Interpretative challenges of environmental constitutionalism in the context of federalism

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Environmental constitutionalism is an emerging phenomenon that centres around constitutional law, international law, human rights, and environmental law. Environmental protection has been tied up with multiple constitutional ideas such as rights, democracy, separation of powers, the rule of law, judicial review, governance and federalism. Procedural environmental rights such as the right to information, the right to participate and access to justice have been the tools of environmental democracy which is also a crucial subject of environmental constitutionalism. Constitutionalism has been a value-laden rhetorical device that elevates the normative values and principles which control government overreach. Is our constitution able to limit political power in the context of substantive and procedural environmental issues?

On the substantive level, the protection of the environment through a right-based approach has been traditionally the most popular legal solution to environmental problems. On the contrary, many scholars point out the deficiency of this approach. They argue that this approach is individualistic in nature and supports anthropocentrism thus human mastery over nature, by creating entitlements rather than duties. There are some issues of legal subjectivity too. State and humans are the only legal subjects of constitutionalism. The difficult question today is who are the subjects of environmental constitutionalism? Are human beings the only possible legal subjects or does it extend to the non-human world as well? Is it possible to view 'the environment' as a legal subject? Can we create legal entitlements for the generation yet to be born? Scholars like Douglas Kysar claim that 'many of environmental law's subjects are not politically represented in the usual liberal fashion'. However, in our context, we cannot deny that the constitutionalization of environment-related rights has strengthened the claim of nature albeit through humans. Before the constitutionalization of this right as an independent right in itself, the Nepali judiciary in several instances interpreted that environmental rights were the derivatives of the right to life. Creating an independent environmental right as a fundamental right not only makes enforcement easier for the state but is also a significant step towards environmental constitutionalism in Nepal.

The substantive right related to the environment provided by the Constitution of Nepal 2015, provides

30. Right to Clean Environment:

(1) Every citizen shall have the right to live in a clean and healthy environment.

(2) The victim shall have the right to obtain compensation, in accordance with law, for any damage caused by environmental pollution or degradation.

(3) This Article shall not be deemed to prevent the making of necessary legal provisions for a proper balance between environment and development in the development works of the nation.

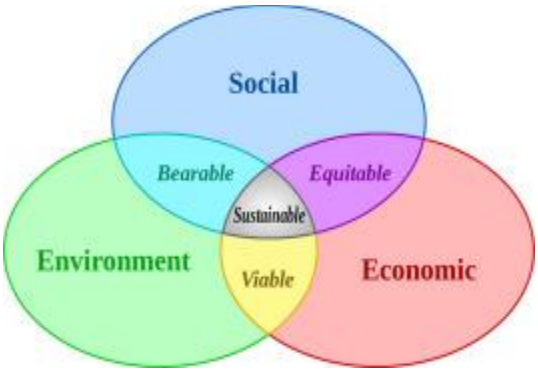
We can observe that the adjectives 'clean' and 'healthy' environment are ambiguous and based on subjective judgment. What satisfies the constitutional requirement of clean and healthy? In this compound adjective 'clean and healthy', does 'healthy' entail clean or does it impose an independent requirement? Does the healthy environment also mean the health of the environment itself? Here, 'healthy' might have some anthropocentric reference but the term 'clean' certainly qualifies the environment.

Similarly, Article 30 (2) implies the Horizontal application of the constitutional provision as the duty bearers of this right could be non-state actors like legal persons, corporations or private individuals. Under the concept of constitutionalism, one of the functions of fundamental rights is to limit the powers of the government. The effect of fundamental rights relates to the vertical relationship between the individual, who may potentially be a victim and the beneficiary of the rights, and the state, who could potentially be a perpetrator and the addressee of the rights. The constitutionalization of the polluters pay principle creates two main implications:

a. Even the non-state actors bear the corresponding constitutional duty not to pollute or the duty to uphold the right to a clean and healthy environment, thus, achieving a deterrence effect and
b. they bear the legal liability to compensate for the harm caused.

However, the execution of such a right to be compensated by the polluter may be challenging due to factors like transboundary pollution, the presence of multiple or unidentifiable sources of pollution, the quantification/calculation of both economic and ecological harm etc.

Lastly, in article 30 (3) we can spot an interesting yet unusual insertion of an (apparently) proviso clause that is fundamentally incompatible with the idea of sustainability and the concept of development. While the promise of pursuing sustainable development has been repeatedly mentioned in part four of the constitution, is it justifiable to presume that the environmental, health and dignity-related demands would be too much to ask for?



This provision sticks to the traditional debate where environment and development are seen as irreconcilable goals. This provision does not encourage sustainable solutions to meet the environmental and health-related needs of the beneficiaries of the development. It envisions a development that possibly could impair the right to a clean and healthy environment and such impairment could be justified as a balance between environment and development. What could be those development projects the constitutional makers had imagined that could possibly create an unhealthy environment? Is human development possible in an unhealthy environment? If national development has been confused with economic growth and the construction of concrete landscapes, is it justifiable for the future generation to yield the benefits of economic development achieved at the expense of the health and the environment of the previous generation? What could be the regulatory implications of such implicit policy choices made as a proviso of a fundamental right? What does it imply in the context of subnational environmental

governance? More importantly, does this fundamental right really limit arbitrary political power in the context of environmental constitutionalism?

However, the etymological debate undoubtedly has not yet manifested as a visible barrier to the content and enforcement of the right but we cannot deny the looming presence of the interpretative challenges for the federal units. The constitutionalization of environmental laws through fundamental rights (there are other tools as well) has indeed contributed to the aesthetics in the text of the Constitution.
Meanwhile, let's delve into the impact of federalism on the pragmatic aspects of environmental constitutionalism which concerns the conflicting policies/priorities of multiple governments and thus possible fragmentation of environmental law in practice. Environmental constitutionalism and Federalism would make a perfect duo for the research endeavours as many aspects are yet to be explored. Meanwhile, this write-up aims to focus on the regulatory challenges by contextualizing with a phenomenon namely the 'race to the bottom' theory (described as the Delaware effect) which postulates that sub-national governments competitively loosen their environmental protection as part of regulatory competition.

This competitive deregulation can have detrimental effects on the environment and, by extension, the well-being of the population. In the context of Nepal, a country that is striving for economic development while grappling with environmental challenges, the race to the bottom theory becomes particularly relevant. Nepal adopted a federal system of government, which is structured with three tiers: federal, provincial, and local. This transition to federalism has implications for regulatory competition and the race to the bottom, particularly in the context of environmental law. Effective coordination between the federal, provincial, and local levels is vital, especially for managing environmental issues that transcend administrative boundaries. Collaboration is required to address shared environmental challenges, such as groundwater use, air quality management etc.
For instance, the power to approve the Environmental Impact Assessments (EIA) on some projects (as specified by the Environment Protection Act, 2019) has been provided to the local government. As we know much of the environmental law is made functional through environmental study reports. The Act provides on pollution, climate change, and heritage protection among others. If we centre around the regulatory role of the local governments through EIA, we can discern that the environmental rights of the people heavily rely on the nature, scope and attitude of the said regulation. All the federal units are responsible for protecting and promoting environmental rights. The constitutional provision which is tilted towards development at the cost of the right to a clean environment could be used as the justification by the local governments to prioritize short-term economic gains arising from their old-fashioned cost-benefit analysis that undervalues the ecological services of nature. There is a need for policy harmonization to avoid the fragmentation of environmental law in practice.
Against the backdrop of interpretative challenges arising out of ambiguous policy-suggesting fundamental rights, multiple players in the competition with economic interests, limited capacity of the subnational governments and in particular the continuous degradation of the environment, it is high time for us to bring up this issue in the discourse of federalism and environmental constitutionalism. The legal implications of federalism, possible regulatory leniency and disintegration of environmental law in practice should be examined in the wider context of environmental constitutionalism.