

Transitional justice in Nepal

Low priority, partial peace

Mandira Sharma

The concept of transitional justice entered the general discourse in Nepal only after the signing of the *Comprehensive Peace Accord* (CPA) in November 2006. Advocated by national and international organisations, transitional justice was meant to be a process to help Nepal deal with the legacy of past human rights violations through truth-seeking, prosecution, reparations and institutional reform. However, a holistic application of transitional justice, which has helped other conflict-affected societies move forward, has yet to be internalised in Nepal.

Transitional justice has been afforded the lowest priority in the peace process, and the debate and thinking required at different levels to make its procedure and outcome meaningful have been limited. The prevailing climate of impunity for political actors and their indifference to transitional justice, the lack of efficiency or shared strategy among international actors, the restricted reach, scope and resources, and the polarisation among victims and civil society organisations have all worked to frustrate the process.

Transitional justice and the CPA

The CPA did not explicitly use the terminology of transitional justice but promised a High-Level Truth and Reconciliation Commission (TRC) to examine atrocities committed during the conflict, provide relief to victims, and pave the way for reconciliation. It is difficult to say precisely why the parties agreed to such a body, but it is clear that the idea of transitional justice gained some currency while the framework of the CPA was being negotiated.

Work by human rights activists and the National Human Rights Commission (NHRC) had previously

exposed the brutality of the conflict and prepared the ground for international interest in resolving the human rights crisis in Nepal. International support for a UN human rights monitoring mission also grew after human rights activists first mooted the idea in early 2002, even though it was thought to be an impossible endeavour at that time.

The royal coup of February 2005 convinced all the major political parties to support the establishment of a mission by the UN Office of the High Commissioner for Human Rights (OHCHR) in May that year, with a mandate to investigate and monitor cases of human rights violations. This was widely perceived as a blow to the royal regime, but it lifted the morale of human rights activists, who appeared to have achieved the impossible. It also laid the foundation for wider political change and encouraged human rights organisations to demand a comprehensive peace process that would deal with past human rights violations.

There was no formal international participation in the negotiation of the CPA. But different international actors actively supported the parties and the process, and

it is widely believed that international advisors were instrumental in convincing the parties to choose the TRC. After the landmark Supreme Court decision of June 2007 that gave clear directives to the government to investigate cases of disappearances during the war, the Commission of Investigation on Enforced Disappeared Persons (CIEDP) was then added to Nepal's transitional justice architecture.

Setting up the commissions: amnesty and accountability

The standard response to human rights violations in Nepal has been to establish a commission of enquiry and pay *ex gratia* compensation to victims. Over the last few decades dozens of such commissions have been established, which have been used to defuse demands for accountability for human rights violations. In the same spirit of superficiality, the cabinet decided in 2007 to establish a TRC by executive decision and even handpicked the commissioners. The government later retracted the decision after widespread protests. Yet, it continued to ignore the demands of both the conflict victims and human rights organisations that the TRC be set up by a parliamentary law, so that its mandate and power, and the appointment of its commissioners could be defined by law, making it less vulnerable to political interference.

Another major demand of the victims and the human rights community was for the legal framework to be designed through a consultative process. It was hoped that the inherent limitations of transitional justice could also be balanced by allowing victims and larger society to participate in such a process. Instead, in 2008, the parties in government picked 'experts' (who, in fact, had no proficiency on the subject) to draft a TRC bill. This opaque process resulted in significant national embarrassment when victims and national and international organisations railed against the proposed amnesty. Their main objection related to the parties' attempt to include a blanket amnesty for the Maoists for actions committed 'to achieve political objectives', as well as those committed by security forces while 'performing their duty'.

Nepali political party leaders had drawn inspiration from the South African TRC model. But they used a distorted understanding of it, equating it with a mechanism to provide amnesty. The South African TRC did exchange amnesty for truth, but the trade-off was specifically designed to balance the legal and political demands of the time, while seeking to make it acceptable to a broad range of actors. Nepali leaders used a partial interpretation of this to match their own interests, but more importantly failed to grasp the significant changes that had occurred in the

global legal context since the South African TRC had tested conditional amnesty.

The lack of transparency regarding international assistance has also been controversial. In the absence of documentation, it is difficult to discern very precisely the role played by international partners early on in the transition. But this author experienced first-hand the rising levels of mistrust between human rights activists and victims on the one hand, and international actors advising the parties on the other. One such instance was when the 'Holland and Knight Memo' was leaked to activists in 2008. Issued by Holland and Knight, a US-based law firm working with a senior international peace advisor working in Nepal at the time, the 60-page document discussed key aspects of transitional justice. According to some human rights activists, the memo was meant to assure political parties that Nepal had no legal obligation to prosecute conflict-era cases of human rights violations, except in instances of torture (and here, committed only by the state apparatus, not by the Maoists) and genocide. And even in such cases, it outlined the possibility of amnesty accompanied by reparations to the victims.

“ Work by human rights activists and the National Human Rights Commission had previously exposed the brutality of the conflict and prepared the ground for international interest in resolving the human rights crisis in Nepal. ”

Echoing the concerns of local activists and victims, a number of international organisations responded to the memo, stating that the legal analysis in it was fundamentally flawed. This incident not only contributed to eroding trust between some international actors involved in the peace process and the Nepali human rights community, but some local human rights activists saw it as misinforming how Nepali political actors perceived the role of transitional justice and the TRC in the peace process.

Under intense pressure, the Ministry of Peace and Reconstruction (MoPR) finally agreed to hold consultations on the 2008 TRC bill. Although there were concerns over how these were designed and undertaken, the consultations were nevertheless seen as a positive

step and were supported by victims as well as national and international human rights organisations. The MoPR conducted 19 rounds of consultations in different parts of the country. It then drew up separate bills to establish the TRC and the CIEDP and presented these in the Legislature-Parliament in February 2010. The TRC draft provided it with wide powers and, importantly, prevented it from recommending amnesty for certain gross human rights violations, even as it opened up possibilities in other areas.

“ Nepali political party leaders had drawn inspiration from the South African TRC model. But they used a distorted understanding of it, equating it with a mechanism to provide amnesty. ”

Both bills received nearly a hundred amendment proposals from parliamentarians. But in late 2012 the government withdrew them, dismissing the entire process. Instead, in March 2013 the Ordinance on the Formation of a Commission for Truth and Reconciliation was promulgated, ostensibly because this was the only way to set up the body given the disparate positions of the different parties. However, victims challenged both the process and the content of the Ordinance, as it had removed the provision prohibiting the commission from recommending amnesty for those involved in certain egregious violations. The Supreme Court rejected the ordinance both for being unconstitutional and for contravening international standards on transitional justice.

In May 2014, seven and a half years after the CPA, the Government of Nepal passed the Commission on Investigation of Enforced Disappearances, Truth and Reconciliation Act (hereafter the Act), providing the legal framework for the TRC and CIEDP but without any regard for the previous decisions of the Supreme Court. Feeling betrayed by the process and by the intent of the political leaders, more than 230 victims from different districts challenged the Act in the Supreme Court, particularly since the Act was very similar to the Ordinance that the Supreme Court had already ruled against. Major human rights organisations backed the victims' petition and decided to boycott the transitional justice process, pending the Supreme Court decision. The UN and other major international human rights organisations

expressed dismay over the Act and how it had been reached, arguing that it was against international standards and best practice, and asked the government not to establish the commissions until the Supreme Court had decided the case.

However, the government and the parliamentary parties ignored these various calls and moved ahead with forming the two commissions. In February 2015, the Supreme Court found that the Act indeed violated the constitution and Nepal's international obligations, and ordered several amendments. In early 2016, the UN wrote officially to the government expressing its inability to support these mechanisms in the prevailing circumstances. International donors and major human rights organisations have kept their distance from the work of the TRC and CIEDP. Neither the amendments required by the Supreme Court nor the support requested by the commissions have since been offered.

Amnesty and accountability in practice

The major concerns of the political parties have revolved around amnesty, and their intent has been to design the TRC as a vehicle to offer amnesty even to those involved in gross human rights violations. International law does not prohibit amnesty per se and amnesty does have a place in transitional justice, within permissible limits. But there has never been any serious discussion on how best to introduce amnesty and how to balance it with other duties and demands of the state.

Back in 2007, human rights organisations became aware of a tacit agreement among the political parties to forget the past and condone impunity. That was when Girija Prasad Koirala, prime minister when the CPA was signed, admitted to a group of human rights activists (including this author) that in response to the concerns raised by the Maoists and Nepali Army, the parties had agreed to provide immunity to all those involved in atrocities.

Political actors have worked hard to dilute efforts for a meaningful transitional justice process. The government has promoted alleged human rights violators to senior government positions, withdrawn criminal charges against alleged perpetrators by executive decree, defied court orders, expelled the OHCHR from the country, and refused to implement the recommendations of the NHRC. These actions have served not only to demoralise victims and human rights activists, but also to silence the call for a meaningful transitional justice process in the country more broadly.

At the same time, local human rights organisations have scored some meaningful victories. At times, the police

have refused to register cases related to the conflict on the grounds that a separate mechanism (ie the TRC), would deal with them. But with backing from the Supreme Court, human rights groups have been able to support victims to file more than 120 complaints (the First Information Report, the document prepared by the police upon receiving information about a cognisable offence having been committed) demanding criminal investigation in conflict-era cases of human rights violations that implicate high-ranking security officials and politicians. Although most of the cases are still pending with the police, a handful have made it to the Supreme Court, where the court has ordered prosecutions to proceed and in some instances has even issued arrest warrants. Building on these cases, many complaints have also successfully been brought before international forums such as the UN Human Rights Committee, as a result of which Nepal has been reminded time and again of its obligations and asked to investigate cases of serious human rights violations.

Likewise, some human rights initiatives have resulted in visa restrictions for alleged perpetrators. Notable examples have generated national headlines, such as the denial of a visa to a senior Maoist leader for his alleged involvement in the abduction and extrajudicial execution of a businessman, and the repatriation of a Nepali Army officer from a UN peacekeeping mission for his alleged involvement in the illegal arrest, disappearance, torture and extra-judicial killing of a female minor. An army officer was also arrested

“ Many complaints have also successfully been brought before international forums such as the UN Human Rights Committee, as a result of which Nepal has been reminded time and again of its obligations and asked to investigate cases of serious human rights violations.”

in the UK for his alleged involvement in torture in Nepal, and human rights organisations have shared incriminating dossiers with different embassies, requesting the initiation of criminal investigations in the respective countries. The combination of these activities has made political leaders aware of a real personal threat, and has provided some space for the transitional justice debate to expand.



A woman carrying multiple placards of three of the disappeared in the course of the 'People's War' at a demonstration demanding their whereabouts in Kathmandu, June 2006. © Shruti Shrestha

Institutional reform is also a key aspect. An example of this is the Supreme Court order in August 2012 asking the government to enact the necessary laws to vet and suspend from public office those suspected of involvement in human rights violations, pending the outcome of cases against them. The Supreme Court had acted in response to a challenge to the appointment of a new head of the police force for his alleged complicity in one of the high profile cases of enforced disappearances and summary executions during the Maoist conflict. National and international actors have missed important opportunities to use the leverage resulting from these efforts. For example, vetting was not on the agenda while reintegrating the Maoist People's Liberation Army (PLA) into the Nepali Army, and the continuing presence of human rights violators in the military not only erodes public confidence but also enables serving perpetrators to block reforms.

Another component of transitional justice is reparation. In this regard, the compensation scheme rolled out for conflict victims in 2007, and which continues even today, was seen as a way of incentivising victims' silence. When victims refused any compensation without accompanying truth, investigation and prosecution, it had to be renamed 'interim relief'. Billions of rupees have been distributed, but controversy persists along with discrimination, as victims of torture and sexual violence are not recognised as qualifying under the scheme.

Conclusion

Tolerance of atrocities committed during the 1990 People's Movement, which precipitated the return of democracy in Nepal, has arguably contributed to impunity regarding the Maoist war – as well as helping to set the tone for post-war impunity. None of the allegations from the many reports of torture and extrajudicial killings in the Tarai in either 2007 or 2015 have been investigated, for example. Addressing the past with justice and accountability is the cornerstone of the future of democracy in Nepal, while impunity is the key manifestation of the inequality that is deeply rooted in Nepali society, since it helps to foster marginalisation of certain voices and communities.

The demand for transitional justice in Nepal has to be linked to the broader structural reforms that were promised in the CPA. The transitional justice elements of the peace process must be brought back on track, respecting the Supreme Court orders, Nepal's international obligations, and the needs and aspirations of the people. The discussion has to reach out to wider society, rather than being limited to some victims and human rights organisations. In the continuing absence of the rule of law, ordinary Nepalis will be afraid to take a stand against crimes committed by the powerful among them. The two-year mandate of the transitional justice commissions ends in early 2017, and their demise should open up new opportunities for a meaningful transitional justice process in the country.

Nepal's international partners need to demonstrably share a common strategy and vision with national partners wanting to promote peace in Nepal. Once very

active, Nepal's donor community has become increasingly indifferent to issues relating to peace and justice, which, at this precarious juncture, risks pushing the country deeper into crisis. Until opportunities are seized to reveal the truth, bring perpetrators to justice, provide reparation to victims, and reform institutions involved in past atrocities, no one can justifiably claim that Nepal's peace process is complete.

Mandira Sharma is a lawyer and human rights defender known for her work against impunity in Nepal. For the past two decades she has worked to promote human rights and the rule of law by monitoring and documenting cases of human rights violations, and by challenging such cases through advocacy and litigation at both national and international levels. She is one of the founders of Advocacy Forum, an organisation of human rights lawyers in Nepal, and was awarded the Human Rights Watch's prestigious Human Rights Defender Award in 2006. She is currently a PhD student at the University of Essex.