



TRANSITIONAL JUSTICE AS INNOVATION IN CRIMINAL LAW IN NEPAL

*Dr. Bishnu Bashyal**

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: Transition, Justice, Criminal Law, Innovation

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

BACKGROUND

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.

To this backdrop, this article examines the faults in the legal and organizational character of the Nepalese transitional process. Article begins by exploring, in short, the notion of transitional justice. After that, the transitional justice jurisprudence of Nepal will be analyzed along with the general background of the armed conflict and development of the transitional legislation. Later section will further examine the TJ mechanism of Nepal in light of international law, international practice and decisions of the Supreme Court of Nepal. This examination will be carried out with the objectives of drawing lessons for the ongoing transitional process, with particular focus on lawmaking process.

Central Debates: Legalism versus Realism/ Peace v. Justice/Truth v. Justice

There are vast differences among the transitional process in terms of the context, design and implementation of the transitional justice mechanism. Elements like power, cultural applicability, political will, or institutional capacity are variable across the mechanism and can be the root cause for their failure or success.¹ Despite this, different scholars

¹ *Changing the Context* Supra 12, at 2-3.

have identified some unique set of dilemmas that distinguished transitional justice from “ordinary” justice.² Dilemmas between procedural and substantive law, dealing with large number of cases, and criminalization of political violence labeling acts once considered legally or politically appropriate, “human rights violations” are few to mention.

These dilemmas are represented as dichotomy of peace vs. justice or truth vs. justice. In this debate, advocates of the legalist approach have emphasized criminal justice as a means to deter future human rights violations and to support peace building. They hold that in the case of transitional justice, its actors must follow and guided by international law to promote universal standard of justice,³ and consider accountability and punishment of crimes of the past as unavoidable components fundamental basis to reestablish and ensure a sustainable peace without fighting impunity, establishing the truth, and building a historical collective memory. As South African TRC reports put it “*this is because past refuses to lie down quietly...It has an uncanny habit of returning to haunt one...Those who forget the past are doomed to repeat it*”.

Unlike legalism, realism does not see law as separate from politics but regards both as intricately linked to power dynamics.⁴ According to this approach, transitional justice is shaped on the basis of option available to new government. For instance, in case of negotiated transition, like in Chile, Argentina, Uruguay, and El Salvador where amenities was enacted, transition mechanism is less confrontational and prosecutorial than in the instance of complete military or political defeat of the preceding government.⁵ Siding the amnesties rather than prosecution of the perpetrators of human right violations South African Judge Mahomed quoting Judge Marvin Frankel⁶ writes:

² Bronwyn Anne Leebaw, *The Irreconcilable Goals of Transitional Justice*, 30 *Human Rights Quarterly* 1, 95-118 at 101 (2008). (Bronwyn Anne Leebaw)

³ Vinjamuri & Snyder, *Advocacy and Scholarship in the Study of International War Crime Tribunals and Transitional Justice*, 7 *ANN. REV. OF POL. SCI.* 346 (2004).

⁴ REBECCA GIDLEY, *ILLIBERAL TRANSITIONAL JUSTICE AND THE EXTRAORDINARY CHAMBERS IN THE COURTS OF CAMBODIA* 20 (2019).

⁵ *Id.* at 20.

⁶ In his book, *Out of the Shadows of the Night: The Struggle for International Human Rights*, Judge Frankel wrote.

*A nation divided during a repressive regime does not emerge suddenly united when the time of repression has passed. If they [perpetrator of human right violations] are treated too harshly - or if the net of punishment is cast too widely - there may be a backlash that plays into their hands. But their victims cannot simply forgive and forget. These problems [...] describe tough realities in more than a dozen countries. If, as we hope, more nations are freed from regimes of terror, similar problems will continue to arise. Since the situations vary, the nature of the problems varies from place to place.*⁷

This shows that punishing the perpetrator of human right violation can present complex and agonizing problems that have no single or simple solution. Supreme Court of Nepal is also of opinion that victim of conflict cannot get justice with prosecution alone without guarantee of non-repetition, true information of wrongdoers, reparation etc. Court believes that without attempting for effective reparation and opening the gates of truth, punishing the some perpetrator will only show political vengeance.⁸

TRANSITIONAL JUSTICE IN NEPAL

Nepal has seen many people's movement and armed conflicts in order to establish democracy, multi-party system and republic system. After the unification carried out by *Prithvi Narayan Shah* in 1746 to form Modern and unified Nepal, Nepal has gone through many power shift and divisions and regime changes. After unification, country has witnessed many ups and downs including, rise and falls of *Rana* regime, establishment of democracy, establishment of *Panchayat* System, re-establishment of democracy, decades long armed conflict and overthrow of King, before establishing itself as Republican Democratic state. While armed conflict that took place after the re-establishment of Democracy is praised for its positive impact on political change and social transformation, at the same time, it has caused unprecedented destruction of human life and property.

⁷ *Azanian Peoples Organization (AZAPO) and others v President of the Republic of South Africa*, Constitutional Court of South Africa 4 South African Reports 671(1996).

⁸ *Bidur Prasad Chaudhary v. Government of Nepal*, NKP, Decision no 10002 (2075).

The term ‘transitional justice’ was for the first time used in Nepalese context in Comprehensive Peace Accord in 2006. But, before that inquiry commissions were constituted, in the aftermath of political changes, to inquire into the human right violations committed during political uprising. *Mallik* Commission of 1990 to investigate on human right violations committed by former government, *Rayamajhi* Commission, set up in 2006 to investigate human rights violations, including excessive use of force, during the April 2006 protests that led to the King’s stepping down are some set up with the nature of the transitional justice mechanism. However, these instances of the past show that there is weakness of government to respond violations of human rights and to combat against impunity. Even where commissions are set up their reports were never implemented effectively.

In this section, transitional justice process that Nepal has adopted after the armed conflict will be discussed along with its historical background. Although, Nepal’s transitional process has several aspects such as political, social and economic etc., major focus in this chapter will be on the legal arrangements made for the transitional process till the date.

CPA AND INTERIM CONSTITUTION

Formal beginning of the end of armed conflict was the CPA of 2062 signed by the parties to the conflict on 22 November 2005. By signing the CPA, parties of the conflict committed to establish the truth about the conduct of the war and to ensure that the victims of conflict receive, both, justice and reparations. These commitments are a concrete and formal acknowledgement that the legacy of the conflict remains to be addressed and that truth, justice and reparations for victims are necessary in securing sustainable peace.⁹ Economic and social transformation remains the central objective of CPA while creating a roadmap for the transition. It explicitly calls for the establishment of a political system that fully complies with universally accepted human rights.¹⁰ Those who negotiated

⁹ Conflict Report, Supra 52, at 29

¹⁰ Comprehensive Peace Agreement concluded between the GoN and the Communist Party of Nepal (Maoist) Art.3.4, 7.1.2 (2006).

the CPA recognized that Nepal as a nation had a need to express and acknowledge the suffering which took place, a need to relate their stories and experiences, a need to know who was behind the atrocities, a need to explain and contextualize decisions and conduct, a need to reconcile with former enemies, a need to begin personal and national healing and a need to build accountability in order to deal with impunity. The CPA required Nepal to establish a Truth and Reconciliation Commission to meet these different needs. The Parliament of Nepal made provision for such a commission in 2014 by virtue of the TRC Act. Interim constitution upholds and confirms the CPA by imposing responsibility to constitute high level Truth and Reconciliation Commission to investigate human right violations committed during conflict and to create an atmosphere of reconciliation in the society.¹¹ By virtue of this provision, the function of the TRC appears to be limited to “investigate the truth” and create “an atmosphere of reconciliation”. Also, this provision fails to confer jurisdiction to either of commissions or regular court to prosecute perpetrator of human right violations.

Internal difficulties saw the Commissions effectively losing more than almost a decade of their existence. These early difficulties led to a crisis of credibility. The measures of internal mismanagement contributed to the many problems experienced by the Commission, not only during the start-up phase but also throughout the life of the Commission till the date.

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.

a. 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

¹¹ Interim Constitution Art. 33 (s) (2063).

by proposing an amnesty clause.¹² 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 Persons¹³ 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 2012.¹⁴

Ordinance of 2012

After withdrawing previous bill from parliament, the Government approved an Ordinance on the Truth and Reconciliation Commission (Ordinance)¹⁵ 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,¹⁶ which was severely criticized form different organizations on ground of including amnesty provision, lack of independence and impartiality of commission and other.¹⁷ After being approved by president the Ordinance lapsed when Parliament failed to adopt legislation.¹⁸

Guideline Manuals for Reparation

Before this Act the Council of Ministers has decided to provide financial assistance to internally displaced persons.¹⁹ After the Supreme Court order, government formulated a policy document detailing the

¹² 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).

¹³ *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.)

¹⁴ 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]

¹⁵ Ordinance on Commission on Disappeared Persons, Truth and Reconciliation, Ordinance No. 8, 2 Nepal Gazette (2069).

¹⁶ 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>.

¹⁷ ICTJ, Authority without accountability, 115, at 105.

¹⁸ Interim Constitution Art. 88. (2063).

¹⁹ Guideline to Provide Relief and Facility to the Displaced Persons due to Conflict, 2007.

reparative measures, defining the beneficiary and establishing a process to access such benefits,²⁰ and procedural guideline.²¹ 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*²² and therefore, it was challenged in the court time and again.²³

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.²⁴ 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.

²⁰ Standard on Financial Assistance and Relief to the Conflict Victims (Standard), 2065.

²¹ 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]

²² Where ordinance was challenged.

²³ Human Rights Watch, 129, at 26-7.

²⁴ 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.

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 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 decides 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 registered the case in the special court.

This provision further allow 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.²⁵ 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.

²⁵ 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.

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.²⁶

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.”²⁷ This Act with its recent amendment has provided similar balance system for transitional justice of Nepal.

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 the provisions of the 2012 Ordinance,²⁸ TRC Act, and 2068 Guidelines for financial assistance have been examined by the Supreme Court. Court

²⁶ Section 26 of the TRC Act, amendment bill.

²⁷ Tanya Goodman, *Staging Solidarity: Truth and Reconciliation in a New South Africa*, (2008).

²⁸ *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.*]

held that Section 15 Guidelines for financial assistance is inconsistency with the Interim constitution, IHL, Interim Constitution of Nepal and courts previous decisions, and instructed to revise the provision.²⁹ In *Suman Adhikari* court struck down different provision of TRC Act.³⁰ Some provision of section 26 (2),³¹ and 29 (1)³² 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,³³ and Torture³⁴ and to implement four Geneva conventions,³⁵ and to make provisions governing vetting process.³⁶

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.³⁷ Reiterating its previous judgments,³⁸ 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. Court observed that granting amnesty in the case of gross violation of human right amnesty is not permissible in any ground, under 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

²⁹ *Ram Dulari Tharu v. GoN*, Writ No. 069-WO-0723, Supreme Court, (2071). [hereinafter *Ram Dulari Tharu v. GoN*]

³⁰ *Suman Adhikari v. GoN*; *Madhav Kumar Basnet et.al.*,

³¹ 'In this provision "...where sufficient ground and reason are not found to grant amnesty from the investigation of the Commission..." was declared void.'

³² '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.'

³³ *Rajendra Prasad Dhakal et.al.* Supra 61.

³⁴ *Rajendra Rajendra Ghimire v. Office of the Prime Minister et. al.*, Decision No. 8101, 51 NKP (2066).

³⁵ *Rajaram Dhakal v. Office of prime minister*, Writ No. 2942, Decision No. 7274, 45 NKP (2060)

³⁶ *Liladhar Bhandari*, at ¶27.

³⁷ *Suman Adhikari v. GoN*, 150, ¶16.

³⁸ *Rajendra Prasad Dhakal et.al.*, Supra 61. *Madhav Kumar Basnet et.al.*, 157.

amnesty-related provision did not change from its previous judgment.³⁹ 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.⁴⁰ 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.⁴¹

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

³⁹ 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>.

⁴⁰ *Suman Adhikari*, Para 26

⁴¹ *Suman Adhikari* Para 79

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.

