

Emblematic Strategic Litigation Cases



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Unofficial Translations

SUPREME COURT, CONSTITUTIONAL BENCH

Hon. Chief Justice Mr. Deepak Kumar Karki

Hon. Justice Mr. Ishwar Prasad Khatiwada

Hon. Justice Dr. Mr. Anandmahan Bhattarai

Hon. Justice Mr. Anil Kumar Sinha

Hon. Justice Mr. Prakashman Singh Raut

ORDER

077-48-0099

Subject: Certiorari

Petitioners

Kapilvastu District, Suddhodana Village Municipality Ward No. 6 permanent home at Lalitpur District, Mahalaxmi Municipality Ward No. 5, Advocate Shailendra Prasad Ambedkar 1

Banke District, Nepalganj Metropolitan City Ward No. 8 currently residing at Lalitpur District, Lalitpur Metropolitan City Ward No. 2. 10, Advocate Mohana Ansari 1

Versus

Opposition

Government of Nepal, Office of the Prime Minister and Council of Ministers, Singhdarbar, Kathmandu 1

Government of Nepal, Ministry of Finance, Singhdarbar, Kathmandu 1

Province No. 1 Province Government, Office of the Chief Minister and Council of Ministers, Biratnagar 1

Province No. 2 Province Government, Office of the Chief Minister and Council of Ministers, Janakpurdham 1

Bagmati Province Government, Office of the Chief Minister and

Council of Ministers, Hetauda 1

Gandaki Province Government, Office of the Chief Minister and Council of Ministers, Pokhara 1

Lumbini Province Government, Office of the Chief Minister and Council of Ministers, Butwal 1

Sudurpaschim Province Government, Office of the Chief Minister and Council of Ministers, Dhangadhi 1

077-WC-0100

Petitioners

Humla District, Kharpunath Rural Municipality Ward no. 5, currently residing at Kathmandu District, Kathmandu Metropolitan City Ward no. 32, Koteshwor, Advocate Ram Bahadur Sahi 1

Baitadi District, Dasharathchand Municipality Ward no. 4, currently residing at Kathmandu District, Kathmandu Metropolitan City Ward no. 32, Koteshwor, Advocate Tejkumar Lohaya 1

Lalitpur District, lalitpur Metropolitan City, Ward no. 13, Advocate Deepak Dube 1

Lalitpur District, lalitpur Metropolitan City, Ward no. 13, Advocate Trilok Bahadur Chand 1

Versus

Opposition

Government of Nepal, Office of the Prime Minister and Council of Ministers, Singhadarbar, Kathmandu 1

Office of the President, Sheetalin Niwas, Kathmandu 1

Government of Nepal, Ministry of Finance, Singhadarbar, Kathmandu 1

Ministry of Law, Justice and Parliamentary Affairs, Kathmandu 1

Government of Nepal, Ministry of Home Affairs, Singhadarbar, Kathmandu 1

Government of Nepal, Ministry of Forests and Environment, Singhadarbar, Kathmandu 1

Government of Nepal, Ministry of Federal Affairs and General Administration, Singhadarbar, Kathmandu 1

Government of Nepal, Ministry of Culture, Tourism and Civil Aviation, Singhadarbar, Kathmandu 1

077-WC-0101

Petitioners

Okhaldhunga District, Former Bhadaure Village, Ward no. 7, currently residing at Chishankhugadhi Rural Municipality Ward no. 6, Advocate Dr. Punyaprasad Khatiwada 1

Kathmandu District, Nagarjuna Municipality Ward no. 5, Advocate Deepak Bikram Mishra 1

Versus

Opposition

Office of the President, Sheetal Niwas, Kathmandu 1

Office of the Vice President, Lainchour, Kathmandu 1

Hon'ble Prime Minister Office of the Prime Minister and Council of Ministers, Singhadabar, Kathmandu 1

Hon'ble Speaker of the House of Representatives, Federal Parliament Secretariat, Singhadarbar, Kathmandu 1

Hon'ble Speaker of the National Assembly, Federal Parliament

Secretariat, Singhadabar, Kathmandu1

Office of the Prime Minister and Council of Ministers, Singhadarbar, Kathmandu 1

Hon'ble Minister of Finance Bishnu Prasad Paudel, Ministry of Finance, Singhadarbar, Kathmandu1

077-WC-0102

Petitioners

Rupandehi District as permanent home, currently residing at Kathmandu District, Kathmandu Metropolitan City, Ward no. 31, Senior Advocate Dinesh Tripathi 1

Versus

Opposition

Government of Nepal, Office of the Prime Minister and Council of Ministers, Singhadarbar, Kathmandu1

Government of Nepal, Ministry of Finance, Singhadarbar, Kathmandu1

Government of Nepal, Ministry of Industry, Commerce and Supply, Singhadarbar, Kathmandu1

Government of Nepal, Ministry of Forest and Environment, Babarmahal, Kathmandu1

077-WC-0103

Petitioners

Bhaktapur District, Bhaktapur Municipality Ward no. 3 now changed to Ward no. 9, Advocate Hariram Lowaju1

Versus

Opposition

Office of the President, Sitla Niwas, Kathmandu, Nepal1

Government of Nepal, Hon'ble Prime Minister and Council of Ministers Office, Singhdarbar1

Government of Nepal, Department of Mines and Geology, Lainchour, Kathmandu 1

Government of Nepal, Ministry of Forests and Environment, Babarmahal, Kathmandu1

Government of Nepal, Department of Forests and Land Conservation, Babarmahal, Kathmandu1

Government of Nepal, Department of National Parks and Wildlife, Babarmahal, Kathmandu1

Government of Nepal, Department of Environment, Babarmahal, Kathmandu1

Government of Nepal, Ministry of Energy, Water Resources and Irrigation, Singhdarbar, Kathmandu1

Government of Nepal, Ministry of Physical Infrastructure and Transport, Singhdarbar, Kathmandu1

077-WC-0104

Petitioners

With Power of attorney of the Nepali Party for Nepal located in Lalitpur District, Dhobighat, and on one's behalf, residing at Kathmandu District, Kathmandu Metropolitan City Ward no. 2 Advocate Atis Karki1

Versus

Opposition

Prime Minister and Council of Ministers Office, Singhadarbar, Kathmandu1

Ministry of Finance, Singhadarbar, Kathmandu1

Ministry of Industry, Commerce and Supplies, Singhadarbar,, Kathmandu1

Ministry of Forest and Environment, Singhadarbar, Kathmandu1

President Chure-Tarai-Madhesh Conservation Development Board, Khumaltar, Lalitpur1

077-WC-0105

Petitioners

Kathmandu District , Budhanilkanth Municipality Ward no. 11, Advocate Bikram1

Kathmandu District, Budhanilkanth Municipality, Ward no. 11, Advocate Santosh Bhandari1

Kathmandu District, Budhanilkanth Municipality, Ward no. 11, Prakriti Khadka1

Kathmandu District, Budhanilkanth Municipality Ward no. 11, Roshan Budhathoki1

Kathmandu District, Kathmandu Metropolitan City Ward no. 32, Advocate Ramesh Kumar.1

Versus

Opposition

Office of the Hon'ble Prime Minister and Council of Ministers,

Singhdarbar, Kathmandu 1

Office of the Hon'ble President, Shital Niwas, Maharajganj, Kathmandu1

Ministry of Law, Justice and Parliamentary Affairs, Singhadarbar, Kathmandu1

Government of Nepal, Ministry of Finance, Singhadarbar, Kathmandu 1

Office of the Chief Minister and Council of Ministers, Province, no. 1, Biratnagar 1

Office of Opposition Chief Minister and Council of Ministers, Province no. 2, Dhanusha1

Office of the Chief Minister and Council of Ministers, Bagmati Province, Hetauda1

Office of the Chief Minister and Council of Ministers, Lumbini Province, Butwal1

Office of the Chief Minister and Council of Ministers, Gandaki Province, Pokhara1

Office of the Chief Minister and Council of Ministers, Karnali Province, Surkhet1

Office of the Chief Minister and Council of Ministers, Sudur Paschim Pradesh, Dhangadhi1

Ministry of Industry, Commerce and Supplies, Singhadarbar,, Kathmandu1

077-WC-0109

Petitioners

Kathmandu District, Kathmandu Metropolitan City Ward no. 29,

Environmental Law Society Nepal having its office at Anamnagar, having power of attorney, Advocate Dhananjay Khanal1

Versus

Opposition

Office of the Hon'ble President, Shital Niwas, Maharajganj, Kathmandu1

Government of Nepal, Hon'ble Prime Minister and Council of Ministers Office, Singhdarbar1

Government of Nepal, Ministry of Finance, Singhadarbar, Kathmandu 1

Government of Nepal, Ministry of Home Affairs, Singhadarbar, Kathmandu 1

Government of Nepal, Ministry of Industry, Commerce and Supplies, Singhadarbar, Kathmandu1

Government of Nepal, Ministry of Forest and Environment, Singhdarbar, Kathmandu1

Government of Nepal, Ministry of Federal Affairs and General Administration, Singhadarbar, Kathmandu1

Government of Nepal, National Plan Commission, Singhadarbar, Kathmandu1

Government of Nepal, Ministry of Law, Justice and Parliamentary Affairs, Singhdarbar, Kathmandu1

Government of Nepal, Ministry of Foreign Affairs, Singhadarbar, Kathmandu 1

Department of Mines and Minerals, Lainchour, Kathmandu1

Industries Department , Tripureshwar, Kathmandu1

Department of Environment, Babarmahal, Kathmandu1

It has been stated that the annual estimate of revenue and expenditure for the Fiscal Year 20785/079 i.e. the annual budget of 20785/079 and all the activities thereto, should be declared null and void from the beginning by issuing an appropriate order including order of certiorari in accordance with Article 133(1) (2) (3) of the Constitution, in all the writ petitions filed in the constitutional bench of this court on different dates. Since the major demands/claims of the petitions are the same, the main points mentioned in the writ petition and the written response have also been put together. Therefore, the brief facts and orders of the writ petitions presented before this bench are as follows:-

Factual summary

1. Common summary of the writ petitions:-

On the basis of the address given by the Honorable Prime Minister on 2078/02/15 and with the recommendation of the Council of Ministers of the Government of Nepal with regards to and the policies and programs mentioned in that address, the Hon'ble President issued Financial Ordinance 2078, Appropriation Ordinance 2078, and National Debt Collection Ordinance 2078 on 2078/02/15. In sub-section 2 of Section 2 of the Financial Ordinance 2078, there is a provision that customs duties will be levied and collected in accordance with Schedule 2 on exported goods. Section 1 of the Schedule 2, Title No. 25.05, 25.15 and 25.17, mentions the goods exported from Nepal to foreign countries, including sand, stone, and ballast, and the export customs duty levied on them. Similarly, in Section 3 (d), it is mentioned that the Customs Act 2064 will be amended and Section 89 (d) of the Act will develop a unified system for international trade or export. On 2078/02/15 Finance Minister of the Government of Nepal released a Public Information Statement of income and expenditure of 2078/079 wherein point no. 2 of the statement states that the basic topics mentioned in the

Appropriation Ordinance, Financial Ordinance and the National Debt Collection Ordinance laws from the Honorable President have been included in the statement of income and expenditure and point no. 199 of the same statement which states that the trade loss will be minimized by extracting mining stones, ballast and sand based on the environmental impact assessment. It has been mentioned that an arrangement has been made to exempt the customs duty required for the construction of a ropeway from industries to the export point for the transportation of mining construction materials to be exported. Based on the same statement, in the press release issued by the Ministry of Finance on 2078/02/19 the policy approach to extract stone, gravel and sand from Churekshetra was presented along with the news that the Government of Nepal, Department of Mines and Geosciences has prepared a plan to export stone, gravel and sand from 92 places in 14 districts of Nepal including Morang, Udaipur, Makwanpur, Chitwan, Doti, Dadeldhura in Churekshetra. From these aforementioned points it appears that arrangements have been made including excavating stone, gravel, and sand mines from the Chure region, allowing mining and processing industries to be put into operation in the Chure region, and constructing a ropeway transport route for the export of the goods from that mine to the export point, and importing all goods required for the construction of the ropeway, and to export stone, gravel and sand from the mining natural resources of the Chure area with customs clearance. It is clear that the things mentioned in Honorable Prime Minister's Address, Financial Ordinance, 2078 Section 2(2) legal arrangements and Title no. 25.05, 25.15 and 25.17 of Section 1 of Schedule 2 the Public Information Statement issued by the Ministry of Finance Statement point no. 2 and 199 along with the press release of the Ministry of Finance dated 02/19/2078, and the plan to extract stone, gravel and sand from Churekshetra by the Department of Mines and Geosciences are all interrelated and are an integral part of the Financial Ordinance 2078.

With the implementation of point no. 199 of the Public Information Statement on the income and expenditure of the Fiscal Year 2078/079, and if the rate at which the extraction of stone, gravel and sand from the Chure region continues, the arable land of Terai-Madhesh will be desertified. Crops will be destroyed due to lack of irrigation. There is an increased risk that thousands of villages in Terai-Madhesh may be swept away by floods due to the rapid flow of river water due to the exploitation of Chure. If the topography of any part of the country is altered, it cannot be returned to its original state, but the pain/effect of it will remain for generations. In addition, the animals living in the reservoir will become extinct, bacteria, plants will be destroyed and their habitat will also be destroyed and the ecological system will also be affected. Agriculture, livelihood, culture, traditional knowledge and residence of the Terai-Madhesh region will all be in crisis if Chure is destroyed. “Chure cannot speak by itself, it is silent, but its usefulness conveys many things.” Chure Hill is biologically and geologically delicate and sensitive and remains a reservoir of environment and forest vegetation, which has been intensively exploited for the last few decades. Chure Hill is the defense armor of Terai. The people of Terai have been suffering from floods and landslides every year, water problems and even agricultural produce problems. Due to the poor topography of Churekshetra, if the stones and gravel are extracted from here, it is almost certain that the flow of the river will be restricted and the sand brought by the strong current will accumulate in Madhesh. Churekshetra is not only a source of sand and gravel but also rich in natural resources. Since a large part of the forest resources under the provincial government is located in the Churebhavar area, it is certain that all the natural resources will lose their habitat due to Chure exploitation. With such a decision by the Government of Nepal, it is certain that the entire Terai region, which serves as the country’s food store, will be desertified while leading to 100 percent of people suffering. Therefore, the government should be aware of forest destruction, environmental balance, conservation of

biological diversity, water source protection as well as protecting the Terai from desertification. Although there are many other measures that could be undertaken by the government to reduce the trade loss, it's disheartening that the country's soil, stone, gravel, and sand are being extracted and sold abroad. For the purpose of strengthening our relations with the neighboring countries, introducing point no. 199 of the budget speech to exploit the Chure area will ultimately lead to the destruction of the environment, destruction of natural resources, floods, landslides, droughts, lack of irrigation, and desertification of arable lands. Not only that but there is also a risk of drying up water sources resulting in drinking water shortages. Besides being unconstitutional and international, such a decision is also a crime against Terai-Madhes and future generations. This kind of decision to pass the budget through an ordinance without discussing critical issues like natural resources and the environment in the Parliament is detrimental to national interests. There should have been an extensive discussion in the House focusing on how to benefit the country, utilize resources domestically, and export them scientifically. This process should have been guided by proper legislation. Instead, the government has neglected these steps, prioritizing its own power and vested interest over necessary and responsible action.

Article 30 (1) of the Constitution of Nepal 2072 states, "Every citizen shall have the right to live in a clean and healthy environment." But now, with the implementation of policy no. 199 introduced in the budget, the fundamental rights guaranteed by the constitution will be stripped off. In Article 5 (2) of the Constitution, it is mentioned that the conduct and actions against the national interest shall be punishable according to the Federal law. Similarly, in Article 16 (1) it is said that every person has the right to live with dignity. If the policy brought by the corrupt government is implemented, it will undermine the fundamental rights guaranteed by the Constitution. In the past, President Chure Terai-Madhesh Conservation

Development Board was formed to stop the exploitation of Chure area and set various standards through the development committee to protect Chure. But by displacing those policies and decisions, exporting stone, gravel and sand under the guise of minimizing trade loss is pushing Terai and the country as a whole towards long-term destruction.

The preamble of the Environmental Protection Act 2076, states that in order to protect the fundamental rights of every citizen who has the right to live in a clean and healthy environment, compensation should be provided from the polluter to the victims for the damage caused by environmental pollution. If this policy and decision is implemented, the Chure region will be exploited at will and its long-term effects will cause great destruction even in the mountains and border areas. By adopting such a suicidal policy, the government has neglected and ignored the right to a clean environment, a modern human right and an environmental right considered as the fourth generation human right, and the policies, laws, court precedents, regional treaties and international conventions to ensure it. Environmental protection cannot be achieved by a single nation. Due to environmental degradation, industrialization and deforestation, there is a negative impact on human health and animal habitats, the Himalayas, seas, rivers, and climate, thus, there have been various declaration proposals and international treaties and conventions in the world to protect it. Nepal is also a party to the Convention. As a party to these treaties and conventions they are binding on Nepal. This policy will destroy the Chure Hills and the arable land of the Terai may eventually become a desert due to severe flooding and inundation. Therefore, it is indispensable that policy guidance from the government should be in the interest of the nation and its citizens, as well as be consistent with the Constitution and laws. Article 2 of the Constitution clearly states that the sovereignty and state power of Nepal is vested in the Nepalese people. If the President and the Prime Minister themselves take

the lead in such unconstitutional and illegal activities, then the country's geographical integrity, nationalism and national security will be disrupted. Therefore, the point no. 199 adopted to pave the way for illegal exploitation through the budget speech of the Fiscal Year 2078/79 is in conflict with Article 30 of the Constitution of Nepal 2072. Thus, the main claim of all writ petitions demands to issue a mandate order as per Article 133 (1), (2) and (3), to prohibit all the activities of point no. 199 of the budget of the Fiscal Year 2078/079 rendering it invalid and annulled.

1.1 Writ no. 077-WC-0101 Additional Application Statement:

On behalf of the Government of Nepal the Hon'ble Finance Minister Bishnu Prasad Paudel from the Ministry of Finance, Singhdarbar has to submit the budget for the Fiscal Year 2078/2079 in the joint meeting of both houses of the Federal Parliament on 2078/02/15. But the budget has been made public outside the Parliament without being presented in the Parliament meeting and currently there is no condition to submit it to the Parliament. However, in the Constitution of Nepal issued by the Constituent Assembly, in the event that the House of Representatives is dissolved, there is no provision as to where and by which process the estimate of income and expenditure must be presented by the Government of Nepal on the 15th of Jestha every year, i.e., the budget, in the event that the House of Representatives is dissolved.

In such a situation, the Government of Nepal, which encompasses intricate matter related to the administration of the state, the implementation of the fundamental rights of ordinary citizens and the economic administration that is directly related to the national interest, and the implementation of the constitution and laws, so if the government's income and expenditure estimates are not presented as a "supplementary budget or emergency budget" but rather as a full budget for the financial year, and if the Parliament cannot convene within the period of the ordinance, or if the House

of Representatives is not formed, or if the budget is implemented again without an ordinance after the ordinance expires, or if the budget passed through an ordinance is either not approved by Parliament, amended, canceled, or replaced, what will be the constitutional and legal validity of such an estimate of income and expenditure?

Even if the House of Representatives of the Parliament is restored or not, or if the Parliament approves it or not, there is no provision in the Constitution and prevailing laws regarding the status or role of the Parliament of our country that has adopted a parliamentary system, and if there is no immediate explanation regarding the legality of the budget announced as above, then a serious crisis may arise in the validity and continuity of the budget presented/to be presented through ordinances by Federal government or other units of the state as mentioned above from outside the parliament or the relevant assembly. Violation of the Constitution, which is the basic law, continues to undermine the principle of separation of powers and control and balance of the legal regime and the legislature and the executive, which are the main organs of the state, and the responsibility and accountability of the government and the parliament and the assembly will weaken. Thus, in the absence of other effective alternative remedy in relation to the content of the present writ petition related to the mandatory constitutional provision of presenting the budget, which is an important, serious and sensitive matter of national public concern, as per Article 46 and Article 133 (1), (2), (3) of the Constitution effective judicial remedy by issuing appropriate orders including order of certiorari, mandamus is demanded.

Pursuant to Article 119 of the Constitution, the Minister of Finance of the Government of Nepal shall submit the annual estimate on the 15th Jestha each year, including the necessary amounts to be spent on the budget of each financial year and the necessary amounts to be spent according to the Federal Appropriation Act.

When submitting the annual estimate, it is arranged that the amount of expenditure allocated to each ministry in the previous financial year and the details of whether the target of such expenditure has been achieved or not must also be submitted. Article 120 provides that the amount required to meet the expenditure according to the Appropriation Act shall be specified under the appropriate title in Appropriation Bill. Likewise, the House of Representatives Rules 2075, Rule 138 and e National Assembly Rules 2074, Rule 130 in accordance with Article 119 of the Constitution state that the Minister of Finance shall present the annual estimate of revenue and expenditure to the joint meeting of the Federal Parliament. There is a provision to tabulate a copy of the annual estimate provided that the annual estimate of revenue and expenditure shall not be discussed on the day it is tabulated.

In addition, Rule 139 of House of Representatives Rules 2075, provides that before the Minister of Finance presents a proposal for the permission to present financial bill in the meeting, the Speaker of the House shall consult with the Prime Minister or any other minister designated by him in his absence to hold a general discussion on the annual estimates of revenue and expenditure within the specified day and time period. A general discussion has been arranged on the annual estimate of revenue and expenditure. Similarly, Rule 142 states, notwithstanding any other provisions in this regulation, the procedure outlined in this paragraph shall be adopted regarding the appropriation bill. Besides, the Minister of Finance shall make a proposal to discuss the principles and priorities of the appropriation bill for budget preparation in the meeting prior to presenting the appropriation bill (except the tax proposal). It is arranged that the procedure of the discussion will be as determined by the Speaker in consultation with the Advisory Committee and that the discussion meeting should be completed at least fifteen days before the annual estimate of revenue and expenditure. Similarly, in Rule 131 of the National Assembly Regulations, 2075, for the

purpose of general discussion on the annual estimate of revenue and expenditure, the chairman shall appoint a day and time period in consultation with the Prime Minister or in his absence any other minister designated by him and within such specified day and time period, a general discussion on the annual estimate of revenue and expenditure shall be held.

Similarly, in Rule 16 of the Appropriation Bill it is arranged that before the presentation of the appropriation bill, the finance minister should propose that the principles and priorities of the appropriation bill (except the tax proposal) should be discussed in the meeting for budget preparation. Although the income and expenditure estimates or the budget of the Government of Nepal will be presented in the joint house of the Parliament, it seems that the House of Representatives has a special role in the budget. However, there does not seem to be any legal provision in the case where the House of Representatives is not in session, or even if the House of Representatives is not convened, or when the House of Representatives is dissolved, or when the budget can be submitted only in one house of the Parliament or only in the National Assembly or outside the Parliament. According to the provision of the Constitution, the statement of income and expenditure should be submitted to the House of Representatives, but in the case of the dissolution of the House of Representatives, there is no provision in the Constitution and other prevailing laws, which is the basic law, on how to make the budget public, and in the absence of any ordinance issued by the Hon'ble President, the act of publicizing the budget is contrary to the provision in the constitution.

Thus, in the current situation where there is a problem in the implementation of the Constitution, Article 76 of the Constitution envisages the possibility of dissolution of the House of Representatives, but Article 119 disregards the possibility of dissolution of the House of Representatives and stipulates that the budget of each financial year must be submitted to a joint meeting

of both the Houses of Parliament on 15th of Jestha. There appears to be a need to clarify the constitutional dispute surrounding the presentation or public disclosure of the budget in the absence or dissolution of the Federal Parliament, or in the absence of the House of Representatives of the Federal Parliament or other local assemblies including the Provincial Assembly or Village or Municipal Assembly, the Government of Nepal or anyone on behalf of the Government of Nepal can/cannot submit the statement of income and expenditure estimates. Likewise, there is no clear provision regarding the procedures and results of the budget if it is not received or if it is submitted, or if the federal budget is submitted or made public on any day other than the 15th of Jestha, and whether it is a constitutional obligation to submit the budget to the provincial assembly or only if it is possible. Thus, an application requests to make a clear law in relation to Article 119 and to enforce it by issuing orders of mandamus and other appropriate orders in the name of the opponents.

1.2 Writ no. 077-WC-0104 Additional Application Statement:

Before giving permission for the excavation of all the rivers and streams within the state of Nepal or carrying out such works, conduct research on the capacity of all the rivers to naturally produce those things and make necessary standards to ensure that excavation is not carried out beyond that capacity. Conduct a follow-up inspection to ensure whether such standards are being followed or not and to take necessary action on the mining works that are against the standards. In this regard the writ petition demands to issue an mandate order in the name of respondent no. 1, 2, 3, and 4 to make necessary arrangements as soon as possible.

Likewise not to carry out activities such as excavating low-value items such as gravel, stone, and sand in the hills (Chure, Mahabharata, and high mountain areas) across the state of Nepal and transporting and exporting these types of items extracted from the mountains

to the domestic or foreign market, or to stop such activities as soon as possible. Countervailing mandate orders should be issued in the name of the defendants to make the necessary arrangements as soon as possible to prevent these types of activities, to make arrangements for monitoring and inspection and to make arrangements for actions that are contrary to the law to be prosecuted as soon as possible.

Issue a countervailing mandate order in the name of the defendants to prevent any kind of excavation work in the mountains of Chure region, and to monitor and inspect the same and to make necessary arrangements to prosecute the contrary activities in accordance with the law.

Application request to issue a mandate order in the name of the respondents to publicize the Environmental Impact Assessment (EIA) reports prepared before conducting any natural work, plan, etc. that will have a long-term impact on the natural assets and resources including all rivers, streams, mountains, etc. throughout the state of Nepal and effectively manage its regulation and inspection and inform the public time and again about it as soon as possible.

1.3 Writ no. 077-WC-0109 Additional Application Statement:

Based on Article IV of the Trade Treaty between the Government of Nepal and India in 2009, Clause (1) sub-clauses (1), (2) and (15) of Article IV of the Protocol to the Treaty of Trade has an agreement that the forest produce, minerals from Nepal which have not undergone any processing and stone, aggregate boulder, sand and gravel to be exported abroad. It seems clear that the provisions mentioned in the treaty have been placed in point no. 199 of the budget speech with the intention of implementing them. According to the provision in Article 156 of the Interim Constitution 2063, which was in force at the time of the said treaty, the said treaty had to be approved by a two-thirds majority of the Legislative Parliament, so far the said treaty has not been approved. The said provision of the Interim Constitution and according to sub-clause (d) of Clause

(2) of Article 279 of the current Constitution of Nepal 2072, the approval, accession, approval or rejection of the treaty or agreement must be approved by a two-thirds majority of immediately existing members in both houses of the Federal Parliament. Neglecting this mandatory constitutional provisions that must be approved by a two-thirds majority, the Government of Nepal does not have the exemption to export abroad just because it is included in the budget speech based on the trade agreement that was implemented without even completing the process and procedures of Section 5 of the Nepal Treaty Act, 2047, which is in conflict with the said article of the Constitution. Therefore, to prevent the destruction of the overall ecological natural system of Churebhavar and Mahabharata region, the environmental protection of that region should be given the highest priority and the necessary arrangements should be made and the following orders should be issued.

Based on Article IV of the Trade Treaty adopted in October 2009, the provision Clause (1) sub-clauses (1), (2) and (15) of Article IV of the Protocol to the Treaty of Trade and point no. 199 and 200 of the Budget Speech dated 2078/02/15 should be repealed.

(a) The Government of Nepal published a notice in the gazette dated 2071/03/16 and declared the area of Chure-Terai as an environmental protection zone, however, the area of inner Madhesh and Mahabharat hills which are not covered by that notice, issue a mandate order in the name of the Government of Nepal in order to declare those area environment protection zone in accordance with Section 30 of the Environmental Protection Act 2076.

b) Issue a mandate order to form a study committee consisting of the President Chure Conservation Development Committee, concerned agencies and independent experts to study the geographical location of Churebhavar region, inner Madhesh and Mahabharata region, statistics of human habitation, water resources and watershed areas as well as identification of wetlands, biological

diversity, government and community forest areas, conservation areas, details of endangered species, areas and forests included in the World Heritage List.

c) Determine the guidelines of the said committee for studying condition of stone, gravel, sand mines and industries currently operating in Churebhavar region, inner Madhesh and Mahabharat region, the status of the industries operating with or without permission, the status of renovation of such industries and whether or not IEE/EIA has been done and if so, the implementation status as well.

(d) Issue an order to establish a special sustainable nature mechanism for the control and protection of illegal and uncontrolled exploitation including armed forest guards and environment inspectors in accordance with Section 46 of the Forest Act 2076 in order to manage environmental services in the Churebhavar area and Mahabharata area.

(e) In the case of N.K.P. 2067 D.N. 8521, there is a directive order for the formation of an environment bench, as the said order has not yet been implemented, issue a mandate in the name of the Government of Nepal to establish an environment bench in the Hon'ble Supreme Court and establish an environment tribunal (Green Tribunal) to hear environmental issues at the provincial level.

f) Since there is no clear legal provision for the mining and use of gravel and sand in the Environmental Protection Act 2076 and other existing laws, a request is made to amend the Environmental Protection Act 2076 to make special provisions regarding the mining, use and regulation of gravel and sand including a mandate order in the name of the Government of Nepal is requested.

2. Orders passed by this Court

2.1 Order on Writ no. 077-WC-0099

What happened in this case? Why should the order as requested by the petitioner not be issued? Including the grounds and reasons according to the law that the order should not be issued if any, submit a written response through the Office of the Attorney General in the case of the respondents no. 1, 2 and in the case of the other respondents through the Office of the Chief Attorney of the respective province within 7 days from the date of receipt of this order excluding the road time limit. Also, keep a copy of this order and writ petition along with the notice period in the name of the respondents and after receiving the written response or after the deadline has expired proceed as per the rules.

Taking in consideration the interim order requested by the petitioner, there is no dispute over the fact that after the budget was presented through ordinance on 2078/02/15 after the dissolution of the House of Representatives on 2078/02/08. It appears that the Public Information Statement regarding the income and expenditure of Fiscal Year 2078/079 has come into effect once the Financial Ordinance 2078 dated 2078/02/15 was approved by the Hon/ble President to implement the financial proposals of the Government of Nepal. In point no. 199 of the income-expenditure statement of the Government of Nepal for the Fiscal Year 2078/079, it is stated that “Trade losses will be minimized by extracting mining stones, gravel, and sand, based on the environmental impact assessment. I have made an arrangement to give a discount on customs duty on imports to build a ropeway from the industry to the export point for the transportation of the mining construction materials to be exported.”

Article 30(1) of the Constitution of Nepal, states that “Every citizen shall have the right to live in a clean and healthy environment.” Similarly, Article 51 (g) of the Constitution of Nepal mentions

the policy related to conservation, promotion and use of natural resources. In which there is a provision of various policies including the protection, development and sustainable use of the natural resources available in the country while adopting the recognition of intergenerational justice in line with the national interest. It is also found that guidelines have been given by this court regarding the use of natural resources in the past. With regards the need to export mining stones, gravel, and sand, point no. 199 seems to aim to reduce trade loss. Intergenerational equity and environmental sustainability should be given importance in the use of the nation's natural resources. Excavating and exporting natural resources such as stone, sand, and gravel will have a far-reaching effect on the natural resources, environmental impact on the nation, including wild animals, birds, plants, and the biological diversity. And in the case that the nation has the right of self-determination (such as; Permanent sovereignty over natural resources) and no law has been made by the sovereign parliament regarding the use of the said natural resources, it appears that the provision of point no. 199 has been made through ordinance. The provisions of Article 114 of the Constitution of Nepal states that, "If any situation renders it to take immediate action the ordinance can be issued or is acceptable." From the viewpoint of balance of context and convenience, when the act is done through an ordinance on matters of long-term importance such as natural resources that have far-reaching effects, it will interfere with the authority and effectiveness of the legislature, thus, point no. 199 does not seem appropriate to be implemented. Therefore, the provision of point no. 199 of the Public Information Statement of the income and expenditure of the Fiscal Year 2078/079 shall not be implemented until the writ petition is finalized. An interim order has been issued in accordance with sub-rule (4) of Rule 19 of the Supreme Court (Constitutional Bench Operation) Rules 2072 in the name of the respondents. The order dated 2078/03/04 from this court also states that information about the order shall be given to the respondents immediately.

2.2. Orders on Writ no. 077-WC-0100, 077-WC-0101, 077-WC-0102, 077-WC-0103, 077-WC-0104, 077-WC-0105, 077-WC-0109:

What happened in this case? Why should the petitioner's order not be issued? If there is a basis and reason according to the law that the order should not be issued, the defendants must submit a written response through the Attorney General's Office within 7 days from the date of receipt of this order, excluding the road time limit. Also, keep a copy of this order and writ petition along with the notice period in the name of the respondents and after receiving the written response or after the deadline has expired proceed as per the rules.

In relation to the interim order requested by the petitioner, an interim order has been issued today in relation to the writ petition 077-WC-0099 (connected petition of the same nature of case) which also includes the petitioner Advocate Shailendra Prasad Ambedkar (Harijan). On the same basis and for the same reason, not to implement the provisions of point no. 199 of Public Information Statement on the income and expenditure of the Government of Nepal for the Fiscal Year 2078/079, until the case is finalized and to uphold the status quo. In this regard, an interim order has been issued in accordance with sub-rule (4) of Rule 19 of the Supreme Court (Constitutional Bench Operation) Rules 2072 in the name of the respondents. The information of the order to be given to the respondents immediately. It is also ordered that the submitted application 077-WC-0099 be kept as per the rules.

3. Written responses submitted by the respondents:

3.1. Government of Nepal, Ministry of Finance and Finance Minister, written response (for all writ petitions):

Clause (1) of Article 110 of the Constitution provides that the Finance Bill can only be introduced in the House of Representatives. Since the House of Representatives was dissolved on 2078/02/08 and the

budget could not be presented in that House, the Hon'ble President has issued Financial Ordinance 2078, Appropriation Ordinance 2078 and National Debt Collection Ordinance 2078. The policy of the state to achieve economic prosperity by maximizing the use of available means and resources, giving importance to the role of the private sector in the economy in sub-section (2) under the policy related to finance, industry and commerce as provided by clause (d) of Article 51 of the Constitution, and including the arrangements made in the mentioned ordinance, the Public Information Statement of the income and expenditure of the Fiscal Year 2078/079 has been made public on 2078/02/15. Article 55 of the Constitution stipulates that no question can be raised in any court regarding the implementation of the state policies provided in Article 51 of the Constitution. Since the budget speech has been made public regarding the implementation of that policy, it appears that the writ petitioner has brought such a matter which cannot be questioned in the Hon'ble Court.

The matter stipulated in point no. 199 of the budget speech is related to providing concessions for ropeway operation by preparing infrastructure for export management. If this is purely a policy matter, the matter of exporting stone, gravel, sand will only happen when the legal process is completed. In Schedule 5, 6, 7, 8, and 9 of the Constitution, the tasks of environmental protection and management are also placed under the jurisdiction of the Federal, Provincial and Local levels. Similarly, the Fifteenth Plan has determined the policy related to environmental protection. Taking in account that sustainable development is based on the interdependent relationship between environmental protection, Environment Protection Act 2076 has been issued and implemented to ensure the right of citizens to live in a clean and healthy environment by reducing as much as possible the adverse effects that can be caused by human beings, flora, fauna, nature and material things from environmental concerns, and to protect the environment through

the proper use and management of natural resources. Under the said Act, in order to effectively reduce, eliminate or control pollution and ensure that the work is carried out effectively in accordance to the preliminary environmental test or environmental impact assessment report, environmental inspectors can be appointed, or an employee can be designated to perform the duties of an inspector, provided they complete the prescribed process. Environmental protection works have been done under the mentioned constitutional, legal and policy provisions. Currently, there is no situation where there is any action against the provisions of the Environment Protection Act 2076 in any activities including industries to be established in Nepal.

Churekshetra is not mentioned anywhere in point no. 199 of the budget speech. If excavating rock, soil, gravel, and sand from the Chure-Terai area risks overexploitation and adversely impacts human health, flora and fauna, then extraction from such areas will not be carried out. Additionally, these materials will not be exported from all regions of the country. Instead, only industries that have obtained the necessary permits will be allowed to export them, provided they complete the process in accordance with the prevailing law. Regarding these exports, provisions have been established to offer concessions and discounts on the import of goods imported for the establishment of the ropeway needed for export management. It is evident that trade losses will be minimized by extracting mineral stones, gravel, and sand based on environmental impact assessment. After assessing the natural resources the extent to which the area can be exploited and mined is publicly published, and only after preliminary environmental testing and environmental impact assessment is done, necessary arrangements will be made regarding contract settlements. Decision on matters such as stone, gravel, sand not to be exported abroad from Churekshetra, parks and the intermediate area of the reserve; in the case of forest and river products allowing them to be exported only after at least one level of processing, prohibiting export of unprocessed boulder, was made

by the Council of Ministers in 2070. Thus, the proposed provision is intended to make the implementation of the Government of Nepal's earlier decision more systematic.

The Government of Nepal is fully committed to the protection and promotion of Churekshetra along with the life and environment of the citizens who are affected by it. Regarding Churekshetra conservation, there have been reasonable efforts by the Nepalese Government, various programs for the conservation of the area have been conducted and sufficient attention has been paid to the protection of the area. Excavation and extraction of stone, gravel and sand shall be done according to the methods and procedures specified by the prevailing law. It is not to be exported anywhere by any means. It will be exported through the ropeway. The establishment of the ropeway for extraction will be done in such a way as to protect the environment and reduce pollution. It is necessary to extract a certain amount of the river resources that have accumulated due to the floods that come in the river every year, and since it has to be raised and flowed in the right way, the collection of sediments is mandatory. If the collected materials are allowed to be exported after meeting the needs of the country, then the country's annual increasing trade deficit can be reduced.

The Export and Import (Control) Act 2013 provides the Government of Nepal the right to impose restrictions on exports and imports. There is a clear provision that the Government of Nepal can prohibit export or import according to that section or impose a quantitative restriction on it if it deems it necessary to control the export and import to achieve the objectives of clause (a) to clause (d) of Section 3 of that Act. In this way, the Nepal Government is vested with the right to export by law itself. According to the same provision, if the export of any river product is unorganized or if it is allowed to be exported causing overexploitation and adversely affecting the health of human, flora or fauna, the Government of Nepal shall immediately take necessary control. Thus, it is not legal nor logical

to request an order on a policy matter based on the claim that the provision of the budget speech is trying to pollute the environment prior to the implementation process of the said provision.

In order to implement the legal provisions including the Mining and Minerals Act 2042, the Government of Nepal, in the point no. 199 of the budget statement, has arranged that the trade deficit will be minimized by extracting stone, gravel and sand. When extracting stone, gravel and sand, it will be done only within the prevailing legal provisions such as the Mining and Minerals Act 2042, Environmental Protection Act 2076, etc. In this regard, there is no way that the constitutional and legal rights of people may be affected rather the state will benefit. If an order is issued by the Hon'ble court and the action is stopped, the increasing trade deficit will not be reduced and the economy will be negatively affected, so no order should be issued to stop the action as per the law, thus, writ petition should be dismissed.

3.2 Government of Nepal, Office of the Prime Minister and Council of Ministers (for all writ petitions):

According to Article 119 of the Constitution of Nepal, the Minister of Finance of the Government of Nepal shall submit the annual revenue and expenditure estimates to both houses of the Federal Parliament on the 15th of Jestha of each year, including the estimates of revenue for each financial year, the necessary amounts to be charged to the consolidated fund and the necessary amounts to be spent according to the Federal Appropriation Act. In Clause (1) of Article 110 of the Constitution, there is a provision that the Finance Bill can only be introduced in the House of Representatives. Since the House of Representatives was dissolved on 2078/02/08 and the dates of election of the House of Representatives was announced for October 26th and November 3rd, 2078, the budget could not be presented in the House of Representatives. Therefore, according to the constitutional provision, the budget should be

issued through an ordinance and accordingly, the Hon'ble Minister of Finance announced the budget on 2078/02/15. Article 114 of the Constitution states that if at any time, except when both Houses of the Federal Parliament is in session, if circumstances exist which render it necessary to take action, the President can issue an ordinance on the recommendation of the Council of Ministers. Similarly, Clause (2) of the article provides that after promulgation of such ordinance it shall be tabled at the next session of both the Houses of the Federal Parliament and if not accepted by both the Houses, it shall automatically become invalid. It can be revoked by the President at any time and if it is not revoked, it will automatically cease to be effective after 60 days after the meeting of both the Houses. Since the place where questions arise regarding the budget issued through ordinance is the Federal Parliament, it is not possible to request a judicial remedy from the court regarding the jurisdiction of the Federal Parliament. Employing jurisdiction of courts in such matters is contrary to the principle of separation of powers, checks and balances.

Clause (1) of Article 75 of the Constitution states that the executive power of Nepal shall be vested in the Council of Ministers in accordance with the Constitution and laws. In Clause (2), it is stipulated that the Council of Ministers shall be in charge of controlling and conducting the general direction, control and enforcement regarding the governance system of Nepal by adhering to the constitution and law. Similarly, Clause (3) provides that all work related to the Federal Executive of Nepal shall be done in the name of the Government of Nepal. In accordance with the provisions of the Constitution, the budget should be published as per the constitution and law to carry out the daily administration of the country, to carry out the expenditure burden on the accumulated fund and to mobilize the revenue. Therefore, the budget of the Federal government has been released according to the provisions of the ordinance. It is a product of necessity. Since arrangements have

been made in Article 114 of the Constitution regarding ordinance, it cannot be said that they are contrary to the Constitution as it ought to be implemented in accordance with those provisions.

Clause (2) of Article 56 of the Constitution strictly stipulates that the exercise of the state power of Nepal shall be done by the Federal, Provincial and Local levels in accordance with the constitution and the law. Therefore, in relation to the use of state power, the budget must be made public by the Federal government, the Provincial government and the Local level within the purview of the constitution and law. Economic rights will be exercised by all these bodies in accordance with the law. Since the representative system is accepted by the country, the work done by the executive body is examined by the people's representative body, so the federal budget, the budget of the provincial government and the budget of the local level can be examined by the legislature of the relevant bodies. In Articles 207 and 230 of the Constitution, the fact that annual estimates 'may be submitted' does not mean it is acceptable if the budget is not submitted to the mentioned provincial governments and local levels. Since the ordinance issued in the event requiring an immediate action is a law in itself, it cannot be claimed that the actions carried out by the implementation of the said constitutional provision are otherwise.

Nepal's federalism is based on the principle of coordination, cooperation and co-existence in relation to the Federal, Provincial and the Local level. The Federal, Provincial and the Local level (Coordination and Inter-Relationship) Act 2077 has been issued to regulate the relationship between the Federal, Provincial and the Local level. Apart from this, An Act Made to Intergovernmental Fiscal Arrangement 2074, National Natural Resources and Finance Commission Act 2074 and the Appropriation Act issued annually, including three-level inter-relationship issues have been managed through laws. Since the work will be coordinated and carried out according to the Constitution and the presented Act, there is no

need to suspect what will happen if the budget goes otherwise.

Article 114 of the Constitution provides for ordinance so that there is no legislative vacuum in the absence of a representative assembly as claimed by the writ petitioner. Since the Ordinance can be issued in accordance with the said provision, the budget for 2078/079 has been issued in accordance with the same constitutional provisions. When the Constitution clearly provides that when the Federal Parliament is not in session, and an immediate action is required ordinance can be issued, the claim that the budget cannot be made through an ordinance, and the provision of export of goods such as gravel, stone and sand cannot be made in the budget is contrary to the constitution. Clause (1) of Article 59 of the Constitution, has ensured that the Federal, Provincial, and Local levels will prepare their respective budgets and submit the budget in accordance with the federal law, and accordingly, in the case of the province, Article 207 and in the case of the local level, Article 230 provides for the estimation of revenue and expenditure.. Thus, when the budget is being made public in accordance with the aforementioned constitutional and legal provisions, there is no need for an order to provide arrangements that no action can be taken without submitting the budget.

There is a provision that the directive principles, policies, and responsibilities mentioned in Part 4 of the Constitution shall serve as guidelines for the operation of the state. Similarly, Article 50, provides directive principles and Article 51, provides provisions for state policies. Sub-clause (d) of the same article, under the policy related to economy, industry and commerce, the policy related to import substitution, export promotion has been determined in point no. 10. Likewise, Article 51 (d) (2) mentions the policy of achieving economic prosperity by maximizing the use of available means and resources by giving importance to the role of the private sector in the economy. The matter arranged in point no. 199 of the budget of the Fiscal Year 2078/079 is related to providing

concessions to operate the ropeway by preparing infrastructure for export management. If this is purely a policy matter, the matter of exporting stone, gravel, and sand will only occur once the legal process is completed. Therefore, when the policy is analyzed and implemented in the policy matter, no order can be issued to curtail the executive action by interfering with the court in advance.

Article 30 of the Constitution has guaranteed every citizen the right to live in a clean and healthy environment. Under this right, victims of environmental pollution or degradation can receive compensation from the polluter in accordance with the law, and the necessary legal arrangements can be made for a proper balance between environment and development in the work related to the development of the nation. Article 51 of the Constitution of Nepal provides for the protection, promotion and sustainable use of forests, wild animals, birds, plants and biological diversity by increasing the awareness of the public about environmental hygiene and minimizing the risk to the environment from industrial and physical development, or if there is a negative impact on nature, environment or biological diversity. It has adopted policies such as adopting appropriate measures to eliminate or minimize negative environmental impact in the event that it occurs, and those who pollute the environment should bear the responsibility for it, and the principles of environmental sustainable development such as prior precautions and prior informed consent in environmental protection. Necessary arrangements in this regard have been made in the Environment Protection Act 2076.

Taking in account that sustainable development is based on the interdependent relationship between economic development and environmental protection, to ensure the right of citizens to live in a clean and healthy environment by minimizing the adverse effects that can be caused by environmental degradation on humans, flora, fauna, nature and material things, and to protect the environment through proper use and management of natural resources, the Environment

Protection Act 2076 has been issued and implemented. As per the Act, environmental inspectors can be appointed, or an employee can be designated to perform the duties of an inspector, provided they complete the prescribed process, in order to effectively reduce, eliminate or control pollution and ensure that the work is carried out effectively in accordance to the preliminary environmental test or environmental impact assessment report.

It has been arranged as a matter of policy in point no. 199 of the budget of the Fiscal Year 2075/079 to carry out the extraction of gravel, stone and sand as mineral products in an orderly and reliable manner by fulfilling the legal provisions in place. Schedules 5, 6, 7, and 9 of the Constitution environmental protection and management tasks are also placed under the jurisdiction of the Federal, Provincial and Local levels. Similarly, the foundation paper of the Fifteenth Plan has determined the policy related to environmental protection. Environment protection activities have been done under the mentioned constitutional, legal and policy provisions. Therefore, there is no situation of doing anything contrary to the provisions of the Environment Protection Act, 2076 in any activities including industries established in Nepal.

The proposed provision of the budget claimed by the writ petitioner will not destroy Chure, adversely impact the environment and or violate the rights as guaranteed under Article 30 of the Constitution. In sub-section (1) of Section 3 of the Export and Import (Control) Act, 2013, the Government of Nepal may, by a notified order, impose restrictions on the export or import of any item, and sub-section (2) states that if it is deemed unnecessary to maintain the restriction imposed on the export or import of any item in accordance with sub-section (1), there is a provision that the Government of Nepal may modify, change or remove such restriction at any time by an informed order stating the basis and reason thereof. Excavation of rocks, soil, stones, gravel, sand from Chure-Tarai area and allowing them to be exported outside Nepal will not be exported from

such places in cases where over-exploitation will adversely affect the health of human, flora and fauna. Such materials will not be exported from all regions of the country, instead, only industries that have obtained the necessary permits will be allowed to export them, provided they complete the process in accordance with the prevailing law. In relation to such export, the arrangement regarding giving concessions and discounts on the import of goods imported for the establishment of the ropeway for the export management has been arranged in point ino. 199 of the presented budget.

However, the export of river products is not arranged in this way in the budget. For this, the provisions of the Export Imports (Control) Act, 2013 are sufficient. Therefore, the claim that the provisions of point no.. 199 of the budget is in conflict with the Constitution is unjustified. The prosperity that Nepal wants can be achieved through a balanced and sustainable prioritization of available natural resources and resources. Prosperity can only be possible if rapid economic growth is achieved by carrying out physical development activities. The stones, gravel and sand that flow annually from the rivers of Nepal are not only important natural resources but also essential materials for development and construction. Environment can be protected only if such materials are mined in an environmentally safe manner. Technical estimates suggest that systematic extraction of river products could yield many times more than Nepal's internal consumption, indicating that such extraction should be taken in an intrinsic manner. In a developing country like ours, it is imperative to carry out physical development activities while maintaining a balance between development and environment. In this situation, subject matters that are made as a policy under the executive authority and are implemented in accordance with prevailing laws, the writ petition submitted on the basis of assumption and various arguments is not justiciable and is therefore liable to be dismissed.

3.3 Gandaki Provincial Government, Chief Minister and Council of Ministers Office written response (Writ no. 077-WC-099 and 077-WC-0105)

From which action of this office, the opposing writ petitioners claimed, Article 30 (1) of the Constitution of Nepal, Section 2(j) and (k), 3, 6, 7, 15 and 35, of the Environment Protection Act 2076, Section 11(d) and (g) of the Local Government Operation Act 2074, Section 10(a) (d) and (e) of the Land and Watershed Protection Act 2039 and Section 7, 19, and 20 of the Water Resources Act 2049 have been violated? Since it has not been established anywhere in the presented writ petition, in the case of this Office, the writ petition should be dismissed.

3.4 Bagmati Provincial Government, Chief Minister and Council of Ministers' Office Hetauda written response (077-WC-0099 and 077-WC-0105):

Article 30 (1) of the Constitution of Nepal stipulates the fundamental right that every citizen has the right to live in a clean and healthy environment. In Article 51(g) of the Directive policies of the state include protection, promotion and environment-friendly natural resources available in the country. Topics such as sustainable use, protection, promotion and sustainable use of forests, wildlife, flora and biological diversity while minimizing the risks to the environment from industrial and physical development are mentioned. Similarly, the Environmental Protection Act 2076 and Regulations 2077, Soil and Watershed Protection Act 2039, Watershed Act 2049, Local Government Operation Act 2074 also mention the issue of sustainable development while protecting natural and environmental resources. This province has always been active and committed to the effective implementation of environmental protection regulations determined by the Constitution of Nepal and prevailing laws. The writ petitioner has filed the writ petition before this Hon'ble court for non-implementation of the point no. 199 of Public Information

Statement on the income and expenditure of the Government of Nepal for the Fiscal Year 2078/079. However, it is well-known that this province does not have jurisdiction in the annual budget brought by the Federal government. As the current law clearly mentions that natural resources should not be exploited and protected and promoted, and the provincial government emphasizes that no actions contrary to the law should be carried out by this office, the writ petition has been dismissed in the case of this office, thus the writ petition should be dismissed in the case of this office.

3.5 The Office of the Chief Minister and Council of Ministers, Lumbini Province, Butwal, written response (Writ no. 077-WC-0099 and 077-WC-0105):

The writ petition filed as an opposition to this office without even mentioning that the actions of the Office of the Chief Minister and the Council of Ministers of Lumbini Province have adversely affected the fundamental rights of Nepalese citizens, is baseless and unfounded. As far as the extraction of mining stone, gravel and sand is concerned, the said matter is in the list of the sole rights of the province for exploration and management of mines and national forest, water use and environment management within the province according to Schedule-6 of the Constitution of Nepal and according to Schedule-8 the protection of mines and minerals is a local authority. Since it is a subject in the list of individual rights of the state, it is managed by the state and local level in accordance with the laws and it is not possible to export, mining stone, gravel, sand based on the budget of the federal government and only after completing the process according to the environmental protection act of the state. There is no adverse impact on the environment as claimed by the petitioner as such mining materials will be extracted in line with the procedures. The national trade deficit will be minimized by adopting criteria that ensure no adverse environmental impact, in accordance with the Environmental Protection Act 2076. Since the government is committed to the protection of the Chure, evident through the

“Presidential Chure-Tarai-Madhesh Conservation Program” being implemented and operating in the spirit of the Constitution and the law, no extraction of stone, gravel and sand is allowed in that regard. Thus, the writ petition should be dismissed.

3.6 Province no. 1, Provincial Government, Chief Minister and Council of Ministers Office Biratnagar, written response (Writ no. 077-WC-0099 and 077-WC-0105)

What is the involvement of the Province no.1 Provincial Government, Chief Minister and Council of Ministers Office, Biratnagar regarding the alleged illegal mining of river materials from the rivers with or without permission from the relevant body? Also, what kind of action or decision of this office has violated the petitioner’s constitutional and legal rights? Nothing has been mentioned in the writ petition in this regard. As mentioned in point no. 199, there is a provision of exempting customs duties on imports to build a ropeway from the industry to the export point for the transportation of the exported mining construction materials. Subjects such as customs, internal duties, value added tax and international trade, exchange, port, quarantine are under the jurisdiction of the Federal government as per the Constitution of Nepal. Accordingly, it is clear that the Provincial government and this Office does not have any involvement in the decision made by the Federal government to exempt the customs duty on import to build a ropeway from the industry to the export point for the transportation of mining construction materials to be exported. Since, decision regarding budget speech is done by the Federal government, there is no basis for the petitioner to make the Province no.1 Provincial Government, Chief Minister and Council of Ministers Office, Biratnagar an opponent to which the writ petition should be dismissed.

3.7 Written response from the Office of the Chief Minister and Council of Ministers of the Western Province (Writ no. 077-WC-0099 and 077-WC-0105):

The subject matter raised in the writ petition is the provision of exempting the customs duty on imports to construct a ropeway from the industry to the export point for the transportation of mining construction materials mentioned in point no. 199 of the Public Information Statement of income and expenditure of the Fiscal Year 2078 / 079 presented by the then Finance Minister of the Government of Nepal, Bishnu Prasad Paudel. As it does not seem to be related and concerned with the office, the writ petition is dismissed.

3.8 Written response from the Office of the President (Writ no. 077-WC-0100, 077-WC-0101, 077-WC-0103, 077-WC-01045 and 077-WC-0109):

In Article 66 (2) of the Constitution of Nepal, when the President complies with his rights and duties, any other work to be performed by the President shall be done with the recommendation and consent of the Council of Ministers, except for the work that is expressly provided that it shall be done on the recommendation of any body or official according to this Constitution or federal law. There is a provision that such recommendation and consent will be submitted through the Prime Minister. Similarly, Article 114 (1) of the Constitution of Nepal, states that “The President may issue an ordinance on the recommendation of the Council of Ministers in cases other than when the sessions of both houses of the Federal Parliament are in session”. Therefore, in the context of Clause (1) of Article 114 of the Constitution, which clearly states that the President can issue an ordinance on the recommendation of the Council of Ministers, the matter raised by the petitioner is in regards to budget speech for the Fiscal Year 2078/079 and it appears that the matter mentioned in the budget speech is related to the financial ordinance. Therefore, the issue of Financial Ordinance 2078, which includes the issues raised by the petitioner, was decided by the meeting of the Government of Nepal, Council of Ministers and with the recommendation of the Hon’ble Prime

Minister, the President issued Financial Ordinance 2078. The act of issuing an ordinance is in accordance with the Constitution, as the mandatory provision in Article 114 (1) of the Constitution has only been implemented by the Hon'ble President. The writ petition filed as an opposition to this office on the actions taken by the office of the President to implement the said constitutional provision, should be dismissed.

3.9 The written response of the Government of Nepal Ministry of Home Affairs (Writ no. 077-WC-0100, 077-WC-0109):

The Government of Nepal Ministry of Home Affairs is committed to maintaining and promoting the national interest by safeguarding the rights and interests of the citizens guaranteed by the Constitution and law by making the concept of legal state come true by adhering to the Constitution and prevailing laws. Upon reviewing the writ petition, it seems that the main contention is that the provision of point no. 199 of the budget speech of the Fiscal Year 2078/079 is in conflict with the Constitution of Nepal and should be invalidated and annulled by the order of certiorari. Also, in the said writ petition, no grounds and reasons for making this ministry an opponent are mentioned. What actions and decisions of this ministry in the writ petition have violated the rights granted by the Constitution and the law? That matter has not been mentioned anywhere in the writ petition. The writ petition submitted by the writ petitioner, which was filed as an opponent even to this ministry without any valid reason, should be dismissed.

3.10 Written response of the Ministry of Law, Justice and Parliamentary Affairs, Government of Nepal (Writ no. 077-WC-0100, 077-WC-0105 and 077-WC-0109):

The right of every citizen to live in a clean and healthy environment is protected under Article 30 of the Constitution of Nepal. Clause (3) of the same Article clearly states that resources can be used in a balanced way for development provided that this article will not

be deemed to have hindered the creation of the necessary legal arrangements for a proper balance between the environment and development in the work related to the development of the nation. Similarly, the Environmental Protection Act 2076, has been issued and is being implemented as a special law regarding environmental protection. According to the said Act, the proposed environmental study report should be prepared by the proposer to prepare the environmental study report, preliminary environmental test and environmental impact assessment in relation to the proposal prepared for the implementation of any plan, project, or work plan to change the existing environmental condition or change the land use. A clear provision has been made regarding the non-implementation of the proposal. As far as the Public Information Statement of the income and expenditure of the Fiscal Year 2078/079 is concerned, it is clarified in the beginning that the subject mentioned in point no. 199 is based on the environmental impact assessment, thus, it is not possible to file a writ petition on the grounds of alleged environmental impact assessment. Issue. The policy adopted by the government to reduce the trade deficit by making proper use of the resources available in the state cannot be said otherwise. As far as the suspicion that the Chure region of Nepal may be destroyed and desertification of the Terai has been expressed in the writ petition, the order issued to form President Chure-Terai-Madhesh Conservation Development Board in 2071, is under implementation thus, the written response filed by the Ministry of Law, Justice and Parliamentary Affairs calls dismissal of the writ petition.

3.11 Government of Nepal, Ministry of Federal Affairs and General Administration s written response (077-WC-0100 and 077-WC-0109):

The standard created by this ministry to organize the excavation of stone ballast and sand in the development work and to prevent shortage of river and mine materials including stone ballast and to discourage the uncontrolled exploitation of such construction

materials has been approved by the meeting of the Government of Nepal Council of Ministers dated 077/04/05 . Approved by the Council of Ministers of the Government of Nepal, the “Standards related to stone, gravel, sand excavation, sale and management, 2077;” the concerned rural municipality or municipality should determine the area where mining and collection of mineral materials will be carried out based on the environmental study report. In the same way, there is a provision that during the extraction of stone and gravel sand in the Chure area, it can only be done on the basis of the consent and approved standards of the President Chure-Tarai-Madhesh Conservation Development Board. In addition, the provision of a monitoring committee under the coordination of the head of the district coordination committee to monitor the processes related to the extraction, collection and sale of river and mineral products has also been made in the said standard. In this way, in order to manage the extraction and sale distribution of mineral products, this ministry has created standards and sent letters to all local levels. From this work, it is clear that this ministry is aware and committed to the work of environmental protection. Therefore, in this regard the petition of the opponent is found to be futile, the writ petition should be dismissed.

3.12 Government of Nepal, Ministry of Culture, Tourism and Civil Aviation written response(Writ no. 077-WC-0100):

As mentioned by the opposition in the writ petition, no one can disagree that it is the duty and responsibility of all of us to protect and promote the natural resources of Nepal. This ministry is always alert and ready to protect and promote the natural resources of Nepal. This ministry has always been following the Constitution and existing rules and laws of Nepal and is committed to continue to do so. As claimed in the writ petition, no action has been taken by this ministry to pave the way for Chure exploitation. The writ petitioner’s claim is based on the point no. 199 of the Public Information Statement of the budget of the Fiscal Year 2078/79.

And since that does not fall within the scope of this ministry as per the Nepal Government Division of Work Regulations of 2074, and this ministry does not have any role in this regard, and the policy and plan related to this ministry submitted by this ministry is not mentioned, making it irrelevant to this ministry, the present writ petition is liable to be dismissed.

3.13 Office of the Vice President, Lainchaur, Kathmandu , written response (Writ no. 077-WC-0101):

Article 67 (2) of the Constitution of Nepal, provides a constitutional provision that in the absence of the President the Vice-President will perform the duties of the President. Likewise, there is no action taken by this Office that adversely affects the fundamental rights granted to the petitioner by the Constitution and prevailing laws of Nepal, the interests of the country, sovereignty, geographical integrity. With the aim of protecting the environment and making appropriate use of forest, natural resources and minerals for the benefit of the nation, the annual estimate of revenue and expenditure for the Fiscal Year 2078/079 has been disseminated and published. The petitioner argues that the environment and biological diversity of the Chure area will suffer if stones, sand, and gravel are not extracted and exported. However, contrary to this claim, the implementation of point no. 199 the budget statement for the Fiscal Year 2078/079 will proceed only if it complies with the Environmental Protection Act and Regulation. This means that an environmental impact assessment must confirm that there will be no adverse effects on the environment. Thus, I respectfully request to dismiss the present writ petition filed as an opponent to this Office.

3.14 Regarding the written response of the Speaker of the National Assembly, Ganash Prasad Timilsina (Writ no. 077-WC-0101):

According to the writ petitioner, in the absence of the representative

assembly of the Federal Parliament or other Local assemblies including the Provincial Assembly, Village Assembly or Municipal Assembly, the Government of Nepal or anyone on behalf of the Government of Nepal is not allowed to submit the income and expenditure estimate statement or if it is submitted, what will be the procedure and result of the same or the Federal budget. Since there is no clear provision in the Constitution regarding whether it is a constitutional obligation to submit the budget to the Provincial Assembly or whether it is considered possible, what will happen if it is submitted or made public on any day other than 15th of Jestha if the corresponding draft of the bill is presented by the Government of Nepal to the Federal Parliament in this regard in accordance with the parliamentary law and procedure. Thus, in the context of passing the bill, there will be necessary administrative support from me, so no order as per the demand of the writ petitioner should be issued in my name. The writ petition. Should be dismissed.

3.15 Written response of Speaker of the House of Representatives Agni Prasad Sapkota (Writ No. 077-WC-0101)

Parliament is the body in which the sovereignty of the people is vested. Since there is a principle of “no taxation without representation” and since there is a constitutional arrangement to present tax-related matters to the House of Representatives, which has representatives directly elected by the people, if the budget is brought from an ordinance with malicious intent, it seems that a wrong tradition will be established and a constitutional crisis will occur. The petitioner states that in the absence of a representative assembly of the Federal Parliament as provided in the Constitution, the Government of Nepal or anyone on behalf of the government of Nepal from outside other local assemblies including the state assembly or the village assembly or the Government of Nepal will not be allowed to submit the income and expenditure estimate statement or if it is submitted, what will be the procedures and results of the same or the federal budget. Since there is no clear

provision in the Constitution regarding whether it is a constitutional obligation to submit the budget to the Provincial Assembly or it can only be done, what will happen if it is submitted or made public on any day other than 15th of Jestha. In this regard, if the corresponding draft of the Bill is presented to the Federal Parliament by the Government of Nepal, in accordance with the parliamentary law and procedure, there will be the necessary administrative support from me regarding the passage of the Bill, so it does not appear that any order as requested by the writ petitioner should be issued in my name.

3.16 Government of Nepal, Ministry of Industry, Commerce and Supply, written response (Writ no. 077-WC-0102, 077-WC-0103, 077-WC-0104, 077-WC-0105, 077-WC-0109)

Geographically, the study work is being done in the Mahabharata mountain range, and the mineral extraction area is not geographically in the Chure area, some areas are in the national forest area and some parts are partially in the Awadi area. In this regard, there will be no adverse action affecting the environment, biological diversity, etc. of the Chure area as per the claim of the opponent. There is no possibility of damage to Churekshetra. According to the prevailing law, the protection of natural resources is prioritized for the purpose of environment protection during mining of construction-oriented minerals from the government of Nepal. In this regard, the policy decision regarding point no. 199 of the Public Information Statement of the Fiscal Year 2078/079 which states, ““Based on the environmental impact assessment, trade losses will be minimized by extracting mineral stone, gravel, sand, and exemption of customs duties on imports building a ropeway from the industry to the export point for the transportation of the exported mineral construction materials,” has been adopted. After the promotion of the construction-oriented minerals, by establishing mines and crushers in an integrated manner, the dependence on the Chure and Terai rivers will be reduced and the internal demand

will be met and only the excess amount can be exported. When the demand for construction-oriented minerals such as stone, gravel, sand, etc. has increased excessively, illegal exploitation should be discouraged, prevented and controlled, promotion of construction-oriented minerals based on sustainable development and regulation of mining will be carried out based on the decision of the Government of Nepal. The writ petition should be dismissed as it is possible to manage the geological and environmental damage, even the construction-oriented minerals can be properly regulated by the regulatory agencies by adopting the law related to mining. The writ petition is dismissed as the management of geological and environmental damage can be done with proper regulation by the regulatory agencies by adopting the law to mining.

3.17 Government of Nepal, Ministry of Forest and Environment, Environment Department, BabarMahal, written response (Writ no. 077-WC-0103 and 077-WC-0109):

Address of the Hon'ble Prime Minister referred to in the writ petition, the legal provisions related to sub-section 2 of Section 2 of Financial Ordinance 2078, Title No. 25.05, 25.15, and 25.17 of Section 1 of Schedule 2 of the same ordinance, budget speech point no. 199 of Fiscal Year 2078/079 issued by the Ministry of Finance, including the press release of the Ministry of Finance on 2078/02/19, and the policy and legal arrangement, including the plan to export stone, gravel and sand from Churekshetra to India are all related to the scope of work of the Government of Nepal, the Office of the Prime Minister and the Council of Ministers and the Ministry of Finance as per the Division Regulations 2074 Schedule 2, Rule 5. And since the matter does not fall within the jurisdiction of this department, the writ petition filed by an unrelated body as an opponent to this department should be dismissed as futile.

3.18 Government of Nepal, Ministry of Land, Infrastructure and Transport, written response (Writ no. 077-WC-0103):

This Ministry has always been aware of the interests of the country, sovereignty, geographical integrity, climate and environmental protection, appropriate utilization of forests, natural resources and minerals in the interest of the country as mentioned in the writ application. From this ministry, no action has been taken to excavate stone, sand and gravel from Churekshetra and export it abroad, polluting the environment, depleting natural resources. And the policy decision of Government of Nepal in the budget statement of the Fiscal Year 2078/079, it appears that point no. 199 can aid in the country's economic development and prosperity and advanced nation building and sustainable development. Since the matter of extracting stone, sand and gravel from Churekshetra and exporting it to foreign countries as mentioned in the writ petition, does not fall within the purview of this ministry in accordance with the Government of Nepal (Division of Work) Regulations 2074, the present writ petition should be dismissed.

3.19 Government of Nepal Ministry of Industry, Commerce and Supply, Ministry of Mines and Geology, written response (Writ no. 077-WC-0103 and 077-5WC-0109):

According to the decision of the Economic and Infrastructure Committee of the Government of Nepal (Council of Ministers) dated 2071/04/11, for the long-term use of river stone and sand, as a long-term alternative source, arrangements have been made for the long-term supply of stone, gravel and sand in the Mahabharata mountain range above Churekshetra. And for this, the Ministry of Industry, Commerce and Supply of the Government of Nepal was given the responsibility of this Department of Mines and Geology.

According to the same directive, quality and quantity have been identified in 16 villages of different 14 districts of the country from this department. In the area where the forest area is low,

exploration and its action plan, field-wide geological study, mining scheme, preliminary environmental test work list and preliminary environmental test report have been prepared and proposed for the proposed mining process of construction-oriented minerals at 92 locations in those areas. For this simple construction-oriented mineral extraction permit, the mining scheme of the 92 mining areas was approved by the departmental decision and the initial environmental test report was granted according to the decision of the Ministry of Science, Technology and Environment dated 2072/05/17.

It is requested that the mineral extraction area should not be geographically in the Chure area and some areas should be in the National Forest area while some partially in the Awadi area. “Geologically, the study work has been carried out in the Mahabharata mountain range and the rock in the proposed mine is geologically a rock that cannot be found in Chure. After the promotion of construction-oriented minerals, by establishing mines and crushers in an integrated manner, the self-sufficiency in the rivers of Chure and Terai will be reduced. The excessive demand for construction-oriented minerals such as stone, gravel, and sand has been increasing, and the illegal exploitation of construction-oriented minerals is being carried out. Also, the promotional work is being done based on the decision of the Nepal government. It seems that the exploration area does not belong to the geographical area. Thus, the petition should be dismissed as aforementioned activities are being carried in accordance with the existing law.

3.20 Government of Nepal, Department of Forestry and Land Conservation, written response (Writ no. 077-WC-0103)

With regards to the claim of the writ petition, “No part of the national forest shall be used in a manner to change the land-use of the forest area,” provided in Chapter 12 of the Forest Act 2076 (provisions related to development projects) was issued to contribute to national

prosperity by protecting, enhancing and utilizing forests, wildlife, environment, water bodies and biological diversity. However, this arrangement will not be applicable in the case of forest area provided to any project as per the decision of the Government of Nepal for infrastructure development. In addition, if there is no other option but to use the forest area to carry out projects of national pride, and if it is found that the operation of such a plan will not have a significant adverse effect on the environment in accordance with the prevailing law, the Government of Nepal shall act as a means to carry out such a plan. It can give permission to use any part of the national forest as specified. Likewise, while providing the forest area for the operation of the plan, at least as much forest area should be used for planting trees in the area as possible. In the event that the land is not available, the manager of such a project shall provide the necessary funds to arrange the land for forest development. In addition, in the legal system which states that if there is any loss or damage to any person or community while giving permission to use any part of the forest, the Nepal Government must make appropriate arrangements for compensation, if there is no other option other than using the forest area for the matter claimed by the petitioner and such environmental test according to the prevailing law. In the Forest Act 2076, there is a necessary provision in this regard that if it is found that there will be no significant negative impact on the environment during the implementation of the plan, the Government of Nepal can give permission to use any part of the national forest for the purpose of implementing such a plan.

Nepal's prosperity can be achieved through the balanced and sustainable use of available natural resources. Prosperity can only be possible if rapid economic growth is achieved by carrying out physical development activities. Stone, gravel, and sand available in different places of Nepal are not only important natural resources but also essential materials for development. Environment can be protected only if it is mined sustainably. In a developing country

like ours, it is mandatory to conduct physical development activities while maintaining a balance between development and environment. In this case, the writ petition is dismissed as the issue pertains to a policy decision made under executive authority and will be carried out in accordance with the existing legal framework.

3.21 National Parks and Wildlife Conservation Department, Babarmahal, written response (Writ no. 077-WC-0103):

According to the prevailing National Parks and Wildlife Protection Act, 2029, no one shall be allowed to mine, quarry or remove any mineral, stone, gravel, soil or other similar substances within the National Park or Reserve under prohibited activities. If any person contravenes this Act or the rules made under and commits a crime, such person is liable to pay fine twice as much the bail bond and imprisonment up to one year, and in case of no bail bond, then fine up to Rs.20,000 or imprisonment for six months or both, depending on the nature of crime. The petitioner has not been able to mention anywhere in the writ petition as to what actions and conditions of this department have violated the rights of the petitioner. Since this department has no involvement in the matter mentioned in point no.199 of the budget for the Fiscal Year 2078/079 announced by the Honorable Finance Minister Mr. Bishnu Prasad Paudel on 2078/02/015. Since there is no involvement of this department and this department has been made an opponent without any basis, the said writ petition should be dismissed.

3.22 Government of Nepal, Ministry of Energy, Water Resources and Irrigation, written response (Writ no. 077-WC-0103):

Excavation of gravel and sand from Chure area, operation of mining industry, construction of transport route ropeway, export of stone, gravel and sand abroad as claimed by the opposition writ petitioner are contrary to prevailing laws against forest, environment, biological diversity, natural resources, wildlife. No decision, order or

action has been taken by this ministry to affect the conservation and protection of biodiversity. The petitioner has failed to identify any actions by this ministry that have violated constitutional rights and rights under prevailing law of petitioner. As far as the matter of point No. 199 of the Public Information Statement of the Fiscal Year 2078/079, which the writ petitioner has claimed, the matter does not come under the jurisdiction of this ministry. Thus, the writ petition should be dismissed.

3.23 Government of Nepal, Ministry of Forestry and Environment, written response (Writ no. 077-WC-0100, 077-WC-0101, 077-WC-0103, 077-WC-0104 and 077-WC-0109)

There is a policy provision regarding providing concessions for rope-way operation by preparing infrastructure for export management under point no. 199 of the budget of the Fiscal Year 2078/079. Such stone, gravel, sand can be exported only when the proper legal process has been completed in accordance with the policy arrangement. Section 49 of the prevailing Forest Act 2076 provides legal provision related to offenses which states, “If anyone who commits or engages in any of the following acts shall be deemed to have committed an offense under this Act except as otherwise provided in this Act or the rules made under this Act.” Likewise, and Section 49, clause (i) states that, “If person extract boulders, pebbles, sand or soil from the river flowing through the forest area, or burn charcoal or lime or manufacture other finished products from them or collect them, and extract or collect mineral substances, shall be deemed to have committed a crime,” and is liable for punishment with both imprisonment or fine depending on the offense. Thus, taking stone, gravel, sand or soil from the river flowing through the forest area, extracting or collecting minerals is considered an offense according to the law.

According to sub-section (1) of section 3 of the Export and Import (Control) Act 2013, the Government of Nepal may impose

a restriction on the export or import of any item by a notified order and sub-section (2), it is necessary to maintain the restriction imposed on the export or import of any item in accordance with sub-section (1). If it is not necessary, the Government of Nepal can modify, change or remove such restrictions at any time by a notified order and the reasons thereof. According to the Export and Import (Control) Act, 2013, the issue of restricting or allowing the export or import of such items by excavating rock, soil, stone, gravel, sand is a matter under the jurisdiction of the Ministry of Industry, Commerce and Supply, so this Ministry should not be an opponent in this matter. Thus, the petitioner's claim should be dismissed with regards to this Ministry.

3.24 President Chure-Terai-Madhesh Conservation Development Committee, Lalitpur's written response (Writ No. 077-WC-0104):

What was the involvement of the President Chure-Tarai-Madhesh Conservation Development Committee in the matter mentioned in Financial year 2078/079 point no. 199 of the budget? For this , the opposition has not been able to logically and rationally mention what operation of the President Chure-Tarai-Madhesh Conservation Development Committee has violated the existing constitution, law and international treaty agreements to which Nepal is a party to. The Financial year 2078/079 point no. 199 of the budget suggests that there is a policy provision regarding the provision of infrastructure for export management and provision of concessions for the operation of the ropeway.

Such stone, gravel and sand can be exported only if the due legal process has been completed regarding the policy of exporting. As far as the right to live in a clean and healthy environment provided by the constitution and the environmental impact assessment are the subject, taking into account the fact that sustainable development is achieved through the interdependent relationship between

economic development and environmental protection, the adverse effects of human beings, animals, plants, nature and physical objects due to environmental degradation should be reduced as much as possible. In order to ensure the right to live in a healthy environment and to protect the environment through the proper use and management of natural resources, the Environment Protection Act 2076 has been issued and implemented. According to the said Act, any proposal can be implemented only after the environmental study report is prepared and the environmental study report is approved. In addition, the said Act has arrangement to appoint environmental inspectors after completing the prescribed process to effectively reduce, eliminate or control pollution and carry out brief environmental studies or preliminary environmental tests or environmental impact assessment reports or appoint any employee to do the work of such inspectors

In sub-section (1) of section 3 of the Export and Import (Control) Act, 2013, the Government of Nepal may, by notified order, impose restrictions on the export or import of any item and in sub-section (2) maintain the restriction imposed on the export or import of any item as per sub-section (1). If it is not necessary, the government of Nepal can modify, change or remove such restrictions at any time by an informed order, stating the basis and reason. Therefore, in accordance with the Export Import (Control) Act, 2013, the issue of restricting or opening the export or import of such items by excavating rock, soil, stone, gravel, sand is a matter under the jurisdiction of the Ministry of Industry, Commerce and Supply. In this regard, the Madhesh Conservation and Development Committee should not be the opposition and the writ petition should be dismissed.

3.25 Government of Nepal, Ministry of Foreign Affairs, SinghanDarbar's written response (Writ no. 077-WC- 0109):

In what ways has this ministry's actions infringed upon the

petitioner's rights? There is a lack of clear and objective basis for the above question. As there has been no action on the part of this ministry regarding the issue raised by the writ petitioner, this ministry should not be made an opponent. Therefore, the present writ petition should be dismissed in the case of this Ministry.

3.26 National Planning Commission's written response (Writ No. 077-WC-0109):

In Part-4 Article 49 of the Constitution of Nepal, "Directive principles, Policies and responsibilities mentioned in this part shall serve as guidelines for state operations. The state shall mobilize resources as necessary to implement the principles, policies and responsibilities mentioned in this part." Similarly, Article 50 provides directive principles, and Article 51 provides provisions for state policies. Clause (d) of the said Article 51, sub-clause (2) under the policy related to economy, industry and commerce mentions the policy of achieving economic prosperity by maximizing the available means and resources, giving importance to the role of the private sector in the economy. Similarly, sub-section (10) has determined policies related to import substitution and export promotion in accordance with the national interest. Similarly, in Article 55, there is a provision that no question can be raised in any court regarding the implementation of any matter written in this part. The matter stipulated in point no. 199 of the budget statement is related to providing concessions to operate the ropeway by preparing infrastructure for export management. If this is purely a policy issue, the matter of extracting stone and sand will be done only after the legal process has been completed. Schedules 5, 6, 7, 8, and 9 of the Constitution of Nepal have also included the tasks of environmental protection and management under the jurisdiction of the federal, province and local level. Excavation and extraction of stone, gravel and sand shall be done according to the methods and procedures specified by the prevailing law. The Export and Import Control Act 2013 has given the Government of Nepal the right to

impose or not impose controls on exports and imports. In order to achieve the objectives of Clause (A) to Clause (D) of Section 3 of that Act, there is a clear provision that the Government of Nepal can prohibit export/import or impose quantitative restrictions on export/import in accordance with that section if it deems it necessary to control the import.

3.27 Department of Industry, Tripureshwar written response (in Writ No. 077-WC-0109):

In the policy/programme and budget of the year 2078/079, the Government of Nepal has mentioned that it will reduce the trade deficit by exporting stone, gravel and sand. The government is not trying to export without following the legal process contrary to the regulations of the Environment Protection Act 2076. Since the process of 64/66 etc. will be completed so that there is no harm during the extraction and export of natural resources, the action of the government will not adversely affect the Chure and Chure Bhawar areas. The writ petitioner has filed the present writ by misinterpreting the issue that the government is trying to adopt a policy to reduce the trade loss by exporting stone ballast by following the provisions of the prevailing law. The petitioner's rights have not been affected by any decision of the Department of Industry. Therefore, the writ petition filed against this department as an opponent should be dismissed.

Judgment-clause

4. According to the rules, the present writ petition has been added to the daily case list and presented before this bench, wherein the Learned Senior Advocate and Learned Advocates present on behalf of the petitioners and Learned Advocates and the Learned Associate Advocate present on behalf of the respondents presented arguments as follows:-

5. On behalf of the petitioners, the petitioner Learned Advocates

Mr. Shailendra Prasad Ambedkar, Mr. Mohana Ansari and Mr. Pankaj Kumar Karna on **writ no. 077-WC-0099**, petitioner Learned Advocates Mr. Ram Bahadur Shahi, Mr. Deepak Duve and Mr. Trilok Bahadur Chand on **writ No. 077-WC-0100**, petitioner Learned Advocates Dr. Punya Prasad Khatiwada and Mr. Deepak Vikram Mishra and Learned Advocates Mr. Manohar Lamichhane, Mr. Khadka Bahadur Rai and Mr. Sonam Moktan on **writ no. 077-WC-0101**, petitioner Learned Senior Advocate Mr. Dinesh Tripathi and Learned Advocate Mr. Kritinath Sharma Poudel on **writ no. 077-WC-0102**, petitioner Advocate Atis Karki, petitioner Learned Advocate Mr. Santosh Bhandari on **writ no. 077-WC-0105**, and Learned Advocate Mr. Bishnu Luitel presenting arguments on **writ no. 077-WC-0109**, stated that as per the Article 119 of the Constitution of Nepal, the Minister of Finance of the Government of Nepal has to submit the estimate of annual income and expenditure to the joint meeting of both houses of the Federal Parliament every year on the 15th Jestha. There does not seem to be a provision in the Constitution for the budget to be presented outside the parliament. But the Fiscal Year 2078/079 budget has been released from Singhadarbar. There is no provision regarding what will happen if the budget is not submitted on 15th Jestha. Similarly, in the case of Provincial and Local levels, Articles 207 and 230 of the Constitution state that estimates of income and expenditure can be submitted, and there is uncertainty regarding what will happen if the estimate of income and expenditure cannot be submitted. Regarding the budget, it seems necessary to have an explanation of the arrangement that there should be a mandatory arrangement. Meanwhile, the House of Representatives was dissolved on 2078/02/08 and on 2078/02/15 the Finance Minister of the Government of Nepal, Mr. Bishnu Prasad Paudel, announced the budget for the Fiscal Year 2078/79. Before the presentation of the budget, the Hon'ble President has issued three ordinances related to the budget on the recommendation of the Council of Ministers. Since the budget was presented through an ordinance

outside of the provision in the Constitution, the estimate of income and expenditure for the Fiscal Year 2078/079 (annual budget) has no constitutional and legal legitimacy. If the work is allowed to be carried out according to point no. 199 of the same budget, instead of protecting the Chure, it will be exploited while valuable goods will go abroad and the Terai will become desertified. The nation's natural resources, environmental impact, wildlife, animals and plants will be affected, due to which the life of not only the citizens living in that area but also the people living in other parts of Nepal will be affected. Therefore, since the legal complexity has been created in relation to Articles 119, 207 and 230, the legality of these budgets should be explained and a clear law should be made and implemented in relation to Article 119. Also, if the problem of Chure area is not addressed in the long term, not only the citizens living in that area but also the people living in other parts of Nepal will be affected. Petitioner also presented a debate on whether the budget point no. 199 issued by the ordinance should be repealed as the national natural resources, environmental impact, wildlife, flora and fauna will be affected.

6. Associate Advocate Mr. Hariprasad Regmi, on behalf of the respondent Nepal Government agencies, said that the Nepal Government has been sensitive to environmental protection. It is not just about extracting stones and sand from Churebhavar but also conducting studies to understand from where and how many resources can be mined and extracted. The subject being studied in the year 2070 is included in the policy and program through the budget statement. Therefore, he also argued that the writ petition should be dismissed as there is no need to issue an order as per the petition.

7. On behalf of the Office of the respondent Vice President (in writ no. 077-WC-0101), Learned Advocate Mr. Khyam Narayan Sapkota said that there is no action taken by this Office to adversely affect the fundamental rights provided by the Constitution and

existing laws of Nepal, the interests of the country, sovereignty, geographical integrity, environment, protection of the environment, forests, natural resources. As stated in the writ petition, the annual estimate of revenue and expenditure for the Fiscal Year 2078/079 has been disseminated and published for the purpose of proper utilization of natural resources and minerals in the interest of the nation. He also argued that the writ petition should be dismissed as there was no involvement of the Vice President and his office in the export process.

8. After listening to the arguments of legal practitioners and government lawyers of both parties and studying all the documents attached with the case file in the presented writ petition which mentions the facts and petitions as mentioned above, it was seen that the following questions should be answered while considering the decision.

- a) What are the environmental protection and development policies adopted by the Constitution regarding Nepal's geographical and environmental location and sensitivity? How are the current challenges to be addressed through these policies?
- b) What role has this court played so far in the development and protection of the environment? In particular, how has this court looked at the issue of mining, exploitation, and extraction of gravel sand?
- c) At present, what is the most pressured area in terms of extraction, use and export of natural resources and gravel sand and what are the legal structures and political arrangements that are attracted in terms of extraction, use and export? What is the status of their implementation?
- d) What kind of legal framework is necessary regarding the mining of stone, gravel, sand and its effects within the

federalist nature of the state?

- e) In the present dispute, is there a situation to issue an order against the petitioner's demand or not? Is there a situation to issue an order or directive in the name of the opponents or not?

9. Looking at the above questions, all the writ petitions submitted to this bench for adjudication are registered as public rights concerns under Article 133 of the Constitution of Nepal. Most of the petitioners are lawyers and people involved in protecting the environment, human rights and public interest concerns. As the export of the country's natural resources is going to be made through the budget statement for the Fiscal Year 2070/79 through point no. 199, the petitioner raised concern whether it is compatible with the Constitution of Nepal or not, and since this issue is related to the environmental health of the country and the livelihood and sustainable development of the citizens, on behalf of the Nepali citizens, the petitioner's right (Locus Standi) to raise the matter for judgment is established.

10. The petitioners have argued that in the context of Article 16, 18, 30, 36 of the Constitution of Nepal as well as Article 51 related to the Directive principles, policies and responsibilities of the State, the provisions of point no. 199 of the budget for the Fiscal Year 2078/79 brought through an ordinance should be declared unconstitutional. However, after the interim order of this court to stay the export tried to be done through ordinance, the later budget statement and the financial act did not mention the matter thus it can be said that this matter has been resolved in a way. But if the government does not decide how appropriate this issue is in the Constitution and the law, the question remains as to what will happen if what is being done through the ordinance is done through the Economic Act or other Acts. Therefore, it was seen that the questions raised above should be answered.

11. Considering the possibility that the issue of gravel and sand extraction may arise again and again, what are the environmental protection and development policies adopted by the Constitution regarding Nepal's geographical and environmental location and sensitivity? Let's look at the first question of how the current challenges need to be addressed through these policies. Nepal is a small country in the central Himalayan region.¹ Surrounded by geographically large countries in the north and south, Nepal is geographically unstable, geographically complex and environmentally sensitive. Whether it is the high Himalayan region including Dolpa, Humla, Mustang, or Manang with Tibet Plateau or the hilly or Churia region or Bhavar and Terai Madhesh region in the south, all the regions of the country are interdependent in terms of the nature of life and biological diversity and are in a very sensitive state. The geological forests of the Himalayan region, mountains are constantly being eroded, large landslides falling from high and steep mountains, soil erosion in the Churia range (hereafter referred to as Chure), earthquakes in the entire region from time to time, short distance from north to south (about 150 to 250 km) between the differences in height, due to rivers flowing from north to south with high speed, floods and landslides during the annual rains are causing serious damage to people, fauna, and flora. In addition, in recent

1 In fact, the western side of the Himalayas is crossed by the Indus River, which flows towards South Pakistan from the Nanga Parbat (8,25 m) in northern Pakistan from the Tibetan side, and the Brahmaputra River, which flows southwest from Namche Baruwa (7,777 m) in Arunachal Pradesh, India, across Tibet to the east. The region is called the Himalayas, which is spread in the shape of a 1,500-mile arc. The northern border of the Himalayas is separated by these two rivers, which flow from east to west, and the northern border of the Ganges is considered to be the northern border. Nepal belongs to the Central Himalaya region, while the region of the Himalayas to the west of Nepal is called the Western Himalayas, Sikkim, Darjeeling, Bhutan, Assam to the east, and the region of Arunachal Pradesh is called the Eastern Himalayas. See Jack Ives, *HIMALAYAN PERCEPTIONS* (London:Routledge, 2004) at p 29, 32; S. S. Negi, *A HANDBOOK OF THE HIMALAYAN* (New Delhi Indus Publishing Co., 1990) at p 13

years, the environmental sensitivity has increased in Nepal due to the lack of long-term thinking, road operations, glacier eruptions due to climate change, increase in wildfires, increased pressure on vegetation, biological diversity, and increased landslides. In the midst of this sensitivity, we have the challenge of finding a way to fulfill the “Aspiration for Development and Prosperity” set by the Nepalese people through the Constitution and also addressing environmental issues.

12. What is interesting is that the Constitution itself has decided the path to fulfill the “Aspiration for Development and Prosperity” set in the Constitution of Nepal. This path determined by the Constitution is a path based on democracy and rights. By walking on this path, citizens will have a dignified life, equality, health, education, food, and respect for the rights to live in a clean and healthy environment is mandatory. Among these rights, the words “clean and healthy environment” have been used in the Constitution, which is very meaningful. It has made it mandatory that not only humans but also the environment should be clean and healthy. In other words, the Constitution recognizes that a clean and healthy environment is the basis of a clean and healthy life and access to it is a basic fundamental right. In this context, in recent times, it has been recognized that a clean and healthy environment is an inherent right not only of humans, but also of nature and the environment. However, if we look at it within the framework of rights and duties, it’s not that some questions will not arise about this concept,² but accepting that nature and the environment have the right to independent existence in the sense that humans must live in a harmonious relationship with nature is in accordance with the recognition of environmental

2 Stockholm Declaration on Human Environment, Principle 1 stating, “Man has the fundamental right to freedom, equality and adequate conditions in life, in an environment of a quality”; Rio Declaration on Environment and Development, Principle 1 stating, “Human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”

justice. In the writ petition of *Prakashmani Shama*, this court said, **“Every creation or object of nature has its own natural reason and significance for its existence. Every object has its own value and recognition. Thus, it is not acceptable to destroy natural values for the sake of someone’s vested purpose or economic interests.”**³ We cannot forget this matter either. On the one hand, the Constitution has guaranteed the right to live in a clean and healthy environment, and on the other hand, it has instructed the state to follow the path of **“sustainable environmental development”** within the guiding principles, policies and obligations of the state. In addition to this, **“intergenerational equity”**, the statements referring to the principles of **“polluter’s pay”**, **“precaution”** and **“prior informed consent”** that those who pollute the environment should bear responsibility for it are also placed in the directive principle.⁴ Going further than that, the Constitution more explicitly states that the national interest should be “enhancing the protection of the natural resources available in the country and equitable distribution of the benefits of sustainable use in an environmentally friendly manner,” producing and developing renewable energy, meeting the basic needs of the citizens, controlling water-related disasters and managing rivers. In order to reduce the risk of natural disasters, to minimize the risk of natural disasters, policies have been put in place to provide relief and rehabilitation. In this way, the Constitution itself is keeping the conservationist orientation of nature and heritage and showing special sensitivity to environmental protection for the present and future generations by accepting the principle of protection, sustainable use and equitable distribution of benefits of natural resources, means, energy and biodiversity. It is clear that “Environmental Sustainable Development” is the means set by the Constitution to fulfill the aspirations of development and prosperity.

3 Advocate Prakashmani Sharma et.al v. The Secretariat of the Council of Ministers of the Government of Nepal

4 See Constitution of Nepal Article 51(g)

13. The principle of sustainable development was first used in the Brundtland Commission report in the 1980s and then accepted as a basic principle in international law from the 1990s.⁵ Nepal's policy makers and courts have repeatedly mentioned this principle in matters related to the protection of the environment. There have been orders from the court accepting this principle. Since sustainable development has been accepted as an umbrella principle in the Constitution and the adjective "sustainable" has been added to the adverb "environmental", it seems necessary to study and ponder the instructions of this and other conceptual terms mentioned above and use these concepts for the protection of civil rights and the security and welfare of the country. .

14. In the context of the conceptual term "Environmental Sustainable Development" mentioned in the Constitution, it is also necessary to clarify that this term seeks such a development process that does not allow any reduction in the ability of future generations to meet their needs in order to meet the needs of the present generation.⁶ We only have one earth and this earth has limited non-renewable resources. Exploitation of such resources in an uncontrolled manner leads to irreparable damage and destruction to the environment. The environment should not be seen as an external factor when using natural resources as it is the inner foundation of nature's existence and dynamism. Therefore, under the concept of sustainable development, it is emphasized that only socially acceptable, economically feasible and environmentally sustainable development should be accepted.⁷ Explaining the theory

5 Rio Declaration on Environment and Development, 1992. Principle 1; Paris Agreement Preamble, and Art. 2

6 Brundtland, G, Report of the World Commission on Environment and Development: Our Common Future. United Nations General Assembly document A/42/427, 1987 defines sustainable development as "Sustainable development is development that meets the needs of the present without compromising the ability of the future generations to meet their own needs."

7 See generally, IUCN, Guide on Preparing the Implementing National Sustainable Development Strategies and Other Multi-Sectoral Environment and

of sustainable development further, Professor Edith Brown Weiss stated;

“Sustainability requires that we look at the earth and its resources not only as an investment opportunity, but as a trust passed to us by our ancestors for our benefit, but also to be passed to our descendants for their use.”⁸

Meaning, the theory of sustainable development embraces the recognition of intergenerational cooperation (**intergenerational partnership**) in development. The nature and environment we have at present is the breath given by our ancestors. It is our intention and belief that we should improve it within the condition we have and if we cannot do it in a better condition, we should hand it over to the next generation in a better condition than this. The popularity of the theory of sustainable development is increasing with the current crisis that humans are facing and is developing as a basic principle of **Environmental justice and Climate justice**. The principle adopted by the Judges’ Conference in Johannesburg in 2002 (**The Johannesburg Principles on the Role of Law and Sustainable Development**) declared that development is an interrelated issue of human rights and the rule of law, while the **United Nations Human Rights Council** has accepted access to a clean, healthy and sustainable environment as a human right on October 8th , 2021.

15. Specially recalling that human rights are non-transferable, interrelated and indivisible, the Council emphasized that all human rights can be enjoyed only in a clean, healthy and sustainable environment. The food we eat, the water we drink, the air we breathe, our health etc. all depend on a clean environment. Therefore, in the context of increasing challenges in the enjoyment of human rights and the respect, protection and promotion of those rights by

Development Strategies 1993, Bonn, Germany.

8 Edith Brown Weiss, In fairness to Future Generations and Sustainable Development, 8 AM. U.J. INT’L L. & POL’Y AT 19-20 (1992)

the present and future generations, a clean, healthy and sustainable environment is accepted as a human right at the international level. By approving, the right to a clean and healthy environment guaranteed by the Constitution of Nepal and the concept of environmental sustainable development have been strengthened and have helped in the implementation thereof.

16. As easy as it is to destroy nature and ecosystems, it is difficult to follow the path of environmentally sustainable development that includes the enjoyment of human rights, including the right to a clean and healthy environment. But it is also clear that no one wins from the destruction of the environment and ultimately everyone loses due to the unimaginable consequences it causes. Therefore, it is important to deeply understand the vision and development path of our constitution makers in environmental protection. In order to implement the transformational aspirations of development and prosperity made by the Constitution, we need to follow the model of sustainable development to ensure the protection of rights, respect and enjoyment.

17. Theoretically, within the principles of sustainable development **intergenerational equity**⁹ mentioned above, in addition to the principles of **pre-informed consent**¹⁰, **polluters pay**¹¹, and pre-emptive precautions, also include the **ecosystem services** that flow or receive from the proper protection of the environment. Considering the services provided by nature, the obligation to

9 See Declaration of UN Conference on Human Environment 1972 Principle 2, Rio Declaration 1992 Principle 3. Weiss explains that there are three normative principles of intergenerational equity. First, each generation must conserve options. Second, each generation should be required to maintain the quality of the planet so that it is passed on in a condition no worse than that in which it was received. Third, each generation should provide its members with equitable rights of access to the legacy of past generations and conserve this access for future generations. See *supra* note 8, p 22-23

10 Rio Declaration on Environment and Development, 1992, Principle 15

11 Rio Declaration on Environment and Development, 1992, Principle 16

maintain **environmental integrity**¹² for the present and future generations, and the principle of the state's non-regression and responsibility of public trust¹³ in protecting nature and heritage lies at the state level. And in the context of bilateral and regional regional cooperation, the **sovereign rights of the nation over natural resources**¹⁴ and the principles of **common but differentiated responsibility**¹⁵, and the **principle of regional cooperation**¹⁶ are included in the principles of sustainable development. In the current situation where the environmental complexity is increasing due to climate change, the scientific community, policy makers and the government cannot ignore the principles of environmental sustainable development and its underlying principles.

18. Environmentally sustainable development also includes the principles of environmental protection, enrichment, and

12 The integrity of the planet requires proper care of the life support systems of the planet, the ecological processes and the environmental conditions necessary for a healthy human environment." See Weiss, supra note 8 at p 21

13 Prof. Joseph Sacks is credited for the modern interpretation of the doctrine of public trustees in Roman law. According to him, natural resources are funds kept for public benefit, so they should not be misused for the use of some individuals or communities. See for detailed information Joseph Sax, The Public Trust Doctrine in Natural Resource Law, Effective Judicial Intervention, 68 Mich. L. Rev 471(1970); Joseph Sax, The Limits of Private Rights in Public Waters 19 Env't. L. Rev. 473(1989); Joseph Sax, Liberating the Public Trust Doctrine from its Historical Shackles, 14 U.C. Davis L. Rev. 185(1980) For judicial application of this doctrine, see Advocate Narayan Prasad Devkota v. Office of the Honorable Prime Minister and the Council of Ministers also NKP 2067, D.no. 8521 pg. 2053, In India; MC Mehta v Kamalnath and Others (1997) 1 SCC 388

14 General Assembly Resolution 1803 of 14 Dec. 1962 accepts principle of permanent sovereignty over natural resource as a constituent right of self-determination; See also Rio Declaration Principle 2

15 Rio Declaration, Principle 7; Paris Agreement to UNFCCC, Preamble and Art 2

16 "No single country or group of countries has the power to ensure a healthy environment for the future. Thus, even when each country cares only about its people, all nations must cooperate in order to guarantee a robust planet in the future." Weiss supra note 7 at pg. 222; Rio Declaration Principle

sustainable use. Therefore, it does not mean that nature cannot be used in the name of conservation, but where it is suspected that the exploitation of some kind will destroy nature, in such a situation, the responsibility of establishing that the environment will not be destroyed or has not been destroyed, based on scientific facts, public hearings, and ecological impact assessment, also lies with the state. On the basis of scientific data, it is suspected that irreparable damage to the environment is imminent, so the state should take precautions to prevent such damage. This is also the basic rule of fiduciary duty of the state and operation of constitutional government. Therefore, in summary, as mentioned above, Nepal is located in the midst of geographical, geological and atmospheric complexities, and considering the fact that the Constitution assigns the responsibility to the state to look at the issue of development and the environment in a balanced manner regarding the country's development, the desire for development and prosperity of the Nepali citizens is environmental sustainable development. It seems that the state should understand that there is an aspiration and following this concept, the state should fulfill the responsibility of respecting the basic rights of the people including a clean, healthy and sustainable environment.

19. In the context of the presented dispute, some things mentioned in the written reply of the Ministry of Finance have to be looked into. In the written response, regarding the obligation of the state to maintain a proper balance between development and environment, under the principle of State Policy, the means described in the following Article 51 (d) (2), under the policy regarding finance, industry and commerce, it provides for stressing on the role of the private sector in the economy and the available means to achieve economic prosperity with the maximum utilization of available resources. And similarly, Article 51 (d) (10) import substitution and export promotion have been determined in accordance with the national interest. Similarly, it has been recalled that there is a

provision in Article 55 that no question can be raised in any court regarding the implementation of any matter written in this part.

What requires clarification regarding the claim is that when examining the state's directive policies and obligations, one might assume that anything not explicitly stated or of which that is stated can be interpreted freely. However, that is not the case. In reality, when talking about fundamental rights or state policies, some rights and policies may appear to be conflicting, inconsistent, or uncoordinated. From the perspective of rights and policies covering multi-subject matter, it is natural to appear this way. In such a situation, the policy makers have to identify which are basic rights or basic policy. For example, the right to a dignified life can be considered **the most fundamental rights** among fundamental rights. In this way, it seems imperative to accept the principle of environmental sustainable development as **the most fundamental principle** of the state policy, in terms of the country's geographical and environmental sensitivities, current activities, its effects and the possible challenges. By adopting this principle and adapting to it, a proper balance between development and environment should be maintained, policies related to economy, industry and commerce should be determined and the role of the stakeholders should be found in accordance with the letter, meaning and the spirit of the Constitution of Nepal.

20. As far as the written response is concerned, it is recalled that Article 55 states that, "no question can be raised in any court regarding the implementation of any of the matters written in this part." This is true and it is not necessary to dispute it. But guiding principles and policies are not meaningless arrangements. These are not laws that are merely said or written just for the show. These are basic provisions to guide policy makers in the context of state governance. Therefore, these policies cannot be ignored in the course of running the state. These policies help to make the fundamental rights meaningful, purposeful, and alive. Therefore, these principles

should be taken as complementary to the fundamental rights.¹⁷ In the current perspective wherein the responsibility of making legal arrangements for the implementation of fundamental rights has been entrusted to the state, this Court may issue appropriate directions.

in order to maintain a clean and healthy environment in the country, to maintain a proper balance between development and the environment and to fulfill the desire for development and prosperity through this means, in order to make the fundamental rights alive and effective¹⁸ wherever adherence to these principles deems necessary and indispensable. Therefore, in summary, in the context of Nepal's geographical and environmental location and sensitivity, it seems necessary that while considering and analyzing the environmental protection and development policies adopted by the Constitution, the challenges related to development and environment are being interpreted in a coordinated manner with the principles of fundamental rights and state policy and accepting the principle of environmentally sustainable development as a basic principle.

21. Having discussed much about the development and environmental protection policies that must be followed to ensure the protection, respect and enjoyment of the fundamental rights recognized by the Constitution, now it seems appropriate to discuss the role played by this court in the development and protection of the environment so far. Excavation of pebbles and sands in particular. The second question of how this court viewed the issue of exploitation and extraction also had to be discussed.

17 In recent times, Indian courts have taken the view that these two should be balanced by taking the guiding principles of political policy as complementary to fundamental rights. See; *Minerva Mills Ltd v Union of India* (1980) 2 SCC 591; *Kasturi Lal Laxmi Reddy v State of J&K* (1980) 4 SCC1; AIR 1980 SC 1992, 2000; *Hashmattullah v State of MP* (1996) 4 SCC 391

18 This Court has done so before. See Hon'ble Prime Minister Mr. Girija Prasad Koirala against Yogi Narharinath also NKP 2053 D.N. 6127 pg. 33

Especially after the restoration of Democracy in 2047, this court seems to have taken the issue of environmental protection seriously. “Man’s life is a goal, development is a means of living happily. Without a clean and healthy environment, people cannot live in a clean and healthy manner, therefore environmental protection is possible, taking into account the fact that measures must be taken to prevent the environment from destruction.¹⁹” With this view, the court has an equally important place in both the means of earning livelihood and the quality of the environment in order to live a dignified life. A clean and stable environment is indispensable for flora and fauna and there is no other alternative. It has declared that the area cannot be habitable in the absence of a quality environment.²⁰ A clean and healthy environment is an integral and holistic part of human life. If the environment deteriorates, its direct impact will be on human life, flora and fauna. At today’s time the world is concerned about protecting the deteriorating environment as the right to a clean and healthy environment is included in the right to life.²¹ Now the environment is not only a matter of concern for a place or a country but it has become a matter of global interest. There can be no doubt that environmental pollution affects not only the people of a place but also the animals and plants and its scope is widening. This is the very reason for the interest from the international convention on environment and various conferences.²² In fact, the question of environmental protection is related to the needs beyond the boundaries of a nation and the scope of nationality. As this

19 Surya Prasad Sharma Dhungel vs. Godavari Marvel Industries Pvt. Ltd. Public Welfare Part 1, (2015-2062) Part 8, pg.7

20 Dharam Bahadur Lamichhane et. al vs Physical Infrastructure and Transport Department SinghDurbar Kathmandu et.al NKP 2075 D.N 10085, pg. 1615

21 Advocate Tulsi Sinkhada vs. Government of Nepal Office of the Prime Minister and Council of Ministers SinghDarbar Kathmandu, NKP 2075, D.N. 10109, pg. 1820.

22 Advocate Padam Bahadur Shrestha vs. Office of the Prime Minister and the Council of Ministers including SinghaDarbar NKP 2074,D.N. 10101, pg. 2026

is a multifaceted and common concern of the whole world, it is not fair to narrow it down to the limits of rights and concerns. While meeting the needs of today's generation, nature's ability to meet the needs of future generations should not be diminished in any way, and today's generation should not encroach on the right of tomorrow's generation to live in a clean environment. It is the responsibility of the promoter of such work to confirm that the development work does not encroach on the environment, i.e. does not cause any negative impact. Precautionary approach should be adopted for control before damage occurs rather than control after damage to the environment. Environmental protection is not an anti-development concept. Environmental protection is not an anti-development concept. But if the balance cannot be maintained in both development and environment, unimaginable damage will result. Laws should be formulated to protect the entire world from this. This court has propounded the principles that Nepalese law stands in favor of environmental protection and since Nepal is also a signatory of environmental protection treaties and conventions, the question of environmental protection cannot be considered trivial in the name of development.²³ While our country has ratified international conventions related to fauna, flora and natural resources and has become a party state, Nepal cannot back down from its obligations arising from those conventions: protecting wetlands, controlling international trade of flora and fauna, protecting biodiversity, etc. The court also has the view that the Government of Nepal can ban the export of certain types of forest products abroad.²⁴ In addition to the conceptual approach, this court questioned on various issues of environmental protection,

23 Office of the Prime Minister and Council of Ministers vs .Environmental Development and Protection Legal Forum NKP ,2069 D.N ,942 ,pg.47 .

24 Tara Bahadur Budhathoki vs .Office of the Prime Minister and Council of Ministers ,SinghDarbar ,Kathmandu ,NKP ,2075 D.N ,10154 .pg.2251 .

such as pollution control,²⁵ construction of pollution standards,²⁶ garbages,²⁷ brick industry,²⁸ plastic,²⁹ pesticides,³⁰ and likewise it's management. Furthermore, protection of heritage³¹, lakes,³² and national parks where the superficiality and carelessness is seen in the environmental impact assessment.³³ Important decisions have

25 Kedarbhakta Shrestha v. Department of Transport Management S.A. First Part relating to Public Welfare (2015-2062) p 88; Shabnudhan Prasad Gupta vs. Everest Paper Mills Pvt. Ltd. NEKAP 20 61 NIN 7427 P-1040; Advocate Padam Bahadur Shrestha b. Office of Kathmandu Metropolitan City Baghdarbar Kathmandu also NEKAP 2072 NIN 9577 p. 688; Advocate Arjun Kumar Aryal v. Government of Nepal including Office of the Prime Minister and Council of Ministers NCAP 2073 NIN 9686 PU1798; Council of Ministers and Office of the Prime Minister against Tulkman Lama NEKAP 2061 NIN 7394 P 731; District Bara Lippanimal Village v. Ramagya Sah Kalwar Ne Ka 2067 Nin 8490 P 1773.

26 Advocate Thaneshwar Acharya and Bhrikuti Pulp and Separ Nepal Limited et. al, Part I on Public Welfare (2015-2062) Part 8 pg.108; Bhojraj Air v. Ministry of Population and Housing, First Part on Public Welfare (2015-2062). Part 8 PU 121; Advocate Prakashmani Sharma v. Prime Minister's office. First Part on Public Welfare (2015-2062) pg. 95; Ministry of Population and Environment v. Prakashmani Sharma, Part I on Public Welfare (2015-2062) Part 8 pg. 371.

27 Nabindra Raj Joshi v. Cabinet Office et. al NKP 2067, D.N. 8616 pg 812.

28 Prakashmani Sharma v. Council of Ministers Secretariat , Part I on Public Welfare (2015-2062) Part 8, pg. 355.

29 Santosh Kumar Mahato v. Council of Ministers Secretariat also NKP 2061, D.N. 7430, pg. 1075.

30 Raju Prasad Chapagai v. Agricultural Statistics and Co-operative Bank, NKP 2066, D.N. 239, pg. 1620.

31 Prakashmani Sharma v. Ministry of Local Development Harihar Bhawan Lalitpur ., Supreme Court Public Interest Part 2 Second Division (2066) p 62; Yogi Narharinath et. al v Hon'ble Prime Minister Mr. Girija Prasad et. al, NKP 2053, D.N. 6127, pg. 33; Advocate PrakashMani Sharma v. Cabinet Secretariat of the Government of Shri 5, NKP 2054, D.N. 6391, pg. 312; Advocate PrakashMani Sharma v. Shri 5 Government Cabinet Secretariat NKP 2056, D.N. 6789, pg. 700.

32 Advocate Khagendra Subedi v. Government of Nepal Office of the Prime Minister and Council of Ministers SinghDarbar Kathmandu, NKP 2075, D.N. 10086, pg. 1626.

33 Advocate Ramchandra Sinkhra et. al v. Prime Minister and the office of the Minister Paripad, NKP 2076, D.N. 10204; Advocate Ramkumar Acharya v. Complainant/Plaintiff: Government of Nepal Prime Minister and the Office of

also been made regarding the promotion of environmental good governance.³⁴ A detailed discussion and analysis of the judgments made in all these matters does not appear to be out of place in the context of the present dispute.

22. In point no. 199 of the budget statement for the Fiscal Year 2078/79 by the Hon'ble Minister of Finance, which has been submitted for resolution on the subject of exploitation and extraction of natural resources in the presented dispute and presented through an ordinance from the government which states that, "Based on the environmental impact assessment, the trade loss will be minimized by exporting mining stones, gravel and sand. Arrangements have been made to exempt customs duties on imports to build a ropeway from industries to the export point for the transportation of the mining construction materials to be exported." Taking in account the statement made in regards it seems relevant to see how this court has taken these two issues.

23. Looking at that context, it seems that the issue of quarrying and extraction of stone gravel sand has been brought to the attention of the court time and again. Regarding the uncontrolled extraction and export of stone gravel, sand from the rivers of Chure and Terai region, a public interest writ petition³⁵ registered by *Advocate Narayan Devkota* states; the crushers industries have been illegally mined day and night from the jungles of Chure area, Charkoshi bush, and illegally exported to India. If it is not stopped, there is a strong the Council of Ministers aet. Al, NKP 2069, D.N.. 8942, pg. 47.

34 Bhojraj Ayer v. Office of the Prime Minister and Council of Ministers ,NKP 2061 , D.N.7453 ,p.g 1361.

35 Advocate Narayan Prasad Devkota vs Office of Honorable Prime Minister and Manwari Paripada NEKAP 2067 NIN 8521 p. 2053 In the writ application, a handful of traders have been using "crushers" in around 25 districts of Terai, Rupandehi, Kapilvastu, Nawalparasi, Bara Parsa, Rautahat, Siraha, Mahottari, Dhanusha, Saptari, Makwanpur, Kailali, Kanchanpur, Dang, etc. It is mentioned that after installing dozer loaders and tippers, stone aggregates are collected and stone crushers are used to produce stone aggregates, sand, etc., and they are being sold and distributed in India for the past ten years.

suspicion that there will be great damage to the Terai Madhesh and the nation in the future. In the writ petition³⁶ filed to stop such, this court after the analysis³⁷ of the studies conducted in this regard and especially the “Report 2066 on the Excavation and Extraction of Stone, Gravel, Sand from Chure Shabar and other areas”³⁸ prepared by the “Natural Resources and Resources Committee” of the Administrative Parliament in accordance with the Constitution of Nepal and prevailing law it has been stated that, **“The Government of Nepal is only a trustee of Nepal’s natural resources³⁹ and should not be allowed to act in a way that adversely affects the environment without any legal basis for the natural resources of Nepal and based only on nominal revenue... The extraction and use of natural resources should not only be done with the view of more profit, but the use of such natural resources**

36 In the writ Petition it is mentioned that a handful of traders have operated crushers industries in about 25 districts of the Tarai, such as Rupandehi, Kapil Bastu, Nawalparasi, Bara Parsa, Rautahat, Sarlahi, Siraha, Mahottari, Dhanusha, Saptari, Makwanpur, Kailali, Kanchanpur, Dang, etc. It is mentioned that after setting up high-pits, dozer loaders and tippers are used to collect stone aggregate and from it stone crusher, stone aggregate sand, etc. which are being sold and distributed in India for the past ten years.

37 In the verdict, it has been said that a six-member team including Sarvajit Prasad Mahato of Makwanpur district's on-site study on the regulation and management of natural resource stone gravel sand prepared by the 23rd Executive Development Program of Nepal Administrative Training Institute Jawalakhel Lalitpur also studied the on-site inspection report of the stone crushing industry submitted to the industry department.

38 It seems that it has been decided that the report also mentions the various rivers of Terai and Churia areas used for mining and the 10 roads used for stone and gravel sand extraction and their state of disrepair.

39 The court stated that, “The Interim Constitution of Nepal, 2063 also seems to incorporate it. Article 33(n) and Article 35(4) are provisions based on other laws related to natural resources which are guided by Public Trust Doctrine. Section 3, Section 17, 18 of the Forest Act, 2049, Section 3 of the Mines and Minerals Act, 2042 and Section 3 of the Nepal Petroleum Act, 2041, which provide state ownership of the natural resources under the respective Acts without providing individual ownership. Those provisions and arrangements related to the natural resources of Nepal are guided by Public Trust Doctrine.

should be done only when there is no adverse effect on the environment.” At the same time, by issuing a directive order that a technical committee⁴⁰ should be formed to study the mining and extraction of stone gravel sand, the petitioner’s demand is to stop the export of sand and gravel to India by polluting the environment or extracting natural resources, other areas, settlements, roads, water sources, forests, wildlife, ancient monuments etc. should be stopped if there is an adverse effect on them. In the same way, stating that it is not allowed to extract more than the capacity, the court further issued an order stating, “Suspend the extraction of stone, gravel and sand for the time being and if the technical committee formed according to the order of this court provides a report stating that it is possible for the industry to extract stone, gravel and sand from the economic and environmental considerations then proceed accordingly.”

24. In addition to the above mentioned writ petition of Narayan Devkota, this court has also expressed its views on the issue of stone, gravel, sand mining in some other writ petitions. For example, in the writ application of *Kapil Chand Pokharel*, this court said, **“Access to natural resources, which are the main basis of human life, should be guaranteed to all people. The state or government should take responsibility for its protection to ensure equal access and enjoyment by all for public purposes to such a generation, not only one class area and community and generation of people will have access to such resources.... The state can only grant permission to use natural resources only for public benefit. It is the responsibility of the state to**

⁴⁰ According to the order ,such a committee is to be formed which is coordinated by the relevant body of the Government of Nepal(1 , Environmentalist coordinator of the Ministry of Environment or appointed by the Ministry of Environment (2 ,Geologist (3 ,Mining Engineer (4 ,Representative of the Department of Industry (5 ,Representative of the local body ,and (6 Other necessary members and environmentalists appointed by the Government of Nepal.

prevent exploitation of public resources for private interests. It is within the constitutional and legal responsibility of the government to stop such industries from excavating public land if it is found that the sand industries operating on the right and left side of Prithvi Highway are being operated by private individuals.” Similarly, in another writ petition⁴¹ filed by *Shiv Prashas Paudel*, the court has stated that, “Extraction or use of natural resources beyond the capacity of industrialization, unorganized urbanization, deforestation, development not in harmony with the environment is the main factor that causes environmental pollution and imbalance in the environment. It should be done in such a way that the environment is not destroyed during use and economic development, so that a balance is maintained between development, construction and environmental protection. The establishment and operation of stone industries that extract, exploit, collect and export natural resources such as stone, gravel, sand, etc. should be within the limits of prevailing laws.” *Khagendra KC*’s writ petition⁴² of a similar nature regarding the fiduciary duty of the state has also been discussed. Thus, through these decisions, this court has clearly presented a clear view as it states that the responsibility of the state remains as a trustee regarding the protection and use of natural resources, that such resources should be used for the public good and in a way that does not destroy the environment, based on the determination of limits of use, regulation and environmental assessment, technical aspects and intergenerational justice

25. Considering the fact that it is mentioned in point no. 199 of the budget speech that the export will be based on environmental impact assessment, but so far the experience of the disputes presented to this court regarding environmental impact assessment

41 Shiv Prasad Paudel against the office of the Prime Minister and Manwariparipada, NKP 2070, D.N. 9030, pg. 868.

42 Khagendra Case (Khadka) also against District Administration Office Udaipur NKP 2073, D.N. 9711, pg. 2285

is not pleasant. For example, in the writ petition⁴³ filed by *Ram Kumar Acharya* regarding the environmental impact assessment report conducted on the road of Bhurigaon-Telkot, tearing up Baridya National park, the court stated, **“Environmental impact assessment (EIA) should be submitted through the procedure prescribed by law. Things regulated by law cannot be hidden or secretive. The objective basis of the report should be that the option chosen from the various other options is the most appropriate from the point of view of environmental protection. Whether those objective grounds are lawful or not is the subject of the court’s review. The statement that the Court should not enter into the subject matter of Environmental Impact Assessment (EIA) cannot be agreed with,”** and in this view since the proposed Bhurigaon-Telpani-Surkhet road will also be constructed within some parts of the Bardiya National Park, it appears that a committee should be formed with experts from the Ministry of Forests as well as the main stakeholders. However, since the Ministry of Environment has formed a committee with relevant experts from the Ministry of Forestry and has not taken any opinions and suggestions regarding the environmental impact assessment of the road construction, the decision of the Ministry of Environment to approve the environmental impact assessment report on the proposed Bhurigaon-Telpani-Surkhet road project has been revoked by the order of certiorari. However, if the road is necessary, a mandate order is also issued to identify the alternatives after completing the due process of the law. A similar situation seems to exist in the environmental impact assessment conducted in the context of road construction within the Chitwan National Park. In the petition⁴⁴ filed by advocate *Ramchandra Simkhda*, the environmental assessment report prepared without consulting with

43 On behalf of the Environmental Development and Protection Legal Forum, *Ram Kumar Acharya v. Prime Minister and Council of Ministers Secretariat* also N.K.P. 2069, D.N. 8942, pg. 47.

44 Advocate *Ramchandra Sinkhra et al. v. Prime Minister and Council of Ministers Office et.al*, NKP 2076 D.N. 10204, pg. 14509

the head or employees of the park and without even reviewing the response of UNESCO or IUCN which is on the World Heritage List and accepting the said report with the intention that the road should be constructed in one go; as such a ministerial decision of the Ministry is found to be flawed, it is revoked by the order of certiorari. An injunction order has been issued to prevent any road construction within the Chitwan National Park until the environmental impact study conducted in consultation and agreement with the Chitwan National Park Office as established by law, UNESCO and other relevant agencies. Under the guise of environmental impact assessment, a report originally prepared for one project was transferred to another project, stakeholders were overlooked, public hearings were held in nominal terms, and likewise there are other disturbing examples. In this regard, the court does not view the environmental impact assessment report as a document that serves as a formality to reach a predetermined destination, or in fact, by examining its basic assumptions and existing laws, it is based on scientific facts to find options that will not cause damage to the environment or at least cause minimal damage, and the report is helpful in reaching a complex decision related to the environment. Environmental impact assessment reports, which are prepared with the involvement of renowned scholars and experts in their respective fields, should never become paper documents that give an open invitation to environmental destruction. Doing so seems to be contrary to the principle of environmental sustainable development recognized by the Constitution of Nepal and contrary to the right of people to live in a clean and healthy environment. Therefore, in order to discourage the activities that are currently taking place, if the environment is destroyed due to the preparation of false reports, it seems necessary to take legal action against such persons.

26. After discussing the approach taken by this court on environmental protection, what is the area with the most pressure

in terms of mining, use and export of river and mineral natural resources and stone gravel sand? What is the status of their implementation? Let's discuss the third question.

Here, in point no. 199, it is not clear from which region of the country the trade loss will be minimized by extracting mining stones, gravel, sand. But since it has also mentioned that the construction of a ropeway from the industry to the export point for the transportation of the mining construction materials to be exported, it is to be assumed that this work will be in the valleys or their gorges and river banks or the land surface of the rivers in the Churia or Mahabharata region and if the ropeway is to be used, then it can be noted that the scale will also be large. This matter has not been clearly denied in the written reply of the Office of the opposition Prime Minister and Council of Ministers. Instead, in the written reply, it is said that it is purely a policy matter, and the export of stone, gravel and sand will be done only when the legal process of export is completed. The arrangement made in the budget of the Fiscal year 2078/2079 regarding the export of stone, gravel and sand is not new. Previously, decisions were made based on district capacities, but now, a policy framework has been established through budgetary measures to systematize and manage it as a national export industry. However, not all areas will have the capability to export stone and ballast without exception. The installation of the ropeway for the extraction ought to be done in such a way that the environment is protected and the pollution is reduced. Such cannot be achieved by ignoring the needs of Nepal. Therefore, it seems that the proposed provision has been made with the intention of reducing the year-on-year increasing trade deficit of the country by allowing the collected material to meet the needs of the country and export the remaining items. It is unclear why the government, despite mentioning numerous details in its written reply, did not specify that such a substantial amount of mining and exportation would occur directly from this specific area in the point

no. 199 itself. There is no indication that such a decision was made following a study, including an environmental impact assessment as required by existing Act, before making such a decision. Looking at the written reply of the opposition Council of Ministers, this is purely a matter of policy; After the policy is analyzed and the policy matter is implemented, no order can be issued by the court to intervene and narrow the executive authority. Similarly, since it is mentioned that whether or not to accept the ordinance is a matter of jurisdiction of the parliament, it appears as an indication to indirectly deny the role of the court or a matter for the court to look into. The purpose of the court is never to interfere in the jurisdiction of the executive or the legislature. The court always looks carefully at the line of control and balance of separation of powers provided by the constitution. But, when constitutional provisions are disregarded and consequently, the country appears to be heading towards a precarious environmental imbalance, the court should not stay silent. Such silence would contravene the Constitution and the oath taken in the name of the country and its people.

27. Taking in account the written response, it is evident that the policy makers are aware of the ongoing work at the district level and the decision of the Council of Ministers' meeting number 17/070, dated 2070/03/27 is also mentioned. The decision states, "Each district shall estimate the natural resources and means within its district and from which area it can be collected, exploited and mined to what extent and publish the details publicly and arrange the contract settlement only after preliminary environmental testing and environmental impact assessment based on that. Not to allow the export of stone, gravel, sand from Chure area, park and intermediate area of the reserve. In case of forest products and river products from other than those areas, they will be allowed to export only after at least one level of processing after increasing the price, and not to export stone (boulder) in unprocessed form." It can be argued

that said decision in a way prohibits mining from the Chure area, reserves and its intermediate area. In addition, the government itself announced on 2071/03/16 that, “Different villages of 36 districts and the area occupied by them have been declared a sensitive and risky geographical area including their watershed and river systems, as environmental protection zones.” The information has been published for the information of the general public.⁴⁵ Likewise, the Terai region has been declared an environmental protection zone. In the Chure Terai Madhesh Protection and Management Master Plan 2074 prepared by the President Chure Terai Madhesh Conservation Development Board states, **“Opening the external export of riverine materials leads to overexploitation of such materials, causing significant adverse effects on the environment, in addition the study report entails that the cost is several times more to repair the physical structures damaged in the process of mining, processing and transporting such materials than the revenue received by the state. Furthermore, there is a lot of difficulty in regulating evidence by experiences. Therefore, it is mentioned that it is recommended to ban the export of river products as raw materials,”** and it is also noted that the Master Plan was approved by the Council of Ministers of the Government of Nepal on 2074/02/04. However, considering the uncontrolled excavation of rivers in the Terai and Mahabharat region valleys and their surrounding areas, and the Section 6 of the **“Standards related to the sale and management of stone, gravel, sand mining 2077”** approved by the government in the year 2077 it states, “Stone, gravel, sand will not be generally mined from forest and forest areas.” Additionally, it states that, “If it is necessary to do this in the area, with the consent of the relevant body, the concerned village municipality or municipality can collect and sell stone, gravel, and sand.” Likewise, in sub-section (1) of Section 19 of that standard states, “The Government of Nepal shall process and export at least one layer of common construction materials such as stone, gravel,

45 Nepal Gazette Volume 64 Number 9 Part 5 Date 2071.03. 16.

and sand.” Despite provisional arrangements in the master plan that can declare the Chure area as an environmental protection zone and impose a ban on the external export of river products, mining from the Chure area has not been completely stopped. Moreover, in the written reply of the opposition Prime Minister and Council of Ministers Office stated that the provision of point no. 199 was made with the intention of reducing the annual growing trade deficit of the country by allowing the remaining items to be exported after meeting the needs of the country. Thus, in summary, it was found that the government is moving towards foreign export of stone, gravel and sand.

28. In fact, the extraction, collection and export of riverine or mined stone gravel sand from Chure or Mahabharata region is a very sensitive issue.. These are also areas that face heavy mining and exploitation. In Nepal, during the 2060s, from Mechi to Mahakali, Chure and Mahabharata area, large quantities of stones, gravel and sand were extracted and sold domestically and abroad, using dozers and excavators in a disorderly, uncontrolled and unauthorized way, in the fertile land of Terai having adverse effect. Responding to the issue wherein the productive and fertile land in the Terai turned into wasteland due to the landslide from Chure, having an adverse effect on the ecological system of the Chure area, the Legislature-Parliament, Natural Resources and Resources Committee on 2066/09/20 stopped the extraction, collection and export of stone, road, gravel and sand abroad. Instructions have been issued to the Cabinet Secretariat and various concerned ministries of the Government of Nepal. After taking into consideration the responses received, a sub-committee⁴⁶ has been formed on the matter and

46 This sub-committee was formed under the chairmanship of MP Chandradev Joshi .The committee formed three teams and conducted an on-site study of the districts including Dhanusha Sirah Saptari Udaipur Sunsari in the central region ,Dhading Makwanpur Vara Parsa in the central region and Rupandehi and Kapulavastu in the western region and observed the operations of the mining crusher industry from various rivers.

a detailed report has been given in the year 2066 through on-site study and consultation with stakeholders. As previously detailed in the writ petition of *Narayan Devkota*, by this court, there is no necessity to reiterate it here. What we want to emphasize here is that the committee's report raises serious questions about the quantity of stone, gravel, and sand being extracted and exported abroad. The activities causing significant environmental impact through such exports have been conducted without IEE/EIA reports, including river excavation using excavators. It is mentioned that there is a lack of coordination between the various ministries of the government, and that the agreements made at the local level have also contributed to the violation of the agreements due to the fact that the people associated with the political parties are organized as parties to the contract. Moreover, showing concern on the lack of effective monitoring mechanism in the context of the uncontrolled and intensive export of stone, gravel, and sand to India and the illegal export, after studying the gaps, complexities, and redundancies in the existing laws on the subject, the committee has recommended the detailed formulation of a new law. Four types of suggestions and instructions have been given in order to find a long-term solution to amend and draft the comprehensive law.⁴⁷ In Section 13 of the recommendations to be implemented in the long term in the report states, **“When making decisions at any level on any matter that has a long-term impact on natural resources, the basic principles of sustainable development and the international principles of natural resource management should be strictly adhered while instructing the Ministry of Forest and Land Conservation, the Ministry of Environment, the Ministry of Local Development and Ministry of Industry.”** Highlighting that the extraction of stone, gravel, and sand has not generated revenue, the parliamentary committee emphasizes the critical importance of

47 Legislature Parliament Natural Resources and Resources Committee Coordinating Report on Excavation and Extraction of Stone, Gravel and Sand from Chure Bhawar and other areas 2066 p. 28.

considering environmental aspects and sustainable development in addressing this contentious issue with informed action.

29. Similarly, in the report of Secretary Lilamani Paudel attached to Schedule 9 of the same report, he has stated, “Stone, soil is truly a national commodity. It can not be exported at any cost.” In Terai, it is imperative from the ecological point of view and from the point of view of flood control to meet the condition where the river flows along the natural and traditional path by lifting the soil deposited by the river in the areas above the surface. However, the ongoing mining is very unnatural and risky thus it is crucial to ban the export of stone, gravel, sand, and make a legal and structural framework and recommendation to the Council of Ministers as soon as possible. Suggestion have been made to instruct the police, administration, the Ministry of Environment and the Ministry of Local Development to stop the extraction activities until these actions are completed, along with suggestion to enforce mandatory compliance with the environmental impact assessment or preliminary environmental testing methods stipulated in the Environmental Protection Act for the extraction of stones, sand, or soil.

30. It has been mentioned above that the Chure and Bhavar area to the south are under more pressure due to irregular and uncontrolled quarrying of stone, gravel and sand. The writ petition states that Chure cannot speak for itself and defend itself while also raising concerns and question about Chure’s geological and geographical sensitivity, as well as the role it plays as a defense shield for the Terai-Madhesh, and the problems of floods and landslides faced by the people of Terai every year due to its rapid exploitation, and the impact on agriculture which is a very serious issues. The rapid environmental destruction in the Chure and Terai regions caused by domestic needs and greed for export must be addressed very seriously. There are compelling geographical, geological, and ecological reasons to support this assertion. It is the southernmost

and weakest⁴⁸ and most sensitive of the Himalayan mountain range, stretching almost 800 km from Mahakali in the west of Nepal to the Mechi river in the east, and covers 36 districts of Nepal. There are some trenches made by the river and some dune valleys in it.⁴⁹ Most of the land in some districts lies in the Churia region.⁵⁰ Chure occupies 12.78 percent of Nepal's territory, while Churebhar and Terai-Madhesh are home to nearly half of Nepal's population. Being under the pressure and influence of 164 river systems⁵¹ that originate in and flow through Churia region along with the being geologically unstable, unorganized settlements in the last 40-50 years, unorganized exploitation of forest produce, land capacity,

⁴⁸ Churia is an area mainly made of sandstone, mudstone, claystone, shale, unconsolidated gravel dominated sedimentation. See, President Chure Terai Madhesh Conservation Development Committee, "Chure-Terai Madhesh Conservation and Management Master Plan 2074, pg. 10," "The major geomorphic process in the Churia is rapid fluvial erosion. The weak geology, heavy rainfall and tropical weathering are the common features of the Churia range. This area consists of a humid tropical climatic zone. During monsoon period Churia becomes quite hazardous for landslides and flash floods", See Dr. B.K. Pokharel, Rabin Raj Niraula, Niroj Timalsina, Rakshya Neupane (eds) CHANGING FACE OF THE CHURIA RANGE: Land and Forest Cover in 1992 and Jan. 2014, (HELVETAS/Nepal, 2015)

file:///C:/Users/user/Downloads/Changing_Face_of_the_Churia_Range_of_Nep2.pdf.

⁴⁹ For example, Marin Khonch of Sindhuli, Kamala Khonch of Dadeldhura, Rahun Khonch of Dadeldhura and some other dune valleys like Udaipur (Triyuga Katari), Chitwan, Dang Deukhuri, Surkhet and Churia are included in the region.

⁵⁰ In some districts like Jhapa, Dhankuta, Bhojpur, Kavre, Lalitpur, Tanahun, Pyuthan and Doti, less than 1% of the area is in Churia area, while in districts like Udaipur, Sindhuli, Makwanpur, Chitwan, Nawalparasi, Dang and Kailali, Churia area is relatively large. In the case of Chitwan and Dang, respectively, 84% and 82.5% of the land is in Churia region, see previous note 47.

⁵¹ In Nepal, 164 river systems have been identified, including 27 river systems originating from the high mountains and mountains, 27 originating from the mid-mountains and 76 flowing from Chure, 48 flowing in the rainy season, and 13 originating from the Terai Madhesh and flowing mostly biannually. Chure Terai Madhesh Conservation Development Committee Chure Terai Madhesh Conservation and Management Master Plan 2074, Page 15.

unfriendly agricultural system, open grazing of cattle, wild forest, unfriendly physical infrastructure, has rendered the environmental condition of the entire Chure area to be critical.⁵² Land cover and land use change (**LCLUC**) in Chure and Terai regions has become a major cause of environmental destruction. In reality, in the context of Nepal, Chure region is an open book of land cover and land use change. Changes in land use and land cover will lead to decreased water and air quality. Watershed protection will suffer, adversely affecting biodiversity, while the accumulation of garbage will increase. Agriculture, animal husbandry, wildlife protection, human health, and climate change will all face serious negative impacts as a result.

Scientific studies have shown that there is a deep connection between changes in land use and climate change in recent times.⁵³ In the current state of agriculture-based economy, increasing population, lack of measures for poverty and urbanization, the pressure on the land due to the lack of management, the destruction of the sustainable use of the land by the limited class and the risk of the country falling into the vicious circle of poverty due to climate change cannot be ignored. Therefore, in the context of Nepal, we have limited land available; It is under human pressure; Our natural environment and ecological system are vulnerable, requiring cautious action. Since careless interference in this system can result in irreparable damage that is difficult to manage. The entire Chure area is very sensitive due to its natural geological and climatic conditions, and the unorganized mining, collection and extraction

52 President Chure Terai Madhesh Conservation Development Committee Chure Terai Madhesh Conservation and Management Master Plan 2074, Page 12

53 Basanta Paudel, Yi-Li Zhang, and Narendra Khanal, Review of studies on land use and land cover change in Nepal, *Journal of Mountain Science*, (October 2016) browsed in <https://www.researchgate.net/profile/Basanta-Paudel> See also Zahra Hassan Rabia Shabbir, Sheikh Saced Ahmad, Amir Haider Malik, Neelam Aziz, Amna Butt and Summra Erum, Dynamics of land use and land cover change (LULCC) using geospatial techniques: a case study of Islamabad Pakistan in Hassan et al. *Springer Plus* (2016) 5:812 DOI 10.1186/s40064-016-2414-z

of river materials has rendered life of this area including entire Bhavar and Terai-Madhesh areas chaotic.⁵⁴ However, the forest area in the Chure region has expanded since the President Chure Terai Madhesh Conservation and Development Board formally began implementing the Master Plan. But due to the destruction of agricultural areas in Chure area and the non-stopping of river stone gravel sand mining in Bhavar area, studies have shown that the width of the rivers in Chure area has turned into agricultural areas, indicating that erosion and landslides in riverine areas have not stopped.⁵⁵ The effect of which seems to be affecting the arable land of the entire Terai region in various ways, such as the surface of the land being filled with sand and water entering the house. Hence, it is crucial to remember that environmentally healthy and clean rivers are vital for the well-being and livelihoods of the Terai-Madhesh area and the entire country. It is imperative to know that, when Chure is destroyed, the entire country will be destroyed. When Chure is destroyed, other areas will not be able to survive.

31. Although, point no. 199 of the budget speech does not specify the location of excavation, the writ petition highlights that news regarding the export plan of stone, gravel and sand has been made public by excavating mines from 14 district 52 locations from Morang to Dadeldhura, and requests authorities to halt such actions. Furthermore, the written response from the opposition has not denied this matter. In the written reply of the Ministry of Finance, it has been stated that excavation will be carried out in areas other than Chure in technically geographical and ecologically suitable locations based on the study report of the Department of Mines and Geology and also indicates that a ropeway will be arranged for the extraction of stone, gravel and sand. Thus, it can be assumed that

54 In the master plan, it has been shown that mining of riverine material is currently being done in 242 areas, see page 38.

55 A study has shown that nearly 20,000 hectares of agricultural land in Churia region has been destroyed and the surface of rivers has increased by 12,300 hectares.

the target area is the Mahabharata region in the north rather than Chure. However, the geographical and geological flow of the river system, coupled with road expansion in the Mahabharata mountain range closely connected to the Chure region, raises concerns. Development structures such as hydroelectric projects and more than five dozens excavation for the cement industry⁵⁶, along with recent earthquake damage in certain areas and increased pressure due to climate change, poses threat rendering that area unsafe. Due to the steepness of the Mahabharata area, and the intense flow of rivers through this area, even minor excavations in the riverbed and surrounding areas can have significant consequences. The state adopts the precautionary principle in such cases where there is a high possibility of significant damage to the environment due to an action, the state should stop such action by taking precautions. In our neighboring nation India, the precautionary principle is adhered to, whether it involves limestone mining in the mountains around Dehradun or mining in the Aravalli Range, or addressing the adverse impact on the environment due to mining activities. In a case the Supreme Court of India said:

“The natural sources of air, water and soil cannot be utilized if the utilization results in irreversible damage to environments. The most vital necessities, namely, air, water and soil, having regard to the right of life under the Constitution, cannot be permitted to be misused and polluted so as to reduce the quality of life of others.... If an activity is allowed to go ahead, there may be irreparable damage to the environment and if it is stopped, there may be irreparable damage to economic interest. In case of doubt, however, protection of the environment would have precedence over the economic

⁵⁶ According to a report, 65 cement industries have taken permission from Nepal Standard and started production in different periods. See GON / Department of Industry, Detailed Study of Cement Industry, 2019 (Study Conducted by Deepak Neupane et al) Executive Summary

interest.⁵⁷

In this way, we must learn from good practices with regards to the efforts being made to protect the river including the Mahabharata and Churia areas in the neighborhood.

32. In Nepal's case, in a situation where it is difficult to meet the country's development needs through low-risk potential mining, be it river or mining, no statistics/data including forecasts indicating the need of the country, the amount of stone, gravel and sand that can be mined safely and flowing annually from the rivers, and in absence of collection the consequential damage due to river changing course has not yet been presented before the bench. Therefore, the written reply of the Council of Ministers stating, "It has been technically estimated that the systematic extraction of river products can yield many times more than for Nepal's internal consumption," lacks clarity regarding the basis for this statement. It is not easy to understand what kind of rapid economic prosperity is being sought to be achieved through the mobilization of natural resources. Indeed, gravel and sand are not only an important natural resource of Nepal but also essential materials for development. It is also true that especially when the river system that flows from the mountains to the Tera which brings a certain amount of gravel and sand to the plains of Bhavar and Terai every year, the diversion of the river and the loss of property will be stopped and the local environment will be protected. Moreover, there is available data and with the present era of science and technology, it may be feasible to conduct surveys through geographic information system (GIS) satellite imaging or other similar systems. Proceeding without scientific data, lacking pre-planning, and disregarding the country's geographical, geological, and environmental sensitivities

57 M.C. Mehta v. Union of India & Others (March 18, 2004) AIR 2004 SC 4016; See also Rural Litigation And Entitlement vs State Of U.P. & Ors (12 March, 1985) AIR 1985 SC 652, 1985 SCR (3) 169; See also National Green Tribunal, Himmat Singh Shekhawat v. State Of Rajasthan (26 February, 2021)

solely for economic or political gain, while attempting to centralize local initiatives, and using flimsy logic to justify the extraction of gravel and sand, whether for profit or to claim business losses, is detrimental to both present and future generations. Exploitation of nature for stone, gravel, and sand is not acceptable. Rather it evokes a heart wrenching image in the mind as if the bones and flesh of the mother earth were torn and damaged. This is ecocide.⁵⁸ Therefore, we should all work together to protect our mountains and Churia and our river systems and keep them clean and healthy. Nature is a gift inherited to us from our ancestors to explain to our descendants. We should never forget intergenerational justice and cooperation. It is also the fiduciary duty of the state. Therefore, while utilizing nature, prior precautions should be undertaken by everyone as a fundamental principle. This is the inherent right of the people to live in a clean and healthy environment guaranteed by the constitution and the policy of sustainable environmental development. Therefore, no one has the right to exploit nature under the guise of trade losses, which irreversibly damage its original state and ecological balance. Instead, regarding the factors of the increase in trade deficit, efforts should focus on evaluating the effectiveness of policies implemented by the state over the past three to four decades, while possibly identifying and addressing the underlying reasons for the deficit. Moving forward, the emphasis should be on compensating for the deficit through the sustainable use of our biological diversity and the development of renewable energy.

33. In the aforementioned discussion regarding the policies adopted by the government regarding the mining, use and export of stone, gravel and sand, it was observed that there are four decisions; the

58 Independent Expert Panel for the Legal Definition of Ecocide, June 2021 defines Ecocide as, "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts." See <https://www.stopecocide.earth/legal-definition>.

decision made by the Council of Ministers on 2070/03/27 the decision to declare the Chure Terai region as an environmental protection zone dated 2071/03/16, the decision of the Council of Ministers to approve the Chure Terai Madhesh Conservation and Management Master Plan dated 2074/02/04 including the decision of the Council of Ministers to pass the Standards related to stone, gravel, sand excavation, sale and management, 2077. These decisions do not completely stop the extraction of gravel and sand. However, in the context of weather the legal system can stop/prevent such action and looking at the legal system and structure in place for quarrying, use and extraction of gravel and sand, it is observed that, it is governed by the Local Government Operation Act 2074, Export Import (Control) Act 2013, Environmental Protection Act 2076, Local Government Operation Act 2074, Land and Watershed Protection Act 2039 and the Water Resources Act 2049, wherein the the petitioner has raised the issues that the work is against these acts. Whereas in written reply of the opponents, the issues of the Local Government Operation Act 2074, the Export Import (Control) Act 2013 and the Environment Protection Act 2076 have been raised. It is also essential to examine the conditions stipulated by current laws governing the extraction of gravel and sand. This examination should determine whether these laws effectively prevent uncontrolled extraction and whether they are adequate within the current federalist framework of the Constitution.

34. In order not to affect the universal recognition of the concurrent and shared powers as provided by the Constitution to the local level, the Local Government Operation Act 2074, Section 11 grants rights to villages and municipalities, wherein sub-section (2)(d) “local tax, service charge and fees,” in the following (6), there is a provision regarding the right to collect duties and sales and export fees⁵⁹ of natural and mineral products such as stone, gravel, sand,

⁵⁹ Similarly, in section (j) of the same section, it is seen that in the following (12) of the local policy law and standards plan formulation related to environmental protection and biological diversity and its implementation,

clay, wood, gravel, slate, limestone etc. Similarly, sub-section (4) (d) (2) the right to coordinate and regulate the collection of royalties from natural resources and service fees, and in the following (3) the right to collect royalties related to the extraction of minerals is mentioned. Likewise, in Sub-section (4) (J), rights are granted and duties are assigned regarding royalties received from natural resources.⁶⁰ While the Local Government Operation Act 2074 grants local levels the authority to collect export fees and royalties, it also appears to delegate the responsibility of considering environmental aspects to the local level. Therefore, it does not seem possible that the Local Government Operation Act grants absolute rights to rural municipalities or municipalities to extract gravel and sand, disregarding environmental challenges.

35. Sub-section (1) of Section 3 of the Export Imports (Control) Act, 2013 has also been mentioned in the written reply of the opposition Council of Ministers. Section 3(1) states, “The Government of Nepal may impose restrictions on the export or import of any item by a notified order,” and in sub-section (2), “If it is not necessary to maintain the restriction imposed on the export or import of any item in accordance with sub-section (1), the Government of Nepal shall it may remove such restriction at any time by a notified order, setting out the reason and ground thereof.” According to the same provision, it is claimed by the opposition that the Government of Nepal can take necessary control in cases where there is disorder in the export of any river products or when the export is allowed to be over-exploited and adversely affects the health of humans, animals, birds or plants. But what needs clarification in this regard is that the Export and Import (Control) Act, 2013 pertains specifically to the export and import of goods, which is also clearly evident from the

monitoring and regulation. In section (n) disaster management, in section (p) different arrangements have been made regarding protection of water bodies, wildlife mining and minerals.

60 Section 11 of sub-section (4) (e) also has provisions regarding forest, forest, wildlife, birds, water use, environment, environment and biological diversity.

definition of “export” as per Section 2 of the Act. Even in Section 3, which the opponent references, the term “goods” concerning the export or import of any “goods” typically refers to “products” or “finished products.” Since, the Act is seen as more as a regulating act rather than granting authority, it does not seem to be possible to interpret that the government has the right to extract stone, gravel, and sand in any condition until a proper order is issued under the Act.

36. On the other hand, certain provisions are in place such as the Environment Protection Act 2076, Section 2 (k) of states, “If there is a proposal prepared in connection with the implementation of a plan or program to change the physical development activity or land use that may change the existing environmental conditions.” Section 2 (d)), “In the case of natural heritage, the environmental impact should be assessed in accordance with Section 3 in the case of physical activities that cause changes in environmental conditions or projects that cause changes in land use.” In accordance with section 7, the environmental assessment report should be approved, and in case of acting contrary to the terms of the environmental impact assessment report, while Section 35 provides for punishment. In addition, Section 30 of the same Act states that places considered to be very important from the point of view of environmental protection can be declared as environmental protection areas.⁶¹ Similarly, Section 10 of the Land and Watershed Protection Act, 2039, specifies that activities such as interfering with the flow of internal rivers within lands designated by the Watershed Protection Officer as prone to flooding, inundation, erosion, or potential erosion, are prohibited without permission. This includes carrying out various activities that interfere with the flow of the internal river as per (a) and (d), and (e) digging, pulling or carrying stones, sand, or other types of soil from these designated areas.

⁶¹ This provision is also found in Section 10 of the former Environmental Protection Act 2053 and under the same provision, the government has declared the Chure area as an environmental protection area on 2071/03/16.

Similarly, Water Resources Act 2049, Section 19 states that water sources should not be polluted beyond the specified tolerance limit. Similarly, Section 20, has a provision that when using the water source, it should be done in such a way that there is no significant negative impact on the environment due to soil erosion, floods, landslides or other similar reasons. Similarly, Section 2 (d) of the Forest Act 2076 defines the rock, soil, river or mineral products in the forest as “forest products”. “Forest area” is defined as the area covered by ponds, lakes, wetlands, rivers, streams, canals, and other land, while Section 41 prohibits the use of any part of the national forest in such a way as to change the land use of the forest area, except for the decision of the Government of Nepal for infrastructure development. Similarly, Section 42 (1) provides that if there is no other option but to use the forest area to conduct national priority projects, plans approved for investment by the Investment Board, and projects of national pride, and provided that implementation of such plans will not have a significant adverse effect on the environment through the environmental test according to the prevailing law, the Government of Nepal can grant permission to use any part of the national forest for the purpose of conducting such a plan as specified. Similarly, the Mines and Minerals Act 2042 defines inorganic substances with chemical composition of certain physical properties and elements as mineral substances. Section 3 provides ownership of such mineral substances to the Government of Nepal. Section 4 states that the right to carry out mineral operations (i.e. exploration and mining) of such mineral substances shall remain with the Government of Nepal. Section 5 states that only those person who has received a permit can carry out mineral operations and even so, Section 11(a) states that a person who has obtained such a permit may carry out mineral operations (i.e. prospecting mining) in such a way that there is no significant adverse effect on the environment. All these legal frameworks consider environmental pollution, environmental degradation and land use change as a serious matter. If there is any development project or program that may change the existing

environmental conditions, physical activity or land use change, the environmental impact assessment report must be duly approved. Actions that bring about changes in land use are discouraged by taking special care of the land or forest area that is likely to occur or prone to floods, rains or soil erosion. Even while conducting projects of national pride, Nepalese law prioritizes both development and protection of the environment with special importance, mandating environmental impact assessment as a crucial requirement.

37. In summary, the issues raised in the writ petition whether the existing legal provisions are complete or sufficient may be possible to dispute, however, upon examining the aforementioned laws, it does not allow us to conclude that these legal systems consider the country's geographical, geological and environmental sensitivities as secondary issues and allow the act of plundering natural resources in the name of development or making up for trade losses. In other words, the existing law of Nepal seems to be generally against the uncontrolled or selfish exploitation of nature. Although the political arrangements that are attracted in the context of mining and extraction of river and mineral natural resources and stone gravel sand do not completely prohibit the export, the use of terminology such as environmental impact assessment and the legal provisions seem to be in essence against the export regardless. The challenge of those systems is the fragmented presence of various laws, the lack of targeted coordination between the legal systems, the laxity of implementation, the duplication of laws, the existence of legal holes. These laws have not been applied in a purposeful manner in accordance with the policy adopted by the Constitution. As a result, due to the lack of coordination between the responsible agencies and self-serving activities at the local level or having interests contrary to official duties, it seems that the principle of environmental sustainable development as directed by the constitution is not taken seriously and the environmental destruction has not been prevented through national governance.

38. Having discussed the legal and political system and its implementation, now let's discuss the fourth question: what type of legal framework is needed to regulate the mining of stone, gravel, and sand, and to address its impacts, given the federal nature of the state? Taking in account the written reply of the opponents, it is established that the mining of stone, gravel and sand falls under the Local Government Operation Act 2074. In preparation of the list of powers of the village and municipality under the Act, Section 11(2) the subjects mentioned in Schedule 8 i.e. List of powers/jurisdiction of local level and Schedule 9 i.e. List of concurrent powers/jurisdiction of Local level are arranged in a comprehensive manner. It has been discussed above that the sale and export fee collection of stone, gravel, sand, soil, wood, firewood, slate, stone, etc., of natural and mineral products, has been placed in Section 11 (2) (d) (6).⁶² Section 11 of the Local Government Operation Act 2074, in accordance with Schedule 8 and 9, provides a detailed list of powers/jurisdiction delegated to the Local level, thus it is possible for some to misinterpret these activities of unregulated exploitation of nature or granting permission by Local level are in accordance with the Constitution. But it is essential to understand that in Schedule 8 and 9, provisions are not limited to listed power but also include responsibilities related to disaster management,⁶³ environmental protection and biological diversity.⁶⁴ In reality, disaster management and environmental protection are such subjects that are connected with many other arrangements mentioned in the reserved and concurrent list of the Federal and the Provincial level. For example, under Schedule 5, within the Federal powers/jurisdiction, there are

62 Clause (d) of sub-section (4) of section 11 also mentions the collection of royalty from natural resources. In serial number (21) of Schedule 8 of the Constitution, which is based on Section 11 of the Local Government Act, there is provision for the protection of water bodies, wildlife, mines and minerals, while in serial number (8) of Schedule 9, royalties received from natural resources are in serial number (8) of mines and minerals and serial number (14).

63 Schedule 8 Serial No. 20: Schedule 9 Serial No. 9

64 Schedule 8 Serial No. 10

policies and standards related to water resource conservation and regional use, central level large power irrigation and other projects and mining, national and international environmental management, land use policy,⁶⁵ etc. Similarly, the powers of the provinces under Schedule 6 include land management, national forest water use and environmental management⁶⁶ within the Province. Similarly, in the concurrent list of Federal and Provincial under Schedule 7, the provincial border rivers, waterways, environment protection, biodiversity; natural and man-made natural disaster preparedness, rescue and relief and recovery; land policy and related matters are included.⁶⁷ When deciding whether to permit or prohibit the extraction of the disputed sand and gravel from the mountains, rivers or rivers, the methods and procedures should take into account the aforementioned things in the list of rights of the Federal, Province and the Local level in the decision-making. Considering the quarrying of gravel and sand can affect the land use environment and biological diversity, and looking at the different scheduling arrangements and the geo-geographical and environmental sensitivity of Nepal, within Nepal's current federal structure, focusing solely on local level rights may not align with the Constitution. Since stone, gravel, and sand is a natural product, without properly assessing where and what quantity was it extracted from, whether private or public land such as rivers, forests, and the kind of impact has it had or is likely to have on the environment and ecosystem, and simply claiming that the local body has the right to collect sales and export fees on stone, gravel, sand, etc, does not justify mining, collecting, selling, and exporting them in ways that could lead to environmental destruction, significant adverse effects on the environment, or the destruction of ecosystems. In our federal structure, the local level agencies are the facilitators of happiness, peace and development working at people's doorsteps. These are not exporting or importing

65 Schedule 5 Serial No. 11, 14, 26, 27, 29

66 Schedule 6 Serial No. 16, 19

67 Schedule 7 Serial No. 13, 17, 24

corporations; they cannot become the factors of destruction of the country's nature and environmental destruction. They were not created for that purpose and the Constitution does not allow the local level to do so. Therefore, in the context that the Constitution has given the residual rights⁶⁸ to the Federal level in law making, and considering the fact in which manner the mining, sale, distribution and export of stone, gravel, and sand are being operated, controlling and regulating such activities through appropriate methods and procedures from the Federal level is seen to be in line with the recognition of sustainable environmental development, and it is desirable to regulate this subject accordingly.

39. Finally, moving to the fifth question of the present dispute: whether there is a situation to issue an order against the petitioner's demand or not? Whether there is a situation to issue any orders or directives in the name of the opposition parties? In various sections above the environmental protection and development policies adopted by the Constitution have been analyzed in relation to Nepal's geographical and environmental location and sensitivity. In this context, it is necessary to use the transformative power of the Constitution and to address the current challenges by interpreting the fundamental rights and directive principles of the state in a coordinated manner and accepting the principle of environmental sustainable development as a basic principle. On discussing about the fundamental rights mentioned in the Constitution of Nepal and the policies and principles of the state, just as the right to a dignified life can be considered as 'the most fundamental right' among the fundamental rights, similarly, within the context of the country's geographic geo-environmental sensitivity and the impact of the current activities and potential challenges "the principle of environmental sustainable development" is also the policies and principles of the state. It seems mandatory to accept it as the most basic principle. According to the Constitution, it is desirable to maintain a balance between development and the environment

by assimilating this principle and determining the policies related to economy, industry and commerce and finding the role of the stakeholders within it.

40. In the present dispute, an attempt has been made to look at the role played by this court so far in the development and protection of the environment, and in particular, how this court has viewed the issue of quarrying, exploitation and extraction of sand, in the light of the principles propounded. In doing so, the court considers that a healthy and dignified life is possible only in a clean and healthy environment; The issue of environmental protection is a matter of common interest and concern not only of a nation but of the whole world; Therefore, the issue of environmental protection should be viewed in the light of the principles of intergenerational justice and precautionary principles, which are accepted by the Constitution. The propounded principle that the issue of environmental protection cannot be considered as a secondary or extraneous issue under the guise of development has also been taken into account by the court. A clear view has been presented by this court that the responsibility of the state remains as a trustee regarding the protection and use of natural resources, such resources should be used for the public good and in such a way that they do not destroy the environment, technical aspects and intergenerational justice should also be considered based on the determination of limits of use, regulation and environmental assessment. With this principle in mind, in the writ petition⁶⁹ of *Narayan Devkota* regarding the uncontrolled exploitation of the rivers in the Terai Madhesh Churiabhavar area the court has stated, **“Stop the extraction of stone, gravel and sand for the time being. And if the technical committee formed according to the order of this court presents a report that it is possible from the economic and environmental point of view, and if the industry still has the ability to extract stone , gravel, and sand, then export it accordingly.”** However, despite

⁶⁹ Advocate Narayan Prasad Devkota v. Honorable Prime Minister and Council of Ministers Office. NKP 2067, D.N 8521, pg. 2053.

the court's decision, it was found that no technical committee was formed nor any study was done as indicated in the decision. It has been observed that at present, by disregarding the order of this court, riverine and mineral natural resources and stone, gravel and sand are still being extracted, used and exported from various rivers of the country including Terai Madhesh, Chure Bhawar.

Upon reviewing the government's policies regarding mining, distribution, and export of stone, gravel, and sand, it appears that there is no significant emphasis on curbing unregulated mining and export practices. Moreover, sporadic provisions within various laws have not been effectively implemented due to lack of proper coordination. Likewise, no effort is found to address such a serious matter in a comprehensive manner through a unified legislation. Upon reviewing existing laws and policies, it becomes evident that the issue of quarrying and extraction of gravel and sand is perceived as a subject matter of local monopoly. However, such an interpretation appears flawed and does not align with the spirit of the Constitution of Nepal. In light of the various provisions in Schedule 5, 8, 7, 8 and 9 of the Constitution of Nepal and the **principle of cooperative government** adopted by the country and the residual rights of the Federal government, a comprehensive objective investigation and discussion with independent experts was conducted to create an umbrella law for the provision of stone, gravel, sand, river and mineral resources. It appears that the extraction and exploitation of materials should be limited to the construction and maintenance of the physical structures that are built privately and publicly within the country. The use of sovereign rights of the state over natural resources should be in the interest of the country and the people; It should be respected by other countries⁷⁰ and this matter should be ensured through environmental governance. The report of the

70 Principle 2, 18 and 19 of Rio Declaration on Environment and Development, 1992.

committee of the Legislature Parliament has also pointed out that the current issue of stone, gravel and sand, is affecting politics at the Local level. In the current perspective, if this matter cannot be controlled through the legal process and proper institutional structure, the river systems will become uncontrolled and landslides and loss of wealth will continue to increase in Nepal. Noting that the Chure, Mahabharata and other mountain ranges are vulnerable to landslides and are depleting and the country's environment and ecological system are getting damaged by the tyranny of interest groups. It is crucial to protect and respect the rights of both current and future generations, as well as the right of nature to remain healthy.

41. Therefore, considering the issues mentioned in the budget statement of the Fiscal year 2078/079 where the government aims to bring through an ordinance in all the aforementioned contexts, disregarding constitutional provisions and previous court orders regarding budget submission, this court deems it necessary to bring this matter to the government's attention. As far as point no. 199 of the budget statement is concerned, since that provision has not been included in the supplementary budget submitted thereafter, rendering ineffective, there is no need to issue order of certiorari to repeal it. However, based on the analysis made in various sections above, in relation to the extraction of stone, gravel sand, etc. by exploiting mineral or riverine natural resources, the extraction of stone, gravel sand, etc. from any area of Nepal is prohibited unless otherwise provided by the law created by the Federal legislature in accordance with the constitutional intent and spirit. And in view of the country's geographical and environmental sensitivity, it is considered that a mandamus order will be issued in the name of the opposition to halt current exports to foreign countries and to arrange an effective system for environmental protection by mobilizing administrative and security agencies accordingly.

In addition, considering the fact that not utilizing river materials

brought by the Salinda River pose risk of river being diverted and other damages can occur,, the location clearly seen through technical study, geographical study system (GSI), in places and areas that are clearly seen through remote sensing imaging, and focusing on the needs of the country's development ensuring that the surface of the river is not deep, the banks are not washed away, and by making necessary dams in the places where the river has a relatively stable flow to ensure that the natural resources such as stones, gravel and sand that have frozen or accumulated at that place are used only for the construction of infrastructure within the country, and to review the existing policies and the environment in the context of conservation, it is considered that an injunction order will be issued in the name of the opposition to regulate this issue through environmental governance by building an effective mechanism with skilled manpower. Proceed as per the other details.

Details

Since it is considered that the present writ petition will be issued, when registering the writ petition, the petitioner Shailendra Prasad Ambedkar through R.No. 5717, Dr. Punya Prasad Khatiwada through R.No. 5716, Dinesh Tripathi through R.No. 5719, Ram Bahadur Shahi through R.No. 5720, Hariram Lovejoo through R.No. 5718, Atis Karki through R.No. 5721 dated on 2078/02/24, Bikram Nagarkoti through R.No. 5723 dated on 2/25/2078 and Dhananjay Khanal through R.No. 5734 dated on 3/24/2078, the amount deposited in this court for bail is Rs.5,000/- (Five thousand rupees) if the petitioner submits an application in accordance with Rule 15 (3) of the Supreme Court (Constitutional Bench Operation) Rules, 2072, it will be returned according to the rules. Inform the Financial Administration Branch of this Court accordingly1

A copy of this order, pursuant to Rule 24 of the Constitution Bench, to be given to the Enforcement Directorate of this Court2

If the interested party asks for a copy, provide a copy according to the rules³

Send a copy of this order to the Office of the Attorney General, upload the order, file and the scope of application to be deducted and the case file to be submitted as per the rules⁴

Judge

We agree with the opinion.

Judge

Judge

Judge

Ka. Mu. Chief Justice

Bench Officer : Nabin Acharya

Research Assistants: Shreya Sanjel (Section Officer), Dikshya Dhital (Intern)

Computer Operator: Harka Maya Rai

Year 2079 B.S., Baishakh 7th, Day 4, Good Luck!

SUPREME COURT, JOINT BENCH
Hon'ble Judge Minbahadur Rayamajhi
Hon'ble Judge Ramprasad Shrestha
2063 B.S Writ No.....0642

Order Date: 2064/06/01/ Day 3

Subject: Certiorari

Petitioner: Currently residing in Kavrepalanchowk District, Village Development Committee, Ward no. 6, 36 years old Devi Sunar

VERSUS

Opposition: Kavre District Police Office, Dhulikhel, et al.

- If FIR is filed demanding justice with respect to the legal provision of offenses relating to the human body under Muluki Ain no. 1, 13(3) for illegally arresting and killing an innocent minor, then should Section 17 of Government Cases Act 2049 be applied if the case falls under Schedule 1 of the Government Cases Act 2049? The case file evidence with the opinion should be sent to the Public Prosecutor's Office and after receiving the case file with the police's opinion, the public prosecutor will study the case file and decide whether to prosecute or not and if it appears that the case will be prosecuted, it should be done according to Section 18 of the said Act. The public prosecutor should prepare the charge sheet as prescribed and file the case in court on time where the legal duty of the opponents remains.

(Reference No. 4)

- In accordance with the provisions of the Government Cases Act 2049, the crime should be effectively investigated and prosecuted in accordance with the law and if there is no case to be prosecuted, the police office has the duty to follow the same procedure, even if the responsible officers of the Nepali Army have committed the crime of killing. As the subject itself is very sensitive, the investigation of such a subject should be carried out very quickly, responsibly and efficiently.
- In the judgment of the General Military Court, the fact that the death of the deceased Maina Sunuwar was due to the wrong procedure and technique adopted during the interrogation by the Nepali Army due to negligence, hastyness and indiscretion is also clear from the judgment itself. Even if the death was caused by any official, whether the death was due to criminal activities and whether the case should be prosecuted or not and if there is a case to be prosecuted after conducting an investigation in a responsible and effective manner, the case should be prosecuted in accordance with the provisions of the Government Cases Act 2049. Since the investigation does not seem to have been carried out effectively even after a long time has passed, an order of Mandamus has been issued in the name of the opponents to complete the investigation within 3 months from the date of receipt of the order.

(Reference No. 15)

On behalf of the Petitioners: Learned Advocate Harikrishna Karki,
Govinda Sharma and Ambar Raut

On behalf of the Opposition: Learned Associate Advocate
Thokprasad Siwakoti

Adopted Case Laws:

Order

Judge Minbahadur Rayamajhi: The brief facts and order of the present writ petition which was registered in accordance with Article 23/88(2) of the Constitution of Kingdom of Nepal 2047 are as follows:

2. I, the petitioner's minor daughter, Maina Sunar Bhagwati was an ordinary student studying as a regular student in grade 9 in Secondary School, Kharelthok, Kavrepalanchok. On 2060/11/05 at 6:00 in the morning, the then army men wearing army uniform from Birendra Shanti Training Center Panchkhal came to my house and searched for me. Since I was not at home that day, they forcibly arrested my minor daughter, Maina Sunwar, aged 15, and took her to Lamidanda in Kavre. The next day, on the 6th, teachers from the school where my daughter studied and 25 other people from the village went to the military barracks in Lamidanda. It was denied that my daughter was arrested and brought there. After that, when they reached Panchkhal barrack during the search, the real facts were hidden from them again and the arrest of my daughter was denied. There were all the witnesses who saw my daughter being arrested and taken inside the Panchkhal army barracks as she disappeared in the middle of the day. Another prisoner who was detained in the same place also told us that her daughter was arrested and tortured in the army's Panchkhal barracks. In this way, after the disappearance of the innocent daughter took place in the middle of the day, during the search for her daughter, national and international human rights organizations tried to pressurize the army to release her from prison. But for a long time, the army kept the truth hidden. After the all-round opposition to the illegal arrest of the daughter took notice, the army found guilty individuals in the murder case of the daughter Maina; the then Colonel Vavi Khatri, Captain Amrit Pun and Captain Sunil Adhikari, among

others who were working in the army's Panchkhal camp, and were prosecuted by the military court. The army headquarters announced that military action had been taken against them by the military court, which came to be known after it was also published in the newspaper. It has been confirmed beyond doubt after the departmental action that was taken against them had been made public that the deceased daughter was killed in an illegal manner after the arrest.

3. Such was the situation where my innocent minor daughter was taken under their control and killed in an extrajudicial manner. The Military Act cannot be applied in this case where an army has killed a non-military civilian. It is undisputed and clear that crimes of such nature fall within the jurisdiction of the ordinary courts and common law, and the culprits are liable to be prosecuted by the ordinary courts. Section 61 of the current Military Act, 2016 states that if any person to whom this Act applies takes the life of a person to whom the Military Act does not apply or commits coercion, he/she shall not be deemed to have committed an offense under this Act and shall not be tried by a military court. Likewise, Section 66 of the current Military Act, 2063 also provides that the matter of rape and murder falls within the jurisdiction of the general court. Looking at the provision mentioned in the Act, no soldier has been given immunity from killing non-military civilians in normal conditions. The military court has clearly excluded the jurisdiction to decide on such criminal acts. In this situation, it is clear that the trial of such cases should be like an ordinary case in an ordinary court. The act of killing the deceased daughter in a dutiful manner on the contrary, is included in Schedule 1 of the Government Cases Act, 2049. In order to get the accused to be prosecuted according to the law, we went to file a complaint in the office of the respondent No. 1 which took place immediately after the incident. Since

the accused was not prosecuted for a long time, on 27 Kartik, 2062, I and the human rights activist went to the District Police Office in Kavre to file a complaint according to Section 3(1) (2) of the Government Cases Act, 2049. The police personnel refused to register a complaint against the soldiers as it should be registered in the registration book specified in Section 3(4) of the Act, so the complaint was filed at the District Administration Office on the same day as per Section 3(5) of the Act. The application was registered. Even after the continuous initiatives, the complaint of the case was registered only on 21 Mangsir 2062 and only in registration no.1760, was the complaint registered in District Police Office, Kavre. In Section 4 of the Government Cases Act, 2049, to prevent the disappearance or destruction of evidence, arrangements should be made to prevent the escape of the criminal and arrest the criminal, including the collection of evidence (Section 10), and if information about the crime is received, the police office of the police officer of at least the rank of Sub-Inspector should conduct the process . For a crime to fall under the jurisdiction of a military court, it must have a direct relationship and connection with the organization and operation of the military and the official duties and discipline of the military. A cruel and inhumane act like killing an innocent minor in one's custody comes under the definition of anti-humane and a criminal act. Such an act can never be for the organizational benefit of the army. The legal responsibility of arresting the accused as soon as possible, collecting evidence and registering the charge sheet after necessary investigation and after the registration of the initial complaint related to such crime is entirely the responsibility of the opposing agencies.

4. Therefore, after the registration of the complaint, the responsibility of proceeding with the investigation as soon

as possible and filing the charge sheet has been assigned to the opposing agencies as a legal duty and authority. It is understood that the accused related to the present case are still working in the army. Even though it may be more than a year since the complaint was registered against them, who are clearly guilty of the incident, the fact that they have not been arrested means that the investigation work has not progressed and the opposition investigator has not fulfilled the duty prescribed by the law. Therefore, since the opposing agencies have not fulfilled the legal duties prescribed by various sections of the Government Cases Act, 2049, on the basis of the complaint submitted, the investigation work as per the law should be immediately carried forward and the accused should be arrested and charged as soon as possible, and the duties prescribed by the Government Cases Act, 2049 should be fulfilled according to Article 88(2) of the Constitution. And in the name of the agencies, issue necessary orders, including mandates, and make arrangements to advance the investigation work as soon as possible. In addition, if it is revealed from the written answer that the accused were not arrested and the investigation was not carried forward due to the work of any agency or official, that agency should also be made an opponent on the basis of this application, and such illegal work decision should be quashed by sending an order.

5. What happened in this case? Why should the order as requested by the petitioner not be issued? To send a written reply through the Attorney General's office, keep 1 copy of the writ petition and send a notice to the opponents and give the answer to the Attorney General's office. Also, considering the seriousness of the subject matter, the order of this court dated 2063/9/27 was to give priority to presenting the written answer after receiving it.
6. After submitting the complaint in writing, the complaint

was registered in the diary no. 10 of this office under case registration no. 31 dated 2063/8/21 and a correspondence was sent from this office to the Police Head Office, Crime Investigation Department, Naxal. A correspondence was sent to Birendra Peace Work Training Center in Panchkhal to register the defendants. As the said office did not register the defendants, a correspondence was sent to the Police Office, Bagmati Zone, asking them to take the initiative to present the defendants from this office. At the place where the dead body of Maina Sunuwar was buried, the human rights officer of the Human Rights High Commission of Nepal and the team of the investigation officer from this office were sent to the training center to conduct an on-site inspection of the place where the dead body was found. Starting from the training center, then cordon off the place and identify the place and secure the incident site. As was the correspondence sent to the said training center. A correspondence was sent to the training center stating that at the place where the dead body of Maina Sunuwar was buried, human rights officers from the Human Rights High Commission of Nepal along with the team of investigation officers from this were to be sent here to conduct an on-site inspection of the place where the dead body was found. Then, secure the incident site by cordoning off the place and identifying the place. A correspondence has been sent to Naxal Police Headquarters asking that an expert be arranged to remove the dead body from the cordoned place and to collect and examine the evidence, but the expert has not been sent yet. A correspondence has been received from the Executive Department (Prad Department) Nepal War Base Kathmandu that the military court has already prosecuted and decided against Colonel Vavi Khatri, who was involved in the killing of Maina Sunuwar. Regarding the correspondence sent to the District Public Prosecutor's Office Kavre to get instructions as to whether action can be taken

in the same case, the investigation is still pending from the District Public Prosecutor's Office Kavre. The written reply of District Police Office Kavrepalanchok was that the order does need to be issued and it has been respectfully requested to get it canceled by the opposition writ petitioner. This was done so on the basis of after receiving a single instruction, the opposing writ petitioner, who proceeded with the investigation process, according to the request mentioned in case number 3, had fulfilled all the responsibilities of the investigation of the said case within the jurisdiction of the said office, and in the context that the necessary actions were being taken towards the arrest of the criminal and the collection of evidence, as per the request of the opposing writ petitioner.

7. Based on the letter from the Police Office, Kavrepalanchowk District, dated 2063/4/1, on receipt no. 79, a correspondence was sent on behalf of the petitioner Devi Sunuwar to the opposition Government of Nepal, Colonel Vavi Khatri who killed the petitioner's daughter, aged 15 years on duty to appear in the said office for further investigation processes. According to the letter from Nepal Army's Executive Department (Prad Division), in the above case, petitioner's daughter Maina Sunuward died 1 hour after the interrogation was carried out in the Panchkhal Barrack. This was due to the adoption of wrongful procedures and techniques as well as due to the carelessness, negligence and lack of discretion from the opposition's side, and also owing to the victim's own weak mental state. Colonel Vavi Khatri, fellow Captain Sunil Adhikari and Amrit Pun, who acted negligently in that incident, were also fined for 6 months of imprisonment, and since the decision of the General Military Court has been implemented in accordance with the Military Act, 2016, it was not justified to take action against them in the same case as per the letter received from the following court. Since the defendants in

the following case were already investigated and tried against, there was doubt over whether the opposition could be tried against. An opinion has been requested regarding whether it is possible to proceed with such proceedings based on the letter sent from the following office dated 2063/4/22, receipt no. 20, where an appeal has been sent in writing to the Appellate Public Prosecutor's Office, Patan, Lalitpur, to get necessary instructions Based on the letter received from the Appellate Public Prosecutor's Office, Patan, Lalitpur, receipt no. 409 dated 2063/5/20, what kind of incident occurred and according to which law was the decision made by the military court? Since it was written that the order could not be given, all the copy of the relative documents and the decisions made by the military court was sent to District Police Officer Kavrepalanchwok, as per receipt no. 40 dated 2063/5/20. A decision will be made in accordance with Section 17 of the Government Cases Act, 2049 as per the correspondence dated 2063/10/29. At present, it has been written that after the complaint is registered in the District Police Office, Kavre, it is possible to proceed with the investigation process. It seems that the appeal made by this office's letter in receipt no. 154 dated 2063/11/1, by the Public Prosecutor's Office's letter in receipt no. 1787 dated 2063/10/29, has been sent in writing to the District Police Office, Dhulikhel. Therefore, when the said case is registered in the crime register book at the District Police Office, Dhulikhel, after investigation according to section 17 of the Government Cases Act, 2049, if an opinion is received from the District Police Office, Dhulikhel, a decision will be made regarding whether or not the case will proceed. After the police have registered the crime, the legal obligation to fulfill the investigation processes falls under the District Police Office, Kavre's responsibility. The written response of the Public Prosecutor's Office, Kavrepalanchowk was a request made to the prior office that there be no violation of

- any of the constitutional and legal rights of the opposition writ petitioner.
8. A letter has been sent to the Police headquarters from the (Jangi Division) regarding the incident mentioned by the petitioner in the complaint, that it was decided by a court of inquiry from the Nepali Army's Executive department, (Jangi Division). As it is also seen from the written reply of the District Police Office Kavrepalanchok to the Nepalese army base to send the original case file along with the judgment of the said date to this court within 7 days. Additionally, regarding the petitioner's complaint, a written reply from the District Public Prosecutor's Office Kavrepalanchok dated 2063/11/1 indicates that the District Police Office has been instructed to proceed with the investigation. By the order of this court dated 2064/1/25, an order has been given to the District Police Office Kavrepalanchowk to provide a clear description of what kind of investigation action has been taken in accordance with the said directive and send it in writing within 7 days.
 9. According to the rules and after reading all the documents of the case files related to the petition presented before the court, learned advocates Mr. Harikrishna Karki, Mr. Govind Sharma and Mr. Amwar Raut, who appeared on behalf of the petitioners, stated that the deceased Maina Sunuwar was captured by the soldiers and did not return home. The fact that she was killed and buried in an illegal manner is confirmed by the reports of human rights organizations and the confessions of military officials. It has been confirmed that a non-military citizen who was captured by the soldiers and died while staying in the military barracks, was illegally killed due to the fact that the body of the deceased was not given to the family members. According to the applicable law of Nepal, a complaint has been filed against the military officer

involved in this incident but no investigation has been carried out which has affected the rights of the citizens. It is also said that a Mandamus order can be issued in the name of the opponents to further the investigation process. As Mr. Thok Prasad Siwakoti, who was present on behalf of the opposition District Police Office Dhulikhel, also argued that the process of investigation is still ongoing and is yet to be completed. It appeared that a decision had to be made as to whether or not the order should be issued as per the petitioner.

10. When considering the decision at hand, at 6 o'clock in the morning of 2060/11/5, army personnels forcibly arrested the 15-year-old daughter of the petitioner, Maina Sunwar from Birendra Shanti Training Center Panchkhal when she was not at home. They also tried to hide this fact. After a long time, the army headquarters announced that Maina's death was caused by the actions of Major General Vavi Khatri, who was working in the army's Panchkhal cap at that time and was found guilty in the case of the murder of the petitioner's daughter, Maina Sunwar. After that, when the petitioner went to file a complaint at the opposition District Police Office Kavrepalanchok to get the accused prosecuted according to law, the police officer refused to register the complaint, so she filed a complaint at the District Administration Office Kavrepalanchok, Dhulikhel according to the law. Since the investigation had not been completed so far, the petitioner has submitted a request to proceed with the investigation immediately and to arrest the accused and file charges as soon as possible to fulfill the duty prescribed by the Government Cases Act, 2049 and to issue a writ of Mandamus on behalf of the opposition In the written reply of the opposition District Public Prosecutor's Office Kavrepalanchok, Dhulikhel, in relation to whether or not the investigation process should be continued when the action has already been taken by the

military court, the appeal was sent to the Appellate Public Prosecutor's Office, Patan where the response was that the since it was possible to conduct the investigations as per the complaint, they should do so accordingly. In accordance with Section 17 of the Government Cases Act, 2049, after the investigation, if an opinion is received from the District Police Office, Dhulikhel, a decision will be made regarding whether or not the case will be prosecuted. In response to the written reply of the District Police Office, Kavrepalanchok, a correspondence was sent to the District Public Prosecutor's Office, Kavrepalanchok, dated 2063/10/10, saying whether it is possible to proceed with the proceedings against the opposition in the same case as they were already sentenced by the military court. A written reply was also received stating that the investigations were being carried out due to the fact that the instructions were yet to be received from the District Public Prosecutor's Office Kavrepalanchok.

11. As per Section 3(1) (2) of the Government Cases Act, 2049, when the petitioner went to file a complaint at the District Police Office, Kavrepalanchok, they did not file the case as per Section 3(4) of the said act. Then, she filed a complaint at the District Administration Office as per Section 3(5) of the Act which cannot be said otherwise by the opposition. While observing the photocopy of the case file that Devi Sunuwar submitted to the District Police Office Kavrepalanchok, she had already been continuously searching for her daughter since 2060/11/6. The fact that the death of her daughter was reported to her by the military headquarters in Baisakh, 2061 when the soldiers came, arrested her and took her away has been mentioned in receipt no. f of the complaint. A complaint was filed on 2062/7/27 requesting that the persons involved in the killing of her daughter should be investigated and punished according to the prevailing law.

Section 3 (1) of the Government Cases Act, 2049 provides that a person who knows that any offense listed in Schedule 1 has been committed or is being committed or is about to be committed, shall disclose the evidence he/she has or has seen of the crime in question and make a written report as soon as possible to the nearest police station. Oral information can also be provided. Section 3(3) of the same act provides that when a person who comes to report a crime has given such information orally, the concerned police officer shall read out to him/her in writing, all the things he/she has said and also the things according to Sub-Section (2), and keep the person's signature as well.

12. While the petitioner's opponent District Police Office Kavrepalanchok has not registered the crime report, the fact that the petitioner filed a report with the District Administration Office in accordance with Section 3(5) of the Act, which can be confirmed as the opposite District Police Office Kavrepalanchok has not been able to say otherwise. It can be seen that the opposition District Police Office Kavrepalanchok did not follow Section 3 of the Government Cases Act, as they did not register such a complaint after a complaint along with the information about the crime was received. Section 4(1) of the Government Cases Act, 2049 clearly lays down the legal duty of a police officer to proceed with the investigation related to a crime as soon as possible when he/she receives information that any crime mentioned in Schedule 1 has been committed. According to the legal provisions of the said Act, the investigation process should be carried out on time after a complaint has been filed. But in this case, even after such a long period of time after the complaint was filed, it could be seen that the investigation process was not carried forward effectively.

13. If the military officials mentioned in the complaint have been

investigated by the military general court and punished, can they be re-investigated according to the complaint or not? District Police Office Kavrepalanchok Dhulikhel requested an opinion from the Public Prosecutor's Office, Kavrepalanchok, Dhulikhel and the Public Prosecutor's Office sent the appeal to the Appellate Public Prosecutor's Office, Patan. Based on this appeal, the Appellate Public Prosecutor's Office, Patan, sent a reply stating that the investigation process can be carried forward in this regard, as the complaint has been registered at the District Police Office, Kavre, which will be decided later in accordance with Section 17 of the Government Cases Act, 2049. Even if it is seen from the documents attached to the case file that the investigation process has already been completed, the following order from this court dated 2064/1/25, the District Public Prosecutor's Office Kavre has instructed the District Police Office to proceed with the investigation process on 2063/11/1 and to send clear details of what kind of investigation has been carried out as per the instruction to this court within 7 days. According to the order, District Police Office Kavrepalanchok Pa.Sa. 2063/064, dated 2064/02/13 in response to this court as per reference no. 7, where Dr. Harira Basti from the Forensic Medicine Department, Maharajanj, Kathmandu, a team of investigating officers from the District Police Office along with an officer of the National Human Rights Commission excavated the human skeleton from the place where the body of deceased Maina Sunuwar was said to have been buried. As per reference no. 8, apart from the fact that the bones were sent for examination, a letter has been sent mentioning to further reveal the identity of those involved in the investigation process and concerning the arrest of individuals.

14. In relation to the incident of 2060/11/5, in the complaint dated 2062/7/27, Colonel Vavi Khatri, Major Amit Pun,

Captain Sunil Adhikari and Captain Niranjan, working in the Nepal Army Camp of Panchkhal have illegally arrested and killed an innocent minor. After having a complaint filed against them on the basis that they should be charged according to Muluki Ain relating to life 1, 13(3). Based on the perspective that the following case relating to life falls under Schedule 1 of the Government Cases Act, 2049, shouldn't they be charged accordingly as per Section 17 of the Government Cases Act, 2049? The evidence of the following case files along with the opinion should be sent to the public prosecutor's office and after receiving the case file with the opinion of the police, the public prosecutor will study it and decide whether to prosecute or not. In case it appears that the case should be prosecuted according to section 18 of the said Act, the public prosecutor will prepare the charge sheet as prescribed and file the case in court on time. The opposition has legal duties to perform in such conditions as well which does not seem to be fulfilled on their part.

15. According to the provisions of the Government Cases Act, 2049, the police office has the duty to effectively investigate the crime and prosecute the case according to the law and even if there is no case to prosecute, the police office has the duty to follow the same procedure nonetheless. In addition, the issue that the responsible officers of the Nepali Army have committed the crime of killing an individual (civilian) is very sensitive in itself, and the investigation of such a matter should be done quickly, responsibly and effectively. On page 9 of the judgment of the General Military Court dated 2062/5/23 received from the Nepali Army, the fact that the death of the deceased Maina Sunuwar was due to the wrong procedure and technique adopted during the interrogation by the Nepali Army due to carelessness, hastiness and indiscretion is also clear from the judgment. Regardless of whether the cause

of the official death was due to criminal activity or not, or if the case should be prosecuted or not, if found that it should be then it should be done so in a responsible and effective manner. The case should also be prosecuted in accordance with the provisions of the Government Cases Act, 2049. In relation to the complaint of 2062/7/27, since the investigation has not been done effectively even after such a long time has passed, a Mandamus order has been issued in the name of the opponents to complete the investigation within 3 months from the date of receipt of this order.

I agree with the opinion,

Judge Ram Prasad Shrestha

Bench Officer: Deputy Assistant Swikriti Parajuli

Year 2064 B.S., Ashwin 1st, Day 3, Good luck _____

SUPREME COURT, JOINT BENCH
Hon'ble Judge Tanka Bahadur Moktan
Hon'ble Judge Hariprasad Phuyal

ORDER

079-WO-0198

Subject: Certiorari, Mandamus

Petitioners

Son of Bhojraj Pokharel, Adhip Pokhrel, Residing in Kathmandu District, Kathmandu Metropolitan City, Ward No. 11...1

Son of Harald Volz, Tobias Volz (Passport No. C4JCLNF5L), A German Citizen With a Permanent Address at Goethestrasse 47, Malsh 76316, Baden-Württemberg, Germany, Currently Residing in Kathmandu District, Kathmandu Metropolitan City, Ward No. 11...1

Versus

Opposition

Ministry of Home Affairs, Immigration Department, Kalikasthan, Dillibazar...1

Director General, Immigration Department, Kalikasthan, Dillibazar...1

The brief facts and order of the present writ petition which was filed under the jurisdiction of this court in accordance with Article 133(2) of The Constitution of Nepal are as follows:-

1. Among the petitioners, I am Adip Pokharel, a Nepali citizen. I am a citizen who can fully enjoy the rights provided to me by The Constitution of Nepal. Before, I was working outside of Nepal. Currently, I have returned to Nepal and have been living here ever since. I am a gay man and I belong to a gender and sexual

minority due to my sexual orientation. I met Tobias Volz, one of the petitioners here in Nepal. He is also a gay man and we got married after we grew closer. Similarly, one of the petitioners, Tobias Volz, is also a German citizen and has a German passport issued by the German government (Passport No. C4JCLNF5L). I have been living in Nepal for a long time due to my work and have worked in international organizations, including GTZ and UNAIDS. During this time period, I met one of the petitioners, Adip Pokharel. As both of us were gay men and since we liked each other, we got married on 2/7/2075 with respect to the German Law. We have registered our marriage (Registration No. E37/2018) from Masleh, Kreis Kalsruhe and have received the following certificate. After the marriage, Tobias Volz, one of the petitioners went to the Immigration Department to apply for a Non Tourist Visa for the first time on 3/4/2079 but no legal actions were initiated. Petitioner Adhip Pokharel asked for a marriage registration certificate in Nepal from the local level where lives, i.e Kathmandu District, Kathmandu Metropolitan City, Ward No. 11. When he went to register the marriage certificate, he was informed that there is no provision for same-sex marriage registration and the marriage was not registered. After that, knowing that the Supreme Court had ordered the opposing Immigration Department to provide a non-tourist visa on (Suman Pant v. Ministry of Home Affairs, along with the Immigration Department with a copy of the order on the writ petition of Mandamus and Certiorari on 6/7/2074), I applied for a visa with a written application on 3/5/2079 but was denied and only oral information was provided.

2. The Constitution of Nepal has established the following rights of homosexuals or gender and sexual minorities and provides that both citizens and individuals shall not be discriminated against and shall be provided accordingly with equal protection in the eyes of the law. According to Section 7 of the Immigration Act, 2049, it is mentioned that the Director General of the Immigration Department can

issue visas as prescribed by the law and can extend the duration of the visa. While Rule 8 of the Immigration Rules 2051 states that a non-tourist visa is granted to a foreigner who maintains a marriage relationship with a Nepalese citizen and that there remains a legal provision which arranges for one to be provided when a marriage registration certificate is submitted. According to which, in the event that any foreigner has established a marriage relationship with a Nepalese citizen and has submitted a marriage registration certificate, the Director General of the Immigration Department is responsible for obtaining a non-tourist visa under Rule 8 and issuing it accordingly. Likewise, in Private International Law, there are various treaties on marriage and family matters. Nepal has also incorporated the provisions of these treaties in their law. Section 692 to 721 of the Civil Code includes provisions related to Private International Law, including matters ranging from marriage, divorce, property transfer agreements and the execution of court's decision. As revealed in various cases above, in addition to the provisions of the Constitution of Nepal, the provisions of various international human rights documents approved by Nepal, and the orders of the respected Supreme Court, petitioner Suman Pant and the opposition Immigration Department, as well as the deportation order, as well as the precedent established in the case, to Tobias Volz as a non-tourist. If there is any decision by the opposition parties by refusing to issue a non-tourist visa to Tobias Volz in a way that affects the rights of the petitioners, then the related decision, correspondence and other matters shall be removed from the order of dispatch and the non-tourist visa shall be issued to the petitioner Tobias Volz with immediate effect. A joint writ petition of petitioner Adhip Pokharel and Tobias Volz to issue an injunction.

3. What happened in this case? Why shouldn't the order be issued as requested in the petition? If the order does not have to be issued, a written response should be submitted through the Attorney General's office within 15 days from the date of receipt of this order,

excluding the deadline of the petition, along with a copy of the order and writ petition in the name of the opponents, along with a notice of extension period. Regarding the demand for interim order, after discussion between both parties, when it seems appropriate to reach a decision, this court dated 19/5/2079 to issue a deadline notice to the opponents to appear on the day of 26/5/2079 for the discussion on whether to issue an interim order or not.

4. In the immigration department, the visa application form has been operating online since last year and according to the records of this department, the applicant is on a tourist visa till 29th September 2022 and it is not visible from the Nepali port software that he has applied for other visas. Section 7(c) of the Immigration Act, 2049 and Sub-Rule (1)c(h) of Rule 8 of the Immigration Regulations, 2050, 5(a) of Point No. 4.4 of Paragraph 4 of the Immigration Procedures, 2065, Section 67 and Section 76 of the Civil Code Act, 2074, Section 18 of the National Identity Card and Registration Act, 2076 as well as Rule 16 of the National Identity Card and Registration Regulations, 2077, including the above-mentioned legal provisions, if the concerned person submits an application through the online portal of this department, the necessary decision will be made after studying the submitted documents. Also the written answer submitted by Rishi Ram Tiwari, Director General of AI.

Order Section

5. According to the rules, the learned advocate Mr. Rupnarayan Shrestha, present on behalf of the petitioners, after studying the documents attached to the writ petition that was submitted before the court, said that the petitioners, Tobias Volz and Adhip Pokharel, are both homosexuals and they got married on October 19, 2018 according to German law. The marriage has been registered in the Marriage Registration Office in Germany (Reg No. E37/2018) and the following certificate has been received. According to the immigration law of Nepal, there is a legal arrangement to grant non-

tourist visas to foreigners who maintain a marital relationship with a Nepali citizen and submit a marriage registration certificate. From this honorable court, in the deportation order case involving Suman Pant versus the Immigration Department, including Dillibazar, explaining in detail about the rights of gender and sexual minorities, in that writ petition, it has been ordered to issue a non-tourist visa to the petitioner's spouse. Therefore, the Constitution of Nepal, existing laws, provisions of various international treaties ratified by Nepal and Suman Pant writ petition against the Immigration Department, with reference to the principles propounded by this court, it was argued that the petitioner, Tobias Volz, should be issued a suitable injunction to grant a non-tourist visa.

6. Learned Associate Advocate Mr. Sanjeevraj Regmi appearing on behalf of the opposing Immigration Department stated that Tobias Volz, being a German citizen and according to the records of the Immigration Department, he was on a tourist visa until 2022/09/29 and he did not apply for any other visa, it is seen from the written reply of the Immigration Department. The Immigration Act 2049 and the Immigration Regulations 2051 stipulate that foreigners who are married to a Nepali citizen and obtain a marriage registration certificate will be granted a non-tourist visa. In 5(a) of Point No. 4.4 of Paragraph 4 of Immigration Procedures 2065, it is mentioned in relation to the necessary documents to be submitted to obtain a non-tourist visa on the basis of marriage. If the petitioner submits an application with the required documents as stipulated in the law and if their marriage is not contrary to the prevailing Nepalese law, then the petitioner will be granted a visa as requested by the concerned body when the decision is made when the petitioner submits the application.

7. Among the petitioners, Adhip Pokharel, a Nepali citizen, and Tobias Volz, a German citizen, were married in accordance with German law on 2/7/2015 (19th October 2018) and registered at the marriage registration office in Malsch Kreis, Karlsruhe,

Germany under registration No. E37/2018 and received a marriage registration certificate. When Tobias Volz applied for a non-tourist visa at the Immigration Department on 3/4/2079, no legal actions were considered for him and after the department requested a marriage registration certificate registered in Nepal, he went to Kathmandu District, Kathmandu Metropolitan City, Ward No. 11 Office to register the marriage accordingly but was informed that there is no such provision for same-sex marriage registration and the marriage was not registered. A copy of the order of the writ petition of Suman Pant vs Ministry of Home Affairs, along with the Immigration Department 06/07/2074 was issued when attempting to re-apply for a visa on 3/5/2079 but was once again denied and only given oral information. With respect to the arrangement granted by Article 16, 17 and 18 of the Constitution of Nepal, as provided in Part-6 of the Civil Code of Nepal 2074, the provisions related to private international law, Section 7 of the Immigration Act 2049 and Rule 8 (1) (h) of the Immigration Regulations 2051, a non-tourist visa must be obtained and in point No. 11 of the form of Schedule - 2A of the Immigration Regulations, 2051, It seems that the main application is to issue a Mandamus or other appropriate order in the name of the opponents to address the matter, as the applicant is having to face the issue of rights due to the provision that the applicant should mention his/her spouse.

8. In the written reply received from the respondents, one of the petitioners, Tobias Volz, claimed that he had applied for a non-tourist visa, but it was not shown in the Nepali Port software. In accordance with the Immigration Procedures, 2065, there is a provision to attach a copy of the marriage registration certificate to the documents to be submitted to obtain a non-tourist visa or an official letter certifying the marriage from the relevant embassy if the marriage took place outside Nepal and regarding that matter there is a legal provision that can register a marriage according to section 67 and section 76(1) or (2) of the Civil Code, 2074 and can

give a notice of marriage according to section 18 (2) of the National Identity Card and Registration Act, 2076, according to the said legal provisions, if the concerned person submits an application through the online portal of this department along with the necessary documents, the necessary decision will be made after studying the submitted documents.

9. Having heard the above-mentioned factual issues and the arguments of both parties, after studying the case file and looking towards the decision, it was found that the following points should be stated in the writ petition:

- a) What kind of arrangements are made in the constitution of Nepal regarding the rights and rights of gender and sexual minority communities and their marriage?
- b) What is the view of this court regarding the rights of gender and sexual minority communities and their marriage so far? What is the opinion of this court so far regarding the granting of non-tourist visa to the foreign married partner of a Nepali gay person?
- c) What kind of arrangements are made in the federal law regarding the rights of gender and sexual minority communities and their marriage?
- d) Should the order be issued according to the request of the petitioner or not?

10. First question- When considering the provisions regarding the rights and marriage of the gender and sexual minority communities in the Constitution of Nepal, during the construction of the constitution of Nepal regarding the gender and sexual minorities, the minority communities based on sexual orientation and gender identity have been discriminated against by the law, administration and society of Nepal. From this court in the writ petition of Sunil

Babu Pant who asked to be able to enjoy equal human rights, it was explained “Since gender includes the third gender apart from women and men, in the Constitution of Nepal, which is being drafted by the Constituent Assembly, when granting rights to individuals, a clear provision should be made in such a way that no discrimination can be made on the basis of gender identity and sexual orientation in addition to women and men, similar to the Bill of Rights of the South African Constitution, has been explained.”⁷¹ In the background of the said judicial comment, the concept paper prepared by the committee formed to study the fundamental rights of the Constituent Assembly and the Directive Principles of the state during the drafting of the Constitution, in the concept of citizenship there is a provision which states, “In a simple and easy manner, provide citizenship certificates to every Nepali citizen who has reached the age of 16 without any discrimination on the basis of gender, and also to third genders.”⁷² It seems that in Article 12 of the Constitution of Nepal, it is arranged that the citizenship of Nepal can be obtained with gender identity. In relation to the rights of gender and sexual minorities, in Article 18 of the Constitution of Nepal, under the right to equality, Sub-Article (1) states that all citizens shall be equal under the law and no one shall be deprived of the equal protection of the law. Similarly, in the restrictive phrase of Sub-Article (3), it seems that additional protection is provided to the people of the gender and sexual minority group by the provision that special arrangements can be made for the protection, empowerment or development of “gender and sexual minorities”. In Sub-Article (4) there shall be no discrimination in wages and social security based on gender for equal work⁷³ and in Sub-Article

71 Sunil Babu Pant vs Government of Nepal Et al., N.K.P 2065, Point 4, Decision No. 7985, Pg. 524

72 Constituent Assembly Fundamental Rights and Directive Principles Committee Subject Concept Paper and Preliminary Draft Report 2066, Pg. 145

73 In Article 18 (4) of the Constitution of Nepal, the words "on the basis of sex" have replaced the words "women and men" in Article 13 (4) of the Interim Constitution of Nepal, 2063.

(5) all children shall have equal rights to ancestral property without gender discrimination. And it does not seem to discriminate on the basis of gender in practice.⁷⁴ In relation to the basic elements and recognition of gender equality guaranteed by Article 18 of the Constitution of Nepal, “The issue of gender equality should not only be between women and men but should be extended to gender and sexual minorities⁷⁵ and it seems to be oriented towards achieving substantive equality rather than formal equality.⁷⁶ Gender inclusion is not only between women and men, but the inclusion of gender and sexual minorities as well. The aim is to be treated equally in the acquisition, distribution and enjoyment of rights. It is also the internal feeling of a person being female, male or third gender.⁷⁷ Sexual orientation refers to the direction of a person’s sexual or emotional attraction, and such attraction may be to the opposite sex, to the same sex, or to all sexes.⁷⁸ Since it is mentioned in the concept paper of the report prepared by the Fundamental Rights and Directive Principles Committee of the Constituent Assembly, it seems that the intention of the drafters of the constitution is that the citizens of the gender and sexual minority communities, along with their identity, can enjoy and practice the rights granted by the said Article 18. “The constitutional guarantee of the human rights of the sexual and gender minority communities is necessary in the new constitution, proper compensation should also be provided for the violation of the human rights of this community, gender neutral words and language should be used in the constitution, and if the words ‘women and men’ are used, then the word ‘third gender’

74 The words "all children" in Article 18 (5) of the Constitution of Nepal have replaced the words "son or daughter" in Article 20 (4) of the Interim Constitution of Nepal, 2063.

75 Constituent Assembly Fundamental Rights and Directive Principles Committee, Thematic Concept Paper and Preliminary Draft Report 2066, Pg. 184.

76 Ibid, Pg. 184

77 Ibid, Pg. 332

78 Supra Note 5, Pg. 359

should also be used as well.”⁷⁹ as has been suggested in the report of the Fundamental Rights and Directive Principles Committee.

11. In the preamble of the constitution, it is stated that “it is resolved to end class, ethnic, regional, linguistic, religious, gender discrimination and all kinds of ethnic untouchability to ensure economic equality, prosperity and social justice, and build an egalitarian society based on proportional, inclusive and participatory principles.”⁸⁰ In order to achieve the constitutional vision of an egalitarian society, it seems that eliminating any kind of discrimination existing in the society is a prerequisite.

12. For years in Nepali society, “Chakka”, “Hijanda”, “Eunuch”, “Meti”, “Gandi”, “Maugi”, “Kothi”, “Maugmehar”, “Maugiyaha”, “Meti”, “Maibabu” among others. have been used. Since the practice of insulting people from gender and sexual minority communities still exists, the preamble of the Constitution of Nepal states that it will be a constitutional scenario to end gender discrimination and build an egalitarian society, and within the scope of the concept proposed by the Fundamental Rights and State Directive Principles Committee, the drafters of the Constitution of Nepal envisioned various related articles of the Constitution. Therefore, the term “gender identity and sexual orientation” entered Nepali legal language and literature only after the case of Sunil Babu Pant. In order to achieve the objectives of protection, empowerment and development and social strengthening, the term “gender and sexual minorities” has been entered in the constitution of Nepal under the provisions of the right to equality and social justice, but overall, the term “LGBTIQ+”⁸¹ and “SOGIESC”⁸² has a wider meaning and

79 Constituent Assembly Fundamental Rights and Directive Principles Committee, Thematic Concept Paper and Preliminary Draft Report 2066, Pg. 184

80 Constitution of Nepal, Preamble

81 The term LGBTIQ+ refers to the Lesbian, Gay, Bisexual, Transgender, Intersex, Queer and Asexual groups, and the term "+" refers to other genders and sexualities not represented by LGBTIQ. It also refers to minority communities.

82 SOGIESC stands for Sexual Orientation, Gender Identity, Gender

scope. It seems that it should be considered as provided.

13. In the preliminary draft of fundamental rights submitted by the Committee on Fundamental Rights and Directive Principles, the provision of family rights is proposed. Under this arrangement, every person has the right to marry and the right to divorce under the law. Marriage cannot be arranged against the will of the party to be married or without full and free consent. The couple has equal rights in property and family matters, child rearing, maintenance and it seems that it is mentioned that for the overall development, parents have equal rights and responsibilities, and every child has the right and responsibility to respect and nurture parents. And having more than one husband or wife, marriage against will and without full or free consent is punishable by law.⁸³ Without mentioning in the draft that marriage is only a relationship between a man and a woman; Gender-neutral terms such as “person” and “citizen” are used, and marriage is accepted as a relationship between individuals, and the rights of gender and sexual minorities regarding marriage and family are also ensured.

14. When the constitution of Nepal was promulgated, although the proposed family-related rights could not be included in the core of the Nepali constitution, it seems that the family-related rights have been ensured because it is provided that couples have equal rights in property and family matters under Article 38, Sub-Article (6) of women's rights.⁸⁴ According to Article 18, by adopting the principle of non-discrimination through the right of equality, including the identity of gender and sexual minority communities, there is also a provision that discrimination cannot be made on the basis of

Expression and Sex Characteristics, which refers to people with non-traditional sexual orientation, gender identity, gender expression and sexual characteristics.

83 Report of the Constituent Assembly Constitution Archives Study and Review Committee 2071, Pg. 95. (2071)

84 These words are used instead of the words "husband" or "husband and wife" used in the laws that existed before the promulgation of the Constitution of Nepal. For example, the palace of the married wife of the Civil Act, 2020.

gender and sexuality. In Article 38 (6), the provision of equal rights in guaranteed property and family matters is also attracted in relation to gender and sexual minority communities. The constitutional basis for the right to marriage and family of the gender and sexual minority community has been prepared, it seems to be acceptable. In Sub-Article (1), (2), (3), (4) and (5) of Article 38, it is clearly specified that the right can be enjoyed by women, but in Sub-Article (6) the gender-neutral term “couple” is used. It seems that it can be considered as pointing to the same.

15. Article 16 of the Constitution of Nepal guarantees the ‘right to live with dignity’, Article 17 ‘the right to freedom’ and Article 18 ‘the right to equality’. As interpreted by this court from time to time in the context of these provisions, it has been established that gender and sexual minority communities have the right to identity, belonging, dignified living and even family life. When interpreting Article 38 (6) harmoniously, the gender-neutral terminology mentioned in Article 38 (6) includes same-sex couples within a couple and property and family rights that same-sex couples receive as a result of marriage. Similarly, according to the directive principle of establishing a public welfare state system by maintaining a fair system in the fields of national life through the values and recognition of human rights, gender equality, proportional inclusion, participation and social justice provided in Article 50 (1) of the Constitution of Nepal. Article 51 (c) (5) states that it is the policy of the state to end all forms of discrimination, equality, exploitation and injustice in the name of religion, custom, tradition, custom and culture in the society, including differences in marriage and family. In the course of creating the current constitution, a narrative that has existed for centuries among the common people that gender is only between people, and even in the issued constitution, an inclusive constitution is being implemented to include people who are excluded from the right perspective or people who are not informed by the common people. In this situation, since the fundamental rights provided by Part 3 of

the Constitution of Nepal should be interpreted harmoniously, it seems that it is within the responsibility of the state to maintain the access of the people of the gender and sexual minority communities to the enjoyment and practice of the fundamental rights, including the rights related to “marriage” and “family”.

16. In the judgment of Sunil Babu Pant, the Constituent Assembly should proceed with the drafting process of the constitution in such a way that the gender and sexual minority communities are not discriminated against. And in the background of such judicial comments from this court, the concept paper of the Fundamental Rights and Directive Principles Committee was prepared and when the words “women” and “men” are used in the constitution, “third gender” is suggested to be added and in the preliminary draft of the constitution. Under the “family-related right” provisions are made stating that every person has the right to marry freely regardless of gender, that provision has been included in Article 38 (6) and under that right, the couple has equal rights in property and family matters. It seems that Article 38 (6) which exists for the purpose of protecting the rights and interests of people belonging to gender and sexual minorities has been accepted in the Constituent Assembly during the making of the Constitution of Nepal. According to the values accepted by the Nepalese society within Article 38 (6) of the Constitution of Nepal, by creating a binary belief that women and men should be the same in concepts such as husband/wife, mother/father, such beliefs themselves have exploitative relationships in the balance of personal and family power under the hierarchy. It seems that it should be considered that the recognition of greater inclusiveness and plurality has been adopted by abandoning the historical, social and legal recognition of accepting and marginalizing different existences and keeping other and separate identities outside the scope of the law. Therefore, in the course of the construction of this constitution, the issue of identity of gender and sexual minority communities has been assimilated and emphasized on the

non-discrimination of human rights, enjoyment and practice of same-sex marriage in accordance with the constitution of Nepal, the decisions of this court, the report of the committee formed in accordance with the order of this court, and the human rights treaties ratified by Nepal. It seems that it should be assumed that it is a subject within the conception of the constitution. According to the values accepted by the Nepali society within Article 38 (6) of the Constitution of Nepal, by deconstructing the binary belief that men and women should be the same in concepts such as husband / wife, mother / father, such beliefs themselves are under the hierarchy. And it seems that it should be considered that those who have exploitative relationships in the balance of family power, accept and marginalize existence different from it, and keep other and separate identities outside the scope of the law and abandon the historical, social and legal norms and adopt the recognition of greater inclusiveness and plurality. Therefore, in the course of the construction of this constitution, the issue of identity of gender and sexual minority communities has been assimilated and emphasized on the non-discrimination of human rights, enjoyment and practice of same-sex marriage in accordance with the constitution of Nepal, the decisions of this court, the report of the committee formed in accordance with the order of this court, and the human rights treaties ratified by Nepal. It seems that it should be assumed that it is a subject within the conception of the constitution.

17. The second question is the view of this court regarding the rights and rights of gender and sexual minority communities and marriage and what is the opinion of this court regarding the granting of a non-tourist visa to the foreign married partner of a Nepalese homosexual person. Based on the writ petitions filed in this court from time to time regarding the issue of rights, it seems that judicial precedents have been expressed by this court regarding the identity of gender and sexual minorities, the right to live with dignity, marriage and the protection of rights and interests. According to Sunil Babu Pant's

decision, the existing society, law and the state have rejected the existence and identity of sexual and gender minority communities, they are being excluded from the family and society, the prevailing laws have not provided proper protection, they have not been able to enjoy the fundamental rights provided by the constitution and international human rights, the rights provided by law. And gender and sexual minority communities are being discriminated against by the laws, administration and society of Nepal and to end such discrimination and make immediate arrangements for the protection and acquisition of legal rights so that they can enjoy human rights equally, to provide citizenship according to gender identity and to repeal other discriminatory laws for equality. Based on the demand for appropriate orders including mandates to create laws, the state should accept the existence of third genders other than women and men and they should not be deprived of their fundamental rights provided by the constitution, the right to privacy for gender and sexual minority communities should be protected, the fundamental rights and human rights provided by the constitution should be protected. It is explained that the legal system that does not enjoy the rights given by the Conventions on its own is arbitrary, baseless and discriminatory. In that decision, it seems that since “gender” includes the third gender apart from women and men, in the Constitution of Nepal, which is being drafted by the Constituent Assembly, there should be a provision that when granting rights to individuals, it should not be discriminated on the basis of gender identity and sexual orientation in addition to women and men. The constitution does not mention men and women but only the word gender is used and it can include men and women as well as the third gender, so that people with different gender identity and sexual orientation can enjoy their rights without discrimination like other people. It seems that a directive order has been issued by this court in the name of the Government of Nepal to amend and make necessary arrangements.

18. Similarly, “In relation to same-sex marriage, since it is a natural right for an adult to have a marriage relationship with another adult according to his/her wish with consent, the rights and rights of the persons related to same-sex marriage and the social and family perspective should be viewed from all sides.”⁸⁵ and the related customs and legal systems of other countries are also studied and analyzed. Since it is necessary to do this, a committee has been formed to conduct a study on same-sex marriage and based on the opinion and suggestions of the said committee, the government of Nepal has been ordered to make the necessary legal decisions and make legal provisions. Recommending to the Government of Nepal for legal reform to provide legal recognition, it is necessary to provide a legal arrangement for same-sex relationships in the Civil Criminal Code or Civil Code, or consider same-sex marriage as equal and expand the relationship between a woman and a man to recognize it as a relationship between individuals. It seems to have been mentioned.⁸⁶ It seems that the said committee also submitted the following suggestions;⁸⁷

- It seems appropriate for the government of Nepal to remove the legal system that recognizes same-sex relationships as marriages only between men and women and adopt the recognition that marriages can be between individuals and establish legal recognition based on the principle of equality,
- After accepting the recognition that marriage is a relationship between individuals freely, if there is a need to change the legal provisions that affect such recognition, it is necessary to provide property and cultural rights to family instead of children, to change the system that provides rights after the remainder to husband and wife, and to provide such

85 Sunil Babu Pant (Decision No. 7954) Pg. 6

86 Committee constituted by the Government of Nepal in accordance with the order of the Supreme Court, Study Report on Same-Sex Marriage, Pg. 55 (2071)

87 Ibid, Pg. . 56

rights to the spouses of related persons and forcefully. Criminal offenses such as rape and sexual violence should be considered crimes committed by individuals against other individuals rather than crimes committed by men against women. In this perspective, the criminal and civil codes and procedures should be revised and amended, as well as the laws related to marriage registration and property should be amended,

- By gradually involving the gender and sexual minority communities in education and financial gain and professional work, by adopting empowerment measures, by adopting legal and social policies that accept the diversity of the society, by taking steps to bring such communities into the mainstream, by making a public call to protect the sexual and family life of such people, steps should also be taken to involve them in the political and administrative level,
- Seeing the fact that various couples have been living in same-sex relationships for a long time, legal recognition should be given to such couples. After providing legal recognition in this way, necessary arrangements should also be made to make legal arrangements for such couples to adopt children after a certain period.

19. In the mentioned case of Sunil Babu Pant, it seems that this court has legally established the right of people belonging to gender and sexual minority communities to live with dignity and to enjoy their constitutional and fundamental rights without discrimination. The decision specifies the immediate cancellation of the existing legal provisions that discriminate against gender and sexual minorities and not to formulate discriminatory laws in the future. Even though the government has accepted the report of the study committee to give legal recognition to same-sex marriage and amend the necessary laws, it seems that the necessary process for

amending the law has yet to be carried out.⁸⁸ The report formed by the Government of Nepal regarding the case of Sunil Babu Pant and same-sex marriage and the Constitution of Nepal, creates the conflict in our society and the creation of the family which is not recognized by the society, which is not recognized by the law, but is experiencing a specific life process and contrary to the idea that the common man looks at his face, his feelings and experiences can be recognized and brought within the scope of the society and the law, where principles and provisions have been announced. However, it seems to be the responsibility of the state to further implement such declarations and protect the complete freedom of such people.

20. Likewise, looking at the decisions of Premkumari Nepali v. The National Women's Commission Et al.,⁸⁹ this court has also explained about same-sex relationships. In that case, Rajni Shahi, a homosexual woman, was married to a man before she could express her natural sexual feelings and desires, and later, while expressing her homosexual sexual feelings, she filed a divorce case in the court to obtain a divorce, and her personal freedom was also violated. It seems that the court explained that even if a person has a sexual orientation different from his physical identity, such orientation cannot be prohibited, and the rights granted by the constitution can be enjoyed equally by any person, whether female, male, gay or transgender, according to the constitution and prevailing laws.

21. In addition, in the same case, regarding the legality of same-sex relationships, if a woman or man wants to live or live with another same-sex woman or man, it is stated that the court will not be able to stop it legally, so it is not enough that the state has not interfered in same-sex relationships. It is explained by mentioning that it should be able to be addressed in detail.⁹⁰ Legitimate same-

88 National Human Rights Commission, Study Report on Human Rights Situation of Sexual and Gender Minorities (2077), Pg. 68

89 Premkumari Nepali v. The National Women's Commission Et al., N.K.P 2070, Point 1, Decision No. 8945

90 Premkumari Nepali (Decision No. 8945), Pg. 8

sex relationships living separately or as partners with people of the same sex, married or unmarried, as the prevailing laws and traditions only specify opposite-sex marriage, the legal provisions on same-sex relationships are insufficient and that who and how to spend life is a matter of personal decision has been explained.

22. Similarly, in the case of “Dilu Buduja v. Government of Nepal Et al.”⁹¹, the same-sex female petitioner Dilu Buduja was not issued a passport with gender identification by the Passport Department because she is a third gender. It seems that an instructional order has been issued by this court to amend Schedule 2 of the Passport Regulations, 2067 as soon as possible to provide third-sex identification. It seems that a legal system has been established where the citizens of the sexual and gender minority communities can get machine readable passports with their gender identity by mentioning “Other” / “O”.⁹²

23. Additionally, in the writ petition of Yam Bahadur Rana Anik v. the Government of Nepal Et al.,⁹³ even with the provision of obtaining citizenship at the age of 16 years, individuals who have not identified themselves opt for “male” or “female”. It seems that the writ petition was filed with the demand to amend the citizenship and other personal documents as well and change their status to “O”. In this regard, from this court, it is a matter under the right of individual self-determination for any person to achieve a gender identity according to his/her self-realization, it is not relevant to determine what is the biological sex of another person, society,

91 Dilu Buduja v. Government of Nepal Et al., N.K.P 2070, Point 8, Decision No. 9048

92 It seems that a legal arrangement regarding gender identity has been made as per Passport Regulations 2077 currently in force, Application for Passport and Travel Permit as per Schedule 2, Passport Application Form "A", Point 6 has "Sex" and "O for Others" and in Form "B", Point 6 has "Sex" and "X for Others"

93 Yam Bahadur Rana Anik Et al. vs Government of Nepal Et al., N.K.P 2074, Point 9, Decision No. 9875

state or law, any provisions that hurt the freedom, dignity and self-esteem of a person. It is not valid even from the point of view of human rights and in relation to the constitution and citizenship. According to the petition, it is ordered that it is appropriate to amend the citizenship certificate obtained on the basis of biological organs and mention “other” in the case where the law has accepted the existence of the third gender and is committed to the rights of such communities. In addition, it seems that a directive order has been given in the name of the Government of Nepal to create an environment where the people of the gender and sexual minority communities will not be subjected to discrimination and humiliation from anywhere.

24. Similarly, in the writ petition of Pushparaj Pandey v. the Government of Nepal, Prime Minister and Council of Ministers, even though there was an order not to provide surrogacy services to same-sex couples, it seems that same-sex marriage had been legalized by mentioning “Nepali same-sex couples”.⁹⁴ Similarly, in the writ petition of Jyoti Lamsal Paudel⁹⁵ filed regarding the implementation and enjoyment of women’s rights, while interpreting the equality rights of people belonging to gender and sexual minority communities, this court stated that full consent of both men and women and same-sex couples is required for marriage to be valid,⁹⁶ which seems to have been mentioned. Similarly, the Universal Declaration of Human Rights, 1948 states that women, men, (the third sex. All human beings are equal before the law and the right to equal protection is inherent in all human beings, and the International Covenant on Economic, Social and Cultural Rights, (1966) states that society is equal to men, women and It is explained in the case of Jyoti Lamsal Poudel that the state should not discriminate between women, men and third genders by addressing

94 Ibid, Pg. 33

95 Jyoti Lamsal Paudel Et al. v. Government of Nepal, Prime Minister and Council of Ministers, Decision No. 8282

96 Ibid, Pg. 16

all the three classes of the society as it has also been included (third gender).⁹⁷ Explaining the right to equality of people belonging to gender and sexual minorities, in the case of Prakashmani Sharma Et al. v. Prime Minister and Council of Ministers,⁹⁸ Article 13 of the Interim Constitution of Nepal, 2063 states that all people are equal under the law. In a country where the fundamental rights are protected by the written constitution, the state cannot discriminate on the basis of gender just because they are male, female or third gender. Laws that discriminate on the basis of gender do not have legal status, such laws are not considered legal in any part of the constitution, and sons, daughters or third genders have equal rights to ancestral property, has been explained. While explaining the right to equality guaranteed in Article 13 of the Interim Constitution of Nepal, 2063, in Jyoti Lamsal Paudel's case,⁹⁹ it seems that the said article is a provision to end the discrimination against the third gender (LGBTI) on the basis of sexual orientation. Similarly, in the case of Sarojnath Pyakurel,¹⁰⁰ it seems that since women and the third gender can get Nepalese citizenship according to their wishes, it seems that an order should be made to arrange for the collection of voter lists and to issue certificates of Nepalese citizenship to those who are eligible to get Nepalese citizenship.

25. It is clear that this court is sensitive to the rights, interests, identity and respect of the gender and sexual minority communities in the aforementioned orders and judgments. While interpreting the Interim Constitution of Nepal, 2063 and the right to equality provided by the Constitution of Nepal, this court has made appropriate amendments to the legal system including citizenship

97 Jyoti Lamsal Paudel v. Government of Nepal, Prime Minister and Council of Ministers, Decision No. 8507

98 Prakashmani Sharma Et al. v. Prime Minister and Council of Ministers Et al., Decision No. 8456

99 Jyoti Lamsal Paudel v. Prime Minister and Council of Ministers, Writ Application No. 064-WO-0186

100 Sarojnath Pyakurel v. Government of Nepal, N.K.P 2068, Point 1, Decision No. 8536

and passport, to ensure the right to identity and self-determination of people belonging to gender and sexual minorities and to provide legality to same-sex marriage and relationships. And various directives seem to have been issued. In this sense, it seems that this court tried to put the principle of equality into practice by interpreting gender justice and jurisprudence to a certain extent. It seems that this court has tried to make the state agencies responsible and accountable for the practice of the rights of the people of the gender and sexual minority communities as an integral part of the progressive society. Looking at the above decisions made by this court so far, it has been explained that the persons belonging to the gender and sexual minority communities have equal rights in the enjoyment and practice of the rights granted by the constitution, such as identity, respectable living, marriage, among others. Although this court has addressed the people of gender and sexual minority communities as “third gender”, it seems that it needs to be reconsidered. In general, the word “Third Gender” is used to indicate communities other than women and men. In some documents, the word “Tesrolingi” is also used to refer to the “Transgender” community”.¹⁰¹ Many gender identity terms have been developed and in the current perspective where people are introducing themselves and identifying themselves openly, since the word “third gender” cannot refer to everyone, it seems that the use of this word can narrow the identity of the people of the overall gender and sexual minority community. Since the LGBTIQ+ terminology cannot cover the entire non-binary group, when there is a general consensus that the inclusive SOGIESC terminology should be used, using the term “third gender” to address the entire non-binary group seems to be contrary to the principle of inclusion.

26. The restrictive phrase in Article 18 (3) of the Constitution of

101 National Human Rights Commission's Study Report on the human rights situation of sexual and gender minorities, 2077 shows that the Nepali translation of Transgender appears to be "Tesrolingi". Similarly, "Tesrolingi (Transgender)" is also used in Suman Pant's case.

Nepal and the term “gender and sexual minorities” used in Article 42 (1) can include all genders and people of different sexual orientations other than “women” and “men”, the term “third gender” is used. It seems appropriate to use the words “gender and sexual minorities” recognized by the Constitution of Nepal instead of the said word. Regarding the rights of gender and sexual minority communities, even though the term “third gender” has been used in the judgments interpreted by this court even before the promulgation of the Constitution of Nepal, it seems more appropriate to use “gender and sexual minorities” from now on. Although in the case of Sunil Babu Pant and others, the term “third gender” was used on the basis that it is more respectful than the words like Hijada, Chhakka, which were used insultingly at that time, but the word “gender and sexual minority” rather than the word “third gender” seems to cover all groups of the said community. In reality, the use of the third gender word should be considered a respectful word used only in colloquial language. On the other hand, people from gender and sexual minority communities are legally obliged to use “other” as their gender identity. Transgender women or men should also be able to choose “female” or “male” gender identity according to their wishes, and other gender and sexual minorities should choose third gender or non-binary. It seems that the issue of mentioning gender details in personal documents along with gender identity should also be considered with sensitivity. A person’s make-up and existence may not be unique and virtually the visible face and identity of a person is one, that is the truth. But the invisible identity and experience of the same person may be different. Being able to understand that feeling is another truth. Therefore, the truth can be different, it should not be seen from one point of view. Just as there is natural diversity, the truth that human beings have diverse and multiple identities and recognitions, from a thoughtful and humane point of view, in the current situation where the recognition of the identity and rights of the gender and sexual minority people is being recognized, this court should be more aware and take into account

the global gender justice and jurisprudential recognition as well.

27. Likewise, looking at the opinion of this court so far regarding the granting of non-tourist visas to foreign couples of Nepali homosexuals, Tobias Volz, who is also a gay male petitioner who is married to the same-sex male petitioner Adhip Pokharel in the present petition, applied for a non-tourist visa to the Immigration Department. In the case of Suman Pant v. Ministry of Home Affairs, Immigration Department Et al.,¹⁰² which has the same facts as the writ application submitted for the denial of visa, it seems that a judicial precedent has been established by issuing a mandate from this court to grant a non-tourist visa to a foreign homosexual who is married to a Nepalese same-sex citizen. It seems relevant to further consider what decision-making basis has been adopted in Suman Pant's case. Suman Pant, a lesbian petitioner in that case, got married in California court with Leslie Lewis on December 18, 2015 in Sacramento County, USA. When Leslie applied to the Immigration Department for a non-tourist visa after coming back to Nepal, the opposing immigration department verbally refused to grant a non-tourist visa, and according to Section 7 of the Immigration Act, 2049, the opposing director general should grant a visa, as there is no decision on the matter, as the Constitution of Nepal accepts gender and sexual minorities. It is against the provisions of Section 7 of the Immigration Act, 2049, Rule 8 (h) of the Immigration Rules, 2049, that foreign nationals who are married to a Nepali citizen and submit a marriage registration certificate will get a non-tourist visa in Nepal. Due to the violation of the rights provided by Articles 17, 18, 18 (2), 18 (3), 38 (1) and 133 of the Constitution of Nepal, if the petitioner and the persons of such sexual and gender minority communities want to get a non-tourist visa to come to Nepal after same-sex marriage, it is found that a writ petition has been filed asking for an injunction to be issued in the name of the opponents to make the relevant law immediately and implement it for convenience.

28. In the said application, when the order was issued by this court to grant a non-tourist visa to the married friend of the petitioner Suman Pant, Leslie Lewis, Part 3 of the Constitution of Nepal guarantees the fundamental rights, the right to live with dignity, the right to freedom, the right against torture, the right to justice and the right to equality, the right to property, the right to information, among others are guaranteed to a person. The words “person” or “citizen” used in the constitution are gender absolute terms. These words do not mean only men or only women. Therefore, the fundamental rights guaranteed by the constitution are available only to men or women, they are not guaranteed to other categories of people who do not belong to the traditional category of men or women or do not want to place themselves in that category. It cannot be said that they do not get the same protection of the constitution and they cannot be deprived of the rights guaranteed in that way.¹⁰³ In this sense, since the rights provided by the constitution are gender absolute, gender and sexual minorities cannot be excluded from the equal protection of the constitution, and it seems that there should not be a situation in which they are deprived of enjoying any rights. In that case, while explaining the right to live with dignity guaranteed in Article 16 of the Constitution of Nepal, “The right to live with dignity guaranteed to every person by the Constitution also includes the right to identity as an individual. As a person, there is no respect until his/her physical existence and identity are acknowledged. In the same way, it cannot be said that his/her respect is accepted until the autonomy that completes life as a person is respected. From this point of view, it is mentioned that laws, policies and practices that do not match with the rights provided by the constitution cannot be recognized.”¹⁰⁴ Earlier, this court explained that the right to live with dignity, provided by Article 12 (1) of the Interim Constitution of Nepal, 2063, includes the right to identity, and continuing with that interpretation, the decision of Suman Pant’s case further explained

103 Suman Pant v. Immigration Department, Case: Certiorari, Mandamus, N.K.P 2074, Decision No. 9921, Point 12, Pg. 6, Decision Date: 2074/07/06

104 Ibid

that a person's identity is not respected until it is accepted, as it seems to be rendered.

29. While discussing the discriminations that may or may not be caused by the state, "in the light of the broad environment of human rights law and the provisions on fundamental rights made by our constitution, all kinds of discrimination against gender and sexual minorities, regardless of whether it is an action or an omission, is illegal and it's visible. To create a situation of abstinence, deprivation or restriction in such a way that discrimination on the basis of gender, physical condition, marital status, and the existence, identity and respect or desire of socially or culturally backward groups including gender and sexual minorities will be adversely affected or the enjoyment or practice of rights will be dull or meaningless.¹⁰⁵ By explaining that it does not seem compatible in any way, discrimination can be caused not only because of positive legal provisions (positive enactments) or actions of the state, but also because of omissions, because any action or inaction done by the state can cause gender and sexual discrimination. It seems that if there is a situation where the respect of groups including minorities is adversely affected or the enjoyment of rights is impaired, then the action or inaction is illegal and the state should not create such an action or inaction.

30. Similarly, the constitution of Nepal does not deprive the people of gender and sexual minority communities from the rights granted by the constitution, including the right to live with dignity and the right to equality. According to the Immigration Department, the petitioner's couple, Leslie Louis Melnyk, will not receive a non-tourist visa as is stipulated in Section (h) of Sub-Rule (1) of rule 8 of the Immigration Act and Immigration Regulations, 2051 that foreigners who submit a marriage registration certificate with a Nepalese citizen will get a non-tourist visa. Regarding the decision, "If a foreigner who claims to be married to a Nepali citizen submits

a marriage registration certificate and the Nepali citizen who marries them identifies themselves as the person they married in the visa application, then the issuance of a non-tourist visa cannot be refused to a foreigner who has married a Nepali citizen. When there is a question about the rights of a person, unless the law clearly prohibits it, everyone should think that the person has the right. The Constitution is not only a document of rights but also a document of justice. The constitution has accepted the separate identity of gender and sexual minorities and guarantees that they cannot be discriminated on the basis of gender, and if the immigration law or regulations do not deny such identity, it is unfair to nullify the right granted by the constitution by the word “husband/wife” mentioned in the application form. It seems that the inaction done by the issuance is not acceptable”.¹⁰⁶ While explaining the right to self-determination of people belonging to gender and sexual minority communities in the said case, the Constitution, human rights law and the immigration regulations which are said to interfere even in the private lives of the people based on how to conduct one’s personal life, what one’s gender identity will be and which call of the soul is the right to self-determination should be dismissed,¹⁰⁷ as it seems to be explained, “gender and sexual minorities who have established conjugal relations cannot be refused non-tourist visas”.¹⁰⁸

31. A foreigner who has a conjugal relationship with a Nepalese citizen of a gender and sexual minority community will receive a non-tourist visa because it is linked to the identity and honor of the person from that community. Non-tourist visa can be given to a foreign married partner of a traditional female or male citizen, but a foreign married partner of a person from a gender and sexual minority community cannot. If they are not able to get that facility, the inaction to grant a non-tourist visa is contrary to the laws related to human rights and the Constitution of Nepal, the Immigration Act

106 Suman Pant, Decision No. 9921, Pg. 18
 107 Ibid, Pg. 18
 108 Suman Pant, Decision No. 9921, Pg. 19

and the Immigration Regulations. Since the order in Suman Pant's case has been made, the legal questions and demands contained in the writ petition presented in accordance with the said case are the same and the facts are also consistent, so in accordance with the principle of precedent, the petitioner Adhip Pokharel's spouse Tobias Volz should be granted a non-tourist visa based on the principle of stare decisis. If it can be accepted from the case, the action taken by the immigration department was not acceptable. Therefore, according to the interpretation and principles adopted by this court in the writ petition of Suman Pant, the petitioner Tobias Volz, it was seen that the inaction of the opposition department in not providing non-tourist visa is against the constitution and the law.

32. Third question- When considering how the issue of the rights of the gender and sexual minority community has been regulated in the federal law during the lawmaking process, how the civil, criminal and other thematic laws deal with the identity, honor, marriage, property, family and other issues of the persons of the gender and sexual minority community. It should be observed how such situations are addressed. Gender neutral terms such as "person" and "citizen" are generally used in various sections of the Civil Code, 2074. Under the civil rights provisions of Part-1, Paragraph 3 of the Civil Code, 2074, Section 17 states that every person is equal in the eyes of the law, Article 18 states that no person shall be discriminated against on the basis of gender in the application of general law, and Article 19 talks upon gender and sexual minorities, that which cannot be considered to be discriminated for the protection, empowerment or development of the citizens according to the law, as has been explained. Similarly, Article 20 states that no person should be deprived of his personal freedom. Also, Article 30 provides that every person will be recognized as a person immediately after birth and will be entitled to enjoy the rights according to the law as long as he is alive. Similarly, in Article 36, it is provided that any person can change his body subject to the law. Therefore, it seems that

there is a system in which persons belonging to gender and sexual minority communities are equal to other genders in the eyes of the law, cannot be discriminated against in the application of general laws, and have the right to enjoy the rights according to the law. However, under the provisions of Part-3 of the Family Law, Article 67 of the definition of marriage states that “a man and a woman shall be considered married when they accept each other as husband and wife through a celebration, ceremony, formal functions or any other act”. According to the order of this court, it has been recommended by the committee formed to study same-sex marriage that it is necessary to amend this section and recognize marriage as a relationship between a man and a woman.¹⁰⁹ Section 69 of the Civil Code, 2074 stipulates that every person has the right to marry and that the family life of that person is inviolable. In the marriage provisions of the said code, the rights and obligations arising from marriage are referred to as “man”, “woman” or “husband”, “wife”. Since it is addressed that the provision does not cover gender and sexual minorities, the said provisions are not informed by the past orders of this court¹¹⁰ and the various provisions of the constitution, it seems that they should be considered according to the principle of equality and non-discrimination.

33. Similarly, Section 76 of the Civil Code, 2074 states that “husband and wife shall register their marriage by submitting an application to the authority as prescribed by law” but here the local level refuses to register the marriage of same-sex couples as Nepali law does not consider same-sex marriages to be registered. In Part 3 of the Code, provisions relating to divorce under family law, provisions relating to the relationship between a mother, father and son, daughter, provisions relating to maternal and paternal

109 Committee constituted by the Government of Nepal in accordance with the order of the Supreme Court, Study Report on same-sex marriage, Pg. 56 (2071)

110 Sunilbabu Pant Et al. v. Government of Nepal Et al., N.K.P 2065, Point 4, Decision No. 7958, Pg. 524

authority, provisions relating to guardianship, provisions relating to curatorship, provisions relating to adoption, provisions relating to inter-country adoption, provisions relating to partition, provisions relating to succession, due to the use of gender-relative words such as man, woman, grandfather, grandmother, father, son, daughter, daughter-in-law, brother, sister, the said law violates the right of the gender and sexual minority community to live a family life in an unfettered manner. According to the constitution and this court, even when the judgments have been approved, it does not seem to be informed by such orders or provisions. In reality, binary words such as son and daughter are a hierarchy in themselves. Although such words carry an emotional connection in the general sense, for people who do not fall into such a literal meaning, other/different people may have kept them under oppression or control in terms of power relations through the legal use of such words. In this perspective, laws using such words are considered questionable and changeable. Similarly, due to the provision of the law related to property in Part-4 of the Civil Code, 2074, in Section 257, it is seen that the gender-related words such as husband, wife, father, mother, son, daughter have been provided regarding the right to the property of the deceased. Similarly, in Part-6 of the Civil Code, the gender-neutral word “civil” is used in the provisions related to private international law,¹¹¹ while in other provisions related to adoption,¹¹² and in the provisions related to maternal and paternal authority,¹¹³ “father”, “mother” are gender-relative terminologies like “son” and “daughter” are used terms which should be changed or amended according to the constitution and the judgments of this court.

34. Gender-neutral word such as “person” is used in Section 171, 172, 173, 174 and 175 of the Criminal Code, 2074, Part 2, Paragraph

111 Section 699, Section 700 and Section 701 of the Civil Code, 2074, provisions related to recognition of marriage.

112 Ibid, Section 703

113 Supra Note 43, Section 702

11 where in the section relating to polygamy, it clearly states that “man” and “woman” are not allowed to commit polygamy. Similarly, it seems that the word “woman” is clearly indicated in the provision of Section 189 of the Code that can induce abortion. Section (k) of Sub-Section (2) of section 192 provides that “if a woman’s breast is cut off”. Under Section 219 of the offense related to rape provided in Section 2 of Part 2 of the Code, “If any person commits rape on a woman without her consent or commits rape on a girl under eighteen years of age even with her consent, he shall be deemed to have committed rape on such woman or girl.” The definition of rape states that only women can be victims of rape. Similarly, it seems that gender-related words are used in Section 220 as well. Since Section 224 refers to sexual abuse as “husband” or “wife”, this provision also seems to be gender-related. Section 226 of the Civil Code, 2074 states that it is considered an offense to commit or cause unnatural intercourse without consent. Although the section only criminalizes unnatural sexual intercourse without consent, the use of the word “unnatural sexual intercourse” is used to refer to same-sex sexual relations in the British colonial law.¹¹⁴ Historically, the arrival and use of this word entered the Nepali legal tradition because it implies that homosexual sex is an act against nature. The words seem insulting to people of gender and sexual minority communities. Similarly, in Sub-Section (3) of Section 233, it seems that the provision is placed under the provision of medical treatment-related offenses that no test should be performed on the human body without consent with the intention of violating the privacy of a “woman”. In the Civil Criminal Procedure Code, 2074, it seems that when a woman is arrested or detained, women police should be deployed as much as possible.

35. Although efforts have been made to maintain gender equality

114 Homosexuality is criminalized in British law, and is known as unnatural intercourse in the British colonies. For example, Section 377 of Indian Penal Code, 1860 and Bangladesh Penal Code, 1860; Navtej Singh Johar & Ors, v. Union of India & ors AIR 2018 SC 4321

by removing gender-related words from some of the subject laws of Nepal through an act made to amend some Nepalese laws in relation to gender equality and ending gender-based violence, it seems that gender-neutral terminology is still not used in some laws.¹¹⁵ “Mother”, “father”, “son”, “daughter”, “son”, “daughter”, “adopted son”, “adopted daughter”, “man”, “woman” among others. are used to refer to people of gender and sexual minority groups. Examples of laws that exclude or cannot cover the said community are as follows:

- In the Interpretation of Laws Act, 2010, gender-related terms such as “father”, “son”, “daughter”, “son”, “daughter”, “adopted son” and “adopted daughter” are used.¹¹⁶ Since Section 12 (1) of the said Act states that “words referring to the male gender also refer to the female gender”, it does not appear to be gender inclusive,
- Clauses (d1) and (d2) of Sub-Section 2 of Section 39 of the Police Act, 2012 provide for making rules and orders to have separate accommodation for “female” and “male” employees,
- In section 2 (c) and section 52 (c) of the Land Act, 2021, family is defined using gender-specific terms such as “husband”, “wife”, “son”, “daughter”, among others,
- Section 2 (d) of the Civil Services Act, 2049 defines “family” as including “husband”, “wife”, “son”, “daughter”, “adopted son”, “adopted daughter”, “father”, “mother”, “grandfather”, “grandmother” among other relationships are defined as belonging to the family,
- In Section 2 (h) of the Working Journalists Act, 2051, relative terminologies is used to define family in terms of gender

115 No. 8 of 2072 Act

116 As mentioned in Section 2 (f), Section 2 (y) and Section 2 (y2) of Interpretation of Laws Act, 2010

such as “husband”, “wife”, “son”, “daughter”, “adopted son”, “adopted daughter”, “male”, “female”,

- In section 2(j) of the Transplantation of Human Body Organs (Regulation and Prohibition) Act, 2055, within the definition of “family member” and “close relative” in section 2(l), gender-related words like “husband”, “wife”, “son”, “daughter”, “adopted son”, “adopted daughter”, “older brother”, “younger brother”, “older sister”, “younger sister”, “grandson”, and “granddaughter” are used,
- The word “child” is used in the Child Labor (Prohibition and Regulation) Act, 2056,
- In section 2 (w) of the Income Tax Act, 2058, when defining a relative, gender-related terms such as “husband”, “wife”, “son”, “daughter” are used,
- In Section 3, Section 5, Section 8 and Section 17 of the Nepal Citizenship Act, 2063, various arrangements have been made in the case of “women” of foreign origin and Nepali citizens. Similarly, in Sub-Section 2 of Section 5, the word “son” is mentioned, and the term “son” is used,
- In Section 47 of the Electronic Transactions Act, 2063, teasing, harassing, insulting women, among others is considered illegal and the victims of the crime do not include the gender minority community,
- In section 2 (z9) of the Companies Act, 2063, while defining “close relative”, gender-related words such as husband, wife, son, daughter, daughter-in-law are used,
- In section 2 (q) of the Federal Parliament Secretariat Act, 2064, when defining the family, the gender-related terms such as “husband”, “wife”, “son”, “daughter”, “adopted son”, “adopted daughter” are used,

- Section 2 (j) of the Banking Offences and Punishment Act, 2064 defines a family member through gender-related terms such as “husband”, “wife”, “son”, “daughter” that are used in the provision,
- In Section 2 (f) of the Non-Resident Nepalese Act, 2064, words such as “husband”, “wife”, “son”, “daughter” are used in the definition of family,
- Section 2 (b) of the Domestic Violence (Offences and Punishment) Act, 2066 used the term “adopted son or adopted daughter” while defining domestic relationship,
- In the Act Relating to Children, 2075, the word “child” is used,
- Section 2 (w) of the Banking and Financial Institutions Act, 2073, when defining family as “husband”, “wife”, “son”, “daughter”, “daughter-in-law” gender-related words are used,
- In section 2 (d) of the Cooperative Act, 2074, when defining “family”, gender-related words such as “husband”, “wife”, “son”, “daughter” are used,
- The Safe Motherhood and Reproductive Health Rights Act, 2075 did not include people from gender and sexual minority communities while providing women’s maternal and reproductive health rights,
- Section 15 of the Prisons Act, 2079 states that separate buildings and toilets should be provided for “female” and “male” prisoners,
- Section 2 (e) of the Insurance Act, 2079, defines “single family” using gender-specific terms like “husband”, “wife”, “son”, “daughter-in-law”, “daughter”, “adopted son”,

“adopted daughter”.

36. Thus, some federal laws still do not use gender-neutral and inclusive terminology to include citizens of gender and sexual minority communities. If gender neutrality and inclusiveness are not adopted in general linguistic usage, it seems that the unrestricted exercise of rights related to the identity of gender and sexual minority communities will be hindered, and the exercise of the rights provided by any subject law may also become dull. If the purpose of any law is not to exclude any group from the exercise of rights, that purpose should also be reflected in the language used in the law. While determining the legislative intent of a law, first of all, the court should adopt the rule of understanding the general meaning of the words used in that law, i.e. the literal rule of interpretation, so it should be clearly mentioned that the language used in the law does not cover any group. Although it is mentioned in Section 12 (1) of Nepal's Interpretation of Laws, 2010 that the words referring to male gender also refer to feminine gender, this provision seems to be insufficient for sexual and gender minority communities. As it is clear from the right to equality provided by Article 18 and the principles of precedent set forth by this court, even the language used in the law should be gender inclusive and cover the gender and sexual minority communities. However, when defining “marriage” and “family” in federal laws, family members are identified by using words such as “husband”, “wife”, “son”, “daughter”, “adopted son”, “adopted daughter”, “daughter-in-law” including “male” or “female”. In this way, the definition of conjugal and family relations in the law as referring only to “men” and “women” has created a situation where people from gender and sexual minority communities have to be deprived of their rights related to marriage and family. Therefore, since gender-related words are used to alienate people from the gender and sexual minority communities, it seems worthy of attention that the government should initiate legislative efforts to include the identity and rights of people from the gender and sexual

minority communities by using gender inclusive terminology in the said laws.

37. Regarding how the rights of the gender and sexual minority communities can be included in the law, Harvard Law Review published an article named “They, Them and Theirs” in which “The law can recognize nonbinary gender using familiar civil rights tools and concepts. Nonbinary gender rights might take the form of recognition of a third gender category, elimination of unnecessary legal sex classifications, or thoughtful integration of non-binary people into rules or spaces that require binary categories.”¹¹⁷ In other words, in order to legally address the rights and rights of the people of the gender and sexual minority communities, it seems necessary to recognize the third gender classification, eliminate the unnecessary legal gender classification and gender classification into “female” and “male” and make judicious adjustments to the classification of gender and sexual minorities if necessary. It seems that unnecessary gender classification should be discouraged by adopting gender neutrality in some subjects, while gender classification is necessary in some other subjects, it is necessary to intelligently figure out how gender and sexual minorities can be included based on the said classification. For example, the use of the word “offspring” instead of “son and daughter” is recognized in Article 18 (5) of the Constitution of Nepal, which avoids the risk of unnecessary gender classification, but the same cannot be done in the case of “parents” within the definition of “parents”. It seems necessary to find out how to include the gender and sexual minority communities. Likewise, the report of the committee formed to study same-sex marriage and the recommendation of the National Human Rights Commission as per the order of this court in Sunil Babu Pant’s case,¹¹⁸ being positive to give legal recognition to same-

117 Jessica A. Clarke, *They, Them and Theirs*, 132 Harv. Law Rev. 894, 901 (2019)

118 National Human Rights Commission, *Study Report on Human Rights Situation of Sexual and Gender Minorities*, Pg. 78-81 (2077).

sex marriage and it seems that recommendations and suggestions have been submitted to include legal provisions for divorce, division, and succession with the recognition of same-sex marriage, and to make a legal arrangement so that after reaching a certain age, an adopted son or daughter-in-law or other religious children can be kept regardless of whether they are a couple or not.¹¹⁹ Therefore, due to the gender-related language used in the current law and the changeable legal gender classification, the enjoyment of the rights related to marriage and family has become dull for the people of the gender and sexual minority communities, it seems that attention should be drawn in this regard.

38. Fourth question - Regarding whether the order should be issued according to the petition demand, the German citizen Tobias Volz, one of the writ petitioners, has applied for a non-tourist visa to the opposing department and where a marriage registration certificate registered in Nepal was demanded. When he went to Kathmandu District, Kathmandu Metropolitan City, Ward No. 11 to register his marriage, he was informed that there is no provision for registering same-sex marriages, and when re-applying, only oral information about the refusal was given, and no information was given regarding whether a decision has been made or not. It seems that a written reply has been submitted by the opponent stating that the marriage registration according to the provisions related to the marriage and the registration of the marriage under the National Registration Act, 2075 should be submitted. In the letter of the writ petition, it has been clarified that the writ petitioners did not apply to test the validity or recognition of their marriage and they got married according to German law on 2/7/2052 (19th October 2018) in the marriage registration office at Malsch, Kreis Karlsruhe, Germany, with registration no. E37/2018. The argument of the opposition immigration department was that the documents according to the Civil Code, 2074 and the National Registration Act, 2075 should be

119 According to the order of the Supreme Court, the committee formed by the government of Nepal, study report on same-sex marriage, Pg. 56 (2071)

submitted, when it was seen that the marriage registration certificate bearing E37/2018 had been submitted and the marriage registration certificate was verified by the German embassy and attached to the case file, it was not considered reasonable.

39. According to Section 7 of the Immigration Act, 2049, the Director General of the Immigration Department, in Sub-Rule (1) of rule 8 of the Immigration Rules, 2051, states that non-tourist visas will be granted to the following foreigners and their family members and in clause (h) “Marriage with a Nepali citizen and submission of marriage registration certificate”.^P It seems that “non-tourist visas should be provided” in the Protocol and Consular Handbook¹²⁰ Chapter 5.3, issued by the Ministry of Foreign Affairs, stating that diplomatic visas will be available to diplomats and their dependent family members and in clause no. 2, the same sex partner of a diplomatic agent holding a diplomatic passport issued by the sending state (reciprocity condition applies)” seems to be arranged. Similarly, Chapter 5.4 in the same protocol states that official visas are issued to the following officers and their dependents, family members with official/service passports, United Nations Laissez-Passer (UNLP) and regular passport holders on formal request of foreign missions, in the said case no. 3, for the same sex partner of an official of a diplomatic mission holding an official/service passport (reciprocity condition applies). According to the mentioned arrangement, the same-sex spouses of foreign diplomats will get non-tourist visas. According to the mentioned arrangement, the same-sex spouses of foreign diplomats will get non-tourist visas. In this way, it seems that same-sex spouses of diplomats and various foreign officials are able to live in Nepal without hindrance, but the same-sex spouses of Nepali citizens cannot obtain non-tourist spouse visas. And on the basis of gender orientation, it seems to be biased and discriminatory. In today’s globalization situation, marriage and divorce can happen not only between Nepali-Nepali but also between Nepalis and

120 Ministry of Foreign Affairs Protocol Division, Protocol and Consular HandBook (May 2018)

foreigners. The Civil Code, 2074 regulates private international law. Article 692, Article 699 and Article 701 of the Constitution provide for the recognition of foreign marriages. Similarly in Kanika Goyal v. Karan Goyal's Habeas Corpus case, it was also ordered that marriage, divorce and custody of children should be looked at on the basis of private international law. It is in the background of legal provisions and court practice. From this, in the writ petition presented, it did not appear that the marriage that took place abroad can be considered otherwise. In order to obtain a marriage visa, the official certificate of marriage or the marriage registration certificate and the citizenship certificate of the Nepali citizen of the couple are considered as the main documents and non-tourist visa is issued. In order to get this type of visa, both the couple have to appear at the department and register. Therefore, if the Nepalese citizen of the couple has the citizenship certificate, marriage certificate and identity card of both the couple, the department cannot refuse to grant non-tourist visa according to Clause (h) of Sub-Rule (1) of Rule 8 of Immigration Act, 2049 and Immigration Regulations, 2051. As the provisions of the Immigration Act, 2049 and the Immigration Regulations, 2051 do not reject the separate identity of gender and sexual minorities, the word "husband/wife" mentioned in the application form is unfair to nullify the right granted by the constitution, so the inaction of issuing non-tourist visa contrary to the constitution is not acceptable. Similarly, it is clear that the rights granted by the Constitution of Nepal should be enjoyed equally by the people of gender and sexual minority communities. It seems that the precedent of this court has been for a long time that the right to live a dignified life includes the right to identity and the right to conduct family life independently. During the drafting of the Constitution, in the draft of the Constitution of Nepal, under the heading "Family Rights", it was stipulated that "Couples shall have equal rights in property and family matters". Differently from the other five sub-sections under sub-section (6), since the word "couple" is used in sub-section (6), there is no need to dispute the

fact that couples from gender and sexual minority communities have equal rights in property and family matters. In this way, the opposition department's refusal to grant a non-tourist visa to the petitioner is contrary to the human rights law, the Constitution of Nepal, the intelligence of the Constituent Assembly during the constitution making process and the study report of the same-sex marriage committee formed by the Government of Nepal in accordance with the order of this court, the principle propounded by this court, the Immigration Act and the Immigration Regulations and seems unlawful.

40. The concept of human rights seems to have developed based on the dignity and respect inherent in each person. It seems that the universal principle of human rights that no person should be deprived of any right based on his identity is also applicable in relation to the rights of the gender and sexual minority communities.¹²¹ Also, on the basis of the principle of equality approved by the Universal Declaration of Human Rights, 1948, social and legal discrimination against people of gender and sexual minority communities is contrary to the concept of human rights and human rights law.¹²² Similarly, the aforementioned rights to life, equality, dignity and privacy guaranteed by the Convention on Civil and Political Rights, 1966, the Convention against Torture, 1984, the Convention against Torture and the Convention against All forms of Discrimination against Women, 1979 and Yogyakarta Principles,¹²³ Yogyakarta

121 United Nations General Assembly. The Universal Declaration of Human Rights (UDHR). New York: United Nations General Assembly, 1948. Art. 1; All human beings are born free and equal in dignity and human rights

122 Id. at Art. 2 Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty

123 The Yogyakarta Principles on the application of international human

Principles plus 10¹²⁴ and United Nations High Commissioner for Human Rights reports¹²⁵ states that it is the responsibility of the state to protect the rights of the people of gender and sexual minority communities, including self-respect, and under that responsibility, it is also the duty to ensure the rights of marriage, replacing the traditional belief that marriage can only be between a woman and a man. And in the course of ensuring the rights of sexual minorities, there are examples of different countries starting to recognize same-sex relationships as well. Registered partnership, civil partnership, civil union, same-sex marriage, domestic partnership, pacte civil de solidarite and unregistered cohabitation is accepted as a legitimate practice, and non-binary marital relationships are recognized. In the Netherlands, which decriminalized same-sex relationships in 1811, there is a provision that homosexuals can formalize their relationship by adopting one of the methods of cohabitation or joint residence agreement or registered partnership.¹²⁶

41. Likewise, in 2003, after different provinces of Canada enacted laws to recognize same-sex marriage, “Proposal for an Act respecting certain aspects of legal capacity for marriage for civil purposes” was brought to the federal level to legalize same-sex marriage, for suggestions on whether the proposal should be constitutional. After the federal parliament of Canada submitted to the Supreme Court in the cases of *Re: Same Sex Marriage*,¹²⁷ which originated in the progressive interpretation of the constitution, after giving legality to

rights law in relation to sexual orientation and gender identity, 2006

124 The additional Yogyakarta Principles (YP+10): Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles. 2017

125 Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity. Report of the United Nations High Commissioner for Human Rights, November 2011

126 Acts of 21 December 2000, Stb. 2001, nos. 9 and 10 (allowing registration that grants similar legal effects as marriage in the Netherlands)

127 *Re: Same Sex Marriage*, [2004] 3 S.C.R. 698

same-sex marriage, in 2005, through the Civil Marriage Act, defined marriage as a legal relationship between two people. Despite the continuous pressure of the Roman Catholic Church, in 1998, under the leadership of local governments, legislation was created in Spain to recognize same-sex marriage, and in 2005, the Central Parliament amended the Civil Code to recognize same-sex marriage.¹²⁸ Regarding the constitutionality test of the said law, a case was filed in the Constitutional Court of Spain, and it seems that the decision was made in 2012 that the said law is still constitutional.¹²⁹ In 2005, in the case of the Minister of Home Affairs and *anr. v. Fourie and anr.*¹³⁰, the Constitutional Court of South Africa ruled that the provisions of Section 30 of the Marriage Act, which has been in force since 1961, was unconstitutional, and in 2006, the Civil Union Act was enacted to give legal recognition to same-sex marriage. Similarly, since same-sex marriage was legalized in Argentina's Buenos Aires, Rio Negro, Villa Carlos Paz and Rio Cuarto before 2009, a law was made to legalize same-sex marriage at the central level in 2010, after the previous Civil Code was replaced by the Civil and Commercial Code in 2015. Same-sex marriage has been legalized by ensuring other rights as well.

42. In the UK, the Civil Partnership Act 2004 was created to regulate and recognize the legal relationship of two people with the same sex desire. After the Marriage (Same Sex Couples) Act 2013 came into effect, it seems that the UK also recognized same-sex marriage. In 2015, the United States Supreme Court ruled in the case of *Obergefell v. Hodges*,¹³¹ where it can be seen that the due process clause and the equal protection clause under the 14th amendment of the US Constitution ensured that same-sex couples have the right to

128 Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en materia de derecho a contraer matrimonio, 13/2005 Act of 1 July 2005

129 Constitutional Court Judgment No. 198/2012 of November 6, SCT 198/2012

130 Minister of Home Affairs and *anr. v. Fourie and anr.*, Case CCT 60/04, [2005] ZACC 19

131 *Obergefell v. Hodges*, 576 US 644

marry. It can be seen that due to the *Toonen v. Australia*¹³² case, which was submitted to the United Nations Human Rights Committee in 1994, Australia's sodomy law was repealed in 2017 through the Marriage Amendment (Definition and Religious Freedoms) Act 2017, the Marriage Act 1961 was amended to recognize same-sex marriages performed abroad.

43. Looking at the legal and judicial development of South Asia regarding gender and sexual minorities in the case of *Dr. Muhammad Aslam Khaki & anr. v. S.S.P. (Operation), Rawalpindi and others*¹³³ in 2009, various interim orders were issued by the Supreme Court of Pakistan. The Transgender Persons (Protection of Rights) Act, 2018 was passed in 2018 to ensure the property, voting rights, education, security and other rights of the people belonging to the gender and sexual minority community, and legal arrangements were made to protect the equality and other rights of the people of the said community, such was arranged. In the case of *National Legal Services Authority v. Union of India and others*¹³⁴ in India, in 2009, it can be seen that every person can make their own decision regarding their gender identity. Similarly, in 2018, in the case of *Navtej Singh Johar & Ors. v. Union of India & ors.*¹³⁵ Section 377 of the Indian Penal Code which criminalized consensual same-sex sexual relations as unnatural intercourse to such an extent, considered them as unconstitutional. The case of Nepal's Sunil Babu Pant was also quoted in that case, "The constitutional principles which have led to decriminalization must continuously engage in a rights discourse to ensure that same-sex relationships find true fulfillment in every facet of life. The law cannot discriminate against same-sex relationships and it must also take positive steps to achieve equal

132 *Toonen v. Australia*, 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994)

133 *Dr. Muhammad Aslam Khaki & anr. v. S.S.P. (Operation), Rawalpindi & ors.*, [2009] Const, Pet No. 43, SC (PAK)

134 *National Legal Services Authority v. Union of India and others*, AIR 2014 SC 1863

135 *Navtej Singh Johar & Ors. v. Union of India & ors.*, AIR 2018 SC 4321

protection”¹³⁶ and concluded that same-sex relationships should not be discriminated against and that legal provisions should be made for equal protection.

44. Similarly, in the case of Taiwan’s Constitutional Court Interpretation No. 748, the provision of the Civil Code was found to be unconstitutional as same-sex marriage was not recognized.¹³⁷ In Bhutan, in December 2020, the Penal Code (Amendment) Act of Bhutan 2021 was passed, and it seems that homosexual sex has been decriminalized under “unnatural sex”. Looking at Sunil Babu Pant’s case regarding same-sex marriage, the report on same-sex marriage of the committee formed according to the order of this court, the principles propounded by the Supreme Court of India and other South Asian countries, and the development of laws related to same-sex marriage in European countries, it seems that the legal recognition of same-sex marriage is gradually developing. In the perspective of South Asia, Sunil Babu Pant’s case seems to be presented as a leadership guidance on the rights of gender and sexual minority communities. On behalf of Blue Diamond Society, from Sunil Babu Pant’s case, it has been accepted that same-sex marriage can be just like marriage between a man and a woman, and according to the order of that case, the committee formed to study same-sex marriage has decided how to legalize same-sex relationships as an appropriate modality. The concept of equal marriage has also been recommended. The report of the said committee has been submitted to the Government of Nepal and is under consideration, because there is a provision in point 11 of the non-tourist visa application form including spouse visa of the Immigration Regulations, 2051, Schedule-2A of the non-tourist visa application form, one of the spouses has to fill in the details stating whether they are the “husband” or the “wife”. It was not possible to say that they could not get a spouse visa because of this. Therefore, in the application made by the writ petitioner Tobias Volz, if the

136 Navtej Singh Johar at para. 124

137 J.Y. Interpretation No. 748 (2017/05/24)

other petitioner Adhip Pokharel identifies that he is the person with whom the conjugal relationship has been established, and presents the writ petitioner Adhip Pokharel's citizenship certificate, marriage registration certificate stating that both of them are married and other documents required in the form, if the application is submitted according to Rule 8 (1) of the Immigration Regulations, 2051. Then a mandamus order shall be issued in the name of the respondent to issue a non-tourist visa to the petitioner Tobias Volz.

45. Now, as far as point No. 11 of the form of Schedule 2A of the Immigration Regulations, 2051, there is a request that the applicant should issue a writ or other appropriate order in the name of the opponent in order to address the matter as the applicant has to mention his/her spouse. In the case of Sunil Babu Pant, this court has issued a directive order in the name of the Government of Nepal that "persons with different gender identity and sexual orientation can enjoy their rights without discrimination like any other person without discrimination".¹³⁸ In Suman Pant's case, the learned associate advocate on behalf of the Government of Nepal expressed before the bench that since the country is at the stage of the implementation of the constitution, the government is still studying this matter to implement the order¹³⁹ with the belief that the Federal Legislature will take positive action but no directive order has been issued at present. However, it seems that the present writ petition has been filed because the rights and rights of people belonging to other gender and sexual minority communities have been affected due to the fact that no amendment has been made even after the order in the said case has been almost 6 years.¹⁴⁰ As in Suman Pant's case, in the writ petition presented, it has been claimed that due to the requirement to fill in the details of the husband/wife

138 Sunil Babu Pant Et al v. Government of Nepal Et al., N.K.P 2065, Part 4, Decision No. 7958, Pg. 6

139 Suman Pant v. Ministry of Home Affairs, including Immigration Department, N.K.P 2074, Part 12, Decision No. 9921, Pg. 20

140 Ibid

in point No. 11 of Schedule-2A of the Immigration Regulations, 2051, the rights and interests of the persons belonging to gender and sexual minorities are being affected. It seems inevitable that the rights and interests of same-sex couples should be protected by revising the said provision. Therefore, in the procedures for obtaining a non-tourist visa for a person who is married to a Nepali citizen of a gender and sexual minority community, the provision of filling in the details as husband/wife of point no. 11 of Schedule-2A of the Immigration Regulations, 2051 is an obstacle to the identification, respect, and poses high risk of nullifying the enjoyment of the right to marriage and family life. It is necessary to make necessary amendments in the said point no. 11 and make arrangements in the future to facilitate the non-tourist visa for foreign nationals who establish conjugal relations with Nepali citizens of the said gender and sexual minority community. An instructional order has also been issued in the name.

46. In view of the situation, attention should also be drawn to the use and influence of gender-related words of such a nature that shows the hierarchy used in the prevailing laws and that which shows the power of a single word such as husband/wife in the balance of individual and family power. Please send a copy of this order to the Attorney General's Office for the information on the Ministry of Law, Justice and Parliamentary Affairs and the respondents regarding the creation and amendment of the law. For the implementation of the attention and directive orders mentioned in this order, the information of the order presented in accordance with sub-rule (4) of rule 127 of the Supreme Court Rules, 2074 will be given to the Directorate of Judgement Execution. Deducting the scope of the application, the electronic copy of the order will be entered in the electronic system and submitted to the records branch as per the case file rules.

Judge
Hariprasad Phuyal

Agreeing with the opinion
Judge
Tanka Bahadur Moktan

Bench Officer (Deputy Secretary): Manoj Baral
Research Assistants: Lakshmi Rana (Section Officer), Rakesh Bam
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