Lessons for Nepal from the Green Judiciary of India: A Politico-legal Analysis

Alok Kumar Yadav[1] and Jivesh Jha[2]

Abstract

It's very disappointing to observe that India and Nepal are ranked among those nations that are at the very cusp of suffering the most adverse effects of climate change, pollution and the stripping of natural resources. These states, which have an open-border and people-to-people connection, merit a whole range of environmental challenges that they must combat with. The people in the Republics could sense the burn of environmental pollution: losses in agro-based industries and incomes; hunger and malnutrition and the associated pressure on the national life. Though the governments in these two states appear as toothless entity involved in saving face in terms of international commitments, the judicial departments have played an instrumental role in canvassing the cause of environmentalism. With the robust judicial activism, Indian education system could see Environmental Law or Environmental Science as a compulsory subject or NCT of Delhi could witness a ban on Diesel buses. There are scores of green judgments in India that could be persuasively taken into consideration by Nepali judiciary or the instrumentalities of the state for advancing the cause of environmentalism.

[1] Jha, formerly a Lecturer of Law in Kathmandu University School of Law, is currently a Judicial Officer with Janakpur High Court, Birgunj Bench.
[2] Yadav is Asst Prof of Law at HNB Garhwal Central University, Srinagar, Uttarakhand

Keywords: Environmentalism, Constitutionalism, India, Nepal, Conventions, Judiciary

1. Introduction

"One of the first conditions of happiness is that the link between man and nature shall not be broken."

Leo Tolstoy

The Supreme Court (SC) of India has been playing a significant role as a steward of environment protection for an obvious reason. The environmental protection has become a matter of great concern for human rights and the right to live with dignity.

The apex Court of India is known across the globe not only for its independence (or non-intervention of politics in the affairs of appointment and transfer of judges), but, notably, for spelling out plethora of welcome judgments that offered a cutting-edge to the concept of judicial activism. With the robust judicial activism, the dimensions of the Public Interest Litigation (PIL) have attained a broader canvass. Fortunately, PIL has become a judicial pill for relief against the wrongdoing of the instrumentalities of the state as well as the non-government actors. The decisions made under the garb of PILs have not only made a noteworthy impact in the Indian Diaspora but also gave a good deal of lessons to the neighboring countries to adopt similar vibrant approaches (in one or some other way) for the cause of environmentalism and green democracy.

The foundation of PIL was laid in 1979 with the landmark ruling of *Hussainara Khatoon* v. *State of Bihar* which paved the ways for the release of more than 40,000 under trail prisoners

in the state of Bihar. Afterwards, the top Court dispensed scores of PIL (including green judgments) that led to unfold a new dawn in the world's largest democracy.

In the case of *People's Union for Democratic Rights* v. *Union of India*[3], Mr. Justice PN Bhagwati clarified the purpose of PIL. He opined that the PIL is a strategic arm of the legal aid movement which intends to bring justice to serve the cause of humanity. In saying so, he also clarified that the PIL makes a departure from ordinary traditional litigations. Of late, India's judicial creativity or engagement has developed a good deal of nexus with environmental issues, despite of the call from the various quarters that the judicial department is diluting the purpose of PIL and its more like over activism. The paper delves to study the creative and constructive approach of the judiciary in advancing the cause of environmentalism in Indian constitutionalism and its probable impact in the Himalayan Republic.

2. International Environmental Principles and Constitutionalism

The international environmental laws have played a stellar role in protecting and promoting the cause of environment globally. It has made the states morally bound to give effect to the international obligations made at different international conventions. After all, 'international law is the name for the body of customary and treaty rules which are considered legally binding by the States in their intercourse with each other'[4], says the much-acclaimed jurist Oppenheim in popular work *International Law.*

The definition of International Law as set forth in the Statute of ICJ as 'the body of rules which are legally binding on the states in their intercourse with each other' enjoy the similar

[3] 1983 SCR (1) 456
[4] 1 OPPENHEIM, INTERNATIONAL LAW 1-2 (1905) *cited in* HO AGARWAL, INTERNATIONAL LAW & HUMAN RIGHTS 1 (20TH ed . 2014)

currency in international environment law. These rules attain their authority from Article 38(1) (c) of the Statute of ICJ which encompasses treaties, international custom, general principles of law recognized by civilized states and other subsidiary sources. The decisions of courts and tribunals and the juristic wrings constitute the subsidiary sources.

The courts and tribunals in India have, at times, interpreted the civil laws in the light of international laws which have later acquired universal name and fame and became an important source in the development of international environment law. The admired commentator of International Law Professor Starke opines that the decisions of the state courts may lead to the growth of customary rules of international law.[5] Professor Philippe Sands[6] believes that the obligation reflected in Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration, namely that states have sovereignty over their natural resources and the responsibility not to cause environmental damage; the principle of preventive action; the principle of good neighborliness and international cooperation; the principle of sustainable development; the precautionary principle; the polluter-pays principle and the principle of common but differentiated responsibility are the general principles in the international environmental law which have universal acceptance.

2.1 International Conventions and the Constitutional arrangement in India

The United Nations on November 10, 1980 emphasized on the purity of drinking water in "International Drinking Water Supply and Sanitation Decade" and made an obligation on the signatories to provide clean drinking water to their citizens as access to drinking water has been globally termed as fundamental rights.

[5] JG STARKE, INTRODUCTION TO INTERNATIONAL LAW, 48 (10th ed. 1989)
[6] 1 PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENT LAW 183 (1995)

The UN Conference held at Stockholm felt the need for a common outlook and principles to inspire and guide the world in preservation and enhancement of the human environment which will indirectly lead to the economic development of the world. Reaffirming the objectives of this declaration, the Rio Declaration on Environment and Development, 1992 was held with a view to establish a new and equitable global partnership to combat with environmental pollution.

The *Convention on Biological Diversity, 1992* is chiefly concerned with the intrinsic value of biological diversity. The preamble of this convention talks about the preservation of biological diversity which has been significantly reduced by certain human activities. Convention reaffirmed that the states have sovereign rights over their own biological diversity and it casts an obligation on the signatory states to use their biological resources in a sustainable manner.

The journey of environmental protection started from Stockholm declaration (1972) to Rio declaration (1992) and then to Johannesburg declaration on Sustainable development, 2002. To achieve such development, various global programs and Agenda 21 principles were laid down. The Rio Summit was a significant milestone that succeeded to set a new agenda for sustainable development. At Johannesburg summit, the significant progress has been made towards achieving the global consensus and partnership amongst all the people of our pretty planet in order to give effect to the visions of sustainable development.

Moreover, the UN conventions of UDHR, ICCPR, ICESCR or CRC also lay down obligations on the signatory states to ensure clean and healthy environment for their people. The Constitutions of India and Nepal host healthy provisions for the protection and promotion of environment.

2.2.1 Constitutional Framework

The 1949 Constitution of India under Article 21 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 the most important Article of profound significance in Indian constitutionalism.

The concluding part—*the procedure established by law*—seeks to ensure rule of law in one or some other way as it explicitly mandates for a lawful governmental or non-governmental action. The phraseology—*the procedure established by law*—has been borrowed from Japan Constitution 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*[7], the topmost 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.

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 procedure at all and all the requirement of Article 21 would not be satisfied. What is fair or just? A procedure to be fair or

7 AIR 1978 SC 1675

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.*[8] The Court stressed on the need of observing law as reasonable laws, 'not mere an enacted piece of law.'

From the close reading of the aforementioned cases, what becomes crystal clear that the right to life is not merely limited to physical act of breathing or a 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 sacred constitutional guarantee secures right to live with dignity that includes 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 a life meaningful, complete and worth living. Notably, a person cannot live a dignified life in absence of a clean and healthy environment.

The horizon of right to life has broadened with the wider judicial interpretation. Now, its well-settled that all the rights required to live a dignified life falls within the ambit of right to life. Interestingly, Article 21 is the only fundamental right under the Constitution which has received (and will receive) the widest possible interpretation. This way, our life does not necessarily demand an exclusive biological presence but also the rights and amenities to live a dignified life.

Fortunately, the Higher Courts under the writ jurisdiction have been entertaining environmental petitions on violation of Article 21. The High Courts and Supreme Court have

[8] AIR 1978 SC 597

passed number of judgments against the government as well as private persons for their involvement in environment pollution.

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 Constitution, the sacred document which contains as many as 395 Articles. In this regard, Article 47 casts an obligation on the state to ensure that the national life merits with nutritious foods and public health is significantly improved. In order to realize this goal, 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 that includes lakes, rivers, or flora and fauna. This provision lays down a fundamental duty on every citizen to have compassion for all the 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 whole or any part of India to give effect to any treaty, agreements or conventions or international obligations 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 the state enactments and laws enacted under Concurrent jurisdiction prevail over the state made laws.

Moreover, Article 32 and Article 226 of the Constitution prescribe for the judicial remedy. Under the writ jurisdiction clauses, the High Courts and Supreme Court are allowed to issue any writ, decision or order against the government agencies or private persons.

2.2.2 The landmark decisions

The brave judiciary of India has given birth to a plethora of welcome judgments that gave a new a dimension to look at the things. The apex Court in the leading case of *Subhash Kumar* v *State of Bihar*[9] wrote that clean and healthy drinking water is a fundamental right within the meaning of right to life and liberty clause.

In this section, the researchers would delve to explore a few leading judgments of the Supreme Court of India that have been cited or could be cited in future by the Nepali judiciary.

In the leading case of *Pro Public* v *His Majesty Government of Nepal*[10] the apex Court of Nepal considered the ruling of *MC Mehta v Union of India (1996)* persuasively (i.e., *obitor dicta*) and observed that the priority should be given for lessening the impact of pollution emanating from such brick kilns that are operating in the vicinity of densely populated areas, schools, cultural and touristic zones, immediate measures are to be taken to lessen adverse impact in such areas. The Court directed the government to form a team comprising representatives each from the Ministry of Commerce and Supply, Ministry of Science and Technology, Ministry of Physical Planning and Public Works, Ministry of Labor and Transport, Department of Housing and professional experts as required along with the representatives from the petitioner-- Pro-Public. The task of this team was supposed to determine the number of

[9] AIR 1991 SC 420
[10] NKP (BS 2059) AVAILABLE ON: https://www.elaw.org/system/files/Nepal+Supreme+Court+Decision+re+Brick+Klins.doc

industries that have polluted the environment, and those that have installed pollution- protection device and other those that have not. Similarly, the Court directed the state to assess the impact of the closure of the brick kilns on national construction and development works as well as on the construction of civil houses and to study on possible alternatives in replacement of brick kilns.

The top Court of Nepal wrote: "In India the brick kilns are allowed to operate at a distance between 20 to 200 kilometers from Taj Mahal which has been included in the world heritage list.[11]"

Much like this, the apex Court of Nepal in the case of *Surya Prasad Sharma Dhungel* v *Godavari Marble Industries Pvt Ltd*[12] was of the opinion that human life would be in danger in a polluted environment. This way, the Court pronounced that the protection of environment leads to protection of human life. The writ petition was filed before the topmost Court to stop the extraction of marbles from Godavari Hill region by Godavari Marble Industries Pvt Ltd. Expressing satisfaction with the contentions raised, the Court said that the extraction results deforestation, floods or unfavorable situations. In this case, the learned counsel drew the attention of the Supreme Court of Nepal about the similar development happened in India in the case of *Rural Litigation and Entitlement Kendra* v. *State of UP* where the Court for the first time held that right to life includes right to live in a healthy environment with minimum disturbance of ecological balance.

[11] AVAILABLE ON: https://www.elaw.org/system/files/Nepal+Supreme+Court+Decision+re+Brick+Klins.doc
[12] NKP GOLDEN JUBILEE SPECIAL ISSUE (1995)

Similarly, the top Court in the case of *Kedar Bhaktra Shrestha* v *Department of Transport and Ors, His Majesty Government of Nepal*[13] held that the policy prohibiting the new diesel Tempo registration even outside Kathmandu was not bad. The highest Court of appeal was of the view that every person in Nepal is entitled to avail a clean and healthy environment in order to cash the right to life and liberty, a sacrosanct fundamental right.

Much like the Supreme Court of the Himalayan Republic, the highest Court in India in the case of *MC Mehta* v *Union of India*[14] has directed that the entire fleet of public transport buses be run on CNG and not diesel. The Court has put a ban on running diesel buses in Delhi.

Its advisable for the judicial department of Nepal to adopt the similar gesture (and it could persuasively consider the judgment of *MC Mehta*) to put a ban on the running of diesel buses and other public transports in the capital city of Kathmandu, for protecting the rapidly deteriorating quality of air. After all, the air quality in Nepal is the worst in world with the Republic being ranked at the tail among the 180 countries surveyed in terms of air-quality in a global study. A report of Environment Performance Index (EPI) which was released in June, 2018 by Yale University and Columbia University in collaboration with the World Economic Forum says, "With the score of 3.94, Nepal's air quality has been reported worse than other countries in the region like Pakistan (176th), China (177th), India (178th) and Bangladesh (179th). Australia secured the highest ranking for clean air while the United States ranked 10th."[15]

[13] SUPREME COURT BULLETIN YEAR, 10, No. 13, vol. 222 (1997) p.7
[14] AIR 1999 SC 2583

[15]AVAILABLE AT: http://kathmandupost.ekantipur.com/news/2018-01-25/nepals-air-quality-is-worst-in-the-world-epi-report.html , ACCESSED ON MARCH 3, 2017

Moreover, "Nepal's capital city Kathmandu has ranked 5th in Pollution Index 2017 mid-year as published by the Numbeo.com recently... Numbeo said it included relevant data from World Health Organisation and other institutions for the ranking...According to the Department of Environment of Nepal, the particulate matter (PM 2.5) of Ratnapark is 107 µg/m³ marking Kathmandu as one of the unhealthy cities to live in. PM 2.5 indicates the matter present in the air that are 2.5 microns or below. These particles include dust, coal, particles exited from power plants and home heating, car exhaust and pollen plants among others. Kathmandu's downfall was heralded due to the snail paced road expansion projects in the Kathmandu Valley and delay in the underground installation of *Melamchi* Drinking Water pipes in the city."[16]

In this way, the atmosphere of Kathmandu remains a deadly affair for the people of Kathmandu. The environmental damage is causing public nuisance in a broad daylight. Like India, the judicial departments in Nepal can make the polluters or the Kathmandu Municipality or other government agencies concerned as party to a suit for their inaction in combating with this hue and cry. In the case of *Municipal Corporation of Ratlam* v *Birdhi Chand*[17], the apex Court of India held that environmental damage is in the nature of Public Nuisance. The Court observed that the liability would be imposed on the public authorities for their failure to mitigate the nuisance caused by environmental pollution.

In this light, it bears relevance to shade light on the constitutional provisions relating to protection and promotion of environment in Nepal. The Nepali charter explicitly and authoritatively declares that the right to clean environment is a fundamental right. Beginning

[16] AVAILABLE AT: https://thehimalayantimes.com/nepal/nepals-kathmandu-ranks-5th-in-pollution-index-2017/ (ACCESSED ON MARCH 4, 2017)
[17] 1981 SCR (1) 97

with a marginal note of "*Right regarding clean environment*", Article 30 envisages that every citizen would have an inherent right to live in a healthy and clean environment.

In a major breakthrough, the Constitution ensures that the victim of environment pollution 'shall have right to' seek compensation from polluters [Article 30(3)]. In doing so, the Constitution succeeds to acknowledge the celebrated concept of "polluter pays principle."

Interestingly, "the principle of polluter pays means that one who carries on a hazardous activity is a liable to make the good loss caused to another person by such activity."[18] So, the polluter is liable to compensate. The Supreme Court of India observed that the polluter pays principle aims to fix absolute liability on the polluters for the harm caused on environment. The Court in the case of *MC Mehta* v *Union of India*[19] held that the polluters should not only be asked to compensate to the victims of pollution but also be asked to pay the cost of restoring the environment.

So, acknowledging the practices of India (persuasively), the higher Courts in Nepal could penalize the polluters, whosoever it may be, for their act of public nuisance and environmental degradation. The relevant provisions of newly enacted National Penal (Code) Act, 2018 could be invoked for punishing the outliers. To mention a few provisions: Section 111 (Punishment for persons causing water pollution: imprisonment up to three years or fine of NPR 30,000 or both); Section 112 provisions for imprisonment for a term of one to five years against a person found causing pollution; and Section 113 slaps a fine of up to NPR 25,000 for the act causing disturbance to public roads, rivers or other public places.

[18] MP JAIN, INDIAN CONSTITUTIONAL LAW, 1176 (7TH ED., 2016).
[19] AIR 19997 SC 761

More so, the Supreme Court of India in the case of *MC Mehta* v *Union of India*[20] directed the Center 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.

The Court has also directed the government to introduce green curricula from school to university education to fulfill the fundamental duties of every citizen to protect and improve the natural environment.

This way, the decisions of the Court shows that there is a dire need of striking a balance between regularity of development and environmental protection. So, there should be no anti-thesis between development and environmental protection. After all, development and clean environment both are essential requirements for a meaningful survival. The former gives a person means to survive while the latter provides reasons to celebrate with a good health.

Above all this, our Hindu philosophies were a step ahead in spearheading environment friendly messages. For example, *Atharva Veda* says that pure water is an effective medicine to cure and prevent all diseases. It also advocates for the protection of wildlife and domestic cattle. Likewise, '*Yajnas*', the sacrificial fire, used to be performed to purify the environment and also to bring purity and prosperity in every walk of life. Moreover, the Christianity and Islam also preached the importance of water and its magnificent necessity.

[20] AIR 1992 SC 382

3. Conclusion

As Nepal goes fully federal, the instrumentalities of the Centre as well as States should not shy away from investing in protection and promotion of environment citing lack of institutional capacity.

The Central government under Schedule-V, entry 27, State governments under Schedule-VI entry 19, and both governments under Schedule-VII entries 12, 18 & 23 have mandates to act on national ecology and of course, on sanitation, clean and healthy water, wildlife conservation or forestation. Nevertheless, there are ways that they could partner with private citizens as well as NGOs for realizing the goals of environmentalism.

The Republic could take a leaf from UDHR, Stockholm Declaration, or Rio's approach to ensure that citizen's health is secured. The provincial governments could be directed by the Center to prepare and publicly disclose a plan for air and solid waste management and prepare a report annually to demonstrate the progress on that plan. The Central government could formulate a policy that requires that the government would block grants allocated for the Provincial governments if they fail to comply with the plans of Central government aimed at ensuring hygienic environment. Also, the government as well as judiciary could take persuasive lessons from groundbreaking verdicts of the apex Court of India which has played stellar roles for cementing the walls of environmentalism.

After the intervention of the top Court, environmental science has been introduced as a compulsory subject in India from school education to university level (in compliance of the verdict of *MC Mehta v. Union of India*). Nepal also deserves to adopt similar initiatives.

Unfortunately, South Asian nations are yet to adjust a harmonious relationship between mushrooming industries and environment. We don't pay disregard to industrialization. However, the enforcement authorities should come in motion to slam the industries' causing pollution. The 'environment impact assessment' should be categorically done for every industrial establishment.

While celebrating the 45th World Environment Day this year with the theme of "Beat the Air Pollution", its high time for the South Asian states to evaluate whether they have succeeded in observing the international commitments made at different stages. An added responsibility lies on China to plan a better future environment since the communist Republic has been declared as global host by the United Nations for 2017 Environment Day celebration.

It's a crucial time for the world community to reaffirm their fresh commitment towards a cleaner and sustainable planet, without which the themes of World Environment Day would not materialize. Nepal's Constitution expressly and authoritatively confer clean and healthy environment on every citizens. This way, the Supreme Court (under Article 133) and High Courts (under Article 144) are under obligation to ensure judicial remedies on the questions relating to violation of fundamental rights, including right to clean and healthy environment. In this process, Nepal's sovereign judiciary could take persuasive lessons from the green judgments of India.

It's a truism that the mere judicial pills could not be a universal remedy for all environmental ills. The administrative and police accountability, grassroots level governance, public consciousness and civic sense and corporate social responsibility are also required while dealing with environmental challenges. Yet, the role of judiciary is crucial. For an instance, the

former President of Nepal Dr Ram Baran Yadav had launched the 'President Chure Conservation Program' in 2010-2011 to conserve the Madhesh valleys and the river valleys of the range (from environmental degradation). But, the lawmakers in Parliament, local bodies and provinces have shown little interest in protecting the *Chure* range of Madhesh. As a result, the place, which has a history of wide forest cover and rich biodiversity, is in want of national and international interventions for regaining its identity. Similarly, the government has planned of developing an international airport in Nijgadh of Madhesh by destroying forests in which millions of trees will be chopped down. The government's discriminatory policies have added fuel in environmental degradation. So, the judiciary, public, political class, enforcement agencies or bureaucrats ought to lie on the same side of spectrum at a time when the judicial remedy is sought against the authority of omission and commission for their involvement in causing pollution.

*****