

COUNTRY REPORT: NEPAL

Development of Environmental Law in 2015

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Introduction

Nepal faced some serious environmental challenges in 2015 arising out of the devastating earthquake of 25 April 2015 and the blockade by the United Democratic Madheshi Front (UDMF) in the Tarai-Madhesh area (motivated by objections to provisions of the new Constitution). It is impossible to estimate the environmental impacts of these events, with rehabilitation likely to take years.

Notwithstanding the challenges, 2015 has been a historical year for the environment in Nepal. The promulgation of a new Constitution with strong environmental safeguards fills Nepal's people with excitement and hope. Different political parties joined together to pass the Constitution by a majority of more than 85%. Other developments include law and policy refinements and noteworthy pronouncements by the Nepal Supreme Court. The following paragraphs provide an overview these developments.

Constitutional Safeguards

The Constitution of Nepal 2015¹ has extensive environmental safeguards. The safeguards are broad in scope, as 'environment' is defined by the *Environment Protection Act 1997* s 2(a) to include 'the interaction and interrelationship among the components of natural, cultural and social systems, economic and human activities and their components'. This is the only definition of 'environment' in Nepalese law, and the courts have interpreted its meaning in different contexts.

The 2015 Constitution is more comprehensive in incorporating environmental provisions than the prior two Constitutions.² Article 16(1) guarantees every person the right

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¹ The Constitution of Nepal, 2015 declared the country as secular, democratic, federal, and republic country based on parliamentary, multi-party and plural system.

² The Interim Constitution of 2007 had a provision of 'right to live in clean environment' for every person in Article 16(1) and right to live in dignity and personal liberty in sub-article 1 and 2 of Article 12 respectively and State Policies on environmental in Article 35(5). The Constitution of the Kingdom of

to live with dignity. Article 17(1) embodies the ‘right to freedom’, with the wording that ‘no person shall be deprived of his or her personal liberty except in accordance with law’. These provisions are not new, and the Supreme Court has previously applied them to environmental rights in the absence of an explicit legal right to a clean environment.³

However, Article 30 of the 2015 Constitution now provides an explicit legal right to a clean environment:

Article 30: Right to Clean Environment

Every citizen shall have the right to live in a clean and healthy environment.

The victim shall have the right to obtain compensation, in accordance with law, for every injury caused from environmental pollution or degradation.

This provision shall not be deemed to prevent the making of necessary legal provision for the proper balance between the environment and development in development works of the nation.

This Article adds the word ‘healthy’ to the right to a clean environment, and also the right to get compensation for loss of this right. This is one step ahead of prior constitutional safeguards. What we must be aware of now is the potential for the spirit of this right to be sacrificed in the name of balancing the environment and development.

Article 51(g) addresses environmental policy:

Article 51: Policies of the State

The State shall pursue the following policies...

(g) Policies relating to protection, promotion and use of natural resources:

To protect, promote and make environmental friendly and sustainable use of natural resources available in the country, in consonance with national interest and adopting the

Nepal 1990 had a provision of personal liberty in Article 12 and State Policies on environment in Article 26(4).

³ The ‘right to life’ and or ‘personal liberty’ were interpreted by Supreme Court in number of cases as also covering the right to live in clean environment. See Surya Prasad Sharma Dhungel on behalf of LEADERS Inc. vs. Godavari Marble Pvt. Ltd., NKP Golden Jubilee Special Birth Anniversary Special Issue, 1995(2052 B.S) at 169, 132-150; Advocate Prakash Mani Sharma and others vs. Council of Ministers and others, SC Bulletin vol. 262 at 10-12 and Bhoj Raj Aiyer vs. Ministry of Population and Environment, SC Bulletin vol. 235 at 10-12.

concept of intergenerational equity, and make equitable distribution of fruits, according priority and preferential right of the local communities.

To make multi-purpose development of water resources, while according priority to domestic investment based on public participation.

To ensure reliable supply of energy in an affordable and easy manner, and make proper use of energy, for the fulfilment of the basic needs of citizens, by generating and developing renewable energy.

To develop sustainable and reliable irrigation by making control of water induced disasters, and river management.

To conserve, promote and make sustainable use of, forests, wildlife, birds, vegetation and bio-diversity, by mitigating possible risks of environment from industrial and physical development while raising awareness of general public about environment cleanliness.

To maintain the forest area in necessary land for ecological balance.

To adopt appropriate measures to abolish or mitigate existing or possible adverse environmental impacts on the nature, environment and biological diversity.

To pursue the principles of environmentally sustainable development such as the principles of polluter pays, of precaution in environmental protection and of prior informed consent.

To make adverse warning, preparedness, rescue, relief and rehabilitation in order to mitigate risks from natural disasters.

Another new Constitutional development is the distribution of environmental and natural resource power amongst Federal, State and Local level governments, separately and concurrently, with residual powers remaining with the Federation (Articles 57, 59). Schedules 5-9 provide a detailed list of environmental powers:

Schedule 5: List of Federal Power

7. *International Treaties and agreements; international boundary rivers*
11. *Policies relating to conservation and multiple uses of water resources*
12. *Inland and inter-state electricity transmission lines*
14. *Central level large electricity, irrigation and other projects*
18. *Quarantine*
23. *Atomic energy, air space and astronomy*
26. *Mines excavation*
27. *National and international environment management, national parks, wildlife reserves and wetlands, national forest policies, carbon service*
29. *Land use policies, human settlement, environment adaptation*
34. *Sites of archaeological importance and ancient monuments*
35. *Any matter not documented in the lists of federal powers; state powers; local level powers; or in the concurrent list and any matter not specified in this constitution and in the federal laws*

Schedule 6: List of State Powers

S.N Matters

- 7. *State level electricity, irrigation and water supply services, navigation*
- 17. *Exploration and management of mines*
- 18. *Protection and use of languages, scripts, cultures, fine arts, and religions*
- 19. *Use of forests and waters and management of environment within the state*
- 20. *Agriculture and livestock development, factories, industrialization, trade, business, transportation*
- 21. *Management of trusts (Guthi)*

Schedule 7: List of Concurrent Powers of Federation and State

S.N Matters

- 2. *Supply, distribution, quality and monitoring of essential goods and services*
- 9. *Drugs and pesticides*
- 13. *State boundary, rivers, waterways, environment protection, biological diversity*
- 15. *Industries and mines and physical infrastructure*
- 18. *Water supply and sanitation*
- 23. *Utilization of forests, mountains, forest conservation areas, and water stretching in inter-state form*
- 24. *Land policies and laws relating thereto*

Schedule 8: List of Local level power

S.N Matters

- 9. *Basic health and sanitation*
- 10. *Environment protection and biodiversity*
- 11. *Irrigation*
- 15. *Agriculture and animal husbandry; agro- products management; and animal health*
- 19. *Water supply; small hydropower projects; alternative energy*
- 20. *Disaster management*
- 21. *Protection of Watershed, wildlife, mines and minerals.*
- 22. *Protection and development of languages, cultures and fine arts*

Schedule 9: List of Concurrent Powers of Federation, States and Local Level

S.N Matters

- 4. *Agriculture*
- 5. *Electricity, water supply, irrigation*
- 7. *Forests, wildlife, birds, water uses, environment, ecology and biodiversity*
- 8. *Rivers and minerals*
- 9. *Disaster management*

12. Archaeology, ancient monuments and museums

The above Constitutional provisions dealing with different aspects of the environment show that the latest version not only guarantees the right to a clean and healthy environment, but also vests powers in the three levels of government. This tripartite system has yet to work effectively, but the requirement that all Nepalese governments protect the environment is now a Constitutional obligation.

Constitution Amendment Bill 2015

To accommodate the concerns of agitators in the Tarai-Madhesh region, the Legislature tabled the first amendment to the new Constitution in December 2015. The Bill is backed by three major political parties, namely the Nepali Congress (NC), Communist Party of Nepal United Marxist Leninist (CPN-UML) and the United Communist Party of Nepal (UCPN (Maoist)).

The Bill seeks to ensure proportional inclusion on elected government bodies, and makes population the major basis for delineating election constituencies. UDMF leaders have been demanding that the language of the Bill be more specific, and that the article on federal unit boundaries ensures at least two provinces in the Tarai-Madhesh. The neighbouring country, India, at first suggested the government take note of the concerns of the Tarai-Madheshbut. Now, with this new Bill, India is saying that the two outstanding issues of constituency delimitation and proportional representation have been addressed.⁴ The Prime Ministers of Nepal and India had a telephone conversation on 31 December 2015. This is a positive indication that there will be a negotiated settlement with the UDMF, and that the Bill will succeed to amend the Constitution. If the Bill is agreed to, environmental protection will be improved along with the effective functioning of the 2015 Constitution.

Legal and Policy Framework

There have been some legislative, policy and institutional developments in 2015 that should lead to better environmental protections and noticeable environmental improvements.

Legal Framework

The latest law having a bearing on the environment is the *Reconstruction of Earthquake Affected Structures Act 2015*. The law was unanimously passed by Parliament on 16 December 2015, 235 days after the devastating earthquake. It was authenticated by the President on 20 December 2015.

⁴The Himalayan Times, 21 December 2015 at 3.

Prior to its passing, the law had been stuck in Parliament for more than two months, mainly due to a dispute between the NC and CPN-UML. The dispute concerned whether to retain Govinda Raj Pokharel as CEO of the all-powerful National Planning Commission. The previous NC government had appointed Raj Pokharel notwithstanding reservations from CPN-UML.⁵ Now the NC is an opposition party, with CPN-UML heading the coalition government with support from the United CPN-Maoist and others. The dispute concluded on the 25 December 2015 when the new coalition party appointed Sushil Gyawali, an experienced civil engineer, as CEO of the newly formed National Reconstruction Authority. This Authority is responsible for post-earthquake infrastructure.⁶ The appointment of an experienced engineer to this position should facilitate better progress in rebuilding efforts and help protect the environment.

Another law in 2015 was the *Amendment of 3 November 2015 to the United Nations Park Formation Order 1995*. The Amendment added sub-section 11 (*jha ek*) to Section 5. The sub-section provides for the development of the United Nations Park as a model environmentally-friendly park. Further, section 5 sub-section k (*Ta*) was substituted with the requirement that park officials work in cooperation with other relevant authorities to achieve this goal. This means, for example, that park officials must obtain bulldozers and other equipment for park and road construction from the Ministry of Urban Development, and the materials necessary for embankment and river control from the Ministry of Irrigation.⁷

Policy Framework

During 2015, Nepal introduced and implemented some important policy frameworks, plans, programs, guidelines and strategies.

The most recent policy framework is the 'Nature Conservation National Strategic Framework for Sustainable Development (2015-2030)',⁸ released on 17 December 2015.⁹ The Framework replaced the 'National Conservation Strategy of Nepal 1988'. The release of the Framework coincides with the replacement of the United Nations Sustainable Development Goals with the Millennium Development Goals (2000-2015). The Framework is not a strategy in itself, but an umbrella instrument that emphasizes the conservation of nature, sustainable use of natural resources and equitable distribution of their benefits. It will be in effect until 2030.

⁵Ibid at 2.

⁶Ibid, 26 December 2015.

⁷ Nepal Gazette number 26, vol. 25 November 2015.

⁸ Government of Nepal, National Planning Commission, July 2015.

⁹Supranote 4, 18 December 2015.

The Framework asserts the following five strategic pillars: Mainstreaming nature sensitivity in development efforts; harmonization between sectoral strategies; coordination between agencies concerned; valuing and accounting ecosystem goods and services; and accountability in results of conservation. The goal is to help achieve sustainable development by integrating nature conservation into all development efforts.

Another relevant measure of 2015 was the implementation of the Government's three-year plan (the 'Thirteenth Plan 2014-2017').¹⁰ The goal of the Plan is to lift Nepal's status from a least-developed country (LDC) to a developing country by 2022. Achievement is to be measured against at least two of three United Nations indicators, namely, Gross National Income, human assets and economic vulnerability. The Plan is an important instrument in the implementation of environmental policy because it recognizes a link between living standards and nature conservation.¹¹ For instance, the Plan aims to: reduce the number of people living below the poverty line to 18 percent; increase tiger populations from 155 in 2010 to over 300 in 2022; increase populations of rhinoceros (635) and wild buffalo (259) by 50 percent by 2025; and maintain forest cover at 40% of total landmass.

Implementation of the Plan has created some division in the nature conservation sector, especially concerning the following matters: integration of environment and conservation into development programmers; participatory approaches in community forestry; limited access of the poor and Indigenous peoples to conservation areas; and promotion of natural resources, such as water, land, forest and minerals etc.

Another notable development in 2015 was the Government declaration that 2015-2024 be the 'Forest Decade for Conservation'. In line with this declaration, the Government formulated and endorsed the 'Forest Policy'. While preparing the Policy, the Government also revised the 'Forest for Prosperity' concept, declared in 2012, and existing policies and programs, such as the 'Revised Forestry Master Plan 1989', 'Leasehold Forest Policy 2001', 'National Wetland Policy 2012', 'National Biodiversity Strategy and Implementation Planning 2014-2020', 'Medicinal and Non-Timber Forest Product Development Policy 2003', 'Procedure for Using the Forest Land for Other Purposes 2005', 'Climate Change Policy 2011', 'Three Years Periodic Plan 2014-2017'.

Point 10 of the Forest Policy explicitly requires sustainable forest management, and the implementation of mitigation and adaptation measures to protect Nepalese forests from the adverse effects of climate change. For sustainable forest management, the Forest Policy contains a strategy to promote public participation and the maintenance of 40% of the

¹⁰Above (n 8) at 8.

¹¹Ibid at 9.

country's land as forest area. These goals are to be achieved through the development and expansion of community-based forest management. To mitigate the adverse effects of climate change, the Policy envisioned a strategy to strengthen the capacity of local communities to mitigate, adapt and withstand the adverse effects of climate change. These goals are to be achieved through the expansion of carbon sequestration areas.¹²

Another important development in 2015 was the introduction of the 'Health Care Waste Management Guidelines'.¹³ The Guidelines aim to ensure that there are no adverse health and environmental consequences from the handling, storage, treatment and development of waste generated and discharged from hospitals, clinics, pharmacies, dispensaries, blood banks, pathologies, laboratories, veterinary clinics and health research centers. The Guidelines set minimum standards for the safe and efficient management of such waste in order to reduce exposure to employees, patients, and attendants. It is expected that these measures will lead to the greater segregation of health care waste (currently at 38.7%) and the end of dumping untreated waste at the Okharpauwa dumping site.

Since the earthquake, the Government of Nepal has made some policy shifts regarding the construction of houses. These led to the introduction of some new construction measures. For example, on 9 October 2015, the Cabinet approved the grant of up to 200,000 rupees (approximately \$USD1850) to the owners of around 490,000 private houses destroyed by the quake. The CEO of the National Reconstruction Authority can provide additional economic relief to victims on the basis of data provided by the Central Bureau of Statistics.¹⁴ The government is also distributing 10000 rupees to all earthquake victims, with the target to complete the work of distributing relief by the beginning of January 2016.

A seven member Steering Committee, led by the CEO of the National Reconstruction Authority, was assigned responsibility to oversee works related to the reconstruction of private residential houses.¹⁵ On 18 December 2015, the Department of Urban Development and Building Construction published a design catalogue for the reconstruction of earthquake resilient houses. The catalogue provides households with clear guidance on earthquake resilient construction techniques and helps them design their houses in compliance with the National Building Code.¹⁶ This should help ensure the building of houses that are safe,

¹² Government of Nepal, Forest Policy, 2015.

¹³ Above (n. 4), 22 November 2015.

¹⁴ Ibid.

¹⁵ Ibid, 26 November 2015.

¹⁶ Ibid, 18 December 2015.

adequate and affordable. It is not mandatory to select a design from the catalogue, but designs must comply with the National Building Code.

In 2015, the Department of Urban Development and Building Construction also introduced the 'Guidelines for Approval for Operation of Earthquake Affected Buildings 2015'.¹⁷ The Guidelines are applicable to construction, repair/maintenance, recovering and retrofitting of government buildings, apartments, private and government hospitals, nursing homes, schools, departmental stores, shopping malls, cinema halls, theatres and hotels. The owners of these premises must obtain a safe operation license from the District Office of the Department of Urban Development and Building Construction to be eligible for a loan from a bank or other financial institutions. The Guidelines state that applications for licenses will be examined and verified by a 3-member team, headed by a divisional engineer. Inspections will involve on-site visits and the examination of quality assurance documents.

Another recent policy of the Government concerns energy. The 'Energy Policy' promotes alternative sources of energy and the improvement of crippling power shortages. Any new residential house built on more than 232.2 square meters of land, and other buildings built on more than 317.9 square meters of land, must install a solar panel with a capacity of 1500 watts if the land receives at least five hours of sunlight a day. If energy consumption is more than 1500 watts, at least 25 percent of the total energy needs must be met through solar power.¹⁸

On 17 December 2015, the Parliamentary Environment Protection Committee issued a Directive to the Government concerning alternative energy technologies. To the Ministry of Population and Environment, the Committee directed an increase in subsidies for rooftop solar panels in urban areas. The Committee directed the Ministry of Federal Affairs and Local Development to find a common stance on the promotion of green and eco-friendly technology.¹⁹ The Committee directed the Government to encourage, use and make operation of eco-friendly vehicles by revising the *Motor Vehicle and Transport Management Act 1993* section 39(2). The current provision bars modification of vehicles into eco-friendly. The Committee directed the Government to similarly amend the 'Environment Friendly Vehicle and Transport Policy 2014'. The Committee directed the Council of Ministers to carry out a detailed study on the operation of trolley bus, tram, monorail, cable car, ropeway and railway. Additionally, the Committee urged the National Planning Commission to prioritize construction of ropeway, cable car, trolley buses, monorail and railway.

¹⁷Ibid, 28 December 2015.

¹⁸Ibid, 23 December 2015.

¹⁹Ibid, 16 December 2015.

On 31 December 2015, Nepal Telecom (NT) and the Ministry of Agricultural Development signed a pact to provide agro-climatic information to farmers. Under this pact, NT will develop a mobile application called 'Our Agriculture' ('HamroKrishi'). The application will provide information easily to users of Android phones and bring into service a toll free number to relay information. It will also provide farmers with notices and agriculture information via text messaging.²⁰

Institutional Setup

On 24 December 2015, the Cabinet split two ministries into three. The Ministries of Health and Population; and the Ministry of Science, Technology and Environment were split into the Ministry of Health, Ministry of Population and Environment, and Ministry of Science and Technology.²¹ Institutionally, the Ministry of Population and Environment now has overall responsibility for the environment. The other ministries handle environmental issues within their mandate.

The other key institution created after the devastating earthquake was the National Reconstruction Authority (NRA). The Authority is responsible for rehabilitation and reconstruction in environmentally-friendly ways, and for distributing relief amounts.

Judicial Pronouncements²²

Judgments of the Nepal Supreme Court in 2015 emphasized that environmental conservation, preservation and protection is not optional; it is obligatory. Public interest litigation in environmental matters was well supported by judicial statesmanship in 2015, as before.

One important judgment was *Padam Bahadur Shrestha on his own and as President representing Environmental Development and Conservation Legal Forum v. Kathmandu Metropolitan and Others*.²³ In this case, the petitioner sought a Supreme Court Order to make the Kathmandu Metropolitan City remove visual pollutants. The petitioner claimed that illegal hoarding boards have marred the city's beauty and posters and pamphlets put up in public places constitute waste under the *Solid Waste Management Act 2011*. The Supreme Court firstly issued an interim order to the City to maintain a clean environment in the City. The final order of 2 September 2015 directed the City to maintain the civilized appearance of

²⁰ Ibid, 1 Jan, 2016.

²¹ Ibid, 25 December 2015.

²² The full texts of the judgments covered under this heading have not yet published.

²³ Judgment delivered on 2 September 2015 by Right Honorable Chief Justice Kalyan Shrestha and Honorable Justice Om Prakash Mishra, see Gorkhapatra of 3 September 2015.

the metropolis and remove visual pollutants caused by different forms of hoarding boards in core areas of the capital.

Another important judgment was delivered on 16 April 2015 in *Prakash Mani Sharma on his own and representing Pro-Public and others v. Ministry of Population and Environment and Others*. The petitioner sought orders to protect the environment in Godavari being destroyed and polluted by Godavari Marble Industries and to close the business down. The court in the first instance comprised two judges that gave different orders. The Honorable Justice Sharada Shrestha issued an order to close the business because of their failure to protect the environment. The Honorable Justice Tahir Ali Ansari dismissed the claim, saying that the business is prepared to protect the environment through future plans and environmental management systems. The different judgments meant the case was automatically referred to a full bench. In the meantime, the government extended the operating license of Godavari Marble for another 10 years. The full bench of the Supreme Court delivered an important judgment on 16 April 2015: the Court directed the Government to shut down Godavari Marble Industries.²⁴ The court annulled the operating license and ordered the Government not to lease the marble quarry in the future.²⁵

Conclusion

This country report shows that during 2015, environment protection in Nepal has remained a priority. A range of measures have been developed for the protection, conservation and preservation of environment. Further, the right to a clean and healthy environment has been assured by the new Constitution, other laws and decisions of the Supreme Court. This makes the environment constitutionally, legally and judicially protected. What Nepal needs to do now is implement these protections properly and effectively.

²⁴The Kathmandu Post, 17 April 2015.

²⁵Republica, 17 April 2015.