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“QUALITY AND DIVERSITY”

The Nation Still in Daze, the Need to Race Out Of the Incompetent Maze:

Sustainable Development (SD) Laws and Nepal

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Abstract

All societies alike have made efforts on socio, economic, political transformations in order to suit their particularized historical, cultural conditions. In this process, that, the development needs a holistic approach over just the 'economic growth' approach, ineludibly, became the pragmatic recourse to agree upon by the human kind. In other words, this norm creation of 'sustainable development' has been expanding in its scope to encompass the determinations of what needs to be done, and what needs to be checked. In the backdrop of a liberal economic system that Nepal attempts to reap benefits from, the backfiring of myopic policies has hit us, as the society fails to create self sustaining legal system in the present scene, where the country is required to juggle with three goals simultaneously, economic development, environmental soundness and human rights for the social uplift. The paper deals with these areas of concern, in order to outline the need for sustainability in Nepal through a more prudent set of laws, and their implementation which can work efficiently in rapidly changed social conditions of this nation, to address and provide better working outcomes to start with, for the future generations.

Development laws - a never ending ninety degrees uphill climb?

During the days of the law school, time and again the author of this paper would contemplate building a development related legal regime is, indeed, a task more challenging than that of Hercules, who could afford to remain focused on competence building in the arena of physical invincibility, whereas,

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the goals and the scope of development laws are astoundingly humongous. First off, this deals with the most complex animate subject of this world - human beings, second subject is the whole encompassment of inanimate resources, which need to be utilized well, and third, the regime should be built relating to forms of behaviour of human beings in their interactions with resources extraction, mobilization, reaping their benefits along with their social, economic, political, scientific/technological dynamics. Hill enough!

Hence, Pound envisioned 'social engineering' through laws pointing how legal theory is very resistant to change and usually lags a generation behind changes in philosophical ideals², and legal experts have been putting in efforts along Pound's ideas, in the line of pragmatism³, growing distinctly more pronounced since the mid 1900s, when scientific and technological leaps bombarded the society with rocket paced questions on forming rules about emerging issues, global level economic liberalizations, resource utilizations, genetic engineering, to name a few. In this race of developed nations setting standards of definitions and forms of controls in the neo liberalism age of the development process, it is evident the developing nations did not have much of a say, except to keep stumbling along in nods facing multitudes of layers of negative impacts with what standards were being laid down, for example the much debated Structural Adjustment Programs (SAPs) of the IMF⁴. It must be confessed that any standards set will have their own strengths and shortcomings in the impacts regardless of who makes them, nonetheless who has made the standards' will turn a normative question of the fairness and justice in the process of setting standards. Studies of literature expound how the rules of free market economy were laid down for the definitions of development by western centric norms, for the benefits of already highly developed nations of the era⁵. On the other hand, the camp of scholars cried hoarse on alternative definitions of development opposing economic growth,

² See Linus J. McManaman, 'Social Engineering: The Legal Philosophy of Roscoe Pound', *St. John's Law Review*, 1958 available at: <http://scholarship.law.stjohns.edu/lawreview/vol33/iss1/1>, accessed on 20 July 2014.

³ Paul Sayre, 'Book Review: The Legal Philosophy of Roscoe Pound', vol. 57, *Harvard Law Review* 581, 1944, pp. 584-85.

⁴ Charles Gore, 'The Rise and the Fall of the Washington Consensus as a Paradigm for Developing Countries', vol. 28, *World Development* 789, 2000, pp. 789-804. Also, see generally Noam Chomsky, *Profit over People – Neoliberalism and Global Order*, Seven Stories Press, New York, 1999.

⁵ David M. Kotz, 'Globalization and Neoliberalism', vol. 12, *Rethinking Marxism* 64, 2002, pp. 64-79.

cited concepts such as the need for actual happiness of people in the society as more important admonishing, and chastised the mainstream definition as a marginalized one, yet assertively appealed forces⁶. For the purpose of this paper, this paper does not go into the direction of proving or disproving how politics plays a role in the definitions⁷, what happened back then or is happening now, neither the repercussions associated with it, rather, this paper delves to discuss how Nepal, as a developing country, has struggled to create a legal framework to reap benefits for development, trying to play in an already dominating definition of the development systems operating currently.

Indeed, these days, we are dealing with a lot of issues regarding development, such as resources crisis, management of existing resources, accessibility issues, and the problem of sustaining the generations as the environmental hazards of climate changes proliferation that is bound to hit developing nations as Nepal will be even worse.

It is for certain that we have to acknowledge that the concept of development will always be a relative one, dependent on the interplay of numerous actors and factors, making an impact in a given societal nature, in a specifically given period of time⁸. So, to compare eras would be faulty if all these variables are not well calculated before pointing towards conclusions.

Nevertheless, the question remains - is Nepal, as a nation, doing the best in this societal context and time? Are the standards set by international setting good enough for us to make them applicable, and whatever standards we are relying to work on, are they effective enough? This paper attempts to discuss the overall set

⁶ For detail, see 'The Concept of Development' in Hollis B. Chenery & T. N. Srinivasan (eds), *Handbook of Development Economics*, North Holland Press, Amsterdam, 1988, pp. 9-26; The authors makes a discourse on the theories of development and underdevelopment, developmentalist theories of economic development and heterodox theories of economic development. Furthermore, they also discuss the issues of the structural transformation, endogenous growth theories and new strategies for development. Also, see generally James M. Cypher & James L. Dietz, *The Process of Economic Development*, Routledge, London, 2004.

⁷ In an article, Helen Milner discusses how process of democratization help fostered economic globalization. See Helen Milner, 'Why the Move to Free Trade? Democracy and Trade Policy in the Developing Countries', vol. 59, no.1, *International Organization* 107, 2004, pp. 107-144.

⁸ Gilberto Gallopin, *Sustainability Assessment in Latin America and the Caribbean, A systems approach to sustainability and sustainable development*, Government of the Netherlands Project NET/00/063, 2003, p.7; David Kennedy, 'Laws and Development', in John Hatchard & Amanda Perry-Kessaris (eds), *Law and Development: Facing Complexity in the 21st Century*, Cavendish Publications, London, 2003, pp. 17-26.

of Nepal's laws relating to sustainable development(hereinafter SD) and the areas of concerns for attention to be addressed by the current legal regime.

SD Definitions and its Pillars Rising Vertical, Expanding Horizontal

SD is a very tricky and highly contested concept. To be frank, at the outset of this chapter, there is a whole bloc that regards SD as an elusive oxymoron, fundamentally having contradictions and irreconcilability, and their questions are valid⁹. How can we weigh whose protection is more important in a given context? How are priorities to be allocated when interests of different parties run the opposite poles? So, it is to be borne in mind that there are a lot of politically driven influences and power play for its definitions, then, now and will remain so in the future. Thus, SD is an expanding or contracting concept depending on the emerging issues backed by normative push by the actors behind it. Literature shows, while conventionally speaking, SD took an approach of inter-generational equity regarding resources with environmental lenses, whereas now, SD is linked with the implications and issues from both specific and web of connectivity aspects, such as a child dropping out from a local school, frogs disappearing from ponds, growing cocoa crops in Africa, discriminatory wages to women in Indian farms to young person watching MTV in the urban setting. SD has, thus, become a matter of obsessive engagement from the UN platform's policy makers to the globally influencing celebrity's diet and clothing choices fads in popular culture of everyday life.

Despite contentions, it ought to be realized that any attempt in defining a difficult concept always starts with fuzzy and debatable matters. But the quest for a more intelligibly acceptable one, is not to be halted. To start with, the western system has institutionally systematized and laid down 'economic

⁹ Herman E. Daly first coined the label of sustainable development notions being an 'oxymoron' one, and 'sustainable growth' as an impossible theorem. Daly challenges the conventional economic approach of growth being good on how the concept of SD is being made meaningless given how economic interests always supersede over ecological ones. See Herman E. Daly & Beyond Growth, *The Economics of Sustainable Development*, Beacon Press, United States, 1996; Also see Peter Bartelmus, 'Sustainable Development-Paradigm or Paranoia?', *Wuppertal Institute Papers*, 1999 available at <http://econstor.eu/bitstream/10419/49099/1/300714491.pdf>, accessed on 26 July 2014; Katrina Brown, 'Sustainable adaptation: An oxymoron?', *Climate and Development journal*, 2011 available at <http://www.ingentaconnect.com/content/earthscan/cdev/2011/00000003/00000001/art00003> accessed on 25 July 2014.

growth' as development. As mentioned earlier, any standard will manifest entrenched shortcomings later in impacts. When the evils of this economic growth, as development standard, brought forth multitudes of social, environmental, institutional, psychological problems¹⁰, a retake on the definition became imperative. Here marches in, what we know of as the concept of SD.

SD concept markedly gained attention in the academic and government circles in the 1970s for its policy initiatives.¹¹ The word 'sustainability' emerged to connote an economy in equilibrium with basic ecological support systems¹². Experts in this field came up with how and why it is important to 'limit growths'. Subsequently, the most famous definition on SD as of yet was produced by Bruntland Commission in 1987 as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. Although, definitions are always incapable of being completely comprehensive, this definition, *albeit* an idealistic one, does lack even the broadest premise of the 'how' aspect of reaching the goal. Further processes of clarifications followed through UN Conferences, *Agenda 21*, formation of Commission on SD and other conventions. For example, principle 4 for the *Rio Declaration* made it clear that environmental protection shall constitute an integral part of the development process. Then it goes on to encompass the importance of social considerations to take into account for the attainment of the goal, wherein principle 5 regards poverty eradication as an 'indispensable requirement for sustainable development'. That the 'interest of indigenous peoples and communities' should be supported were recognized in principle 22. With 2002 World Summit on SD, a further expansion was marked

¹⁰ Robert W. Kates, Thomas M. Parris & Anthony A. Leiserowitz, 'What is sustainable development? Goals, Indicators, Values and Practice', vol. 47, *Environment: Science and Policy for Sustainable Development* 8, 2005, pp. 10-11.

¹¹ Michael Schaper, 'The challenge of environmental responsibility and sustainable development: Implications for SME and entrepreneurship academics', *Radical changes in the world: Will SMEs soar or crash*, 2002 available at <http://cob.nmu.edu/amtman/Lavras%20Course%20Materials/challenge%20of%20environmental%20responsibility%20and%20sustainable%20development%20Implications%20for%20SME%20and%20entrepreneurship%20academics%202002.pdf> accessed on 19 July 2014.

¹² Robert L. Stivers, *The Sustainable Society: Ethics and Economic Growth*, Westminster Press, Philadelphia, 1976.

with the recognition of three pillars: Economic, Social, and Environmental as 'collective responsibility'¹³.

Following paragraph summed up by Cotula¹⁴ encapsulates the essence of how the concept of SD continued growing in the scope and understanding:

While the Rio Declaration placed much emphasis on balancing economic development and environmental sustainability, subsequent summits have more fully recognised the importance of social aspects in sustainable development. Taking social considerations seriously means that even an investment that is economically beneficial to the country as a whole (for example in terms of gross domestic product or public revenues) cannot promote sustainable development if affected people are arbitrarily dispossessed of their land, if they are oppressed by security forces, if they do not benefit from the deal, or if they have no mechanism to voice their grievances.

Thus, the elements for attainment of SD have metastasized in spectrum beyond the traditional understandings of taking just positive approaches towards higher dimension now, by the creation of checkpoints determinations what will not make it realized, for example, displacement of people while setting up an economic project in the area. It must be mentioned that the understanding of SD also no longer remains a separate branch to be dealt with, but needs a more integrated approach¹⁵ with and applied, but a matter that is to be ingrained in all aspects of development related law-making. This would be something analogous to how women's rights largely meant suffragette rights and property rights issues, back until the 1920s; as of now, it is absorbed in each piece of law making as if a *sine qua non* element of a piece of legislation such as gender budgeting, inclusiveness in decision making, implementation bodies. SD

¹³ *The Johannesburg Declaration on Sustainable Development*, UN Doc. A/CONF.199/20, adopted on 4 September 2002; Kates, Parris & Leiserowitz (n 10), p 12.

¹⁴ Lorenzo Cotula, *Foreign investment, law and sustainable development, A handbook on agriculture and extractive industries*, International Institute for Environment and Development, London, 2014, p.8.

¹⁵ John Robinson, 'Squaring the circle? Some thoughts on the definitions of Sustainable Development', *Ecological Economics*, 2004 available at http://www.buyteknet.info/fileshare/data/ambides_lect/Robinson.pdf accessed on 19 July 2014.

definitions in the same way, has marched towards an integral body of law in a growing manner through webs of inter connectedness and linkages¹⁶.

Laws as Bricks and Mortars to Create the Building Blocks of Development

Law is a greatly important means for balancing interests and mediating competing claims, and it is an instrument seen as both a reflection and instrument of social order¹⁷. This means that legal structure is significant for creating a system of substantive power holding issues and procedural aspects, benefits, impacts to people, resources, and institutions¹⁸. Take for example, the national interest of generating more GNI through hydropower business privatization. The laws of the host country regulates the nature of water resources holding rights of the area, taxes, the rights of the domestic or foreign investors out of the profits, and the protection clauses for the interests of the locals, their traditional uses of such water resources or other environmental resources based in the demarcated area. Alongside, major issue may arise as regards the irrigation uses of the same water (another economic activity for development) in practice, which might already be detrimental to the purposes of hydropower generation.

To add to the scene, there are a bunch of international laws, including the human rights laws co-applicable leading to situations such as international protection of business investors v. human rights of the displaced people¹⁹, that also come into play as to what extent they will be applicable in consonance or in conflict with the national policies/laws regarding this new project of hydropower liberalization. The whole body of contractual laws involving national and international laws, issues of court jurisdictions, product standards set by international laws regarding the use of safety/green technology,

¹⁶ *Ibid.*

¹⁷ As Gregory C. Shaffer and Mark A. Pollack write, 'many conceptions of the relation between law and social order view as either a "mirror" of the social order or as an "engineer" of it'. According to the first view, the content of law mirrors the content of prevailing social norms. In other words, law is a reflection-a 'mirror of society'. Brian Z. Tamanaha, *A general Jurisprudence of Law and Society*, Oxford Socio Legal Studies, London, 2001; Lawrence Friedman, 'Borders: On the Emerging Sociology of Transnational Law', vol. 32, *Stan. J. Int'l Law* 65, 1996, p.72; Also, see Roscoe Pound, *Social Control Through Law*, Yale University Press, New Jersey, 1942 in Gregory Shaffer & Mark A. Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance', vol. 94, *Minnesota Law Review* 706, 2009, pp. 706-799.

¹⁸ Cotula (n 13), pp.21-26.

¹⁹ *Ibid.*

grievance mechanisms, reputational damage concerns are a broad range of multifaceted factors, in which the whole web of development interactions cannot escape globalized matters even in the tiniest of local ventures.

Raw, Scattered, Some Picked for Deliveries, Others Mostly Neglected, Smashed or Left to Rot--SD Laws of Nepal?

Interestingly, towards the latter times in Nepal, all the laws relating to SD have come in the form of soft laws; as policies, strategies, guidelines, plan of actions²⁰. No law for an overarching encompassment of SD in mandatory laws can be found by the way of permanency-seeking Acts and Rules. Take for instance, *SD Agenda 2002*, *Water Resources Strategy 2002*, *Leasehold Forestry Policy Guidelines 2003*, *National Agriculture Policy 2004* and *Climate Change Policy 2011*. In a country where the enforcement of mandatory laws such as of Acts turns out a painstaking process that has to be lobbied for by pressing interest groups; policies, as we know, have even a weaker predicament as they can only remain soft laws that can be overridden and ignored very easily. So, for an area that dominantly has an enforcement problem²¹, this non-incorporation of sustainability related issues in hard laws, is a threshold problem at the outset.

²⁰ Before 2000 AD the enactment of: *National Park and Wildlife Conservation Act*, 1973, Nepal; *National Park and Wildlife Conservation Rules*, 1974, Nepal; *The National Forestry Policy* (herein after NFP), 1976, Nepal; *Leased Forest Rules*, 1978, *Watershed Conservation Act*, 1982, Nepal; *King Mahendra Trust for Nature Conservation Act*, 1982, Nepal; *Soil and Watershed Conservation Regulation*, 1985, Nepal; *National Conservation Strategy*, 1987, Nepal; *Nepal Environmental Policy and Action Plan* (hereinafter NEPA), 1993, Nepal; *Forestry Policy*, 1992, Nepal; *Hydropower Development Policy*, 1992, Nepal; *Industrial Policy*, 1992, Nepal; *National Shelter Policy*, 1996, Nepal; *Buffer Zone Management Regulation*, 1996, Nepal; *National Solid Waste Management Policy*, 1996, Nepal; *Environment Protection Act*, 1996, Nepal; *Environmental Protection Rules*, 1997, Nepal; *Buffer Zone Management Guidelines*, 1999, Nepal; After 2000 AD, the formulation of : *Sustainable Development Agenda for Nepal* (hereinafter SDAN), 2002, Nepal; *Nepal Biodiversity Strategy*, 2002, Nepal; *Nepal Biodiversity Strategy Implementation Plan*, 2006-2010, Nepal; *National Wetland Policy*, 2002, Nepal; *Water Resources strategy*, 2002, Nepal; *Leasehold Forestry Policy Guidelines*, 2003, Nepal; *National Action Program on Land Degradation and Desertification*, 2004, Nepal; *National Agricultural Policy*, 2004, Nepal; *Community Forestry Guidelines*, 1996 (revised in 2002 and 2005), Nepal; *Agro-biodiversity Policy*, 2007, Nepal; *National Adaptation Programme of Action* (hereinafter NAPA), 2010, Nepal; *Climate Change Policy*, 2011, Nepal.

²¹ See generally Gregory L Rose, 'Gaps in the Implementation of Environmental Law at the National, Regional and Global Level', *First Preparatory Meeting of the World Congress on Justice, Governance and law for Environmental Sustainability*, Kuala Lumpur, Malaysia, 18 July 2014 available at

Major Areas of Concern

The Economic Pillar

While discussing Nepal's approach in strengthening the three major pillars of SD, it will be vital to understand the government's official recognition of where the country stands. The author starts out with the Economic Pillar. Economic development has been a prime area of goal manifested by the *Interim Constitution of Nepal, 2007* which has mentioned about reaching this goal through various provisions.²² Moving towards our latter status, that is, where we have reached in building the economic pillar, first, the report submitted by Nepal in the 2012 UN Conference on SD (Rio +20) sums up that 'there has been a good progress in terms of poverty reduction and towards attaining the MDGs',²³ Issues of 'distributional inequalities, multi dimensionality and complexities of poverty' require to be taken into account, and the creation of investment friendly environment and promoting private public partnerships are essential, according to the report²⁴. However, although, the body of laws such as Industrial Policy, *Hydropower Policy*, *Foreign Investment, Trade and Technology Transfer Act* and the much hyped one window policy are brought into the legal framework, we do not see efforts for the same, with a macro level clarity of approach on how investment friendly environment and promoting private public partnerships are to be done both in integrated manners and specific approaches, singling out the areas of agricultural produce increment, industrial productions, channelling remittance income and the sectors of energy, transport and tourism.

Second, while making attempts to improve the economic pillar, the author must draw the attention to the inherent paradox of having to improve it at the cost of costs of social and environmental factors. Nepal's laws are unclear about what happens when the trade regime related aspects conflict with social/environmental priorities? The interest of a private industrialist whose venture could provide

<http://www.unep.org/delc/Portals/24151/IssueBriefTheme3.pdf>, accessed on 18 July 2014.

²² *Interim Constitution of Nepal, 2007*, preamble, arts. 21, 33- 35.

²³ National Planning Commission, 'Nepal Status Paper', *United Nations Conference on Sustainable Development 2012 (Rio+20)*, Rio De Janeiro, Brazil, 20-22 June 2012 available at <http://sustainabledevelopment.un.org/content/documents/1018nepalnationalreport.pdf>, accessed on 18 July 2014.

²⁴ *Ibid.*

employment, helping over a million people lift themselves out of poverty; but, it could come with the cost of massive deforestation and/or displacement of hundreds of thousands of people, dismantling the already existing local market by replacing it with imported goods. Which takes the favoured lead? How is such a process spelled out by law? What are the rules of deciding among various goals? How are these disputes to be resolved legally? On these questions, the Nepalese laws are mum.

As Nepal is a party to both, the environmental instruments related to SD and the instruments of WTO, Bretton Woods and International Financial Institutions, Nepal needs clarity of approach in harmonizing two kinds of opposing goals. Literature review, in this regard, points towards the need of the same in every national piece of legislation²⁵. It needs to be also underlined that applying SD as a central principle within the WTO framework²⁶, developed nations can set bars to the restrictions in the import of the goods that fail to meet the production quality recommended by the SD standards, thereby, barring a lot of goods produced by developing countries, including Nepal²⁷. One of the extreme issues relating to this is the use of child labour or more subtle issue of workers working without green economy technology work place standards. Thus, it is time for Nepal to figure out what needs to be done about these issues, what would be the monitoring bodies, How the standards are to be enforced, among other things, in order to keep playing in the global economic regime.

The third aspect is a failure in synchronization of laws addressing economic, social and environmental factors. Major conflicting areas include the issues of development pursuance as a national interest v. the human rights of the people in defining their own development needs and issues (that a development

²⁵ Cotula(n 14).

²⁶ First sentence of the preamble to the *Marrakech Agreement*, the founding agreement of the WTO, 1994 mentions of the objective of SD; Emily Lydgate, 'Sustainable Development in the WTO: From Mutual Supportiveness to Balancing', vol. 11, *World Trade Review* 621, 2012, pp.621-629.

²⁷ Article XX of the GATT lays out a permission of unilateral trade restrictions under particular circumstances, for example, where it is 'necessary to protect human, animal or plant life or health' and those 'relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption'; A Report by the World Growth discusses how the regulation of sustainability of traded goods have directly brought forth the issue of developed nations pursuing 'protectionism' at the cost of impacts on developing nations. See World Growth, *Abuse of Sustainability Standards, An Attack on Free Trade, Competition and Economic Growth*, 2011.

project ensues, such as displacement, loss of livelihood etc.) as seen in the past in *Arun III case*²⁸ and lately in *West Seti case*²⁹. Very recently, the issue of Indian government showing interest to support a large scale hydropower project in Nepal has been on the news, which means that the State's political interests is pushing it to the direction to a quagmire³⁰. As Nepalese, we complain about lack of grand scale investments in the nation, but we are less bothered to strengthen our feasibilities and capacities to create a conducive environment for them, or develop alternative approaches. Foreign investments

²⁸ For details on the social and political aspects of readings on this case, see, Bipin Pokharel, 'NRSC 616 Project Paper: Power Shortage its impacts and the Hydropower Sustainability Assessment Protocol: in the context of South Asia', *World Bank*, 8 December 2010 available at

[http://lnweb90.worldbank.org/exteu/SharePapers.nsf/\(ID\)/9FC30006ED600CA08525785E00780506/\\$File/nrsc_616_project_paper_bipin_pokharel.pdf](http://lnweb90.worldbank.org/exteu/SharePapers.nsf/(ID)/9FC30006ED600CA08525785E00780506/$File/nrsc_616_project_paper_bipin_pokharel.pdf) accessed on 22 July 2014; See The Inspection Panel Report on Request for Inspection Nepal, Proposed Arun III Hydroelectric Project and Restructuring of the Arun III Access Road Project, (Credit 2029-NEP)Request No. RQ94/1', *World Bank*, 16 December 1994, p. 13 available at http://www.wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2004/04/23/000265513_20040423154049/Rendered/PDF/28475.pdf, accessed on 5 July 2014; For a viewpoint of the finance minister of the then existing government of Nepal, see 'The Loss of Arun III', *Nepal Study Center, University of Mexico* available at <http://nepalstudycenter.unm.edu/MissPdfFiles/The%20Loss%20of%20Arun%20IIIRevised.pdf>, accessed on 17 July 2014.

²⁹ See Nepal West Seti Hydroelectric Project, *Restoration of the livelihoods and income, Summary Environmental Impact Assessment*, W. Seti Hydro Ltd. for the ADB', *Asian Development Bank*, 2007 available at <http://www.adb.org/documents/environment/nep/40919-nep-seia.pdf>, accessed on 18 July 2014; Mukul Humagain, 'West Seti Hydropower Co poised to Lose License', *The Kathmandu Post*, July 2011 available at <http://www.ekantipur.com/the-kathmandu-post/2011/07/25/money/west-seti-hydropower-co-poised-to-lose-licence/224439.html>, accessed on 26 July 2014; 'Delay prone West Seti Hydropower Plant in Limbo', *Business Monitor International*, August 2014 available at <http://store.businessmonitor.com/article/500791>, accessed on 4 August 2014; Ramesh Prasad Bhusal, 'Chinese firm eyes West Seti Project', *The Himalayan Times*, May 2011 available at <http://damsandalternatives.blogspot.com/2011/05/chinese-firm-eyes-west-seti-project.html>, accessed on 2 August 2014.

³⁰ Kamal Raj Dhungel, 'Nepal, India and Hydropower Potential', *Nepal News*, October 2012 available at http://www.nepalnews.com/archive/2010/others/guestcolumn/dec/guest_columns_03.php, accessed on 23 October 2014; Nepal Energy Forum, 'Nepal Maoist Party Opposes Indian Investment in Hydropower Sector', *Nepal Energy Forum* available at <http://www.nepalenergyforum.com/nepal-maoist-party-opposes-indian-investment-in-hydropower-sector/> accessed on 20 October 2014; 'Nepal to propose India to build high capacity transmission', *Republica*, July 2014 available at http://www.myrepublica.com/portal/index.php?action=news_details&news_id=79969, accessed on 30 July 2014.

are always politicized regardless of delving into the research of the objectivity of the economic benefits it might bring to the country. John Anthony VanDuzer et al, comment with precision of hitting the heart of the matter:

many developing countries do not possess the technical capacity or the physical and institutional infrastructure to regulate the environmental or the social effects of foreign investments effectively. The problem is sometimes political – industry lobby groups and various political interests may make it difficult for governments to regulate or control foreign investors effectively.³¹

Similar issues of concerns were raised in Nepal in the ‘Hybrid Maize Controversy’ of Monsanto related potential agriculture agreement by the government being not in consonance with farmers' rights protection issues, at the same time, curtailing consumers’ rights of not wanting to choose genetically modified seeds³². In hydropower related economic aspects, a culture of any new potential venture go crashing due to the politicization of the matter, and this scenario is seen recurrently in Nepal rather than efforts in resolving the issue through a legal paradigm.

Another scenario is: rules are now made for foreign employment as regards who can go abroad for it and how they can go; but for such an income generating activity, growing in a prolific manner by leaps and bounds, where are the laws about foreign employment bandwagon trend drawn in consonance with SD? The plight is seen in the remittance tragedy of the country; remittance is the second largest source of income of Nepal after agriculture³³. Yet, the State has failed to come up with laws to tap in the remittance income for national development related goals, where overwhelming of such income has been flowing awash to the foreign countries consuming their goods. In this situation, how could we, the Nepalese, curb this problem, when an economic legal regime is almost invisible when the national set of laws is looked into. In the name of an aim to promote the employment sector, we have, thus, created a system where we stare bluntly at the labour rights of Nepalese violated abroad, while hard earned remittances are flowing even more quickly than they came,

³¹ John Anthony VanDuzer, Penelope Simons & Graham Mayeda, *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators*, Commonwealth Secretariat, London, 2013, p. 255.

³² PragatiShahi, ‘Hybrid Maize Controversy: Nepali Officials deny Monsanto Deal’, *The Kathmandu Post*, Kathmandu, 9 November 2011.

³³ Nepal Status Paper (n 23), p. 19.

back to where they originated for consumption of imported goods with the nation left with neither the sturdy human resources nor the capacities to tap in the financial resources they've been sending home. Supporting this kind of model of development legal framework is proving costly to Nepal, and the plight could, inevitably, only worsen if steps to correct the shortcomings are not hastened.

In the like approach, the tourism sector can be evaluation, where the goal of eco-tourism policy is for poverty alleviation, but policies and strategies fail to address directly interlinked aspects of environmental planning, urban and rural planning, waste management, traffic regulations and energy utilization³⁴. The sustainability factor by using the revenue generated from tourism to be used in community involvement, environmental conservation and diversifying the link with cottage industries, promotion of local crafts are not being implemented through laws³⁵.

The Social Pillar

Exploring the social pillar of SD, in relation to where Nepal stands, the government's report concedes the fact that the agenda of 'social inclusion' became a national focus in legislative framework only after 2006s people's revolution, thus, making it quite an emerging area of legal subject matter. The *Interim Constitution of Nepal* envisions social development through devolution, decentralization, gender equality and social inclusion³⁶. To further break down, the social agenda includes areas of poverty combating, reducing inequality, health and facilities, improving access to resources and participation in decision-making process, which have been outlined as plan of action following the *Agenda 21* of the *Rio Declaration*. By far, Nepal has made progresses through the constitutional provisions guaranteeing basic human rights, such as right to education, employment, social justice and health as fundamental rights enforceable to the extent of their capacities by the government. Women's rights of equal pay, special protection in reproductive rights and against torture, violence are particularly well protected by the Constitution³⁷. Similarly, it imbibes the aspiration of devolution and decentralization, along with protection and promotion of marginalized section

³⁴ HariNath Yogi, 'Eco tourism and sustainability opportunities and challenges in the case of Nepal', Department of Sustainable Development, University of Uppsala, 2010, p. 50.

³⁵ Ibid.

³⁶ *Interim Constitution of Nepal*, 2007, arts 138-140, 13, 20 and 33-36.

³⁷ *Interim Constitution of Nepal*, 2007, art 20.

of people. Gender Equality and Social Inclusion (GESI) strategies and Gender Responsive Budget (GRB) in all areas through executive bodies are some major examples how the government is trying to create a holistic and integrated approach to laying down foundations of the social pillar of SD³⁸.

Now, the first issue is that even though there are statistics proving improvements in poverty reduction, health, education, and attainment of the millennium development goals³⁹, the realization is still shallow when it comes to seeing the actual improvements in the society. The urban-rural divide, accessibility issues by the marginalized and socially deprived regions of the country, and the increasing gaps between the rich and the poor therein are glaring starkly amidst us. Government's status paper, itself concedes:

The number of underweight children below five is still 38.6 percent and 39 percent of children do not meet the expected growth levels. Likewise, 36.15 percent of the population (the poor and geographically and socially excluded groups) is still deprived of the minimum food requirement, and about 47 percent children under five years of age are stunted. Further, 38.8 percent of the people are either unemployed or underemployed and there is disparity in wages of men and women."⁴⁰

Although the Constitution makes proclaims the recognition of the right to food security and food sovereignty, it remains a farce, as the government is not backed up by an elaborate set of legislation pointing towards how it is to be attained.

Second, an area of concern is the implementation of indigenous people's rights over resources relating to the International Labour Organization's *Indigenous and Tribal Peoples Convention*, (hereinafter *ILO 169*). Although Nepal ratified it in 2007, its implementation has not been seen in substance, given how the indigenous people's standards of life actually still remain a critical area of concern and non-improvement over the past years, as compared to the overall improvements reflected in poverty reduction, education, health etc. The government's accountability is poorly reflected by the fact also, as not a single

³⁸ Nepal Status Paper (n 23), pp. 24-25.

³⁹ For detail, see Government of Nepal, *Nepal Human Development Report, Nepal Millennium Development Goals Progress Report, Nepal Living Standard Survey*, 2011 available at <http://www.npc.gov.np/new/uploadedFiles/allFiles/mdg-report-2013.pdf> accessed on 30 July 2014.

⁴⁰ Nepal Status Paper (n 23), p 25.

country report has been submitted to the *ILO 169* Secretariat. Furthermore, a draft strategy paper of the Nepal government regarding the domestic implementation of *ILO 169* remains unapproved till date. There are also concerns of how the set of rights under *ILO 169* are to be allocated and exercised in the emerging context of federalism that the Interim constitution has envisaged of.⁴¹

Third, accomplishments have been seen in the accessibility to forest and bio diversity resources by the communities. The government report mentions that ‘community forestry, which covers 31.62 percent of forest area (4.27 million ha.) (GON/MOF, 2011), is the most decentralized and relatively more successful in terms of social development’⁴², and the positive impacts on economic benefits out of use of resources have been reported to have reached the most marginalized sections of the communities⁴³. Despite the positive findings, the legal framework on community forestry, use of resources and mobilization lacks a visionary insight in keeping the decentralization concept of laws in this area intact from politicization. Dahal and Chapagain write, ‘Adoption of the decentralization policy in forestry has come about after a long journey along a rough road and its implementation is still selective.’⁴⁴ Deforestation, land use policies and rules tend to be bent according to the political manipulation of the each replacing governments and

This problem is very severe in the terai, where the government remains reluctant to implement decentralization policies. One reason the lessons of successful decentralized forestry in the hills have not been fully capitalized on in the terai has to do with the high value forest resources

⁴¹ *Ibid*, p.28.

⁴² *Ibid*, p.28.

⁴³ ‘In the seven districts, where the DFID-funded LFP is being implemented, average annual household incomes had increased by 61 percent in 2008. The highest increase has occurred for Dalits (93%), indicating that forestry has a high potential to contribute towards reducing poverty and inequality’. Nepal Status Paper (n 23), p. 28; ‘Despite having some successes, many studies on community forestry in Nepal have indicated that poor people are still not benefiting equitably. In some cases, their livelihoods have even been adversely. Studies have shown that local elites are benefiting most because they hold the powerful positions in the executive committees and can manipulate decisions in their own favour, ignoring the agendas of the poor and marginalized. The big challenge in community forestry, then, is how to overcome elite capture and make the whole process more equitable. Ganga Ram Dahal & Apsara Chapagain, ‘Community Forestry in Nepal: Decentralized Forest Governance’ in C.J.P. Colfer, G.R. Dahal & D. Capistrano (eds), *Lessons from Forest Decentralization: Money, Justice and the Quest for Good Governance in Asia-Pacific*, Earthscan Publications, London, 2008, p. 77.

⁴⁴ Dahal & Chapagain (n 43), p. 76.

there. Due to the lack of rights to management, local users are powerless spectators before powerful networks of illegal loggers who operate often beneath the very eyes of state authorities. Government still holds several rights, including land tenure. Abrupt decisions on the part of government such as imposing taxes on the revenues from forest product sale often make a mockery of the devolved system, at times breeding widespread suspicion and unpredictability.⁴⁵

Fourth, there are issues of the protection of labour and migrant workers abroad, given a situation where an increasing number of the national population has been seeking employment out of the country.⁴⁶ There is a gap in the legal framework in addressing the issues from a rights based approach, contract related obligations, protection of vulnerable groups and inadequate guarantees of transparency of the businesses involved in the area of migrant workers.⁴⁷ Issues of being underpaid in violation of the foreign country's standards, forced labour, harassments are to be seriously looked into for resolutions by Nepal against such violations of human rights.⁴⁸ Herein, cross cutting issue of women being more vulnerable with sexual abuses/harassment and vulnerabilities⁴⁹ out of the Nepalese territory are to be dealt with strongly by laws, by creating mechanisms for pursuing their prevention and smooth and convenient system/procedures for punishment and victim compensations measures, when incidents occur.

The Environmental Pillar

⁴⁵ *Ibid*, p. 77.

⁴⁶ *Foreign Employment Act (Baideshik Rojgaari Ain)*, 2007 (2064), Nepal and the *Foreign Employment Rules (Baideshik Rojgaari Niyam)*, 2008 (2064) are the major laws in existence, that largely regulate the issues of Nepali migrant workers with a few provisions for protection against discrimination and child labour.

⁴⁷ Sarah Polettiet et al., *Migrant Workers' Access To Justice at Home*, Open Society Foundations, Center for the Study of Labour and Mobility, Nepal, pp. 77-92.

⁴⁸ Various coverage by the media and investigative report. For example, see Pete Pattison, 'Revealed: Qatar's World Cup Slaves', *The Guardian*, September 2013 available at <http://www.theguardian.com/world/2013/sep/25/revealed-qatars-world-cup-slaves>, accessed on 12 August 2014; See also National Human Rights Commission, *Human Rights Situation of Nepalese Migrant Workers, Observation and Monitoring Report, South Korea and Malaysia, Nepal*, 2013 available at http://nhrcnepal.org/nhrc_new/doc/newsletter/HR%20situation%20of%20Nepalese%20Migrant%20Worker%20Report%20Aug30-Sept7-2013.pdf accessed on 12 August 2014.

⁴⁹ National Human Rights Commission Report (n 46), p. 45.

Nepal, as a party to numerous environmental instruments as the *UN Convention on Biological Diversity* (CBD), *UN Convention on Combating Desertification* (UNCCD), *UN Framework Convention on Climate Change* (UNFCCC) and the Kyoto Protocol, has shown some engagements through national plans and policies to incorporate the environmental conservation aspects. Nepal recognizes the problem of climate change and as a developing mountainous nation, has adopted the *Cancun Adaptation Framework*.⁵⁰ It has endeavoured to garner international attention, lately in the issue regarding the melting of glacier in the Himalayas, by organizing various programs calling for measures of protection, globally and nationally. One notable mention goes to the 2011 *Climate Change Policy* of Nepal, which has created some efforts through the *National Plan of Action* (NAPA), and by channeling 80 percent of the climate change funds through the mobilization of local agencies that relies on community based Local Adaptation Plan of Action (LAPA). The government report also states, 'Nepal is among the few pioneer countries to promote a clean and renewable energy path for low carbon emissions' and cites some success stories on carbon trade funds generation through Clean Development Mechanism (CDM), envisioned by Kyoto Protocol, as an area of leverage for the country. Likewise, the arena of REDD+⁵¹ are in the initial stages of implementation.

From the Constitutional and human rights perspective, the *Interim Constitution of Nepal, 2007* has guaranteed the right to live in clean environment as a fundamental right putting responsibilities on the state to 'make necessary arrangements' for the clean environment, 'prevent further damage due to physical development activities', protect 'forest, vegetation, and biodiversity, its sustainable use and for equitable distribution of the benefit derived from it'.⁵² As stated earlier, while sensitivity towards sustainability were shown from the eighth plan that elaborated on agriculture and forest productivity along with maintenance of sustainability, last two interim plans have focused much on environmental sustainability, living standards and economic growth. The concern of the need for integrated environmental policy and the integration of environmental conservation in socio-economic development policy and

⁵⁰ Nepal Status Paper (n 23), p. 32.

⁵¹ (UN) Reducing Emissions from Deforestation and forest Degradation in developing countries (REDD) was launched in 2008 and works with Food and Agricultural Organization (FAO), United Nations Development Programme (UNDP) and United Nations Environment Programme (UNEP).

⁵² *Interim Constitution of Nepal, 2007*, arts. 16 and 35 (5).

programs are equally stressed by the running periodic plan.⁵³ Institutionally speaking, it was right after Rio Conference that the Environmental Protection Council (EPC) (in 1992), following which, two major environmental protection related provisions were endeavoured through obligatory laws such as *Environment Protection Act (EPA)* 1996 and *Regulations*, 1997. In addition, guidelines of Environment Impact Assessment (EIA), and Strategic Environmental Impact (SEA), for assessing the impacts of any developing project have been enforced mandatorily within the environmental legal paradigm of Nepal. Alongside, National Council for the Conservation of Natural and Cultural Resources (NCCNCR) (1989), the Environment Protection Council (EPC) (1992), National Commission on Sustainable Development (NCSD) (2002), Climate Change Council (CCC) (2009), Climate Change Management Division, Climate Change Initiative Coordination Committee (CCICC) are working to implement various environmental commitments of the nation.

Even though the legal efforts look promising and well spanned out, the actual implementation aspects are very disheartening. Take for instance, the provision of an Environmental Inspector to monitor all environmental related standards of pollution etc., in the *Environment Protection Act (EPA)*. This body had not been set up in all stubbornness by the executive organ of the government until 2008⁵⁴ despite the call for its institutionalization back in 1996, by the EPA. It was a welcome step when the government set up the body, starting with eight environmental inspectors, but the effectiveness of its working has been very bleak, and the Environment Inspectors are protesting that they are too few in number to make a difference⁵⁵. Likewise, the Ministry of Environment and related governmental institutions have to depend much on the funds allocated by the government to perform their functions and, thus, their work autonomy is challenged time and again when it comes to planning, implementing, monitoring environmental commitments. Legally speaking, environmental institutions cannot work efficiently without a degree of autonomy. Given a situation where the economic interest conflicts with the environmental ones for example in enforcing requirements of EIA, the lobbying of the industry groups and the financial interests pressure turns the whole thing into a political fiasco,

⁵³ See Government of Nepal, 'National Three years Periodic Plan of Nepal (2013-2016)' available at <http://www.finland.org.np/public/download.aspx?ID=112594&GUID=%7BD13F0081-6826-4B4F-AEAB-F2E771185004%7D>, accessed on 15 October 2014.

⁵⁴ Ramesh Prasad Bhusal, 'Who is at Fault? Government or Environmental Inspectors', *The Himalayan Times*, 25 August 2009.

⁵⁵ *Ibid.*

making the environmental institutions/agencies come off a showpiece to the global community.

Regarding the forest, biodiversity and watershed sector, while Nepal has made efforts through laws and policies, in line with the international framework of *CBD*, with positive assets including the maintenance of forest resources to about 40%, establishment of 23% of the national territory as protected area as part of the National Biodiversity target, the protection of endangered species has been very weak. For instance, 'of the 22 biodiversity targets in the *CBD* for 2010, only five were achievable (GON/MOFSC, 2009)⁵⁶. Blames are constantly linked to the poor institutional system, lack of enforcement of already existing laws alongside corruption⁵⁷ for failures to curb the illegal trade of species such as rhinoceros, tiger and leopard, among others. Ecological disturbances are blamed as the reasons for the loss of other species such as vultures.⁵⁸

One more areas which the author regards of great importance to comment upon, is that of agro policies. In Nepal, the *National Bio-safety Framework and Policy, 2006*, seeks to protect bio-diversity and human health from the unfavourable impacts of imports, production and the use of genetically modified organisms (GMOs) and the *Nepal Agro Biodiversity Policy, 2007* aims at development of agriculture, food security and poverty alleviation, both of which deserves a focus given burning debate of increasing agricultural productivity v. rights of traditional agricultural practices and environmental conservation. When we are dealing with the problems of food scarcity for growing population, rise of food prices, need of modern technologies to enhance productions and minimum costs, use of genetically modified seeds etc., we are also required to address the issues of rights of traditional farming practices of indigenous people and the importance of green organic farming, as a way of environmental sustainability. Nepal still lacks a clear legal framework on ways to: balance this tussle of interests, integrate the matters of diverging poles, determine what prevails over the others and determine the ways of resolution of conflicts in this area, nationally and in international forums.

⁵⁶ Nepal Status Paper (n 23), p 39.

⁵⁷ *Ibid.*

⁵⁸ Darcy L. Ogada, et. al, 'Dropping Dead: Causes and Consequences of Vulture Population Declines Worldwide', *Annals of the New York Academy of Sciences*, 2011 available at <https://www.peregrinefund.org/docs/pdf/research-library/2011/2011-Ogada-vultures.pdf>, accessed on 29 July 2014.

Conclusion

Nepal's SD laws need a timely fix. As pointed out in the discussion of the major areas, the problems need to be addressed out in three faceted levels.

First, laws should be promulgated, where inadequate; examples include the areas of resource generating projects such as hydropower, figuring if foreign employment is still to be promoted or discouraged, based on socio economic research, channelling remittances income for national benefits, protection of labour rights abroad, eco-tourism laws related with local cottage products, market and environment protection, developing sound laws on carbon trading benefits, investing in research and getting the most of green technology from international framework of the support system.

Second, the body of laws should be moved towards harmonized synchronization, in line with national interest aligned with international commitments, the major example being conflict resolution laws where human rights and economic development contravene. Nepal speedily needs to frame an integrated set of clear corporate laws, taxation, property rights, labour laws, environmental protection areas, transparency laws and anti corruption measures, applicable separately for domestic and international investors from the light of investor friendly environment. A form of financially autonomous system must be created for the environmental laws/policies implementation that can tackle the problems of politicization when it comes to matters of the SD. The concept recommended by the government's report regarding the establishment of constitutionally created 'Green Commission' with some envisaging of a fund to sustain it, is much needed. The international environmental legal framework has obliged the developed nations to help the developing nations financially, technologically and calls for sharing of best practices regarding the environmental protection accomplishment models. But, the States are lagging behind in implementation; the non-fulfilment of Official Development Assistance (ODA) commitments, to take an example. Nepal's proactive pressing for such facilities and opportunities needs to be seen in the international platform with more persistence.

Third, Nepal must implement all the good it has by gearing up; For instance, by setting up the body of Environmental Inspector, as mandated by the EPA and making it functional to its best, by strengthening community forestry mechanisms even to make it more pro-marginalized sections of the society. Strengthening the work areas of already existing institutional set up, wiping out the inefficient practices, combating corruption, revamping the bodies, backed by a strong political shall remain Herculean tasks of responsibility to be shouldered

by both, State and non state actors, in order to take the charge of the whole matter of SD in Nepal.