

Supreme Court, Division Bench

Honorable Justice Sapan Pradhan Malla

Honorable Justice Susmalata Mathema

Order

077-WO-0019

Case: Mandamus, et al.

Writ Petitioner: Advocate Shashi Basnet, resident of Sanepa, Ward No. 2, Lalitpur Metropolitan City, Lalitpur District, on behalf of Juri Nepal and self

Chun Bahadur Gurung, resident of Chandragiri Municipality, Ward No. 14, Kathmandu District, originally from Fedikhola Village Municipality, Ward No. 4, Syangja District, on behalf of Juri Nepal and self

Advocate Vishnu Prasad Pokhrel originally from Pyuthan District, Jhimruk Gaunpalika Ward No. 4, currently residing at Kirtipur Municipality Ward No. 2, Kathmandu District, on behalf of Jury Nepal and self

Advocate Balmaya Bishwakarma, on behalf Juri Nepal, Resident of Dang District, Tulsipur Sub-Metropolitan City Ward No. 13, currently residing at Kirtipur Municipality Ward No. 3, Kathmandu District,

Advocate Sundar Bahadur Seni, working with ury Nepal, currently residing at Kathmandu District, Budhanilkantha Municipality, Ward No. 3, originally from Bajhang District, Jayaprithvi Municipality, Ward No. 10

Vs

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

Government of Nepal, Ministry of Finance, Singha Durbar

Government of Nepal, Ministry of Physical Infrastructure and Transport, Singha Durbar

Government of Nepal, Ministry of Energy, Water Resources and Irrigation, Singha Durbar

Government of Nepal, Ministry of Forests and Environment, Singhadurbar

National Planning Commission, Singh Durbar

Department of Revenue, Tripureshwor, Kathmandu

The brief fact and order of the writ petition submitted under the extra-ordinary jurisdiction pursuant to Article 46 and Article 133(2) of the Constitution of Nepal are as follows:

Summary of the Facts

Summary of the Petition

The government's decision to increase customs and excise duties on electric vehicles through the budget for the fiscal year 2077/78 (corresponding to 021/22) is likely to result in a nearly twofold increase in the price that consumers pay for electric cars. This will completely bring to a standstill the increasing demand for electric vehicles. This decision is contrary to the Constitution of Nepal, laws, and the government's declared policies and commitments. By promoting the use of petrol and diesel vehicles, this has created a situation where foreign exchange reserves will be further depleted and the trade deficit will increase. On the other hand, the increasing consumption of petrol and diesel will lead to increased air pollution, which will cause irreparable damage to public health, and the lack of promotion of electric vehicles will inter alia result in the wastage of electricity during "off-peak" hours.

Vehicles running on fuel emit approximately 2 tons of carbon monoxide per year, whereas electric vehicles reduce such pollution. However, the Financial Act, 2077 has increased the customs duty on electric vehicles from 10% to 80%. The said Act has classified electric vehicles into 5 categories based on their motor power and imposed an excise duty ranging from 30% to 80%. The road maintenance tax has been increased from 4% to 5%. Due to the changes in customs duty and tax, the customs duty and tax on electric vehicles have increased by 296.09% to 579.82%. As a result, the electric vehicles have become inaccessible to the general public.

According to its own study, the Government of Nepal has stated that the main sources of air pollution in Kathmandu and other urban areas are vehicles. There is no alternative but to promote non-polluting means of transportation such as smoke-free cycles, walking, and electric vehicles to reduce such pollution. On the contrary, the Financial Act, 2077 has suddenly abandoned the policy that has been adopted for electric vehicles for several years. The state from time to time has been imposing undue restrictions on citizens' right to clean environment, and the government's recent decision to increase customs and excise duties on electric vehicles has created an undue restriction on the right to live in a clean environment.

Therefore, by promoting the production and use of 'clean', 'renewable' or 'green' energy in a gradual and planned manner, and reducing dependence on polluting energy sources such as petrol and diesel, and ultimately replacing them with clean energy, the provincial government, local levels, and active organizations and stakeholders in the field of environment and climate change should be consulted to create an environment where people can enjoy their constitutional right to live in a clean environment. A separate national plan of action should be made for the promotion of clean, renewable or green energy, and its implementation should be ensured through the government's policy, program, and budget from the next fiscal year, and therefore, a writ of mandamus should be issued in the name of the Office of the Prime Minister and Council of Ministers, Ministry of Forests and Environment, Ministry of Finance, and National Planning Commission. Additionally, the Supreme Court has issued orders for the control of air pollution and other environmental protection measures since the promulgation of the Constitution in 2047 BS (1990), and it should be ensured that these orders are implemented in accordance with their spirit and essence. A committee or task force comprising experts and representatives of stakeholders should be formed to study and provide recommendations on the impact of these orders on the development of environmental law and the measures to be taken in the future. Based on the recommendations of this committee, appropriate orders should be issued in the name of the respondents. Furthermore, while formulating economic laws and budgets in the future, the issue of air pollution causing irreparable damage to public health should be taken into consideration, and necessary arrangements should be made to promote the right of citizens to live in a clean environment and the petitioners hereby request the honorable court to issue appropriate order in the name of the Ministry of Finance et.al..

Show Cause Notice

A show cause notice had been issued by this court on 2077/04/13 (corresponding to 28 July, 2020) which reads as follows: "What has happened in this matter? Why should the order as sought by the petitioner not be issued? Provided, there are any reason and grounds for not issuing the order, the respondents are directed to submit their rejoinder within 15 days excluding the period of travel through the Office of the Attorney General. It is hereby ordered to provide a copy of the writ petition and to issue summon in the names of the respondents and to submit the case file upon submission of the rejoinder or upon the expiry of the limitation period. Since the petition is of public importance and taking cognizance of the gravity of the subject matter a prompt decision is required and therefore, this court pursuant to Rule 73 of the Supreme Court Rules, 2074 prioritizes the case for hearing

Summary of the Rejoinder

The rejoinder submitted by Nepal Government, the Ministry of Forests and Environment reads as follows: that the writ petitioners through their petition has stated that although the government through various policies and programs were to reduce air pollution and promote the use of electric vehicles, on the contrary the government through its budget for the fiscal year 2077/78 has discouraged the use of electric vehicle and therefore, the policy adopted by the government of Nepal is contrary to the Constitution of Nepal, existing laws, and provisions laid down by the international laws and is also contrary to the interpretation made by the Supreme Court. However, the petitioner has not been able to provide any justification as to the involvement of this Ministry and has failed to provide any logical justification as to how the actions of this Ministry are contrary to the constitutional and legal provisions. Regarding the development of a separate project, or constitution of a Task Force or Committee for clean renewable energy or promotion for green energy upon consultation with stakeholders or on matters relating to the implementation of the interpretation of the Supreme Court, the Ministry with the aim of protecting the fundamental right of citizens to live in a clean and healthy environment, to protect the forest and the environment, to minimize the adverse environmental impact on the environment and on the bio-diversity and to face the challenges in environment changes has drafted a Bill which had been subsequently submitted to the federal Parliament wherein the Bill has been endorsed and has been promulgated as Environment Protection Act, 2076. Likewise, the Nepal government by exercising the rights prescribed under Section 44 of the said Act, has approved and implemented the "Kathmandu Valley Air Pollution Control Action Plan, 2076" Therefore, since the issues raised by the petitioners will be addressed there is no need for a separate action plan, or to constitute a Task Force, or committee and therefore, since the petition where the Ministry has been made a respondent is frivolous the petition should be dismissed.

The rejoinder submitted by Government of Nepal, Ministry of Energy, Water Resources, and Irrigation reads as follows: that this Ministry has been involved in promoting the production, development, conservation, and use of clean and renewable energy. In order to increase the use of electric vehicles, the Ministry has been promoting Nepal Electricity Authority in establishing charging stations. In order to promote the use of electric vehicles in the coming days, various policy arrangements will be made. A central renewable energy fund with financial arrangements is being operated to effectively operate grants and easy loans in the field of rural and renewable energy technology. Pursuant to the Alternative Energy Promotion Center that has been established in accordance with the Alternative Energy Development Committee (Formation) Order, 2053, it has been working in the development, use, and promotion of renewable energy sector. In order to implement the right to clean environment, various agencies have been established and these agencies have been working to promote renewable and green energy by formulating their own work plans and therefore, there is no need to formulate a separate national work plan. This Ministry has been implementing the decisions and orders of the Supreme Court and the Ministry has been providing information to the Judgment Execution Directorate. Pursuant to Rule 129 of the Supreme Court Regulation, 2074, a Judgment Execution Directorate has been established to implement and monitor

the judgments of the Supreme Court and its subordinate courts. Pursuant to Sub-rule (1) of Rule 11 of the Government Attorney Regulation, 2077, the Office of the Attorney General has been corresponding to the concerned constitutional bodies, ministries, secretariats, departments, or other government offices to implement the judgments and orders of the Supreme Court and its subordinate courts. Since there are legal and institutional arrangements for the implementation of judgments, there is no need to form a new task force. The petitioner has failed to state as to which act or decision by this Ministry has affected them. Since the writ petition where the Ministry has been made a respondent is baseless, the writ petition should be quashed. Since the Ministry has not taken any decision or performed any act that has affected the constitutional and legal rights of the petitioner, the petition should be dismissed.

The rejoinder submitted by Kewal Prasad Bhandari, Secretary of the National Planning Commission reads as follows: that the Fifteenth Plan has provided incentives for the production of electricity. As mentioned in the Fifteenth Plan, the production of electricity (installed capacity) for the fiscal year 2075/076 has reached 1250 megawatts and by fiscal year 2100, the target is to reach 40,000 megawatts. Action Plan 6 of Strategy 3 of 4.3 of 8.1.1 of the Fifteenth Plan has made arrangements for the participation of the private sector in the establishment and promotion of charging stations deemed necessary for the operation of electric vehicles. The result indicator of the Plan (page 482) has indirectly promoted electric vehicles and a clean environment by increasing the proportion of renewable energy in comparison to energy consumption (targeting 7% in the base year and 50% by FY 2100/01). 7.3.6 of Goal 7 of Destination 7 of the Millennium Development Goal has assigned the Department of Transportation the responsibility for the management of traffic for electric vehicles in the public transportation system. Issues related to energy and hydropower vehicles have also been discussed in the mid-term expenditure framework, annual development program, and meetings of the National Development Problem Resolution Committee.

The rejoinder submitted by Department of Customs, Ministry of Finance, Government of Nepal, Teku reads as follows: that the right to impose, increase or decrease the rates of tax rates is vested upon the Government, and since the changes in the revenue rate has not infringed the citizen's right to clean environment, the petitioners' claim that the Financial Act, 2077, which has increased the customs duty on electric vehicles has affected the citizen's right to live in a clean environment is baseless and therefore, the aforementioned writ petition is liable to be quashed. The Department of Customs is the implementing agency of the laws and regulations of the Government of Nepal. The Government of Nepal may continue with the custom duty, tax and other duties or may make amendments to it and if deemed necessary may amend some prevalent Nepal laws relating to revenues and may promulgate a Financial Act every fiscal year for its implementation and operation.

Since this Department is an implementing agency of the laws and regulations promulgated by the Government of Nepal, and since there are no grounds for making this Department a respondent, the writ petition is baseless and liable to be dismissed.

The rejoinder submitted by Secretary Mr. Shishir Kumar Dhungana, on behalf of the Ministry of Finance and Secretary Devendra Karki, on behalf of the of the Ministry of Physical Infrastructure and Transport reads as follows: that pursuant to Sub-article (3) of Article 119 of the Constitution of Nepal, the Minister of Finance of the Government of Nepal is required to present the estimates of revenue and expenditure to the Federal Parliament on the 15th day of Jestha (mid-May) every year. Pursuant to the provisions of the Constitution, a Finance Bill including the rates is presented before the Federal Parliament on the 15th day of the month of Jestha every year and the provisions prescribed in the said Bill comes into effect from the same day. Pursuant to the aforementioned constitutional provisions, the Government of Nepal on the basis of appropriateness and rationality has presented the tax rates through the Finance Bill before the Federal Parliament, wherein a clause-wise discussion was held in in both Houses of Parliament whereby the Bill had been promulgated as law and therefore, the imposition of taxes on electric vehicles is lawful. The Government of Nepal from the perspective of

environment and public health has a policy to promote electric vehicles. Pursuant to this policy, the government has continued to maintain 1 percent tax on buses used by the general public as a means of public transportation, and 30 percent customs duty on buses that run on petroleum products. As per the Schedule-1 of Title 8703.80 under the Finance Act, 2077, and pursuant to Sub-section (3) of Part (z) of Section 14 of the same Schedule, 50 percent exemption is provided, and only 40 percent customs duty is levied. Similarly, pursuant to the Excise Rate Title 8703.80 of the said Act, customs duty of 80 percent, excise duty of 60 percent to 100 percent (based on capacity), and value-added tax of 13 percent are levied on cars, jeeps, and vans that run on petroleum products. However, customs duty of 40 percent, excise duty of 30 percent to 80 percent (based on capacity), and value-added tax of 13 percent are levied on cars, jeeps, and vans that run on electricity. It is clearly evident that the tax levied on electric vehicles is lower in comparison to the vehicles that run on petroleum products and therefore, the petitioner's contention that the Government of Nepal has encouraged the use of vehicles that run on petrol and diesel is false. In the South Asian Association for Regional Cooperation (SAARC) countries there are high rates of tax rates in the import of electric vehicles. For instance, in India, 40 percent custom duty and 5 percent GST is levied, while in Pakistan, 50 percent customs. In Bangladesh, a total of 91.37 percent tax is levied which includes 6 different taxes including customs duty and value-added tax, and in Sri Lanka, 15 percent customs duty and 8 percent value-added tax and excise duty of Rs. 15,000 per kilowatt for up to 50 kilowatts, Rs. 25,000 per kilowatt for 100 kilowatts and above, and Rs. 55,000 per kilowatt for 200 kilowatts and above are levied. These examples show that the tax rate levied on electric vehicles in Nepal is lower. The Finance Act, 2076, had provided for the imposition of tax on diesel and petrol vehicles based on their engine capacity, with higher tax rates for higher capacity vehicles, and a uniform tax rate of 10 percent for all electric vehicles, regardless of their capacity. However, this provision was not progressive and fair from the perspective of revenue collection and therefore, the Finance Act, 2077, has introduced a provision for the classification of electric vehicles based on their motor power and the imposition of different tax rates on high-capacity electric cars, jeeps, and vans, making the tax system more progressive and fair. Therefore, where the government has followed a progressive tax system, the order as sought by the petitioner should not be issued.

The contents of the rejoinder submitted by Secretary Dhan Raj Gyawali on behalf of the Government of Nepal, Prime Minister and Office of the Council of Ministers, reads as follows: pursuant to Article 115 of the Constitution of Nepal, no tax shall be levied or collected except in accordance with law. The Finance Act, 2077, passed by the Federal Parliament, has determined the tax rate for electric vehicles and therefore, it is not reasonable to file a writ petition in the Supreme Court to discuss the tax rate. The issues relating to the collection of revenues, increment, decrement or exemption of taxes is regulated every year by the Finance Act. Where the tax rate determined for one fiscal year can be revised in the next fiscal year, it is not appropriate and lawful to seek an order from the court on matters that are being determined by the Federal Parliament. Regarding the issue of excise and customs duty levied on electric vehicles, the change in tax rate has been done to maintain the country's balance of payments, increase revenue, and discourage the use of luxury goods and therefore, the amendments to the tax rate cannot be deemed to be otherwise. The petitioner in the context of environment protection has claimed an increase in the pollution of the environment. However, studies at the international level have shown that Nepal's per capita carbon emission is low, and Nepal is one of the countries with low carbon emissions and this fact clearly established the situation of our country. With regards to the execution of the orders of the Supreme Court post 2047 BS, the orders of the Supreme Court has been executed by all concerned, and for the protection of the environment an Environment Protection Act and Rules have been implemented. Likewise, the Forest Act and other laws related to it are also being implemented and arrangements for an environmental-friendly system for industrial production have been in place. Where a separate mechanism has been established in each ministry for the execution of orders, and pursuant to an order by the Nepal Government Council of Ministers dated 2067/11/17 (corresponding to 1 March, 2011) an Order Monitoring Committee has been formed to monitor the execution of the orders and a separate Directorate for the same reason has

been established in the court, the petitioners' demand to seek the establishment of a structure or group is inappropriate, irrelevant and beyond the law. For a clean environment guaranteed and as directed by the Constitution, we from time to time and based on the current situation, and considering our unique geographical conditions and pursuant to the latest technology available in the world have to take different policy level decisions. Currently, at a global level there is an increasing trend to reduce the consumption of diesel and petrol and promote alternative energy and electric vehicles. The Government of Nepal has also taken steps to reduce taxes on alternative energy and electric vehicles and provide subsidies and therefore, the petitioners claim that the tax was increased and there was no initiative taken to protect the environment is unreasonable and irrelevant.

Order of the Court

Pursuant to the Rules the writ petition has been submitted in the cause-list and upon perusal of the case file and petition and following deliberations have been heard by this Bench.

Learned advocates Mr. Dhurba Koirala, Ms. Shashi Basnet, Mr. Subhas Bishwakarma, and Ms. Suchana Sunar on behalf of the petitioner argued that Article 16 (1) of the Constitution of Nepal guarantees every individual the right to live with dignity. In addition to this, the right to live in a clean environment is guaranteed as a separate fundamental right under Article 30. However, the respondents have been complacent in the execution of this fundamental right. To ensure the right to live in a clean environment as guaranteed by the Constitution, the respondents should have taken steps to control air pollution by promoting clean, renewable, or green energy-powered vehicles. On the contrary, the Government of Nepal without considering these issues decided to increase customs and excise duties on electric vehicles and since this is not only contrary to the Constitution and laws but also contrary to the declared policies and commitments of the Government of Nepal, the petitioner seeks the decision to be quashed and in order to implement the policy of the Government of Nepal regarding the promotion of electric vehicles so as to ensure the right of citizens to live in a clean environment with dignity the petitioners' seeks an order of mandamus be issued in the names of the respondents.

Joint Attorney Mr. Gopal Prasad Rijal on behalf of the respondents argued that the imposition of customs and excise duty on goods imported from abroad and to generate revenues by the State falls within one of the important duties of the State and as such this cannot be deemed to be otherwise. From the rejoinder submitted by the Ministry of Finance, it is evident from the Finance Act, 2077, that the electric vehicles in comparison to vehicles running on petroleum products has less custom and excise duty and that the rate determined for electric vehicles by the Finance Act, 2076 has been refined and made more progressive by the Finance Act, 2077. Likewise, the petitioners' have not been able to state their interest or meaningful relation to the issue relating to the determination of the tax that has been determined pursuant to the law. The Special Bench in *Sitaram Agarwal vs. Nepal Government*, Nepal Law Magazine 2059 Vol. 9/10 Decision No. 7132, had opined that the writ petitioner had failed to show his meaningful relation and concern against the amendment made in the laws relating to taxation. Where under the capacity of a legal practitioner, a writ petition is filed, meaningful relation and concern cannot be deemed to be concluded and in the absence of being a representative of the concerned general public such relations cannot be deemed to be present and as such the order sought by the petitioner need not be issued and since the writ petition is contrary to the established principle the writ petition should be quashed.

Likewise, the written pleading notes submitted by Learned Advocates Mr. Raju Prasad Chapagain, Mr. Dhurba Koirala, Ms. Shashi Basnet, Mr. Shyam Bahadur Bishwakarma, Mr. Bishnu Prasad Pokharel, Ms. Bal Maya Bishwakarma, and Mr. Sundar Bahadur Sen on behalf of the petitioners, and the written pleading note submitted by Learned Joint Government Attorney Mr. Gopal Prasad Rijal

on behalf of the respondents were also considered.

Upon hearing the deliberation, it is for this Bench to decide on the following issues:

- (a) As to whether or not, the Government of Nepal's decision to increase the rate of tax for electric vehicles has affected the right to live in a clean environment due to increased pollution is a matter of public interest? As to whether or not the petitioners' have any interest and meaningful relations regarding this issue?
 - (b) What are the obligations of the State to ensure the right to live in a clean environment?
 - (c) As to whether or not the increase in the tax on electric vehicles has infringed the citizen's right to live in a clean and healthy environment?
 - (d) As to whether or not an order should be issued as sought in the petition?
2. Firstly, the Bench needs to consider as to whether or not Nepal Government's decision to increase the customs and excise duty on electric vehicles infringes the rights of citizens to live in a clean environment is a matter of public interest or not. Upon consideration of this matter, it appears that the present writ petition has been filed under Article 133 (2) and (3) of the Constitution of Nepal. In this regard, the petitioners have claimed that since petrol/diesel-powered vehicles cause environmental pollution, the government should encourage the purchase and sale of electric vehicles, but on the contrary the government's decision to increase customs and excise duties on electric vehicles has brought a reduction in the purchase and sale of electric vehicles, thereby affecting the right to a clean environment. Likewise, the petitioners through their petition have also raised the issue that decisions made with regards to environmental protection have also not been effectively implemented. Provided, a dispute involves a matter of public interest, where the rights, interests, or concerns of the general public guaranteed by the Constitution are affected, then such issues can be considered to be a public interest dispute. A similar question was raised in Advocate Tulsi Sinkhada vs. the Government of Nepal, Office of the Prime Minister and Council of Ministers (Nepal Law Magazine 2075, Volume 10, No. 10109) wherein the court had held that "the issue of protection of the environmental was not just a matter of general curiosity and interest of the petitioner. The petitioner has the locus-standi to file a writ petition on such a public matters. The management of garbage and protection of the environment is a matter of importance that is not limited to the boundaries or peripheries of a nation and it would not be appropriate to limit such a multi-dimensional public concern to the scope of locus-standi." According to this principle, the Bench deems that the issue of environmental protection is a multi-dimensional shared concern and the locus-standi for such matters, cannot be limited to a specific individual or community or nation.
3. Similarly, in Narayan Prasad Devkota vs. Right Honorable Prime Minister and the Council of Ministers et.al. (Nepal Law Magazine 2067, No. 12, Decision No. 8521), this Court has established the principle that "environmental pollution is actually caused by the State's poor socio-economic policy and provided the Executive causes delay to perform its constitutional duty or falls behind in this noble task, the court, as the guardian of the fundamental rights of the citizens cannot remain silent. The precedent set by this case is that the court is vested with the "constitutional mandate" to protect the environment and it is the duty of the court to enforce and comply with it." According to the aforementioned principle, provided the State rather than drafting suitable socio-economic policy related to environmental protection drafts a poor socio-economic policy, the court as the guardian of the fundamental rights granted to the citizen by the Constitution has the jurisdiction to hear the matter and doing so is the constitutional responsibility of the Court.

4. When the customs and excise duty rates on electric vehicles are increased, the price of such vehicles will rise, making them inaccessible to the general public, and the import of such vehicles will decrease, leading to an increase in the import of petrol/diesel-powered vehicles resulting in increased pollution from petroleum-based vehicles, thereby affecting the right to live in a clean environment. The matter in the present writ petition is directly related to the protection of the environment and the right to live in a clean environment. Determination of tax is a matter of discretion of the Executive, however if the exercise of such discretion infringes the rights guaranteed by the Constitution, it cannot be deemed to say that such matters cannot be entertained by the court.
5. It appears that the petitioners who are citizens of Nepal are also associated with an organization working in the field of justice and human rights, and when the customs and excise duty rates on electric vehicles are increased, there is a decrease in the import of electric vehicles, resulting in an increase in the import of vehicles that run on petroleum products, and due to the smoke and dust emitted by these vehicles, the environment becomes further polluted which may infringe the right to live in a clean environment. Therefore, the subject matter of the writ petition appears to be directly related to the issue of environmental protection and the right to live in a clean environment.
6. Since the subject matter of the petition is directly related to the protection of the environment and the right of humans to live in a clean environment, it is deemed that the petitioners have a substantial interest in the subject matter and therefore, petitioners have the locus standi to file the petition. Therefore, the Bench does not agree to the respondents' contention and arguments that the petitioners do not have the locus standi to file the petition.
7. It is necessary for this Bench to discuss as to what kind of international and national obligations Nepal has with regards to the right to a clean environment and the right to live with dignity.
8. Considering Nepal's international obligations, there various treaties to which Nepal is a Party that has ensured the right to life, and the State has been held responsible for the fulfillment of those rights. Article 6 of the International Covenant on Civil and Political Rights, 1966, states that "Every human being has the inherent right to life. This right shall be protected by law." Similarly, Article 3 of the Universal Declaration on Human Rights (UDHR) states that "Everyone has the right to life, liberty and security of a person." Likewise, Article 11 of the International Covenant on Economic, Social and Cultural Rights, 1966, provides right relating to health. It prescribes that the State must protect the physical and mental health rights of citizens and for this purpose it must improve all aspects of environmental sanitation. Article 11 of the aforementioned Covenant states that "1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) ...; (b) The improvement of all aspects of environmental and industrial hygiene;" Since Nepal is a Party to these international treaties, it is evident that these international treaties pursuant to Section 9 (1) of the Nepal Treaty Act, 2047 is applicable like Nepal law. Therefore, pursuant to the provisions prescribed in the treaties, it is the obligation of the State to ensure the right to life and the right to health.
9. Observing the international development related to the right to a clean environment and based on the document of the United Nations to which Nepal is a Party and considering the interdependence between life and the environment, the United Nations Conference on the Human Environment (United Conference on Human Environment) held in Stockholm in 1972 issued the Stockholm Declaration with 26 Declarations, which has become a milestone in the protection of environment. Declaration No. 1 of the Stockholm Declaration states, "Man has the fundamental right to freedom, equality and adequate condition of life, in an environment of a quality that permits a life of dignity

and well-being, and he bears solemn responsibility to protect and improve the environment for present and future generations." This emphasizes on the present and future generations right to live in a clean environment. Similarly, the United Nations Conference on Environment and Development passed 27 Resolutions and passed the Rio Declaration wherein Agenda 21 emphasizes on sustainable development and the right to live in a clean environment and stresses on the responsibility of the State and private sector to ensure this right. Principle No. 6 of the Stockholm Declaration provides that "The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to ensure that serious or irreversible damage is not inflicted upon the ecosystems. The just struggle of the peoples of all countries against pollution should be supported." Principle 15 of the Rio Declaration mentions the precautionary principle, which states, "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." This principle is also included in Article 3 (3) of the United Nations Framework Convention on Climate Change (UNFCCC). Nepal became a Party to the UNFCCC on October 2016. The main objective of this convention is to control human intervention in the climate and balance greenhouse gases. Considering the rights of future generations, the Parties to the convention must reduce the factors contributing to climate change and minimize its impacts.

10. Article 3(3) of the Paris Convention states that "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. To achieve this, such policies and measures should take into account different socio-economic contexts, be comprehensive, cover all relevant sources, sinks and reservoirs of greenhouse gases and adaptation, and comprise all economic sectors." Principle 16 of the Rio Declaration provides for the Polluter's Pay Principle. According to this principle, the person polluting the State's, economic mechanism should pay for the pollution. Principle 16 states that "National Authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment".
11. Based on the aforementioned facts, provisions and commentaries, while drafting the economic and social policies, attention should be given to minimizing climate change and environmental pollution and policies and provisions should be drafted accordingly and Nepal also has the obligations to draft such policies and systems accordingly. The respondents through their rejoinder have stated that customs and excise duties have been increased to reduce the import of luxury goods. However, the State should have taken into account as to whether the vehicle running on petrol or the electric vehicle would cause more negative impact to the environment and should have taken precautionary measures to prevent such risks. Therefore, since international documents have also ensured the right to live in a clean environment, the State while drafting tax policies should adopt a policy that discourages polluting policies and should encourage and promote activities that do not pollute the environment or have a minimal impact on the environment. In addition, the State should also adopt policy to prevent adverse effect to the environment and adopt precautionary policy and measures. The third question to be decided is as to whether or not the decision of the Government of Nepal to increase customs and excise duty on electric vehicles has affected the right to live in a clean environment. Article 30 of the Constitution of Nepal has ensured the right to a clean environment and Article 16 the right to live with dignity.

12. The third question to be decided is as to whether or not the decision of the Government of Nepal to increase customs and excise duties on electric vehicles has affected the right to live in a clean environment. Article 30 of the Constitution of Nepal has ensured the right to a clean environment and Article 16 the right to live with dignity. Sub-article (1) of Article 30 of the Constitution of Nepal states that "every citizen shall have the right to live in a clean and healthy environment". For the protection of the environment, Nepal has the Environment Protection Act, 2076. The principal objective of this Act is to minimize the adverse effects on environmental biodiversity. Section 15 (1) of the Environment Protection Act, 2076 prescribes for the following: "the Government of Nepal may, by a notification in the Nepal Gazette determine necessary standards for the mitigation or doing away with the impacts of pollution from any motor vehicle, device, equipment, ..." Therefore, in order to control pollution, the Act prescribes that the State determine standards for vehicles and implement the same and therefore, it is the State's obligation to minimize the polluting vehicles
13. The objective of the Fifteenth Periodic Plan (Fiscal Year 2076/77-2080/81) of the Government of Nepal is "creating a healthy and balanced environment and providing citizens the experience of a dignified and refined life". Similarly, Strategy (3) prescribes for the following: "shall promote the use of electric vehicles and transportation by emphasizing on solar, wind, biogas and other renewable energy sources." Chapter 8, Strategy (3) under Infrastructure Structure of the Plan prescribes the following work policies: "to conduct a study on the promotion of electric vehicles and determine an appropriate tax rate and in participation with the private sector shall establish as deemed necessary charging stations for the promotion of electric vehicles." Likewise, under 8.2.5 of the Plan under Management of Transport, the Plan has Strategy 4.4 and under No. 2 of the Work Policy, the Plan stresses on the use of sustainable and environmental friendly vehicles. Similarly, under No. 3 of the work plan, the Plan prioritizes for the use of electric vehicles. Similarly, Section 10.10 of the Plan under the title of Climate Change has included Strategy No. 4 wherein under Work Policy No. 3 the Plan envisages adopting the concept of green development to reduce climate change and promote clean energy. The Work Plan also prioritizes electric vehicles. Likewise, various policies and programs have been drafted to promote electric vehicles for the protection of environment in the Transport Policy 2071 and the Air Quality Management Plan for the Kathmandu Valley, 2076
14. The decision to increase customs and excise duties on electric vehicles by the Government of Nepal needs to be considered in terms of whether it promotes environmental pollution or not. A study conducted in 2017 by the Ministry of Environment of the Government of Nepal has included emissions from vehicles and dust and dust accumulated on the roads as the main sources of air pollution in the transportation sector. Another source for pollution is the industrial sector, which includes brick kilns and boiler-based industries, as well as diesel generators. Similarly, construction activities, residential areas, agricultural sectors, burning of garbage in the open, and natural and man-made forest fires have been identified as sources of air pollution. Therefore, the report mentions that the transportation sector is the major factor contributing to environmental pollution¹. Likewise, in the transportation sector, it is necessary to look at the difference in the level of pollution caused by vehicles running on petroleum products and electric vehicles. The amount of pollution caused by electric vehicles and vehicles running on petroleum products and the impact of their use vary. These vehicles are not of the same nature, but rather they are vehicles of different natures.
15. Looking at the various study reports conducted on these issues the report shows that vehicles running on petroleum products are more pollutant than electric vehicles. A study report concludes,

¹ Quality Air Management Work Plan for Kathmandu Valley, 2076, Department of Environment, Ministry of Forest and Environment, Babbar Mahal, Kathmandu

"An average battery electric vehicle is able to reduce from 59% to 72% of greenhouse gas emission in the entire life cycle with respect to those generated by traditionally-fueled cars (gasoline, diesel, LPG)"². Similarly, pursuant to a study made in Battery Electric Vehicles vs. Internal Combustion Engine Vehicles, ADL (2016), the study shows that vehicles running on petroleum products through internal combustion engines have high tailpipe emissions, whereas electric and battery-powered electric vehicles have almost zero tailpipe emissions. Studies have also been conducted on the impact of environment by the smoke emitted by vehicles and its subsequent impact on human health. The report states, "The assessment of the impact on human health confirmed the best score of the battery electric vehicles compared to all the assessed vehicle technologies. Like for the greenhouse gas emission, the gasoline car has the worst score for human health, due to the high nitrogen oxides and sulphur oxides emissions during its use phase"³. Looking at various study reports, it is seen that vehicles running on petroleum products emit about two tons of carbon monoxide per year. Therefore, emphasis has been made for the use of electric vehicles.

16. Pursuant to the aforementioned facts, provisions, study reports, and commentaries, it can be concluded that the main source of air pollution is the smoke and dust emitted from vehicles. A study conducted by the Ministry of Environment shows that 38 percent of air pollution in the valley is caused by vehicle smoke. Gases such as carbon dioxide, carbon monoxide, sulphur dioxide, nitrogen dioxide, nitric oxide, and various hydrocarbons, including methane are released from the fuels used in the vehicles. Likewise, it also releases 2.5 PM harmful particles. These greenhouse gases emitted from vehicles absorb the heat from the sun in the atmosphere and increases the temperature of the earth. This is known as 'global warming'. The hydrocarbons emitted from the use of such fuels react with nitrogen dioxide and form ozone. Although the ozone is useful in the upper layer of the atmosphere, it is harmful at the lower layer since it severely affects the lungs and heart. This fact is corroborated by Charles B. Barret and others who in the article "Climate Change, Human Health, and Epidemiological Transition write that "The study on causes of global warming indicates that climatic condition is warming due to heating of the surface air by greenhouse gas and changing atmospheric system due to massive extraction of energy from fossil fuels during the past two centuries. This warming system has not only affected human health, but also the quality and quantity of basic social determinants"⁴. It is evident that this has not only had a negative impact on the health of humans but also on the health of other living beings. The increase in the earth's temperature has led to the extinction of thousands of species and thousands of species are struggling to survive in the changed environment. A study conducted by scientists from University of Arizona has warned that one-third of plants and animals could become extinct within the next 50 years⁵. The principal cause for this is air pollution.
17. In the present context, the Bench deems it necessary to analyze the tax rate applicable to electric vehicles. Schedule 3 related to Section 10 of the Finance Act, 2077, prescribes for road construction tax charges. No. 1 (d) of Schedule 3 has fixed the rate for electric cars, jeep and vans at 5% whereas in the previous fiscal year the rate was 4%. Likewise, the Sub-section (1) of Section (2) of the Act related to Schedule of the said the Act prescribes for customs duty wherein the customs duty for electric vehicles in comparison to the previous fiscal year has increased from 10% to 80%. Similarly, the Schedule related to Section 3 of the Act prescribes for excise duty.

² Perez, J. et. al. (2012), Comparison of Green House gas emission from Different vehicle covering the entire life cycle, WIT Press Vol. 128, p. 94.

³ Fayçal-Siddikou Boureima et al. (2009), Comparative LCA of electric, hybrid, LPG and gasoline cars in Belgian Context, *World Electric Vehicle Journal* Vol 3, p. 473

⁴ Barrett, B., Charles, J. W., & Temte, J. L. (2015). *Climate change, human health, and epidemiological transition*.

⁵ Cristian Román-Palacios, John J. Wiens. **Recent responses to climate change reveal the drivers of species extinction and survival.** *Proceedings of the National Academy of Sciences*, 2020; 201913007

The Finance Act, 2077, has classified electric vehicles into 5 categories based on their motor power and has imposed an excise duty ranging from 30% to 80%. Therefore, owing to the changes made in the customs and tax, the customs and tax applicable to electric vehicles have increased from 296.09% to 579.82%, thus making the electric vehicles inaccessible to the general public.

18. Likewise, the Government of Nepal on Kartik 2075 BS (corresponding to November, 2018) had made public the 'National Plan for Electric Vehicles' and through the Plan the government had set a target of converting 20 percent of the vehicles into electric within the next two years. The Work Plan promotes the use of energy efficiency and electric vehicles and by the year 2050 targets to reduce the public transportations dependency on petroleum products by 50 percent⁶. The Work Plan has been made public for almost four years however no progress can be seen with regards to the promotion of electric vehicles. Although it has been over more than a decade that electric vehicles have been used in Nepal, the number of users is still very low. From among the total number of vehicles registered all over Nepal with the Department of Transportation the total number of electric vehicles registered is 0.025 percent.
19. According to the statistics of the Department of Customs 5,239 electric vehicles have been imported in the fiscal year 2074/75 (018/019), whereas 4,745 were imported in 2075/76 (019/020), and 575 vehicles have entered the country in 2076/77 (020/021). Similarly, the import of electric vehicles decreased to 249 in the fiscal year 2077/78 (021/022). Thus, it can be drawn that in comparison to the previous fiscal year there has been a dramatic decrease in the import of electric vehicles in the fiscal year 2077/78 (021/022) and this is due to the imposition of high taxes on electric vehicles. Therefore, it can be seen that there has been a dramatic decline in the import of electric vehicles owing to the increase of customs and excise duties.
20. Secretary Shishir Kumar Dhungana and Secretary Devendra Karki on behalf of Ministry of Finance and Ministry of Physical Infrastructure and Transportation through their rejoinder had stated that although the Finance Act, 2076 has a provision to impose tax at a higher rate on diesel and petrol-operated vehicles based on their engine capacity and a uniform 10 percent customs duty on electric vehicles of any capacity, this provision was not progressive through the perspective of revenue collection and justifiable and therefore, the Finance Act, 2077 was adopted which follows a just and progressive tax system by classifying small-sized electric vehicles used for personal luxury and based on peak hour of the vehicles, the vehicles have been classified wherein a justifiable and progress tax system has been followed. However, while adopting a just and progressive tax system, it is necessary to consider the fundamental rights, including the right to live in a clean environment and the right to life, and to adopt the principles of sustainable development and precautionary principle in environmental protection. While adopting a tax system, the State cannot ignore the environmental risks such as environmental pollution and climate change and their impact on health and life. Provided, the State fails to fulfill its fundamental rights and responsibilities under national and international law, it will not only have a serious impact on human health but also on the overall economy and long-term development.
21. Based on the aforementioned facts, provisions, and commentaries, it is evident that in comparison to electric vehicles, the contribution to pollution by petroleum-based vehicles is extremely high. Therefore, it is evident that with the increase in customs and excise duties on electric vehicles is discouraging the people to use such vehicles. This directly affects the right to a clean environment. Environmental pollution affects the right to live in a clean environment. Therefore, the decision of the Government of Nepal to increase customs and excise duties on electric vehicles is a violation of the right to a clean environment as guaranteed by Article 30 of the Constitution of Nepal.

⁶ National Work Plan for Electric Transportation, 2075

22. Existence of the Constitution, law, and policy in isolation is not sufficient; special emphasis must be given for their effective implementation. As stated above, for the implementation of the constitutional, legal and policy provisions, the State while determining the taxes on electric vehicles should also consider the environmental aspects. The State should play a guardians role in all the activities relating to development and providing service to the people. Pursuant to the principle of *parens patriae*, Nepal government is the guardian of the State and according to the said principle, it is the obligation of the State to protect the environment. Under the public trust doctrine, Government of Nepal is merely a trustee and therefore, it cannot bring forward policies that are adverse to the environment. Likewise, prior to taking any decisions that has an impact on the environment Nepal government should follow and abide by the precautionary principles. The adoption of precautionary principle has been emphasized in Advocate Padma Bahadur Shrestha vs. Kathmandu Metropolitan City Office (Nepal Law Magazine 2074, Vol. 4, Decision No. 9577) and Arjun Giri vs. Office of the Prime Minister and Council of Ministers (Nepal Law Magazine 2076, Vol. 7, Decision No. 10305). The court through those cases had propounded that "the effective way to manage pollution is proper management of garbage however preventing the production of garbage or adopting the precautionary measures is more effective for managing pollution. Therefore, since it is evident that the use of electric vehicles can to some extent control environmental pollution, the Government of Nepal's failure to apply the principle of precaution on matters relating to environment pollution is not justifiable. As the guardian of the resources of the state, it is the obligation of the State to follow the said principles prior to making any decisions. Therefore, it is the responsibility of the State to promote in the production and use of green energy and in a planned manner gradually create an environment to minimize the pollution from vehicles using petroleum products and gradually establish electric vehicles or other best alternatives.
23. In Amita Gautam Poudel vs. Prime Minister and Council of Ministers (073-WO-0830) the Supreme Court had propounded that "since the quality of fuel used in vehicles plays a role in air pollution, emission standards should be formulated and implemented to regulate air pollution from motor vehicles and equipment with spark-ignition engines and internal combustion engines. Likewise, in order to control pollution, the government should promote the use of alternative fuels such as compressed natural gas (CNG). In order to encourage the use of electric vehicles institutions providing alternative fuel and services should be exempted from tax and there should be exemption of customs in the import of such vehicles and their spare parts. Similarly, the precedent also underlines that cycle-friendly roads should be constructed in urban areas to promote the use of non-motorized vehicles like bicycles.⁷" Therefore, the Court has already issued orders for the control of air pollution and sustainable protection of the environment
24. In order to control air pollution, the concerned authorities must continuously carry out studies and research on the number and road quality and capacity of all vehicles being operated in the transportation sector, they should from time to time conduct a review of the pollution standard and rigorously implement them and make notable improvements and strengthen the existing policy, legal and institutional arrangements and capacity and with the participation of the general public they should formulate promotional, preventive and remedial programs and implement, monitor and evaluate the same. The Government of Nepal and all concerned authorities should pay attention in the execution of the orders made through judicial activism by this court and its subordinate courts.
25. Therefore, based on the aforementioned facts, legal arrangements, propounded principles, and commentaries, the primary duty of the government is to promote the right to life and interests of its citizens. To fulfill this duty, the State must provide a healthy environment for its citizens. Likewise, it is the State's responsibility to make necessary decisions or cause to make necessary

⁷ Nepal Law Magazine 2047 Vol. 6 Decision No. 1829

decisions within the limits and scope of its constitutional and legal arrangements, and implement or cause to implement those decisions. The State has a responsibility to implement and enforce or cause to implement and enforce the aforementioned policies and laws to control pollution caused by the transportation sector, which is one of the major contributor to environmental pollution. In this context, instead of curbing the purchase and sale of vehicles that causes adverse effect to the environment, the government while determining the tax rate should determine the tax on the basis of the principle that the polluter must pay (Polluters Pay Principle). To ensure that the public can enjoy the right to life in a clean environment as guaranteed by the Constitution, tax policies, rules, and laws should be formulated to promote the production and use of clean, renewable, or green energy, gradually and systematically reducing dependence on polluting energy sources like petrol and diesel, and replacing them with clean energy. To this end, an order of mandamus is hereby issued by this Bench directing the government to determine and implement tax rates while ensuring a balanced protection of the right to a healthy environment as provided by the Environment Act, and take necessary precautionary measures to control and prevent air pollution. Furthermore, an order of mandamus is issued in the names of the respondents directing them to draft a separate work plan to protect pollution of the environment and to create a conducive environment allowing for the enjoyment of right to clean environment.

26. One of the challenges of fully implementing electric vehicles is the management of the batteries of the electric vehicle. Various countries are involved in the research for resolving and managing this problem. In order to regulate electric vehicles, the United States has recently passed the Senate S.4057 - Strategic EV Management Act of 2022, which addresses issues such as what can be done for management of batteries of the electric vehicle battery⁸ In the context of Nepal, the electric vehicles are a good alternative from an environmental perspective, however, the fact that batteries will need to be replaced after a couple of years and unplanned management of the batteries will have an additional impact on the environment is an issue that needs to be considered. In some countries, used batteries are given a "second life" and are being reused according to their capacity. Therefore, what can the standards be for recycling or reusing the batteries used in electric vehicles? Nepal should immediately carry out a study on the effective management of batteries of electric vehicles and determine as to whether or not it is feasible to establish a recycling or reuse plant and its subsequent operation in Nepal and also determine how beneficial it would be? The Bench hereby directs the respondents to form a Task Force within 3 months from the date of receipt of this decision and carry out a study to ascertain other alternatives for management of batteries and develop strategies for resolving and managing the batteries without causing pollution.
27. In order to make the use of electric vehicles more convenient and attractive charging of the batteries of such vehicles is important. The charging station should be sufficient and adequate and the charging capacity should also be good and effective allowing the battery to be charged within a short period of time. Therefore, the Bench directs the respondents to take necessary and appropriate initiatives in making the charging of electric vehicles reliable and effective.
28. For the purpose of sustainable environmental protection there are various alternatives to electric vehicles and from among the alternatives there are Hydrogen Fuel Cell Vehicles, Biofuel Powered Vehicles, Green Methanol Powered Vehicles, Plug-in Hybrid Vehicles, including electric vehicles. The Bench hereby directs the respondents to find the best option from among the alternative and create an environment to promote the use of the best option for transportation.
29. Several orders published in Nepal Law Magazine 2074, Vol. 4, Decision No. 9577, Nepal Law Magazine, 2074, Vol. 6, Decision No. 9829, Nepal Law Magazine 2075, Vol. 10, Decision No.

⁸ <https://www.congress.gov/bill/117th-congress/senate-bill/4057>

10109, Nepal Law Magazine 2075, Vol. 11, Decision No. 10131, Nepal Law Magazine 2076, Vol. 3, Decision No. 10210, Nepal Law Magazine, 2076, Vol. 11, Decision No. 10380 relating to control of air pollution has been rendered by this court. In order to monitor the execution of the orders made by this court a Judgment Execution Directorate pursuant to Rule 129 of the Supreme Court Regulation, 2074 has been established and operational. The Office of the Attorney General pursuant to Sub-Rule (1) of Rule 11 of the Government Attorney Rules, 2077, has been corresponding with relevant constitutional bodies, ministries, secretariats, departments, or other government offices regarding the implementation of the judgments and orders of this court and its subordinate courts. However, these infrastructures also need cooperation from other relevant sectors. Pursuant to the rejoinder submitted by the Office of the Prime Minister and Council of Ministers of the Government of Nepal, the rejoinder states that each ministry has a separate mechanism for implementing orders, and pursuant to a decision dated 2067/11/17 (corresponding to 1 March, 2011) by Nepal Government Council of Ministers, an Order Implementation Monitoring Committee has been formed and therefore, it appears that mechanisms are in place in each ministry. An order of mandamus is hereby issued in the name of the respondents to prepare an Execution Strategy Report within 6 months from the date of receipt of this order directing the Judgment Execution Directorate under this court to coordinate with the Judgment Execution Committee under the Prime Minister's Office and with other relevant ministries and with the Order Execution Monitoring Committee under the Office of the Attorney General to collect the orders and judgments made in relation to protection of environment and control of pollution and provide a status of their execution, availability, challenges in its execution, responsible agencies for execution, parties causing obstacles and identification of such elements and to implement and cause to implement the execution of the judgments pursuant to the study report.

30. It is hereby ordered to provide a copy of the order to the respondents through the Office of the Attorney General and pursuant to Rule 127 (4) of the Supreme Court Regulation, 2074 to provide a notification of this order to the Judgment Execution Directorate.
31. It is hereby ordered to remove the writ petition from the diary and to enter this order in the electronic system and return the case file to the Record Section.

Justice Sapana Pradhan Malla

Consenting with the above Opinion

Justice Sushma Lata Mathema

Bench Officer (Under Secretary): Nirajan Sharma

Research Assistant (Intern): Rojina Shrestha

Computer Operator: Chandra Timala

In the year 2079 BS, of the Month of Ashar Date 3 Day 6

(Corresponding to the Year 2022 of the month of June date 22 Day 6)