

Public Interest Litigation in Mountainous Ecosystem

by Shiva Prasad Paudel¹

Nepal enjoys diverse topography; hence, this paper would take into account the most important public interest litigations which have shaped up Nepal's environment justice. The paper illustrates the efforts made by citizens and their groups in protecting mountainous ecosystem in Nepal through public interest litigation. The paper highlights the conventional jurisdiction under Nepalese Legal System which allows citizens to move to the court in protection of public interest. It further elaborates the development made after the incorporation of a clause in the constitution of 1992 to widely accept public interest suits. The paper also throws some lights on the jurisprudential issues such as principle of standing (*locus standi*) and features of Public Interest Litigation in Nepal. In concluding observation, the paper has highlighted the challenges the public interest litigators facing in Nepal. While summarizing, the paper has critically reviewed how various principles of environment justice are being used in Nepal.

Introduction

Topography

Nepal has a total territory of 147,191 square kilometres. It is divided into three regions. Himalayan range and its watershed area in the north, and Mahabarat range and Churia hills in the middle and Terai (plain) in the south. Himalayan range includes 8 of the 14 highest peaks of the world that has altitude more than 8,000 meter: Mt. Everest (8,848m), Kanchanjunga (8,586 m), Lhotse (8,516m), Cho Oyu (8,201 m) and Dhaulagiri (8,167 m), Mt. Makalu (8,463 m), Manaslu (8,163 m) and Annapurna I (8,091 m). It covers about 16% of the total land area of Nepal with elevation range from 2,500 m to 8,848 m (Everest). The middle hills known as Mahabarat range encompass 65% of the area with altitude range from 500 to 3,000 meters above sea level. The plain area bordering with India known as Terai covers 17% of the land with altitude range from 100 to 300 m. Because of its fertile land, Terai has 48% of the country's population. Nepal has ten national parks which are spread across all three regions.²

Legal System and Recognition of Environmental Rights

Nepal is ruled under Interim Constitution of Federal Republic of Nepal 2007. The Constitution Assembly is drafting the constitution at the moment and also finalizing peace process.

¹ Staff Attorney, Pro Public, Nepal

² <http://www.dnpwc.gov.np> (as of 3.16.2012)

In the section of Fundamental Rights, the Interim Constitution recognizes that every person shall have the right to life in clean environment³. In the section of directive principles, it is stated that the state shall make necessary arrangements to maintain clean environment and give priority to the protection of the environment, and also to the prevention to its further damage due to physical development activities by increasing the awareness of the general public about environmental cleanliness. It is further stated that the state shall also make arrangements for the special protection of the environment, the rare wildlife, the forest, vegetation and biodiversity, its sustainable use and for equitable distribution of the benefit derived from it.⁴

Nepal has also enacted legislation to protect environment, wildlife, forest in line with the constitutional provisions and has promulgated laws to regulate industry, extraction of groundwater, mining activities etc.

The evolution of Public Interest Litigation

Recognition of Public Interest in general law/judicial tradition

The 1987 amendment⁵ in the section 10 of the Court Procedure in National Code 1962 has introduced the statutory recognition of the matter of public interest.⁶ The clause allowed public spirited citizens to bring suits to protect public property. Some lawyers express the doubt that the procedure governed by the National code, however, was not fully effective because a petitioner was required to take a prior permission either of the government or of the court before moving to the court for public interest.⁷ However judges shared the experience of using this clause to protect public interest.⁸

Before the 1987 amendment, in Nepalese legal tradition any public spirited citizens were allowed to bring suits to local police office, administration or directly to the court claiming that any activity is against the public morale, social order and interest of public. After receiving such complaint, Nepalese law enforcement agencies at villages or at districts adjudicate such disputes and try to maintain public interest. Even there was a provision to directly appeal to the King (this is known as Hukum Pramangi) for justice. The king often time refer such appeal to the Supreme Court and which would adjudicate the matter. Besides the regular appeal proceedings, this jurisdiction provided opportunities to the Supreme Court to uphold the public Interest. One of the best example of this is the judicial order made by the court to conserve the 'Bhugol Park' in the mid of Kathmandu.⁹ A retired general appealed to the palace for conserving the park which was being destroyed by the

³ Art. 16.

⁴ Art. 35

⁵ See 9th amendment of the National Code, 1987.

⁶ Section 10 reads: "In relation to the cases which are state cases as per the laws in force, such cases shall be tried by maintaining the Government of Nepal as the petitioner. In relation to the other cases, the Government of Nepal, or any public generally, with the leave of the office, may, being the petitioner, institute a case involving the interest or concern of the Government of Nepal or public interest or concern, in view of the subject-matter or nature of such cases. An application for such leave has to be accompanied by the plaint. If an application for leave is so made, along with the plaint, decision on the application shall be made on the same day. If leave is not granted, an application may be made to the appeal hearing office."

⁷ Dhungel et.al, *Commentary on the Nepalese Constitution*, DeLF lawyers Inc, 1998, p. 140.

⁸ Conversation with Justice Kalyan.

⁹ *Chandra Bahadur Thapa vs. Kathmandu Municipality*, Decision of 1968.5.1(2025.01.14 B.S.)

municipality for constructing their own office. Likewise the court of Chief Justice Hari Prasad Pradhan in 1954 ordered that making a blast in the river for the purpose of fishing is illegal¹⁰, forest land which contains the spring of the water source of the city should not be registered as a private land.¹¹

Recognition of public interest in the constitution

The explicit recognition of the public interest started with the Constitution of Kingdom of Nepal 1990. The same provision continued in the Interim Constitution of Nepal 2007. The extra ordinary jurisdiction of the court allows any citizen to come to the court for the settlement of any constitutional or legal question involved in any dispute of public interest or concern.¹²

Under extra ordinary jurisdiction, the Supreme Court of Nepal has received 25204 cases in last 20 years (from 1990 to 2009). The public interest litigation takes a small size in these cases. The total number of public interest litigation in last 20 years is estimated to be 600. However, the exact numbers of such cases are yet to be known. In last 5 years, there were 190 public interest litigation registered in the Supreme Court.

¹⁰ *Midevlal Upadhya vs. Budhillal Guvaju*, Decision of 1953.8.1 (2010.4.14)

¹¹ *Mukhiya Singhbir vs. Mukhiya Manbir Budha*, Decision of 1953.8.7 (2010.4.20)

¹² The full text of Article 88 is as follows - 88: Jurisdiction of the Supreme Court:

(1) Any Nepali citizen may file a petition in the Supreme Court to have any law or any part thereof declared void on the ground of inconsistency with this Constitution because it imposes an unreasonable restriction on the enjoyment of the fundamental rights conferred by this Constitution or on any other ground, and extraordinary power shall rest with the Supreme Court to declare that law as void either *ab initio* or from the date of its decision if it appears that the law in question is inconsistent with the Constitution.

(2) The Supreme Court shall, for the enforcement of the fundamental rights conferred by this Constitution, for the enforcement of any other legal right for which no other remedy has been provided or for which the remedy even though provided appears to be inadequate or ineffective, or for the settlement of any constitutional or legal question involved in any dispute of public interest or concern, have the extraordinary power to issue necessary and appropriate orders to enforce such rights or to settle the dispute. For these purposes the Supreme Court may, with a view to imparting full justice and providing the appropriate remedy, issue appropriate orders and writs including habeas corpus, mandamus, certiorari, Prohibition and quo warranto: -

Provided that: (a) the Supreme Court shall not be deemed to have power under this clause to interfere with the proceedings and decisions of the Military Court except on the ground of absence of jurisdiction or on the ground that a proceeding has been initiated against, or punishment given to, a non-military person for an act other than an offence relating to the Army, (b) except on the ground of absence of jurisdiction, the Supreme Court shall not interfere under this clause with the proceedings and decisions of Parliament concerning penalties imposed by virtue of its Privileges.

(3) The Supreme Court shall have original and appellate jurisdiction as defined by law.

(4) The Supreme Court may review its own judgment or final orders subject to the conditions and in the circumstances prescribed by law.

(5) If His Majesty wishes to have an opinion of the Supreme Court on any complicated legal question of interpretation of this Constitution or of any other law, the Court shall, upon consideration on the question, report to His Majesty its opinion thereon.

(6) Other powers and procedures of the Supreme Court shall be as prescribed by law.

Features of Public Interest Litigation in Nepal

The meaning of Public Interest and Concern

From time to time the apex court has encountered with the challenge of defining public interest and concern. The stand of the Supreme Court has been unchanged since *Radheshyam Adhikary vs. Secretariat of the Council of Ministers and others*,¹³ which is popularly known as the first ever case of the public interest litigation.

The court defined that a dispute of public interest or concern meant a dispute involving the **rights and concerns of ordinary people or communities**, and is not limited to enforcement of the rights and concerns of a person or persons. Thus the court first distinguished the public interest litigation from class action suits. The court felt, however, that no definite meaning was capable of being ascribed to the word '**concern**'. In common parlances this word has been used in a broad sense but its meaning and nature may vary according to the context in which it is used. People have a concern in anything representing the public in general or a community in particular, or affecting their interests positively or negatively including issues relating to the country, the system of governance, social peace, public education, health and morality, the economic condition of the country, price rises, the directive principles and state policies of the constitution, matters related to social justice and so on. Thus, matters of 'public concern' are not susceptible of any precise definition as there are so many such matters. While interpreting the term 'concern' for the purposes of Article 88 (2), however, it is necessary to define it within the limits of the law and the Constitution so that it can be settled in a judicial forum.¹⁴

In *Mira Kumari Dhungana vs. Ministry of Law and Parliamentary Affairs*¹⁵, the Supreme Court observed that public interest litigation is not of adversary nature. In the public interest litigation there is the commonality of public interest of both the parties- petitioner and respondents. In such case, both the parties have a relationship of cooperation and complementarity rather than rivalry. There remains a responsibility of finding out a common ground of meeting the public interest to which judiciary also supports.

In the area of environment justice, the court has accepted following matter as public interest: the matter related to human health,¹⁶ the matter related to natural resources,¹⁷ the matter related to public property,¹⁸ and the matter of national heritage.¹⁹

Liberalizing Rule on Locus Standi

The rule of locus standi on constitutional remedy is liberal than the remedy available under general law.²⁰ According to the liberal interpretation of the 'public interest or concern' by the court, it seems that a citizen, group of citizens or a legal entity who:

¹³ *Nepal Kanoon Patrika* (Nepal Law Journal), No. 33, Page 810, Year 2048.

¹⁴ *Ibid.*, pp 817-18.

¹⁵ Decision of 1995.8.5 (2052.4.18)

¹⁶ *Prakash Mani Sharma vs. Ministry of Health*, Decision of 1995.8.7 (2052.12.20)

¹⁷ *Balkrishna Neupane vs. Prime Minister Girija Prasad Koirala*, Decision of 1992.12.17 (2049.8.30)

¹⁸ In Ranipokhari (Prakash Mani Sharma)

¹⁹ *Machendralal Kayastha vs. Ministry of Health*, Decision of 2006.6.26 (2057.3.9)

- is concerned with the interest and right of general public or their groups
- has substantial relation (*sarthak sambandha*) or substantial concern (*tatwik sarokar*) with the dispute. In constitutional remedy, the court applies liberal attitude to evaluate the relationship of petitioner to the subject matter of dispute. The court doesn't say that the relationship of the petitioner to the disputed matter to be as strong as in the cases of personal benefit.²¹
- should be able to convince the court that s/he duly represents the interest of general public over the dispute. The court has expressed its assumption that the petitioner has come as a public interest litigant for those groups who cannot easily come to the court because of their own situation as poor, marginalized, children, senior citizens, persons with disability or any other disadvantages.
- has a claim, which clearly links with a right guaranteed under the constitution or law and where government/state authority has not acted in accordance with prevalent law.

The court *In Ajit Kumar*²² has stated that if the concerned government office who should safeguard the public interest is not acting, any citizens who are aggrieved as a public can move to the court. After the promulgation of the constitution in 1992, the situation has not been arisen in the court on the implication of litigant's demise. However before the constitution, *In Chandra Bahadur Thapa*, a judge expressing his dissenting opinion expressed that even if the petitioner has died while the case is *sub judice*, the court would continue the petition as a matter of public interest.²³

So far the court has expressed that following limitations would apply in the public interest litigation- the matter which is brought before the court on hypothetical ground with the assumption that wrongful act would take place in future,²⁴ does have mere personal or group interest over the matter, is using the court for cheap popularity, vested interest, for spreading rumour and for publicity.²⁵

Right to information as an enabling right to PIL

Public Interest Litigation is closely linked with the right to information. Government often tries to hide the information from the citizens in order to act arbitrarily and to their own interest, which often affect public interest. If there is no right to information, there is a less chance of pursuing and succeeding public interest litigation.

The first few years after the promulgation of democratic constitution in Nepal, lawyers moved to the court taking PIL to guarantee right to information. The matters of public interest were related to issues of governance in natural resource management. *In Balkrishna Neupane*²⁶, the issue was raised to share the documents exchanged between the government of Nepal and the government of India regarding construct of the dam on

²⁰ *Surya Prasad Dhungel vs. Godavari Marble* (Division Bench), Decision of 1992.8.25 (2049.5.8.) (Dissenting opinion of Justice Kedar Nath which was supported by the Special Bench in their decision)

²¹ *Ibid.*

²² *Ajit Kumar vs. Krishna Bahadur Shrestha*, Nepal Law Reporter 2044 (1988) No.5, page 554.

²³ *Supra note 8.*

²⁴ *Radhesyam Adhikari vs. Prime Minister Office*, Nepal Law Reporter 1992 (2048), Issues 12, p. 810.

²⁵ *Supra note 19*

²⁶ *Supra note 16*

Mahakali River. The government claim was that the documents are office secret and the government is not obliged to share it with public including lawyers. The court observed that any matter related to natural resource management of the country is entailed to public interest and government is under obligation to share information with public. In *Gopal Siwakoti*²⁷, the court issued eight points procedure to seek and render information related to public interest. In this case, the petitioner, a human rights lawyer demanded the release of adequate information by the hydroelectricity project being developed by the World Bank and the Asian Development Bank. Later both the banks dropped the project.

The Environmental PILs in Nepal

Right to life in pollution free environment

In Godavari Marble case²⁸, the Supreme Court established the link between environment and life and stated that the right to environment as an essential component of right to life. This case recognized a right against polluted environment. In court's opinion, the polluted environment put the life in danger; hence, every citizen has a right to life in an environment without pollution. In this meaning, the matter of ecological conservation is part of constitutional guarantee of right to life.

Use, stockpiling and management of pesticide (DDT)

In *Prakash Mani Sharma vs. Ministry of Agriculture*²⁹, the petitioner filed a PIL in the Supreme Court asking the order of certiorari and mandamus to cancel the Ministry of Health decision to import DDT from Indonesia in support of World Health Organization. Part of the consignment was already delivered and the last part had yet to be delivered. The court did not have to issue the order as government cancelled the import of the D.D.T. before the final decision. The court neither entered into the debate whether D.D.T. was harmful to human health.

10 years later, storage of pesticide including that of D.D.T. and other Persistent Organic Pollutants (POPs) was raised in *Raju Prasad Chapagain vs. Ministry of Agriculture*³⁰. The petitioner demanded the safe disposition and relocation of the pesticide in environment friendly manner. Further the petitioner demanded the compensation to the local people who had suffered the damage as well as to sterilize the surroundings where the pesticides were stockpiled over 35 years. It was found that the pesticides were brought to Nepal as a part of agriculture loan lent by Asian Development Bank.

The court reiterated that polluted environment infringed right to life which is a fundamental right guaranteed by the constitution. By assimilating the concept of environmental justice, the constitution has accepted the right to life in a clean environment as a fundamental right in itself. The court further observed that Nepal having ratified Basel Convention on January 13, 1997 and the Stockholm Convention on October 13, 2006, the Government of Nepal is under an obligation to implement the treaties. The court issued a mandamus in the name of government of Nepal with nine points order. The court asked the government promptly

²⁷ *Gopal Siwakoti vs. Ministry of Finance*, Decision of 1994.5.12 (2051.1.25)

²⁸ *Surya Prasad Dhungel vs. Godavari Marble*, Decision of 1995.10.31 (2052.7.14)

²⁹ Decision of 1996.4.7 (2052.12.20)

³⁰ Decision of 1999.10.21 (2066.7.4)

prepare inventory, classify the pesticides and safely package, repackage and ensure environment-friendly disposal of the toxics. The court provided one year time frame for the disposal of the toxics in cooperation of international non-government organizations in the spirit of the conventions.

Conservation of environment- forest, lakes, heritage site, greenery of city, underground water

*In Devghat Case*³¹, the petitioner a celibate and head of the religious endowment, filed the case against the government's decision to allocate the forest area for a private medical university. The petitioner argued that the leasing out of 4.2 hectare land to construct the facilities for medical college require deforestation and would adversely affect the environment and also affect the religious rights of the Hindu people, who have been using the site as a pilgrimage for centuries.

The court further stated that while deciding about the matter of national interest, the government should keep the national interest in the centre without violating the constitution and laws. In view of the constitutional provisions of protection of environment, endangered animals and forests in the section of state polices and directive principles, the court may call upon the government to take actions if the court finds out that the government is taking action in contrary. The court cannot restrain its power only because such provision is written in the directive principles, which are not justiciable. Considering the valuable correlation between environment and forest, the court nullified the government decision to lease out the forest to the medical college. The court reminded the government its obligation to keep the archaeological, religious and natural sites protected.

*In Underground Water Case*³², the court ordered to appoint a powerful state body which would conduct scientific study of situation of underground water in Kathmandu valley and would recommend necessary arrangement regulate the extraction of the water through deep boring. The court also drew the attention of the government that no excessive water than the recharge capacity should be drawn.

*In Bishazari Lake Case*³³, the court ordered the government of Nepal to take appropriate steps to protect the lake which is listed in world's wet land and where thousands of flora and fauna dwells and provides important contribution to maintain the ecosystem. The court also required to make a comprehensive master plan if any development project has to be carried out in this area.

*In Mayadevi Temple Case*³⁴, the court ordered the government of Nepal to provide information including the reason why the banyan tree has to be cut down and why the idols were to be removed regarding the activities the government is carrying out in developing and conserving Lumbini- Lord Buddha's birthplace. In *Machendra Lal vs. Ministry of*

³¹ *Yogi Narahari Nath vs. Prime Minister*, Decision of 1996.5.4 (2053.1.17)

³² *Prakash Mani Sharma vs. Nepal Government*, Decision of 2009.12.18 (2066.9.1)

³³ *Dhananjaya Vs. Nepal Government*, Decision of 2006.9.8 (2063.5.21)

³⁴ *Kashi Dahal vs. Nepal Government*, Decision of 1996.11.8 (2053.7.21)

*Helath*³⁵, the court ordered the Ministry of Health that any construction of maintenance to the national heritage should not take away its original significance.

*In Ranipokhari Case (two cases)*³⁶, the litigant filed a PIL to stop the construction of police building adjacent to the pond and other structures created by government authorities. The litigant contested that the constructions adversely affected the conservation of Ranipokhari (Pond of the Queen) which was built in the medieval era. The court issued a directive order to the government to make a policy in line with the Convention for the Protection of the World Cultural and Natural Heritage, 1972 to protect the places of religious, cultural and historical significance. The court further required the government to monitor whether the existing urban planning legislation which are enacted to regulate expansion of the city. The court further observed that the court can take into account the obligation imposed on government to conserve environment and ecosystem. In this case, the court however did not give an order to stop the construction of the police office on the bank of Ranipokhari on the ground that the site was possessed by the government over 40 years.

*In Pyuthan Forest Case*³⁷, the court ordered the preservation of the forest to respect and maintain biodiversity and environment protection. The court restricted the authority of forest offices stating that the forest management only should be done in accordance with bio diversity or environment protection plan of action.

*In Ringroad Case*³⁸, the petitioner claimed that the local government did not manage the ring road of Kathmandu city to control environment pollution and to preserve the green belt around the road. The petitioner claimed that activities of local government to lease out the green belt for parking purpose are found contravening to the environment standards. The court did not provide any directives to the government believing on the report and superficial promise given by the government. The interesting aspect of this case is that the local authority decided to cancel their leasing order while the case was *sub judice*. In another case³⁹, the court gave an order to the Municipality and Department of Roads to preserve environment while constructing roads etc.

*In UN Park case (2 cases)*⁴⁰, the litigant claimed that the government's announcement to convert a northern bank of Bagmati River near Kupandole Bridge to UN Park to commemorate 50th anniversary is putting the old heritage of Kathmandu in threat. Likewise, the litigant also claimed that the maternal hospital of the valley and the municipality of Kathmandu is pouring the untreated waste into Bagmati River to make it extremely polluted and unbearable. The litigant even requested the court to issue the order of mandamus to compel the government to take concrete steps to implement Ancient Monument Preservation Act 1956 (Prachin Smarak Samrakshan Ain 2013) and other Acts related to urban planning. The court observed that the government authorities are under obligation to preserve the historical sites in its original form (from Sankhmul to Teku). The court issues seven points Mandamus to the government consisting of a) Municipality is under an

³⁵ *Machendralal Kayastha vs. Ministry of Health*, Decision of 2001.6.26 (2057.3.9)

³⁶ *Prakash Mani Sharma vs. Nepal Government*, Decision of 1997.6.14 (2054 2. 27)

³⁷ *Tikaram Tiwari vs. Government of Nepal*, Decision of 2001.2.19 (2057.11.2)

³⁸ *Bijendra Lal Joshi vs. District Development Committee Kathmandu*, Decision of 1996.6.13 (2055.2.26)

³⁹ *Purna Bhadra Dangole vs. Council of Ministers*, Decision of 2006.7.7 (2063.3.20)

⁴⁰ *Prakash Mani Sharma vs. the Council of Ministers and Prakash Mani Sharma vs. Ministry of Culture* (both the cases, Decision of 1999.6.18(2056.2.31)

obligation to preserve old heritage, environment and cultural sites, b) the duty of maintenance of cultural heritage also lies with local administration, c) The government should install the plant to treat the municipality waste before pouring into the river and to keep the environment clean, and d) In the name of hospital, no adverse impact to be created on river and other public places. In the second case which was more focused towards performance of the duties of Ministry of Culture to preserve national heritages. The court observed that unwillingness or non-performance by the government to preserve national heritage would destroy the national identity. The government should consider the cultural heritages which are symbol of national identity while making any decisions. The court would require the government to take actions to preserve national identities in line with religious and cultural rights of its people together with the duties of government specified in the section of directive principles. The court has stated that the court sees itself taking a duty to direct government. The government issued an order preventing the state from building the road damaging religious, cultural heritage.

In *Chure Range Protection Case*⁴¹, the court observed that exploitation of any natural resources, including extraction of stones and sand from river, should not adversely affect ecology and should only be exploited in ensuring public interest. The court issued an order to constitute monitoring committee in each district to control exploitation of natural resources and also set standards for extracting stones and sands from the rivers.

In *Euro-copter Case*⁴², on the basis of news of landing of a helicopter in the Mount Everest the petitioner asked the court to issue an order in the name of government to preserve the Mount Everest by not allowing any flights to land at the peak and surroundings which adversely affects the mountain. Further the petitioner asked the court to order the government to prosecute such wrongdoer. The court observed that Mt. Everest is the national heritage and attach to the concern of the World. It is the duty of government to conserve Mt. Everest. Besides the need of special situation of emergency operation of flights in such sensitive area there is a need of addressing problems by enacting law, policy and guidelines that contain necessary preventive, precautionary, compensatory measures in regard to prohibit flights and other measures necessary to redress harms or damages of such sensitive area and to people who have been living with the surroundings.

Regulating Pollutant Industries

In *Shree Distillery Case*⁴³, the litigant claimed that the effluents and excrement out of the alcohol factory polluted diameter of 5 kilometres from the factory's location and adversely affected human health and existence of biodiversity including pollution to water of nearby river. The court observed that 'no factories can run to damage the ecosystem and balance of the nature. Every factory has a responsibility to balance between fulfilments of human need vis-à-vis preventing from environmental degradation. Every factory should not view environment from narrower lens and run its business without being sensitive towards environment.'

⁴¹ *Narayan Prasad Devkota vs. Prime Minister's Office*, Decision on 2010.8.8 (2067.4.21)

⁴² *Dharmapath Youth Club vs. Ministry of Civil Aviation*, Decision of 2007.12.20 (2064.9.3)

⁴³ *Rajendra Parajuli vs. Shree Distillery*, Decision of 1998.10.29 (2054.7.12)

When the case was *sub judice*, the factory and local reached to an agreement with an obligation on behalf of the factory to prevent from polluting the river and taking other measures from impacting on people's health. Hence the court did not go into details of the promise made by the industry but simply ordered the local administration office to investigate and monitor the situation and enforce an agreement that was reached between the factory and the local administration to remove pollution.

In *Bhirkuti Paper Mill case*⁴⁴, the petitioner asked the court to examine the water of Narayani River (one of the major tributary of Gandak River) which was polluted by the effluents from the paper mills. The petitioner further asked the court to appoint a committee to carry out an investigation to examine the water and air pollution created by the Mill. The petitioner asked the court to issue the order of Mandamus to the government and to the factory to install water and air purification plant. The court issued a directive order to the government to ensure installation of such equipment to effectively control water and air pollution.

Controlling River Pollution

In *Bagmati River case*,⁴⁵ the litigant raised the issue of right to clean water and right to clean environment as a part of fundamental right to life. The court stated that right to clean environment is not only associated with right to life, it further extends to individual liberty. The court elaborates that a polluted environment would affect people's health and also deprives people from accessing human rights such as education, employment. The court underscored that right to life embraces pollution free air, water including river. Hence the court concluded that environment is closely linked with right to life, public health, individual liberty and social and economic rights. The court issued an order of Mandamus to the government and other legally founded institutions to take every step to control pollution of Bagmati River. The court, however, also specified that it is a duty of general public also to maintain cleanliness and prevent a river from getting polluted. In *Bhojraj Ayer Case*⁴⁶, the court ordered that the government is under an obligation to preserve ecology, to maintain cleanliness of Bagmati River, to provide potable drinking water and to manage the waste of the Kathmandu Valley in environment friendly manner. In similar manner the court also gave an order to control pollution and maintain cleanliness of Bishnumati River.⁴⁷

In *Seti River Case*⁴⁸, it was seen that the Pokhara Municipality was 'provisionally' dumping the city waste to the Seti River. The act of the Municipality was supported by the tourism infrastructure development project, a loan project funded by Asian Development Bank. The litigant argued that such disposal of waste adversely affects the biodiversity of the area – both of water and land, which is prohibited by the Environment Protection Act 2053. After the case was filed, the municipality published 8 points commitment which also stated the prevention of that direct disposal of the waste into the river. The court did not enter into the subject matter of environmental pollution and quashed the petition on the belief that the Municipality would take action immediately.

⁴⁴ *Thaneshwor Acharya vs. Bhirkuti Paper Mills*, Decision of 2001.12.6 (2058.8.19)

⁴⁵ *Bharat Mani Gautam vs. Government of Nepal*, Decision of 1999.7.16 (2056.3.29)

⁴⁶ *Bhojraj Air v. Council of Minister*, Decision of 2009.4.9 (2065.12.22).

⁴⁷ *Bharatmani Gautam and Hutaram Baidhya vs. Council of Minister*, Decision of 2002.6.16 (2058.2.29)

⁴⁸ *Jivan Lamsal vs. Pokhara Sub-metropolitan*, Decision of 2000.3.1(2056.11.13)

In *Arsenic Drinking Water Case*⁴⁹, the petitioner claimed that the government is not fulfilling its duty to provide clean water to its citizens. Government is also not running programs to prevent its population from use of Arsenic water. The petitioner claimed supply of safe drinking water, compensation to those who got affected by arsenic water and also facilities to get health treatment. The court issued a mandamus order to the government to run awareness program as well as to distribute safe drinking water without arsenic contamination but remain indifferent to compensation and treatment issues.

In *Everest Paper Mill case (two cases)*⁵⁰, the court gave an order to the formulation of an expert committee to visit the sites and submit the report. After finding out the pollution was done by the paper mill, the court stated that the paper mill should operate only after the installation of the purification plant which doesn't exceed the tolerance limit specified in the national Gazette. The court gave 10 months' time to the paper mill to install the purification equipment. The court further stated that the Ministry should appoint an expert committee to monitor the emission and inform the court and the litigant about the progress made. The court clearly stated that the Paper Mill should operate only after meeting the parameter of industry specific discharge standard. The court even asked the government of Nepal to appoint Environmental Inspectors and create other infrastructures as required by the Environment Protection Act.

In *Polythene Bag Case*⁵¹, the court asked the government to constitute a committee with the membership of chemical scientists, representatives of municipalities and concerned government ministry as well as the representatives of plastic production association to look at the implication of banning polythene bag and alternative to the use of such product. The court instructed the committee to take an appropriate decision after taking view of general public regarding banning the polythene bag.

Controlling Air Pollution

In *Monitoring the Pollution Case*⁵², the court issued an order in the name of government to issue the air, water and sound pollution standard and take effective measures to monitor the water and air pollution at the major cities and also take preventive measures to control pollution.

In *Vehicle Emission Control Case*⁵³ the court also ordered the government to make a standard for the vehicles that running out of petrol, diesel and LPG In another case, the court also ordered the government to carry out a study to control of pollution in and outside of the Kathmandu Valley. Inside the Kathmandu Valley, the government should take effective measures within two years from the date of order to safeguard people's health from harmful emission that comes out from vehicle plying in Kathmandu Valley.⁵⁴ In

⁴⁹ *Prakash Mani Sharma vs. Prime Minister's Office*, Decision of 2007.3.1(2064.6.15)

⁵⁰ *Prakash Mani Sharma vs. Ministry of Environment and Shatrughan Singh Gupta vs. Everest Paper Mills*, Decision of 2004.7.29 (2061.4.12)

⁵¹ *Santosh Kumar Mahato vs. Nepal Government*, Decision of 2004.3.1(2061.8.4)

⁵² *Bhojraj Ayer vs. Ministry of Environment* Year 2000 (2056) Writ no 4193.

⁵³ *BharatMani Gautam vs. Government of Nepal* 2001.6.6 (2058.2.19)

⁵⁴ *Prakash Mani Sharma vs. Council of Ministers*, Decision of 2003.3.14 (2059.11.27)

another petition of Bhojraj Ayer, the court ordered to create Environmental Pollution Protection Fund out of the tax collected from the petroleum product.⁵⁵

In *Brick Kiln Case*⁵⁶, the court issued an order to make a committee with the representation of litigant to find out the number of Brick Kiln Industries who have installed pollution control technology and who have not and also to monitor the level of emission they are making. The court further observed that the Brick Kiln Industry around school and touristic area should be closed down. The court gave responsibility to the committee to ensure that the polluting Brick Kiln should install the pollution control technology into their production plant.

In *Stone Quarry Case*⁵⁷, the petitioner demanded to cancel the license of a stone quarry contractor who violated environmental standards as well as the quarry adversely affected the water source of irrigation channel. The court did not enter into the issue of environmental degradation, which was obvious from the facts and complaints that local people lodged in the District Development Committee. The court did not issue the order or certiorari against the order of local government to cancel the license of the contractor. The court rather issued an order of mandamus to District Development Committee to speedily decide on the complaint of local people. In court's opinion it was the legal obligation of the local government to decide about licensing.

In *Methane Gas Case*⁵⁸, the petitioner claimed that the government should make a law to regulate the emission of Methane Gas out of landfill sites where the waste of Kathmandu Municipality is dumped. The court ordered the Ministry of Environment to adopt appropriate steps to control emission of Methane Gas and also to make law to control emission of Methane to balance the ecology.

Public Interest Litigation Strategies

Before the constitution was drafted in 1992, the strategy of public interest lawyers, majority of whom were educated and influenced from the jurisprudence of Indian born social action litigation, concentrated in pursuing the constitutional drafting committee to accept 'public interest litigation' as a part of ensuring access to justice. The same advocacy continued even in 2006 when the interim constitution was being drafted. The environment activists pursued the drafting committee that accepting 'clean environment' as a part of fundamental right is a step forward in ensuring environment justice. The same efforts were carried out when the current constituent assembly was taking views, opinion and expert submission from the concerned group. Environment Organization- both national and international- supported initiative to educate CA members on environment justice issues.

Within the narrow framework of litigation, lawyers seem to be taking following strategies, however, they are not written in order.

⁵⁵ *Bhojraj Air vs. Ministry of Environment*, Decision of 2004.8.18(2061.5.1)

⁵⁶ *Prakash Mani Shrama vs. Ministry of Industry*, Decision of 2005.12.11 (2062.8.24)

⁵⁷ *Harihar Karki v. Ministry of Environment*, Decision of 2008.1.4 (2064.9.17)

⁵⁸ *BharatMani Gautam vs. Ministry of Environment*, Decision of 2002.5.24 (2059.2.7)

- Generally the judicial education on environment matters have been very productive to inform the judges about the effect of polluters' activity and environment degradation
- Before filing the case
 - Educating local people on adversary effect of polluter's action together with complainant.
 - Collecting scientific researches and evidences of violation of people's as well as environment rights.
 - Corresponding and gather support of likeminded organizations and individuals.
- After registering the case
 - Asking the court to commission an investigation or study
 - Asking for visits of bench to the field
 - Whenever possible to show the court evidence collected from field, including visual
 - Bringing International Legal Framework and the judgments from international courts to judicial knowledge
 - Also bringing testimony from the local people

Creating alliances between organizations is a great strategy to move to the court, however at times, due to competition between civil society organizations prevent lawyers from acting smartly.

On-going Struggles and Challenges

Weak response from executive

In common law tradition, judiciary issues the order and communicates to the executive branch. Such orders have to be implemented by the executive with the full sincerity. This tradition is supported by the doctrine of separation of powers. Unfortunately most of the public interest judgments are not implemented fully. This is not the case of environment justice but applies equally to other human rights violations.

A research carried out by the National Judicial Academy regarding the implementation status of the directive orders of the Supreme Court reveals many important aspects⁵⁹. The study has taken 67 directive orders of the Supreme Court into consideration and has analysed their implementation status. The cases were randomly selected from the record section of the Supreme Court. The research underlines that the Supreme Court doesn't have a comprehensive record of the public interest litigation as well as directive orders given to public offices.⁶⁰ The research reveals that only 13 orders have been fully implemented by the concerned authorities; 6 orders are partially implemented; 22 orders are in process of implementation and 11 orders are not implemented.⁶¹ The implementation statuses of 15 orders were not known. Hence only 20 percent of directive orders found to be fully implemented and the other 10 percent are partially implemented. When inquired, it is

⁵⁹ Shyam Kumar Bhattarai and Umesh Koirala, *The Implementation Status of the Directive Orders issued by the Supreme Court*, National Judicial Academy, 2006.

⁶⁰ *Ibid.*, p. 123.

⁶¹ *Ibid.*, p. 124.

standard answer from the government authorities that they are in the process of implementation of the judgments but it is not realistically reliable.

Another research carried out by the National Judicial Academy has looked at the implementation status of judicial orders of lower tiers of court⁶². The research has concluded that more than 60 percent of the judicial decisions are not implemented for long periods of time. In the cases of decisions related to penalty or fine, it was found out that on average only 12 percent were implemented; whereas in the cases of judicial imprisonment, on average only 13 percent was implemented.

The consistency in judicial vision

The judicial vision over last 20 years is also not consistent. In Godavari Marble case which established jurisprudence of right to life in a healthy and clean environment is still pending in the court. After the Godavari first, the plaintiff filed a case against the government renewed the Godavari Marble Industry which continuously damaging the environment and ecology. It has dried up the water of the area, increase land slide and the factory area from the satellite looks like a desert amid trees. The court initially took interest and established right to an environment and ecology but later shifting its stand, seems unwilling to intervene in the license renewing process issuing stringent environment protection guideline.

Similarly in Bagmati River case, with the pro-activeness of judges 13 years before, the initiation of cleaning of Bagmati River started but now another judge did not take any decision on contempt petition and sympathize with the government on its delayed response on executing the plan of action.

In propounding principles, the court seems to take a much proactive steps. For example, as early as 1992 in the case of Godavari Marble, the court stated that right to environment is part of right to life, the court has also stated in Devghat case that the state should function according to public trust doctrine and also made provisions of directive principles justiciable. However the court refused to accept polluter's pay principle for long until Shree Distillery. Even if it is accepted then, the cases later that such as Everest paper mills and even Arsenic water case the court remain indifferent in deciding about the compensation and health treatment issues. In similar manner, the court assumed the duty of environment safe-guarder in Bagmati River case but did not take such duty in Stone Quarry case.

The classical reasons: resources, capacity etc.

To some extent, it is true that the government doesn't have adequate resources to allocate for implement the decision which has larger financial implication, such as managing municipality waste and cleaning rivers. However this claim seem inconsistent when we look at enforcement of those judgments which don't require much finances, such as making laws, or drafting standards etc. Among orders, many are relevant to change the law or

⁶² Dr. Ananda Mohan Bhattarai et. al, *Problems related to Implementation of Judgments and Measures of Resolving Them*, National Judicial Academy, 2009 (in Nepali). This research reveals many facts regarding the implementation status of all kinds of judicial decisions in all tiers of the court. The research was based on the responses of 365 respondents from legal/judicial community and parties to the conflict and depended on the comparative analysis of three years of court records.

enacting new laws which would require greater social responsibility on behalf of Industries but government is taking decades to draft such standards.

Further in relation to the need of greater financial resources to develop basic infrastructure to build environment standards, the government can work with multinational or bilateral agencies from which the government seem taking loans from before.

internal challenges

On positive sides, there is an increment in number of public interest lawyers and civil society organizations who are pursuing public interest goals. However it doesn't limit the financial and technical constraints of public interest organization to retain staffs and sustain their offices. In absence of financial and technical ability, it is also not being feasible to carry out scientific studies.

On the other hand, public interest lawyers and organizations have to challenge the social attitude, which is negative, towards non-government organisation. Though not sponsored by any organization, often time media and even judiciary is captured by the mind-set of propaganda played by other parties.

Conclusion

The Supreme Court of Nepal has brought many significant changes in the area of Environment Justice since it started hearing the cases related to the 'public interest and concern' under the extra ordinary jurisdiction since 1990. The public interest judgments of the Supreme Court of Nepal preceded the enactment of several environment protection related legislation. Its contribution to environment justice can be summarized as:

- Recognizing matter of environment and ecology as a matter of public interest and thence granting *locus standi* to any citizens and their group.
- Recognizing right to clean environment as a part of right to life. Further, recognizing clean environment is an enabling right to fully enjoy 'individual liberty' and other social and economic rights.
- Extending the provisions written in the section of directive principles as a part of fundamental rights.
- Taking into account international legal framework on environment justice into national jurisdiction and even asking the government to make laws in line with the international convention.
- Recognizing the court's own duty to safeguard environment and ecology from further degradation and reiterating government's duty to preserve ecology.
- Recognizing polluter's pay principle and imposing duty on industry to pay for the environment damage and health facilities.
- Applying the principle of sustainable development by quoting that 'excessive use' of natural resources has adverse impact and also expressing that the rechargeable capacity of water bodies should be taken into account.
- Recognizing the Public Trust doctrine, the court has expressed that the government's activities should not deviate from this theory.
- The contribution of the Supreme Court in founding the environment justice cannot be undermined by its criticism of being inconsistency in maintaining its stand

expressed earlier in the judgments. However from the litigant perspective, it has been a great challenge to wage a legal war for over 20 years in Godavari Case, over 15 years in Bagmati River case. Having known that Public Interest Lawyers don't make personal gain out of the case, it is yet to convince the new judges that 'lawyers are friend of the courts'. It seems that Judges often carry the suspicious doubts that have sponsored the environment lawyers, unknowingly being victim of the media propaganda of polluters.