

# Kathmandu School of Law Review

ISSN 2091-2110

Volume 6

Issue 1

April 2018

## FOREWORD BY EDITOR-IN CHIEF

*Prof. (Dr.) Yubaraj Sangroula*

Religion and State: Revisions Needed in Sri Lankan Constitutional Implications

*Nishandey Ratnam*

## FEATURE ARTICLE

Cultural Dimension of Rule of Law and Social Episteme

*Prof. (Dr.) Yubaraj Sangroula*

Personal Law and Property Rights of Hindu Woman in India - the Need for Codification

*Sindhu Thulaseedharan*

## ARTICLES

Belt and Road Initiative and Nepal's Economic Perspective: Regionality and Specificity

*Ashish Adhikari*

Unwholesome Tendencies in the Judicial Appointment - A Nepali Perspective

*Bishal Khanal*

Tax Regime in Nepal - Implications on Human Rights

*Dagan Ommesiga*

Assessing Social Impacts of Slum Displacement on Women's Lives: A Case Study of Three Resettlement Colonies in Delhi, India.

*Dr. Deeksha Bajpai and Dr. Upma Gautam*

Analyzing Hindu Women's Right to Property in Bangladesh: Absolute Interest versus Limited Interest

*Ferdousi Begum*

Making WTO Dispute Settlement System Useful for LDCs

*Prof. (Dr.) Kumar Ingnam*

## LEGISLATIVE COMMENT

Assessing Impacts of Banks and Financial Institutions Act in the Development of Financial Sector

*Ram Sharan Pokharel*

## STUDENT ARTICLES

Sexual Orientation and Gender Identities: An Analysis of the Contemporary Laws and Literature

*Dhruba Yonzon*

Rohingya's Genocide: Human Rights and Politics

*Prachi Tomar and Aditya Pandey*

Comparative Study on Anumana and Inference of Hindu and Western Philosophy

*Nikhil Dongol*

## CASE COMMENT

An Analysis of Principle of Erga Omnes Partes with Special Reference to the Case of Belgium v. Senegal, 2012

*Prajwol Bickram Rana*



**Kathmandu School of Law (KSL)**

Suryabinayak-4, Bhaktapur, Nepal, Ph: 6634455, 6634663,

Email: [info@ksl.edu.np](mailto:info@ksl.edu.np), [www.ksl.edu.np](http://www.ksl.edu.np)

# Tax Regime in Nepal- Implications on Human Rights

Dagan Ommesiga\*

## Abstract

*This paper examines how tax abuse affects the realization of human rights in Nepal. Nepal is losing approximately 597 million US dollars through tax evasion and other illicit financial flows annually; it is no surprise that over 25.2 percent of the population lives below the national poverty line.<sup>1</sup> This shows that they lack access to basic human rights such as the right to food, the right to housing, the right to clothing and above all, the right to health. This article explores how human rights in Nepal have evolved over time and how they are protected along with the available remedies through national and international mechanisms. Additionally, it examines the available mechanisms and remedies for the breach of human rights. To contextualize the concept offered, this write-up explores the research produced by scholars and the steps that have been taken by organizations like United Nations and the International Bar Association to establish a link between illicit financial flows and violation of human rights. In conclusion, the paper provides some recommendations to both the government of Nepal and business enterprises.*

## Introduction

The United Nations Human Rights Office of the High Commissioner defines human rights as ‘rights that should be enjoyed by all human being regardless of their societal statuses’<sup>2</sup> and should be promoted and protected by all States<sup>3</sup>.

In the situation of human rights crisis, citizens always turn to their respective governments to demand the realization of these rights especially the economic, social and cultural rights often termed as second generation rights by generation theorist.<sup>4</sup> Citizens turn to their governments because states have the moral obligation to promote the welfare of their citizens and members.<sup>5</sup> However, these demands are

---

\* Dagan Ommesiga is a LLM student specializing in Public International Law at Leiden University in the Netherlands. He holds a Post Graduate Diploma in Bar Professional Training Course from Cardiff University, Wales.

<sup>1</sup> Asian Development Bank, ‘Poverty in Nepal’, *Asian Development Bank Official Website* available at <https://www.adb.org/countries/nepal/poverty>, accessed on 9 March 2017.

<sup>2</sup> United Nations Human Rights Office of the High Commissioner, ‘What are human rights?’, *United Nations Human Rights Office of the High Commissioner Official Website* available at <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>, accessed on 15 March 2017.

<sup>3</sup> *Vienna Declaration and Programme of Action*, A/ CONF. 157/23, adopted on 23 June 1993.

<sup>4</sup> See *International Covenant on Economic, Social and Cultural Rights*, 993 UNTS 3, adopted on 16 December 1966, entered into force 3 January 1976 (ICESCR).

<sup>5</sup> Barry Brian, ‘Do Countries have Moral Obligations? The Case of World Poverty’, 27 October 1980 available at [https://tannerlectures.utah.edu/\\_documents/a-to-z/b/barry81.pdf](https://tannerlectures.utah.edu/_documents/a-to-z/b/barry81.pdf), accessed on 15 March 2017; Christopher Spencer Lammer- Heindel, ‘Does the state have moral duties? State duty-claims and

made oblivious by citing the fact that monetary resources are required to achieve and maintain these rights.<sup>6</sup> For most of the governments, the main source of monetary resources are taxes, which is always supplemented by resource exploitation and imports and exports, which are often subjected to taxation and foreign aid.<sup>7</sup> Therefore, it is the duty of government to implement just tax systems and policies to maximize tax collection so as to generate revenue to fund these rights.<sup>8</sup>

In recent years, a new debate has started identifying a potential link between tax and human rights and this debate, as a result, has brought the International Bar Association's Report on Tax Abuses and Human Rights showing substantial progress in the field.<sup>9</sup> Shane Darcy mentions tax abuses have a negative impact on the state's delivery of services, and this, in turn, creates problem to address the poverty which poses a detriment to the state's ability to meet its human rights obligations.<sup>10</sup> With the United Nations Human Rights Council's endeavour of adopting guiding principles for businesses and human rights in 2011<sup>11</sup>, it shows that there is a greater attention being drawn to tax abuse and its human costs at the international level.<sup>12</sup>

This paper seeks to investigate and address the following questions:

1. How have human rights evolved over the years in Nepal and how are they protected through national and international mechanisms?
2. What is the tax structure of Nepal and how does it affect the realization of human rights?
3. What mechanisms are available for confronting these human rights breaches in relation to unjust tax policy?

## Status of Human Rights in Nepal

Nepal enacted various legislations to safeguard its citizens against potential breaches of human rights. In 2012 B.S. (1955 A.D.), it passed the Civil Rights Act to promote

---

the possibility of institutionally held moral obligations', Doctor of Philosophy Thesis, University of Iowa, 2012 available at <http://ir.uiowa.edu/etd/3330>, accessed on 9 September 2018.

<sup>6</sup> Attiya Waris, *Tax and Development: Solving Kenya's Fiscal Crisis through Human Rights*, Law Africa Publishing Ltd, Nairobi, 2013.

<sup>7</sup> World Bank, *World Development Indicators 2010*, World Bank Publications, Washington DC, 2010, p.315.

<sup>8</sup> Tax Justice Network, 'Lima Declaration on Tax Justice and Human Rights', April 2015, *Tax Justice Network Official Website*, available at <http://www.taxjustice.net/2015/06/24/the-lima-declaration-on-tax-justice-and-human-rights/>, accessed on 15 March 2017.

<sup>9</sup> International Bar Association, 'Tax Abuses, Poverty and Human Rights-A report of the International Bar Association's Human Rights Institute Task Force on Illicit Financial Flows, Poverty and Human Rights', October 2013, *International Bar Association Official Website* available at <http://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=4A0CF930-A0D1-4784-8D09-F588DCDDFEA4>, accessed on 15 March 2017.

<sup>10</sup> S Darcy, "The Elephant in the Room": Corporate Tax Avoidance & Business and Human Rights', vol. 2, no. 1, *Business and Human Rights Journal* p.1, 2016.

<sup>11</sup> Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', (2011) UN Doc A/HRC/RES/17/31.

<sup>12</sup> See Darcy (n 10).

the right to property, religion and other rights<sup>13</sup> and in 2049 B.S. (1993 A.D.) it passed the Civil Service Act to eliminate any form of discrimination in the Civil Service.<sup>14</sup> It should be noted that civil and political rights were among the first fundamental rights guaranteed in Nepal. Nepal ratified the International Covenant on Civil and Political Rights (ICCPR) along with its Optional Protocol on 14 May 1991.<sup>15</sup> The Optional Protocol grants the Human Rights Committee the competence to receive and consider complaints about potential breaches of the ICCPR.<sup>16</sup> Nepal has been able to entrench the international covenants and treaties it has signed through the Nepal Treaty Act.<sup>17</sup>

Additionally, Prof. Pradhananga points out that the Nepalese government, to some extent, has not been successful to guarantee the right to a fair trial by a competent, independent and impartial court based on article 126 of the Constitution. He argues personnel presiding over these tribunals should be judicially trained and independent but the Chief District Officer and District Forest Officer, who have the authority to decide the cases being a quasi-judicial body may not always meet the standard.<sup>18</sup>

Nepal has tried to further incorporate the economic, social and cultural rights guaranteed under the International Covenant on Economic, Social and Cultural Rights (ICESR) being a state party to the same covenant.<sup>19</sup> Article 2 of the ICESR sets out the obligations to the state parties but the sub-article 1 of the same article stands out with particular reference to the State's obligation to ensure that resources are available for the realization of economic, social and cultural rights.

### **Article 2 of the International Covenant on Economic, Social and Cultural Rights**

- '[E]ach State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'<sup>20</sup>

However, it should be noted that Nepal is not a signatory to the Optional Protocol to the ICESCR, which gives competence to the CESCR Committee to hear individual

---

<sup>13</sup> *Civil Rights Act, 1955*(*Nagarik Adhikar Ain 2012*).

<sup>14</sup> *Civil Service Act, 1993* (*Nijamati Sewa Ain 2049*).

<sup>15</sup> See *International Covenant on Civil and Political Rights*, 999 UNTS 171, adopted on 16 December 1966 (ICCPR).

<sup>16</sup> *Optional Protocol to the International Covenant on Civil and Political Rights*, 999 UNTS 171, adopted on 16 December 1996, entered into force 23 March 1976.

<sup>17</sup> *Nepal Treaty Act, 1990* (*Nepal Sandhi Ain 2047*).

<sup>18</sup> Rajit Bhakta Pradhananga & Shreeprakash Upreti, 'Human Rights in Nepal: Moving Forward', vol. 1, no. 1, *Journal on Human Rights Sambhak* p. 1, 2016.

<sup>19</sup> See *ICESCR* (n 4). Nepal ratified ICESCR on 14 May 1991.

<sup>20</sup> *Ibid*, art 2(1).

complaints from nationals of state parties.<sup>21</sup> With the adoption of a National Human Rights Action Plan, Nepal aimed at improving its human rights situation and mainstreaming the human rights into its development plans through the mobilization of national and international resources.<sup>22</sup> This approach is supported by the United Nations as it acknowledges that the objectives of the realization of human rights are in line with the general objectives of the State, particularly development<sup>23</sup>.

## The Rights of Children in Nepal

In a country with 11,526,000 children under the age of eighteen and 2,911,000 under the age 5,<sup>24</sup> Nepal has protected their rights and interests<sup>25</sup> by enacting legislation, such as the Children's Act, 1992 A.D.<sup>26</sup> and the Child Labour (Prohibition and Regulation) Act, 1992 A.D.<sup>27</sup> These were passed to entrench the obligations that Nepal had received for being a party to the International Convention on the Rights of the Child<sup>28</sup>. However, inconsistency arises where the Children's Act, 1992 A.D. provides for the legal definition of a child as a minor who has not completed the age of sixteen<sup>29</sup> and the Convention on Rights of the Child refers to a child as a human being below the age of eighteen<sup>30</sup>. The Convention provides that the children enjoy the right to education from primary level to secondary level and after that should have access to higher education.<sup>31</sup> The same convention in article 32 provides that children ought to be protected from any form of economic exploitation whatsoever.<sup>32</sup>

The Government of Nepal had further ratified the International Labour Organisation Convention concerning the Prohibition and Immediate Action for the Elimination

---

<sup>21</sup> *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, A/RES/63/117, adopted on 10 December 2008.

<sup>22</sup> His Majesty's Government Office of the Prime Minister and Council of Ministers, 'National Human Rights Action Plan', April 2004, *Office of the United Nations High Commissioner for Human Rights Official Website* available at [http://www.ohchr.org/Documents/Issues/NHRA/Nepal\\_NHRAP.pdf](http://www.ohchr.org/Documents/Issues/NHRA/Nepal_NHRAP.pdf), accessed on 30 March 2017.

<sup>23</sup> Office of the United Nations High Commissioner for Human Rights, 'Handbook on National Human Rights Plans of Actions' 29 August 2002, *Office of the United Nations High Commissioner for Human Rights Official Website* available at <http://www.ohchr.org/Documents/Publications/training10en.pdf>, accessed on 30 March 2017.

<sup>24</sup> United Nations Children's Fund, 'Data: Monitoring the Situation of Children and Women, Country Profile: Nepal', United Nations Children's Fund Official Website available at <https://data.unicef.org/country/npl/>, accessed on 30 March 2017.

<sup>25</sup> *Constitution of Nepal*, 2015, art 39.

<sup>26</sup> *Children's Act*, 1992 (*Bal Balika Sambandhi Ain* 2048).

<sup>27</sup> *Child Labour (Prohibition and Regulation) Act*, 2000 (*Bal Shram Nished Ra Niyaman Garne Ain* 2056).

<sup>28</sup> *United Nations Convention on the Rights of the Child*, GA Res/44/25, adopted on 20 November 1989, entered into force 2 September 1990 (CRC). Nepal signed this convention on 26 January 1990 and ratified it on 14 September 1990.

<sup>29</sup> *Children's Act* (n 26), art 2(a).

<sup>30</sup> *CRC* (n 28), art 1.

<sup>31</sup> *Ibid*, art 28.

<sup>32</sup> *Ibid*, art 32.

of the Worst Forms of Child Labour<sup>33</sup> on 03 June 2002, and International Labour Organisation Convention concerning Minimum Age for Admission to Employment<sup>34</sup> on 30 May 1997.

In 2011, the International Labour Organisation together with the Central Bureau of Statistics of Nepal produced a report which scrutinizes the rights of the children in relation to labour.<sup>35</sup> Based on the National Labour Force Survey,<sup>36</sup> the report estimated that Nepal has a child population of 7.77 million which constitutes 33 percent of the country's population and of this 3.3 million are economically active with 36,000 currently employed but seeking better jobs. 87.7 percent of the working children are engaged in agriculture where they unleash hard labor as cultivators, 9.8 percent are service workers and 2.5 percent are in the manufacturing sector. Most of the labor is home based with 90 percent contributing as family members, 4.2 percent are paid employees and 2.5 percent are self-employed.

The report further shows that among the child population in the age group 5-17, 82.4 percent are literate with 21 percent having completed the primary school of which 3.4 percent are believed to have attended secondary school or higher levels. On the other hand, 9 percent have never attended school at all. They are subjected to long hours of work under hazardous conditions and are paid insufficiently, that is below than 2167 Nepalese Rupees monthly which is less than 25 US Dollars.<sup>37</sup>

Given the statistics above, one cannot fail to note that there is a clear breach of the human rights as these children have been deprived of the right to education and the right to be protected from any form of economic exploitation.

Article 12 of the ICESR<sup>38</sup> and article 24 of the CRC<sup>39</sup> recognize the right to health which is an obligation to be met by the state parties. Sonal Singh notes that due to the heavy taxation that had been imposed on government employees by the Maoist regime, primary health care post staff in some areas of Nepal had been forced to flee impeding the delivery of health services thus causing a breach of this right to health.<sup>40</sup>

---

<sup>33</sup> *International Labour Organisation Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour*, C182, adopted on 17 June 1999, entered into force 19 November 2000.

<sup>34</sup> *International Labour Organisation Convention concerning Minimum Age for Admission to Employment*, C-138, adopted on 26 June 1973, entered into force on 19 June 1976. Nepal has specified the minimum age to be 14 years under this Convention.

<sup>35</sup> International Labour Organization & Central Bureau of Statistics of Nepal, *Nepal Child Labour Report: based on data drawn from the Nepal Labour Force Survey*, International Labour Organization & Central Bureau of Statistics of Nepal, Kathmandu, 2012.

<sup>36</sup> Central Bureau of Statistics of Nepal, 'Report on the National Labour Force Survey-2008', August 2009, *International Labour Organization Official Website* available at [http://www.ilo.org/wcmsp5/groups/public/@asia/@ro-bangkok/@ilo-kathmandu/documents/publication/wcms\\_118294.pdf](http://www.ilo.org/wcmsp5/groups/public/@asia/@ro-bangkok/@ilo-kathmandu/documents/publication/wcms_118294.pdf), accessed on 17 April 2017.

<sup>37</sup> Nepal Child Labour Report (n 35), p. 100.

<sup>38</sup> See *ICESCR* (n 4), art 12.

<sup>39</sup> See *CRC* (n 28), art 24.

<sup>40</sup> Sonal Singh et.al, 'The State of Child Health and Human Rights in Nepal', vol. 3, no. 7, *PLOS Medicine* p. 948, 2006, p.949.

With these child rights clearly set out in the Constitution of Nepal under Article 39,<sup>41</sup> and a remedy provided<sup>42</sup> one can hope that it is the start of a new era in Nepal in the realization of the rights of the child since the preceding Interim Constitution had failed to accomplish this.

## The Rights of Women in Nepal

Sujata Magar notes that in Nepal, females are kept on the sidelines when it comes to the question of development although they are of same importance as of males.<sup>43</sup> The regime on the rights enjoyed by women is protected under the Constitution<sup>44</sup> along with the National Women Commission Act, 2017 A.D.<sup>45</sup> National Women Commission has been established as a constitutional body tasked with enhancing the welfare of women in Nepal.<sup>46</sup> Based on the report produced by the United States Department of State, the Nepali women and girls are subjected to sex trafficking in Asia, the Middle East, and sub-Saharan Africa.<sup>47</sup> Nepal ratified Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) on 22 February 1991<sup>48</sup> and Optional Protocol to CEDAW on 15 June 2007<sup>49</sup>. The report manifested that the Human Trafficking and Transportation (Control) Act<sup>50</sup> was not in conformity with international law and thus is recommended for its revision.

The Constitution of Nepal has guaranteed the right to reproductive health of women<sup>51</sup> emphasizing its obligation under provisions of the CEDAW. The Country Civil (Code) Act, 2074 B.S., which serves as the new general code guiding the civil matters, treat women equally in the matters of enjoying property rights.<sup>52</sup>

Although 'women comprise 51.5 percent of the total population of Nepal but continue to be discriminated against in every aspect of society'<sup>53</sup>. The decade-long insurgency

---

<sup>41</sup> See *Constitution of Nepal* (n 25) art 39.

<sup>42</sup> Ibid art 46.

<sup>43</sup> Sujata Magar, 'Rights of Women in Nepal', *Sharing4Good Official Website* available at [www.sharing4good.org/article/rights-women-nepal](http://www.sharing4good.org/article/rights-women-nepal), accessed on 30 March 2017.

<sup>44</sup> See *Constitution of Nepal* (n 25), art 38.

<sup>45</sup> *National Women Commission Act, 2017 (Rashtriya Mahila Aayog Ain 2074)*.

<sup>46</sup> *Constitution of Nepal* (n 25), art 252.

<sup>47</sup> Office to Monitor and Combat Trafficking in Persons, 'Trafficking in Person Report-2016', *United States Department of State Official Website* available at <https://www.state.gov/j/tip/rls/tiprpt/countries/2016/258829.htm>, accessed on 30 March 2017.

<sup>48</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, 1249 UNTS 13, adopted on 18 December 1979, entered into force 3 September 1981.

<sup>49</sup> *Optional Protocol to the Convention on the Elimination of Discrimination against Women*, 2131 UNTS 83, adopted on 6 October 1999.

<sup>50</sup> Human Trafficking and Transportation (Control) Act, 2007 (*Manab Bechbikhan tatha OsaarPasar Niyantran Ain 2064*).

<sup>51</sup> *Constitution of Nepal* (n 25), art 38.

<sup>52</sup> *Country Civil (Code) Act, 2017 (Muluki Devani (Sabita) Ain 2074)* s 205.

<sup>53</sup> ESCR Committee et.al, 'Economic, Social and Cultural Rights in Nepal-A Civil Society Parallel Report', October 2013, *United Nations Human Rights Office of the High Commissioner Official Website* available at [http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/NPL/INT\\_CESCR\\_NGO\\_NPL\\_15369\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/NPL/INT_CESCR_NGO_NPL_15369_E.pdf), accessed on 30 March 2017.

weakened the position of women in education, participation in income generating activities and other sectors, but till now the state has no clear policy to bridge this inequality between men and women.<sup>54</sup> Another contentious issue in the discussion of women's human rights is that of land. With more than 80 percent of the people depending on land for their livelihood,<sup>55</sup> it is argued that land is a source of socio-economic resources.<sup>56</sup> Land in Nepal was originally held in seven tenures with two major categories: *Raikar* denoting land was taxable and *Birta* denoting the livelihood.<sup>57</sup> This tenure system was changed by the enactment of the Land Act, 1964 A.D.<sup>58</sup> which abolished the discriminatory tax collections (*jimdari*). Women at present enjoy about 25 to 50 percent tax exemption on land registration if married and 35 percent if single in status.<sup>59</sup> This initiative can be seen to encourage the ownership of land by women but at present, the ownership of land stands at only 5 percent with 19.7 percent of the women owning land in Nepal.

### The Rights of Workers in Nepal

The Constitution of Nepal stipulates the prohibition of any form of slavery<sup>60</sup> maintaining the principle of just and favorable conditions of work. With the enactment of the Labour Act<sup>61</sup>, workers were guaranteed the benefits that cut across both the workplace and while on leave, one of the progressive provision was that the employees were entitled of insurance for occupational hazards and medical expenses when falling sick.<sup>62</sup> Nepal has also enacted the Foreign Employment Act to protect the rights and interests of workers who go for foreign employment.

Article 18(4) of the Constitution set down the rule that no discrimination shall be instituted on the issue of remuneration on the ground of sex. The preamble of the International Labour Organisation's Constitution set out in 1919 recognizes that if a State fails to improve the conditions of works, it not only harms its own people but also detriments the other countries' efforts in improving and sustaining their working conditions.<sup>63</sup>

---

<sup>54</sup> Ibid.

<sup>55</sup> Samjhana Shrestha, 'Nepal: The Right to Land is the Right to Livelihood', *Isis International Official Website* available at [http://www.isiswomen.org/index.php?option=com\\_content&view=article&id=573:nepal-the-right-to-land-is-the-right-to-livelihood&catid=131&Itemid=452](http://www.isiswomen.org/index.php?option=com_content&view=article&id=573:nepal-the-right-to-land-is-the-right-to-livelihood&catid=131&Itemid=452), accessed on 30 March 2017.

<sup>56</sup> Elisabeth Wickeri, 'No Justice, No Peace: Conflict, Socio-Economic Rights, and the New Constitution in Nepal', vol. 2, no.2, *Drexel Law Review* p. 427, 2010.

<sup>57</sup> Babu Ram Acharya, 'Land Tenure and Land Registration in Nepal', *International Federation of Surveyors Official Website* available at [http://www.fig.net/resources/proceedings/fig\\_proceedings/fig2008/papers/ts07b/ts07b\\_02\\_acharya\\_2747.pdf](http://www.fig.net/resources/proceedings/fig_proceedings/fig2008/papers/ts07b/ts07b_02_acharya_2747.pdf), accessed on 30 March 2017.

<sup>58</sup> *Lands Act*, 1964 (*Jagga Ain* 2021).

<sup>59</sup> International Organisation for Migration, 'Securing Women's Land and Property Rights in Nepal', 28 June 2016, *International Organization for Migration Official Website* available at <https://www.iom.int/news/securing-womens-land-and-property-rights-nepal>, accessed on 30 March 2017.

<sup>60</sup> *Constitution of Nepal* (n 25), art 29 (3).

<sup>61</sup> *Labour Act*, 2017 (*Shram Ain* 2074).

<sup>62</sup> Ibid, s 69.

<sup>63</sup> International Labour Organisation, Instrument for the Amendment of the Constitution of the



Overall, it can be noted that the implementation of the economic, social and cultural rights is impeded most of the time by political and civil unrests as was seen during the ten-year war. Furthermore, Nepal is facing a problem of unemployment although it is fairly low because of the majority of Nepali citizen's dependence on subsistence agriculture. International Labour Organisation, in its survey in Nepal, noted that 33 percent of the youth typically between the ages of fifteen to twenty-four years were engaged in self-employment.<sup>64</sup> Although the implementation of these rights has been termed as too weak due to State's institutional framework,<sup>65</sup> but with the adoption of the new Constitution, the future might be as regards to the progressive realization of this generation of rights.

The constitutional acceptance of economic, social and cultural rights and the similar practice around the world does not necessarily mean that their implementation will be like a walk in the park. Since they flow only from the hard legal obligations with the engagement of the different states' entities, it requires the enactment of domestic law with clear judicial remedies.<sup>66</sup> On the other hand, the constitutionalization of these rights shows the commitment of the government to protect them during periods of political, civil unrests and natural catastrophes which had been common sights in Nepal over the past twenty years.<sup>67</sup>

## The Tax Regime of Nepal

The notion that human rights need resources cannot be reconciled without examining the tax structure. Tax can be defined as a compulsory contribution made by a taxpayer to the government without any reference to particular benefit whatsoever.<sup>68</sup> Taxation in Nepal has undergone an extensive discussion and development over the past years, with the role of taxation becoming more evident in the process of economic development as the government needs more revenue to meet the high expenditure on its plans and programs. This causes a resource gap which cannot be always filled by seeking international financial aid. Therefore, the only way out of this resource gap is taxation.<sup>69</sup>

---

International Labour Organisation, 19 June 1997, *International Labour Organization Official Website* available at [https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS\\_442248/lang-en/index.htm](https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/departments-and-offices/jur/legal-instruments/WCMS_442248/lang-en/index.htm), accessed on 11 September 2018.

<sup>64</sup> Makiki Matsumoto & Sara Elder, 'Employment Working Paper No.51: Evidence from the ILO School-to-work transition surveys', 2010, *International Labour Organization Official Website* available at [http://www.ilo.int/wcmsp5/groups/public/-ed\\_emp/-emp\\_policy/documents/publication/wcms\\_141016.pdf](http://www.ilo.int/wcmsp5/groups/public/-ed_emp/-emp_policy/documents/publication/wcms_141016.pdf), accessed on 30 March 2017.

<sup>65</sup> International Labour Organisation, 'Decent Work Country Programme for Nepal 2008-2012', *United Nations Information Centre Kathmandu Official Website* available at <http://un.info.np/Net/NeoDocs/View/4831>, accessed on 30 March 2017.

<sup>66</sup> International Commission of Jurists, 'Economic, Social and Cultural Rights and the New Constitution of Nepal', August 2009, *International Commission of Jurists Official Website* available at [HTTP://www.icj.org/wp-content/uploads/2012/04/Nepal\\_Economic-Social-and-Cultural-Rights-and-The-New-Constitution\\_Thematic-Report\\_2009.pdf](http://www.icj.org/wp-content/uploads/2012/04/Nepal_Economic-Social-and-Cultural-Rights-and-The-New-Constitution_Thematic-Report_2009.pdf), accessed on 30 March 2017.

<sup>67</sup> *Ibid*, p. 5.

<sup>68</sup> Goode Richard, *Government Finance in Developing Countries*, Brookings Institution, 1984.

<sup>69</sup> Ashok Shumshere JBR, 'An Analysis of Tax Structure and Responsiveness of Tax Yields in Nepal',

As stated by Ashok Shumshere, "Taxation is not only an effective instrument for resource mobilization- a "boot-strap" operation for financing economic development -but also a "toolkit" for revenue collection to maintain growth, equity and stability"<sup>70</sup>.

He further states, as the resource gap widens, huge fiscal and budgetary deficits tend to arise.<sup>71</sup> Due to the low taxation potentiality<sup>72</sup> of underdeveloped countries like Nepal, shortage of revenue becomes apparent. With the government required to play an active role in the realization of rights like education, health, drinking water and sanitation, it has increased the revenue-expenditure gap in Nepal since the private sector is still too weak to deal with these issues. Shumshere reaffirms that the only effective way to fill this gap is through taxation because seeking international aid always has adverse effects on poor economies.<sup>73</sup>

The value-added tax (VAT), which was introduced in 1997 A.D., is the main indirect tax and is capped at 13 percent.<sup>74</sup> The main form of direct tax is income tax which comprises of corporate tax capped at 25 percent, dividends at 5 percent and capital gains are capped at 10 percent for natural persons and 15 percent for others. Nepal has many other forms of tax, for example, education service tax (recently scrapped), land registration fees and vehicle tax.<sup>75</sup> So as to maximize tax revenue through indirect taxes, it can be showed that Nepal applies a regressive taxation system which tends to place a high tax burden to the poor thus eroding their incomes at the expense of the rich which bridge inequality.<sup>76</sup> This can be evident in Nepal with the introduction of a 1 percent service fee on admission and tuition fees that are collected by private institutions with a penalty of 15 percent if one fails to pay on time.<sup>77</sup>

The tax regime in Nepal is marred by tax evasion and tax avoidance which results in leakages of money that could have been deposited into the government treasury. Banshidhar Ghimire, in his study, estimates that Nepal loses more than 40 percent of taxable capacity to tax evasion.<sup>78</sup> In a separate report, it is noted that Nepal loss approximately 5 billion Nepalese Rupees (NPR) per year through tax leakages.<sup>79</sup> The

---

Doctor of Philosophy in Economics, Tribhuvan University, 2008.

<sup>70</sup> Ibid.

<sup>71</sup> Madan Kumar Dahal, 'Taxation in Nepal: Structure, Issues and Reforms', vol.32, no. 125, *Economic Journal of Nepal* p.1, 2009; Ibid, p. 1.

<sup>72</sup> Nicholas Kaldor, 'Capital Accumulation and Economic Growth', in D.C. Hague (ed), *The Theory of Capital*, Palgrave Macmillan, London, 1961.

<sup>73</sup> Shumshere (n 69), p.19. The taxation regime in Nepal is mainly handled by the Inland Revenue Department under the Ministry of Finance.

<sup>74</sup> International Monetary Fund, 'Nepal Selected Issues' (November 2011), IMF Country Report No. 11/319.

<sup>75</sup> Ibid.

<sup>76</sup> See The Guiding Principles on Extreme Poverty and Human Rights, HRC/Res. 21/11, 27 September 2012.

<sup>77</sup> See Nepal Selected Issues (n 74).

<sup>78</sup> Banshidhar Ghimire, 'Study for the Measures of Tax Compliance Habit and Leakage Control', Policy Paper 32, Economic Policy Network, 2006.

<sup>79</sup> Richard Mallett et. al., 'Taxation, livelihoods, governance: evidence from Nepal' January 2016 available at [https://assets.publishing.service.gov.uk/media/57a0895fe5274a31e0000044/Taxation\\_report8-nepal.pdf](https://assets.publishing.service.gov.uk/media/57a0895fe5274a31e0000044/Taxation_report8-nepal.pdf), accessed on 5 April 2017.

Prevention of Corruption Act,<sup>80</sup> Income Tax Act<sup>81</sup> and the Customs Act,<sup>82</sup> have the provisions to address the tax evasion, but due to the poor tax administration in Nepal these all measures have been in vain. The main reason for this is the unreliable data for the income distribution in Nepal.

In a briefing paper issued by the Tax Justice Network, Nepal was ranked 107<sup>th</sup> among 145 countries on the rank of total tax evaded.<sup>83</sup> It was estimated that Nepal lost approximately 599 million Nepalese Rupees of tax to the shadow economy and tax evasion costs Nepal close to 43,717 million Nepalese Rupees annually.<sup>84</sup> Furthermore, the Global Financial Integrity, in its report on illicit financial flows, ranked Nepal 86<sup>th</sup> out of 149 countries with the largest illicit financial flows. The report estimated that Nepal had lost close to 567 million US Dollars through these flows from 2004-2011.<sup>85</sup>

Trying to increase its competitiveness with neighbouring countries, Nepal offers a wide range of tax incentives and allowances in form of tax rebates.<sup>86</sup> Additionally, Nepal has signed Double Taxation Avoidance Agreements (DTAA) with India,<sup>87</sup> Thailand,<sup>88</sup> Austria,<sup>89</sup> China,<sup>90</sup> Pakistan,<sup>91</sup> Bangladesh,<sup>92</sup> and Mauritius.<sup>93</sup> The main purpose of

<sup>80</sup> *Prevention of Corruption Act, 2002 (Bhastachar Nivaran Ain 2059).*

<sup>81</sup> *Income Tax Act, 2002, amended by Financial Act, 2011 (Aaya Kar Ain 2058 amended by Aarthik Ain, 2068) s 4.*

<sup>82</sup> *The Customs Act, 2007 (Bhansar Ain 2064).*

<sup>83</sup> Tax Justice Network, 'The Cost of Tax Abuse- A briefing paper on the cost of tax evasion worldwide', 2011, *Tax Justice Network Official Website* available at <https://www.taxjustice.net/wp-content/uploads/2014/04/Cost-of-Tax-Abuse-TJN-2011.pdf>, accessed on 5 April 2015.

<sup>84</sup> *Ibid.*

<sup>85</sup> Dev Kar & Joseph Spanjers, 'Illicit Financial Flows from Developing Countries: 2004-2013', December 2015, *Global Financial Integrity Official Website* available at [http://www.gfintegrity.org/wp-content/uploads/2015/12/IFF-Update\\_2015-Final-1.pdf](http://www.gfintegrity.org/wp-content/uploads/2015/12/IFF-Update_2015-Final-1.pdf), accessed on 5 April 2017.

<sup>86</sup> See Nepal Selected Issues (n 74), p. 14.

<sup>87</sup> *Agreement between The Government of Nepal and The Government of the Republic of India for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*, 27 November 2011, *Indian Embassy of Nepal Official Website* available at <https://www.indianembassy.org.np/doing-business/DTAA-2011Nov-Eng.pdf>, accessed on 5 April 2017.

<sup>88</sup> *Agreement between The Government of Nepal and The Government of the Kingdom of Thailand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*, 26 June 1996, *Revenue Department of Thailand Official Website* available at [http://download.rd.go.th/fileadmin/download/nation/nepal\\_e.pdf](http://download.rd.go.th/fileadmin/download/nation/nepal_e.pdf), accessed on 5 April 2017.

<sup>89</sup> *Agreement between The Government of Nepal and The Republic of Austria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*, December 2000 available at <http://internationaltaxtreaty.com/download/Nepal/DTC/Nepal-Austria-DTC-Dec-2000.pdf>, accessed on 5 April 2017

<sup>90</sup> *Agreement between The Government of Nepal and The Government of the People's Republic of China for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*, May 2001 available at <http://internationaltaxtreaty.com/download/Nepal/DTC/Nepal-China-DTC-May-2001.pdf>, accessed on 11 September 2018.

<sup>91</sup> *Agreement between The Government of Nepal and The Government of Islamic Republic of Pakistan Republic of Austria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*, 25 January available at <http://download1.fbr.gov.pk/Docs/201210151310629812010.SRO659.pdf>, accessed on 11 September 2018.

<sup>92</sup> *Agreement between The Government of Nepal and The Government of Islamic Republic of Pakistan Republic of Austria for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*, 20 January 2015.

<sup>93</sup> *Double Taxation Agreement (Nepal) Regulations*, 30 August 1999 available at [http://www.mra.mu/download/Mtius\\_Nepal.pdf](http://www.mra.mu/download/Mtius_Nepal.pdf), accessed on 5 April 2017.

the avoidance of double taxation agreements is to eliminate double taxation and tax evasion and promote Foreign Direct Investment (FDI). The Organization for Economic Co-operation and Development (OECD) highlights double taxation as the main obstacle to FDI and, through its model, sets out to make the negotiations of double tax agreements simpler.<sup>94</sup> However, it can be argued at times that these double tax agreements tend to deprive governments of money that could actually have been used for resource mobilization.<sup>95</sup> This is because of people with the intention of evading tax establish shell companies in one of the countries where the DTAA's are affected and most times end up not paying capital gains tax thus depriving governments of fiscal resources.<sup>96</sup>

The Tax system, as noted by Dahal, is inefficient, unfair and lacks transparency.<sup>97</sup> This statement was affirmed when the International Consortium of Investigative Journalists released the famous Panama Papers where it was shown that over 45 million US Dollars was linked to someone of Nepalese nationality or with a Nepalese passport. Nepal is currently ranked as 116<sup>th</sup> among countries that held the largest dollar amount in the leaked Swiss files.<sup>98</sup>

Having pointed out some of the tax loopholes in Nepal, we are going to examine how these have been detrimental to the realization of human rights in Nepal.

Following the 2015 A.D. earthquake, which led to the loss of over 8,702 people's lives and left 22,493 homeless,<sup>99</sup> fundamental rights that are guaranteed by both the international conventions and the Nepali legal framework were breached. Examples of these include:

## Constitution of Nepal

### Article 36. Right to food

1. Each citizen shall have the right relating to food.
2. Every citizen shall have the right to be safe from the state of being in danger of life from the scarcity of food.
3. Every citizen shall have the right to food sovereignty in accordance with

<sup>94</sup> Organisation for Economic Co-operation and Development, 'Model Tax Convention on Income and in Capital', 15 July 2014, *Organisation for Economic Co-operation and Development Official Website* available at [http://www.keepeek.com/Digital-Asset-Management/oced/taxation/model-tax-convention-on-income-and-on-capital-2015-full-version\\_9789264239081-en#page1](http://www.keepeek.com/Digital-Asset-Management/oced/taxation/model-tax-convention-on-income-and-on-capital-2015-full-version_9789264239081-en#page1), accessed on 5 April 2017.

<sup>95</sup> Abdul Muheet Chowdhary, 'Child Rights and Tax Justice in India: Tackling DTAA's and P-Notes', 24 April 2016, *Oxford Committee for Famine Relief Official Website* available at <https://www.oxfam.org/sites/www.oxfam.org/files/tax-essay-2016-chowdhary-child-rights-and-tax-justice-in-india.pdf>, accessed on 5 April 2017.

<sup>96</sup> *Ibid*, p.5.

<sup>97</sup> Dahal (n 71).

<sup>98</sup> International Consortium of Investigative Journalists, 'Swiss Leaks- Nepal', *International Consortium of Investigative Journalists Official Website* available at <https://projects.icij.org/swiss-leaks/countries/npl>, accessed on 5 April 2017.

<sup>99</sup> United Nations High Commissioner for Refugees, 'Nepal: 2015 Earthquakes', June 2015, *United Nations High Commissioner for Refugees Official Website* available at <http://data.unhcr.org/nepal/>, accessed on 5 April 2017.

law.<sup>100</sup>

### **Article 37 Right to housing**

1. Each citizen shall have the right to an appropriate housing.
2. No citizen shall be evicted from the residence owned by him/her nor shall his or her residence be infringed except in accordance with law.<sup>101</sup>

### **International Covenant on Economic, Social and Cultural Rights**

#### **Article 11**

1. The State Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.
2. The State Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:
  - (a) To improve methods of production, conservation, and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources;
  - (b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need.<sup>102</sup>

The Asian Development Bank estimates that over 490,000 houses were destroyed and 2500,000 houses were damaged during the earthquake of 2015 A.D. of Nepal.<sup>103</sup> The post-disaster needs assessment carried out by Nepal's National Planning Commission with the support of the United Nations Development Program, World Bank, Japanese International Cooperation Agency and the Asian Development Bank estimated that about 7 billion US Dollars were needed for the reconstruction of the earthquake ruins.<sup>104</sup> This shows that it was the duty of the Government of Nepal to ensure that it does whatever it can so that the livelihood of its people was restored.

---

<sup>100</sup> Constitution of Nepal (n 25), art 36.

<sup>101</sup> Ibid, art 37.

<sup>102</sup> ICESCR (n 4), art 11.

<sup>103</sup> Asian Development Bank, 'First Steps in Reconstruction of Post-earthquake Nepal', 25 June 2015, *Asian Development Bank Official Website* available at <https://www.adb.org/news/videos/first-steps-reconstruction-post-earthquake-nepal>, accessed on 5 April 2017.

<sup>104</sup> The World Bank, 'Nepal Rural Housing Reconstruction Program', 2 February 2016, *World Bank Official Website* available at <http://www.worldbank.org/en/country/nepal/brief/nepal-reconstruction-program>, accessed on 5 April 2017.

The project notes that international aid and taxation are the principal ways through which the government can raise fiscal resources to address the breach of the economic, social and cultural rights. However, due to tax evasion, Nepal has lost significant amounts of money that could have been channeled for the realization of these rights. The deficits in corporate taxation, due to the various Double Taxation Avoidance Agreements, can be arguably detrimental to the accumulation of fiscal resources that could have been allocated to the affected regions.

The regressive nature of Nepal's tax system shows an inclination of the tax burden to the poor citizens which in most circumstances tends to impoverish them further. The unequal distribution of the tax burden widens discrimination and detriments access to the fundamental rights on behalf of the poor. In particular, the education service tax would be pointed out as one of the reasons some children, mostly those from poor families, could not go to school.

As UNICEF warned that more than 3 million children risked death or disease due to shortage of food and medicines,<sup>105</sup> it can be argued that money that is lost through these illicit financial flows would help to provide health care, food, and shelter for these children. As noted in the Right to Health Fact Sheet No.31, a country will not be absolved from taking necessary action to ensure the realization of the right to health even when it is in a difficult financial situation.<sup>106</sup> Therefore Nepal has to make sure that it maximizes the available resources existing within the country and those it can mobilize from the international community.

The Tax Justice Network considers large-scale tax evasion to be a crime against society and democracy.<sup>107</sup> This is because as economies weaken and the demand for government services increases, there will be no people to pay for these services due to tax loss and thus, democracy and society go threatened.<sup>108</sup> It can be observed that, based on the tax regime of Nepal, a lot of tax revenue is lost which in the long run has adverse effects on the realization of human rights.

### **Mechanisms and Remedies for an Unjust Tax Behaviour that Affect Human Rights.**

Every country has an obligation to ensure that human rights are guaranteed. When a given right is breached, the redress of this violation depends largely on the effectiveness of the remedies set out at both the national and international level. The right to a remedy in the situation of human rights violation is in itself a right that is

<sup>105</sup> United Nations Children's Fund, 'Nepal: Serious shortage of essential supplies threatens millions of children this winter', 30 November 2015, *United Nations Children's Fund Official Website* available at [https://www.unicef.org/media/media\\_86394.html](https://www.unicef.org/media/media_86394.html), accessed on 30 April 2017.

<sup>106</sup> Office of the United Nations High Commissioner of Human Rights, 'The Right to Health-Fact Sheet No. 31', *Office of the United Nations High Commissioner of Human Rights Official Website* available at <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>, accessed on 5 April 2017.

<sup>107</sup> Tax Justice Network (n 83).

<sup>108</sup> Ibid.

guaranteed by international human rights instruments.<sup>109</sup> Governments are required to provide remedies at the national level to protect human rights guaranteed by the different international conventions like the ICESR, ICCPR, and CEDAW. This can be done through the enactment of legislation and adoption of appropriate measures to entrench international obligations into domestic law.<sup>110</sup>

The conference report on the use of domestic remedies noted that domestic remedies can be seen as more rational and effective compared to the international remedies because national authorities know the context of the human rights situations in their respective country.<sup>111</sup>

The following chapter explores the national and international remedies that can be sought in this regard. Additionally, it will examine what remedies the Government of Nepal can adapt to confront the issue of tax abuse.

Part III of basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights and serious violations of international humanitarian law provided that:

#### **Principle 4**

In cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him. Moreover, in these cases, States should, in accordance with international law, cooperate with one another and assist international judicial organs competent in the investigation and prosecution of these violations.<sup>112</sup>

Furthermore, the guidelines provide that:

#### **Principle 11**

Remedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim's right to the following as provided for under international law:

---

<sup>109</sup> Dinah Shelton, *Remedies in International Human Rights Law*, 3<sup>rd</sup> edition, Oxford University Press, Oxford, 2015, p. 58.

<sup>110</sup> United Nations Children's Fund, 'Nepal: Serious shortage of essential supplies threatens millions of children this winter', 30 November 2015, *United Nations Children's Fund Official Website* enable available at [https://www.unicef.org/media/media\\_86394.html](https://www.unicef.org/media/media_86394.html), accessed on 30 April 2017.

<sup>111</sup> Dagmara Rajska, 'Use of Domestic Remedies, Judicial and Non-Judicial Mechanisms by Legal Professionals', *Council of Europe International Conference on Protection of Human Rights in Montenegro*, Podgorica, 28 June 2016 available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806f14d3>, accessed on 30 April 2017; Dani Barrington, 'How The 'Tampon Tax' violates Human Rights' available at <https://theestablishment.co/how-the-tampon-tax-violates-human-rights-ea69ca1efb16>, accessed on 21 March 2017.

<sup>112</sup> *Basic Principles and Guidelines on the Rights to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA res. 60/147, adopted on 16 December 2005.

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.<sup>113</sup>

Based on the provisions set out above, the Government of Nepal and the international community can be able to bring a claim against anyone and other entities which have been involved in the violations of human rights.

On one hand, individuals who have had their rights violated by the State can bring a claim under international law and national law as seen below;

The International Covenant on Civil and Politics Rights (ICCPR),<sup>114</sup> and the Universal Declaration of Human Rights<sup>115</sup> provide that all persons are entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. This project points out this right because it cuts across all the judicial mechanisms laid out for the protection of rights. Based on this, it can be showed that anybody with a criminal or civil proceeding before the court would have a fair trial and one whose rights have been breached can bring proceedings before the court.

The Optional Protocol to ICESCR,<sup>116</sup> the Optional Protocol to the ICCPR<sup>117</sup> and the Optional Protocol to the CRC<sup>118</sup> set out provisions that can be followed to lodge a complaint regarding the breach of the Covenant rights. However, it should be noted that Nepal has not ratified the ICESR Optional Protocol and therefore one cannot raise complaints regarding the breach of economic, social and cultural rights in Nepal to the Committee.

Constitution of Nepal under part 25 has established the National Human Rights Commission (NHRC) has a constitutional body to ensure effective realization and implementation of human rights in Nepal.<sup>119</sup> A complaint regarding any form of human rights violation in Nepal can be brought to the NHRC following the guidelines set out in the National Human Rights Commission Act, 2012 A.D.<sup>120</sup>

A claimant, who feels that his/her human rights provided in the Constitution are violated, can seek a constitutional remedy.<sup>121</sup> This can be as set out in article 133, registering a petition requesting the Supreme Court to issue a writ in matters

---

<sup>113</sup> Ibid, principle 11.

<sup>114</sup> See *ICCPR* (n 15), art 14 (1).

<sup>115</sup> *Universal Declaration of Human Rights*, 217 A (III), adopted on 10 December 1948, art 10.

<sup>116</sup> *Optional Protocol to ICESCR* (n 21).

<sup>117</sup> *Optional Protocol to ICCPR* (n 16).

<sup>118</sup> *Optional Protocol to the Convention on the Rights of the Child on the communications procedure*, A/HRC/RES/17/18, adopted 12 February 2002.

<sup>119</sup> See *Constitution of Nepal* (n 25), part 25.

<sup>120</sup> See *National Human Rights Commission Act, 2012 (Manab Adhikar Aayog Ain 2069)*.

<sup>121</sup> See *Constitution of Nepal* (n 25), art 46.



regarding the interpretation of the Constitution and public interest litigation.<sup>122</sup> However, it should be noted that this right has a limitation based on section 47 of the Constitution. This means that where the Parliament of Nepal has not enacted legislation providing a statutory basis for a given right, the fundamental rights provided in part 3 cannot be enforced.<sup>123</sup>

## Conclusion and Recommendations

Having established a link between illicit financial flows and human rights, this paper provides following recommendations that may be of help to ensure that there is the maximization of resources in Nepal to fund human rights issues and obligations.

### Recommendations

This paper confirms that, to a greater extent, the implementation and realization of human rights most especially the economic, social and cultural rights in Nepal has not only been impeded by the unjust tax regime, but also by the laxity on part of the government to enact legislation enforcing these rights as set out in the Constitution. In addition to its international obligation, it is legally and politically bound to enact legislation that would supplement the Constitution so as to give statutory footing to these rights. Therefore, in order to ensure the progressive realization of human rights, the Government of Nepal, business enterprises and other stakeholders should consider the following recommendations.

As noted above that significant amounts of money are lost through illicit financial flows and is stacked away in banks, the Government of Nepal should consider signing the OECD Common Reporting System so that it can be able to automatically exchange information regarding tax matters with other countries.<sup>124</sup>

The United Nations Guiding Principles on Extreme Poverty and Human Rights should serve as a manual for the maximization of available resources so as to reduce abject poverty among the people most in the rural areas of Nepal.

Under the Maastricht Principles, the government should take all the necessary steps to ensure that the economic, social and cultural rights are respected and protected in Nepal.<sup>125</sup> Furthermore, under these principles, the government should ensure that

---

<sup>122</sup> See *Constitution of Nepal* (n 25), art 133.

<sup>123</sup> Megan Jones, 'Tax Havens in an Emergency: Nepal in Crisis', 2016, *Oxfam International Official Website* available at <https://www.oxfam.org/sites/www.oxfam.org/files/tax-essay-2016-jones-tax-havens-in-an-emergency-nepal-in-crisis.pdf>, accessed on 30 April 2017.

<sup>124</sup> See Organization for Economic Cooperation and Development, 'Standard for Automatic Exchange of Financial Account Information in Tax Matters, 21 July 2014, *Organization for Economic Cooperation and Development Official Website* available at <http://www.oecd.org/ctp/exchange-of-tax-information/standard-for-automatic-exchange-of-financial-account-information-for-tax-matters-9789264216525-en.htm>, accessed on 14 September 2018.

<sup>125</sup> *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, adopted on 26 January 1997 available at [http://hrlibrary.umn.edu/instreet/Maastrichtguidelines\\_.html](http://hrlibrary.umn.edu/instreet/Maastrichtguidelines_.html), accessed on 14 September 2018.

it establishes a monitoring system to provide accountability in the discharge of its obligations and an effective remedy where rights have been breached.<sup>126</sup>

The Government should sign up for the OECD Guidelines with Multinational Enterprises and further encourage business enterprises in Nepal to integrate them into their day-to-day operations. Additionally, as set out by the United Nations Guiding Principles on Business and Human Rights that:

3. In meeting their duty to protect, States should: (a) Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps; (b) Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights; (c) Provide effective guidance to business enterprises on how to respect human rights throughout their operations; (d) Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.<sup>127</sup>

These guidelines would impose an obligation on business enterprises to be cautious of their dealings and further facilitate their financial contributions to the government revenue so as to realize human rights.

The Government of Nepal is under the obligation to ensure that resources are made available for the realization of human rights. It should, therefore, improve the policy coherence between its obligations and tax laws. This can be done by taking periodic human rights impact assessments when considering any amendments to the existing laws.

The Government of Nepal should adopt a progressive tax system which favors all classes of people in society and further reforms the income tax incentives so as to increase the revenue collection and productivity. After the collection of these taxes, the government should ensure that it pays attention to how the revenue that is collected is distributed and spent well for the realization of human rights.

The Government of Nepal should eliminate various forms of value added tax exemptions that erode the tax base and add a tax burden on the poor people.

The Government should further impose criminal liability on any form of illicit financial flow and breach of human rights by any individual.

The Government of Nepal should advocate for a regional human rights court to address

---

<sup>126</sup> Ibid.

<sup>127</sup> John Ruggie, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises', 7 April 2008, Office of the High Commissioner of Human Rights Official Website <https://www.ohchr.org/documents/issues/business/a.hrc.17.31.pdf>, accessed on 14 September 2018.

substantial human rights breaches where one feels that the national mechanisms have not provided an adequate remedy to his/her claim.

On the other hand, businesses should, in the due course of operations, uphold the protection of human rights and be more transparent in their financial flows by releasing substantial information like financial reports periodically.

### **Conclusion**

With the examination of the regime on tax and human rights, this paper provided valid evidence on how the realization of the economic, social and cultural rights is impeded by the illicit financial flows. Therefore, the burden rests with the Government of Nepal to ensure that emphasis is not only put on the civil and political rights but also be focused on the so-called second generation rights to improve the livelihood of the people of Nepal.