

Constitutional Debate on 'Sovereignty' and 'Rights' over Natural Resources

Dina Mani Pokharel

Advocate

Devlaw.associates@gmail.com

9851076347

Stockholm Declaration Principle: 21

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national

Rio Declaration Principle: 2

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction

CBD Art. 3

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

CBD Art: 15

1.

Recognizing the sovereign rights of States over their natural resources, the authority to determine access to genetic resources rests with the national governments and is subject to national legislation.

2.

Each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.

ART:15...

3.

- For the purpose of this Convention, the genetic resources being provided by a Contracting Party, as referred to in this Article and Articles 16 and 19, are only those that are provided by Contracting Parties that are countries of origin of such resources or by the Parties that have acquired the genetic resources in accordance with this Convention.

4.

- Access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article.

•

ART:15

5.

- Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party.

6.

Each Contracting Party shall endeavour to develop and carry out scientific research based on genetic resources provided by other Contracting Parties with the full participation of, and where possible in, such Contracting Parties.

Art: 15..

7.

- Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 and 19 and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms.

Sovereign Right And Ownership Right

Ownership of Water Resources: The ownership of the water resources available in Nepal shall be vested in Nepal.

- **No person shall be entitled to utilize the water resources without obtaining a license under this Act.**

No Need to take License

- no license shall be required for the following uses of water resources.
- For one's own drinking and other domestic use on an individual or collective basis,
- For the irrigation of one's own land on an individual or collective basis,
- For the purpose of running water-mill or water-grinder as cottage industry,
- For the use of boat on personal basis for local transportation,
- For the use, as prescribed, of the water resources confined to a land
- by the owner of such land.

Constitutional Issues and Debate

- The committee for Allocation of Natural resources, Economic Rights and Revenue Sharing has proposed the following issues in the preamble:
 - Biodiversity
 - Sustainable management and use of natural resources
 - To ensure prior use rights to the indigenous, ethnic and other communities in natural resources and their use.

Making a Balance

- As state has sovereignty over natural resources under the principle of Eminent Domain, it can utilize such resources for public benefit. However, while utilizing the natural resources the state has to take into consideration the following matters:

Considerations

1. As, Indigenous, ethnic and local communities are dependent on natural resources, they have a great contribution on the protection and promotion of resources, and they will be impacted while utilizing these resources, it is necessary to ensure participation in investment of such people while utilizing these resources and they should be prioritized to the use of such resources with ensuring involvement in protection and promotion.

Considerations 2

2. Based on the principle of equity, in order to share certain amount of benefit generated from the use of natural resources to local people
3. While utilizing such natural resources, as far as possible, measures should be adopted so that no one is displaced from the project and in the condition that the displacement cannot be avoided, there should be a guarantee for reasonable compensation and rehabilitation.

Considerations 3

4. According to the magnitude and nature of natural resources, in certain situations, it is necessary to ensure rights to access to the resources of the people that are dependent on the natural resources but they are not closed to the location of the resources.
5. The state has to adopt a balancing approach while preserving rights of communities, so that preservation of one communities' rights does not become a cause of violation of others rights.

Fundamental Rights

- Right to food
- Food Sovereignty
- Right to environment
- Right to drinking water
- Right to property (land Reform?)
(Developmental activities?)

Fundamental duties

- There shall be the duty of every citizen to protect and promote natural resources.
- There shall be the duty of every citizen to protect and promote public property
- No citizen shall breach other's rights in excising one's own rights

State Responsibilities

- State has responsibilities to protect and promote natural resource, and to provide equitable distribution of benefits to the local communities prioritizing their rights in the sustainable use of natural resources
- State shall protect, promote and secure genetic resources and traditional knowledge, skills and practices relating to cultural heritage of indigenous, dalit and local communities, and shall arrange equal benefit sharing from these resources.

State Responsibilities 2

- State shall protect national interest while signing agreements at international level including agreements relating to water resources
- State shall preserve 40 percent land of the total land of the country for jungle/forest.

-

State Responsibilities 3

- State shall adopt precautionary measures in order to make secured people from natural disaster, and shall arrange for rescue and protection in the disaster and provide reasonable compensation to the affected people.
-

State Policies

- Sustainable development
- Intergenerational equity

Federal Structure

- Federal
- Provisional
- Local
- List : federal , State and concurrent list

Power Sharing

Subject	Federal	State	Local
Drinking water	Mega drinking water project and quality standard of drinking water	Middle drinking water project	Small drinking water project, distribution and management of drinking
Environment	Environment(Standardization and Regulation)	Environment	Environment
	biodiversity	biodiversity	
Forest	Forest	Forest	Forest
Water	National/ inter-provisional water shed	Water shed area	Water shed area

National Natural Resources Commission

- Function and Power:
 - To settle disputes relating to natural resources between federal-province, province-province, province-local and local –local governments.
 - To study, investigate, and identify the problems or possible problems relating to sharing of natural resources or environment and recommend to the government
 - Other matters as specified by law

Policy Recommendation

- ABS law should be made and implemented
- Need a informed debate on the constitutional making process
- Harmonize the implementation process of international treaties