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Strategic roadmap for Nepal: Integrating United Nations Guiding Principles on Business and Human Rights into domestic law



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Strategic roadmap for Nepal: Integrating United Nations Guiding Principles on Business and Human Rights into domestic law

Ravi Prakash Vyas¹

EXECUTIVE SUMMARY

Taking the business sector in Nepal as a subject, we can observe that it is continuously growing. Nepal's constitution has directed the economic objective of the state to achieve sustainable economic development with the involvement and participation of the public, private and cooperative sectors. Keeping this in mind, laws today can be seen as more receptive towards the contribution business sectors have to offer. There are laws in practice which promote competition and market promotion along with laws that govern foreign direct investments that directly affect the business sector. While there are laws that have created feasibility and growth of investments in the business sector, we can also see laws that regulate these businesses making sure that they ensure respect, protection and promotion of human rights.

This policy brief outlines the existing legal structure and analyses it in a perspective of integrating the loophole in a framework for business and human rights in Nepal. In a simpler sense, we cannot overlook the human rights issues that could arise through business practices in Nepal. It provides policy recommendations to the government as to actions that can be adopted going forward for developing a National Action Plan (NAP) on Business and Human Rights. It recommends that Nepal should initiate the process of adopting a NAP, ensuring transparency and participation of all relevant stakeholders.

¹ I would like to thank Prof Geeta Pathak for her valuable comments and feedbacks in developing this policy paper. Excellent research assistance for this was provided by Mr Sudip Raj Ghimire and Ms Pranjali Kanel.

INTRODUCTION

Nepal is receptive to various business enterprises of international as well as national character. Nevertheless, business enterprises are not strictly bound by human rights obligations. The United Nations Human Rights Council in June 2011 endorsed² the United Nations Guiding Principles on Business and Human Rights (UNGP) which provides the framework for duties and responsibilities of governments and business enterprises to prevent and address business-related human rights abuses. Such rights and duties include overseeing the practices and policies in the business-oriented workplace and if it aligns with labour rights and child rights ensured in the statutes and governmental policies. An act of negligence from a company, evident in the Bhopal gas tragedy in India, could lead to a detrimental effect on people's right to life and the environment. South Asian states over the last few years have taken encouraging steps with India bringing its zero draft of a National Action Plan (NAP) on Business and Human Rights³, and it also released National Guidelines for Responsible Business Conduct⁴ in 2019. Pakistan has started the process of developing a NAP on Business and Human Rights. The Government of Maldives is considering bringing sections on business and human rights in their NAP for Human Rights. The notion that business enterprises have the primary aim of earning profit is changing today. The repercussions of how business enterprises operate are felt profoundly on the environment, human rights (more so on women and children), global injustice etc. The Government of Nepal is currently developing a NAP on Human Rights. There have been positive indications at the various stakeholder meetings, where there is an increasing demand to add sections on

business and human rights, and there is the willingness on the part of the Nepalese government to do so.

PROBLEM DESCRIPTION AND RATIONALE FOR ACTION

In Nepal, since the promulgation of the new constitution in 2015, laws are being transformed and updated, and new laws are being introduced. The new legislation on labour law and a contribution-based social security scheme are some critical developments in linking human rights obligations from a business perspective. Looking at the precedents and the current situation in Nepal, business enterprises and their obligation towards human rights protection is not as encouraging despite the efforts of the government. The three pillars of the UNGP, which are the state's duty to protect, corporate responsibility and the access to remedy, need to be analysed and strengthened in the case of Nepal. This situation demands the study of existing national and international laws in Nepal relating to business enterprises and their obligation towards human rights. Thus, it is an apt time to analyse the existing legal framework under the three pillars and provide policy recommendations to the government as to actions that can be adopted going forward for developing a NAP on Business and Human Rights.

EXISTING LEGAL FRAMEWORK IN NEPAL

Constitutional framework

The Constitution of Nepal governs the state mechanism and represents the will of the people. The constitution does not have explicit provisions regarding business and its regulations.

2 Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 (UNGP) (21 March 2011) <https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf> accessed 10 April 2020.

3 Government of India, Ministry of Corporate Affairs, National Actional Plan on Business and Human Rights, Zero Draft, (February 2019) <<https://mk0globalnapshvllfq4.kinstacdn.com/wp-content/uploads/2019/02/draft-nap-india-2019.pdf>> accessed 10 April 2020.

4 Government of India, Ministry of Corporate Affairs, National Actional Plan on Business and Human Rights, Zero Draft, (2019) <https://www.mca.gov.in/Ministry/pdf/NationalGuideline_15032019.pdf> accessed 10 April 2020.

Albeit, it guarantees the freedom to establish and operate any industry, trade and business in any part of Nepal, which ensures the rights of the private and public sectors to run business enterprises.⁵ The historical development of the constitution shows that the essential components, including labour rights, employment rights, non-discrimination, social security and consumer rights, were incorporated. These rights are the progressive standards further incorporated as fundamental rights with the development of Nepal's democratic governance.

The constitution, promulgated in 2015, guarantees all the fundamental rights mentioned in previous constitutions of the state, including the right to freedom,⁶ right to employment,⁷ right to social security⁸ and right regarding labour.⁹ The constitution also includes protection for marginalised groups, including woman, children, Dalits¹⁰ and socially backward people.¹¹

The progressive standards of the constitution incorporating business and human rights are the inclusion of rights relating to employment and social security as fundamental rights. This inclusion entails obligations for the state and business enterprises for ensuring the welfare of employees and achieving decent work for all. In 2018, the government introduced a mandatory obligation for all sectors to implement a contribution-based social security scheme under the Contribution Based Social Security Act, 2017 and its regulation.¹² The constitution also secures citizen's rights regarding labour, including the freedom of association, right to

appropriate remuneration, facilities and contribution-based social security, and the right to form and join trade unions and engage in collective bargaining for the protection of interests.¹³ Directive principles mentioned in the constitution have directed the economic objective of the state to achieve sustainable economic development through participation and development of the public, private and cooperative sectors.¹⁴ Specific policies of the state relating to economy, industry and commerce exist to guide these sectors.¹⁵ The obligation ensures that the market should prioritise the interest of consumers by maintaining fairness in trade. It also extends the protection and promotion of domestic industries and resources. It grants priority to domestic investment based on Nepalese labour.¹⁶ Nepal's move in incorporating labour and employment rights in the constitution consistently stresses creating an environment to ensure decent work for all. These are positive steps on behalf of the state to respect human rights.

Environment protection mechanism

The protection of the environment includes the protection of biodiversity and the ecosystem. Environmental protection is also associated with people's right to live with proper hygiene and in a healthy environment. It is directly associated with the right to life with dignity.¹⁷ Domestic laws enacted in Nepal regarding this create obligations for industries and business enterprises to minimise the impact on the en-

5 Constitution of Nepal, 2015 (2072 BS) art 17.

6 Ibid.

7 Ibid art 33.

8 Ibid art 43.

9 Ibid art 34.

10 The word Dalit is used for people who live at the bottom of the caste hierarchy in parts of South Asia, also known as 'untouchables'. The word comes from the Marathi language and means 'oppressed' or 'broken'.

11 Constitution (n 5) arts 38, 39, 40.

12 International Labour Organization (ILO), 'Nepal launches contribution-based Social Security Scheme' (ILO, 27 November 2018) <https://www.ilo.org/kathmandu/info/public/pr/WCMS_651182/lang--en/index.htm> accessed 10 April 2020.

13 Constitution (n 5) art 34.

14 Ibid art 50.

15 Ibid art 51(d).

16 Ibid.

17 *Dhar Bahadur Lamichanne v Ministry of Physical Infrastructure and Transport* [2017] NKP.

vironment. They also enunciate certain precautionary measures in this regard.

There is specific legislation curated to create obligations for business enterprises to protect the environment. The Industrial Enterprises Act, 2016 has provisions to assess the impact of industries. Under the act, the industrial sector should take precautions. An impact assessment procedure begins before the establishment, operation, production or transaction by the business enterprise.¹⁸ According to section 7 of the Environmental Protection Act, 1977 (now repealed), no business enterprises shall create pollution in a manner as to harm the environment or likely to be hazardous to public life and people's health to the prescribed standards.¹⁹ This provision mandates the business enterprises to conduct an impact assessment following the three-step method involving an initial impact assessment, environmental impact assessment and summary environmental examination. With the enactment of the Environment Act, 2019, the earlier Environment Protection Act is now repealed. The new act adopted the provisions from the old act and has redefined certain terms for comprehensiveness. It also authorises the government to set standards to reduce and regulate emission, hazardous waste. 'Harmful substances' is defined as per the Basel Convention 1989.²⁰ The new act is also inclusive in terms of incorporating international standards and rules with national laws. The government are empowered to engage in carbon trading along with an elaborate complaint mechanism about anyone in violation of the act.²¹

Consumer protection framework

The domestic laws enforced to protect the consumers incorporate the fundamental rights provided to consumers within the constitution. This includes the consumer's right to be informed, safeguarded and compensated for the alteration of valuable goods that the person has been deprived of. The primary legislation that deals with consumers' rights and remedies is the Consumer Protection Act, 2018. To ensure that consumer protection is adequate, the act has mandated for the formation of the Consumer Protection Council,²² the Central Market Monitoring Committee,²³ the Provincial Market Monitoring Committee²⁴ and the Local Market Monitoring Committee.²⁵ The Minister for Industry, Commerce and Supplies acts as a chairperson of the Consumers Protection Council and includes secretaries of concerned ministries including that of the Ministry of Industry, Commerce and Supplies, Ministry of Agriculture and Livestock Development, Ministry of Land Management, Ministry of Finance, Ministry of Home Affairs, Ministry of Law, Justice and Parliamentary Affairs and Ministry of Health and Population as well as other stake holders as members of the council thus ensuring coordination among various ministries and stakeholders.²⁶ The responsibility of the council is to determine policies on the matters regarding protection and enforcement of consumer rights to the government, to provide necessary recommendations to the government relating to the protection of interests and rights of consumers, to make necessary policy arrangements for including consumer education in the academic curriculum and to give directives to the provincial government and the

18 Industrial Enterprises Act, 2016 s 5.

19 Environmental Protection Act, 1977 s 7.

20 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989 <<http://www.basel.int/Portals/4/download.aspx?d=UNEP-CHW-IMPL-CONVTEXT.English.pdf>> accessed 10 April 2020.

21 Batu Uprety, 'Environment Protection Act, 2019 Complexity of Study & Approval Process' (Spotlight, 5 December 2019) <<https://www.spotlightnepal.com/2019/12/05/environment-protection-act-2019-complexity-study-approval-process/>> accessed 10 April 2020.

22 Consumer Protection Act, 2018 s 22.

23 Ibid s 25.

24 Ibid s 27.

25 Ibid s 28.

26 Ibid s 22.

local level government for the protection and promotion of the consumer's rights as well.²⁷

Labour law standards

The Constitution of Nepal encompasses the fundamental rights of workers as per the International Labour Organization's (ILO) international labour standards²⁸. Primary rights enshrined in the constitution are the right to employment,²⁹ right to labour³⁰ and right to social security.³¹ These rights ensure fair employment and labour practice in the country. Nepal has ratified 11 ILO conventions, seven of which are among the eight fundamental conventions.³² Workers have been guaranteed the right to form and join trade unions and engage in collective bargaining, as per the law.³³ To ensure the same, Nepal has also implemented the Labour Act, 2017. In general, the law applies to every institution or organisation irrespective of its status as a company, private firm, partnership, cooperative, association or other organisations to undertake the operation of business or industry or provide service with or without motive. The act is clear while mentioning its application to entities, both domestic and foreign, engaged in the

promotion of business, sale of products or promotion of other works in Nepal. It only excludes civil services including the security forces (army, police and the armed police force) and entities incorporated under other prevailing laws in special economic zones have separate provisions.³⁴ The act has also incorporated the aspect of safety and health through the introduction of the Safety and Health Committee.

The act is a positive step to ensure respect for and compliance of human rights. Inclusion of provisions on sexual harassment under the current law³⁵ ensures Nepal's commitment towards fulfilling its international obligations. 10% from both the employer's and the employee's basic remuneration would be deposited to the Provident Fund as per the labour law and employees would be eligible to access the fund from the first day of employment.³⁶ It is not necessary for the employee or employer to contribute to the above mentioned provident fund once the employer and employee start contributing to the social security fund.³⁷ The act further provides for the establishment of a Social Security Fund. The contribution-based Social Security Act, 2018 was enacted following the constitutionally guaranteed provision regarding labour and

27 Ibid s 24. 'The functions, duties and powers of the Council shall be as follows: (a) to submit to the Government of Nepal by determining policies on the matters regarding the protection and enforcement of the rights of the consumers, supply system and the determination of price and quality of goods and services, (b) to provide necessary recommendation to the Government of Nepal regarding the amendment, improvement in the existing policies or new policies which are to be made regarding the protection of the rights of consumers, (c) to disseminate and cause to be disseminated information relating to the rights and welfare of the consumers to get the consumers informed regarding the goods and services, (d) to inform or get the consumers informed regarding the price, quality, quantity, purity and unfair trade activities of the goods or services, (e) to make necessary policy arrangements for including the consumer education in the curriculum from secondary level up to the university level, (f) to draft necessary policies to cooperate with national and international organizations or institutions related to the rights of consumers, (g) to give directive to the Provincial Government or Local Level to protect and promote the rights of the consumers as necessary, (h) to perform such other functions as prescribed.'

28 International Labour Organization (ILO), International labour standards in Nepal <<https://www.ilo.org/kathmandu/areasofwork/international-labour-standards/lang--en/index.htm>> accessed on 10 April 2020.

29 Constitution (n 5) art 33.

30 Ibid art 34.

31 Ibid art 43.

32 ILO, 'The ILO in Nepal' (ILO) < https://www.ilo.org/kathmandu/whatwedo/publications/WCMS_684588/lang--en/index.htm> accessed on 10 April 2020.

33 Constitution (n 5) art 34, explanation clause.

34 Labour Act, 2017 s 90 and 180.

35 Ibid s 132.

36 Ibid s 52.

37 Ibid s 57.

the Labour Act, 2017 whereby it incorporates elements of tripartite consultation.³⁸ As per the new legislation a total of 31% of the basic remuneration of the employee would be deposited to the Social Security Fund out of which the contribution from the employee is 11% and from the employer is 20%.³⁹ Such provisions have a pivotal role in improving the working conditions in business enterprises.

Specific business sectors under strict regulations

The government scrutinises specific sectors under strict regulations. Some acts specifically address business enterprises involved in producing or manufacturing harmful products, such as the Tobacco Products (Control and Regulatory) Act, 2011. The act prohibits advertisement and sponsorship of tobacco products in any form or medium.⁴⁰ The act includes an obligation for business enterprises, including local stores and retailers, by prohibition of the sale, distribution and display of tobacco products to people below the age of 18 years and pregnant women.⁴¹ Similarly, the National Policy on Regulation and Control of Alcohol was adopted in 2017.⁴² Nepal is the first country in the world to introduce a 75% pictorial warning on alcohol products. This policy completely bans advertisement, promotion and sponsorship of alcohol and stresses the decreasing availability of alcohol products.

The manufacturers and industries involved in producing and selling medical drugs, including ayurvedic medicines, are included under the

Drugs Act, 1978. Those found guilty under the act can face imprisonment for up to life;⁴³ furthermore, other penalties can be imposed including adulteration of medicines, illegal selling of narcotic and poisonous drugs and offences that contravene the regulation of drug control measures.⁴⁴

The bad condition of slaughterhouses harms consumers, and for that the Animal Slaughterhouse and Meat Inspection Act, 1999 addresses such concerns.⁴⁵ The law has framed criteria for inspection and examination of slaughtering houses.⁴⁶

UNITED NATIONS GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS AND NEPAL

Responsibility of the state

The UNGP on Business and Human Rights are a prominent international instrument to update the standards of business enterprises to protect, respect and provide remedy for human rights violations. As mentioned in a descriptive framework of the three pillars, the guidelines have illustrated the necessary means and conditions to have a sustainable and well-accepted environment for economic growth and the productivity of business enterprises.

Nepal needs to adapt the framework for incorporating business and human rights obligations because of various problems. The direct impact is manifested in people facing poverty,⁴⁷ a degradable environment for work⁴⁸ and busi-

38 Nepal ratified the ILO Convention Concerning Tripartite Consultations to Promote the Implementation of International Labor Standards C144 (adopted 21 June 1976 entered into force 16 May 1978) in 1995.

39 Social Security Scheme Operation Directives 2018 s 25.

40 Tobacco Products (Control and Regulatory) Act, 2011 s 10.

41 Ibid s 11.

42 Oystein Bakke, 'Nepal passes new National Alcohol Policy' (*Forut*, 24 February 2017) <www.add-resources.org/nepal-passes-new-national-alcohol-policy.5944894-315750.html> accessed on 10 April 2020.

43 Drugs Act, 1978 s 34.

44 Ibid chap 7.

45 Animal Slaughterhouse and Meat Inspection Act, 1999 ss 6-13.

46 Ibid s 17.

47 Sangita Shrestha, 'Constructions of the Environment in Nepal: Environmental Discourses on Air and the Ground' (September 2012) <http://202.45.147.21:8080/jspui/bitstream/123456789/273/1/PhD%20Thesis_Sangita%20Shrestha.pdf> accessed on 10 April 2020.

48 Lok Nath Bhusal, 'Key Issues in Nepalese Labor Market' (*The Rising Nepal*) <www.therisingnepal.org.np/news/18519>

nesses profiteering by a low and risky supply of products to consumers.⁴⁹ The nature of investment by the private sector is focused on the outcome of the investment and the state mechanism in Nepal to regulate business enterprises to ensure human rights obligations are not sufficient and transparent. There is no specific law or policy regarding business and human rights obligations and thus providing space for business houses to escape their liabilities in protecting human rights. Various laws and regulations are in place but what is lacking is their effective implementation because of various factors, such as:

1. Lack of awareness and effort put up by part of the cottage and small-scale enterprises to have standard quality.⁵⁰
2. The threshold of standards for regulation of business enterprises is sometimes too high and not possible to comply with. The breach of such laws, therefore, makes them ineffective, especially when there is a compromise for economic growth in a developing country.⁵¹
3. The liability for engaging in unlawful business activities merely remain on paper and not in action.⁵² In most instances, when the government takes the necessary steps to combat the wrongful action of business enterprises, the force of cartels makes the steps ineffective.⁵³
4. The state mechanism of Nepal needs to regulate foreign companies. The inability to do so affects people. In the case of companies operating in Nepal without registration, there stands no premise for the courts to adjudicate cases.⁵⁴

The issue of business enterprises causing human rights violations is prevalent in most of the sectors in Nepal. The laws need to expand their scope beyond regulating illegal acts. There should be proper assessment and research regarding the impacts caused by the establishment of business enterprises in a particular area and what the necessary measures are for protection in cases of violations of human rights. The state should propose mandatory and voluntary measures based on international instruments so that it becomes a consistent obligation on all business enterprises to ensure all operations respect human rights. Enforcement of such laws will not be the only solution. The state should also provide technical assistance to incorporate human rights standards that business enterprises need to address. It will assist the businesses in establishing internal divisions for human rights compliance to avoid risk and not face liability. Abidance by Nepal in this regard will meet the standard operating principles of UNGP, which creates a duty on the state to protect its people and ensure human rights.⁵⁵

Encouraging corporate responsibility

The tendency to comply with the law is possible when there is voluntary participation from the business enterprises. In recent times, the awareness and opinions of people towards wrongful acts of business enterprises are increasing, and thus it is also their responsibility to be responsive towards its customers and employees.⁵⁶ Human rights due diligence mechanisms are thus essential to ensure the protection and promotion of human rights. Thus, some of

accessed on 10 April 2020.

49 RK Shah, 'Corruption in Nepal: An Analytical Study' [2018] Nepal Journals Online 273.

50 Industrial Enterprises Act (n. 18) s 48 '(Medium industries; i.e. industries having investment in fixed assets exceeding NPR 100,000,000 but less than NPR 250,000,000; Large industries; having investment in fixed assets exceeding of NPR 250,000,000; Cottage industries and small industries having annual turnover more than NPR 150,000,000).'

51 AlJazeera, 'Indonesia's Most Polluted Water' (*AlJazeera*, 3 May 2018) <<https://www.aljazeera.com/programmes/101east/2018/05/indonesia-polluted-river-180502051143231.html>> accessed on 10 April 2020.

52 Kifle Laxman, 'Efforts to control black marketing ineffective' *The Rising Nepal*, Kathmandu (14 September 2018).

53 Ibid.

54 *Ashok Kumari Sharma v Labor Court* Decision No 10182.

55 UNGP (n.2) principle 3.

56 Phillip I Blumberg, *The Multinational Challenge to Corporation Law* (OUP 1993) 23.

the steps which could be adopted by business enterprises are:

1. Separate departments should be established to address issues of human rights in business enterprises. The task force needs to have links with the operations, services, products and business relationships.
2. The constitution provides specific rights concerning education and health.⁵⁷ The government should build public-private partnerships and establish institutions with joint efforts. Existence of business enterprises in such initiatives will help in the development capacity of the area along with benefits to the local community. This sense of corporate responsibility will promote and protect human rights.
3. International financial institutions have designed safeguard policies to protect human rights and the environment.⁵⁸ Business enterprises should seek an interest in accommodating a human rights due diligence mechanism as per UNGP guidelines.⁵⁹

However, the possibility of such compliance and participation to address human rights issues is not prevalent. The main concerns have been the cost of such services for a business enterprise, and this is where states can play an important role by providing financial and technical assistance. This is relevant in developing countries like Nepal, where industrial impact on the environment and the local community is high. In Nepal, economic growth is essential. Therefore, joint initiation for a better business environment and operation ensures long-term operation of the company and support to and from the local community.

Access to remedy

The analysis of the remedy mechanism in Nepal over human rights violations is judiciary-centric. However, access to remedy should be for everyone. The criteria for remedial mechanism irrespective of non-judicial and judicial mechanisms is accessibility, affordability, effectiveness and transparency. The UNGP has put the criteria only for non-judicial mechanisms.⁶⁰ However, it is equally essential for the judicial mechanism to apply these criteria. Public interest litigation (PIL) has been a convenient means for people affected by business-related human rights while approaching the court.

The fact though remains that there are various barriers in the realisation of justice for the affected and some of them are:

- Separate legal entities between parent and subsidiary companies;
- Proceeding delays;
- Limited enforcement of a judgment;
- Cost of a legal proceeding; and
- Political pressures.

The constitution envisioned three tiers of government; federation, province and local level.⁶¹ Each of the tiers of government are guaranteed with their sole rights and responsibilities by the constitution itself. Currently there are 753 local level governments in Nepal. The local people elect local level governments. Therefore, they are closer and more accountable to the local community. Within the local level, the constitution envisioned the formation of a judicial committee for settling minor disputes that arises within the area of that particular local level government.⁶² Thus, the local level governments in Nepal can play an essential role in providing

57 Constitution (n 5) arts 31, 35.

58 The World Bank, 'Environmental and Social Framework: Setting environmental and social standards for investment project financing' (The World Bank 4 August 2016) <https://consultations.worldbank.org/Data/hub/files/consultation-template/review-and-update-world-banksafeguardpolicies/en/materials/the_esf_clean_final_for_public_disclosure_post_board_august_4.pdf> accessed on 10 April 2020.

59 UNGP (n.2) principle 17.

60 UNGP (n.2) principle 31.

61 Constitution (n 5) art 56.

62 Ibid art 217.

access to remedy. The local governments are decentralised and present in all parts of the country. However, the jurisdiction provided to the judicial committee at the present time is considerably less.⁶³ The local governments should establish mechanisms at the local level to provide victims with legal aid and advice while seeking judicial proceedings. Thus, if local authorities are provided with more responsibilities towards protection from human rights abuses, then they could play a substantial role in the implementation of laws protecting from such abuses. The cases can be taken up at the provincial level, and the provincial legislatures should develop laws and regulations with frameworks to ensure that business enterprises fulfil their obligations.

The Federal Parliament in Nepal also plays a vital role as three out of its 16 committees have direct jurisdiction to investigate the issues of business and human rights, including:

- Committee on Industry, Trade, Labour and Consumer Protection;
- Committee on Law, Justice and Human Rights; and
- Committee on Women and Social Affairs.

Therefore, the concern of human rights abuses by business enterprises can also be protected through the political mechanism available in Nepal.

POLICY RECOMMENDATIONS

While aiming for a better-developed society through investment in business and development activities, we cannot overlook the effects that could emerge out of these businesses' practices. In a simpler sense, we cannot overlook the human rights issues that could arise through business practices in Nepal.

The Working Group of the United Nations' (UNWG) Guidance on NAP provides for a five-phase process;⁶⁴ Phase 1 'initiation', Phase 2 'assessment and consultation', Phase 3 'drafting of initial NAP', Phase 4 'implementation' and Phase 5 'update'.⁶⁵ Essential criteria for an effective NAP is that:

- It must be based on the UNGP;
- Specific concerns of national context are covered;
- Development and implementation through a transparent and inclusive process; and
- It should be reviewed and updated regularly.

The Nepalese government should consider doing the following:

1. The Nepalese government must adopt, wherever necessary, and take reference of the existing guidance documents and NAPs as a recommendation.
2. Currently, Nepal is in its first phase of initiation regarding developing a NAP and thus, it should initiate and show more than a willingness to adopt the UNGP. Adopting the business and human rights issues in the NAP for Human Rights is a step, but a separate NAP on Business and Human Rights is a must with the growing nature of the development in the country and fast-growing economy.
3. The process must be collaborative with complete transparency. All stakeholders must be given the opportunity in the process, including business enterprises, civil society organisations and, most importantly, the communities which are adversely affected by the activities of businesses.
4. A comprehensive study of the existing legal framework at the national and international level should be conducted. It is further important to understand the intersection-

63 Local Government Operation Act, 2074 s 47.

64 UN Working Group on Business and Human Rights, 'Guidance on National Action Plans on Business and Human Rights' (Version 2.0, UN Working Group on Business and Human Rights 2015) <https://www.business-humanrights.org/sites/default/files/documents/UNWG_NAPGuidance_Version2%200_final_print_09112015.pdf> accessed on 10 April 2020.

65 Phases 1 to 3 describe the development of an initial NAP. Phases 4 and 5 include the continuous cycle of implementation, monitoring and update of successive versions of the NAP.

ality of laws and identify discrepancies or overlapping and suggest improvements in all such laws. For example, confusions regarding the implementation and process of adopting social security laws should be clarified.

5. The National Human Rights Commission and civil society organisations should be involved by the government at all levels of discussion.
6. Provincial and local level governments should also be involved and included in the development process of the NAP as they are going to be responsible for the implementation.
7. Consultations and discussions with relevant stakeholders should be language friendly.
8. Human rights abuses could take place in both formal and informal sectors, and thus research should be conducted in identifying the areas of concerns for Nepal at all levels including; violations by public and private companies, government agencies, foreign companies and their subsidiaries in Nepal.

WAY FORWARD

Laws making it necessary for businesses to oblige to the utmost protection of human rights can be found in the existing legal framework in Nepal, but there are gaps in the framework. The gaps are not only in the information of laws and its implementation but also the proper regulation of corporate social responsibility (CSR) funds and the access to remedy regarding human rights abuses concerning business practices. State-based grievance mechanisms are required to ensure access to remedy for business-related human rights. With formal and informal mechanisms like the judicial bodies and the quasi-judicial bodies, the state has tried in ways to provide appropriate remedies in cases where there is a lack of enforcement of fundamental rights or legal rights as well as issues of subject matter which are of public concern. The existence of these pertinent laws along with some gaps calls for an actual discourse on addressing the concerns if public policies induce private businesses to serve the public interest. Further, the framework lacks effective mecha-

nisms to enforce and implement necessary laws.

While moving forward, the government should ensure the following:

1. Ratification of international conventions and agreements related to business enterprises and human rights should be done as a priority;
2. Streamlining judicial and non-judicial mechanisms;
3. Establishing human rights due diligence mechanisms as per the second and third pillars of the UNGP for obligating Nepalese companies legally;
4. Streamlining CSR laws and identifying and reforming regulatory gaps in implementation;
5. Ensuring accountability and transparency in the taxation of business enterprises;
6. Ensuring transparency and inclusiveness for all stakeholders by the government;
7. Ensuring coherence in policies, laws and institutional frameworks at the federal, provincial and local level.

With the need for stable development and economic growth, for which the business sector has been widely sought; it would call for both the government and businesses to consider human rights as a precondition of any development model that aims at bringing prosperity. Proper research, as well as a better framework for incorporating business and human rights, would aid Nepal for it is in the right position to promote human rights-friendly development and businesses.

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