

Supreme Court, Full Bench

Honorable Justice Hari Prasad Phuyal

Honorable Justice Dr. Kumar Chudal

Honorable Justice Til Prasad Shrestha

Order

Date of Order: 2078|05|27 (corresponding to 12 September, 2012)

078-WF-0025

Subject: Certiorari Mandamus et.al.

Applicant: Advocate Bigyan Singh Bista, resident of Bhaktapur District, Suryavinayak Municipality, Ward No. 4

Advocate Basant Joshi, resident of Kailali District, Bardagoria Village Municipality Ward No. 1,

Vs

Opponent : Government of Nepal, Office of the Prime Minister and Council of Ministers, Singha Durbar, Kathmandu

Government of Nepal, Ministry of Forests and Environment, Singha Durbar, Kathmandu

Case No. : 077-WO-1188

Rt. Honorable Chief Justice Cholendra Shumsher J.B.R. The writ petition had been submitted pursuant to Article 133 (2) and (3) of the Constitution of Nepal, wherein considering the seriousness and importance of the subject matter, the Division Bench of this court pursuant to Part (c) of Rule 23 (2) of the Supreme Court Regulation, 2074 had been referred the case to this Bench and the brief facts of the petition and the order rendered by this court is as follows:

Facts

Honorable Judge Hari Prasad Fuyal: The writ petition submitted by Advocate Basant Joshi reads as follows: A headline in Kantipur Daily titled “Work policy provided to Yeti for the production of electricity in Langtang amended” ([HTTPS://EKANTIPUR.COM/NEWS/2021/05/27/162212487756248764.HTML](https://ekantipur.com/news/2021/05/27/162212487756248764.html)) and published on 2078 Jestha 13 (corresponding to 27 May, 2021) had caught our attention. The news informs that in order to allow Yeti World Investment Company Pvt. Ltd. to produce electricity within the core area of Langtang National Reserve, Prem Bahadur Ale, Minister for Forests and Environment has amended Clause 5 of the Work Policy relating to the Construction and Operation of Physical Infrastructure in Protected Areas, 2065. Langtang National Park, spans to some parts of Rasuwa, Nuwakot, and Sindhupalchok districts, extends up to the border with China in the north. Langtan Lirung (7,243 meters) and Himalchuli (7,864 meters) are some of the mountains that add beauty to the area. The rivers originating from the park flow westwards towards Trishuli and eastwards

towards Sun Koshi. The park is home to a unique asset of vegetation and animals. The Langtang Sal (the only deciduous tree found in the coniferous forest) is one of the exclusive properties of this reserve. The beauty and attraction of the park is further enhanced by the various wild animals such as snow leopard, red panda, musk deer, Himalayan black bear, Thar, Ghoral, red monkey, and Langur. The park also has "Bon Po" a monastery related to the Tibetan religion and there are other cultural sites including Gosaikunda which is a sacred site for Hindu devotees. In 2007, the lakes in and around Gosaikunda have been recognized as wetlands having international importance. On 2055 Baisakh 14 (corresponding to 27 April, 1998) some of the area of park was declared as the buffer zone and this covers an area of 420 square kilometers including the settlement area located within the core area and the surrounding areas. The Langtang region selected by Yeti for their project is a suitable and appropriate only for wildlife and biodiversity.

Various policies and institutional arrangements have been made by the government of Nepal for the conservation of forest and environment. Similarly, Nepal is a State Party to various multilateral environmental treaties, including the Ramsar Convention, 1971, Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973, Convention on Biological Diversity, 1992. From among these conventions, the "Work Policy relating to the Construction and Operation of Physical Infrastructures within Protected Areas, 2065" is one of them.

Prior to the amendment, Clause 5 of the Work Policy relating to the Construction and Operation of Physical Infrastructures within the Protected Areas, 2065, stated that "no physical infrastructure should be constructed within the national park and reserves but consent, may be given to generate less than 1 megawatt of electricity (subject to the condition that it is not connected to the national transmission line) for the benefit of local consumers. While diverting or damming the river/stream, the Policy provided that the rivers and streams should be left open with at least 50 percent of the natural flow. However, pursuant to a decision of the Government of Nepal's Council of Ministers dated 2078/02/13 (corresponding to 27 May, 2021), Clause 5 of the Policy was amended to allow the construction of large-scale hydroelectric projects (from 1MW to 250MW) within the national parks and core area of the reserves and it stipulated that only 10 percent of natural flow can be released when rivers and streams are closed to generate between 100 to 250 megawatt of electricity. Pursuant to the amended provision and with the reduction of the natural flow of the rivers and streams to 10% would not only have a significant adverse impact on the natural environment of the Langtang region, but would also have an adverse effect on the wildlife, flora, and landscape and this is fundamentally contradictory to the concept of a national park.

The Preamble of the National Parks and Wildlife Conservation Act, 2029 (1973) underlines the objective of the Act which is to make arrangements for the management of national parks, conservation of wildlife, and their habitats. Clause 5 (j) of the said Act prohibits the blocking, diversion of rivers or streams flowing through national parks or reserves, or any other source of water, or use of any harmful or explosive materials. While constructing a dam for the purpose of generating more than hundred megawatt of electricity, it is evident that explosive materials will be used and construction of large scale hydroelectric projects will have an adverse effect on the environment and wildlife habitats within national parks. When 90 percent of the water is blocked, the existence of not only the terrestrial but also the aquatic life will be threatened. In addition, there is no doubt that the aquatic ecosystem of the park will become extinct. The objective of the National Parks and Wildlife Conservation Act, 2029 (1973) is to prevent the obstruction of the flow of water in the rivers and streams within national parks. However, the respondents' through the amendment of the Work Policy not recognized by the Act has

attempted to amend the substantive provisions thereby defeating the very purpose of the Act, and therefore, this act illegal and unjust.

Furthermore, after Clause 14, Clause 15 has been inserted in the Work Policy for Construction and Operation of Physical Infrastructure within the Protected Areas, 2065. The said Clause reads as follows: "prior to this projects having already received survey permit issued by the Department of Electricity Development shall be permitted to undertake their projects and for hydroelectric and other projects such as cable car falling within the national park and wildlife reserve, the Body issuing the permit shall upon obtaining the consent from the Ministry of Forests and Environment conduct survey of the project and carry out any other task deemed necessary." This provision appears to benefit certain unknown private companies at the expense of the natural environment, and the decision to amend is malicious and fraudulent. The amended provision of the Work Policy will have a negative impact on human life and is contrary not only to Article 30 of the Constitution of Nepal which guarantees the right to live in a clean environment but is also contrary to the spirit of multi-national environmental treaties to which Nepal is a Party. Since, the amendment is contrary to the precedents propounded by the Supreme Court the decision to amend the Policy should be quashed. While carrying out any development works, the basic concept of inter-generational equity and sustainable development needs to be considered to ensure that development work does not harm the equity of future generations. Part 4, Article 51 (6) (1) of the Constitution of Nepal provides to protect, promote, and make environmental friendly and sustainable use of natural resources available in the country in consonance with national interest and adopting the concept of inter-generational equity. Similarly, Article (7) of the said Constitution provides to adopt appropriate measures to abolish or mitigate existing or possible adverse environmental impacts on the nature, environment or biological diversity. The respondents cannot refrain themselves from not implementing these policies. Acting for short-term gain will affect the ecosystem and will put the future generations and humanity at risk. Prohibiting arbitrary actions is a fundamental aspect of environmental justice. Provided, the court does not intervene through judicial activism in such matters, human civilization will be at risk. The reason for amending the policy by the Ministry of Forests and Environment is that the water from the rivers and streams used for large-scale hydroelectric projects will be sufficient for aquatic life and other wildlife, even if a small percentage of the total flow is released downstream from the dam. However, there is no scientific or technical basis for this claim. Therefore, the decision of the Government of Nepal, Council of Ministers, dated 2078|02|13 (27 May, 2021) to amend the policy regarding the Work Policy for Operation and Construction of Physical Infrastructure within the Protected Areas, 2065, and other related decisions and correspondence, should be quashed. The petitioner seeks the court to quash the decision made on 2078/02/13 (corresponding to 27 May, 2021) made by Nepal government, Council of Ministers regarding the amendment made on the Work Plan regarding the Construction and Operation of Physical Infrastructures within Protected Areas, 2065, and any other correspondence made therein through the order of certiorari and also requests the court to issue an order of mandamus in the name of the respondents refraining them to do or cause to do any other activities causing harm within the national reserve and the protected areas and further requests the court to issue an interim order preventing the respondents from implementing or cause to implement the amendments made in the Work Plan.

A show cause notice had been issued by this Bench which reads as follows: why should the order as demanded by the petitioner need not be issued? A summon be issued in the names of the respondents along with a copy of the writ petition directing the respondents to submit their rejoinder along with the grounds and reasons thereof for not issuing the order within 15 days excluding the period of travel through the Office of the Attorney General and to submit the case file before this court upon receipt of the rejoinder or upon the expiry of the limitation period. Referring to the article titled "Work Policy

amended to provide consent to Yeti for generating electricity in Langtang” published on Kantipur daily on 2078/02/13 (corresponding to 27 May, 2021) the petitioners’ citing Clause 5 of the Work Policy for the Operation and Construction of Physical Infrastructure within the Protected Areas, 2065 stated that no physical infrastructure should be constructed within the national park and reserves but consent, may be given to generate less than 1 megawatt of electricity for the benefit of local consumers, wherein the provision prescribed in Clause 5 of the Work Policy for the Construction and Operation of Physical Infrastructure within the Protected Areas, 2065, was amended on 2078/2/13 (corresponding to 27 May, 2021) through the decision of the Council of Ministers wherein the new amendment allowed for the construction of large-scale hydroelectric projects and stipulated that only 10 percent of natural flow of water can be released when the rivers and streams are closed to generate between 100 to 250 megawatt of electricity. Similarly, the petitioners state that Clause 15 had been inserted in the Work Policy for the Operation and Construction of Physical Infrastructure within the Protected Areas, 2065, wherein the new Clause stipulated that prior to this projects having already received survey permit issued by the Department of Electricity Development shall be permitted to undertake their projects and for hydroelectric and other projects such as cable car falling within the national park and wildlife reserve, the Body issuing the permit shall upon obtaining the consent from the Ministry of Forests and Environment conduct survey of the project and carry out any other task deemed necessary. The new Clause will have an adverse effect on the natural environment and the amendment has been made for the benefit of certain unknown private companies and since the amendment is malicious and fraudulent, the petitioner seeks the court to quash the decision made by the Council of Ministers regarding the amendment through an order of certiorari and also requests the court to issue an order of mandamus in the name of the respondents refraining them to do or cause to do any other activities causing harm within the national reserve and the protected areas and further requests the court to issue an interim order preventing the respondents from implementing or cause to implement the amendments made in the Work Policy for the Operation and Construction of Physical Infrastructure within the Protected Areas, 2065.

Considering the petitioners’ demand for an interim order, it is evident that Clause 5 of the Work Policy for the Operation and Construction of Physical Infrastructure within the Protected Areas, 2065 had been amended through a decision made by the Council of Ministers on 2078/2/13 (corresponding to 21 May, 2021). Prior to its amendment, Clause 5 stipulated stated that no physical infrastructure should be constructed within the national park and reserves but consent, may be given to generate less than 1 megawatt of electricity (not connected to the national transmission) for the benefit of the local consumers. While generating electricity, the policy provided that while damming or diverting the rivers and streams, the rivers and streams during monthly discharge should be left open with at least 50 percent of the natural flow. Section 5 of the said Work Policy, 2065 had been amended which underlined that as long as there are other alternatives, infrastructures including electricity and any other projects cannot be constructed inside the national parks and protected areas. However, a proposal was submitted by the Ministry of Forest and Environment which allowed for construction of infrastructures for production of electricity for national needs and the proposal stated that monthly discharge of natural flow of water for 1 megawatt should be 50 percent, 1 to 10 megawatt should be 35 percent, 10 to 25 megawatt should be 30 percent, 25 to 100 megawatt should be 20 percent and 100 to 250 megawatt should be 10 percent. Provided these conditions were met, permission to carry out a study, construction and operation of the project would be provided and the proposal that was forwarded to the Nepal government, Council of Ministers was endorsed on 2078/2/13 (corresponding to 21 May, 2021) by stating “to proceed according to the proposal”.

The Preamble of the National Parks and Wildlife Conservation Act, 2029 (1973) lays out the objective of the Act and stipulates that the Act has been framed for the management of national parks, conservation of wildlife and their habitats, and to conserve, promote, develop and make appropriate arrangements for and the use of places which are of special importance from the point of view of natural beauty. Clause 5 of the said Act stipulates that no person shall carry out the following actions within the national park or reserve without obtaining a written permission from the authorized official wherein the following provisions have been made in 5 (e), 5 (f) and 5 (j):- Clause 5 (e) provides for the following: to cut, clear, fell, remove or block trees, plants, bushes or any other forest resources or do anything to cause any forest resources dry, or set on fire or otherwise harm or damage; Clause 5 (f) provides that no one shall dig mines, stones or remove any mineral, stone boulder, earth or any other any similar material, and Clause 5 (j) provides that no one shall block, divert any river or stream flowing through the national park or reserve, or any other source of water or use any harmful or explosive materials.

In in order to materialize the legislative intent in conserving the national parks and wildlife, the aforementioned Act has incorporated provisions that prohibit certain types of activities within the national parks. Upon reviewing the revised provision of Clause 5 of the Work Policy, it is evident that the construction of large-scale hydroelectric projects up to the capacity of 250 megawatts is permissible within the national parks. The construction of large hydroelectric projects requires building of dams and reservoirs and would involve in the damming and diversion of water. In the name of constructing hydroelectric project, provided, 90% of the water is dammed and if only 10% water is allowed to flow then this will have an adverse impact on the aquatic animals and their habitat, ecosystem, and will also have an adverse impact on the weather and the environment that the wetlands and wildlife depend upon. Similarly, construction of hydroelectric projects involves in the removal of rocks, soil, and gravel which can lead to the destruction of rare vegetation in the area. The use of explosives in the construction of large hydroelectric projects can also have a negative impact on the wildlife in the area, and will also have a calamitous and adverse effect to the geological and geographical conditions, climate, natural beauty, and the ecosystem. In the dispute relating to environment, this court in a writ petition of certiorari Nepal Law Reporter 2073 Unit 1, Decision No. 9575 had laid down the following principle:- "Every creation or object of nature has its own natural reason and importance for its existence. Each object has its own unique value and significance. It is not acceptable if anyone compromises the natural value and significance of an object for someone's personal interest or economic gain. Matters such as air, water, forests, and biodiversity which are connected to the identity and existence of nature are not limited to a single generation. They should not be destroyed under any pretext. In the name of development, no one has the authority to destroy the nature and its basic features. The value of the gift provided by the nature cannot be compared to the benefits provided by development activities. Therefore, even if a development activity provides significant benefits, it should not be allowed to continue if such development has a negative impact on the nature and the environment."

An interim order pursuant to Rule 49 (2) (a) of the Supreme Court Regulation, 2074 had been issued in the names of the respondents on 2078/3/6 (corresponding to 20 June, 2021) which read as follows: the national parks and wildlife are rare assets and heritage of the country. It is the duty and responsibility of all to protect them. The conservation of invaluable natural resources, rare vegetation, biodiversity, environment, and the atmosphere is the need of the day. Without any reasonable and justifiable grounds, the sensitivity towards the conservation of national parks and wildlife that is related to the nature and pride of the country has been affected by the amendment made in Clause 5 of the Work Policy for the Operation and Construction of Infrastructures within the Protected Areas, 2065, and where the insertion of Clause 15 has caused adverse effect to the conservation and protection of national parks and wildlife,

the court hereby issues an interim order directing the respondents not to implement or cause to implement the amended Clause 5 and Clause 15 of the aforementioned Work Policy that was amended through a decision by Nepal government, Prime Minister and Council of Ministers on 2078/2/12 (corresponding to 27 May, 2017) until the final hearing of this writ petition.

The rejoinder submitted by the Ministry of Forest and Environment reads as follows: the proposal for the amendment of the Work Plan Relating to the Operation and Construction of Infrastructures within the Protected Areas, 2065 was approved by the departmental Minister on 2078/02/03 (corresponding to 17 May, 2021) and was subsequently submitted to Nepal government Council of Ministers by this Ministry wherein the Work Plan was approved by the Council of Ministers on 2078/02/13 (corresponding to 27 May, 2021). Taking note of the provisions prescribed in Section (e) and (j) of Clause 5 of the National Parks and Wildlife Conservation Act, 2029, since the water of the rivers and streams to be used for large-scale hydroelectric projects will be abundant and therefore, when a small percentage of the total flow is released downstream would be sufficient for the aquatic and other wildlife. The amendment made in the Work Plan is not contrary to the prevailing Constitution, law, and treaties to which Nepal is a Party and therefore, the order sought by the petitioners need not be issued and hence should be quashed.

The rejoinder submitted by Nepal government, Prime Minister and Office of the Council of Ministers reads as follows: since the Government of Nepal is fully committed and active in the protection of the environment and biodiversity there is no need to submit a petition requesting the honorable court to issue an order for the implementation of constitutional and legal provisions. The construction of hydropower infrastructures are carried out only when the conditions for environmental protection as per the provisions of the Environment Protection Act and the Regulation thereunder are met. Pursuant to the Electricity Act and relevant legal provisions, the capacity is determined by the concerned Ministry through the Department of Electricity Development and therefore, the court cannot decide on the site and the capacity of electricity to be produced. The petitioner's claim that development activities including the construction of hydropower projects cannot be carried out in protected areas and conservation sites is not tenable under the law. By maintaining a balancing between development and the environment, the government's priority is to carry out development activities thereby attaining economic development.

To maintain the environmental balance and to conserve biodiversity and the ecosystems the provision prescribed under Clause 5 of the Work Plan for the Operation and Construction of Physical Infrastructure within the Protected Areas, 2065, had been amended by the Government of Nepal on 2078/2/13 (corresponding to 27 May, 2021) pursuant to the proposal submitted by the concerned Party wherein instead of Clause 5 a new provision was inserted in the Work Plan. The new provision stipulates that for projects below 1 megawatt, 50%, for 1-10 megawatts 35%, for 10-25 megawatts 30%, for 25-100 megawatts 20%, and for 100-250 megawatts 10% of the water must be released. This will ensure a sufficient supply of water for aquatic and other animals and vegetation in the lower riparian areas, as well as supplement the water supply from the flow of rivers and streams affected by large projects and therefore the present amendment is not contrary to the commitments made by Nepal expressed in the international agreements and treaties to which Nepal is a Party. Such kinds of projects are not operated in any location within the protected area but rather the projects are operated in the areas deemed suitable and appropriate in terms of environment and construction of infrastructures. Furthermore, construction cannot take place without the consent of the concerned agency in the national parks, protected areas, and similar areas. The present provision is equally applicable to all, and it is not applicable to a specific area or a person. Therefore, the petition filed based on the news of May 27,

2021 is inappropriate. It is common for the executive body to amend and revise legal provisions and such matters cannot be deemed to be activities contrary to environmental balance.

Similarly, since the amendment made to the "Work Plan for the Operation and Construction of Physical Infrastructures within the Protected Areas, 2065" to allow for the construction of cable cars and based on the environmental impact assessment of hydro-electric projects carrying out physical works without causing any harm to the ecosystem, the writ petition submitted against the amendment is inappropriate. Survey permit for hydropower and other industries is obtained upon fulfilling prevailing legal procedures. A survey is required to determine whether a project is suitable or not. Provided, orders are issued on policy matters, then such order causes encumbrances to the development works. Balanced development is the need of the day and to achieve this we need to protect the nature and adopt cautionary measures while carrying out development works, and subsequently the amendment had been made in the Work Plan and therefore, the petitioners' claim is inappropriate and hence the petition should be quashed.

An application submitted on 2978/4/11 (corresponding to 26 July, 2021) by MPK Energy Pvt. Ltd. and Kumar Upreti, Project Coordinator and shareholder of MPK Energy Pvt. Ltd. on 2978/4/11 (corresponding to 26 July, 2021) reads as follows: that the applicants are directly involved in the said writ petition and that the applicants right and interest are attached with the writ petition and through an ex-parte hearing by the Supreme Court on 2078/3/6 (corresponding to 20 June, 20221) had issued an interim order thereby affecting our rights and the applicants hereby requests the court to allow the applicants to be present before the court as other respondents and to be present to participate in the hearing and proceedings of the case.

An order on 2978/4/12 (corresponding to 27 July, 2021) had been issued by this court which reads as follows: pursuant to the application 078-FN-0023, the court pursuant to rule 47 (2) of the Supreme Court Regulation, 2074 hereby issues an order allowing the applicant to be present and to participate in the proceedings against writ petition 077-WO-1188 and allows the petitioner to be submit a rejoinder and to submit the case file as per the rules.

The rejoinder submitted by Dhurba Kumar Upreti on behalf of MPK Energy Pvt. Ltd. reads as follows: the provision of the amended Clause 5 of the "Work Plan for the Operation and Construction of Physical Infrastructures within the Protected Areas, 2065" is merely a guideline and not the final approval. The determination of the balance between development and environment is a matter of State policy. Therefore, in the absence of a clear violation of any constitutional provision or law, there are no sufficient grounds to quash the Work Plan issued by the Government of Nepal. Green energy generated from water resources around the world is essentially to reduce the carbon emission and the petitioner's writ petition is merely to prevent development projects that have been recognized as environmentally friendly and the intention of the petitioner is not reduce the use of biofuels in Nepal but rather increase it. Provided, our company is not allowed to perform development works according to the permit, the purpose of the permit will be meaningless. The survey for the production of hydro-electricity or the permits for the production of hydro-electricity are permits issued for a specific river or stream. In such circumstances, provided, our company is not allowed to construct the project within the Varun Makalu National Park, the permit will become inactive. On the one hand, the Ministry for Energy which has issued the permit has not been made a respondent to the writ petition by the petitioner and on the other, provided ,the order pursuant to the writ petition is issued, then all electricity permits issued by the Government of Nepal in a lawful manner to construct and operate projects in the protected areas will

be revoked. However, no such claim in this regard has been made by the petitioner. Since there is no factual or legal basis for the writ to be issued, the writ petition should be quashed.

An order on 2078/4/15 (corresponding to 27 July, 2021) had been issued by this court to inform the petitioners' Bigyan Singh Bista et.al. about the hearing relating to the dismissal of the interim order and to submit the case files pursuant to the rules.

The petition filed by the Executive Committee of the Independent Power Producers' Association of Nepal (IPPAN) seeking the courts permission to be a respondent and to participate in the hearing of the case.

The applicant Bishnu Prasad Luitel, authorized representative and on behalf of Independent Energy Producers Association of Nepal through an application filed before this court had informed the court that they were directly concerned with the writ petition no. 077-WO-1188 and had sought the court's permission to be involved in the hearing wherein this court pursuant to Rule 47 (2) of the Supreme Court Regulation, 2074, had issued an order on 2078/4/29 (corresponding to 27 July, 2021) granting permission to be involved in the hearing process and to submit their rejoinder and the Bench also ordered to submit the case file accordingly.

The rejoinder submitted by Bishnu Prasad Luitel on behalf of IPAAN reads as follows:- the hydroelectric projects are projects of national priority and the construction of the projects are carried out upon obtaining a license based on the environmental impact assessment carried out within the national park and conservation area and where the interim order dated 2078/3.6 (corresponding to 27 July, 2021) has caused significant injury to the respondent, the respondent have been compelled to respond. The development of hydroelectric projects falls within the ambit of infrastructure under the Public-Private Partnership Act, 2076, and the Industrial Enterprise Act clearly outlines it as an industry receiving national priority, and pursuant to the Electricity Act, 2049, and the Regulation, 2050, it is a project with more than 15 billion investment and envisages continuous development of projects equivalent to 5 trillion and 20 billion rupees and pursuant to the Environment Protection Act, 2076, and on the basis of the environmental impact assessment carries out development projects and under the green energy carries out construction works without causing any impact to the environment, leaving sufficient normal flow of water as directed by the government and is not contrary to any treaties and agreements and as development and environment are supplementary to achieve the objective of development, the interim order dated 2078/3/6 (corresponding to 20 June, 2021) should be quashed and justice should be meted out to the respondent.

An order on 2078/5/21 (corresponding to 6 September, 2021) had been issued by this Bench which reads as follows: that an order on 2078/4/29 (corresponding to 13 August, 2021) had been issued allowing the Nepal Independent Energy Producers Association to participate in the hearing process and to submit their rejoinder. However, since the Association has not been provided with the hearing date regarding their participation in the discussion relating to the interim order, the court hereby orders both the Parties to be present on 2078/5/27 (corresponding 12 September, 2021) to discuss on the revocation of the interim order and to present the file according to the rule.

An order issued by this court on 2078/5/27 (corresponding to 12 September, 2021) reads as follows: the decision to amend the Work Plan relating to the Operation and Construction of Physical Infrastructures within the Protected Areas, 2065, is contrary to the legislative intent and this would have an adverse impact on aquatic and aquatic habitats, ecosystems, wetlands, and the air, water and the environment necessary for other wildlife would also be impacted and would also cause destruction to

the rare vegetation and cause an impact on the natural beauty. While reaching such a decision, the Nepal government has not carried out any study or research, and neither has it mentioned the grounds or reason for making such amendments in the Work Policy and taking note of the importance of the subject matter the court deems it appropriate to resolve this issue by the Full Bench and therefore, pursuant to Rule 23 (2) (c) of the Supreme Court Regulation, 2074, the case has been referred to the Full Bench.

ORDER SECTION

The case had been presented before this Bench as per the rules and the learned advocates Mr. Hari Prasad Pangeni and Mr. Basant Joshi on behalf of the petitioners stated that on 2078/2/13 (corresponding to 27 May, 2022) an article published by Abdulla Mia in Kantipur titled "amendment of work policy to allow Yeti to produce electricity in Langtang" was published. Furthermore, they stated that according to Clause 5 of the Work Plan for Operation and Construction of Physical Infrastructure within the Protected Areas, 2065, the Policy provided that no physical infrastructures should be constructed within national parks and reserves but consent may be given to generate less than 1 megawatt of electricity for the benefit of the local consumers, and while damming or diverting the rivers and streams, the rivers and streams monthly discharge should be left open with at least 50 percent of the natural flow. They further opined that the aforementioned provision was amended by a Cabinet decision on 2078/2/13 (corresponding to 27 May, 2021), allowing the construction of hydroelectric projects within national parks and reserves to generate power from 1 megawatt to 250 megawatt, and while damming the rivers and streams for generating 100 megawatt to 250 megawatt, 10 percent of the natural flow of water may be released. They further stated that Clause 15 was added to the Work Policy, 2065, which stipulated that prior to this projects having already received survey permit issued by the Department of Electricity Development shall be permitted to undertake their projects and for hydroelectric and other projects such as cable car falling within the national park and wildlife reserve, the Body issuing the permit shall upon obtaining the consent from the Ministry of Forest and Environment shall conduct a survey of the project and carry out any other task deemed necessary. The petitioners argued that the aforementioned amendment has been made for the benefit of certain unknown company and since the amendment is malicious and fraudulent, the petitioner seeks the court to quash the decision made by the Council of Ministers regarding the amendment and the amendments made in the Work Policy through an order of certiorari.

The learned Joint Government Attorney Mr. Hari Prasad Regmi, on behalf of the respondent the Government of Nepal, argued that the Work Policy on the Construction and Operation of Physical Infrastructures within the Protected Areas, 2065 does not prohibit the construction of hydroelectric projects in national parks and protected areas. On the contrary, it has laid down provisions for obtaining approval and consent while carrying out such projects or carrying out development works. The amended provision that was amended by the decision of the Council of Ministers on 2078/2/13 (corresponding to 27 May, 2021) requires a person to obtain approval/consent. Clause 15 that was inserted in the amended Work Policy provided for projects other than those already having received consent for hydroelectricity, other projects may receive the license upon survey of the project and receiving consent from the Ministry of Forest and Environment. This has not contributed to the degradation of the environment but rather has laid emphasis in the protection of the environment. The Work Policy is a policy document and does not have any legal value. They further argued that this matter falls within the jurisdiction of the executive right and it is purely a policy based decision made by the Executive. The government within the ambit of the Constitution of Nepal can formulate and amend policies relating to development and the amendment of the said policy has not violated any rights of the petitioners and the provision of the amended policy is not contrary with the Constitution or the law. Therefore, the

amendment made in Clause 5 of the said Work Policy does not need to be quashed by an order of certiorari and therefore the petition should be dismissed.

The learned Senior Advocates Mr. Shambhu Thapa and Mr. Satish Krishna Kharel, and the learned Advocates Mr. Ashish Adhikari, Mr. Lekhnath Bhattarai, Mr. Narayan Chaulagain, Mr. Mukesh Dhungana, Ms. Pratima Kandel Kharel, Ms. Regina Poudyal, and Mr. Anmol Marasini, appearing on behalf of the stakeholder M/s MPIC Energy Pvt. Ltd., stated that the provision under the amended Clause 5 of the Work Policy on the Operation and Construction of Physical Infrastructure within the Protected Areas, 2065 is merely a guideline and not a final approval. The task of maintaining a balance between development and the environment is a policy matter of the State. Therefore, where the petitioners have not been able to show that there has been a clear violation of any constitutional provision or the law, then there is no reason for revoking the Work Policy issued by Nepal government. Clause 5 of the National Parks and Wildlife Conservation Act, 2029, has stipulated that the protected areas cannot be used without obtaining permission from an authorized official, and Clause 5 of the amended Work Policy also contains the same provision and therefore, it would be meaningless to repeal the amended Clause 5. The amendment of Clause 15 is not applicable to those who have already received permission and are working prior to the amendment. Prior to receiving any approval, the provision requires receiving approval from the Ministry of Forests and Environment and provided it causes adverse impact to the environment approval will not be granted. Since the Work Policy was amended for the protection of the environment, the Work Policy should not be quashed and therefore, the writ petition should be dismissed.

Similarly, Learned Senior Advocate Mr. Kedar Karki and the Learned Advocate Mr. Homkant Chaulagain, on behalf of the Independent Power Producers Association of Nepal (IPAN), argued that the project had been developed based on the environmental impact assessment conducted pursuant to the Environment Protection Act, 2076, and that under the Green Energy project, the project was carried out without causing impact to that area except for a minimal impact during the construction period and that the flow of water to be released as specified by the government was sufficient, and that it was not contrary to any treaty or agreement, and since development and environment are supplementary to each other it was necessary to amend the Work Policy to fulfill the desired development. Therefore, the amendment made in Clause 5 of the said Work Policy should not be repealed and the writ petition should be dismissed.

The principal claim of the petition is that Clause 5 of the Work Policy for Operation and Construction of Physical Infrastructures within the Protected Areas, 2065, provides that no physical infrastructures should be constructed within the national parks and reserves but consent may be given to generate less than 1 megawatt of electricity for the benefit of the local consumers and while damming or diverting the rivers and streams, the rivers and streams monthly discharge should be left open with at least 50 percent of the natural flow. However, without any scientific and technical grounds the Council of Ministers had amended the provision on 2078/2/13 (corresponding to 27 May, 2021). Similarly, the Policy was amended allowing the construction of hydroelectric projects within national parks and reserves to generate 1 megawatt to 250 megawatt electricity and while damming the rivers and streams 10 percent of the natural flow of water may be released. The petition further states that Clause 15 was added to the Work Policy, which stipulated that prior to this, projects having already received survey permit issued by the Department of Electricity Development shall be permitted to undertake their projects and for hydroelectric and other projects such as cable car falling within the national park and wildlife reserve, the Body issuing the permit shall upon obtaining the consent from the Ministry of Forests and Environment conduct survey of the project and carry out any other task deemed necessary.

The petition claims that the amendment provision is harmful to the natural environment and had been made for the benefit of certain unknown company and since the amendment is malicious and fraudulent, the petitioner seeks the court to quash the decision made by the Council of Ministers regarding the amendment and the amendments made in the Work Policy through an order of certiorari.

The rejoinder submitted by Nepal government Ministry of Forest and Environment states that taking not of the legal provisions prescribed under Clause 5 (e) and (j) of the National Parks and Wildlife Conservation Act, 2029 (9173), since the water of the rivers and streams to be used for large-scale hydroelectric project is abundant, a small percentage of the total flow of water released downstream would be sufficient for aquatic and other wildlife wherein a proposal had been submitted by this Ministry and a decision of the Nepal government Council of Ministers on 2078/02/13 (corresponding to 37 May, 2021) wherein amendments were made in the Policy and since the amendment is not contrary to the prevailing Constitution, law, and treaties to which Nepal is a Party, the claim made by the petitioner should be rejected.

The content of the rejoinder submitted by Nepal government, Prime Minister and Office of the Council of Ministers states that since there are no legal issue in the amendment made in the Work Policy on Construction and Operation of Physical Infrastructures within the Protected Areas, 2065, the petition is improper. We should free ourselves from being self-centered and finding faults or apprehensions and causing encumbrance to development works. The act of obtaining or obtaining the permission for survey of hydropower and other is obtained upon fulfilling prevailing legal procedures. A survey is necessary to determine as to whether or not any program or project is appropriate. Provided, orders are issued on policy based matters this would cause an encumbrance to development work. Therefore, adopting necessary precaution for development works, protecting the nature, and achieving balanced development is the need of the day and substantially the Policy was amended and therefore, the petition should be dismissed

It is noted that MPEAK Energy Pvt. Ltd. and the Independent Energy Power Producers' Association(IPAN) have been permitted by this Court to be present and submit their rejoinders respectively.

Upon hearing the arguments and written submissions presented by the learned Advocates and the Joint Government Attorney and upon examining the case file including the petition, the rejoinders submitted by the respondents, and the order issued by the Division Bench, it has been noted that owing to the seriousness and importance of the subject matter raised by the petitioner, the Division bench of this court has referred this petition to be heard and resolved by the Full Bench and accordingly the case file has been submitted before this Bench wherein this Bench deems to consider on the following issues to resolve the dispute:

- a. As to whether or not physical infrastructure development activities including generation of electricity can be carried out within the national parks and wildlife reserves?
- b. As to whether or not the Work Policy on the Operation and Construction of Physical Infrastructures in the Protected Areas, 2065" is a policy or a legal document? As to whether or not this can be a subject of judicial review?
- c. What kind of relationship can be perceived between the environment, climate change, national parks and wildlife reserves and protected areas and development?
- d. As to whether or not any order as sought by the petitioner or any other appropriate order needs to be issued?

2. The present petition is primarily related to the Langtang National Park and the mountains, the snow, forest, vegetation and the environment, as well as the wildlife found in the high Himalayan region, and the rivers originating from the Himalayan range, and the permission to operate in the production of hydroelectricity in the northern Himalayan settlements, and the likelihood of creating environmental problems, climate change, and impact on the livelihood of the people in that area. Taking note of the issue of protection of environment in development works and the concept of climate-resilient development, the Bench deems it appropriate to explore the international law or provisions, the Constitution of Nepal, laws, related policies, and development as well as the interpretations made by this court in the context of environment and climate change. The court deems it expedient to discuss the existing policy and legal arrangements regarding the relationship between environment and development.
 - a. Taking stock of the international efforts made in relation to the environment, climate change, and development, the Stockholm Declaration and Action Plan for the Human Environment, 1972, has presented 26 principles related to the environment, and has laid emphasis on maintaining a balance between environment and development by stating that nations should adopt a balance between the environment and development¹ and that there should be a rational planning to coordinate the needs of development and the protection of environment² The United Nations Conference on Environment and Development, held in Rio De Janeiro in 1992, developed 27 principles related to the environment, and stressed that the right to development should ensure the environmental and developmental needs of present and future generations³ and since the protection of environment is an integral part for sustainable development it cannot be treated in isolation⁴. After the United Nations Conference on Sustainable Development, Rio De Janeiro, 1992 (Rio +20) paved the way for sustainable development, the State Parties have endorsed the Sustainable Development Goals (SDGs)⁵.

Similarly, in the context of international provisions relating to climate change, the United Nations Framework Convention on Climate Change, 1992, which is the first treaty to raise the issue of climate change, contains important provisions⁶ such as key principles related to climate change, dispute resolution, and the responsibilities of the State Parties. The Framework informs the State Parties have to adopt⁷ safeguards to reduce the causes and effects of climate change and also provides that it is the responsibility⁸ of each State to promote sustainable development.

¹ Principle 13- *"In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and coordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population."*

(source: <https://wedocs.unep.org/bitstream/handle/20.500.11822/29567/ELGPIStockD.pdf> accessed on 19th July 2023)

² Principle 14- *Rational planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment.* (source:

<https://wedocs.unep.org/bitstream/handle/20.500.11822/29567/ELGPIStockD.pdf> accessed on 19th July 2023)

³ Principle 3- *The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations* (source: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N92/836/55/PDF/N9283655.pdf?OpenElement> accessed on 19th July 2023)

⁴ Principle 4- *"In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it."* (source: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N92/836/55/PDF/N9283655.pdf?OpenElement> accessed on 19th July 2023)

⁵ United Nations Conference on Sustainable Development (Rio +20), 20-22 June 2012, source :<https://sustainabledevelopment.un.org/rio20>

⁶ *United Nations Framework Convention 1992- snapshot*, LexisNexis, 2023, para.1.

⁷ Article 3 (3) – *"The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost."*

⁸ Article 3 (4) *"The Parties have a right to, and should, promote sustainable development. Policies and measures to protect the climate system against human-induced change should be appropriate for the specific conditions of each Party and*

The Kyoto Protocol 1997⁹ has made arrangements for making and implementing policies and programs to reduce the use of greenhouse gas emissions and to provide reporting¹⁰ on them. The Paris Agreement 2015, which is the latest attempt in relation to climate change, includes objectives that aim to strengthen the response to the threat to climate change in the context of sustainable development and efforts to eradicate poverty¹¹. Although, this agreement does not include all the nations equal responsibility to global environmental degradation that is included in the United Nations Framework Convention on Climate Change (UNFCCC) and Kyoto Protocol, it highlights the importance of global cooperation and principle of common but differentiated principle¹², and provides that State Parties should take the initiative to bring about environmental integrity and transparency¹³.

- b. Upon perusal of the aforementioned international treaties, it is evident that development, environment, and climate change should be taken forward in balanced manner, and that the right to environment and development should be ensured for future generations as well, and while using natural resources for development works, appropriate measures should be taken to avoid the negative impacts of climate change and should focus on sustainable development. Upon perusal of the international values and norms regarding development, environment, and climate change, it is deemed imperative to discuss on our constitutional, legal, and policy efforts. Article 19 (5) of the Constitution of Nepal, 2019, stipulates the following: “The development goal of Panchayat System shall be to mobilize Nepal's natural resources and heritage in beneficial and advantageous way and in just manner for balanced development among the various regions of Nepal on equal basis of opportunity; initiate for providing appropriate facilities to bring people of all regions in equal status and to make effort for economic development to fulfill the basic necessity of people of remote areas.” Article 26 (3) of The Constitution of the Kingdom of Nepal, 2047 states that "the State shall pursue a policy of mobilizing the natural resources and heritage of the country in a manner which might be useful and beneficial to the interest of the nation." Sub-article (4) of the said Article states that "the State shall give priority to the protection of the environment and also to the prevention of its further damage due to physical development activities by increasing the awareness of the general public about environmental cleanliness, and the State shall also make arrangements for the special protection of rare wildlife, the forests, and the vegetation." Article 35 (4) of The Interim Constitution of Nepal, 2063, under the State Policies, states that "the State shall while mobilizing the natural resources and heritage of the country that might be useful and beneficial to the interest of the nation, pursue a policy of giving priority to the local community” and Sub-article (5) states that "the State shall make necessary arrangements to maintain the natural environment. The State shall give priority to special protection of the environment and rare wildlife and prevent further damage due to physical development activities, by increasing awareness of the general public about environmental cleanliness. Provisions shall be made for the protection of the forest, vegetation and biodiversity, their sustainable use and for equitable

should be integrated with national development programs, taking into account that economic development is essential for adopting measures to address climate change.”

⁹ 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11/12/1997, 2303 UNTS 148, 37 ILM 22 (1998)

¹⁰ What is Kyoto Protocol?, United Nations Climate Change, accessed from: https://unfccc.int/kyoto_protocol#:~:text=,para.3

¹¹ Article 2 (1): “This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty,...”(source: https://unfccc.int/sites/default/files/english_paris_agreement.pdf accessed on 19th July 2023)

¹² Preamble, Paris Agreement 2015

¹³ Article 6, Paris Agreement 2015

distribution of the benefits derived from them. Looking at the provisions of the Constitutions prior to 2072, it can be seen that the 2019 Constitution had laid emphasis on development with a policy of using natural resources, whereas the Constitution of the Kingdom of Nepal, 2047, and the Interim Constitution of Nepal, 2063, in addition to development had a policy of considering environmental aspects while carrying out development activities.

Article 30 (1) of the Constitution of Nepal states that "every citizen shall have the right to live in a clean and healthy environment". Sub-article (2) of the said Article states that "the victim shall have the right to obtain compensation in accordance with law for any injury caused from environmental pollution or degradation" and Sub-article (3) states that "this Article shall not be deemed to prevent the making of necessary legal provisions for a proper balance between the environment and development works of the nation." The Constitution has recognized the right to environment as a fundamental right thereby ensuring the right of citizens to a clean environment, and obtaining compensation from polluters, and making of necessary laws and embraces the principle of balance between environment and development. Under the development Policy¹⁴ the Constitution of Nepal states that the State shall pursue to develop balanced, environment friendly, quality and sustainable physical infrastructures, while according priority to the regions lagging behind from development perspective. Likewise, the Constitution has made arrangements for the conservation, promotion, and use of natural resources¹⁵, and has adopted the policy "to protect, promote and make environmental friendly use of natural resources available in the country in consonance with national interest and adopting the concept of inter-generational equity.....¹⁶". The Constitution has adopted the policy of sustainable uses of resources by not exploiting the natural resources and taking account of inter-generational equity. Under the policy related to the conservation, promotion, and use of natural resources, the Constitution "ensures reliable supply of energy in an affordable and easy manner and to make proper use of energy for the fulfillment of the basic needs of citizens by generating and developing renewable energy."¹⁷

On matters relating to climate change the State has adopted the policy "to adopt appropriate measures to abolish or mitigate existing or possible adverse environmental impacts on the nature, environment or biodiversity"¹⁸. Likewise, the State has adopted a policy to pursue the principles of environmentally sustainable development such as the principles of polluter pays¹⁹.

- c. The Constitution of Nepal has recognized the right relating to environment as a fundamental right and has embraced the concept of balancing development and the environment, including the use of natural resources, in an inclusive, sustainable, environmentally friendly, and climate-resilient manner which is also reflected in the periodic plans and sectoral policies. The Fifteenth Plan (2076/77-2080/81) has included environment and climate change as interrelated subjects and has set the objective as "to maintain a balance between physical infrastructure development and natural environment"²⁰ and in relation to climate change the objective is "to implement the

¹⁴ Part 4, Article 51 (f) (2) of the Constitution of Nepal

¹⁵ Part 4 Article 51 (g)

¹⁶ Ibid Article 51 (g) (1)

¹⁷ Part 4, Article 51 (g) (3)

¹⁸ Part 4, Article 51 (g) (7)

¹⁹ Ibid Article 51 (g) (8)

²⁰ Fifteenth Plan (2076/77-2080/81), National Planning Commission, pg. 352

concept of environmental friendly clean energy and green development for climate change mitigation.²¹"

The National Environment Policy, 2073 (2019) underlines policy of mainstreaming of environment²²]and states that "an assessment of policies, programs and projects that impacts the social and environmental shall be carried out, to internalize the environmental aspects in all stages of development projects, to mitigate the adverse impacts on the environment and society caused by development projects, and to expand the positive impacts, and to make necessary arrangements to render environmental study reports objective and reliable ". Likewise, the Sustainable Development Policy²³ states that "environmentally friendly structures will be built while constructing physical infrastructure, highly sensitive areas from the perspective of environmental conservation such as the Chure range will be protected and will be sustainably managed, and natural resources will be managed in a sustainable and integrated manner, with a system of equitable distribution of benefits". Along with this, arrangement has also been made for environmental justice and good governance policy, and has vested the three-tier government the responsibility to implement the policy.

The goal of the National Forest Policy-2075²⁴is "to produce and enhance the value of forest wildlife products and services through sustainable and participatory management of forests, protected areas, watersheds, biodiversity, wildlife and plants, and ensure their equitable distribution".

The goal of the National Climate Change Policy-2076[25] is "to contribute to socio-economic prosperity of the nation by building a climate resilient society" and "to promote green economy by adopting the concept of low carbon emission development²⁵."

- d. The present petition is related with the production of electricity by using the water from the river flowing through the Langtang National Park area, and therefore, it is pertinent to study the legal provisions related to the use of forest in the national park or protected area for the production of hydroelectricity and the legal provision relating to the diversion of the river water flowing through that area. The National Parks and Wildlife Conservation Act, 2029 (1973), had been enacted with the objective to make arrangement for the management of national parks, conservation of wildlife and their habitat, regulate hunting and to conserve, promote, develop and make appropriate arrangements for and the use of places which are of special importance from the point of view of natural beauty and therefore, it is pertinent to look into the provisions prescribed by this Act. The National Parks and Wildlife Protection Act, 2029 has prescribed some legal provisions. Pursuant to Clause 5 of the aforementioned Act, no person shall without obtaining a written permission from the authorized authority cut, clear, fell, remove or block trees, plants, bushes or any other forest resources or do anything to cause any forest resources dry, or set on fire or otherwise harm or damage it²⁶, to dig mines, stones or remove any mineral,

²¹ Fifteenth Plan (2076/88-2080/81), National Planning Commission, pg. 352

²² National Environment Policy, 2073, Symbol No. 8.2, pg. 5, Nepal Government Prime Minister and Office of the Council of Ministers

²³ National Environment Policy, 2076, Symbol No. 8.5, pg. 7, Nepal government Prime Minister and Office of the Council of Ministers

²⁴ https://dnppwc.gov.np/media/rules/Ban_Niti_2075.pdf

²⁵ https://climate.mohp.gov.np/downloads/National_Climate_Change_Policy_2076.pdf

²⁶ Clause 5 (e) of National Parks and Wildlife Protection Act, 2029 (1973)

stone, boulder, earth or any other similar material, soil²⁷, to block, divert any river or stream flowing through national park or reserve, or any other source of water, or use any harmful or explosive materials²⁸. Clause 24 of the Electricity Act, 2049 (1992), stipulates that "while carrying out electricity generation, transmission, or distribution, it shall be carried out in such manner that no substantial adverse effect be made on the environment by way of soil erosion, flood, landslide, air pollution, etc."

Clause 9 of The Water Resources Act, 2049 (1992), provides for utilization of water resources for hydro-electricity and Sub-clause (1) of the said Clause stipulates "notwithstanding anything written in Clause 8, the license relating to the survey of water resources and its utilization for the generation of hydro-electricity shall be governed by the prevailing law". Similarly, Sub-clause (2) states "with regards to the generation of hydro-electricity other matters relating to the utilization of water resources shall be in accordance with this Act". Likewise, Clause 20, under the Title "Not to Cause Substantial Adverse Effect on Environment" states "while utilizing water resources, it shall be done in such a manner that no substantial adverse effect be made on the environment by way of soil erosion, flood, landslide, or similar other causes". It is evident from the aforementioned legal provisions that along with the Electricity Act, the Water Resources Act is also applicable while developing hydro-electricity. It is also evident that while utilizing water resources for hydro-electricity, the utilization should be environmental friendly manner or should not cause adverse effect on the environment.

The Preamble of (The) Control of International Trade of Endangered Wild Fauna and Flora, Act, 2073 (2017) stipulates that "it is expedient to make necessary legal provisions for conservation of various species of the endangered fauna and flora in order to implement the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973 to which Nepal is a Party and for regulation and control of international trade." It is evident that no acts can be performed contrary to this Act.

The Preamble of The Environment Protection Act, 2076 (2019), enacted to implement the environmental rights and policies guaranteed by the Constitution of Nepal, aims to protect the fundamental right of each citizen to live in a clean and healthy environment, provide victim with compensation by the polluter for any damage resulting from environmental pollution or degradation, maintain a proper balance between environment and development, mitigate the adverse environmental impacts on nature, environment, and biodiversity, and face the challenges posed by climate change.

Schedule 9 of Clause 19 of the Industrial Enterprise Act, 2076 (2020), prescribes for industry of national priority and Section 2 of the Schedule categorizes energy-based industry as industries of national priority. Similarly Schedule 3 of the said Act, categorizes industries generating energy from water resources as energy-based industries.

Clause 42 (1) of the Forest Act, 2076 (2019) stipulates the following: "Notwithstanding anything contained elsewhere in this Act, if there is no other alternative to the using of forest area for the operation of a national priority project, plan of which investment is approved by the Investment Board, project of national pride, and it appears from the environment examination referred to in the prevailing law that the operation of such plan does not result in

²⁷ Ibid Clause 5 (f)

²⁸ Ibid Clause 5 (j)

significant adverse effect on the environment, the Government of Nepal may give approval as prescribed, to use any part of the national forest for the purpose of operation of such plan."

It is evident that the national priority projects can utilize the forest area. Constitutions promulgated prior to the promulgation of the Constitution of Nepal 2072 BS did not fully incorporate the theory of balance between development and environment, sustainable development, inclusive development, climate adaptation, and development of environment. The legal provisions in the National Parks and Wildlife Conservation Act, 2029, Water Resources Act, 2049, and Forest Act, 2076, does not seem to have adequately addressed the issues of inclusive equitable justice, and balanced and sustainable development, utilization of natural resources favorable to environment and climate change, including intergenerational equitable justice as envisioned by the Constitution of Nepal (2072). However, it is evident that the environmental aspects have been considered in one way or the other with regards to development. The laws enacted post 2072 BS have prescribed specific provisions for maintaining a balance between development and environment, climate-resilient development, sustainability in natural resource and development and inter-generational equity and inclusive development.

3. In light of the aforementioned constitutional and legal provisions, it is deemed relevant to examine and to decide as to whether or not generation of electricity including construction of physical infrastructures in the national parks and wildlife reserves is possible. However, prior to reaching a decision, it is pertinent to reflect upon the orders and decisions made by this court in relation to forest, development and environment as well as certain established practices of foreign courts and draw an analytical conclusion.
 - i) Upon perusal of the orders/decisions made by this court, a writ petition of certiorari²⁹ having writ no. 2346, pursuant to Article 88 (2) of the Constitution of the Kingdom of Nepal, 2047 had been filed by petitioner Yogi Narhari Nath, President of Pashupati Mrigasthali Gorakhnath Spiritual Institution against Office of the Prime Minister wherein His Majesty's Government had approved to lease 42 acres of forest land situated north of Narayanghat market of Chitwan district to International Society of Medical College. Article 88 (2), provides the Supreme Court with an extraordinary jurisdiction for the settlement of any constitutional or legal questions involved in a dispute of public interest or concern and may issue necessary and appropriate orders to enforce such rights or settle the disputes. With reference to writ petition no. 1851, the Special Bench has stated that the country's natural resources are the national heritage and is a common property of all its citizens. The citizens of the country have a meaningful relation to the economic development of the country, conservation of environment and other resources. The court has provided a detailed interpretation that each citizen has the right to seek necessary information from His Majesty's Government regarding national rights or creation of duties and provided such matters are contrary to the constitutional provisions they have the right to oppose and file a petition pursuant to Article 88 (2) of the Constitution and in the context conservation of environment and sites of archaeological importance, the court has interpreted that the petition filed is a matter of public interest and therefore the petitioners have the *locus-standi* to file the petition.

²⁹ Nepal Law Reporter 2053, Month of Baisakh, Decision No. 6127 (Lease of 42 acres of forest land situated north of Narayanghat market of Chitwan district to International Society for Medical College)

In the writ petition no. 3401³⁰ filed by Advocate Dhananjaya Khanal against Prime Minister and Office of the Council of Ministers et.al [30], the court has opined that “the Environment Protection Act has provisioned to carry out an environment impact assessment (EIA) to assess the impact the project would have on the environment and where the act of diverting the water of the canal to the pond and draining the excess water through an outlet clearly shows that environment impact assessment has not been carried out and the act of digging a pit south to 20 thousand lakes and execution of other project activities is not in consonance with Clause 3, 4 and 5 of the Environment Protection Act, 2053, Wetland Policy, 2059, Ramsar Convention on Wetlands, 1971 and Convention on Biological Diversity, 1992 and has interpreted that an environment impact assessment should be carried out prior to operating a project.

In the writ petition (certiorari including mandamus 066-WO-052)³¹ filed by Advocate Narayan Prasad Devkota against the Prime Minister and the Office of the Council of Ministers et.al. the court has stated: “the planners and the government while framing any plans should maintain a balance between economic development, industrial development, and protection of environment. In the 21st century, we must be conscious towards the need and importance of a clean environment. In the name of economic development, the cost of environmental destruction cannot be accepted. Under the public trust doctrine, Nepal government is only a trustee of the natural resources of Nepal, and in the absence of any legal grounds, the natural resources of Nepal cannot be utilized randomly to generate revenue by causing adverse effects to the environment. Environmental pollution is actually caused by the State's poor socio-economic policy. In this noble task, provided, the Executive delays or falls behind in performing its constitutional duties, the court as the guardian of the citizens' fundamental rights cannot remain silent. This court must fulfill and comply with its constitutional mandate to protect the environment. The right to a noise-free environment and residence and the right of the children to study in a noise-free environment also arises from Article 16. Provided, any person in the name of operating any business, or in the name of exercising one's rights pollutes any locality and affects others then such acts constitute an act of nuisance and is a violation of the right guaranteed by Article 16. The operation of stone, sand, and gravel quarries cannot be carried out in a way that it causes nuisance. Therefore, operation of an industry and business cannot pollute the environment and provided such a situation arises the court can impose a stay on such activities.

In the writ petition of certiorari and mandamus (068-WO-0639)³² filed by Legal Forum for Development and Conservation of Environment vs. the Government of Nepal, Office of the Prime Minister and Council of Ministers, the court opined that “the protection of the environment is a common and global concern, and where the court has a guardian role in the protection of the environment it is expected that the people and organizations involved in the protection of the environment also have an active role to play. The issue of protection of the environment is related to the necessity that transcends all boundaries of a nation and nationality. This is a multi-dimensional issue which is a common global concern and therefore, it cannot be justifiable to limit this issue to the issue of locus-standi and interest as raised by the

³⁰ Nepal Law Reporter 2063, Month of Bhadra, Decision No. 7695 (Protection of Twenty Thousand Lakes and surrounding wetland areas of Chitwan District)

³¹ Nepal Law Reporter 2067, Month of Chaitra, Decision No. 8521 (regarding the illegal excavation of stones, pebbles and sand by Crusher Industries in the Chure jungle, Char Koshe jungle and exporting it to India)

³² Nepal Law Reporter 2072, Month of Baisakh (Decision No. 8942, regarding construction of road Bhuri Gaon to Surkhet through the Bardiya National Park)

respondent. Provided, there is an alternative route to the proposed project and provided, the environment can be protected by following this alternative route, then the alternative route should be given the foremost priority.” The ruling clearly shows that matters relating to the protection of environment cannot be limited to the scope of locus-standi and concern but rather it is a common global concern. In the writ petition of certiorari 065-WO-0499³³ filed by Purna Dhunga Udhyog Pvt. Ltd. against the Government of Nepal (Council of Ministers), Prime Minister and Council of Ministers et.al., the court stated that “due to the destruction and depletion of natural resources, the environment is being adversely affected, and human life is at risk. Natural resources are invaluable gifts of nature. These resources are provided by nature and are not man-made, and therefore while utilizing these resources their utilization should not cause harm to human settlements and the environment and they should be utilized in such a way that allows future generations to utilize them as well. Provided, they are not utilized with discretion, the very existence and development of the nation, society, and individuals will be in peril. Human development is not possible without economic and economic development can also lead to environmental degradation. However, sustainable development can only be achieved through a balanced relationship between economic development and environmental protection, and environmental protection can be achieved through the proper use and management of natural resources, minimizing the adverse effects on human beings, animals, plants, nature, and physical objects, and maintaining a clean and healthy environment. Nepal has ratified more than 20 international treaties related to conservation of environment and biodiversity, including the World Cultural and Natural Heritage Conservation Treaty, 1972, the Ramsar Convention on Wetlands of International Importance, 1971, and the Convention on Biological Diversity, 1992. In this context, Nepal also has the obligation to respect, protect, and to fulfill the provisions made by these international treaties. Therefore, the Government of Nepal and its authorized agencies should take legal measures to protect the environment and caution or ban industries that harm the environment.” The ruling clearly shows that in the context of protection of environment, in addition to national laws, the commitments made by Nepal in the international forum must be considered

In the writ petition of prohibition/certiorari 069-WO-0156³⁴ filed by petitioner Advocate Mithilesh Kumar Singh, et al. against the Prime Minister and Office of the Council of Ministers, the court ruled that "since the license for the production of Trishuli 1 Hydroelectric Project has been advertised at the national level and the project is related to the development of hydroelectricity and is a project involving foreign investment for the production of electricity, it cannot be deemed to conclude that the issue is related to the personal rights and interests of the petitioner lawyers. Where the petitioner lawyers have claimed that the provision of Clause 35 of the Electricity Act, 2049 (1992) has been wrongfully applied, the court deems that the issue raised by the petitioner lawyers falls within the ambit of public interest." The following ruling informs that matters relating to issuance of license for production of hydroelectricity falls within the ambit of public interest.

In the writ petition of certiorari/mandamus 065-WO-0005³⁵ filed by Forum for Protection of Public Interest against the Government of Nepal, Secretariat of the Council of Ministers, the court ruled that "every creation or object in nature has its own natural reasons and importance

³³ Nepal Law Reporter 2072, Month of Mangsir, Decision No. 9454 (Purna Stone Quarry Pvt. Ltd. Lalitpur)

³⁴ Nepal Law Reporter 2073, Month of Jesth, Decision No. 9544 (Regarding the license for Upper Trishuli-1 Hydro-electric Project)

³⁵ Nepal Law Reporter 2073, Month of Shravan, Decision No. 9575 (Godavari Marble Industry Fulchowki)

for its existence. Each object has its own separate and distinct value and recognition. Compromising the natural value and recognition for one's own personal ulterior motive or economic interest is not acceptable. Air, water, forests, and biodiversity, are issues connected to the identity and existence of nature and are not limited for a single one generation. They should not be depleted on any pretext. In the name of development, no one has the concession to destroy the basic features of nature and its components. The value of the gifts provided by nature is incomparable to the benefits provided by development activities. Even if physical development activities provide significant benefits, such activities cannot remain in continuity if it causes adverse effect on the nature and the environment or causes harm." The ruling suggests that development should also be perceived from the perspective of environmental benefits and losses.

In the petition relating to certiorari/mandamus 067-WO-0693³⁶ filed by petitioner Advocate Khagendra Subedi et.al. against the Government of Nepal, Office of the Prime Minister and Council of Ministers, the court ruled that "one of the principal responsibilities of the present generation is to ensure that all kinds of natural, cultural heritage, forests, air and water, environment and biodiversity that it has enjoyed or received should be transferred to the next generation in accordance to the principle of intergenerational equity. The obligation of the present generation is to transfer the Fewa Lake that has been naturally acquired and that has an economic, social, cultural, and environmental importance to the future generation." The ruling incorporates the principle of intergenerational coordination in the utilization of natural resources.

In the petition relating to mandamus 074-WO-0283³⁷ filed by petitioner Advocate Padma Bahadur Shrestha against Office of the Prime Minister and Council of Ministers, the court ruled that "pursuant to the principle of *parens patriae*, it is the State's responsibility to work for the protection of the environment and to mitigate climate change". The said order directs for the immediate formulation and implementation of an integrated law relating to climate change and in the absence of such law, the court rules that the Climate Change Policy, 2067, National Adaptation Program of Action, 2010, and National Framework for Local Adaptation Plan for Action, 2011 have provisions for some action plans to mitigate the effects of climate change wherein the court through an order of mandamus has directed the government to take recourse of the provisions prescribed in the said plans and policies until the formulation of an integrated law relating to climate change." The ruling suggests that that it is the State's responsibility to make developments favorable to climate change and protect the environment and formulate a separate law relating to climate change.

Pursuant to a writ petition filed by Consumer Protection Forum et.al. against the Office of the Prime Minister and Council of Ministers, (writ petition of certiorari 068-WO-0597)³⁸, the court ruled that "the government is not the owner of public property, but rather it is a trustee. Since the trust of the natural resources or heritage has been retained for the benefit of all the people of Nepal, present and future, the government with regards to the operation of the resources cannot ignore the interest of the overall people of the country and operate the resources arbitrarily for the benefit of a limited people or community. The government should

³⁶ Nepal Law Reporter 2075, Month of Paush, Decision No. 10086 (relating to Fewa Lake of Kaski District)

³⁷ Nepal Law Reporter 2076, Month of Ashar, Decision No. 10210 (Framing and implementation of laws relating to climate change)

³⁸ Nepal Law Reporter 2076, Month of Jesth, Decision No. 10204 (Chitwan National Park)

acknowledge and contemplate that the natural resources are the property of all the people including the present and future generations of the country. The petition of public interest is a petition for the voiceless, it is a petition made on behalf of individuals or communities who are unable to speak for themselves, and it is a petition made to the court on behalf of all living beings in the context of environmental justice. In the absence of consultation and consent from the concerned stakeholders including UNESCO and unless approved by environment impact assessment, act of constructing a road within the national park cannot be carried out.” The above interpretation states that development works including the construction of roads inside the national park cannot be carried out with the consent of the concerned stakeholders and without the approval from the environment impact assessment.

In the petition filed by Amarnath Jha against the Office of the Prime Minister and Council of Ministers, Singh Durbar, Kathmandu, (writ petition no. 073-WO-1404³⁹, the court ruled that “the court must seriously consider the expanding scope and concern of environment, climate change and human rights law. The right of the people to live in a healthy and safe environment must always be respected. The court must understand the adverse effect caused by floods and landslides in relation to their rights and the court must exercise its authority to protect life and property. The court's concern and interest should increase even when the right of a single person is violated.” This ruling informs that the court should remain vigilant and take interest and concern on matters relating to environment, climate change and human rights issues.

In the writ petition filed by Forum for Protection of Public Interest and Senior Advocate Prakashmani Sharma against the Government of Nepal, Office of the Prime Minister and Council of Ministers, Singh Durbar, Kathmandu, (writ petition no. 076-WF-0006)⁴⁰ the court ruled that “courts are not an impediment to development work. The right to development is also a subject of human rights, and that the judiciary plays a positive role in the protection, strengthening, and implementation of the right to development. There is no reason to cast apprehension on this matter. However, this does not mean that the court should always advocate any kind of physical construction-focused development project. From a judicial perspective, development denotes sustainability, durability, and balanced development. The fact that physical development is sustainable, durable or balanced after the destruction of the environment and this concept has been acknowledged internationally and this is the concept, principle and recognition that has been accepted internationally. In the name of development, the court should not provide judicial endorsement to activities that are contrary to the Constitution and legal provisions or to acts that are contrary to the principles relating to rule of law. To the extent possible, projects that causes minimal damage to the environment should be prioritized. Possibility of carrying out development works and conserving the environmental should be explored and this is an important aspect of the concept of sustainable development. It would not be proper to evaluate solely on the basis of monetary profit and loss. The judiciary should internalize these principles and play a role in maintaining a balance between development and the environment. The issue of protection of environment should not be construed to be related to human interests and welfare; it should also be viewed from the perspective of nature's rights-based approach. Protection of animals and vegetation is not just a voluntary subject of human passion or preference. Transferring a healthy and clean

³⁹ Nepal Law Reporter 2078, Month of Paush, Decision No. 10743 (regarding climate change and the damage caused by the flood from Mahuli river of Saptari District)

⁴⁰ Petitioner Forum for Protection of Public Interest and Senior Advocate Prakashmani Sharma vs. Nepal Government Office of the Prime Minister, Singha Durbar, Kathmandu et.al. Case: 076-WF-0006 Certiorari (Case relating to Nijgadh Airport)

environment along with an ecological system to the future generations is the obligation of the present generation. Therefore, it is expedient and desirable to maintain a balance between development and the environment.” The ruling outlines that the activities of the State should be focused in maintaining a balance between development and the environment.

In a writ petition filed by Chanda Kumari Thani against the Government of Nepal, Office of the Prime Minister and Council of Ministers, et al.⁴¹[41] the court ruled that "the construction of a project depends upon the flow of the river, the difference in height between the dam and the power house, technology, geographical, geological and environmental risks. Such matters are to be resolved by the Executive. However, the country's rivers, streams, land, soil, environment, and forests are invaluable assets of the country. They should be utilized in accordance with the concept of environmental sustainable development incorporated by the Constitution. This includes public interest. The responsibility of the Executive is to oversee the project from selection to implementation. As long as the executive's authority has not been misused, the court must respect the decision. Considering the facilities Nepal is receiving, it cannot be said that the executive's utilization was colored or was in the interest of the nation. The wisdom of the executive's order to extend the deadline cannot be questioned. Utilization of natural resources should be in accordance with the concept of sustainable development and the responsibility for carrying out development work lies with the executive body and where the executive authority has not been abused, the judiciary cannot intervene in such matters." The ruling suggests that the government should work and focus on the concept of environmental sustainable development.

Upon studying the orders/judgments related to environment and climate change made by this court, it can be concluded that prior to the enactment of the Constitution of Nepal (2072), the orders relating to development and environment has been different and with the enactment of in particular the Environment Protection Act, 2076, the judicial concept has changed. Some of the orders made by this court have given priority to the protection of the environment over development, whereas in the recent days orders have emphasized for the need to balance development and environment or in other words it has emphasized in maintaining a balance between development and environment. The Constitution of Nepal (2072) incorporates the principle of balancing development and environment, and for the implementation of the constitutional provisions, the Environment Protection Act, 2076 was enacted and considering the constitutional and legal provisions, the court's perspective has not been to put a halt to development works but rather to carry out development works by ensuring and promoting appropriate measures to protect and conserve the environment. During the latter half, the orders made by this court have emphasized the need to implement the principle of balancing development and environment, formulating integrated laws related to climate change, and maximum utilization of the country's natural resources such as rivers and forests as deemed necessary to develop hydro-electric infrastructures for the prosperity and development of the country, however, any activity that has an impact on the environment and climate change, and in particular polluting the environment and thereby causing negative impact on the livelihood of the local communities, then such activities cannot be carried out. The court's perspective has been that development should not lead to destruction, but rather development should be for the creation and prosperity, and provided the environmental impact assessments can be made

⁴¹ 079-WC-0057 (dispute relating to the extension of the agreement made by and between Government of Nepal and G.M.R.-I.T.D. Consortium in 2064 regarding development of Upper Karnali Hydro-electric Project)

meaningful and effective, it would be possible to address the problems caused by development, such as withering away of the environment and the ecosystems and the depletion of the aquatic and vegetation and ensure sustainable development.

- ii) Upon perusal of foreign judgments related to development and environment, it is deemed expedient to examine the interpretation made by the Indian Supreme Court on the subject of environmental protection, adoption of judicial activism, and the principles propounded therein. In the case of *Narmada Bachao Andolan V. Union of India*⁴², the court ruled that development works should not be halted by citing environmental problems but rather appropriate measures should be taken to protect and conserve the environment. A brief excerpt of the judgment has been cited for reference: **“It finally concluded that if the Government should decide to go ahead with the project it should be done with provision of environmental management authority with adequate powers and teeth to ensure that environment management plan is implemented pari passu with engineering and other works. It concluded that effective implementation of the engineering and environmental measures simultaneously will go a long way and that such a project could be implemented by harmonizing environmental conservation needs with the developmental effort.”**

Similarly, in the case of *N.D. Jyal V. Union of India (2004)*⁴³, the court ruled that for a sustainable development there should be coordination between environment and development and development should not be halted in the name of protection of the environment. A brief excerpt from the judgment is cited here for reference: **“The right to development included the whole spectrum of civil, cultural, economic, political, and social process, for the improvement of peoples' wellbeing and realization of their full potential. Adherence to the sustainable development principle was a sine qua non for the maintenance of the symbiotic balance between the rights to environment and development”**.

4. In light of the analysis made in relation to the international legal provisions, constitutional and policy arrangements, as well as the orders and interpretations of this court and foreign judgments related to development, environment, and climate change, it is evident that development should not be prohibited while protecting the environment, rather the issue of protection of the environment should be adequately addressed and development should be given space, and environmental sustainability should be promoted. Where the issue of development work is raised, the issue of environment also arises, and development is necessary for the protection and promotion of the environment. Provided, development is carried out by ignoring and disregarding the environmental aspects then such development not only invites environmental problems but also summons destruction and therefore, development and the environment should be balanced and should go hand-in-hand. The issues of development, environment, and climate change cannot be viewed separately, and the concept of halting development work for the protection of the environment or ignoring the environmental aspects in development construction or infrastructure development work are not correct. Therefore, "environment for development or development for environment" is the need of the day. Our development projects should focus on achieving the goal of sustainable development by balancing development and the environment in a balanced manner.
5. Now, considering the first question, as to whether or not physical infrastructure development activities including generation of power can be carried out within the national park and wildlife

⁴² *Narmada Bachao Andolan Vs. Union of India & Ors* [2000] INSC 518 (18 October 2000) AIR 2000 SC 3751

⁴³ *Jyal and anor v India and anor*, civil writ petition (2004) 9SCc 362, ILDC 456 (in 2003)

reserve area, it can be seen that a Work Policy was issued in 2065 for the operation and construction of physical infrastructure within the protected area. Section 5 of the said Work Policy states that “no infrastructure, including hydropower can be constructed within the national park and reserve. However, approval for generation of power of less than 1 megawatt capacity (not connected to the national transmission line) can be provided for the benefit of local consumers. While damming or diverting the rivers/streams for the production of electricity, the monthly discharge of natural flow of water should be at least 50 percent (fifty percent)” This provision indicates that subject to certain conditions physical infrastructure including generation of power can be carried out within the national park and wildlife reserve. The principal contention in the present petition is the amendment of Section 5 of Work Policy relating to the Operation and Construction of Physical Infrastructure within the Protected Areas, 2065, allowing the production of electricity in the core area of the Langtang National Park. It is for this court to decide as to whether or not permission can be granted to utilize the area of the Langtang National Park for generation of power generation. Clause 5 of the National Parks and Wildlife Conservation Act, 2029 (1973), prescribes activities that are prohibited to carry out within the national park and reserve. Clause 5 (1) of the said Act, stipulates that no person shall use the forest, rivers and minerals without obtaining a written permission from the authorized official⁴⁴. Pursuant to the provision of the Act, it is evident that damming and diverting the rivers and streams flowing within the national park and wildlife reserve can be carried out with the permission from the authorized official. The provision does not prohibit the utilization of the national parks and wildlife reserves for the production of electricity.

6. The applicant has claimed that granting permission to construct and operate a hydroelectric project in the Langtang National Park area will have a negative impact on the wildlife, vegetation and trees in this area potentially leading to destruction to the environment. In the context of developing projects in the forest and to resolve the issue, it is pertinent to scrutinize the Forest Act, 2076 (2019), which has been enacted with the objective of conserving, promoting, and utilizing wildlife, environment, and biodiversity. Clause 42 (1) of The Forest Act, 2076 (2019) stipulates that operation of national priority project plan of which investment is approved by the Investment Board may use any part of the forest and for other projects approval may be required. In this context, it is necessary to determine as to whether or not the hydroelectric project approved pursuant to Clause 42 (1) proposed for the Langtang National Park area is a project of national priority or is a project approved by the Investment Board or a project of national pride. The disputed subject matter involves work related to the production of hydroelectricity or is related to the industries and Schedule 9 of Clause 19 of the Industrial Enterprise Act, 2076, classifies industries as "national priority industries" Wherein serial no. 2 of Schedule 9 includes "energy-based industries". From the above provisions, it can be concluded that the production of hydroelectricity or industries related to it falls within the ambit of energy-based industries and such kind of industries are classified as priority industry. Since the industry or project related to the production of hydroelectricity is considered as a priority industry, it is evident that the Forest Act has not provided any restriction for the utilization of the forest area for the operation of such industry or project. Therefore, provided any work relating to the development of hydroelectricity in the Langtang region needs to be carried out, an environment impact assessment of the hydroelectricity project from the Ministry of Energy needs to be obtained and provided any work relating to the development of hydroelectricity needs to be carried out in the national parks and reserves, an approval pursuant to the criteria determined by law need to be obtained and therefore,

⁴⁴ Clause 5 (a) to (j) of the National Parks and Wildlife Protection Act, 2029 (1973)

it cannot be deemed that the area of the national park and the reserves cannot be utilized for the development of infrastructure including hydroelectricity.

7. With regards the second question as to whether or not the "Work Policy on Operation and Construction of Physical Infrastructure within the Protected Areas, 2065" is a policy or a legal document and as to whether or not this can be subject of judicial review. The petitioner claims that since the amended provision in the Work Policy on the Operation and Construction of Physical Infrastructures within the Protect Areas, 2065, is contrary to the Constitution and the laws, the petitioner seeks the court to quash the provision through an order of certiorari. During the hearing of the petition, the learned Joint Government Attorney on behalf of the respondent the Government of Nepal, argued that since this policy was approved and issued by the Council of Ministers of the Government of Nepal and since the amended Work Policy with regards to construction has no legal source, the Work Policy is a policy-based document and therefore cannot be subject to judicial review. The learned advocates on behalf of the petitioners have not been able to state otherwise. The Work Policy on the Operation and Construction of Physical Infrastructure within the Protected Areas, 2065, was approved and issued by the meeting of the Council of Ministers on 2065/12/20 (corresponding to 2 April, 2009). Section 5 of the Work Policy was amended by a decision of Nepal government Council of Ministers on 2078/2/13 (corresponding 27 May, 2021) and Section 15 was inserted in the Work Policy. With regards to the application of this policy, the Policy may be applied under the following headings: (a) to construct and operate physical infrastructure within the boundaries of the national parks, reserves, buffer zones, and conservation areas, and to carry out feasibility study of physical infrastructure and to prepare and approve the report on preliminary environmental examination and environmental impact assessment report for the construction and operation of hydroelectricity and other physical infrastructures from the streams/rivers flowing through those areas; (b) to provide approval to the proposed project whose preliminary environmental examination or environmental impact assessment report have been approved pursuant to the Environment Protection Act, 2053 and Environment Protection Regulation, 2054; and (c) to construct and operate hydroelectricity and other physical infrastructure as alternative energy within national parks, reserves, buffer zones, and conservation areas. From the perusal of the provisions of the Policy, it is evident that pursuant to the Policy, feasibility study and initial environment examination, preparation of environmental impact assessment report, and pursuant to the Environment Protection Act, approval for environmental impact assessment report and its subsequent implementation may be given for the production of electricity including construction and operation of physical infrastructure in the national parks and protected areas. The above Policy is a policy based document that provides the Ministry of Forest and Environment and its subordinate Units to prepare environmental impact assessment report for projects and hydroelectricity to be constructed by utilizing the forest areas and to grant approval for the implementation of the projects upon approval of the report and therefore, it is indisputable that the document is a policy-based document. Question now arises as to whether or not the decision of the Council of Ministers dated 2078/2/13 (corresponding to 27 May, 2021), to amend the Work Policy can be subjected to judicial review.
8. Before deciding as to whether or not the decision of the Government of Nepal to amend the Work Policy on the Operation and Construction of Physical Infrastructures within the Protected Areas 2065 can be subject of judicial review, it is pertinent to study the concept of judicial review and the legal provisions. With regards to the explanation and definition of judicial review, judicial review is a judicial weapon of the judiciary which examines the legality of laws formulated by the Legislature as well as delegated laws made under the relevant law and decisions and actions taken

by administrative bodies or any authorized body. It is a constitutional tradition that provided any law is inconsistent with the Constitution or the parent law then such laws can be repealed, and provided any Executive or administrative decision or any proceeding is found to be contrary to the prevailing law, Constitution, or judicial eye, then such decisions or proceedings can be repealed or rendered null and void.

With regards to judicial review, the US Supreme Court in the case of *Marbury vs. Madison*⁴⁵ declared Clause 13 of The Judiciary Act of 1789 to be unconstitutional as it was contrary to the Constitution, and interpreted that the court is vested with the authority to test the validity of the laws enacted by Congress and to declare such laws invalid. With this interpretation, majority of the democratic countries of the world have incorporated the authority of judicial review or test to be conducted by the higher or Supreme Court. Judicial review is not only viewed as an instrument for the implementation and protection of civil rights and fundamental rights but is also viewed as a fundamental prerequisite for judicial independence. In 1954, the US Supreme Court in the case of *Brown vs. Board of Education*⁴⁶ that provided separate provision of providing different infrastructures for the white and the black community was rejected by the court on the grounds that the concept of "separate but equal" was contrary to the constitutional provision of equal protection under the law,.

The Indian Supreme Court of India in a case in 1973 has interpreted that the Constitution cannot be amended in a way that it changes its basic structure of the Constitution⁴⁷. Judicial review has been advanced as an inalienable right of the judiciary, a symbol of constitutional dynamism and as a part of the basic structure of the Constitution⁴⁸.

9. The review made by the judiciary regarding the legislative actions taken by the legislature and the decisions or actions taken by the executive bodies is known as judicial review. The Constitution has vested the Supreme Court with the authority to examine as to whether or not the bodies established by law have exercised their authority within the ambits and scope determined by law, and in particular as to whether or not the organs of the State while exercising their state power have complied with the principle of separation of powers and balance. Under judicial review, provided any laws made by the legislature is contrary to the fundamental law, i.e., the Constitution, then such laws to the extent of it being contrary law shall be repealed and provided any Regulation or By-rules made under substantive and delegated legislation is contrary to the parent law then such Regulation or By-law to the extent of it being contrary shall be repealed or provided any procedure or process is not followed pursuant to any Act or Regulation or By-rules, then such act or decision shall to that extent be repealed.
10. In this context, Article 133 of the Constitution of Nepal prescribes jurisdiction of the Supreme Court. Sub-Article 1 states that provided a petition is filed to have any law declared void on the ground of inconsistency with this Constitution⁴⁹, the Supreme Court shall have the extra-ordinary jurisdiction to declare that law void either *ab initio* or declare some part of it void. Upon perusal

⁴⁵ *Marbury v. Madison*, 5 U.S. 137 (1803)

⁴⁶ *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)

⁴⁷ Some judgments of the Indian Supreme Court has recognized some basic structure of the Constitution as judicial review: *Indira Gandhi v. Raj Narain*, AIR 1975 SC 2299; *Minerva Mills v. Union of India*, AIR 1981 SC 271; *S.R. Bommai v. Union of India*, AIR 1994 SC 1918; *I.R. Coelho v. State of Tamil Nadu*, AIR 2007 SC 861; *Supreme Court Advocates-on-Record Association and Another v. Union of India*, (1993) 4 SCC 441

⁴⁸ *Ibid*

⁴⁹ Article 133 (1) of the Constitution of Nepal

of the subject matter raised in the petition, the petitioners have raised that the amendment made in Clause 5 of the Work Policy relating to the Operation and Construction of Physical Infrastructure within the Protected Areas, 2065, and the insertion of Clause 15, made by Nepal Government Council of Ministers through its decision on 2078/2/13 (corresponding to 27 May, 2021) and the approval to release less than 10 percent of water from the rivers or streams while developing hydropower in the national parks and reserves is inconsistent with the law. Upon inspection of the Work Policy, it does not seem that the Work Policy has been formulated under any Act or delegated legislation or in other words the Work Policy does not appear to have been framed on the basis of Regulation or By-rules. It does not seem that the Work Policy has been formulated under substantive or delegated legislation. Pursuant to the provisions of the Constitution of Nepal and the laws, it is evident that the Executive has the jurisdiction to decide as to what kind of projects should be constructed in which areas and the amount of water to be released from the river while developing hydroelectric projects. Where the policy is not recognized by any substantive or delegated legislation, and where the petitioners have not sought for the review of the Work Policy, it is hereby deemed that pursuant to the principles of judicial review, the Work Policy on the Operation and Construction of Physical Infrastructures within the Protected Areas, 2065, need not be declared void.

11. The right to application of judicial review has been clarified by the previous orders of this court. In the writ petition filed by Ganesh Panjiyar against the Judicial Council Secretariat⁵⁰, the Full Bench of this court has ruled that "the right to judicial review is considered essential for the following purposes: (a) to protect and ensure the right and freedom of the citizens' and to ensure its enjoyment, (b) to make the concept of the rule of law meaningful, (c) to implement the concept of limited government, (d) to effectively apply and comply the principle of separation of powers and checks and balances, (e) to limit the actions and decisions of the government within the legal framework, (f) to ensure judicial independence and competence, (g) to control the arbitrary and autocratic actions of the executive body of the state, (h) to protect the Constitution by nurturing constitutional supremacy." Therefore, while resolving matters relating to judicial review, the above matters should be clearly specified in the petition.

Similarly, in a petition filed by the Acting Chairman of the Committee of the Nepal World Hindu Federation Mr. Shree Prasad Upadhyay, against the Office of the Prime Minister and Council of Ministers⁵¹, the Special Bench of this court ruled that "where the State and the judiciary are functioning pursuant to the Interim Constitution, the court cannot speak contrary to the provision of the constitutional provisions and therefore, the court cannot issue any order to defeat the Constitution. Since the source of the power of judicial review is the Constitution, the judicial review of the Constitution cannot be done but rather the constitutionality of the law can be tested."

In a writ (writ/mandamus)⁵² petition filed by the petitioner Law Student Society Kathmandu, et al. against the Office of the Prime Minister and Council of Ministers, et al., the Special (Full) Bench of this court ruled that "laws made by the State under its policy framework should also take into consideration the traditions, customs, culture, and behavior of society, it is a matter of State policy

⁵⁰ Nepal Law Reporter 2067, Month of Asadh, Decision No. 8329 (Termination from the post of district judge by Judicial Council on the grounds of incompetency)

⁵¹ Nepal Law Reporter 2065, Month of Jesth, Decision No. 7925 (Regarding the declaration made by the House of Representative declaring Nepal being a secular State was contrary to the Interim Constitution, 2063)

⁵² Nepal Law Reporter 2072, Month of Baisakh, Decision No. 9319 (Clause 16 of the Meat Inspection and Slaughter House Act, 2055, is contrary to the Interim Constitution, 2063)

to decide through legal arrangements as to which type of traditions, customs, culture, and behavior of society should and should not be recognized. The court cannot exercise its extraordinary jurisdiction and intervene through a judicial review on matters of policies that are inherent in the law.

In the context of judicial review, the Constitutional Bench of this court vide order dated 2080/01/24 (corresponding to 7 May, 2023) had ruled that "the rivers, streams, land, forests, biodiversity, and natural resources within the country are invaluable assets of the people. These assets must be utilized in accordance to the concept of environmental sustainability as incorporated in the Constitution. This is where the public interest lies. The government is the trustee of public interest. Pursuant to the public policy, it must always act for the benefit of the nation. One of the foremost responsibilities of the Executive body is to decide as to whether or not a particular project is in line with public policy and as to what kind of undertakings should be carried out to achieve comparative benefit. This responsibility of the selection of the project and its implementation should be promptly executed. Necessary homework should be carried out to reap the maximum benefit from any negotiations. Provided, options can be presented in the negotiation a beneficial outcome can be achieved. Provided, one is to utilize the benefit for one's own interest for a long duration, caution and promptness is equally important from the stage of negotiation to the implementation of the agreement. All these tasks are to be performed by the Executive body and until and unless it is not established that the authority has directly abused its authority or the authority has been colored, the court should always respect the wisdom of the Executive body which is in line with the principle of separation of powers, control, and balance as envisioned by the Constitution⁵³.

12. In the context of judicial review as mentioned above, and from the study of the aforementioned principles, legal provisions and orders made by this court it is evident that judicial review is a right of the judiciary. Provided, any question that a substantive law framed by the Legislature or any part thereof and any Regulations or By-laws made pursuant to the delegated legislation or any part thereof is inconsistent with the Constitution and parent law is raised, the supreme judicial body can conduct a judicial review on those matters. Similarly, provided if a question is raised before this court that an Executive decision or action is contrary with the Constitution and the law, or it has been made by overlooking a specified procedure or process thereby resulting in a procedural error, the court can conduct a judicial review. Furthermore, provided the substantive law or delegated legislation is not inconsistent with the Constitution, but however, if it is seen that there has been an abuse of power and an act has been done contrary to national interest or public interest, the court can exercise the right of judicial review which is an extraordinary right of this court.
13. The petitioners contend that provided the amended provision is to be implemented, this will have an adverse impact on the environment, wildlife, vegetation and landscape of the Langtang region. Upon reviewing the revised provision made in Section 5 of the aforementioned policy, it is established that the Policy prescribes for the release of 50 percent of water for hydropower projects with a capacity of less than one megawatt, 35 percent of water for projects with a capacity of 1-10 megawatts, 30 percent of water for projects with a capacity of 10-25 megawatts, 20 percent water for projects with a capacity of 25-100 megawatts, and 10 percent water for projects with a capacity of 100-250 megawatts. The rejoinder submitted by the respondent Ministry of Forest and Environment states that where the water of the rivers and streams utilized for large-scale

⁵³ 079-WC00057 (Dispute relating to the extension of the period relating to the agreement made by and between Nepal Government and G.M.R.-I.T.D. Consortium regarding development of hydroelectricity project in Upper Karnali)

hydropower projects is in huge quantity, even a small percentage of the total flow of water released downstream from the dam would be significant and would be sufficient for the aquatic and other wildlife. Provided, the Work Policy is to be implemented, it is evident that the Policy provides directives for providing consent or approval to carry out an environmental impact assessment for the development of hydroelectricity in the national parks and reserves and to provide approval for the construction of infrastructures for projects whose environmental impact assessment has been approved. In the process of providing approval for the implementation of the approved environmental impact assessment, the law requires that prescribed procedure be followed for approval of survey permit of the project and that decisions be made by relevant technical experts. In this process technical matters such as the percentage of water to be released from the river or to be dammed is also looked upon and therefore, the apprehension that the amendment in the Work Policy will cause environmental degradation and will have an adverse impact on climate change and will cause an impediment to sustainable development and therefore, the said decision should be repealed is not tenable and there is no need to reconsider in repealing the decision. Upon reviewing Section 15 that was amended and inserted in the said Work Policy, the Section prescribes the following “prior to this projects having already received survey permit issued by the Department of Electricity Development shall be permitted to undertake their projects and for hydroelectric and other projects such as cable car falling within the national park and wildlife reserve, the Body issuing the permit shall upon obtaining the consent from the Ministry of Forests and Environment conduct survey of the project and carry out any other task deemed necessary.” This provision requires that the consent from the Ministry of Forests and Environment must be obtained before issuing a permit for new hydropower projects, including survey permits and other necessary permits. The decision to amend Section 5 and insertion of Section 15 in the Work Policy for Operation and Construction of Physical Infrastructure within the Protected Areas, 2065, is purely an policy-based executive decision, and the petitioner has not raised any legal issue related to the amendment and since the provision of the said Policy is not inconsistent with the Constitution and laws and where the decision made by the Government of Nepal Council of Ministers on 2078/2/13 (corresponding to 27 May, 2021) to amend the Work Policy on the Operation and Construction of Infrastructure within the Protected Areas, 2065, is not inconsistent with the Constitution and the prevailing laws, nor is it seen to be an abuse of executive power that is contrary to national or public interest, the court therefore, deems that it is not necessary to exercise its extra-ordinary jurisdiction and conduct a judicial review on the decision to amend the Work Policy.

14. With regards to the third issue as to what kind of relationship can be perceived between the environment, climate change, national parks and wildlife reserves and protected areas and development, it is evident from the above commentaries regarding development and environment that the concept of environmental sustainability has been incorporated in our Constitution, legal provisions and judicial practices and emphasis have been made for environmental friendly development by developing infrastructures upon carrying out environmental impact assessment. The provisions prescribed in the Work Policy for the Operation and Construction of Physical Infrastructure within the Protected Areas, 2065, emphasizes that development works should be environmentally friendly. Prior to taking into account the relationship between development, environment, and climate change, it is imperative to explore their meanings and definitions. Development refers to prosperity or positive change including growth. Development encompasses economic, social, physical, including environmental development. Society for International Development defines development as "a process that creates growth, progress, positive change or the addition of physical, economic, environmental, social and demographic components. The

purpose of development is a rise in the level and quality of life of the population, and the creation or expansion of local regional income and employment opportunities, without damaging the resources of the environment.⁵⁴ Environment has been defined as “environment means the interaction and interrelationship among the components of natural, cultural and social systems, economic and human activities and their components.”⁵⁵ When considering the definitions of development and environment in conjunction, it is evident that positive change with growth is deemed to be development and protection of environment and promotion are an integral part of positive change. On the other hand, development has a relationship with natural, economic, social, and cultural systems and interrelationship with human activities for its development. Therefore, environment and development are interrelated subjects. The Preamble to the Environment Act states “to maintain a proper balance between the environment and development.”⁵⁶ The Preamble of the Forest Act, 2076 (2019), states the following “to protect, promote, and utilize the wildlife, environment, watersheds and biodiversity.” Similarly, Clause 24 of the Electricity Act, 2049 (1992), states that while carrying out electricity generation, transmission, or distribution of electricity it shall be carried out in such manner that no substantial adverse effect by way of soil erosion, flood, landslide, air pollution, etc. Incorporation of development, environment, and climate in the laws clearly shows that they are interrelated.

15. The petitioner through the petition has raised that development, climate change, forest and environment should not be considered separately but rather should be considered to be interrelated and this is our constitutional, legal, and policy arrangement. Development of energy and its expansion is pivotal for development. In developing countries like ours, renewable energy in particular with regards to hydropower, is considered to be a fundamental basis for sustainable development. Development of hydropower provides an alternative to domestic and industrial fuels, and prevents over-exploitation of forests and minerals. This leads to reduction in environmental pollution. Unscientific industrialization and deforestation increases greenhouse gas emissions thereby creating global warming which inter alia has a negative impact on climate change. Provided, industries including industries for the development of hydropower are established and operated unscientifically and in particular if the national parks and protected forest areas are utilized indiscriminately this will have a negative impacts on the environment and climate change. However, provided environmental impact assessments are conducted scientifically and in a systematic manner and if hydroelectricity can be produced therein, this will not only contribute to sustainable development but will also assist in establishing procedure for the protection of the environment and will also contribute to development that is favorable to climate change. Therefore the development of green energy like hydropower is essential for balancing development and environment. Since unscientific and indiscriminate development invites destruction, it is necessary to protect and expand the forest areas to minimize environmental pollution and carbon emission. To achieve this, concept of national parks and wildlife reserves as well as scientific forest management including policies has been implemented. The nature’s gift that our generation has inherited should be utilized in such a manner that it allows our future generations to experience and enjoy them in the same manner that our generation has enjoyed and therefore, while carrying out development activities, the issue of environment should also be taken into consideration.
16. With reference to the petition, it is evident that utilization of the Langtang National Park and conservation area for the production of hydroelectricity and other development works, and

⁵⁴ <http://sid-israel.org/en/what-is-development/> accessed on 20th July 2023

⁵⁵ Clause 2 (t) of Environment Protection Act, 2076 (2019)

⁵⁶ Preamble of Environment Protection Act, 2076 (2019)

conservation of the environment of that area should not be viewed separately but rather should be perceived as interrelated subjects. Development of national park and conservation area will provide support to the development and protection of trees, saplings, vegetation, rivers and streams. Sufficient development of hydroelectricity will boost the increase of renewable energy which inter alia will result in the decrease of environmental pollution. Provided, infrastructures including hydroelectric projects are carried out indiscriminately without carrying out any environmental impact assessment and analysis then this will invite environmental degradation such as floods and landslides. In this regard, in writ petition of mandamus filed by Advocate Amita Gautam against the Office Prime Minister and the Council of Ministers, the court ruled that "development is essential to make human life prosperous and easy, but on the contrary, provided development works are carried out in a way that endangers human life, then such works cannot be considered to be a balanced development. Development that has a significant impact on the environment and poses a threat to human existence can be a curse. Rather than making human life simple it makes it more arduous. It is the collective responsibility of all to maintain a suitable environmental standard to live a qualitative life, save our future and ensure the safety of future generations." It is evident that the national parks and reserve areas should be protected and promoted by emphasizing on the concept of "environment-friendly development" and "development for the environment" and a balance should be struck between development and the environment and possibilities of mitigating the negative impacts of climate change and incorporating the concept of sustainable development. To achieve this coordinated and balanced relationship between development, environment and climate change should be developed to ensure the right to environment and development for future generations.

17. With regards to the fourth question, as to whether or not an order of certiorari or any other appropriate order should be issued to repeal the amended provision made in the Work Policy for the Operation and Construction of Physical Infrastructures within the Protected Areas, 2065, and all the work carried out in relation to the Policy. As discussed above, the said Policy does not prohibit the construction of hydroelectric projects in national parks and protected areas, but rather the Policy provides for obtaining approval and consent while carrying out such projects or development works. The provision that was amended by the decision of the Government of Nepal Council of Ministers on 2078/2/13 (corresponding to 27 May, 2021) does not provide for production of electricity within the national parks or reserve areas without obtaining any approval/consent. Section 15 has been inserted in the amended Work Policy wherein this Section provides for the issuance of survey permits and other permits only with the consent of the Ministry of Forest and Environment, except for projects that have already obtained electricity permits. The petitioner contends that this provision would cause environmental degradation and cause negative impact to climate change but on the contrary this provision at the very outset has prescribed provisions for obtaining approval from the Ministry of Forests and Environment and therefore, the provision has paved the way for preventing the destruction and conservation of the environment that may have incurred by development of hydroelectric projects. As discussed above, the amended provision of said Policy is not inconsistent with the protection of the environment, sustainable development, and other policies, laws, and international commitments made by the State, and neither does it violate the judicial principles established by this court. It is evident that a Work Policy in the absence of a legal source is a policy document and the right to formulate or amend such policies falls within the executive's jurisdiction. Formulation and amendment of development-related policies and Work Policy falls under the purview of the Executive and therefore, the Government of Nepal within the scope of the Constitution can make decisions on such matters. Therefore, the decision to amend the Work Policy on 2078/2/13 (corresponding to

27 May, 2021) by the Government of Nepal Council of Ministers need not be deemed otherwise. It also evident that the petitioner's rights have not been violated by the decision to amend the Work Policy on the Operation and Construction of Physical Infrastructures within the Protected Areas, 2065. It cannot be deemed that the amended provision in the Work Policy is contrary to the Constitution or the laws. The Policy was amended by Nepal government Council of Ministers. However, the petitioner does not claim that the amendment should not have been made by that body and since the amendment made in the Work Policy for the Operation and Construction of Physical Infrastructure within the Protected Areas, 2065, cannot be deemed to be otherwise, the Bench deems that the amendment need not be quashed through an order of certiorari and therefore, the order as sought by the petitioner cannot be issued. The writ petition is hereby quashed.

18. Although a writ of mandamus may not be issued and the writ petition is subjected to be quashed, the petitioner however has raised pertinent issues and concerns wherein provided the Work Policy is to be implemented the flow of water from the rivers/streams would plunge to 10 percent and this would have an adverse effect on the natural environment of the Langtang region, as well as to the wildlife, vegetation and to the landscape. When 90 percent of the water is dammed, not only the terrestrial but also the existence aquatic life may be at risk and the aquatic ecosystem of the park may also be extinct resulting in the negative impact on human life and may also have a negative impact on the environment of the Langtang region. These issues raised by the petitioner need to be considered in accordance with our Constitution, laws, and the interpretations made by this court, and the policies relating to balanced development and environment. It cannot be presumed that development work including hydropower in the Himalayan regions in particular in the Langtang National Park and its surrounding areas which are sensitive to climate change cannot be carried out. While granting permission for development works including hydropower in any national park and in particular in the Langtang region, caution and alertness should be adopted from the survey stage and environmental-friendly and climate-resilient development should be ensured. Therefore, this Bench deems that the environmental impact assessment should be made more effective and that development along with the development of the environment should also be ensured..
19. Likewise, the petitioner has raised that the Langtang National Park is spread over three districts covering Rasuwa, Nuwakot, and Sindhupalchok. The area is surrounded by Langtang Lirung (7,243 meters) and Himal Chuli (7,864 meters) mountains, and Trishuli river flows to the west and the Sun Koshi river to the east of this region. The only deciduous tree found in the coniferous forest, the Langtang Sal, the snow leopard, red panda, musk deer, Himalayan black bear, Thar, Ghoral, monkey, langur and the "Bon Po" monastery and the Hindu pilgrimage site of Gosaikunda which falls under the list of wetlands and the surrounding lakes are not only valuable assets for the Langtang region but also a repository for the country and this Bench does not have any grounds to differ to the issue raised by the petitioner. It is imperative to conserve and develop these heritages which are a unique gift of nature. However, it is necessary to utilize the natural resources available in this area, develop tourism in the Himalayan region, including the observation of Himalayan flora and fauna, Himalayan wildlife and operate and implement a scientific forest management program for the old and fallen trees and vegetation in the Langtang National Park region for the benefit of the nation. Likewise, it is necessary to carry out development works like generating hydroelectric power by utilizing the water of the rivers and streams in the area and to construct canals or irrigation channels to supply water to the settlements in the lower regions for drinking and irrigation purposes. While operating such development projects, it is essential to consider the environmental and climate-resilient factors and should be cautious from the stage of selection of

the plan and programs. Likewise, in order to make the environmental impact assessment more transparent and effective it is deemed pertinent to make additional legal arrangements to make the decision-making authorities more accountable.

20. In the context of granting permission for development and construction works in this area, and the operation and production of hydroelectricity and for the operation and management of revenue including royalties (including environmental fees) incurred therein, the directive set aside by this court in the name of the Government of Nepal through the writ petition of certiorari 079-WC-0057 relating to Upper Karnali Hydroelectric Project is deemed pertinent to be mentioned here. In the petition, the court ruled that "the example presented by the Upper Karnali Project for the protection of the people in the watershed area can also be an exemplification for other projects" and the court further laid down a directive stating that "the government should make an account based on the free electricity received from the Upper Karnali Hydroelectric Project, dividend on shares, and revenue and on the basis of the amount received annually, the government annually should allocate equitable percentage of amount through the local level for the education, health, agriculture, industry including economic, educational and social development, and conservation of the environmental conservation for the people in the watershed area of the Karnali river. It appears that a directive has been issued to manage and arrange for the same. Pursuant to the directive, it is deemed imperative that the Nepal government should make an account of the royalties, revenue, and the returns received in lieu of shares received from the production of hydroelectric and from other development projects carried out in the Langtang region or any other national park and its surroundings and allocate the amount through the local government and should make provisions to spend the amount for the development and conservation of the environment of that particular area.
21. It is evident from the Preamble of the National Parks and Wildlife Conservation Act, 2029 (1973), that the Act was enacted for the conservation, promotion, and development of national parks and wildlife reserves. Clause 5 of the Act provides that the national parks and wildlife reserves can be utilized upon obtaining approval from an authorized official. Similarly, Clause 33 (a) of the said Act provides that procedures or directives may be formulated to implement the provisions of this Act and the Regulation. However, from the case file it is evident that no procedures or directives pursuant to Clause 33 (a) have been issued till date to implement the provisions prescribed in Clause 5. Upon perusal of the Work Policy on the Operation and Construction of Physical Infrastructure within the Protected Areas, 2065, it is evident that the Policy is applicable for providing survey including permits for the operation of hydroelectric projects in the national parks and wildlife reserves. However, it is not clear under which Act or Regulation was the Work Policy issued. It is said that it is imperative to implement the provision prescribed under Clause 5 of the National Parks and Wildlife Conservation Act, 2029 (1973), however, the policy arrangements made in the Work Policy that is not recognized by the Act and is in itself inconsistent and inadequate. Permission to utilize the national park and wildlife reserve areas for the production of hydroelectricity and construction of physical infrastructure including development of infrastructures is a matter of long-term importance and regulation of these works by the Work Policy framed outside the jurisdiction of the Parliament cannot be deemed to be appropriate. It is deemed appropriate to make a long-term legal arrangement in accordance with and within the limitation of the National Parks and Wildlife Conservation Act, 2029 (1973), as well as the Forest Act, Electricity Act, Environment Act, and other legal provisions, and in line with the constitutional provisions, obligations created by government through international commitments and from the decisions/orders and judicial principles laid down by this court. However, for the

moment, it is deemed appropriate to frame suitable procedures or directives recognized by the law to initiate works relating to development of hydroelectricity and other infrastructure development in the national parks and protected areas.

22. Pursuant to Sub-article (3) of Article 133 of the Constitution of Nepal, the Supreme Court under its extraordinary jurisdiction may issue an order of certiorari including any other appropriate orders. Pursuant to Sub-article (3) of Article 133 of the Constitution of Nepal, the court under any appropriate order can also issue directive orders and therefore, a directive order is hereby issued in the name of the Office of the Prime Minister and Council of Ministers including other respondents to the following with regards to granting approval for the development hydroelectricity and development of other infrastructures within national parks and protected areas.
- a. For the purpose of implementing Clause 5 of the National Parks and Wildlife Conservation Act, 2029 (1073), regarding the approval for carrying out development works including development of infrastructure in the national park and wildlife reserve area, it is hereby directed to frame and implement as soon as possible a procedure or directive relating to the construction and operation of physical infrastructure within the protected area. Furthermore, while formulating the said procedure necessary arrangements shall be made to protect the rights of investors, including those who have already obtained permission to generate hydroelectricity and have made investments therein, thereby incorporating the work and activities already undertaken.
 - b. While granting permission to carry out infrastructure development works, including hydropower, in the national parks and protected areas, arrangements pursuant to the concept of sustainable development shall be made to ensure the implementation of necessary monitoring and compliance mechanisms to balance the environment and development related to environmental conservation and climate change.
 - c. Likewise, while granting permission for development hydropower including development works and implementation of the project in national parks and protected areas, it is hereby directed to ensure and make proper arrangements for the conservation of wildlife such as the snow leopard, red panda, musk deer, Himalayan black bear, Thar, Ghoral, monkey and langur, and the vegetation found in high Himalayan areas and Langtang region and in particular while developing hydropower from the rivers flowing from those areas, necessary arrangements shall be made to ensure that the natural flow of the river is not affected, in other words shall make necessary arrangements to ensure that the forest, vegetation and the local people living below the project area receive sufficient water.
 - d. In the event permission for the production of hydroelectricity or construction of physical infrastructure within Langtang National Park and other protected areas is granted, an equitable percentage from the revenue received by Nepal government from the production and operation shall be allocated annually through the local levels of the area which shall be invested in activities such as education, health, drinking water, community development, access to justice, and creation of employment. Likewise, provisions shall be made to spend on the conservation and development of forests, jungles, and medicinal herbs within the national parks and protected areas as well as on the environmental development, protection of environment and climate change adaptation programs in the concerned area.
23. It is hereby ordered to provide a notification of this order and for its subsequent implementation to the respondents through the Office of the Attorney General and pursuant Rule 127 (4) of the

Supreme Court Regulations, 2074, a copy thereof shall also be sent to the Judgment Execution Directorate to monitor as to whether or not the order has been implemented. It is hereby ordered to enter the order into the electronic case management system of this court, and to remove the case file from the register and accordingly submit the case file to the Record Section.

Concurring with the aforementioned Opinion.

Honorable Judge Kumar Chudal

Judge Til Prasad Shrestha

Bench Officer (Under Secretary): Tika Bahadur Thapa

Computer Operator: Chandan Kumar Mandal

Done on the Year 2080 of the Month of Jestha Date 32 Day 5

(Corresponding to Year 2023 of the Month of June Date 15 Day 5)