Community Forest Management in Nepal and the Judiciary

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Introduction

Community forestry is hyped as a successful program of natural resource management in Nepal. This program which first started as a pilot program in two districts of middle hills in the 1980s is now spread in all but one districts of Nepal. Despite the country facing a decade long conflict (1996-2006) that affected the life of almost everyone in the village, community forest was left largely unscathed. Today, over 1.7 million hectare of national forest (over 30% of the total forest cover) has been handed over to communities. Over 18,324 Forest Users Groups(CFUGs) comprising some 2.2 million households (i.e. over 8 million people) throughout the country are engaged in community forestry program. Despite this however, the community forest program is not free from problems. The paper looks into some of them, examines them from legal angle, highlights the limits of judicial intervention, and shares some thoughts what legal and policy perspective would take the program further.

Statutory Framework


Under the Forest Act 1993 forests are broadly divided into two ownership categories: national and private. National forests are further categorized into: (1) government-managed forests; (2) leasehold forests; (3) religious forests; (4) protected forests; and (5) community forests. Community, leasehold and religious forests are managed by local communities or user groups, while government-managed and protected forests are directly administered and protected by government agencies. Private forests are managed by individual households. A latest entry in the forest management in Nepal is "Collaborative Forest Management" launched in some Terai districts run jointly by government agencies, institutions of local self government and forest users but its legal basis is not clear.

The Forest Act 1993 provides handing over of any part of national forest to the Forest Users Groups(CFUGS) for conservation and collective utilization. Prior to registration, the CFUGs prepare internal rule for governance, develop Management Plan keeping in mind long-term community development and sustainable forest development needs. Factors such as distance of the community to the target forest, existing forest use practices and interests and management capacity of the community

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1 This is another important Act that is responsible for the management of 10 national parks, 3 wildlife reserves, 6 conservation areas, 1 hunting reserve, and 12 buffer zone areas. These protected areas cover 34,185.62 sq. km (23.23%) of the total geographical area of the country.

2 Forest Act S 2(e) defines National forest to include besides forest any barren land or unregistered land or foot trails, ponds, lakes, spring sources and their outstretching beds as national forest. Besides the designated national forest, the Forest Rule[Rule 26(2)] allows communities to grow community forest in public land that fall outside the boundary of national forest.

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♣ Acting Chief Justice, Court of Appeal Nepal.
are taken into consideration while allotting the forest parcel to the community. The Management Plan, prepared in consultation with the District Forest Office is generally valid for five years. It is unamendable for the first two years. The CFUGs come into operation following its registration with the District Forest Office.

The CFUGs are said to be autonomous body with perpetual succession, competent to sue and be sued. The Act provides them autonomy to purchase, use and alienate property in their name. They can penalize the users who encroach upon the forest or do activities that violate the Management Plan or the internal rule of governance. The Act and the Rule allow communities to harvest all the benefits that accrue from community forest management. The CFUGs are required to allot at least 25 percent of the revenue for community forest development. The remaining 75 percent can be utilized for activities such as poverty alleviation, micro-credit, subsidized loan, and other income generation and community development works.

In a nutshell, the community forest program reverses the hostile relationship created by the Forest Act of 1961 that derecognized the age-old tenural relation of local people with the forests and village commons in the neighborhood. The new Act demonstrates how empowerment of the local people through recognition of their age old use-rights of common property resources creates motivation for their management and collective happiness.

Having said this, one must be frank to admit that the community forest program is not free from problems. While the CFM has been able to arrest forest loss mainly in the mountains and hills, it has not been able to reverse overall forest loss at the national level. As for instance, a recent study conducted by the Forest Resources Mapping and Evaluation Project shows that between 1991 to 2010 some 32,000 ha forest was lost in 18 districts in the southern plains (colloquially called Terai) of Nepal. The annual loss in Terai in the last 19 years is 0.4% per year. At the national level also the annual forest loss has not been arrested. Rampant infrastructure development projects, illegal quarrying, logging and smuggling, and a few natural causes such as climate change, forest fires, attack by insects and mosses etc are some of the problems that blights the success of the program. Besides, transparency, accountability and good governance are some of the issues that need to be properly handled.

The Role of the Judiciary

Going by the Forest Act and the Rule, the role of the judiciary in community forest management seems only peripheral. It does not seem to be a mainstream player. The mainstream players in the program are the CFUGs, their federations, the District Forest Office and the Forest Department. The judiciary comes into picture only when there is dispute between the users or between the users and the Forest

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3 According to the report out of the 18 district only three districts viz Banke, Siraha and Nawalparasi witnessed some growth in the forest cover. Of the total area of Terai some 4,11,580 ha (i.e. 20.41 %) is covered with forest. See Kantipur Daily July 23, 2014.

4 A source claims that between 1990 and 2000, Nepal lost an average of 91,700 hectares of forest per year. The amounts to an average annual deforestation rate of 1.90%. Between 2000 and 2005, the rate of forest change decreased by 28.9% to 1.35% per annum. In total, between 1990 and 2005, Nepal lost 24.5% of its forest cover, or around 1,181,000 hectares. Seehttp://rainforests.mongabay.com/deforestation/archive/Nepal.htm accessed July 24, 2014.
Department or where forest crimes are alleged to have been committed. In what follows a discussion is made on the nature of judicial involvement in community forest related disputes.

The CFUGs are said to be statutorily autonomous to be governed by their own rule prepared in advance which set-out their formation, organization and governance. They are required to hold periodic election of their executive bodies and run the organization transparently and accountably. Sometimes dispute arises among users with regard to running the organization, keeping the book of account properly and expenditure on community development works. Some disgruntled members of the executive body of the CFUG or ordinary user bring the case to the court alleging violation of Act, rule or the Management Plan or the internal rules or the finance. Cases have also reached the courts where the forest authorities have meddled with the election or running of the CFUGs. The Court issues appropriate order in the form of certiorari, mandamus or injunction to promote good governance in the running of CFUGs.

Sometimes unwarranted government intervention creates problems in smooth running of the CFUGs. One such case relates to the decision of the Cabinet which required the CFUGs to deposit at least 40% of the revenue with the government for running the community forestry program.\(^5\) Whereas the Forest Act and Rule allowed the CFUGs to keep all the revenue generated from community forest management works\(^6\), the decision was taken without the authority of the said law. The Supreme Court of Nepal accepting the petition of the Federation of the Community Forest Users Nepal (FECOFUN) quashed the decision of the government and thus ensured that all the revenue generated from community forestry remains with the community.

Another case that came to the Supreme Court relates to the annulment of registration of the 11 CFUGs conserving and managing forests (basically plantations) that fell on banks of the irrigation canal.\(^7\) The CFUGs were properly registered on different dates with the District Forest Office (Sarlahi) and were managing the forest for several years in the form of community forest. However, one fine morning the same Office quashed their registration without giving the CFUGs any opportunity of hearing or following the provisions of the Forest Act. In the written submission filed to the Court the District Forest Office argued that the land on which the forest grew belonged to the irrigation project and that in order to avoid duplication, it would be better if such forests were managed by the Irrigation Users Groups pursuant to Rule 12 of the Irrigation Rules 2000. A pertinent question raised in the Court was: can the registration of a CFUG be cancelled except when they violated conditions laid down in Section 27 of the Act\(^8\). The Supreme Court in this case issued the writ of certiorari and mandamus, quashed the decision of the District Forest Office and asked the concerned authorities to make reliable arrangement for forest management by giving a hearing to the grievance of the CFUGs and avoiding duplication in work of the forest office and irrigation office. Despite this however, the Court was not very forthright in assuring the CFUGs that the wealth they had created by managing community forest would be protected and not taken away without compensating them.

This takes us to a larger question of payment of compensation that so far remained unaddressed. What happens in case the community forest is acquired by the state for National Priority Projects as provided

\(^5\) The government on 2057/1/19 (May 1\(^{st}\) 2000) had made such decision. See Hari Prasad Neupane on behalf of FECOFUN v HMG, Cabinet Secretariat, NKP 2060 NN 7184 p 160
\(^6\) Forest Act 1993 S 25(1); Forest Rule 1995 Rule 32, 33, 36.
\(^7\) See Sitaram Pokharel on behalf of FECOFUN District Office v Ministry of Forest and Soil Conservation and Others, Supreme Court, Collection of Decisions on Public Interest Part 2 Vol 2 2066 at p 293.
\(^8\) Section 27 assured the communities that except when the CFUG went against the Management Plan or caused significant damage to the environment or did anything against the Act or the Rule or conditions laid down by the government from time to time, the forest would not be withdrawn.
in Section 68 of the Act? Can the communities challenge such acquisition on the ground that there are alternatives or that the project causes significant adverse effect to the environment or that there has been a colorable exercise of state power? Can they deny acquisition unless compensation is secured to them? The communities obtain use-rights once the forest is handed over to them, and they create wealth by managing the forest. In such a situation it is desirable that the law clearly vests the power to question reckless acquisition of community forest, and demand and secure compensation for every bit of the natural wealth they generated by their sweat and toil.

Today, most of the lower courts have significant number of cases where the office bearers of the CFUGs are dragged to the court for forest related crimes. Most of these crimes pertain to illegal cutting and smuggling of forest produce or killing of wild animals. During the early phase of the community forestry program, there were problems in taking actions against the CFUG members or any-non members that committed crimes in the community forest. However, after the amendment to the Forest Act in 1999 any activity in violation of the Forest Act or the Management Plan now invites criminal sanction. Forest crimes are now dealt by courts either as the Court of first instance or by way of appeal\(^9\). A conviction in such crime results in confiscation of the proceeds and means used for committing the crime or transporting proceeds\(^10\), and a fine double to the amount of the goods abstracted from the forest. Such person may also be imprisoned for a year. And in case one is found guilty of exporting banned forest products, the conviction may go up to five years' jail term. Bail is denied to the accused if he has been already convicted for similar offence.

But then question often raised in this connection are whether or not the CFUG or any member thereof violated the Management Plan or it was simply a matter pertaining to mis-communication or failure of communication or coordination. For instance, where the Management Plan allowed harvesting of the forest product of certain quantity, should the office bearer of CFUG be punished just for the failure to communicate the same to the District Forest Office in advance or getting the right seal in the product? Does the Court or should the Court take into account possible high-handedness of the forest bureaucracy in dealing with the CFUGs.

Yet another question pertains to the quantity of the forest product harvested by the alleged offender. Even though no official survey regarding gravity of offence has been conducted, there is a general impression that in hills and mountains, due to remoteness of the market, the forest crimes are less severe than in the plain areas where chances of cross border smuggling of forest product are higher. In view of this, having a blanket adversarial approach that does not give the CGUGs chances of correcting even clerical mistakes may sometimes contravene with the development logic embodied in the Forest Act or overall conservation initiatives adopted in community forestry program and de-motivate innocent members of the CFUGs for being penalized just for taking a particular harvesting decision.

Possible way forward

As mentioned earlier, the role of the judiciary in the community forest program is rather peripheral. The Courts become active only when disputes are taken to them. In that sense in most of the situations they

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\(^9\) According to Section 65(1) of the Act any crime inviting punishment of up to 10,000 rupees(USD 100) is heard by the District Forest Officer and more serious crimes are dealt with by the District Courts.

\(^10\) Now following the decision of the Supreme Court in Government of Nepal v Belbahadur Thapa Magar and Others [NKP 2068 Decision no 8629 at p 908] the trend of automatic seizure of means of transport under S 66 of the Forest Act even when the owner of the transport was not involved or the crime was committed without his consent or knowledge has been relaxed.
are reactive than pro-active whereas the nature of community forestry program may demand preventive actions. Besides factors such as adversarial nature of judicial process, its dilatory procedures, and the need to maintain consistency, may require the Courts work in certain format that may not be very congenial for quick resolution of disputes or the development orientation of the community forestry program. The Courts may also not be the right forum to deal with larger issues such as forest fires, attack of destructive insects, pests and pirates or terminal diseases, effect of climate change, or market pressures resulting in cross-border smuggling of forest products, gravels, sand-stones etc. A case in point in Nepal is the rampant quarrying and mining in the Churia region. Whereas the resources lie in the upper end of the Indo-Gangetic Plain the market for sands and gravels is across the borders. A few cases were filed in the Supreme Court praying the Court to ban the export of stone, gravels and sands seeking the closure of crusher industries in the region. The Court did not outright ban the export but issued directives to the government to study and monitor the situation and take suitable action so that human activities in the region do not spoil environmental sanctity.\(^{11}\) There was very little impact of the Court order on the ground though the government seemed moving some papers to concerned units and departments. On the part of the Court also there was no follow up. This being the situation the government has now come up with the initiative to declare Churia region a conservation zone and banned the export of sands and gravels. It is a laudable initiative which demand expertise, financial resource and appropriate logistic, support of the state agencies and local people. The new initiative may be seen in the light of the Court order but one has to be frank to accept that it is not a court propelled initiative. As was done in Narayan Devkota\(^ {12} \) a soft order in the form of directives, or a policy of deference to the executive wisdom may sometimes be desirable when projects of such magnitude are designed and operationalized. But then as environmental rule of law demands that these initiatives be in consonance with overall constitutional and legal framework of the country that prioritizes people centered development initiative and calls upon the government to act as a trustee of the resources and not as the supreme owner that Victorian notion of \textit{parens patrae} justified. The judiciary will obviously be keen to see that local people especially those whose lives are inextricably linked with the exuberance of local natural resources, are consulted and allowed to participate in decision making and benefit sharing\(^ {13} \).

Finally, community forest program in Nepal is a baby of the government initiative launched in the late 1980s. It came into existence not because of any grass-root movement but because of the realization on the part of state authorities that empowerment of the people for taking charge of natural resources would reinforce conservation and create livelihood rejuvenation in the mountains. As one can witness this has happened in the span of two decades. The involvement of millions of peoples especially those in the villages and mountains demonstrate their faith as well as their zeal. Deviant efforts in the form of bureaucratic high-handedness may scuttle the gains achieved so far. Frank discussion on the achievement and limitations of each stakeholders- CFUGs, Institutions of Local Self Government, the

\(^{11}\) See Narayan Prasad Devkota v PM and Others NKP 2067 Decision No8521 p. 2053; Shiva Prasad Paudel v PM and Others, NKP 2070 Decision No 9030 p 868.

\(^{12}\) Narayan Prasad Devkota v PM and Others NKP 2067 Decision No8521 p. 2053

\(^{13}\) There has been a grumbling on this by the FECOFUN, see its press release in \texttt{http://fecofun.org.np/} accessed on July 27, 2014
Forest Department and the judiciary and a forward looking approach towards expanding, diversifying and successful marketing of products, capacity building of the CFUGs on each of them with strategic focus on participation, consensus building and mediation among stakeholders would contribute towards bringing about social transformation and achieving sustainable developments in the mountains. Honest action of the government of Nepal in the form of trustee of natural resources, and its abidance to the dictates of economic, social and development rights of the people would herald a new age of participatory natural resource management in the Himalaya region.