



# TRANSITIONAL JUSTICE RELATED LAW MAKING IN NEPAL

*Prof. Dr. Krishna Prasad Bashyal\** | *Nabin Kumar Subba\*\**

## ABSTRACT

*Visiting Nepal as case study, this article attempts to address the issues of transitional justice related law making in the Nepal and recent progress. While the armed conflicts resulting in the decades of violent atmosphere have long ended, memories of the mass atrocity crimes that occurred during the 1990s and early 2000s continue to cast a long shadow over the peace process. Its post-conflict achievements have been extraordinary including, inter alia, promulgation of new constitution, but on the dark side of the transition there are more problematic realities. Little of what the Comprehensive Peace Accord (CPA) envisioned for Nepal has come to fruition in the nineteen years since it was signed, and the government made limited progress securing accountability or redress for the violations committed during the conflict. Therefore, the Article argues that transitional justice cannot succeed in Nepal without a credible, robust, proper and principled justice mechanism capable of ensuring accountability for victims of past abuses and end to the peace process at large. Article seeks for the strong commitment on the part of the State and political leaders to the honorable and successful exit from the transitional justice process for which formulation of the effective law is the first steps.*

**Key Words** : Transitional, Justice, Conflict, Abuse, Commitment

---

\* Dean , Faculty of Law Tribhuvan University

\*\*Assistant Professor, Nepal Law Campus, Tribhuvan University, Kathmandu.

## BACKGROUND

In the aftermath of internal armed conflict, response to human rights violations and their perpetrator is critical and central. To mitigate the harmful feelings, to transformed conflicting relations, to avoid the formation of circle of violence, and to achieve ultimate goal of peace, the aspects of acknowledgement and accountability need to be addressed, by identifying different measures. These measures includes both retrospective and prospective as well as judicial and non-judicial rendering it very complex and flexible process.<sup>1</sup> In this context of conflict and atrocities connected with such conflict, transitional justice is that formal attempts by post-repressive or post-conflict societies which address past wrongdoing in their efforts to democratize.<sup>2</sup> Within this process societies emerging from conflict negotiate and, come to terms, with past human rights abuses to ensure justice, accountability, reconciliation, and sustainable peace.<sup>3</sup>

There is one major argument which called for past to be put to rest, for the armed conflict chapter to be closed, and for focus to be shifted to future. The modern civilized states, for this cause, under the guidance and influence, of the international law have opted for addressing the conflicted past by intertwining vengeance and forgiveness resulting the remarkable new forum for dealing with past. Nepal has followed the same path.<sup>4</sup> However, so far in Nepal, transitional justice has failed to uphold the expectation of people to establish rule of law, sustainable peace and justice to victims.<sup>5</sup> The culture of impunity, as remnant of conflict, continued to mark its presence in one form or another and continues to act as an obstacle to real progress.

---

<sup>1</sup> Gentian zyberi & Jernej Letnar Cernic, *Transitional Justice Processes and Reconciliation in the Former Yugoslavia: Challenges and Prospects*, 33 *Nordic Journal of Human Rights* 132-157, 136 (2015).

<sup>2</sup> COLLEEN MURPHY, *THE CONCEPTUAL FOUNDATIONS OF TRANSITIONAL JUSTICE 1* (cambridge press, 2017).

<sup>3</sup> Kai Ambos, 'The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC', in *BUILDING A FUTURE ON PEACE AND JUSTICE: STUDIES ON TRANSITIONAL JUSTICE, PEACE AND DEVELOPMENT* 21 (Kai Ambos et. al. ed., 2009). [hereinafter Kai Ambos]

<sup>4</sup> MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998).

<sup>5</sup> Nikhil Narayan, *Restoring the Rule of Law in Nepal: Can Transitional Justice Deliver without Criminal Justice?* 11 *DREXEL LAW REVIEW* 969 (2019)

Nepal's transitional justice is being shaped partly from domestically, including concerns of victims and other stakeholders on one hand, and on the other, how it will be perceived internationally. International community has shown its expectation that employment of the transitional justice in Nepal will offer unique values, symbols and beliefs not only within the boundaries but also across the world. Therefore, this process of justice needs to acquire through its process and mechanism the legitimacy and authority necessary for this cause.

Two commissions which are established, namely Commission on Investigation on Enforced Disappeared Persons and the Truth and Reconciliation Commission, established under The Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071 (TRC Act) in 2015 are the institutional tools trusted with implementing the transitional justice. While there was great excitement about the possibility that transitional justice offered, no particular success has been achieved so far. The TRC Act is already amended thrice to increase the life span of the two commissions. These commissions are criticized for lack independence, transparency and compliance with ruling of Supreme Court and international law. Provisions of Act itself are not in complete coherence with international law, humanitarian law and human right law. Also, the commissions are unpopular among many victims and civil society organizations, who criticize their powers to recommend granting amnesty to perpetrators.

## **TRANSITIONAL JUSTICE: DEFINITION, DEBATES AND APPROACH**

While some scholars regard transitional justice as a phenomenon that stretches far back into history,<sup>6</sup> most trace its origin back to World War II.<sup>7</sup> Modern notion of transitional justice was emerged during the political transitions of 1980s.<sup>8</sup> Within short time period of its origin

<sup>6</sup> Jon Elster, *Coming to Terms with the Past. A Framework for the Study of Justice in the Transition to Democracy* 39 Eur. J. of Soc.7-48, 1 (1998). (Stating that "already the restoration of democracy in Athens in 403 BC constitutes an unambiguous case of transitional justice")

<sup>7</sup> RUTI G. TEITEL, TRANSITIONAL JUSTICE 31, 39-49 (2000). [hereinafter teitel]

<sup>8</sup> RUTI G. TEITEL, GLOBALIZING TRANSITIONAL JUSTICE: CONTEMPORARY ESSAY 4 (2014).

transitional justice has gained remarkable degree of dynamism, experiencing multiple phases of development.

The term transitional justice represents how successor regimes should deal with the human rights abuses of their authoritarian predecessors.<sup>9</sup> However, in wider sense, it is not limited to situations of post-conflict or regime changes rather includes situations of peace processes within ongoing conflicts.<sup>10</sup> Its concept is built upon the theoretical, policy and practical implications of dealing with past human right violations in societies.<sup>11</sup> These set of processes and measures which are symbolical and legal to respond the past regime or conflict by new government constitutes transitional process. It has goals to provide people with truth of conflict and establish clear break from the past, deter future wrongdoing and remember and rectify historical injustice.<sup>12</sup>

There is no widely universal definition of transitional justice because of diverse forms of measures taken in the process of transition. ICTJ defines it as “*the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses.*”<sup>13</sup> Prominent transitional justice scholar *Ruti Teitel* defines transitional justice as the “conception of justice associated with periods of political change, characterized by legal responses to confront wrongdoings of repressive predecessor regimes”.<sup>14</sup> The necessity of addressing the past atrocities is pertinently put in the South African TRC Report as, “*however painful the experience, the wounds of the past must not be allowed to fester. They must be opened. They must be cleansed. And balm must be poured on them so they can heal. This is*

---

<sup>9</sup> TRICIA OLSEN ET. AL., TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY 2 (2010).

<sup>10</sup> Kai Ambos *Supra* 3 at 21.

<sup>11</sup> Christine Bell et. al., *Transitional justice: (Re) conceptualising the field*, 3 INT’L J. OF L. IN CONTEXT 81–88, 81 (2007).

<sup>12</sup> Samar El-Masri et.al., *Changing the Context: Can Conditions Be Created That Are More Conducive to Transitional Justice Success?* 2-3. (2020) (hereinafter *Changing the context*)

<sup>13</sup> ICTJ, International Center for Transitional Justice, “What is Transitional Justice?” <http://ictj.org/about/transitional-justice>.

<sup>14</sup> Teitel *Supra* 7, at 4.; Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HAR. HUM. RTS J. 69-94, 69(2003). [hereinafter *Teitel Genealogy*]

*not to be obsessed with the past. It is to take care that the past is properly dealt with for the sake of the future.”<sup>15</sup>*

In the documents of UN a broad definition can be observed:

*[t]he full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (and none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.<sup>16</sup>*

The UN definition has identified broad scope and spectrums of transitional justice in comparison to other. According to UN definition this process of justice is not limited to investigation and prosecution rather it is a broad process that addresses the political, legal and moral responsibility of individuals and institutions for past violations of human rights and dignity. Thus, in short we can define transitional justice as a concept of justice, with element of both prospective and retrospective justice, associated with periods of political changes and conflicts, characterized by legal and symbolic responses to confront the wrongdoings of repressive predecessor regimes.<sup>17</sup> Transitional justice takes different forms based on “who” committed “what” kind of violations and “when”.<sup>18</sup> Since the process involves several distinctions, negotiations and dynamics, TJ becomes imperfect and limited by nature<sup>19</sup> or always incomplete and messy.<sup>20</sup>

<sup>15</sup> South Africa. Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa report / Truth and Reconciliation Commission; foreword by Desmond Tutu* 7 (1998).

<sup>16</sup> U.N. Secretary General, *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶8 UN Doc S/2004/616, 4 (Aug. 23, 2004).

<sup>17</sup> Teitel Geneology *Supra* 14 at 69-70.

<sup>18</sup> Rosemary Nagy, *Transitional Justice as Global Project: Critical Reflections*, THIRD WORLD QUARTERLY 29 276 (2008)

<sup>19</sup> Pablo De Greiff, *A Normative Conception of Transitional Justice, Dealing with the Past*, 50 POLITORBIS 19 (2010).

<sup>20</sup> Catherine M. Franke, *Gendered Subjects of Transitional Justice*, 15 COLUMBIA JOURNAL OF GENDER AND LAW, 814 (2006).

By this time there are established transitional justice mechanisms such as trials, truth commissions, amnesties, reparations (both material and symbolic), lustration, and informal/local/traditional practices—or a combination of these. Nepal has chosen to follow the combination of trials, commission, amnesties and reparation.

### **TRANSITIONAL-RELATED LAW MAKING IN NEPAL**

If transitional justice related law making in Nepal is to be made explicable, at least three major topics to be discussed: first, efforts for legislation making prior to TRC Act of 2071 where amnesty had overshadowed the accountability; secondly, TRC Act of 2071 and intervention of Supreme Court that saw the formal defeat of amnesty in transitional justice and thirdly, efforts for amending TRC Act to make it resonates with Supreme Court and international law.

Further, it seems that, the TRC is being shaped by, on the one hand, local pressures for managing social and political transformation and demonstrating the new state's ability to resolve tensions among its citizens. On the other hand, Nepal's international obligation to prosecute gross human right violations and role played by the Supreme Court has forced the state to negotiate between amnesty, reconciliation and justice. However, mere negotiation between these three elements do not reflect the required innovations to produce a forum that privileged the stories of victims, enabled public participation, and promulgated a vision for inclusion and solidarity. The process has identified truth commissions and trial as complementary and necessary measure in confronting past violence through restorative justice.

#### **Prior Efforts for Legislations**

CPA pledged the establishment of high-level truth commissions; however it was significantly delayed and legislation for the purpose was not adopted by Nepal's Parliament until 11 May 2014. Before that many Bills were drafted and ordinance was adopted although none of them carried out function of transitional justice.

## **Bills of 2007 and 2010**

In the first bill of 17 July 2007 government attempted to include provisions that excluded the prosecution of human rights violations by proposing an amnesty clause.<sup>21</sup> This bill was highly criticized by national and international organization and it was never presented before parliament. Government, then, prepared two bills, namely a Bill on Truth Finding and Reconciliation Commission, and a Bill on Disappearance of Persons<sup>22</sup> and submitted to legislative-parliament in 2010. After making several amendments of pending Bill and ruled out amnesty provision government withdrew it just before Parliament was dissolved in August 2012.<sup>23</sup>

## **Ordinance of 2012**

After withdrawing previous bill from parliament, the Government approved an Ordinance on the Truth and Reconciliation Commission (Ordinance)<sup>24</sup> to establish just a commission, empowered with wide discretion to recommend the granting of amnesties for all crimes, including those amounting to crimes under international law,<sup>25</sup> which was severely criticized from different organizations on ground of including amnesty provision, lack of independence and impartiality of commission and other.<sup>26</sup> After being approved by president the Ordinance lapsed when Parliament failed to adopt legislation.<sup>27</sup>

## **Guideline Manuals for Reparation**

Before this Act the Council of Ministers has decided to provide financial assistance to internally displaced persons.<sup>28</sup> After the Supreme

<sup>21</sup> Advocacy Forum, *Review of implementation of the recommendations made by the UN Working Group on Enforced or Involuntary Disappearances after its visit to Nepal in December 2004*, 1 Occasional Briefing Series 5 (2010).

<sup>22</sup> *Rajendra Prasad Dhakal et.al. v. GoN*, Decision No. 7817, 49 Nkp (2064). [hereinafter Rajendra Prasad Dhakal et.al.] (In this judgment Supreme Court ordered to constitute separate commission of inquiry with fore enforced disappearance.)

<sup>23</sup> ICTJ, Authority without accountability, 115, at 104.; Human Rights Watch, No Law, No Justice, No State for Victims The Culture of Impunity in Post-Conflict Nepal, 26 (2020). [hereinafter Human Rights Watch]

<sup>24</sup> Ordinance on Commission on Disappeared Persons, Truth and Reconciliation, Ordinance No. 8, 2 Nepal Gazette (2069).

<sup>25</sup> ICJ, Compromising Justice. Nepal's Proposed Ordinance on Commission on Disappeared Persons, Truth and Reconciliation at 5 (2012) <https://www.icj.org/wp-content/uploads/2012/10/TJ-Ordinance-Briefing-Paper-FINAL-VERSION.pdf>.

<sup>26</sup> ICTJ, Authority without accountability, 115, at 105.

<sup>27</sup> Interim Constitution Art. 88. (2063).

<sup>28</sup> Guideline to Provide Relief and Facility to the Displaced Persons due to Conflict, 2007.

Court order, government formulated a policy document detailing the reparative measures, defining the beneficiary and establishing a process to access such benefits,<sup>29</sup> and procedural guideline.<sup>30</sup> However, these guidelines were criticized and challenged in court for failing to meet international standard of reparation and for not being effective.

Briefly stated, legislation making efforts in the opening years after CPA was signed were not in resonance with constitution, CPA, international law, principles of transitional justice and goals of Nepal's peace process.

### **TRC Act, 2071**

TRC Act is the most recent legal instrument introduced to frame transitional justice mechanism in Nepal. This Act is formulated on the basis of previous Ordinances and other bills with slight changes. The spirit and intention of the interim constitution as well as CPA is reflected in the preamble of the Act and provides the framework within which establishment and mandate of two truth commissions is set out. However, this Act is was rigorously criticized for failing to incorporate Supreme Court's judgment, mainly of *Madhav Basnet*<sup>31</sup> and therefore, it was challenged in the court time and again.<sup>32</sup>

TRC Act provides constitution of two separate independent, impartial, accountable and high level commissions namely Enforced Disappearances Enquiry Commission and Truth and Reconciliation Commission. Constituted on February 2015, these commissions are tasked to uncover the truth of the incident that took place during the course of armed conflict, bring about reconciliation and make recommendation for prosecuting offender of grave violations of human right and reparation to the victims.<sup>33</sup> TRC of Nepal as reflected in this Act is being framed as a quasi-legal structure that will be abided by the principles of transitional justice, respect for individual human rights, and the rule of law.

---

<sup>29</sup> Standard on Financial Assistance and Relief to the Conflict Victims (Standard), 2065.

<sup>30</sup> Guideline to Provide Financial Assistance to Kin of the Deceased, 2008.; Directives on Financial Support to Nominee of victims (First Amendment Directives, 2068), 2065. [hereinafter Guidelines for financial assistance]

<sup>31</sup> Where ordinance was challenged.

<sup>32</sup> Human Rights Watch, 129, at 26-7.

<sup>33</sup> TRC Act, 4, §3.

Following the enactment of the Act in 2071, in a writ petition filled by *Suman Adhikari et.al.*, Supreme Court held that (1) Reconciliation under Section 21 (1) of the Act must need free consent of the victims; (2) as section 25, read with section 26, can be used by commission to provide amnesty to perpetrator of the gross human rights violations it is declared void. On 2077 government filed the review petition challenging the judgment of *Suman Adhikari* where court firmly reaffirms its earlier judgment of 2015.

TRC Act 2071 takes a long time to settle the crucial points regarding the proper criminal treatment of the perpetrator of the human right violations. For this reason Act has been amended time and again following the judgment of the court. Other than that, the Act is amended to extend the tenure of the commissions. After the promulgation of the Act on 2071 B.S., there were three amendments on 2075/03/20, 2075/10/25 and 2081/05/13. In the following section, the amended provisions will be tested against the court's judgment, international law and overall jurisprudence of the transitional justice.

### **Third Amendment of the Act**

Two years earlier third amendment bill was presented in the parliament which failed to find the approval. After the long pause, transitional justice process resumes after the parliament approved third amendment Act. This amendment came after the consultation and dialogues conducted both at the national and provincial levels, collecting suggestions and recommendations from relevant stakeholders and conflict victims.<sup>34</sup> At the mean time a task force was commissioned<sup>35</sup> and assigned to bring a focal point of agreement amidst the diverse understanding of and demands from transitional mechanism. Based on the report of the task force, top leaders of major political parties agreed on the major riddles that were roaming around the process. The third amendment provides total of 24 amendments to exiting provisions, some of which are

<sup>34</sup> <https://kathmandupost.com/politics/2023/03/20/disputed-bill-to-revise-transitional-justice-law-lands-in-house>.

<sup>35</sup> Members of the task force – Home Minister and Nepali Congress leader Ramesh Lekhak, UML Chief Whip Mahesh Kumar Bartaula and Maoist Centre leader Janardan Sharma.

crucial for the implementation of the transitional justice in Nepal. Following are the major amendments: (1) Definition of the Gross human right Violation and human right violation, (2) tenure of the commissions, (3) Authority of commissions (4) Reparation, (4) reconciliation, (5) amnesty, (6) punishment, (7) Filing the petition.

### **Dichotomy of human right violations and human right violations under the Act**

The third amendment has amended the section 2(j) of the Act. Initially, the provision provided mandate of commissions to investigate the gross violations of human rights defined as the acts which were committed in the course of armed conflict directed against unarmed persons or civilian population or committed systematically.<sup>36</sup> Latest amendment provides two different sets of human right violations namely '*human right violation*' and '*gross human right violation*'. This distinctions between two types of violations have different consequences than the original regime. While offences defined as human rights violations could be granted amnesty if certain conditions provided under the Act are satisfied, later violations will mandatorily be recommended for criminal trial in the special court.<sup>37</sup> That means, distinctions between two types of violations have different consequences than the original regime.<sup>38</sup>

### **Gross Human Right Violations**

The amended definition enlist three crimes as gross human right violations rape and other serious sexual violence, arbitrary killing, enforced disappearance provided that the victim's whereabouts remains unknown; and "inhuman or cruel torture" that occurred during the armed conflict. Among three crimes, arbitrary killing and enforced disappearance are the crime either directed against unarmed persons and civilian community or

---

<sup>36</sup> Definition of gross human right violation before amendment had provided list of the such acts including murder, abduction and taking hostage, enforced disappearance, causing mutilation or disability, physical or mental torture, rape and sexual violence, looting, possession, damage or arson of private or public property, forceful eviction from house and land or any other kind of displacement and any kind of inhuman acts inconsistent with the international human rights or humanitarian law or other crime against humanity

<sup>37</sup> Under the original Act, gross human right violations can be investigated and recommended for prosecution by the commissions under the Act.

<sup>38</sup> <https://www.hrw.org/news/2024/08/20/nepal-new-transitional-justice-law-flawed-step-forward>.

systematically committed by parties of the conflict. As mentioned above, perpetrator of gross human right violations will be held accountable through judicial process, barring commissions to recommend amnesty for these crimes. This provision can be seen as being consistence with international law and Supreme Court judgment. However, there still remains ample room to argue that the Act still violates obligation of Nepal under international law. For instance, the prohibition of torture and the requirement that it be criminalized is absolute and there can be no qualification for “inhuman or cruel” torture, since torture by its nature is inhuman or cruel.<sup>39</sup>

### **Other Human Right Violations**

The human right violations<sup>40</sup> are defined as crime either directed against unarmed persons and civilian community or systematically committed by parties of the conflict, except gross human right violations defined under the Act, which violate Nepali laws, international human right law and international humanitarian law.<sup>41</sup> Also, this provision requires that both categories of violations (serious and not) are committed “in a targeted or planned manner against an unarmed individual or community.” This means that alleged perpetrators of crimes committed against combatants, or in a non-targeted or unplanned manner, are excluded from any possibility of criminal accountability.

### **Prosecution under the Act**

Section 27 of the Act the commissions needs to recommend the case to the attorney general accompanied with circumstances of and reason behind the incident, evidences and report. Also the recommendation should contain details on if the suspect assisted the commission in finding the

<sup>39</sup> Nepal: New Transitional Justice Law A Flawed Step Forward

<sup>40</sup> List of human rights violation other than gross human right violation, which can be qualified for amnesty under section 25 and 26 of the amended bill, is provided in Section 2 (j) of amendment bill. This includes, Murder, sexual violence, physical and mental torture, abduction and taking hostage, illegal detention, Looting, possession, damage or arson of private or public property, causing bodily harm, Forceful eviction from house and land or any other kind of displacement, any kind of inhuman acts inconsistent with the international human rights or humanitarian law.

<sup>41</sup> In the bill of 2079, Proposed amendment of section 2(j) categorized the gross human right violations of the Act as human right violations except rape. Further the bill added section (j1) that categorized rape, murder by cruel torture, forceful disappearance of person, inhumane and cruel torture as gross human right violation.

truth, regretted for committing the violence, ask for forgiveness with victim and promise of non-repetition in the future. After receiving the recommendation government attorney will decide to proceed further or not based on the availability of sufficient evidence to establish the accusation in the special court, a court commissioned under section 29(a) of the Act. If the government attorney decides to proceed to court the attorney general or other attorney whom attorney general delegated his or her power will register the case in the special court.

This provision further allows for the attorney general, excluding in cases of rape or “serious sexual violence,” to make a binding request for a 75 percent mitigation in the sentencing for those accused of gross violations. This provision, however, invites serious criticism stating that it amounts to a disguised amnesty and hence contradicts the principle that criminal sanctions must be proportionate to the gravity of the crime, and also undermines the fundamental role and competency of the judiciary. The court should decide what reduction may be appropriate, if any, based on its own consideration of the facts and submissions by the parties to the proceedings.

Another important provision regarding the prosecution is that of transfer of cases *sub-judice* in district and high court and are related to human right violations during conflict. Attorney general can write to the court for the transfer.

### **Amnesty under the Act**

As discussed earlier, the commissions can recommend amnesty to the perpetrator of the human right violations under section 25 of the Act. This, however, will not automatically grant amnesty to these sets of crime and can be recommended for the judicial trial. Therefore, the Act has provided that:

1. Every human right violation can be recommended to special court for the trial. However, gross human right violations must be recommended for the prosecution.
2. Amnesty provision is not blanket one but is subject to certain terms and conditions.

This provision can be very useful to reach reconciliation among the parties, perpetrators and victims. Further, these conditional amnesties in exchange of information volunteered can act as the incentive for truth finding, it will help in establishing other forms of the accountability than criminal punishment such as acknowledgement and apology, contributions to compensation or restitution etc.<sup>42</sup> But, the problem resides in the nature and gravity of these crimes and their potential conflicts with both international law and Supreme Court's verdict.

One way of viewing, amnesty under the Act is that it is the conscious decision of the state to deal with the past in specific ways ensuring non-judicial accountability. As discussed above amnesty provision seems to be both limited and conditional; granting amnesties is neither automatic nor generalized, but rather individualized and conditioned on submission of application followed by evaluation conducted by commissions to find out whether the statutory requirements to grant amnesty are fulfilled or not. An active commitment from the perpetrator is required, show up in front of the committee, confess his or her crime and accept to confront with victims. Further, the perpetrator can be asked to provide reasonable compensation to the victims. But granting amnesty is not possible without the free consent of the victims.<sup>43</sup>

These provisions very much resemble with South African TRC and TRC of East-Timore. It is relevant to mention here what Tanya Goodman notes while discussing on South African TRC that “...rather than agreeing to a blanket amnesty for apartheid-era crimes, as had been the case in most other situations, they struck a unique balance between offering amnesty for perpetrators on an individual basis and providing opportunities for victims to participate in the process by telling their stories.”<sup>44</sup> This Act with its recent amendment has provided similar balance system for transitional justice of Nepal.

<sup>42</sup> Belfast Guidelines, Principle 2-5.; Some elements of the Gacaca communal court system in Rwanda have fulfilled this role in linking public admission with community service or compensation.

<sup>43</sup> Section 26 of the TRC Act, amendment bill.

<sup>44</sup> Tanya Goodman, Staging Solidarity: Truth and Reconciliation in a New South Africa,(2008).

### **Positioning of Victim under the Act**

Justice in transitional justice is foremost and predominantly justice for victims. Thus, in any transitional process, victim must be identified, along with offences and perpetrators, in order provide them with their right to justice and other associated right. Many human right instruments have used term victim without defining it.<sup>45</sup> However, victims are widely understood as direct victim and immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims.<sup>46</sup> The law now permits the special court to adjudicate disputes related to reparations, an important expansion of its role. Section 19 has ensured that commission's work needs to be impartial, victim-centered, as well as disable and gender friendly. Under section 22(a) victims are ensured reparation irrespective of reconciliation, amnesty and judicial conviction.

### **Other important provisions of the Act**

Under section 13, the Act now gives the commissions the mandate of analyzing gravity and nature of the violations of human right and act of parties of armed conflict. Further, the commissions has responsibility of truth finding, suggesting policies and program that ensure the non-repetition of these violations in the future, and recommendation for vetting of persons involved in armed conflict.

### **Supreme Court of Nepal, TRC Legislation and Amnesty**

The Supreme Court of Nepal has been seen to be robust-court in the matter of the transitional justice. In its decision, Court has identified transitional process to have close relation with human society, and this process has two spectrums, one to make offender accountable for his wrongdoing, and other, to create environment for reconciliation. Some of

---

<sup>45</sup> International Covenant on Civil and Political Rights, Art.9 (5), Dec. 16, 1966, 999 UNTS 171.; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 14(1), Dec. 10, 1984, 1465 U.N.T.S. 85.; The Rome Statute of the International Criminal Court, Art. 75(1), 85, July 17, 1998, 2187 UNTS 90.

<sup>46</sup> Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/60/509/Add.1 Principle 23 (March 21, 2006) at Principle 8; International Convention for the Protection of All Persons from Enforced Disappearance, Art. 24, Dec. 20, 2006, 2716 UNTS 3.

the provisions of the 2012 Ordinance,<sup>47</sup> TRC Act, and 2068 Guidelines for financial assistance have been examined by the Supreme Court. Court held that Section 15 Guidelines for financial assistance is inconsistent with the Interim constitution, IHRL, Interim Constitution of Nepal and courts previous decisions, and instructed to revise the provision.<sup>48</sup> In *Suman Adhikari* court struck down different provision of TRC Act.<sup>49</sup> Some provision of section 26 (2),<sup>50</sup> and 29 (1) <sup>51</sup> of the TRC Act were declared void for being inconsistent with Interim Constitution of Nepal. Also, Supreme Court has issued order to make a special type of effective law to criminalize enforced disappearance,<sup>52</sup> and Torture<sup>53</sup> and to implement four Geneva conventions,<sup>54</sup> and to make provisions governing vetting process.<sup>55</sup>

According to the view of Court, the first step in transitional process is to identify which incidents should be prosecuted, on one hand, and which should be reconciled, on the other. Court makes it clear that if grave offences are reconciled with intention to protect offender and minor incidents carried out without intentions are prosecuted, in both instances, transitional justice cannot be successful.<sup>56</sup> Reiterating its previous judgments,<sup>57</sup> court held, in *Suman adhikari*, that it is not expedient to look for grounds and reasons for granting pardon amounting to amnesty without determining the offense or making the prosecution.

The Court observed that granting amnesty in the case of gross violation of human right amnesty is not permissible in any ground, under

<sup>47</sup> *Madhav Kumar Basnet et.al. v. GoN*, Decision No. 9051, 55 NKP (2070). (In this case court finds section 23(2), 25 and 29 of the ordinance invalid.) [hereinafter *Madhav Kumar Basnet et.al.*]

<sup>48</sup> *Ram Dulari Tharu v. GoN*, Writ No. 069-WO-0723, Supreme Court, (2071). [hereinafter *Ram Dulari Tharu v. GoN*]

<sup>49</sup> *Suman Adhikari v. GoN*,; *Madhav Kumar Basnet et.al.*..

<sup>50</sup> 'In this provision "...where sufficient ground and reason are not found to grant amnesty from the investigation of the Commission..." was declared void.'

<sup>51</sup> 'In this provision "If recommendation is made by.... to the GoN to prosecute the perpetrator found to be guilty of the offence of gross violation of human rights, the Ministry..." was declared void.'

<sup>52</sup> *Rajendra Prasad Dhakal et.al. Supra* 61.

<sup>53</sup> *Rajendra Rajendra Ghimire v. Office of the Prime Minister et. al.*, Decision No. 8101, 51 NKP (2066).

<sup>54</sup> *Rajaram Dhakal v. Office of prime minister*, Writ No. 2942, Decision No. 7274, 45 NKP (2060)

<sup>55</sup> *Liladhar Bhandari*, at ¶27.

<sup>56</sup> *Suman Adhikari v. GoN*, 150, ¶16.

<sup>57</sup> *Rajendra Prasad Dhakal et.al.*, *Supra* 61. *Madhav Kumar Basnet et.al.*, 157.

constitution as well as Nepal's obligation under international law. After this landmark judgment, government has asked full bench of Supreme Court to review its judgment of special bench in *Suman Adhikari*. However, Court's standing on amnesty-related provision did not change from its previous judgment.<sup>58</sup> Therefore, this decision compelled the government to move away from historic tendency to confer amnesties or pardon to the actors of the conflict responsible for the atrocious crimes. Supreme Court of Nepal has indicated in *Madhav Basnet* case that on the basis of nature of crimes, view of the victims, impact of the amnesty on society, apology of the perpetrator etc, if it seems to be appropriate, amnesty or reduction of the punishment or other forms of the alternative remedies can be adopted.<sup>59</sup> However, in *Suman Adhikari*, court finds that any search of ground for providing amnesty to perpetrator of gross human right violation is very unfortunate and any efforts to provide amnesty to these perpetrators cannot be accepted.<sup>60</sup>

## ANALYSIS

Unlike the original Act the third amendment has provided a renewed negotiation between peace and justice. It has reduced the scope of the amnesty than before, making it more conditional as opposed to blanket, with some legitimate objectives. As the Supreme Court had asked for the categorization of violence as serious and non-serious and worthy of amnesty and unworthy of amnesty, depending on their severity, latest amendment has classified the former gross human rights violation into two distinct kinds as discussed above. Therefore, prosecution can be barred by the provision relating to reconciliation and amnesty.

However, third amendment Act is being criticized mainly on the ground that this very categorization fails to comply with international law and the decisions of the Supreme Court. It is important to note that, the similar criticism was raised against the former version of this provision. Therefore, in the following section the provisions of the third amendment

<sup>58</sup> Nepal: Supreme Court's Decision Reaffirms the Need to Amend Transitional Justice Law (May 1, 2020). <https://www.hrw.org/news/2020/05/01/nepal-supreme-courts-decision-reaffirms-need-amend-transitional-justice-law> .

<sup>59</sup> *Suman Adhikari*, Para 26

<sup>60</sup> *Suman Adhikari* Para 79

Act will be analyzed on the basis of relevant part of international law and Supreme Court TJ jurisprudence.

## **CONCLUSION**

In light of above discussion, this Article holds that the transitional justice law making of Nepal, which has been the battlefield for decades, has finds the negotiated settlement. This process of law making involves time in decades and rigorous struggles in and out the court. The involvement of the court, international actor and national actor can be the testimony to show the importance of law making in transitional justice. However law making is just a step forward; just a brick to build the mechanism. Strong institutional setup, procedural regulations, and implementation of laws with utmost responsibility and good faith needs to be the characteristics of journey forward.

□