State Practice of Asian Countries in International Law

Nepal

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AIR LAW – CIVIL AVIATION SECURITY RULES, 2019

Legislation Passed by the Parliament of Nepal in 2019

The First Amendment to Civil Aviation Security rules was published in Nepal Gazette on December 9, 2019. Nepal is a party to the Convention on Civil Aviation (ICAO) and a Member of the International Civil Aviation Organization.

ENVIRONMENT LAW – ENVIRONMENT PROTECTION ACT, 2019

The Environment Protection Act was authenticated on October 13, 2019. It repealed the previous Environment Protection Act passed in 1997. One of the primary features introduced by the Act is to introduce an Environment Fund under Section 33 to protect the environment, national heritage, and control pollution. The Act attempts to fulfill the right to a clean environment ensured under Article 30 of the Constitution of Nepal, 2015. The Act is passed in the light of Nepal's participation in the United Nations Framework Convention on Climate Change (UNFCCC), UN Convention to Combat Desertification (UNCCD), Convention on Biological Diversity (CBD), The Montreal Protocol on Substances that Deplete the Ozone Layer, Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

ENVIRONMENTAL LAW – FOREST ACT, 2019

The Forest Act was authenticated on October 14, 2019. The purpose of the Act is to “manage the national forests as the Government managed forest, forest protection zone, community forest, partnership forest, lease-hold forest, and

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religious forest and to contribute to national prosperity by protecting, promoting and utilizing the wildlife, environment, watersheds, and biodiversity while promoting the private, public and urban forests” as described in the Preamble. The Act is comprehensive dealing with the aforementioned different types of forests. It promotes afforestation under Article 70. The Act is a reflection of Nepal's signature to the UN Convention to Combat Desertification and the Convention on Biological Diversity.

**ENVIRONMENTAL LAW – REGULATIONS TO REGULATE AND
CONTROL INTERNATIONAL TRADE IN ENDANGERED WILD
FAUNA AND FLORA, 2019**

Regulations to regulate and control International Trade in Endangered Wild Fauna and Flora were authenticated on October 17, 2019. The regulations are passed according to the Act to Regulate and Control International Trade in Endangered Wild Fauna and Flora, 2017. The Act tries to fulfill Nepal's international obligation as a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973.

**HUMAN RIGHTS – CHILDREN'S RIGHTS – JUVENILE JUSTICE
PROCEDURAL RULES, 2019**

Juvenile Justice Procedural Rules were published in Nepal Gazette on June 3, 2019. The rules were formulated for elucidating the adjudicatory procedure of cases filed against minors under the parent Act Relating to Children, 2018. The rules also ensure the rights of the child as mentioned in Article 39 of the Constitution of Nepal, 2015. Article 39(8) particularly ensures the right to juvenile-friendly justice. Nepal is a party to the United Nations Convention on the Rights of the Child and the two optional protocols to the Convention.

**INTERNATIONAL ECONOMIC LAW – THE FOREIGN INVESTMENT
AND TECHNOLOGY TRANSFER ACT, 2019**

The Foreign Investment and Technology Transfer Act was enacted on March 27, 2019. The Act aims at easing the investment scenario in Nepal. Section 15 mentions the procedure of application by a foreign investor before the Foreign

Investment Approving Body. According to Section 17, the Body can approve an investment up to an amount of Nepalese Rupees Six Billion. A sum exceeding the amount shall be approved by the Investment Board under the Investment Board Act, 2011. Further, sharing of information with Nepal Rashtra Bank is provided under Section 16. Section 40 of the Act lays down a clear procedure for the settlement of disputes. Concerning international institutions, Nepal is a member of the World Trade Organisation. Nepal has accepted the UNCITRAL Model Law and endorsed the Convention on the Recognition & Enforcement of Foreign Arbitral Awards (the New York Convention) of 1958. Nepal is a party to various Bilateral Investment Treaties. The Act is to be read in consonance with Public-Private Partnership and Investment Act, 2019.

INTERNATIONAL ECONOMIC LAW – THE SAFEGUARDS, ANTI-DUMPING AND COUNTERVAILING ACT, 2019

The Safeguards, Anti-Dumping, and Countervailing Act, 2019 was authenticated on October 14, 2019. The Act empowers the Government of Nepal to impose Safeguard measures to protect the domestic industries from material injury or serious injury. The legislation is a result of Nepal's membership in the World Trade Organisation. It complies with the WTO agreements viz. (a) Agreement on Safeguards (b) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade and (c) Agreement on Subsidies and Countervailing Duty.

INTERNATIONAL ECONOMIC LAW – ASSET (MONEY) LAUNDERING PREVENTION RULES, 2019

The First Amendment to Asset (Money) Laundering Prevention Rules was published in Nepal Gazette on January 4, 2019. The amendment concerns technical aspects. Nepal has acceded to the United Nations Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances that criminalizes money laundering.

Treaties Ratified by Nepal in 2019

ENVIRONMENTAL LAW – AMENDMENTS TO ANNEXES II, VIII, AND IX TO THE CONVENTION ON THE CONTROL OF TRANSBOUNDARY MOVEMENTS OF HAZARDOUS WASTES AND THEIR DISPOSAL

Nepal signed the amendments to Annexes II, VIII, and IX to Basel Convention on May 10, 2019.

ENVIRONMENTAL LAW – ADJUSTMENTS TO THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEplete THE OZONE LAYER RELATING TO THE CONTROLLED SUBSTANCES IN ANNEX C, GROUP I, FOR PARTIES NOT OPERATING UNDER PARAGRAPH 1 OF ARTICLE 5

Nepal signed the adjustments on November 9, 2019. It entered into force on June 21, 2019.

ENVIRONMENTAL LAW – NAGOYA PROTOCOL ON ACCESS TO GENETIC RESOURCES AND THE FAIR AND EQUITABLE SHARING OF BENEFITS ARISING FROM THEIR UTILISATION TO THE CONVENTION ON BIOLOGICAL DIVERSITY

Even though Nepal ratified the Nagoya Protocol on December 28, 2018, it entered into force on April 28, 2019.

HUMAN RIGHTS – PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN

The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children

The Protocol was registered on July 16 2019 and acceded by Nepal a year later on July 16, 2020.

Treaties under Consideration in 2019

Two international treaties were taken under consideration by the House of Representatives of the Parliament in 2019. The Doha Amendment to Kyoto Protocol was registered in the House of Representatives on July 22, 2019. The Intergovernmental Agreement on Dry Ports was registered in the House of Representatives on July 21, 2019.

HUMAN RIGHTS – INTERNATIONAL CONFERENCE ON PROTECTION OF HUMAN RIGHTS OF MIGRANT WORKERS 2019

The International Conference on Protection of Human Rights of Migrant Workers was convened in November 2019. Sixty-two representatives from thirty States participated in the Conference. The government of Nepal provided financial assistance to organize the conference under the aegis of the International Labor Organization, International Organization on Migration, and the United Nations Development Program.

Universal Health Coverage and Climate Action Summit, 2019

Nepal participated in the Universal Health Coverage and Climate Action Summit in 2019.

ENVIRONMENTAL LAW – ENVIRONMENT JUSTICE AND PROTECTION

Cases Related to International Law

Arjun Giri et al. v. Office of Prime Minister and Council of Minister et al.
[NKP 2076 Vol. 7 Decision No, dated January 17, 2019]

Nepal's government published a notice in Nepal Gazette stating that the total life span for public vehicles shall be twenty years. Such vehicles shall be scrapped within two years as old vehicles increase environmental pollution and are not passenger-friendly. A similar notice was provided for electric vehicles and three-wheelers and microbus operated by gas. However, they were not

given a different life span. A notice published by the Transport Management Office stated that the petitioners were informed not to operate such vehicles. The petitioners filed the case mentioning that both the vehicles provided the same service and were environment friendly. Moreover, the decision and the published notice violated Article 18 (right to equality), and deprivation of the right to equality incurred deprivation of benefit from business as guaranteed in the fundamental right to property under Article.25 and right to employment under Article.33 of the Constitution of Nepal.

The issues highlighted before the court were whether electric vehicles and vehicles operated through gas are similar. Is there a difference in the amount of pollution caused by them? The court also had to decide if the decision violated the right to equality, right to property, and right to employment?

The court stated that the writ petitioner could not provide the authenticated facts to prove their claim that the gas-powered vehicle and electric vehicle's pollution were of the same level. It also stated that gas-powered vehicles are of a different nature than electric vehicles and various report have shown that gas-powered vehicles cause more pollution than electric vehicles. Court also expressed that setting standards for the use of public transport, taking into account public health and hazards, does not mean controlling employment and violating the right to employment. While Article 30 of the Constitution provides for the right to a clean environment and guarantees the right of every citizen to live in a clean and healthy environment, so necessary legal measures adopted to keep the environment clean and healthy to prevent any adverse effect on the environment and people should not be taken or interpreted in another way. It set out that to live dignified quality of life both means of earning and standard environment is equally important. In the absence of a standard environment, the applicant shall not be able to exercise the employment effectively. Notice published in the Gazette stipulates the maximum age of public transport 20 years. The government is not trying to restrict the employment of the applicants as it is only for 20 years old vehicles, rather it seems to be trying to reduce the adverse effects on the environment and wellbeing of people. The decision made keeping in view the safety, health, and environment of the general public and passengers and the information dated published in the Gazette did not seem unreasonable to stop its implementation.

The court stated that, as environmental protection is becoming a global concern today, the concept of environmental justice has been adopted by Nepal through the ratification of international treaties, the International Covenant on Economic, Social and Cultural Rights (1966), and the Nepal Commitment Declarations such as Stockholm Declaration (1972), Rio Declaration (1992).

Taking into consideration the national as well as international laws, the court found that the action was necessary for the implementation of the fundamental rights guaranteed by the constitution and was not illegal. Since the constitutional and legal rights of the writ petitioners have not been violated, the writ petition was quashed.

The court in its *ratio decidendi* held “Setting standards for the use of public transport, taking into account public health and hazards, does not mean controlling employment and violating the right to employment.” The court also noted that “While it is the responsibility and obligation of the state to provide easy access and facilities to the citizens in the transport sector but if any action was taken in the name of providing access to transport to the public, adversely affect the environment, public health and if the government doesn’t halt such action then it can’t fulfill its responsibility in an effective manner towards the citizen and law and shall be contrary to the principle of sustainable development.” It also observed that “The Government shall have the power to take necessary legal measures to reduce the risk to the life and health of the people, to set standards for the regulation of such vehicles and if necessary, can prohibit.”

ENVIRONMENTAL LAW – BIOLOGICAL HERITAGE – CHITWAN NATIONAL PARK

Advocate Ramchandra Simkhada et al. on behalf of Nepal Consumer Forum v. Nepal Government, Prime Minister and Council of Minister
[NKP 2076 Vol. 2, Decision No, 10204, dated February 13, 2019]

Consumer rights are enshrined in the Universal Declaration of Human Rights 1948 and in International Covenant on Economic, Social and Cultural Rights 1966 and the UN has also set the United Nations Guidelines for Consumer Protection which has guarantee environmental rights as consumer rights. Following the publication of news of construction of road from Parsa district to Thori to Triveni of Nawalparasi passing through Chitwan National Park by exploiting the area and natural resources of Chitwan National Park through various media, the petitioners filed an application to the office of the respondent regarding the documents related to the construction of road from Parsa district Thori to Triveni of Nawalparasi passing through Chitwan National Park but the respected office hasn’t made any response to it. Petitioners then filed a writ of certiorari on behalf of Nepal Consumer Forum regarding the exploitation of the Chitwan National Park area with the construction.

In the writ petition, the petitioner filed a petition based on Articles 12, 13, 16, 17 (3), 35 (5), 107 (2) of the Interim Constitution of Nepal, 2007, Articles 3, 4, 5, 7, 9, 10 of the Environment Protection Act, 1997. Additionally, the petition also referred to Article 9 of the Treaty Act, 1990 and other related international conventions Convention on Biological Diversity 1992, CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora) 1973, Convention Concerning the Protection of the World Cultural and Natural Heritage 1972, Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, Convention on Wetlands of International Importance Especially as Waterfowl Habitat 1971.

The pertinent issues that the court was to answer to were, what was the significance of Chitwan National Park in terms of natural, biological resources and with regards to environmental protection? What are the challenges in conserving the biological heritage and environment of Chitwan National Park? How these challenges should be viewed in the context of national and international challenges? And if the proposed Environment Impact Assessment Report of Road construction has addressed the environmental conservation challenges?

While addressing the question about the significance of Chitwan National Park in terms of natural, biological resources, the court recognized the significance and importance of Chitwan National Park. The park is rich in wildlife, flora and fauna, aquatic animals and other natural resources, its wetland are suitable habitats for the birds, wildlife and aquatic animals and 60% of foreign tourist visiting Nepal come to this park and it has been listed in World Heritage Site in 1984 by UNESCO with Outstanding Standing Universal Value.

The court identified direct and indirect challenges in conserving the biological heritage and environment of Chitwan National Park. The direct challenges include poaching, arson, deforestation and encroachment and of park areas, flooding of wild animals due to flood, cross border movement of wildlife due to the park connected to the Indian border, attack on farmers and their livestock and can create conflict between the public and the national park. Indirect challenges include political turmoil and transition, poverty, population growth, migration and urbanization, deforestation, pollution, and climate change. The other side of the challenge relates to the commitment made to Nepalese citizens through constitutional and legal frameworks and Nepal's commitment to the world community to abide by international treaties and agreements.

The court also took the notice of the replacement of the Interim Constitution by the Constitution of Nepal 2015 which further strengthened the rights enshrined in the Interim Constitution. Article 30 of the current constitution states the right to a clean environment, the right to be compensated for environmental pollution and degradation, and the responsibility to strike a balance

between environment and development. Implementation of the constitution is a major responsibility of the state, along with that as a responsible member of the world community Nepal must also abide by its international treaties. There are a large number of international conventions to which Nepal is a party, but the conventions mentioned by petitioners are particularly noteworthy in light of the controversy presented here.

Given that the Chitwan National Park is one of the World Heritage Site under the Convention Concerning the Protection of the World Cultural and Natural Heritage 1972, Nepal has the responsibility for its protection and preservation. Similarly, the Convention on Wetlands of International Importance Especially as Waterfowl Habitat 1971 is important as it incorporates Bishajari Taal for its protection which is located in Chitwan National Park. Convention on Biological Diversity 1992 in Article 14 has pointed out that the Environment Impact assessment should be carried out on any activity that has a significant adverse effect on biodiversity. Due to the provisions of Article 9 of the Treaty Act 1990, the provisions of the Conventions have acquired the status of Nepali law. Nepal cannot deviate from its legal obligation to abide by the provisions of the Conventions on the Protection of the Chitwan National Park.

The Environmental Impact Assessment submitted by the Office of the Attorney General only mentions Chitwan National Park as a World Heritage Site but it does not mention the studies conducted by UNESCO and IUCN, discussions and decisions made by the World Heritage Committee, or its follow-up or analysis of environmental heritage studies. The court notes that that the EIA is not just a formality. It was also stated that in a clear view of UNESCO that the widening and asphaltting of Thori-Bharatpur road should not be done.

The court believed that the construction of a road in the area of the national park shall put it in danger. So, the court gave the decision that no further work shall be carried out for the construction of roads within the Chitwan National Park until Environmental Impact Assessment is carried out on the consultation and consent of UNESCO and Chitwan National Park Office established by law.

The *ratio decidendi* of the case is that “The government is not the owner of public property; it is only the trustee. Natural Resources or Heritage is for the benefit of all the people of Nepal, present and future generations so utilization of natural resource should be for benefit of citizen not for the personal benefit. The government needs to understand and reflect on the fact that natural resources are the property of all the people of the nation, present and future generations or even descendants.” The case also highlights that “no work related to road construction should be carried out within the national park

unless the Environmental Impact Assessment conducted in consultation and agreement with the concerned bodies including UNESCO gives permission.”

HUMAN RIGHTS – PROCEDURAL FAIRNESS AND JUSTICE

Sudhir Basnet v. Kathmandu Metropolitan Police Range and Metropolitan Crime Division et al. [NKP 2076 Vol. 5, Decision No. 10260 (*Habeas Corpus*), dated April 15, 2019]

The petitioner is the Director of Kohinoor Hill Housing Pvt. Ltd and Chairman of Oriental Cooperative Limited. Kohinoor Hill Housing Pvt. Ltd. had invested in various sectors, including land development, housing, apartments, while Oriental Co-operative Ltd. had been collecting and investing deposits to increase the cooperative's shareholders' income. The country's situation and then economic policy of Nepal Rastra Bank led to a market slump in business due to which the return and recovery could not be balanced as the depositors of the cooperatives demanded the return of the deposit at once. The petitioner was arrested based on the complaint of the depositor of the cooperative and a case of fraud was filed against him in the Kathmandu District Court. The petitioner was imposed with a fine; following the payment of the fine he was released from prison.

The petitioner was arrested and remanded in custody by the plainclothes police personnel from the Kathmandu Metropolitan Police Range and Metropolitan Crime Division as per the letter of the Problematic Cooperative Management Committee. Thus, the writ petition of Habeas Corpus was filed by the petitioner's mother on behalf of Sudhir Basnet to release Sudhir Basnet who was in illegal detention as the reason for the arrest wasn't disclosed.

The court had to decide whether the habeas corpus order will be issued as per the demand or not and whether the action taken by the respondents in arresting the petitioner is in accordance with the constitution, law, and the accepted principles of justice.

The court stated that the Cooperative Act, 1992 was in force when the dispute first began which later was repealed by Cooperative Act 2017 whose Article 114 provided remedial action for the crime committed under the Act and Article 122 of the Cooperative Act 2014 listed the crimes under the Act. The court recognizes that criminal law has no retrospective effect and has stated Article 11(2) of the Universal Declaration of Human Rights 1948 which provides:

No one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offense was committed.

The court makes mention of the right to justice under Article 20 of the Constitution of Nepal, 2015, sub-article (4), “no person shall be liable to punishment for any act which is not punishable by the prevailing law and no person shall be punished more than prescribed in law” and the sub-article (6) “No person shall be prosecuted more than once for the same offense in court and shall not be punished” while giving its decision. These subarticles under Article 20 prevents prosecution of any act that is not considered punishable by law when the crime was committed. The purpose of the previously mentioned provisions relates to any act that is not considered punishable by law when the crime was committed. In cases where the act was not punishable as crime under present legal instruments, the particular act shall not be punished by making new laws. Court also mentioned that procedural law might carry out according to the present law. However, substantive law shall not have a retrospective effect.

Despite no punishment for the offense imposed on the petitioner as per the Cooperatives Act, 1992, the petitioner was already punished for the crime of fraud in the case filed by depositors of Oriental Co-operative Limited. The court gave its decision by saying that there was no provision of punishment in the then prevailing Act, i.e. Cooperative Act 1992, when the crime was committed. However, the demand for re-punishment has been made based on the Cooperatives Act, 2017 issued after the date of the misdemeanor. Once the offense has been established and even punished according to the prevailing law, the offense based on amended law cannot be consistent with the legal system and principles. So the accusation made upon the chairperson shall attract Cooperative Act 1992 rather than the Cooperatives Act, 2017. As the chairperson has already been punished, the detention made according to the Cooperatives Act, 2017 is not consistent with the law.

The Court gave the decision based on constitutional and legal provisions, universal principles of criminal law and international treaties, court rulings, and the reports from the Commission of Inquiry. It relied on the fact that the petitioner has already paid imprisonment in a fraud case. The petitioners shall be released immediately from the respondent’s illegal detention by issuing a writ of habeas corpus.

The *ratio decidendi* of the case is that “Once the offense has been established and punished in accordance with the prevailing law, sustaining the offense based on amended law cannot be consistent to legal system and principles.”

HUMAN RIGHTS – PROTECTING THE RIGHTS OF THE WOMEN

Sukum Thapa et al. v. Pitambar Thapa et al. [NKP 2076 Vol. 9, Decision No. 10346, Dated July 7, 2019]

The petitioners, in this case, are the wives and daughters of the respondent Pitambar Thapa. Among the petitioners, the first wife, Chitra Kumari Thapa, and third wife Sukum Thapa filed a property partition case against Pitambar Thapa. The Supreme Court decided that property owned by Pitambar Thapa's father Chudamani shall be divided to Pitambar Thapa's mother, Nanda Kumari, and Pitambar Thapa himself, and his property has been divided into 9 shares as there were 9 inheritors. However, Nanda Kumari passed away before the preparation of the partition document. Later, while preparing the partition document, Pitambar claimed half of the property on the basis of the deed of legacy (residual will) given to him by his mother. The partition document was made according to the respondent's claim. The District Court and Appellate court later revoked this. A writ petition was filed by the respondent where the Supreme Court dismissed the petition.

The respondent claimed that the shareholding decreased due to the marriage of the daughters. The respondents further claimed that the deed of legacy was passed to respondent Rakshya Thapa, the fourth wife respondent Pitambar Thapa and property of Nanda Kumari should be inherited by Rakshya Thapa. Thus, the petitioner filed the case claiming that the partition of property should be into nine shares, including the property of deceased Nanda Kumari, and the daughter should be a coparcener of the property.

The respondent's daughter Manisha and Nisha were married before Pitambar Thapa filed the petition. However, the Constitution of Nepal 2015 was already promulgated. Article 38 (1) had provided that every woman has equal lineage right without gender-based discrimination. As the respondent daughters were married earlier, the substantive rights essentially provided by Muluki Civil Code 2017 to have the right over parental property cannot be applied. Thus, the court had to decide whether the partition of property should be done into nine shares, including the property of deceased Nanda Kumari or not?

Pitamber claimed half of the property owned by his mother based on the deed of legacy/ residual will given to him by his mother. Rakshya Thapa did not raise any concern. However, the respondents again claim that the deed of legacy was passed to respondent Rakshya Thapa, the fourth wife respondent Pitamber Thapa and the property of Nanda Kumari should be inherited by Rakshya Thapa. In such a situation, the court stated that the then Muluki Ain Registration Chapter No. 34 cannot be applied by prioritizing an older document.

The court mentioned Article 38(1), 18(5), 18(3), and stated that the constitution of Nepal had given equal lineage rights to sons and daughters and equal rights in ancestral property. It also seems to prohibit discrimination between sons and daughters based on marital status.

The rights of independent individuals are related to the right to self-determination, marriage, family right, and property rights.

The court recognizes Article 1 of the Convention on Elimination of all Forms of Discrimination against the Women. The article states that “discrimination against women” shall mean any distinction, exclusion, or restriction made based on sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, based on equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field. Nepal is a party to the Convention. In line with the provision, it presents that Article 1 of the CEDAW presents the discrimination based on marital status and also notes that excluding them or restricting their rights is also discrimination against men and women.

The court stated that there seems to be discrimination against women when choosing between getting married or inheriting ancestral property based on being a woman. Women's identity and property rights in ancestral property are not determined based on marriage. The right to ancestral property is a right created after birth and obtained after birth. Treating sons and daughters differently based on marital status is a form of discrimination. Different treatment can restrict a woman's access to the property and even exclude daughters from patrimonial property rights. The constitution and the law intended to give the daughter the same share in the son's ancestral property. The Supreme Court has already established the daughters as a coparcener. Even while preparing the partition document, the respondent recognized the daughters as a coparcener. Thus, the argument presented later by the respondent stating that daughters are not coparcener as they got married earlier cannot be undertaken.

By issuing the order of *mandamus*, the court decided that there should be a partition of property common to all the coparcener, including the property of

deceased Nandamaya, and daughters of the respondent are the coparcener of the property. The Supreme Court overturned the High Court's decision to exclude the daughter from coparcener through the order of certiorari. The court stated that the decision of the High Court was contrary to the Constitution, International Convention to which Nepal is party, and domestic law of Nepal.

The court promulgated, "To make a woman choose to get married or get ancestral property just based on being women is discriminatory. The right to ancestral property is a right created after birth and obtained after birth. Treating sons and daughters differently based on marital status is a form of discrimination. Different treatment can restrict a woman's access to the property and even exclude daughters from patrimonial property rights." The *ratio decidendi* for the case states that the constitution and the law intended to give the daughter the same share in the ancestral property as the son.

International Economic Law – Intellectual Property and Trademark

CA K.N. Modi on behalf of Tejram Dharampal Firm v. Pradip Kumar Aanchaliya on behalf of Ganapati Tobacco Private Limited [NKP 2076 Vol. 7, Decision No. 10303, dated 24 June 2019]

Ganapati Tobacco Private Limited, a company based in Nepal, Limited applied for the registration of the trademark 'RAJ NIWAS' of International Class 31 and 34 in the name of Ganapati Tobacco Private Limited. Tejram Dharampal Firm, a firm based in Delhi, Limited, applied for the registration of the trademark 'RAJ NIWAS' of International Class 31 and 34 in the name of Ganapati Tobacco Private Limited. Ganapati Tobacco Private Limited applied for the registration of the trademark 'RAJ NIWAS' of International Class 31 and 34 in the name of Ganapati Tobacco Private Limited. Ganapati Tobacco Private Limited filed the application claiming the same trademark. Tejram Dharampal Firm ascertained that the RAJ NIWAS trademark product was registered in India and that video ads could be seen on YouTube.

The Department of Industry decided that although Ganapati Tobacco Private Limited first applied for the registration of trademark RAJ NIWAS, it has been proved that Tejram Dharampal Firm is the authorized owner, and trademark RAJ NIWAS shall be registered in the name of Tejram Dharampal Firm.

Ganapati Tobacco Private Limited filed an appeal in High Court Patan. The Deputy Registrar High Court ordered to stop the registration concerning the disputed trademark in the current situation in the name of Tejram Dharampal Firm. Later, both the parties filed the case in High Court Patan. The High Court then ordered not to carry out the act of registration unless

the trademark dispute is resolved and decided that trademark RAJ NIWAS shall be registered in the name of Ganapati Tobacco Private Limited. Following High Court Patan's decision, Tejram Dharampal Firm applied to quash the Supreme Court's decision. The application was filed based on Section 18 sub-section (1) of The Patent, Design, and Trade Mark Act, 1965.

Both the parties brought their cases before the court, with claims to be observed by the court. Tejram Dharampal Firm stated that Nepal being a member of the WTO is bound to comply with the TRIPS fully. As Nepal has become a party to international treaties on protecting intellectual property, such as the Berne Convention, the Paris Convention, and the TRIPS under the WTO, Nepal must abide by those conventions' provisions under the Nepal Treaty Act, 1990. It was also stated that after becoming a member of the WTO, Nepal has committed to provide international protection to the industrial property by amending The Patented Design and Trade Mark Act, 1965 through the Act Made to Amend Some Nepal Acts Relating to Export and Import and Intellectual Property, 2006.

The primary claims raised were that the RAJ NIWAS trademark is registered in Tejram Dharampal Firm's name in UAE and Lebanon. It was also important to take note that the use of the trademark was being advertised. The registration process was in process in other countries and agreements were reached with Indian and Nepalese manufacturers to use trademarks. Thus, it was claimed that the Tejram Dharampal firm was the official user of the RAJ NIWAS brand. The party also states that it was registering the brand as its industrial property even in Nepal.

Ganapati Tobacco Private Limited claimed that Ganapati Tobacco Private Limited first applied to register trademark RAJ NIWAS. Also, as mentioned, RAJ NIWAS trademarks Class 31 and Class 34, Vijiayshree Food Products Pvt. Ltd has registered RAJ NIWAS trademarks in Sri Lanka, Bangladesh, Afghanistan, Pakistan, Iran, Iraq, Kenya, Uganda, Mozambique, South Africa, and Switzerland and applied for registration in some countries which was later handed over to Ganapati Tobacco Private Limited through Deed of Assignment. So, a document related to the registration of a trademark in countries party to the Paris Convention is provided. An excise duty of NRS 25,149,600 has been paid to the Inland Revenue Department. Thus, the court to decide on the following:

- What are the provisions in the law regarding the right to trademark? Moreover, under what conditions can a trademark registered in another country can be recognized in Nepal?
- In whose name should the trademark RAJ NIWAS be registered?

In deciding the case, the Supreme Court stated that the trademarks are considered an identifying mark of intellectual property and part of one's intellect. Supreme Court has recognized the definition of trademark given by Agreement On Trade-Related Aspects Of Intellectual Property Rights, Section 2 Article 15.

The court asserted that registration and use of trademarks are considered an important aspect to obtain trademark rights. These two bases seem to be the global basis for trademark registration so far. Just because a trademark is registered in one country, it is not automatically recognized in another. Each nation has its laws for trademark registration. Even well-known trademarks registered in other countries are eligible for acquisition in that country only after they have been registered under the concerned country's laws. Article 6(1) of the Paris Convention, to which Nepal is a party, states that "The Conditions for the filling and registration of trademarks shall be determined in each country of the Union by its domestic legislation."

While deciding in whose name the trademark RAJ NIWAS should be registered, the Supreme Court mentioned Section 21C of The Patent, Design, and Trade Mark Act, 2022 (1965), which provides that "the Department may register patents, designs, and trademarks registered in foreign countries without conducting any inquiries if an application is filed for their registration along with certificates of its registration in a foreign country." In this case, the court said that the applicant had filed the application after the respondent's application for the trademark registration. The claim made by the applicant was that the RAJ NIWAS trademark was registered in the name of Tejram Dharampal Firm in UAE and Lebanon, but evidence regarding the registration was only after the date of application for registration.

The court opined that even though the applicant claims that it has been producing goods and delivering them to different countries in the trademark of RAJ NIWAS and advertising it; it does not align with the Patent Design and Trademarks Act, 1965, where trademarks related to a product or advertisement can be registered based on product and advertisement alone. Nor does it appear in international intellectual property law that trademarks can be registered based on product and advertisement. Article 6 D of the Paris Convention also states that "No person may benefit from the provisions of this Article if the mark for which he claims protection is not registered in the country of origin." Although the appellant claimed that 'RAJ NIWAS', under the trademark name, was being manufactured in India and was being advertised and promoted, the disputed trademark did not appear to have been registered in India (country of origin) when applied for in Nepal. Thus, the court noted that the trademark RAJ NIWAS could not be registered in Tejram Dharampal Firm's name.

The court decided that the trademark RAJ NIWAS should be registered in the name of Ganapati Tobacco Private Limited and not in the name of Tejram Dharampal Firm. It gave the decision based on factual details presented, the Paris Convention, The Patent Design and Trademarks Act, 1965, and judicial precedents.

The *ratio decidendi* propounded by the court stated, “any firm company or person to symbolically identify their creation, to distinguish it from others and to confirm that such product is their creation, the word, symbol or picture used or a combination of these three things is called a trademark.” It further added that, “being in the trademark registration process and having a registration certificate are two different things. The law requires that a trademark be registered in another country. It must be with a certificate of registration and an application for registration in the Department of Industry. The mere mention in the application does not mean that such certificate was obtained without obtaining a trademark registration certificate from abroad.” It highlighted that “the intent to recognize and register a trademark related to a product solely based on the product and advertisement does not appear to be in the provisions of Article 6 of the Patent Design and Trademark Act, 2022 and Article 6 of the Paris Convention.”

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