state to safeguard the forests and wildlife of the country. Article 51A (g) imposes a fundamental duty on every citizen to protect and improve the natural environment, including lakes, rivers, flora, and fauna. This provision lays down a fundamental duty on every citizen to have compassion for all living creatures.

Apart from fundamental rights and fundamental duties, the Constitution of India hosts healthy provisions regarding legislation-making. Article 253 confers a blanket power on the parliament to make laws for all or any part of India to give effect to any treaty, agreement, convention, or international obligation to which India is a state party. More so, Article 246 provisions for the enactment of laws by the center or state under the specified jurisdiction. It details three Lists—Union List, Concurrent List and State List—under which the various subjects are enumerated on which the concerned lawmaking agency of the state, that is state or union or both, is empowered to enact laws. As per the provision, Union-made laws prevail over state enactments and laws enacted under Concurrent jurisdiction prevail over state made laws.

Moreover, Article 32 and Article 226 of the Indian Constitution prescribe for the Judicial remedy by way of writs, namely habeas corpus, mandamus, prohibition, certiorari and quo-warranto. Under the writ jurisdiction clauses, the High Courts and Supreme Court are allowed to issue any writ by way of their decision or order against government agencies or private persons. Writ of Habeas Corpus can be issued against a private person.

The Indian Supreme Court in the leading case of *Subhash Kumar v State of Bihar* (1991) wrote that clean and healthy drinking water is a fundamental right within the meaning

of right to life and liberty clause. *MC Mehta v Union of India* (1999) has directed that the entire fleet of public transport buses be run on CNG, not diesel. The Court has put a ban on running diesel buses in Delhi.

Apart from the constitutional obligations, the government of India has adopted a good deal of environmental legislation for the protection and promotion of natural environment. Importantly, India's practice and experience in fight against environmental pollution could be acknowledged by Nepal too. In *MC Mehta v Union of India* (1996), India's Supreme Court held that Brick Kilns should operate at a distance between 20 KM to 200 KM from Taj Mahal. In *MC Mehta v Union of India* (2002), the Indian Supreme Court held that it's imperative to run CNG, not diesel, buses on the streets of Delhi. Environmental education has been made compulsory in University curricula by virtue of *MC Mehta v Union of India* (1991) verdict. Along with these, right to the environment has been guaranteed to every person in India, unlike Nepal's 'every citizen'. So, these practices could be acknowledged by Nepal too. There would be positive impact by imparting environmental education explaining the importance of preservation and protection of the environment.

Conclusion And Suggestion

The Environment Protection Act of 2019 is a comprehensive piece of legislation. It was enacted primarily to give effect to Article 30 of the Constitution which guarantees citizens the right to fresh air and a clean environment. The Act was issued with a view to consolidating environmental laws. The Act assures victims of pollution a reasonable amount of compensation from the polluter. The main legislative intents are to ensure right to clean and green environment, maintain a balance between environment and development, and save communities from adverse environmental impacts and climate change.

Like India, there could be an order of the Supreme Court of Nepal or of the government to prescribe the environmental education as a compulsory subject in Nepal's college education. This would have an impact in the protection and promotion of the environment as the students of every discipline would have an opportunity to learn the concepts, laws, conventions and judgments on or about environmental protection. Most importantly, the right to clean environment should be available to every person, including that of citizen as well as non-citizens. Nepal's Constitution under Article 30 guarantees right to the environment exclusively to citizens, whereas the same right is available to every person in India under Article 21 of Indian Constitution.

The Act compels development actors to comply with different environmental policies, plans and programs. All three levels of government are assigned the role to monitor and evaluate situation of respect to law, policy,

plan and programs. Based on their monitoring, different government officials can take action, including stopping the implementation of the project. The Act has set heavy fines for non-compliance of law and government policies. However, vast discretionary power is given to law-enforcing officials. The minimum amount of fine is not stated leaving vast discretion, so the provision requires correction. The imposition of minimal fine in violation of this law may help defeat spirit of law itself. Additionally, the Act has no provisions of rewards to those who make an exemplary contribution on the conservation and protection of the environment.

The state acknowledged the celebrated concept of 'Public Trust Doctrine' by asserting states fiduciary duty of stewardship to the environmental entity of public life. The resources are held in trust for the benefit and use of general public of today and future. Other constitutional

provisions empower state to implement the doctrine. Present is the high time to enforce green laws contained in the Constitution and environmental law that will virtually flourish Nepal in the form of a green democracy.

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