



# **Environmental protection regime under Nepal's constitutional renaissance: A revisit to the salient features of the Environment Protection Act, 2019**

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## **Abstract**

Authors, in this article, delve to study the legal provisions relating to right to clean and green environment guaranteed to citizens. The Environment Protection Act, 2019, which is enacted to enforce right to clean environment, embodies environmental principles such as sustainable development, Environment Impact Assessment (EIA), or Polluter Pays Principle (PPP) to foster purposive and progressive environmentalism. These green laws mandate that there should be developments but that development should be in closest possible harmony with environment, otherwise, there would be development at the cost of environment which would ultimately result in total devastation. In this light, the author discusses the compliance mechanisms, rights of the Centre and Provinces and among other legal mandates (embodied under the Act, 2019) provisioned to control and abate the acts and omissions that tend to degrade the quality of environment.

**Keywords:** Environment, Law, Constitution, Environmental law, green democracy

## 1. Introduction

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

- Leo Tolstoy

As environment protection constitutes an integral part of development process and it cannot be considered in isolation, there appears a close relationship between a healthy environment and economic condition of the community members. Hence, the protection of environment is a global issue and it is not the private problem of a country. In order to protect Nepal’s ecological interest, the Himalayan Republic adopted and enacted the Environment Protection Act, 2019 to enforce the fundamental right of citizens to have a clean and healthy environment. This green law puts the duty on the state as well as citizens to protect and improve the natural environment.

The Act hosts plethora of welcome provisions to upkeep the concept of environmentalism. As per the Act, a victim of environmental pollution is entitled to file an application at the concerned authority demanding compensation from the person or organized involved in causing the pollution. This goes in line with polluter pays principle, as provisioned under Article 30(2) of the Constitution of Nepal. According to this Act, the term ‘pollution’ includes degradation caused to the quality of natural environment by waste, chemical heat, sound, electronic magenta or radiations. Moreover, the term ‘harmful substances’ is defined as per Basel Convention of 1989 which also takes account of harmful wastes which incidentally gets transported from one national boundary to another.<sup>1</sup>

Interestingly, the Act, 2019 prohibits carrying out of any developmental work in non-compliance of Environment Study Report, Environmental Management Plan, Environment Assessment Report and Supplementary Environment Impact Assessment. However, the 1997 environment law had only provision for Initial Environment Examination and Environment Impact Assessment (EIA). This way, the present Act goes beyond these parameters and places more restrictions so as to strike a balance between development and environment.

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<sup>1</sup> Nepal Live Today. 2021. Think about implementing green laws as we celebrate the World Environment Day - Nepal Live Today. [online] Available at: <https://www.nepallivetoday.com/2021/06/04/think-about-implementing-green-laws-as-we-celebrate-the-world-environment-day/>

Moreover, the power to declare any place with natural heritage, rare wildlife and plants as protected area is bestowed on the government. Likewise, the government has been given the power to name any area as green zone. In the same manner, the government holds the power to restrict the movement of people to an area declared as a polluted area where harmful materials or wastes are stored or disposed of. The Act, 2019 also allows the government to take part in carbon trading in line with international treaties and agreements with foreign governments or organizations.

The current environment protection law of Nepal have measures for provide citizens clean and healthy environment to live in. It tries to guarantee compensation against pollution. On the top, the law directs the private as well governmental institutions to refrain from undertaking any developmental activities at the cost of environment.

## **2. Premise of the Act**

As a signatory to Stockholm Declaration (1972) on Environment, Nepal enacted laws to control pollutions. The preamble of the Environment Protection Act, 2019 clarifies that the legal arrangements are made to guarantee citizen's right to live in a healthy environment. In order to implement Article 30 of constitution, which provides right to environment as a fundamental right to every citizen of Nepal, the present Act encompasses a plethora of provisions that seek to maintain a proper balance between environment and development and to protect the national ecology and biodiversity.

## **3. Towards constitutional frameworks**

The Constitution of Nepal, which entered into force on September 20, 2015, is perhaps one of the exceptional highest laws of the land in world which embodies specific fundamental rights provisions relating to the protection and promotion of environment. It casts a solemn duty on the state instruments as well as the private persons to protect and improve the natural environment.

There is plethora of green laws incorporated under the national charter for advancing the cause of green Republic. To mention a few, an individuals' right to live in a clean environment (Article 30); right to clean water and hygiene (Article 35); right to food sovereignty (Article 36); or right of consumer to have quality foodstuffs and services (Article

44) are put in place to control or prevent any act or omission polluting or likely to pollute the environment. Moreover, the High Courts (Article 144) and Supreme Court (Article 133) are empowered to issue any directions, orders, determinations, or writs for the protection and promotion of environment.

While invoking writ jurisdictions, the Supreme Court of Nepal has authored scores of welcome judgement to accelerate the cause of green democracy. The apex Court in the court case, *Surya Prasad Sharma Dhungel v Godavari Marble Industries Pvt Ltd* held that in a polluted environment, human life would be in danger. The Court announced that the protection of environment leads to the protection of human life.

In the leading case of *Pro Public v His Majesty Government of Nepal*<sup>2</sup>, the apex Court observed that the priority should be given for lessening the impact of pollution coming out from brick kilns that are placed in the vicinity of densely populated areas. The immediate measures should be taken to lessen adverse impacts in such areas. The Court directed the government to form a team comprising representatives from various Ministries. The task of this team was to determine the number of industries that have polluted the environment, and those that have installed pollution-protection device and other those that have not.

The top Court in the case of *Kedar Bhaktra Shrestha v Department of Transport and Ors, His Majesty Government of Nepal*<sup>3</sup> held that the policy prohibiting the new diesel Tempo registration even outside Kathmandu was not bad.

The case of *Bharatmani Gautam v His Majesty Government of Nepal* (2059 BS) is a writ regarding the pollution of *Bishnumati* river, whose significance is linked not only with religion but also with history and culture. 'Bishnumati' river which originates from Shivapuri flows from Budhanilantha, Narayanthan, Basbari, Balaju, Shova Bhagvati, Teku, and get mixed with Bagmati River. The river had become the victim of solid wastes' dumping and untreated drainage waters. The court was of the view that the instruments of the state was under an obligation to preserve the national ecology; maintain cleanliness of rivers; ensure portable drinking water and manage the waste of the Kathmandu Valley in an environment

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<sup>2</sup> NKP (2062 BS) Decision Number 758, available at: [http://nkp.gov.np/full\\_detail/2059/?keywords=%E0%A4%AA%E0%A5%8D%E0%A4%B0%E0%A5%8B%20%E0%A4%AA%E0%A4%AC%E0%A5%8D%E0%A4%B2%E0%A4%B2%E0%A4%BF%E0%A4%95](http://nkp.gov.np/full_detail/2059/?keywords=%E0%A4%AA%E0%A5%8D%E0%A4%B0%E0%A5%8B%20%E0%A4%AA%E0%A4%AC%E0%A5%8D%E0%A4%B2%E0%A4%B2%E0%A4%BF%E0%A4%95)

(Accessed on May 11, 2021)

<sup>3</sup> Supreme Court Bulletin Year, 10, No. 13, Vol. 222 (1997) p.7

friendly manner. Also, in *Tulak Man Lama v. Government of Nepal* (2061 BS), the ban of 2-stroke three-wheeler Vikram Tempo was held to be valid. The Court wrote 12 to 14 seats Micro-bus could be allowed to ply on the roads of Kathmandu—instead of huge smoke emitting Vikram tempo.

As Nepal goes fully federal, the constitution empowers the instruments of the Centre as well as provinces to adopt and enact laws on protection and promotion of environment. The Central government under Schedule-V, entry 27<sup>4</sup>, State governments under Schedule-VI entry 19<sup>5</sup>, and both governments under Schedule-VII entries 12<sup>6</sup>, 18<sup>7</sup> & 23<sup>8</sup> have mandates with regard to national ecology, sanitation, clean and healthy water, wildlife conservation. Similarly, the Directive Principles, contained under Part-4 of the constitution, directs the provincial governments to adopt policies for the protection and promotion of ecology. Moreover, there are ways through which partnership with private citizens and NGOs could be developed to achieve the goals of environmentalism.

#### 4. Objectives

The objectives of the Environment Protection Act, 2019 could be outlined as:

- Protecting and improving environment and mitigating the pollution;
- To grant compensation to the victims of environmental pollution;
- To ensure the compliance of Environmental Study Report, Environment Impact Assessment, Initial Environment Examination and among other compliance mechanisms;
- To take strict action and impose fine against all those who violate the provisions or compliances envisaged under the Act;
- To enforce laws on environment protection in the areas that were not included under existing legislations;
- To give powers on the central, provincial and local governments to inspect (through Environmental Inspectors) whether or not the provisions of the Act are complied by proponent and among others;

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<sup>4</sup> National and international environment management, national parks, wildlife reserves and wetlands, national forest policies, carbon services.

<sup>5</sup> Use of forests and waters and management of environment within the state

<sup>6</sup> Ayurvedic medicine, veterinary, Amchi and other professions

<sup>7</sup> Tourism, water supply and sanitation

<sup>8</sup> Utilization of forests, mountains, forest conservation areas and waters stretching in inter-state form

- To give powers to central government to adopt measures to control or abate climate change;
- To give powers to central and provincial government to establish laboratories for testing the samples collected to test or identify the level of pollution;
- To give powers to central and provincial government to grant pollution control certificates;
- To confer power on the central government to declare any area as environment protection area, green zone or polluted area and prohibit the carrying out of any activities in those areas.

### **5. Scope and applicability**

As the Environment Protection Act, 2019 is a parliamentary enactment; it confers a wide range of powers to the instrument of central government. For instance, the Act, 2019 under Section 15(1) casts an obligation on the government to set standards to reduce and regulate the emissions, hazardous wastes, and pollution emitted by vehicles, equipments, industries, hotels, restaurants or among other activities like that. The succeeding clause, i.e., Section 15(2) outlaws carrying out of any activities that could adversely affect humans and environment or have potential to contravene the standards set by the government (under Section 15(1)).

In contrast to Act 1997, the Act 2019 provides arrangement for dealing with climate change and control or abatement of greenhouse gases. The Part-4 of the Act lays down provisions relating to climate change. Under Sections 23-26, the central, provincial and local governments have been conferred with collective responsibility to adopt measures or enact policies for reducing emissions, pollutions. Still, the central government has an exclusive jurisdiction over identifying areas emitting green-house gases and determine their national reference level.<sup>9</sup> In doing so, the legislation clarifies that central government has an occupied filed over identifying areas emitting green-house gases and the provincial and local governments are there to just act in furtherance of the directions of the Government of Nepal. The provincial and local governments have mandates to act in the fields for reduction of

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<sup>9</sup> Section 25(1) of Environment Protection Act, 2019: “The Government of Nepal may identify areas emitting green-house gas and determine their national reference level.”

green-house gases emissions.<sup>10</sup> In contrast to erstwhile 1997 Act, the present Act of 2019 envisages that the government of Nepal may participate in carbon trading with foreign governments or organizations.<sup>11</sup>

Moreover, the central government has been conferred with an exclusive power to adopt measures and lay down the policies, strategies and actions plans to be implemented by the government of Nepal, provincial governments and local bodies for the mitigation of adverse impacts of climate change.<sup>12</sup> The Act directs the central government to specify an area as an open or green area. Conversely, the government at the centre may declare an area as a polluted area and prohibit the movement of people or carrying out of any activities within that premise. These legal arrangements clarify that the provincial governments would have to compose their functions (for the protection of environment) in line with the policies of the Centre.

On the contrary, the current environment protection law borrows the provisions for the protection of natural heritage from the preceding 1997 Act. As per the Act, it's the solemn duty of the every agency of the government to protect the national heritage.

## **6. Compliance mechanism**

Unlike the previous 1997 Act, which only required a developer to comply with Initial Environment Examination and Environment Impact Assessment (IEIA), the current Act of 2019 obliges the developer to comply with following compliances:

### **1. Environment Study Report<sup>13</sup> undertakes the following examinations:**

- a. Brief Environment Study<sup>14</sup> (a brief environmental study of a proposal)

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<sup>10</sup> Section 25(3) of Environment Protection Act, 2019: "The Ministry, provincial government and local level may launch necessary programs."

<sup>11</sup> Section 28(1) of Environment Protection Act, 2019: The Government of Nepal may participate in carbon trade with the mechanism established by the international treaty, any foreign government or organization, business entity or private sectors for the mitigation and conservation of carbon emissions.

<sup>12</sup> Section 26(1) of Environment Protection Act, 2019: "The Government of Nepal, for the purpose of managing adverse impacts and risks of climate change, issue necessary orders, by a notification in Nepal Gazette, as to such measures as to be adopted for the mitigation of adverse impacts and risks of climate change, in the sectoral policies, strategies and action plans, to be executed by the government of Nepal, provincial government, local level and other public bodies as well as the private sectors."

<sup>13</sup> Section 2(u) of Environment Protection Act, 2019 defines Environment Study Report as "a report prepared with respect to the brief environmental study, initial environmental examination or environmental impact assessment."

b. Initial Environmental Examination<sup>15</sup>

c. Environment Impact Assessment (EIA)<sup>16</sup>

Adopting a strict regulatory regime, Section 6(2) of the Act, 2019 provides that if a developer carries out developmental activity in non-compliance of the Environment Study Report, then in such case, the developer shall not be allowed to submit the report up to a maximum time period of five years. Similarly, if a proposal is implemented without a brief environment study report, a fine of up to 500,000/- (five Lakh) shall be levied upon the defaulting party.<sup>17</sup> If a proposal is implemented without an Initial Environment Examination report, then in such case, a fine of up to 10,00, 000/- shall be levied upon the defaulting party.<sup>18</sup> However, in case of non-compliance of EIA, the stipulated fine is up to 50 Lakh (i.e., five million)<sup>19</sup>.

## **2. Environment Management Plan**

The proponent<sup>20</sup> is required to state the probable measures or safeguards to be adopted during the developmental activities so as to mitigate the adverse impacts on environment.<sup>21</sup> However, if the concerned agency has a reason to believe that the environment management plan set out by the proponent may not be able to mitigate the adverse environmental impacts, then in such case, the government may direct the proponent to adopt other effective measure

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<sup>14</sup> Section 2(y) of Environment Protection Act, 2019 states: Brief Environmental Study means a study to be made briefly as to measures to be adopted for avoiding or mitigating the adverse effects on the environment as a result of implementation of any proposal.

<sup>15</sup> Section 2(m) of Environment Protection Act, 2019 states: Initial Environmental Examination means an analytical study or evaluation to be conducted to ascertain as to whether, in implementing a proposal, the proposal does have significant adverse impacts on the environment or not, and with respect to the measures to be adopted for avoiding or mitigating such impacts by any means.

<sup>16</sup> Section 2(v) of Environment Protection Act, 2019 states: Environment Impact Assessment means detailed study and evaluation to be made to ascertain as to whether, in implementing a proposal, the proposal does have significant adverse impacts on the environment or not, and as to the measures to be adopted for avoiding or mitigating such impacts.

<sup>17</sup> Section 35(1)(a) of Environment Protection Act, 2019 states: A fine not exceeding five hundred thousand rupees if, in case of a proposal of which the brief environmental study report has to be approved, the proposal is executed without having it approved or if any proposal is executed in a manner inconsistent with the approved report.

<sup>18</sup> Section 35(1)(b) of Environment Protection Act, 2019 states: A fine not exceeding one million rupees shall be levied if any proposal is executed without having the initial environment examination approved or in a manner inconsistent with the approved report.

<sup>19</sup> Section 35(1)(c) of Environment Protection Act, 2019 states: A fine not exceeding five million rupees, if in the case of a proposal of which the environmental impact assessment report, has to be approved, the proposal is executed without having it approved or if any proposal is executed in a manner inconsistent with the approved report.

<sup>20</sup> Section 2(l) of Environment Protection Act, 2019 states: Proponent means a person or governmental, semi-governmental or non-governmental agency or institution that makes application for the approval of a proposal or that has got approval for the implementation of the proposal.

<sup>21</sup> Section 10(2) of Environment Protection Act, 2019: In preparing the environmental management plan, the proponent shall set out, inter alia, which of the measures to mitigate environmental adverse impacts will be adopted in the course of building the project and which of such measures will be adopted after the completion, or in the course of implementation, of the project.



and the concerned proponent has to bear the expenses incurred in implementation of the direction so given.<sup>22</sup>

### **3. Environment Impact Assessment Report**

This report has to be submitted by the proponent at the completion of two years (from the date of initiation of proposal) of the project. In case of any defiance or inconsistent activities pursuant to the mandates of EIA, the proponent has to bear the fine of up to five million.

### **4. Supplementary EIA<sup>23</sup>**

The Section 11 of the Act, 2019 envisages that a supplementary EIA is required to be done in a proposal, whose EIA has already been done, where there is need of modification, alteration or addition of forest in design for further enhancement of development project.

### **7. Powers of Central Government to take measures to protect and improve environment**

The Environment Protection Act, 2019 has been enacted by the competent Parliament of Nepal with an object to mitigate the adverse environmental impacts and compensate the victims of the pollution. As the legislation is the outcome of the Centre, it confers ample powers upon the Government of Nepal.

As a matter of fact, Section 3(2)(a) of the 2019 Act prescribes that the Government of Nepal shall oversee Environmental Study Report, or Initial Environmental Examination or EIA or any in case where the project is of national importance or under the jurisdiction of federation or the inter-provincial development project.

In an exception to Environmental Study Report (ESR), Section 3(3) of the Act, 2019, beginning with a *non-obstinate* clause, provisions that the proponent is exempted from ESR compliances if the development project relates to the reconstruction of such heritage

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<sup>22</sup> Environment Protection Act, 2019. Section 10(3).

<sup>23</sup> Section 2 (n) of Environment Protection Act, 2019 defines Supplementary Environment Impact Assessment as an environmental impact assessment to be made again *vis-a-vis* a proposal submitted in order to make revision partly in physical infrastructure, design, or form, transfer or alter a structure, add a forest area or increase the project capacity on the environmental impact assessment proposal which has been already accepted.

considered an ancient monument. However, the proponent is bound to prepare ESR as has been determined by the Government of Nepal.<sup>24</sup>

Moreover, the central government or provincial government can choose an area for environmental study.<sup>25</sup> The Govt. of Nepal is also obligated to come up with necessary standards for the mitigation of all kinds of pollution.<sup>26</sup> This way, the central government has a wider jurisdiction over adopting policy frameworks required for the mitigation of pollution.

Under Section 16, the central government has an ample power to regulate the import and export of hazardous substances that don't cause significant adverse impacts on the human health and environment. In order to ensure of the compliance of ESR and standards relating to pollution control, the central government may designate any officer as Environmental Inspector to inspect over the compliances prescribed by the Act.<sup>27</sup> Interestingly, Section 22 prescribes a list of powers of the Environmental Inspector (so appointed by central or provincial or local government). He is empowered to inflict fine upon any person or institution or proponent at the instance of violation of the provisions contained under the Act, 2019.

As the rising sea levels, heat waves, melting glaciers, intense drought, storms, and warming oceans are some of the well known consequences of climate changes, it can directly harm animals, destroy the places humans and animals live and wreak havoc on people's livelihood and communities. In this context, Chapter-4 of the Environment Protection Act, 2019 is devoted to deal with the uncertainties and upheavals of the climate change. The central government's Ministry of Environment has been conferred with the power to make a periodic study about the impacts of climate change on local communities, eco-system and bio-diversity.<sup>28</sup> Section 23(2) envisages that the government of Nepal, provincial governments and local governments would collectively take steps to execute the plans and policies formulated by the Ministry of Environment to tackle with the climate change.

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<sup>24</sup> Section 6 (1) of Environment Protection Act, 2019 states: In preparing an environmental study report pursuant to this Act, the proponent shall so prepare it in the form as prescribed that the standards and quality determined by the Government of Nepal are maintained.

<sup>25</sup> Environment Protection Act, 2019. Section 14(1).

<sup>26</sup> Environment Protection Act, 2019. Section 15(1).

<sup>27</sup> Environment Protection Act, 2019. Section 3(2)(a).

<sup>28</sup> Environment Protection Act, 2019. Section 23(1).

In order to avoid the adverse impacts of climate change, the governments at centre, province or local governments would make and implement adaptation<sup>29</sup> plan at the national, provincial and local levels, respectively.<sup>30</sup> Likewise, the central government, that is Ministry of Environment, has jurisdiction over identifying areas emitting green-house gas and determining their national reference level<sup>31</sup>. In this job, the central, provincial and local governments could launch necessary programs. So, the Act, 2019 directs all the levels of governments to jointly or independently adopt measures to mitigate the adverse impacts of climate change. Under Section 26, the government of Nepal is empowered to issue necessary orders for mitigating the adverse impacts of climate change and the agencies of the central government, provincial and local governments are bound to materialize those orders or policies. Similarly, the central government, under Section 27, is empowered to determine and enforce the technical standards against climate change.

Along with this, the central government at the helm has an exclusive mandate to determine and enforce necessary standards (on priority basis) for urban and rural areas for mitigating the adverse impacts and risks of climate change.<sup>32</sup> Also, the Central government is conferred with the power to develop technologies required for curbing adverse impacts of climate change.<sup>33</sup> It may be noted here that the Kyoto Protocol of 1997 is to be credited for evolving the concept of carbon trading. The Protocol puts a ceiling on the amount of carbon a country is allowed to emit. Nepal ratified this protocol on December 14, 2005. Interestingly, the Kyoto Protocol provides that the countries that emit high carbon, i.e., above the ceiling so fixed, can purchase the right to release more carbon from the countries that have lower carbon emissions.

According to available data, Nepal's global share of Fossil Carbon Dioxide (Co<sub>2</sub>) stands at 0.02%, while the Himalayan Republic's neighbouring countries China is the largest emitter of Carbon Dioxide gas (almost 30 percent of the world's total Co<sub>2</sub> emissions in 2019) and India

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<sup>29</sup> Section 2(a) of the Act, 2019 defines "Adaptation" as the prevention or mitigation of further loss and damage upon projecting potential impacts and risks of climate change.

<sup>30</sup> Environment Protection Act, 2019. Section 24(1).

<sup>31</sup> Environment Protection Act, 2019. Section 25.

<sup>32</sup> Section 27(1) of Environment Protection Act, 2019 states: "The Government of Nepal may determine and enforce necessary standard for the setting of priority of matters to be implemented in urban and rural areas as to the mitigation of adverse impacts and risks of climate change."

<sup>33</sup> Section 27(2) of Environment Protection Act, 2019 states: "The Government of Nepal may determine necessary policy and technical standard for the development of such technology as may be necessary in the prescribed subject areas for the mitigation of adverse impacts and risks of climate change."

stands as the third third-largest emitter (it produced about 2.65 billion metric tons of Co2 in 2018). These data show that Nepal could become the victim of the pollution that originally generated in her neighbouring countries.<sup>34</sup>

Rationally thinking, Nepal has all the right to claim compensation from the two neighbour-states—China and India—two of the world’s biggest polluters—which causing pollution or whose irresponsible disposal of pollutants in the form of air or water caused immense harm to Nepal’s ecology and environment.<sup>35</sup> Principle 14 of the Rio Declaration, 1992 states that all countries are obligated to discourage any activity causing adverse effect on natural environment. Similarly, Principle 16 of the Convention talks about Polluter Pays Principle, through which the polluter has to pay the cost of ratifying environmental damage.

As Nepal is one of the least developed countries and lags behind in term of industrial development, it could not be blamed for contributing much in the emission of fossil Carbon dioxide. The Rio Declaration under Principle 19 also obligates the states to keep an eye on the trans boundary environmental effect and provide relevant information to affected states. However, this provision, like many other international obligations, also remains like a dead letter as the countries, which have considerable share in carbon emissions, are yet to inform their neighbours about any of their activities that could contribute in trans-boundary pollution. Moreover, the 1972 Stockholm Declaration, in its Principle 6, envisages that the release of toxic substances should be stopped. The Environment Protection Act, 2019 defines the term ‘pollution<sup>36</sup>’ but does not include ‘trans-boundary’ environmental effects as one of the means of pollution. This could be taken as a limitation of the Act.

While widening the scope of the environmental regulatory regime, the government of Nepal has been conferred with the power to specify any specific areas as an open or green area in a bid to protect the environment of such area.<sup>37</sup> Also, the government of Nepal may declare any

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<sup>34</sup> Kathmandu’s deteriorating air quality: Nepal should seek compensation from China, India”, (April 1, 2021), *South Asia Monitor* , available at: <https://www.southasiamonitor.org/spotlight/kathmandus-deteriorating-air-quality-nepal-should-seek-compensation-china-india> (Accessed on May 11, 2021).

<sup>35</sup> *Ibid.*

<sup>36</sup> Section 2(J) states: Pollution means the activities that significantly degrade, damage the environment or harm the beneficial or useful purpose of the environment, by changing the environment directly or indirectly as a result of wastes, chemical, heat, noise, electric, electro-magnetic wave or radioactive ray.

<sup>37</sup> Section 30(1) of the Environment Protection Act, 2019 states: The Government of Nepal may, in consultation with the provincial government and concerned local level and by a notification in Nepal Gazette, maintain as an environment protection area any place containing a natural heritage or aesthetic place which is considered

area as polluted area and prevent the movement of the people in that specified area.<sup>38</sup> The government may prohibit the carrying out of any activities under the premise of green zone so declared. Ensuring a say of the local government, the Section 30 (4) provides that the government of Nepal may, in consultation with local level, issue any appropriate order for curbing environmental pollution in any specific area.<sup>39</sup>

As per Section 31 of the Act, 2019, a fund should be established by the Govt. of Nepal, Provincial Govts. or local bodies, which is then to be invested the protection of environment, control of pollution and protection of national heritages.

Over and above all this, the Act, 2019 envisages for an Environment Protection and Climate Change Management National Council chaired by the Prime Minister. The Council sees Prime Minister as the Chairperson, while the following persons as members: Minister for Forest and Environment, three Ministers of government of Nepal designated by the PM, Chief Ministers of all seven provinces, member of National Planning Commission who looks after environment, two professors, including one woman, of environmental science, three persons, including two women, nominated by the Chairperson and Secretary of Ministry of Environment as *ipso-facto* Secretary. The members of the Council serve the office at the satisfaction of the Chairperson, i.e., Prime Minister. However, the tenure of members so appointed is three years unless removed from the office. So far the meeting is concerned; the Act mandates that Council shall meet at least once a year at such venue prescribed by the Chairperson.

Section 34 provisions for the functions of the Council. As per Section 34, the Council is at competence to direct the Ministry of Environment to adopt such policies required for

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extremely significant from the point of view of environmental protection or any place of historical or cultural importance.” Similarly, Section 30(2) states that “In making any road, building, river management or other physical infrastructure, the government of Nepal may, in coordination with the concerned body and by a notification in the Nepal Gazette, specify any specific area as an open or green area with a view to protecting the environment of such area.”

<sup>38</sup> Section 30(5) of Environment Protection Act, 2019 states: The Government of Nepal may specify any place in which any injurious or hazardous substances or wastes are stored or disposed or there is excessive pollution for other reason as a polluted area and prevent the movement of public there.

<sup>39</sup> Section 30(4) of Environment Protection Act, 2019 states: In cases where it appears that adverse impacts have been caused, or likely to be cause, on public health or environment of any specific area or place as a result of excessive environmental pollution, soil erosion, excessive exploitation of natural heritages or occurrence of a natural calamity in such area or place, the Government of Nepal, may, in consultation with the concerned Local Level, issue any appropriate order for the balance, management or restoration of the environment, upon specifying such an area or place as a sensitive area from the environmental viewpoint.

mitigating the climate change and pollution. It may give guidelines to provincial and local governments with regard to environmental protection and climate change. Also, the Council is shouldered with the responsibility of managing economic resources for environmental protection and climate change. The Council could direct the Ministry of Environment to adopt policies for the protection of natural, cultural and physical resources and heritages.

To put it simply, the Act, 2019 grants a wide range of powers to central government. In the areas like climate change, or carbon trading, the central government has been conferred with exclusive jurisdiction.

### **8. Powers of the Provincial governments**

As environment protection is the collective responsibility of the governments, the Act, 2019 provides ample powers to the second and third tiers of government to adopt plans and policies for the conservation of environment. For instance, Section 3(2)(b) of 2019 Act envisages that the Environment Study Report shall be submitted to the provincial government in case where the development project falls under the jurisdiction of provincial law. In addition to this, Section 3(2)(C) directs the local governments to oversee Environmental Study Report and Initial Environmental Examination in case of proposal relating to development falling under the jurisdiction of local levels. Still, the law mandates that the EIA will be regulated by the provincial government even if the developmental project falls under the local jurisdiction. The concerned agency—central government, provincial or local governments—may immediately prevent the project to be implemented if a proponent executes a project without having ESR.<sup>40</sup>

In order to ensure of the compliance of ESR and standards relating to pollution control, the provincial government may designate any officer as Environmental Inspector to inspect over the compliances prescribed by the Act.<sup>41</sup> Interestingly, the local governments have also been empowered to employ its “any employee” as Environmental Inspector to monitor whether or not the acts to be performed in pursuant to ESR have been performed effectively.

Under Section 18, the central and provincial governments, both, have power to establish laboratories to study, test or examine the samples so collected to analyze pollution. Similarly,

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<sup>40</sup> Section 13(1) of Environment Protection Act, 2019: If any person executes a project without having the environmental study report approved pursuant to this Act or contrary to the approved environmental study report, the concerned body may immediately prevent the project from being executed.

<sup>41</sup> Environment Protection Act, 2019. Section 21(2)(b).

the central or provincial governments can issue pollution control certificate to any industrial enterprise.<sup>42</sup> Along with this, the provincial government is under an obligation to make public necessary information required to combat pollution, and climate change. The Act envisages that the provincial governments would give priority to the issues of biodiversity, climate change, or strategies to mitigate pollution in developing plans and policies for the province. In order to avoid adverse impacts of environmental risks or climate change, the provincial, local or central government may adopt adaptation plans in their respective jurisdiction. Under Section 30, the central government has power to declare environment protection area in consultation with provincial or local government. On the top of all, the legislation foresees Environment Protection and Climate Change Management National Council under the chairmanship of Prime Minister where the Chief Ministers of provinces are *Ipsa facto* members. Understandably, the Chief Ministers could press and pass their agendas from the meetings of the Council which would ultimately help the second tier governments to adopt measures to mitigate pollution and climate change under their respective jurisdiction. In India, the Environment Protection Act, 1986 does not confer power on the state governments (but on central governments) to adopt plans and policies or establish laboratories or inspect any plant.

In this way, the provincial and local governments are empowered to adopt measures to fight against climate change and pollution. They can establish laboratories to test the samples so collected to analyze the quality of air or water or natural environment. Still, the Act does not confer power on the provincial governments on the matters of national importance, climate change, carbon trading and among others. It, however, seems that the role of provincial government is secondary and not primary. In order to give effect to this Act, the provincial and local governments are obliged to act in furtherance of the direction and policies issued by the Centre.

## 9. Penalties

Saint Augustine, a philosopher of Natural Law, has rightly said, punishment is justice for the unjust. The 2019 Act hosts stringent provisions to curb the acts and omissions that tend to violate the provisions enshrined therein. Section 35(1) provisions for a fine of up to 500,000/-

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<sup>42</sup> Section 20(1) of Environment Protection Act, 2019 states: The Ministry or Provincial Ministry may provide a pollution control certificate, as prescribed, to any industry that makes a significant contribution to the control of pollution.

for non-compliance of ESR; a fine of 10,00,000/- at the instance of non-compliance of Initial Environmental Examination and 50,00,000/- in case of non-compliance of EIA. Similarly, the government has been conferred with the power to blacklist such person or body for a period of one to five years who disobeys the order of the government made under this Act. Moreover, the Act gives currency to polluter pays principle and in doing so, it bilges the government to seek the cost of compensation from the polluter to restore the environment and compensate the victim of pollution. In addition to this, the Director General may impose a fine of up to 100,000/- on a person or body that violate the order issued by the government to enforce this Act.

### **10. Conclusion**

The Environment Protection Act, 2019 is a comprehensive piece of legislation adopted and enacted for the purpose of implementing Article 30 of the Constitution of Nepal which guarantees every citizen a breath of fresh air and clean environment.

As Nepal goes fully federal, the instrumentalities of the Centre as well as States should not shy away from investing and taking steps for the protection and promotion of environment. The Act, 2019 has been brought into force to consolidate and amend the environment protection laws in order to provide compensation to the victim of pollution from the polluter. The legislative will is reflected under preamble of the Act which obliges the state to guarantee every citizen the right to clean and green environment and a right to seek compensation from polluter on the account of being victim of pollution. It also obligates the state to maintain balance between environment and development. Simultaneously, it also obligates the States to mitigate adverse environmental impacts.

In order to ensure the compliances of the mandatory provisions of the Act, the concerned government has been conferred with the power to stop any proposal from execution that goes in contravention to the ESR, Initial Environment Examination or EIA and impose fine under Section 35. The government has a duty to prepare annual report on a subject including change in quality of air and water. Likewise, the government has been empowered to prohibit any activities that degrade the quality of mountains, national heritages and places of scenic importance. It places restriction on export and import of harmful substances.



Along these lines, the Act, 2019, a central legislation, has been enacted by the government in order to provide enough powers to the central government to draft policies for the protection and promotion of environment. From the above discussion, it's evident the Environment Protection Act is very important piece of legislation. This law is a general legislation that covers many aspects of pollution, including that of climate change. However, there is room for improvement and reformation in this Act as well. For instance, the Act, 2019 prescribes maximum fine for non-compliance of ESR, EIA or any mechanism, but no minimum fine has been envisaged. The government should impose at least minimum fine and not maximum. Ultimately, it would lead to the dilution of the deterrent effect of the legislation. The provincial governments are mandated to act in pursuance of the directions, plans and policies of the central government. The Act does not expressly provide that the central government would give grants to the provincial governments in a certain ratio for implementing the provisions. Despite of this, it is a positive piece of legislation that aims to implement the right to environment guaranteed to every citizen of Nepal.

Still, its high time the state acknowledged the celebrated concept of 'Public Trust Doctrine' which states that the state has fiduciary duty of stewardship to environmental entity of public. In the public interest of present and future generations, the resources are kept in trust. We have ample constitutional provisions relating to environment which empowers the state to implement the message of this doctrine. Now, it's time to enforce the green laws contained under the Constitution and other environmental laws for the cause of green democracy. After all, a green democracy is deserved by every country including Nepal.