

TAX HAVENS IN AN EMERGENCY: NEPAL IN CRISIS

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In 2015 Nepal suffered great devastation. Almost 9,000 people died and over 600,000 homes were destroyed following two major earthquakes.¹ A human rights crisis followed and funds are still required to address economic, social and cultural rights of citizens. In this essay, a background to the situation in Nepal is first provided. Second, a complaint is outlined that citizens still in temporary shelter, following the earthquakes, have had their right to housing breached. Third, a legal basis for the complaint is discussed. It is concluded that a complaint will be made to the National Human Rights Commission (NHRC), under the *National Human Rights Commission Act 2012*. Forth, issues of concern are noted. The main issue is that maximum available resources have not been raised to progressively realize economic, social and cultural rights, in particular the right to housing. This is on the basis that tax evasion to tax havens exists. Finally, proposals are made for recommendations the NHRC can make to the Government of Nepal (GoN). These include agreeing to exchange of information, in relation to financial account information, with other countries and reviewing the tax system for discriminatory taxes.

Background

Following the two deadly earthquakes in Nepal, economic, social and cultural rights of many survivors were and still are at risk.² UNICEF estimates that approximately 200,000 families are still living in temporary accommodation at altitudes higher than 1,500 metres.³ At these heights they are subjected to extreme cold, making their situation worse. After the disaster, \$4 billion of aid funding flowed into the country. However, it is estimated that an additional \$3 billion is needed

¹ National Human Rights Commission (NHRC), *Preliminary Report on Monitoring on the Overall Human Rights Situation of Earthquake Survivors, Loss of Lives and Properties including the Humanitarian Support such as Rescue*

² Himalayan Times, *Quake victims battling against cold in tents*, 19 December 2015, <<http://thehimalayantimes.com/nepal/quake-victims-battling-against-cold-in-tents/>>; Himalayan Times, *Elderly quake victims demand clothes, shelter*, 29 December 2015, <<http://thehimalayantimes.com/kathmandu/elderly-quake-victims-demand-clothes-shelter/>>; The Guardian, *Water crisis spells cold comfort for Nepal earthquake survivors*, 12 February 2016, <<http://www.theguardian.com/global-development/2016/feb/11/nepal-water-crisis-earthquake-rebuilding-cold-survivors>>

³ UNICEF, *Nepal: Serious Shortage of essential supplies threatens millions of children this winter*, 30 November 2015, <http://www.unicef.org/infobycountry/media_86394.html>

to complete reconstruction works.⁴ Unfortunately further loss of life occurred later in 2015 following the promulgation of the *Constitution of Nepal 2015* (“the Constitution”) in September.⁵ Protests by minority groups took place along the Indian border and resulted in deadly attacks and a four month unofficial blockade by India. This deepened the crisis for those already suffering. Enjoyment of multiple rights were affected as access to fuel, gas, medical supplies and food was further restricted and education for thousands of children was put on hold.⁶

Despite civil unrest, a positive outcome of the new Constitution, as noted by Nepal’s President Yadav, is that the country can now focus on development. Nepal is considered a least-developed country and is ranked 145 out of 188 countries in terms of human development.⁷ In addition to showing low socio-economic indicators it is landlocked with mountainous terrain. Even prior to the recent crises, roads, electricity and communication facilities were not sufficient and it remains difficult for many people to access important services and resources.⁸ The rate of poverty in Nepal, using the national poverty line is 25.20 per cent.⁹ When considering the multidimensional poverty index or when calculating poverty using the median poverty line, of USD \$3.10 per day, poverty is high and closer to 50 per cent.¹⁰ Inequality in Nepal is also widespread. The latest data shows a Gini coefficient of 0.32.¹¹

Of large concern to Nepal’s citizens is their Government’s ability to raise sufficient funds to progress development and fund the fulfilment of economic, social and cultural rights. Of particular concern, is the right to housing given the deficit in funds to complete reconstruction works. This is of particular concern following the revelation in 2015, that Nepali citizens held funds in Swiss

⁴ The Guardian above n 2

⁵ Following the earthquakes Nepal set about finalising its Constitution, a task that has taken 7 years. The Constitution promulgated in September 2015 is the countries’ first since the monarchy was abolished in 2008. The new constitution comes after years of political instability, most notably a ten year civil war that ended in 2006. Maoist rebels instigated the civil war to address corruption, poverty, inequality and discrimination which ended with the signing of a Comprehensive Peace Accord (CPA) which contained a number of human rights to be incorporated into a new constitution.

⁶ Human Rights Watch, *World Report 2016*, accessed 19 February 2016, <https://www.hrw.org/world-report/2016>; NHRC, *Human Rights Situation During the Agitation Before and After Promulgation of the Constitution of Nepal, Monitoring Report*, NHRC 2015; UNICEF, above n 3

⁷ United Nations Committee for Development Policy, *List of Least Developed Countries (as of 16 February 2016)*, accessed 19 February 2016, <http://www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf>

⁸ UN Country Team Nepal, *United Nations Development Assistance Framework for Nepal, 2013-2017*, 2012, p. 1

⁹ The World Bank, *Nepal, World Development Indicators*, Accessed 19 February 2016, <<http://povertydata.worldbank.org/poverty/country/NPL>>

¹⁰ United Nations Development Program (UNDP), *Human Development Report 2015, Work for Human Development*, 2015, p. 218; The World Bank, above n 9

¹¹ UNDP, above n 10

bank accounts, which may have been used to evade taxes in Nepal. This was outlined in the International Consortium of Investigative Journalists (ICIJ) report, “Swiss Leaks”. The report suggested that Nepali citizens deposited USD 54 million into Swiss bank accounts held with HSBC in the 2006-2007 years.¹² Shortly after the ICIJ report was released, the Nepal Rastra Bank (NRB) announced that it had started investigations following instruction from the Parliament’s Finance Committee.¹³ It also announced that it had requested the Nepal Department of Revenue Investigation (DRI) to investigate whether any tax evasion was involved.¹⁴ To date there has been no update on these investigations. It is also possible that accounts are held with other banks in Switzerland and with other banks around the world. The complaint being made is summarized below.

Complaint

Rights breached

- Right to an adequate standard of living including food, clothing and housing (ICESR (Article 11(1)).
- Right to appropriate housing (Constitution of Nepal (Article 37(1)).

Issue of concern

- The maximum available resources, to fund economic, social and cultural social rights, have not been raised and allocated, as tax evasion has not been addressed.
- Tax evasion is causing discrimination.

Wealthier citizens are able to evade taxes at the expense of poorer citizens.

The tax system is heavily weighted with regressive taxes, which are also discriminatory against the poor and may further restrict citizens’ ability to access economic, social and cultural rights.

¹² International Consortium of Investigative Journalists, *Swiss Leaks*, 2015, accessed 19 February 2016, <http://projects.icij.org/swiss-leaks/countries/npl>; The Kathmandu Post, *Rs 5.4b held in Swiss bank in '07*, 10 February 2015, < <http://kathmandupost.ekantipur.com/news/2015-02-10/rs-54b-held-in-swiss-bank-in-07.html>>

¹³ Setopati, *Govt begins investigation into Nepali’s accounts in Swiss bank*, February 2015, <<http://m.setopati.net/news/5555/>>

¹⁴ My Republica, *NRB writes DRI to probe deposits by Nepalis in Swiss banks*, 3 March, 2015, <<http://www.nepalupclose.com/News.aspx?ID=678946>>

Plaintiff

- Aggrieved citizens that lost their homes and are still residing in temporary shelter following the Nepal earthquakes in 2015.

Defendant

- Government of Nepal

Remedy

- The complaint cannot be taken to court given the legal framework in Nepal. Instead, a complaint is being brought under section 10 of the *NHRC Act, 2012* to the NHRC.

Legal basis for the complaint

International and domestic avenues for bringing this complaint to the attention of the GoN are discussed below. First, international complaints procedures are discussed and it is concluded none are available. Second, domestic avenues for complaint are discussed. A right to Constitutional remedy exists however it cannot be used in this case. Instead, a complaint will be made under the *NHRC Act, 2012* to the NHRC. Finally, directive principles, policies and responsibilities, as set out in the Constitution, are discussed as they guide actions of the State.

International complaints mechanism

Nepal ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1991. It is not a party to its Optional Protocol. The Optional Protocol provides a complaint mechanism for individuals (or groups of individuals) in relation to the violation of economic, social and cultural rights set out in ICESCR. Despite it being recommended that Nepal ratify the Optional Protocol in its 2011 Universal Period Review (UPR), the recommendation was not accepted by Nepal. As such, there is no ability for Nepali individuals to raise complaints to the Committee for Economic, Social and Cultural Rights. In any case, the Optional Protocol states that the Committee will not accept a complaint unless all available remedies have been exhausted at a domestic level. In the current case, no international remedy exists. Domestic remedies are discussed below.

Domestic complaints mechanism

At a domestic level Nepal's Constitution sets out 30 rights (including some economic, social and

cultural rights) in addition to the right to constitutional remedy.¹⁵ The Constitution provides a legal basis for the protection and promotion of human rights in Nepal. However, it is complicated by section 47 which states that for the rights to be enforced the State must make legal provisions within three years of the commencement of the Constitution (September 20, 2015). As such, laws need to be enacted through parliament for the Constitutional rights to be enforceable. This places a limitation on the rights set out in the Constitution, where there is a lack of corresponding legislation. Further, a right to Constitutional remedy is set out in section 46 of the Constitution. It allows a Nepali citizen to file a petition in the Supreme Court to have any law declared void if it is inconsistent with the Constitution because it places an unreasonable restriction on the enjoyment of fundamental rights.¹⁶ This complaint will not be brought under the provision for constitutional remedy, as the aggrieved are not arguing that a current law is inconsistent with the Constitution.

The Constitution also provides the NHRC with a duty to ensure respect, protection and promotion of human rights and their effective implementation.¹⁷ Under the *NHRC Act, 2012*, human rights are defined as: “rights related to life, liberty, equality and dignity of a person provided by the Constitution and other prevailing laws and this term also includes the rights contained in the international treaties regarding human rights to which Nepal is a party.” As such, the NHRC has a duty to ensure rights under both the Constitution and international human rights treaties are respected and implemented.

The Constitution also sets out the functions, duties and powers of the NHRC. These are also legislated in the *NHRC Act, 2012*. Functions, duties and powers of the NHRC include being able to conduct inquiries into, investigations of and recommendations for action against instances of violation of human rights of any person or group of persons. This can occur upon a petition or complaint presented to the Commission by a victim or any person.¹⁸ The NHRC also has the ability to monitor the implementation of international treaties on human rights and if found not to be implemented, forward recommendations to the Government of Nepal (GoN) for effective implementation.¹⁹ As outlined above, in the complaints section, a complaint is being brought under section 10 of the *NHRC Act 2012*. It will be in the form of a complaint to the NHRC that rights

¹⁵ *Constitution of Nepal, 2015, Part 3, Fundamental Rights and Duties* (Sections 16 to 46)

¹⁶ *Constitution of Nepal, 2015, Section 133*

¹⁷ *Constitution of Nepal, 2015, Part 25: National Human Rights Commission* (Section 249(1)).

¹⁸ *National Human Rights Commission (NHRC) Act, 2012, Section 10; Constitution of Nepal, 2015, Section 249(1).*

¹⁹ *Constitution of Nepal, 2015, Section 249(2)(g)*

under the ICECSR and Constitution have been violated by not tackling tax evasion to ensure the maximum available resources are available to fund economic, social and cultural rights.

Directive Principles, Policies and Responsibilities of the State

It should also be noted that the Constitution provides guidance in governing the State in relation to maximum available resources. This is set out in its *Directive Principles, Policies and Responsibilities of the State*.²⁰ Section 50 (3) states that, “*it shall be the economic objective of the State to make the national economy self-reliant, independent and developing it towards socialism oriented economy with equitable distribution of resources and means and by ending all forms of economic exploitation and inequality, with the maximum utilization of available resources... for sustainable development and to build an exploitation free society by fair distribution of the achievements made so far.*”

The state policies go on to say that policies regarding finance, industry and commerce should achieve economic prosperity with the maximum utilization of available resources²¹ and a fair distribution of the fruits of development and available means and resources.²² Nepal’s obligation is “*protecting and promoting fundamental and human rights and to observe the directive principles.*”²³ It should be noted that as a result of section 55 of the Constitution, no question can be raised in court as to whether directive principles, policies and responsibilities of the State have been implemented or not.²⁴ As such, no legal remedy exists if the principles, policies and responsibilities of Nepal have not been met. However, details of this can be included in the complaint to the NHRC.

Issues of Concern

Under ICESCR, States should take steps to the maximum of their available resources to achieve progressively full realization of economic, social and cultural rights.²⁵ Further, the *Maastricht*

²⁰ *Constitution of Nepal, 2015, Part 4: Directive Principles, Policies and Responsibilities of the State*

²¹ *Constitution of Nepal, 2015, Section 51(d)(2)*

²² *Constitution of Nepal, 2015, Section 51(e)(5)*

²³ *Constitution of Nepal, 2015, Section 52*

²⁴ Despite the implications of Section 55 of the Constitution, it should be noted that there has been a judicial trend of enforcing directive principles if it is found that the Government has disregarded them (as noted in *Yogi Narahari Nath et al. v Rt Honourable Prime Minister Girija Prasad Koiralaa and Others* [1996] NKP 33).

²⁵ *International Convention on Economic, Social and Cultural Rights*, opened for signature on 16 December 1966 and coming into force from 3 January 1976, Article 2(1)

Principles state that a country violates economic, social and cultural rights if they are not providing the maximum of their available resources to these rights.²⁶ The Constitution also states that maximum available resources should be used to achieve sustainable development. While not specifically mentioned in international human rights treaties, taxes are becoming recognized as a component of the maximum available resources of a country and therefore issues in relation to raising tax revenue must be considered.²⁷ This includes considering tax evasion, which reduces a country's maximum available resources.

Tax evasion

In addition to the ICIJ report, the Tax Justice Network estimates that approximately USD 599 million is lost to tax evasion from the shadow economy in Nepal every year.²⁸ It is suggested that part of this loss relates to tax havens. In the year the calculations were made, this equated to 3.8 per cent of Nepal's GDP and taxes in total only made up approximately 13 per cent of GDP. It should be noted that when preparing these calculations, criminal activities were excluded. Further, Kar and Freitas estimate illicit financial flows from Nepal, over the years 2000 to 2009, to be on average between USD 592 million and USD 604 million per year.²⁹ Illicit financial flows are amounts that are illegally earned, transferred or utilized and approximately 54 per cent relates to tax evasion. Taxing these funds could result in significantly more revenue for Nepal, which is critical given the current situation.

The complaint at hand is that tax evasion has reduced the amount of funds available for Nepal to spend on progressively recognizing economic, social and cultural rights.³⁰ By not addressing tax evasion, Nepal is not devoting its maximum available resources to these rights which may be seen as a violation of its obligations under ICESCR.³¹ The Committee on the Rights of the Child also supports the view that tax evasion affects raising maximum available resources. This was set out in

²⁶ *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights Principles*, Article 15

²⁷ Radhika Balakrishnan, Diane Elson, James Heintz and Nicholas Luisani, *Maximum Available Resources & Human Rights*, 2011, Centre for Women's Global Leadership, Rutgers University, New Jersey; United Nations General Assembly (UNGA), *Report of the Special Rapporteur on extreme poverty and human rights, Magdalena Sepulveda Carmona, A/HRC/26/28*, 22 May 2014; Ignacio Saiz, *Resourcing Rights: Combating Tax Injustice from a Human Rights Perspective*, in Aoife Nolan, Rory O'Connell and Colin Harvey (eds.), *Human Rights and Public Finance* (Oxford Hart Publishing, 2013), p. 77

²⁸ Tax Justice Network, *The Cost of Tax Abuse, A briefing paper on the cost of tax evasion worldwide*, 2011, Tax Justice Network, p. 11

²⁹ Dev Kar and Sarah Freitas, *Illicit Financial Flows from Developing Countries Over the Decade Ending 2009*, December 2011, Global Financial Integrity, p. 57

³⁰ Committee on Economic, Social and Cultural Rights, General Comment No. 20 (E/C.12/GC/20)

³¹ UNGA above n 28

their report to Georgia in 2000, which stated “*widespread practices of tax evasion and corruption are believed to have a negative effect on the level of resources available for implementation of the Convention on the Rights of the Child*”.³² The same could be held for ICESCR. It is also in contravention of the Directive Principles set out in the Constitution.

Tax evasion caused by the existence of tax havens can also affect equality, a key human rights principle. This is because the ability of a government to tax high net wealth citizens is restricted.³³ Therefore, poorer citizens take on the additional tax burden, which is difficult given the current situation in Nepal. This can be further entrenched by regressive taxes.³⁴ In Nepal indirect taxes on goods and services and trade, which can be considered regressive, make up approximately 75 per cent of the countries tax revenue.³⁵ This is significantly greater than progressive taxes and is an indicator that taxes overall may be discriminatory towards poorer groups. This may be further impacting the realization and enjoyment of economic, social and cultural rights. It is requested that Nepal address illegal tax evasion to mobilise resources. To do this, it needs information to enable the calculation of tax liabilities of those shifting funds offshore.

Proposed Remedy

Upon complaint to the NHRC it is requested that the case be investigated and recommendations made to the GoN. It is requested that as a potential remedy to fulfilling the rights breached, as outlined above, the GoN addresses tax evasion. This is for the purpose of ensuring maximum available resources can be dedicated to realizing economic, social and cultural rights and contribute to sustainable development. It is recognized that not all resources can be dedicated to this aim but addressing tax evasion would go some way towards contributing to a better overall fulfillment of rights.

To address tax evasion it is suggested that the GoN consider signing the OECDs Common Reporting Standard, which allows for automatic exchange of information in relation to financial accounts. It has been argued by Knobel and Meinzer that information exchange is a vital tool for

³² Committee on the Rights of the Child (CRC), CRC/C/15/Add.124, 2000, CRC Georgia, para 18-19

³³ Gabriel Zucman, *The Missing Wealth of Nations: Evidence From Switzerland, 1914-2010*, February 2011, PSE Working Papers N 2011—07, 2011, <halshs-00565224v1>

³⁴ UNGA above n 28 para 59

³⁵ International Monetary Fund (IMF), *Nepal: Selected Issues*, IMF Country Report No. 11/319, 2011

developing countries in addressing illicit financial flows to tax havens.³⁶ Those developing countries that have signed the Common Reporting Standard, noted it was for the purpose of revenue collection and deterring tax evasion. It is also suggested that a review of the tax system takes place to determine if any burden of the impact of regressive taxes can be removed from low-income earners. It is also suggested that comment be made in Nepal's next UPR on the link between raising maximum available resources through the taxation system and human rights performance.

³⁶ Andres Knobel and Markus Meinzer, *Automatic Exchange of Information: An Opportunity for Developing Countries to Tackle Tax Evasion and Corruption*, June 2014, Tax Justice Network