

Public Interest Litigation Writ Petition filed at the Supreme Court of Nepal

Subject: Requesting issuance of necessary appropriate order or warrant, including certiorari mandamus as per Articles 32, 107 of Nepal's Interim Constitution and Rule 41 of Supreme Court Regulations

Prabindra Shakya, Chairperson of Community Empowerment and Social Justice Foundation (CEmSoJ)

Against

Office of the Prime Minister and Council of Minister, Singha Durbar, Kathmandu
Ministry of Forests and Soil Conservation, Singha Durbar, Kathmandu
Ministry of Federal Affairs and Local Development, Singha Durbar, Kathmandu
Ministry of Science, Technology and Environment, Singha Durbar, Kathmandu
Ministry of Agricultural Development, Singha Durbar, Kathmandu
Ministry of Cooperatives and Poverty Alleviation, Singha Durbar, Kathmandu
Ministry of Information and Communication, Singha Durbar, Kathmandu
Ministry of Energy, Singha Durbar, Kathmandu
Ministry of Irrigation, Singha Durbar, Kathmandu
Ministry of Finance, Singha Durbar, Kathmandu
Ministry of Land Reforms and Management, Singha Durbar, Kathmandu
Ministry of Culture, Tourism and Civil Aviation, Singha Durbar, Kathmandu
Ministry of Industry, Singha Durbar, Kathmandu
National Planning Commission, Singha Durbar, Kathmandu
Department of Forests, Babar Mahal, Kathmandu
Department of Forest Research and Survey, Babar Mahal, Kathmandu
Department of National Parks and Wildlife Conservation, Babar Mahal, Kathmandu
REDD Implementation Center, Babar Mahal, Kathmandu

1. I, petitioner, am an aware Nepali citizen working in favor of constitutional supremacy, rule of law and human rights. With the sense of responsibility of respecting and causing to respect Nepal's constitution and laws, I submit this writ application to the Supreme Court on an issue of public interest to get inappropriate, undemocratic, unjust and unconstitutional action of the defendants annulled from the beginning for protection of all human life and formation of just and civilized society.
2. In this context, industrialization and resulting pollution in the name of population growth and development have caused imbalance in the natural atmospheric cycle. That has resulted in increase in the Earth's temperature and unnatural change in weather as proven in scientific studies. This has been known as climate change. In recent years, we have seen excessive melting of snow in the mountains, bursting of glaciers, occurrence of floods and landslides

due to heavy rainfall against regular weather cycles. Scientists have called such change in weather patterns as climate change.

Global warming is the main cause of climate change. Carbon dioxide is the main greenhouse gas that is resulting in global warming, along with methane and nitrous oxide. Use of fossil fuels (petroleum, gas and coal) for factories, means of transport and other works causes emission of carbon dioxide in a large quantity. Consumption of fossil fuels and factories are two major areas of carbon dioxide emissions globally with shares of 26% and 20% respectively.

Mitigation and adaption programs are being formulated for minimizing various impacts of climate change and its causes. Deforestation and forest degradation has a share of around 17-20% in global carbon dioxide emissions. Thus, among other various measures of minimizing impacts of climate change, Reducing Emissions from Deforestation and Forest Degradation (REDD) in developing countries is currently being taken as a major one. Lately, the REDD concept has been further refined and called REDD+ incorporating measures of effective conservation, sustainable management and public promotion of forests.

Excessive consumption of fossil fuels in developed or rich countries, including for the factories in those countries or extraction and consumption of fossil fuels by factories of multinational companies of those countries set up worldwide are main cause of greenhouse gas emissions. REDD can thus be understood as the concept of using forests and other lands and resources therein in developing or poor countries to minimize the impacts of climate change instead of addressing the source of emissions by reducing extraction and consumption of fossil fuels and making factories environment-friendly. Financial investments and technical resources of international institutions including the UN and World Bank and various multinational companies involved in fuel extraction such as Shell Oil Company as well as Official Development Assistance (ODA) obligation of developed countries towards developing countries have been used for REDD implementation.

3. Under REDD/REDD+ concept, developing countries have been formulating and even implementing various readiness programs. In Africa, REDD+, carbon credits, agrofuels and export crops, are driving massive land grabs. Carbon trading companies have applied for rights over one-third of Mozambique, to sell REDD credits. More than 40% of Cameroon's forests – almost 20% of the country- may be slated for REDD-type projects and 20% of Liberia's forests were almost grabbed for a billionaire carbon scam.

Despite Amnesty International's recommendation to "stop immediately the practice of forced evictions," as Kenya's Mau Forest was made "ready" for a UNEP-funded REDD+ project, members of the Ogiek People suffered violent evictions, and Ogiek activists were attacked for protesting land grabs. In March 2013, the African Court on Human and Peoples' Rights issued provisional

measures to ensure that the Ogiek cannot be evicted while the case is before the court.

Also, in Kenya, under a World Bank funded REDD+ project to establish a conservation area in Embobut forest, thousands of houses of indigenous Sengwer people, with a population of 15,000, were burnt down to forcibly move them from the forest where they had been living for centuries. Despite orders from federal and national high courts, Kenyan Forest Services and police administration have continued their acts of displacing the community.

Over 22,000 peasants with land titles were violently evicted from the Mubende and Kiboga districts in Uganda to make way for the UK-based New Forests Company to plant trees, to earn carbon credits and, ultimately, to sell the timber. According to *The New York Times*, "New Forests Company (NFC), grows forests in African countries with the purpose of selling credits from the carbon dioxide its trees soak up to polluters abroad." *The New York Times* also reports that "...[V]illagers described gun-toting soldiers and an 8-year-old child burning to death when his home was set ablaze by security officers. New Forests Company is 20% owned by the HSBC bank, and investors in the project include the World Bank. Evicted successful farmers are reduced to becoming poorly paid plantation peons on the land they were evicted from.

Thus, under UN carbon offset schemes as per REDD+ concept, with involvement of World Bank, between 2000 and 2010, a total of **500 million acres** of land in Asia, Africa, Latin America and the Caribbean was acquired or negotiated under deals brokered on behalf of foreign governments or transnational corporations. Many such deals are geared toward growing crops or biofuels for export to richer, developed countries – with the consequence that smallholder farmers are displaced from their land and lose their livelihood while **local communities go hungry**. The concentration of ownership of the world's farmland in the hands of powerful investors and corporations is **rapidly accelerating**.

Two of the biggest greenhouse polluters on the planet oil giants, Gazprom and Shell, infamous for the genocide of the Ogoni People and environmental destruction in Nigeria's Niger Delta, bankroll the Rimba Raya REDD project in Central Kalimantan, Indonesia. In Indonesia and Malaysia, large swathes of forests have been destroyed for palm oil plantations to produce biofuel under REDD+ projects. In this course, indigenous peoples and other forest dependent communities have been displaced. Thus, while multinational companies have doubly gained by using the REDD+ concept to destroy biodiversity and community livelihoods in the name of paying for their pollution while voiceless indigenous peoples and forest dependent communities have doubly borne the brunt.

UN studies had projected risks of various human rights violations and destruction of biodiversity as a result of developing countries undertaking

massive land concessions to multinational companies in order to attract foreign investments under REDD+ concept. Such impacts of REDD are now already occurring. Despite such impacts, developing countries, including Nepal, are rapidly embarking on policy formulation and implementation of REDD without any effort to effectively address those impacts.

4. Nepal is among those countries that are currently undergoing a REDD+ Readiness process with considerable amount of multi-lateral and bilateral international support. The Government of Nepal has made public a National REDD Plus Strategy for Nepal and has been collecting suggestions on the strategy. The Strategy report, in line with the impacts mentioned in Chapter 3, has identified significant environmental and social risks of REDD+, including potential impacts on indigenous peoples and forest dependent communities due to exposure to international market based carbon trade such as their involuntary displacement due to forced acquisition of their lands and other violations of their rights as well as destruction of biodiversity. The report has also identified remarkable challenges including lack of clarity on customary rights of indigenous peoples and forest dependent communities in ownership, control and management of forests and lands for implementation of REDD+ in Nepal.

The governmental structure related to REDD+ in Nepal is as follows:

- **The Apex Body:** Consists of an inter-ministerial, governmental committee, chaired by the Ministry of Forests and Soil Conservation (MoFSC). In charge of policy-making.
- **The REDD+ Working Group:** 12 individuals selected by the MoFSC – nine from governmental agencies, one from an aid agency and two from civil society.
- **The REDD Implementation Center (REDD-IC):** The administrative support body in the MoFSC. REDD-IC coordinates and implements REDD management, consultation and research activities at national and sub-national levels.

Multi-stakeholder consultation is explicitly emphasized in the roadmap as an important contributor ‘to promote a transparent, inclusive, accountable, equitable and ecologically sustainable implementation of REDD in Nepal’ in REDD+ Readiness Preparation Proposal of the Government of Nepal adopted in 2010. The United Nation’s Framework Convention on Climate Change (UNFCCC) further specifies that parties must promote education, training and public awareness that encourage the participation of a wide range of stakeholders including indigenous people, women and non-governmental organizations. Nonetheless, various research studies have proven that multi-stakeholder consultation meetings of REDD+ Preparation Process have been ineffective to bring the weak actors’ perspectives that actually participate in those meetings. Nepal’s institutional REDD+ planning structure is highly dominated by techno-bureaucratic top-down practices representing government interests and international donors’ requirements, while sub-national and non-governmental stakeholders often find themselves to be merely used to legitimize the policy

process rather than to actively shape it. A considerable share of policy preparations is left to the outsourced experts.

For example, figures available in an independent research report show high participation of government representatives in three national, five regional and fourteen local consultation workshops but lesser participation of community forest user groups' representatives and negligible participation of indigenous peoples' representatives. This is despite legal provisions in line with **Free, Prior and Informed Consent** (FPIC) requirements as prescribed by REDD+ decisions under the UNFCCC, and applied by financing institutions and donor organizations active in the field of REDD+ (e.g. WB and UN) though without effective implementation.

5. *Till date, Nepal's Government has received assistance of about two million USD following adoption of REDD+ Readiness Preparation Proposal in 2010, including 45 percent of the amount from Forest Carbon Partnership Facility and 51 percent from other organizations. It has been reported that monitoring, documentation and verification programs as well as studies and research along with capacity building trainings, regional conferences and interaction workshops have been undertaken with the amount. Participation of indigenous peoples have been minimal in those programs as in the REDD+ strategy consultation workshops mentioned in Chapter 4.*

Similarly, under the first-ever pilot Forest Carbon Trust Fund in Nepal, representatives from three watersheds in Dolakha, Gorkha and Chitwan districts received a total of USD 95,000 as grants on behalf of community forest user groups at a ceremony organized at the International Centre for Integrated Mountain Development (ICIMOD) in 2011. ICIMOD and its partners, the Federation of Community Forestry Users, Nepal (FECOFUN) and the Asia Network for Sustainable Agriculture and Bio resources (ANSAB), are implementing this initiative. Both FECOFUN and ANSAB are non-indigenous organizations. Though most of the members of community forest user groups are indigenous persons, their representation is minimal in the decision-making level i.e., community forest users' committee. Thus, it is clear that indigenous peoples have not received proportionate benefits of grants provided to community forest user groups.

6. Thus, as mentioned in Chapter 3, there is strong likelihood that Nepal's forests, lands and other resources, which are properties of the nation and people, will go under the control and authority of international institutions such as the World Bank and multinational and private companies when those resources are made available for international market based carbon trade under implementation of REDD concept. That can raise question on the sovereign powers and state authority inherent in the people of Nepal.

In addition, there have been violations of fundamental rights guaranteed in Nepal's Interim Constitution 2007 and existing national laws in Nepal's REDD+

readiness process including formulation of REDD+ national strategy, as described in Chapters 4 and 5. Article 21 of the Constitution, under right to social justice, provides that women, Dalits, indigenous peoples, Madhesi and other groups have the right to participate in state structures on the basis of principles of proportional inclusion. Further, Article 13, under right to equality, states that special provisions can be made for the protection, empowerment or advancement of women, Dalits, indigenous peoples and other marginalized groups. Local Self-Governance Act, 1999 also states the expediency to institutionalize the process of development by enhancing participation of all the people including indigenous peoples and Dalits in bringing out social equality in mobilizing and allocating means for the development of their own region and in balanced and equal distribution of results of development. REDD+ preparation process is being undertaken in contravention of these constitutional and legal provisions and hence the entire process should be annulled.

Article 12 of the Constitution guarantees every person the right to live with dignity while Article 17 states that each community residing in Nepal has the right to preserve and promote its culture, cultural civilization and heritage. Indigenous peoples have inherent and spiritual relationships with lands, forests and natural resources. Their cultures and civilizations are also inter-related with lands, forests and natural resources. REDD+ implementation will highly likely restrict access and control of indigenous peoples and forest dependent communities over forests and resources in violation of their right to live with dignity and cultural rights.

Article 16 of the Constitution regarding environment and health and Environment Protection Act, 1997 ensure right to live in a clean environment. There is strong potential of loss of biodiversity as projects to grow crops or biofuels for export such as palm oil plantations can be implemented under REDD+ concept. Thus, REDD+ implementation will also violate rights relating environment.

Besides constitutional and national legal provisions mentioned above, Nepal has also infringed on its international human rights obligations under ILO Convention 169, UN Declaration on the Rights of Indigenous Peoples (UNDRIP), UNFCCC and Convention on Biological Diversity (CBD) that it is a State party to. ILO C169 (Articles 13, 14, 15, 16 and 17) and UNDRIP (Articles 26 and 27) ensures indigenous peoples' rights over lands, territories and resources. REDD+ implementation will violate those rights of indigenous peoples. Nepal's Land Act, 1964 and Forest Act, 1993 have also not incorporated those rights. Nepal's REDD+ Readiness Process, including formulation of National REDD+ Strategy, is proceeding on the basis of those acts. Thus, those acts not in line with international obligations of Nepal need to be reformed and ongoing process related to REDD+ should be nullified.

UNDRIP (Article 19) provides that States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative

institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. REDD+ environmental and social safeguards policy in Cancun Agreement (COP16) under UNFCCC calls for respect of the rights of indigenous peoples noting the adoption of UNDRIP by UN General Assembly. Thus, it is obligatory for Nepal to respect and fulfill the rights of indigenous peoples over lands, territories and resources and to free, prior and informed consent.

7. Precedents:

a) Certiorari mandamus of joint bench of Nepal's Supreme Court in Advocate Shankar Limbu et al v. Office of the Prime Minister and Council of Ministers et al (Writ No. 065-WO-0475, Order date: 2013/04/21/1)

8. Demands:

Issue an interim order to the defendants not to implement or cause to implement the concept of REDD+ in Nepal that carries strong likelihood of violating the human rights of indigenous peoples and forest dependent communities and negatively impacting the entire human life and world by handing over the control and authority of Nepal's forests, lands and other resources, which are properties of the nation and peoples, to international, multinational and private institutions

However, if REDD+ process is to be carried on,

- a) Issue necessary appropriate order or warrant to the defendants for ensuring meaningful participation of indigenous peoples, Dalits, women and other groups on the basis of principles of proportional inclusion in REDD+ related structures as guaranteed in the Constitution.
- b) Issue directive order for complying with ILO Convention 169, UNDRIP, CBD, Safeguards Policy in Cancun Agreement (COP16) under UNFCCC and implementing the rights of indigenous peoples provided in those instruments in course of formulating REDD+ related strategies and policies and the entire process.
- c) Issue appropriate mandamus to carry out necessary study to annul or revise Nepal's Land Act, 1964 and Forest Act, 1993 that are the basis of Nepal's REDD+ related process since those laws are not in line with international human rights standards of indigenous peoples.
- d) Issue mandamus to the defendants to fulfill the right of indigenous peoples to free, prior and informed consent in any readiness or implementation process of REDD and make necessary legal arrangements to form a separate high-level mechanism for the purpose with proportional inclusive participation of indigenous women and youth.

9. Since the subject of this writ petition is a grave issue of public interest, it is requested that the Court hears this writ petition by according preferential rights as per Rule 5(a) of Supreme Court Regulation, 2049 BS.

10. An advocate has not been commissioned to register this writ petition. It is requested that points of arguments of advocate who will be appointed later be adopted as integral parts of this writ petition.

11. Enclosed documents:

- a) A copy of identification of the petitioner
- b) Position paper of Nepal Federation of Indigenous Nationalities on Climate Change and REDD

I hereby declare that the information provided in this writ petition are true to my knowledge and will bear the responsibility as per law if proven to be false.

Petitioner

Prabindra Shakya

Dated

Draft Translation