वर्ष ७ । अंक १ । जेठ २०८२

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सत्यको खोजी

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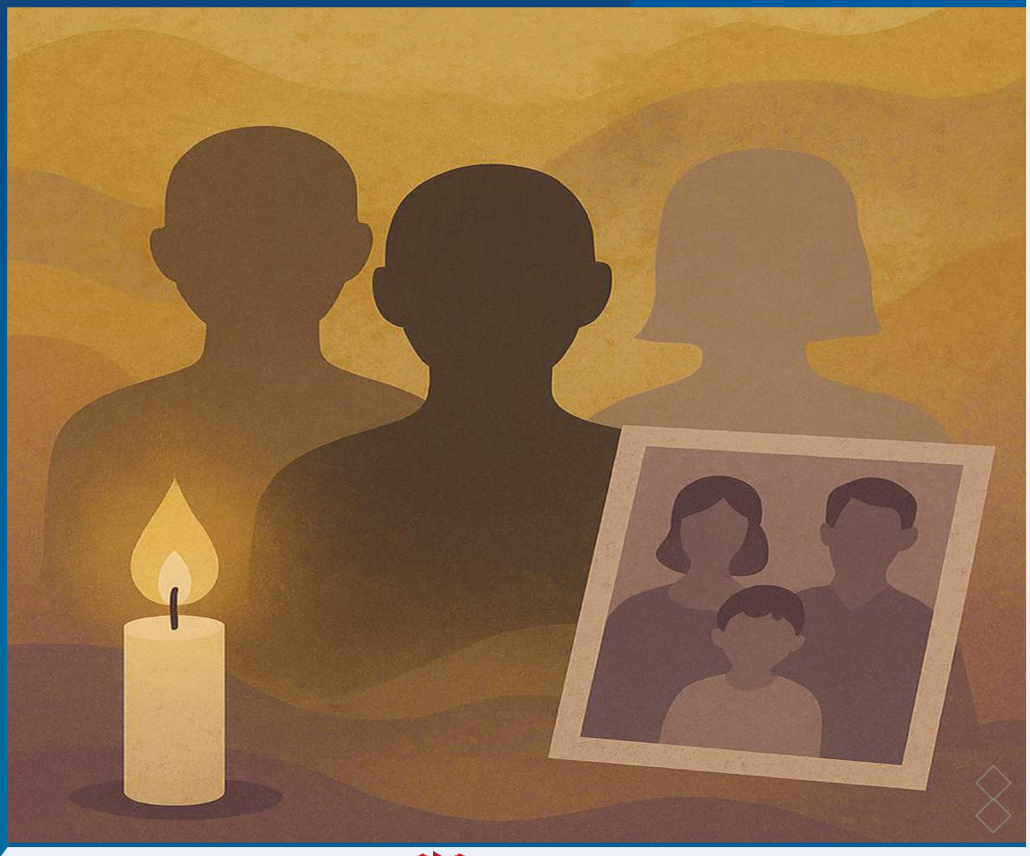

बेपत्ता पारिएका व्यक्तिको छानबिन आयोग

भद्रकाली प्लाजा, काठमाडौं

वर्ष: ७ अंक: १ जेठ २०८२

सत्यको खोजी

"मर्यादाका लागि सत्य-तथ्य, न्याय र परिपूरण"

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सत्यको खोजी

सल्लाहकार

सचिव श्री खेमराज ज्ञवाली

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प्रकाशन मिति र प्रति
मितिः २०८२ जेठ
प्रतिः चार सय पचास

प्रकाशक
बेपत्ता पारिएका व्यक्तिको छानबिन आयोग, नेपाल
भद्रकाली प्लाजा, काठमाडौं
फोनः ०१-५३५०६९६
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कम्प्युटर डिजाइन
कम्प्युटर अपरेटर श्री रोशन खनाल
कम्प्युटर अपरेटर श्री सुन्दर बलम्पाकी

यस जर्नलका सम्बन्धमा कुनै सुझाव, गुनासो एवं प्रतिक्रिया भए आयोगको इमेल ठेगाना *ciedpnepal@gmail.com* एवं आयोगको कार्यालयको ठेगानामा समेत पत्राचार गरी सुझाव पठाउनुहुन अनुरोध छ ।

मुद्रण
श्री साईनिङ ट्रेड लिंक प्रा.लि.
शान्तिनगर, काठमाडौं ।
मोवाइल नं. ९८५११६२२०८

बेपत्ता पारिएका व्यक्तिको छानविन आयोग
नेपाल

मन्तव्य

नेपालमा संवत् २०५२ साल फागुन १ गते देखी २०६३ साल मंसिर ५ गतेसम्म चलेको सशस्त्र द्वन्द्वको क्रममा भएका गम्भीर मानव अधिकार उल्लङ्घन तथा अन्य मानव अधिकार उल्लङ्घनका घटनाको छानविन, सत्य अन्वेषण तथा अभिलेखन, परिपूरण प्रदान तथा भविष्यमा यस प्रकारको द्वन्द्व दोहोरिन नदिने लगायतको अन्य कार्य गर्ने उद्देश्यका साथ बेपत्ता पारिएका व्यक्तिको छानविन आयोग, सत्य निरुपण तथा मेलमिलाप आयोग ऐन, २०७१ बमोजिम बेपत्ता पारिएका व्यक्तिको छानविन आयोग सर्वप्रथम मिति २०७१/१०/२७ गते, दोश्रो पटक मिति २०७६/१०/०६ गते र तेश्रो पटक २०८२/०१/३१ गते गठन भएको थियो।

बेपत्ता पारिएका व्यक्तिहरुको छानविन आयोगको प्रमुख काम द्वन्द्वकालमा व्यक्ति बेपत्ता पारिएको घटना सम्बन्धमा सत्य तथ्य पत्ता लगाई यथार्थ कुरा प्रकाशमा ल्याउने, पीडित परिवारलाई परिपूरणको सिफारिस गर्ने, पीडक पहिचान गरी कारवाहीको लागि सिफारिस गर्ने र भविष्यमा यस प्रकारको द्वन्द्व दोहोरिन नदिनको लागि संस्थागत सुधारको लागि सिफारिस गर्ने रहेको छ। बेपत्ता पारिएका व्यक्तिको छानविन, सत्य निरुपण तथा मेलमिलाप आयोग ऐन, २०७१ मिति २०८१/०५/१३ मा भएको तेश्रो संसोधनले समेत यी नै विषयहरुलाई प्राथमिकताका दिएको छ। नेपालको संविधानले समेत द्वन्द्व व्यवस्थापन तथा संक्रमणकालीन न्यायलाई तार्किक निश्कर्षमा पुऱ्याउन राज्यलाई दायित्वबोध गराएको छ।

नेपालमा संक्रमणकालिन न्याय सम्बन्धी अवधारणा नवीनतम् नै रहेको र सो सम्बन्धी प्रकाशन तथा जानकारीमूलक स्रोत सामग्रीहरुको कमी रहेको परिप्रेक्षमा यो जर्नल प्रकाशन हुन लागेकोमा मलाई अत्यन्तै खुशी लागेको छ। प्रस्तुत जर्नलमा लेख, रचना उपलब्ध गराउनु हुने सबै लेखकहरु तथा विज्ञ समिक्षकहरुलाई आभार प्रकट गर्न चाहन्छु। यस जर्नललाई मूर्त रुप दिने सम्पादन समितिका सदस्यहरुलाई धन्यवाद दिन चाहन्छु। यस प्रकाशनले संक्रमणकालीन न्याय, विस्तृत शान्ति प्रकृयाका विभिन्न पक्षहरु, बेपत्ता पारिएका व्यक्तिको छानविन आयोगको कार्य सम्पादन लगायतका विषयहरुमा सु-सूचित पार्न सहयोग पुग्ने अपेक्षा गरेको छु। साथै न्याय, कानून, द्वन्द्व व्यवस्थापन, मानव अधिकार, संक्रमणकालीन न्याय र सरोकार राख्ने सबैलाई यो जर्नल उपयोगी सामग्री हुने आशा लिएको छु।

जेठ, २०८२

(लीला देवी गडतौला)
अध्यक्ष
बेपत्ता परिएका व्यक्तिको छानविन आयोग

सम्पादकीय

नेपालमा वि.सं. २०५२ साल फागुन १ गते देखि २०६३ साल मङसिर ५ गते सम्म राज्य पक्ष तथा तत्कालीन नेपाल कम्युनिष्ट पार्टी (माओवादी) बीच भएको सशत्र द्वन्द्व मिति २०६३ साल मंसिर ५ गते भएको विस्तृत शान्ति सम्झौता र नेपालको अन्तरिम संविधान, २०६३ को मर्म र भावना तथा द्वन्द्वका क्रममा भएको मानव अधिकारको गम्भीर उल्लंघन तथा मानवता विरूद्धको अपराध सम्बन्धी घटनामा संलग्न व्यक्तिहरूको सत्य अन्वेषण तथा छानविन गरी वास्तविक तथ्य जनसमक्ष ल्याउन तथा यस द्वन्द्वसँग सम्बन्धित व्यक्तिहरूलाई न्यायको अनुभूति दिलाउन, पीडितलाई परिपूरण उपलव्ध गराउने र भविष्यमा द्वन्द्व दोहोरिन नदिन अपनाउनुपर्ने उपायहरू सिफारिस गर्ने उद्देश्यका साथ बेपत्ता परिएका व्यक्तिहरूको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ जारी गरी २०७१।१०।२७ मा बेपत्ता पारिएका व्यक्तिहरूको छानबिन आयोगको गठन भएको हो।

संक्रमणकालीन न्यायलाई तार्किक निष्कर्षमा पुऱ्याउने उद्देश्यका साथ मिति २०८१।५।१३ मा ऐनको तेस्रो संशोधन भएको अवस्था छ। उक्त ऐनमा भएको संशोधित प्रावधानहरूको प्रभावकारी कार्यान्वयन तथा आयोगको उद्देश्य प्राप्तिका लागि संक्रमणकालीन न्यायसँग सम्बन्धित विविध आयामहरुको निरन्तर खोज, अध्ययन तथा अनुसन्धान आवश्यक रहन्छ। यसै सन्दर्भलाई दृष्टिगत गर्दै संक्रमणकालीन न्यायको प्रणाली, संयन्त्र, अन्तर्राष्ट्रिय स्तरमा अपनाइएका अभ्यास लगायतका पक्षहरू समेटी आयोगबाट वि.सं. २०७६ सालदेखि **सत्यको खोजी** नामक जर्नल प्रकाशन हुँदै आएको छ। सोही खोज कार्यलाई निरन्तरता दिने उद्देश्यका साथ यस विषयमा विज्ञता हाँसिल गरेका, राष्ट्रिय तथा अन्तर्राष्ट्रिय स्तरमा संक्रमणकालीन न्यायको क्षेत्रमा कार्यरत विज्ञहरूबाट प्राप्त लेखहरुको संगालो **सत्यको खोजी वर्ष ७, अंक १** नामक जर्नल प्रकाशन गरिएको छ। यस जर्नलमा प्रकाशित लेख तथा रचनाहरूलाई प्रमाणित, परिष्कृत, गुणस्तरीय र विश्वसनीय तुल्याउनका लागि प्राप्त लेखहरूको पुनरावलोकन समेत गरिएको छ।

अन्तमा, लेख/रचना उपलब्ध गराई सहयोग गर्नुहुने विद्वान सर्जकहरू, पुनरावलोकन कार्यमा संलग्न विषय विज्ञहरू, सल्लाहाकारका रूपमा रहनुभएका यस आयोगका सचिवज्यू, समितिमा रही महत्वपूर्ण योगदान पुऱ्याउनु हुने सम्पादक समितिका सम्पूर्ण सदस्यहरु तथा कम्प्युटर डिजाइन लगायतका कार्यमा संलग्न कर्मचारीहरू, प्रकाशन कार्यमा प्रत्यक्ष तथा परोक्ष रूपमा संलग्न सम्पूर्णमा हार्दिक धन्यवाद व्यक्त गर्दछौं र भविष्यमा पनि यस्तै साथ सहयोगको अपेक्षा गर्दछौं।

सम्पादन समिति
बेपत्ता पारिएका व्यक्तिको छानबिन आयोग
भद्रकाली प्लाजा, काठमाडौं

जेठ, २०८२

विषय-सूची

अनुभूति

The Need for Enhancement of Economic, Social, and Cultural Rights in Nepal's Post-Conflict Recovery

Alina Raut

Abstract

Nepal's post-conflict recovery presents an urgent need for the enhancement of Economic, Social, and Cultural Rights (ESCR) to address the multifaceted challenges faced by conflict affected populations. The prolonged arm conflict exacerbated existing inequalities, particulaly affecting marginalized communities, and left deep scars in terms of social, economic, and cultural dislocation. This paper explores the significant complexities in strengthening ESCR, examining how international law, particularly the UN Committee on Economic, Social, and Cultural Rights (CESCR), can assist in navigating these challenges. An analysis of CESCR's evolving jurisprudence on armed conflict and its application in post-conflict settings reveals how reporting procedures can be utilized more effectively to address the ongoing needs of victims, ensuring their rights are safeguarded within the broader framework of recovery. The paper emphasizes the importance of integrating ESCR with transitional justice mechanisms and post-conflict recovery policies, advocating for stronger governance, the restoration of cultural rights, and the promotion of gender equality. Nepal's recovery will not be sustainable unless these rights are meaningfully addressed, particularly by restoring access to critical services like education, healthcare, and housing. By utilizing international law to complement national efforts and focusing on inclusivity, this paper argues that Nepal can build a more equitable and peaceful society. This integrated approach would also enhance social cohesion and empower the population, facilitating a recovery that not only addresses the immediate consequences of conflict but also addresses the structural inequalities that contributed to it.

1. Introduction

A non-international armed conflict took place in Nepal between February 1996 and November 2006, involving the Communist Party of Nepal (CPN-Maoist) and the Government of Nepal. The CPN-M was a particular type of 'political armed group', one which used violence,

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including detentions, as a 'legitimacy-contestant.'[1] The impact of the armed conflict is widespread and leaves every aspect of life affected. The loss of lives and property is huge and the impact created consistently intensified violence and spillover of terror had rendered the lives of ordinary people extremely difficult. During the armed conflict, 17,000 people were killed, with an average death toll of two dozen per day, while massive displacement, particularly among the youth, was intense; the widespread terror was further fueled by mass abductions, especially of school children, and the tragic deaths of students caught in crossfire.

The conflict is driven by deep political, social, and economic issues. The root causes stemmed from historical inequalities, and the failure of the democratic system established in 1990 to address the needs of all Nepali people. The CPN-M launched a 'people's war' against the government, seeking to overthrow the monarchy and establish a democratic republic. The violence escalated, with both sides committing human rights violations.

In November 2006, a peace agreement was signed, this led to the reduction of violence and the improvement of human rights, with Maoists opening up their areas to other political parties. Many marginalized groups, including indigenous communities, lower castes, and women, face significant challenges in accessing justice, particularly in rural regions. Despite political difficulties, the peace process offered a valuable chance to overcome these long-standing barriers to justice and address issues caused by the conflict, ensuring fair justice for everyone.

The mass displacement had severe consequences for the displaced population, disrupting their access to basic needs like food, shelter, and healthcare, and violating their economic, social, and cultural rights. People in rural areas were especially affected as they were often caught in the crossfire and left with limited opportunities for livelihood or security. The conflict's impact on ESC rights was profound, as many displaced individuals struggled to access education, work, and healthcare. In 2006, with the peace agreement and the return of political stability, some of these issues began to improve, but the long-lasting effects on the rural population remained a significant challenge.

Nepal's transitional justice process stands at a critical crossroad, with recent legal amendments aiming to address the severe human rights violations committed during the country's decade-long arm conflict. While these reforms signal progress, the path to justice,

[1] Andrei Miroiu, POLITICAL THEORY OF ARMED GROUPS: SOCIAL ORDER AND ARMED GROUPS 7 (SPRINGER, 2020)

reconciliation, and accountability remains complex and highly debated. Although the international community has largely welcomed these developments, significant domestic challenges persist, particularly in addressing the needs of victims and ensuring meaningful reparations. Transitional justice must extend beyond civil and political rights to include ESCR. The conflict was deeply rooted in socio-economic disparities, with marginalized communities facing systemic exclusion from resources and opportunities. To achieve lasting peace, transitional justice must move beyond truth commissions and legal accountability, embracing broader social transformation, equitable distribution of resources, and sustained economic justice.

2. Understanding Economic Social and Cultural Rights (ESCR)

Human rights are the fundamental rights that every individual is inherently entitled to, simply by virtue of being human. These rights are considered universal and apply to all people, regardless of citizenship, residency, ethnicity, gender, or any other status. They are commonly recognized as inalienable and essential to human dignity. States are under the obligation to respect, protect and fulfill human rights and to abide by certain international human rights treaties in curbing rights violation irrespective of time and nature of the occurrences.[2] Providing reparations to victims and preventing future abuse is a precondition towards preserving and enhancing lasting and just peace. The word 'just' here means fairness and making sure people's rights are respected. It means the peace achieved should not only be stable but also fair to everyone affected. A peace that deals with past wrongs, holds people accountable, and gives help to victims can lead to true healing and long-lasting stability.

According to the generation theory of Human Rights, the first twenty articles of the Universal Declaration of Human Rights (UDHR), which include rights such as free speech, religious freedom, and protection from torture, the right to a fair trial, and the right to vote, fall under civil and political rights. These were later incorporated into the ICCPR and are known as first-generation rights. Articles 22 to 27 of the UDHR outline socio-economic rights, including the right to work, fair wages, food, shelter, clothing, and education, which are categorized as second-generation rights. Meanwhile, collective or solidarity rights, such as the right to self-determination and the right to development, are classified as third-generation rights. These third-generation rights are broader and more abstract, encompassing group and collective

[2] U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, INTERNATIONAL HUMAN RIGHTS LAW, available at http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx (Accessed on Feb. 12, 2025)

rights related to self-determination, development, environmental protection, and access to natural resources.

The UDHR includes the ESCR rights as[3]

1. the right to work, to just and fair conditions of employment, and to protection against unemployment
2. the right to form and join trade unions
3. the right to a standard of living adequate for health and well-being, including food, clothing, housing, medical care and social services, as well as security in the event of loss of livelihood, whether because of unemployment, sickness, disability, old age or any other reason
4. the right to education, which shall be free and compulsory in its 'elementary and fundamental' stages.

Economic, Social and Cultural rights are basically the freedoms, privileges and entitlements that individuals and societies require to live a life of dignity. They are one of the two pillars of the United Nation human rights framework. It implies that a state has legal obligations to respect, protect and fulfill their ESC rights.

- To Respect: The State should refrain from interfering with the enjoyment of the right in any way.
- To Protect: The responsibility is to ensure that others do not interfere in the exercise of one's rights through effective regulation and treatment. Under this, the State should stop any third party trying to violate the human rights of the citizens.
- To Fulfill: The State itself has an obligation to promote rights, facilitate access to rights and provide necessary services if individuals and groups are unable to exercise their rights by their own means for reasons not under their control. To guarantee human rights, the state must take all positive initiatives, including the formulation and implementation of laws and policies.

[3] Universal Declaration of Human Rights (1948), Art. 25

3. Complexities in Enhancing ESCR

The widespread violation of human rights in Nepal is deeply connected to the country's socio-political structure, which was historically exclusionary. Many individuals and groups are denied a stake in political, social, and economic affairs. Politics centered on power hubs resists the idea of inclusive democracy. The socio-economic marginalization of a significant portion of the population is a pressing issue that requires urgent attention. Unfortunately, ESCR are largely neglected. Contrary to the principle of the indivisibility of human rights, civil and political rights have been prioritized in the constitution without ESCR. However, it is a well-established fact that civil and political rights cannot be effectively enforced without ensuring economic and social rights, and vice-versa. The Constitution of Nepal has made notable provisions regarding ESCR and, in fact, has made more extensive provisions regarding ESCR compared to past Constitutions.

In the language of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights:

The obligation "to achieve progressively the full realization of the rights" requires States parties to move as expeditiously as possible towards the realization of the rights. Under no circumstances shall this be interpreted as implying for States the right to defer indefinitely efforts to ensure full realization. On the contrary, all States parties have the obligation to begin immediately to take steps to fulfill their obligations under the Covenant.[4]

In the International Covenant on Economic, Social and Cultural Rights, progressive realization applies generally, in article 2(1), and to education in particular, in articles 13 and 14. In the Convention on the Rights of the Child there are references to progressive realization only in relation to education, in articles 24(4) and 28(1). The UDHR speaks of the need for progressive measures to secure the realization of human rights. There are few circumstances in which any human right can be fully realized instantaneously. It takes work and resources. All human rights must be fully realized as rapidly as possible, taking into account local resources and circumstances. The idea of progressive realization acknowledges that the pace

[4] The Limburg Principles on the Implementation of the ICESCR, Part 1 (A) (21)

of realization of some rights may be constrained by the availability of resources. This is relevant for all categories of rights, and not just economic rights.

The benefits of clearly using the framework of the ICESCR to address socio-economic and cultural human rights issues caused by armed conflicts are significant. The State reporting process before the Committee on Economic, Social and Cultural Rights (CESCR) is the main way to monitor how well countries implement these rights. The Committee can help explain how ESCR relate to post-conflict situations and ask governments to provide details on how they are addressing these issues. This includes transitional justice mechanisms, which are steps taken to deal with past human rights violations. By doing so, the Committee can help ensure that past injustices are properly addressed while also focusing on the current protection of ESCR. These recommendations can also serve as benchmarks to evaluate government policies after a conflict. Since the CESCR is a permanent body, it can follow up on whether governments have acted on its recommendations when they submit future reports.

Governments have a duty to gradually ensure the realization of ESCR and to address past violations, which becomes especially important when societies are rebuilding after conflict. In countries like Nepal, post-conflict governments have sometimes made the protection of ESCR a clear political priority. When reviewing reports from conflict-affected states, the Committee can often expect that its suggestions will be taken seriously. However, despite these opportunities, challenges remain. While improving how the CESCR addresses conflict-related ESCR issues is important, it does not guarantee that these rights will be effectively protected on the ground.

4. Integration of ESCR in Post- Conflict Recovery

In the context of rebuilding after conflict, it's crucial to uphold the ESCR guaranteed by the International Covenant on ESCR. These rights encompass essential aspects of life, including the right to employment,[5] fair working conditions,[6] the freedom to join trade unions,[7] social

[5] International Covenant on Economic, Social and Cultural Rights (1966), Art. 42

[6] *Id,* Art. 43

[7] *Id,* Art. 44

security,[8] family support and assistance,[9] an adequate living standard,[10] the highest attainable standard of physical and mental health,[11] access to education,[12] and participation in cultural life and scientific advancements.[13] ESCR are crucial for post-conflict recovery. Protecting and promoting them immediately ensures people can participate in decision-making and fosters future stability. It is also important to note that ESCR are considered programmatic, to be realized gradually.[14] To make ESCR a reality, we need a good government that can make these rights official and set up ways to protect them. But sometimes, in places that have just come out of a conflict, the government often isn't working well. This makes it hard to put ESCR into practice right away.

Transitional Justice should help societies move from repression to openness and equality by addressing past abuses and discrimination. This means dealing with the root causes of conflict, including human rights violations that existed even before the conflict. To truly achieve justice for victims, ESCR must be a key part of Transitional Justice efforts. With the well-established notion of indivisibility of CPR and ESCR, full enjoyment of human life is determined by the adequate social conditions for meeting necessary basic needs.[15] Logically, there are basic minimums everyone should have, and this is true for rights too. All societies, especially those transitioning after conflict, need to be part of deciding what those basic minimums are.

There's no good reason why ESCR shouldn't be a part of transitional justice. Just because someone is poor or lacks resources doesn't mean they shouldn't have access to justice. While ESCR are sometimes seen as something to be achieved over time, they can be implemented quickly if there's the political will to provide the necessary resources. The ideas of

[8] International Covenant on Economic, Social and Cultural Rights (1966), Art. 45

[9] *Id,* Art. 46

[10] *Id,* Art.47

[11] *Id,* Art. 48

[12] *Id,* Art 49

[13] *Id,* Art 50

[14] E.W Vierdag, The Legal Nature of the Rights Granted by the International Covenant on ESCR, Vol. 9, NETHERLANDS YEAR BOOK OF INTERNATIONAL LAW 103 (1978)

[15] Icelandic Human Rights Centre, *The Right to Adequate Standard of Living,* available at https://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/substantive-human-rights/the-right-to-an-adequate-standard-of-living, (Accessed on Feb. 08, 2025)

indivisibility, universality, and interdependence of rights need more focus in discussions about Transitional Justice, but making these rights enforceable isn't impossible.

Progress in fulfilling ESCR is expected to happen gradually. However, two important things must be remembered: First, there's a basic minimum level of each right that must be met immediately[16], and secondly, the government has a duty to take steps, using all available resources, to progressively achieve the full realization of these rights, including by passing necessary legislation.[17] Therefore, "progressively" shouldn't be used as an excuse for doing nothing or taking actions that make the government's obligations meaningless. Instead, it acknowledges the need for flexibility, given the real-world challenges any country faces. The *raison d'être* of the Covenant remains to establish clear obligations for states parties in respect of the full realization of the rights in question.[18]

The CESCR advised Nepal to give greater importance to mental health care for individuals affected by the conflict.[19] Similar to the Committee's recommendations on the provision of mental health care to strengthen implementation of the right to health in countries affected by an ongoing or past conflict, the Committee sometimes, but not consistently, made links between the right to education and efforts to overcome the legacy of armed conflict or widespread violence. To Nepal, the CESCR stressed 'the value of education as a tool for national reconciliation' to emphasize its recommendation on equal access to free primary education.[20]

5. International Legal Framework

The Universal Declaration of Human Rights (1948) and the International Covenant on Economic, Social and Cultural Rights (1966) both protect ESCR. Article 2(1) of the ICESCR commits each country to take steps, using its available resources, to progressively achieve full realization of these rights. 'Progressive realization' acknowledges that less developed countries can't be expected to provide the same level of benefits as wealthier nations right

[16] International Covenant on Economic, Social and Cultural Rights (1966), Art.2(1)

[17] *Id*

[18] Richard Bennet, former Representative of the UN HIGH COMM'R FOR HUMAN RIGHTS IN NEPAL, Synopsis of the Speech (Interaction Program on Community and Economic, Social and Cultural Rights, organized by NGO Federation of Nepal, Kathmandu, 17 June 2009).

[19] CESCR, 'Concluding Observations, Nepal' (2008) UN Doc E/CN.12/Npl/CO/2, paras 25, 45.

[20] *Id,* para 47

away. However, the CESCR, which monitors the ICESCR's implementation, has made it clear that all countries have an immediate obligation to provide a minimum essential level of ESCR and to take deliberate, concrete, and targeted steps toward fully realizing these rights.[21]

Because human rights are universally accepted as indivisible, interdependent, and interrelated, it's wrong to prioritize some over others. It's a completely incorrect approach to treat certain human rights as optional, less important, expendable, non-obligatory, or even as not real. The growing consensus within the UN is that all human rights should be seen as complementary and mutually reinforcing. General comment from the CESCR explains how to interpret the principle that men and women have equal rights to enjoy all economic, social, and cultural rights. When putting Article 2 of the ICESCR into action, countries should be aware that laws, policies, and practices can fail to address, or even worsen, existing inequalities between men and women.[22] This is especially true if they ignore existing economic, social, and cultural inequalities, particularly those affecting women and traditionally marginalized groups.

a. Justiciability of ESCR

The concept of justiciability revolves around whether disputes related to a particular type of law can be resolved in a court of law. Some argue that certain laws, by their nature, are not suited for judicial proceedings, while others believe that a law that cannot be enforced in court is not truly a law. Justiciability is about ensuring accountability through legal proceedings. It is closely connected to the 'violations approach' in human rights work, which focuses on identifying violations, determining who responsible, gathering evidence is, and ensuring that the violator faces justice through a legal process. The 'violations approach' emphasizes accountability by holding violators accountable in courts or tribunals, aiming to deter future violations and promote respect for human rights and the rule of law. War crimes tribunals follow this approach.

Under the ICESCR, states are only required to show that they are making genuine efforts to fulfill these rights over time, based on their available resources. When courts and other authorities have reviewed claims related to economic, social, and cultural rights, they have generally respected governments' decisions on how to allocate resources. They only step in to ensure that governments take fair and reasonable actions, without discrimination, and within their means, to respect, protect, and fulfill these rights. It is often underestimated that social

[21] International Covenant on Economic, Social and Cultural Rights, Art. 16, Dec. 16, 1966, 993 U.N.T.S. 3.

[22] GR 25, Gender-Related Dimensions of Racial Discrimination, 56th Sess. (2000),

and economic discrimination and structural violence can be 'powder kegs' that, if left unaddressed, threaten to sabotage peace building processes. Zimbabwe is ample evidence to demonstrate how deliberately marginalizing economic and social imperatives in the transition from repression results in a dangerous path.[23]

In the context of Transitional Justice and ESCR, some states are reluctant to allow human rights cases to be adjudicated at the international level, fearing that such mechanisms could be used to undermine national sovereignty. During the drafting of the Universal Declaration of Human Rights in 1947, it became evident that the main challenge to its unanimous approval was not its content, but concerns that it could legitimize external interference in a country's internal affairs.[24] This same concern explains the United States' opposition to the International Court of Justice's compulsory jurisdiction and its later resistance to the establishment of the International Criminal Court in the late 1990s. This sovereignty-based argument differs from the claim that certain laws, particularly ESCR, are inherently difficult to enforce through judicial mechanisms.

Within the framework of Transitional Justice, the violations-based approach tends to focus on individual acts of wrongdoing, emphasizing accountability for specific events rather than addressing systemic injustices. This perspective makes it difficult to recognize chronic structural issues such as prolonged discrimination, poverty, or lack of access to basic needs as human rights violations. As a result, post- conflict mechanisms often prioritize civil and political rights over ESCR, reinforcing a focus on direct violence rather than structural violence. While it is essential to continuously strengthen institutional mechanisms for accountability through adjudication, it is important not to see judicial processes as the only means of ensuring accountability. Within the United Nations, human rights treaty bodies do not have adjudicatory powers. Instead, they employ a method known as 'constructive dialogue,' a more flexible approach aimed at guiding non-compliant states toward compliance rather than imposing direct legal consequences. Some critics may view this as a default strategy resulting from the treaty bodies limited

[23] Ismael Muvingi, *Sitting on Powder Kegs Socioeconomic Rights in the Transitional Societies*, Vol. 3, THE INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE 163-182 (2009) available at https://doi.org/10.1093/ijtj/ijp010 (Accessed on Feb. 17, 2025).

[24] Mary Ann Glendon, A WORLD MADE NEW ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 96 (Random House Trade Paperbacks, 2001)

political power. However, constructive dialogue can also be understood as a pragmatic and effective response to the widespread resistance against global governance mechanisms. This approach respects national sovereignty, aligning with the expectations of UN member states while still promoting accountability in the context of Transitional Justice and ESCR.

b. Efforts Integrate ESCR in Transitional Justice

In properly functioning rights systems, rights holders must know their rights. And knowing their rights, the rights holders also must have and know about realistic possibilities for seeking remedies if they feel their rights have not been realized. The CESCR has not yet developed a consistent approach to addressing ESCR issues related to armed conflict, though there are signs of progress. It has expressed serious concern about the impact of prolonged internal conflicts on civilians and criticized the lack of detailed reports from affected states.

i. Closer Scrutiny

The Committee had urged governments to take immediate action and provide updates on their efforts to protect ESCR, especially for vulnerable groups like displaced children, women, and girls. It had also emphasized the need to integrate ESCR into national strategies tackling social inequalities, which had often fueled conflicts. The Committee's willingness to confront these sensitive topics had shown its commitment to holding states accountable for their obligations under the Covenant, even in difficult circumstances.[25]

ii. Addressing Impunity

The Committee has recently started emphasizing the connection between impunity and the realization of ESCR**.** While it has always called for judicial remedies for ESCR violations, it has rarely recommended investigating, prosecuting, and punishing perpetrators. The Committee's growing focus on this issue suggests that it sees justice and accountability as essential for protecting ESCR, and there is no legal reason why it should not expand this approach further.

iii. References to Transitional Justice

The CESCR has begun showing interest in transitional justice mechanisms, first mention-

[25] CESCR, Concluding Observations, Colombia (2010) UN Doc E./C.12/Col/CO/5, para 7

ing them in Morocco's 2006 report and later in Kenya and Colombia. However, it has not yet analyzed these mechanisms in depth to assess their role in achieving ESCR. The Committee's focus on conflict-related ESCR issues is increasing, reflecting a broader trend in international law that integrates human rights law and international humanitarian law. Over time, the distinction between ESCR and civil-political rights has faded, with many countries recognizing ESCR as equally important. While gaps remain in the Committee's approach, its recommendations can be strengthened if provided with better information from stakeholders. However, it is still uncertain if this shift will be sustained over time.

iv. ESCR in the CPA

The Comprehensive Peace Agreement (CPA) includes provisions for inclusive, democratic, and progressive restructuring of the state to replace the centralized and unitary system. It aims to address discrimination based on class, caste, language, gender, culture, religion, and region, particularly concerning women, Dalits, indigenous groups, and minorities. The CPA commits to gradual economic and social transformation, including the abolition of feudalism, scientific land reforms, and policies ensuring education, health, housing, employment, and food security for all citizens.[26] It also emphasizes economic protection for socially and economically disadvantaged groups, such as landless squatters, bonded laborers, and pastoral farmers, making it a key framework for transitional justice in Nepal.[27] CPA ensures that both parties commit to protecting ESCR and preventing future violations.[28] It also promises impartial investigations and legal action against those obstructing these rights. CPA on ESCR emphasizes the commitment of both sides to respect and protect individuals' right to livelihood through freely chosen employment.[29] It also binds them to ensure food security, health, and education for all. These provisions reinforce the CPA's role in promoting human rights and transitional justice in Nepal.

6. Conclusion

Efforts are being made to address ECSR more effectively in post conflict recovery. It's important for Transitional Justice to take on issues that traditional justice systems often avoid, especially in developing or underdeveloped countries, where these rights are often

[26] THE INTERIM CONST. NEP., (2007), Art. 33

[27] *Id,* Art. 12-32

[28] Comprehensive Pease Accord, Art. 7(1)

[29] *Id,* Art. 7(5)

overlooked. ESCR need to be protected by constitutions, supported by laws, managed by government agencies, safeguarded by institutions, and enforced by courts. A full approach to transitional justice should not only focus on the human rights violations that happened during conflicts but also on the wrongs that caused or contributed to the conflict in the first place, so these issues don't continue in the future.

In conclusion, while the ICESCR offers a useful legal framework to address ESCR issues in post-conflict situations, its full potential has not yet been realized. The challenges of displacement, access to healthcare, education, and discrimination exacerbated by conflict require strategic attention. The use of UN body observations can significantly influence both international and domestic efforts to improve ESCR protection. It is crucial for stakeholders to explore transitional justice mechanisms, such as truth commissions and reparations programs, to assess how they can strengthen ESCR protection. Civil society and other stakeholders can play a key role by providing specific, timely information on how conflict-related challenges impact ESCR. Additionally, building capacity around transitional justice mechanisms will improve coordination and maximize the effectiveness of efforts to protect and realize ESCR in post-conflict contexts.

Addressing Forced Disappearance through Transitional Mechanisms: The Colombian System for Truth, Justice, Reparations and Non-Recurrence

Caterina Heyck Puyana [1] *Felipe Carranza Roa* [2]

Abstract

This article explores Colombia's comprehensive transitional justice approach to addressing forced disappearance in the aftermath of decades-long internal armed conflict. Anchored in the 2016 Final Peace Agreement between the Colombian government and the FARC-EP, the system integrates judicial and extrajudicial mechanisms aimed at upholding victims' rights and ensuring truth, justice, reparation, and non-recurrence. The phenomenon of forced disappearance is analyzed in terms of its scale, dynamics, and the actors involved. Special focus is placed on the operations of three key institutions: The Truth, Coexistence and Non-Recurrence Commission; the Special Jurisdiction for Peace (SJP); and the Unit for the Search for Persons Deemed as Missing (USPM). This article presents how the victims of forced disappearance are being responded to under the provisions of the AFP, based on the work carried out by the different competent entities. The article highlights their complementary roles and coordinated efforts, including precautionary measures and victim participation, to search for missing persons and provide dignified responses. A paradigmatic case the La Escombrera search is presented to illustrate institutional success in recovering remains after years of advocacy. The authors conclude by emphasizing the need for a victim-centered, context-sensitive, and cooperative approach to transitional justice, particularly in dealing with the profound consequences of forced disappearance.

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[2] Law Clerk, Review Chamber from the Special Jurisdiction for Peace.

1. Introduction

After an armed conflict that began around the middle of the 20th century and involved the participation of several actors, Colombia has embarked on different efforts to apply transitional justice mechanisms that allow it to find a peaceful solution. The most recent of these, currently underway, is the Final Agreement to end the Armed Conflict and Build a Stable and Lasting Peace (FPA), signed in 2016 between the Colombian State and the guerrilla organization known as FARC-EP (Revolutionary Armed Force of Colombia - Army of the People).

This Agreement provides for the interaction of a combination of judicial and extrajudicial mechanisms, having as its ultimate goal the satisfaction of the rights of the victims who have suffered the rigors of war and have been affected as a result of the crimes committed in the framework of the armed conflict.

One of the most repeated dynamics of violence in the country, carried out by almost all the actors involved, has been forced disappearance. This has been understood as a multifaceted conduct whose investigation, prosecution, and reparation entail particularities that are extremely difficult to overcome. According to the National Center of Historical Memory, forced disappearance 'constitutes a multiple and continuous violation of several rights, and its impact does not only concern those who experience it directly'.[1] In addition, 'it violates the right to life, human dignity, liberty, autonomy, and personal security, the right not to be arbitrarily detained, due process, the right to recognition of legal personality before the law, and the right to humane treatment in detention. It is also consolidated as a form of cruel, inhuman, or degrading treatment, both for the direct victim and for his relatives, since 'the anguish and suffering caused to the relatives by the disappearance of their loved one and by the continuous uncertainty as to his fate and whereabouts, constitute a form of torture or cruel and inhuman treatment'.[2]

This article presents how the victims of forced disappearance are being responded to under the provisions of the AFP, based on the work carried out by the different competent entities.

To this end, the dimension of forced disappearance and its impact on the Colombian armed conflict will be presented first. Subsequently, the creation of the Comprehensive Peace

[1] National Center for Historical Memory, Until We Find Them (Hasta Encontrarlos) 53 (2016)

[2] *Id.*

System will be briefly described, with emphasis on the entities whose objective is to respond to the victims of forced disappearance. Finally, how these entities interact will be explained, and some examples of their articulation will be presented.

2. Forced Disappearance in Colombia: Scale and Dynamics

The use of forced disappearance had several motivations, as it served different objectives. On the one hand, it was a way to conceal the commission of the crime and thus avoid investigation and prosecution. It was also used as a tool to control the population since the uncertainty generated by not knowing the whereabouts of their loved ones, and the fear of becoming the next victim, led citizens to obey the rules imposed by the armed groups in those places where they were present. In addition, forced disappearance was generally accompanied by physical and psychological torture, homicide, or dismemberment, in a display of cruelty that diminished the population's capacity for resistance and strengthened control of the territories. Some investigations have even concluded that, on occasions, forced disappearance served as a tool to teach other new combatants how to exercise violence against individuals and populations.[3]

This, coupled with the rugged geography in those places with the most significant presence of armed actors and the lack of state presence in those populations, meant that criminal structures had considerable freedom to disappear people with high levels of impunity. In fact, according to the report presented by the Truth, Coexistence and Non-Recurrence Commission (TCNRC), the occurrence of forced disappearances reached the following levels:

a. Forced Disappearance Figures

According to the final report of the TCNRC, one of the mechanisms created in the FPA which will be discussed in more detail below, the records show a total of 121,768 missing persons between 1985 and 2016[4] (the period documented by the Commission). This figure was consolidated thanks to a methodological project in which the SJP, the Commission, and the Human

[3] National Center for Historical Memory, Corporal Texts of Cruelty: Historical Memory and Forensic Anthropology (Textos Corporales de La Crueldad: Memoria Histórica y Antropología Forense) (2014)

[4] Truth, Coexistence and Non-Recurrence Commission, Even War Has Limits: Violations of IHL and Violations of Human Rights: Statistical Annex 30 (2022), (Hasta La Guerra Tiene Límites: Infracciones al DIH y Violaciones a Derechos Humanos: Anexo Estadístico) 30 (2022), available at https://www.comisiondelaverdad.co/anexo-estadistico-hasta-la-guerra-tiene-limites-infracciones-al-dih-y-violaciones-derechos-humanos (Accessed on Mar. 12, 2025)

Rights Data Analysis Group (HRDAG) participated. As it is described by the project itself, it was based on the analysis, cross-checking, and purging of '112 databases provided by 44 State institutions, victims' organizations, and civil society organizations'[5] to unify existing records and present data with high reliability.

In any case, as mentioned by the Commission itself, this type of data is inconclusive regarding forced disappearances, given that there is considerable underreporting due to the difficulties in denouncing and accessing justice. For this reason, the TCNRC stated that 'more precisely, the range of estimation is between 204,395 and 225,410'.[6]

According to the conclusions of the Commission's final report, cases of disappearance augmented at three moments in time. The first was between 1985 and 1990, a period during which there was a 53.8% rise in the number of cases. The second occurred in 2002, 'related to the increased deployment of violence by the United Self-Defense Forces of Colombia'[7], a name given to the various paramilitary groups that operated in different regions of the country. Finally, the third of these corresponds to 2007, which according to the TCNRC 'coincides with the reports of forced disappearances that were made in cases of false positives [criminal pattern deployed by the security forces, consisting of the murder of civilians followed by a complex staging and a military and legal cover-up, to give the appearance that they were casualties in combat or during military operations] and with the beginning of the paramilitary rearmament'.[8]

b. Distribution of Cases of Forced Disappearance by Type of Perpetrator

The Commission's findings also show the essential differences that exist when it comes to analyzing which armed actors committed the most acts of forced disappearance as part of their criminal activities. The following is the distribution of cases according to the perpetrator, including not only the information derived from the consolidated data (in yellow), but also the estimate made in the framework of the methodological project already mentioned (in green), given that there is also a significant underreporting in terms of the identification of the perpe

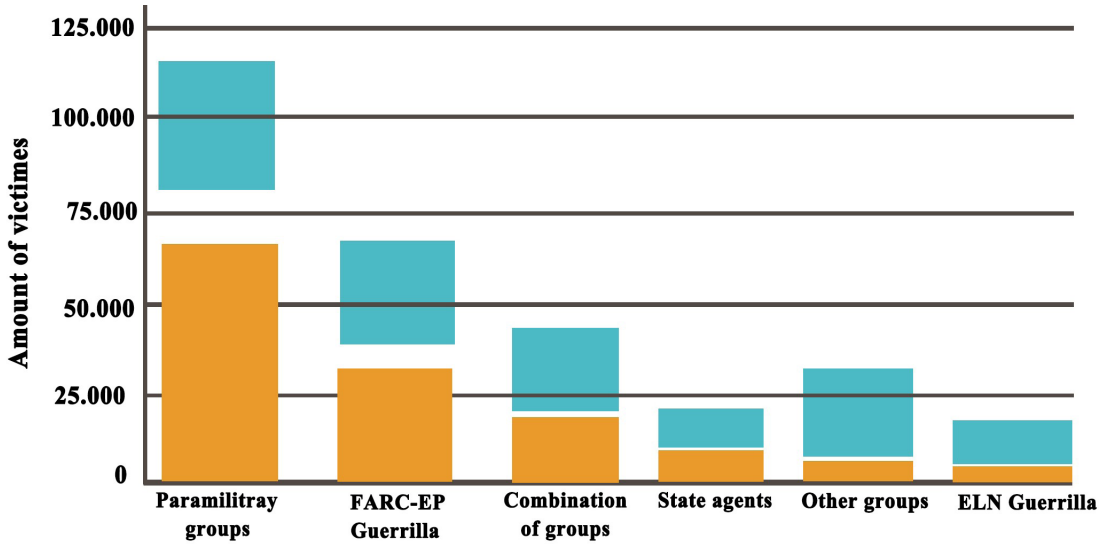
[5] Human Rights Data Analysis Group, Frequently Asked Questions About the JEP-CEV-HRDAG Project of Integration of Data and Statistical Estimation (Preguntas Frecuentes Sobre El Proyecto JEP-CEV-HRDAG de Integración de Datos y Estimación Estadística), available at https://hrdag.org/colombia-faq/ (Accessed on Feb. 3, 2025)

[6] Truth, Coexistence and Non-Recurrence Commission, supra note 4.

[7] *Id.* at 31.

[8] *Id.* at 32.

trators of the disappearances:[9]



The fundamental disparity between the number of disappearances attributed to the different groups lies in the purpose for which each committed this type of crime. The paramilitary groups made disappearance one of their primary modes of operation since they used it to terrorize people and subdue the populations in which they were present. On the other hand, in the case of the guerrillas, disappearance tended to be more a consequence of kidnappings in which the abducted person never returned to their family, or it happened after the recruitment of minors who were never heard from again after joining the guerrilla ranks. As for the security forces, the use of forced disappearance is closely linked to what is called '*false positives*', in which civilians who were killed and presented as combat casualties ended up buried in official cemeteries as unidentified persons.

3. The Creation of the Comprehensive System for Truth, Justice, Reparations and Non-Recurrence

One of the main challenges in agreeing to benevolent judicial treatment for former combatants was how to satisfy the rights of the victims and impose sanctions proportional to the harm

[9] Graphic taken from Truth, Coexistence and Non-Recurrence Commission, Even War Has Limits Violations of Human Rights, Violations of International Humanitarian Law and Collective Responsibilities (Hasta La Guerra Tiene Límites Violaciones de Los Derechos Humanos, Infracciones al Derecho Internacional Humanitario y Responsabilidades Colectivas) 190 (2022)

caused, while at the same time providing former combatants with a way out that guaranteed their legal security and recognized their status as political criminals, without imposing prison sentences and thus providing an incentive for them to lay down their arms definitively.

This was a difficult balance to achieve, which had a particular impact on Colombia's compliance with its international obligations to investigate, prosecute, and punish the most serious crimes committed in the context of the internal armed conflict.

For example, specifically about the commitments made by the State in the fight against enforced disappearance, it is important to mention the International Convention for the Protection of All Persons from Enforced Disappearance, signed by Colombia in 2007 and ratified in 2012. Articles 3 and 7 of these international instruments establish the obligation of the States party to 'take appropriate measures to investigate acts defined'[10] as enforced disappearance, as well as 'make the offense of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness'.[11]

In a similar sense, the statute of the International Criminal Court, whose competence to hear crimes committed in Colombia has been effective since October 31, 2007, classifies as a crime against humanity the 'Enforced disappearance of persons',[12] understood as 'the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time'.[13]

These international obligations represented a considerable limit on the need to impose lesser or less drastic sanctions than those customary in the ordinary justice system, which had to be compensated for with a strong emphasis on satisfying the rights of the victims and

[10] General Assembly of the United Nations, International Convention for the Protection of All Persons from Enforced Disappearance, Art. 3 (2006), available at https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-all-persons-enforced (Accessed on Mar. 13, 2025)

[11] *Id.* at Art. 7.

[12] United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, Art. 7.1(i) (1998), available at https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf (Accessed on Mar. 13, 2025)

[13] *Id.* at Art. 7.2(i).

with the perpetrators making other kinds of commitments that in some way represented a contribution correlative to the reduction of the sanction they were seeking.

To this end, point 5 of the negotiation agenda stipulated that the issue of victims would be addressed, stating that 'compensating the victims is at the core of the National Government-FARC-EP agreement',[14] which would entail addressing both victims' rights and truth-building issues.

As a result, point 5 of the negotiation was included in the AFP, entitled 'Agreement regarding the Victims of the Conflict: Comprehensive System for Truth, Justice, Reparations and Non-Recurrence, including the Special Jurisdiction for Peace; and Commitment on Human Rights',[15] whose objective is to draft 'a content that will satisfy the claims of those who have been affected by the long conflict'.[16]

Around that point, there were already several debates, related to the possibility that a more favorable criminal treatment could satisfy not only the demands of the victims but also the requirements of the aforementioned Courts and international instruments.

One of the voices that had been heard in this regard was that of the Office of the Prosecutor of the International Criminal Court, who, in her interim report on the situation in Colombia in November 2012, spoke about the legal framework that would later serve as legal support for the FPA, in the following terms:

'Moreover, bearing in mind the preamble of the Statute, the Office considers that efforts to address large-scale criminality, however challenging, are more likely to contribute to preventing future crimes if as much truth about such crimes as possible is uncovered.

The Office will consider the issue of sentences, including both reduced and suspended sentences, in relation to the facts and circumstances of each case. In particular, the Office will assess whether, in the implementation of such provisions, reasonable efforts have been made to establish the truth about serious crimes committed by each accused

[14] Delegations from National Government and FARC-EP, *General Agreement for the Termination of the Conflict and the Building of a Stable and Lasting Peace, 3 (2012) (Acuerdo General Para La Terminación Del Conflicto y La Construcción de Una Paz Estable y Duradera, 3* (2012)), available at https://bapp.com.co/archivos/1.03.0058.pdf (Accessed on Feb. 4, 2025)

[15] Delegations to the peace process, *Final Agreement to End the Armed Conflict and Build a Stable and Lasting Peace,* 132 (2016), available at https://bapp.com.co/wp-content/uploads/2023/08/1.03.4453.pdf (Accessed on Feb. 4, 2025)

[16] *Id.*

person, whether appropriate criminal responsibility for such crimes has been established, and whether the sentence could be said, in the circumstances, to be consistent with an intent to bring the person concerned to justice'.[17]

This approach focused on the dismantling of the guerrilla organization and the obtaining of extraordinary contributions in terms of truth and reparation being a sufficient gain to justify a certain degree of renunciation of the investigation, prosecution, and punishment of the perpetrators, was also assessed by the Colombian Constitutional Court when determining whether the design created in the FPA was respectful of the Constitution.

In this regard, the High Court considered that the Constitutional modification that materialized the legal path for the FPA was in accordance with the constitutional provisions, in the following terms:

'The Chamber concluded that Legislative Act 01 of 2017 does not replace the structural principles of the higher order, taking into account the following considerations: (i) first, because the restrictions on the victims' right to justice are counterbalanced by a gain in terms of recognition of the truth and reparation, through the system of conditions; (ii) second, because with regard to the most serious forms of crime, Legislative Act 01 of 2017 preserves the State's duty to impose an effective sanction; (iii) third, because although the general duty of material reparation lies with the State and not with the perpetrators, and furthermore, the amount of compensation is subject to the availability of resources, this general model is consistent with the nature of reparation programs in scenarios of massive and systematic violation of rights, in which the traditional paradigm can not only become materially unviable, but also produces inequities and distortions in the distribution of resources among victims, and between them and other social sectors'.[18]

To fulfill this goals, three main entities were created. On the one hand, the Truth, Coexistence and Non-Recurrence Commission, whose primary function was to 'Contribute to the clarification of what happened, in accordance with the elements of the Mandate, and offer a broad explanation of the complexity of the conflict, in such a way as to promote a shared

[17] Office of the Prosecutor of the International Criminal Court, *Situation in Colombia Interim Report,* 64 (2012), available at https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/3D3055BD-16E2-4C83-BA85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf (Accessed on Mar. 13, 2025)

[18] Colombian Constitutional Court, C-674/17 (2007), available at https://www.corteconstitucional.gov.co/relatoria/2017/c-674-17 htm (Accessed on Mar. 13, 2025)

understanding in society, especially of the lesser known aspects of the conflict, such as the impact of the conflict on children and adolescents and gender-based violence, among others'.[19]

This purpose was achieved through the publication of its final report on June 28, 2022, after three and a half years of hard work, which reflects the development of its mandate in the following terms:

'We received the mission to clarify the truth about the conflict and we have done so in two moments. First, by listening to embrace the reality of the physical and emotional impact of violence on people and communities, those unquestionable harms and pain that need no interpretation. Second, by seeking the truth that explains: why did it happen? Who did it, what is their responsibility and how to prevent it from continuing? What happened to society and the State while it was happening?'[20]

About forced disappearance, the findings of this Commission on the struggle of family members to persist in the search for their missing persons are of great importance, as described in the following terms:

'Forced disappearance subjects family members to uncertainty, oscillating between the life and death of their missing loved ones, which leads to significant physical, emotional and mental exhaustion. The search is an urgent need for the relatives, which drives them to action. This arises, on the one hand, from constant questions about the state and well-being of the disappeared and fantasies about other forms of violence that may be inflicted on them. On the other hand, they are affirmed in the vindication of the integrity and dignity of these people and their own. It is an act of love but also of resistance to the perpetrators' intentions; an affront to fear, lies, silencing, and injustice. The hope of the encounter leads to undertaking the search, persisting in it, and reacting to any clue that brings the whereabouts of the loved ones closer. No matter what this may imply (stigmatization, security risks, mistreatment and humiliation-especially by officials-, economic detriment, deepening of family impacts, among others), in addition to facing the high levels of stress, exhaustion,

[19] Decree Law 588 of 2017, Art. 2.1 (2017) **(**Decreto Ley 588 de 2017, Art. 2.1 (2017)

[20] Truth, Coexistence and Non-Recurrence Commission for the Clarification of Truth, Coexistence and Non-Repetition, Call for a Great Peace. Declaration of the Commission for the Clarification of Truth, Coexistence and Non-Repetition 15 (2022)

and wear and tear that this causes. María del Carmen, sister of a person who was disappeared and who, after nineteen years, has still not been found, expresses this in the following words:

> «Sometimes you wake up in the morning, you go to bed with ninety-nine percent saying he is already dead, but that one percent the next day says to you, you have the hope that he is alive, but where is he? How is he? What did they do to him? So, it is something that does not have, it has no reversal»'.[21]

On the other hand, and moving on to another of the entities that are part of the Comprehensive Peace System, the Special Jurisdiction for Peace (SJP) was created as a judicial component of the Agreement. According to the constitutional reform that created this Jurisdiction, its central purpose is 'to satisfy the right of victims to justice; to offer truth to Colombian society; to protect the rights of victims; to contribute to the achievement of a stable and lasting peace; and to adopt decisions that grant full legal security to those who participated directly or indirectly in the internal armed conflict through the commission of the aforementioned conducts'.[22]

The work of the SJP mainly aims to judicialize crimes committed during the armed conflict. Thus, it punishes those most responsible for the most serious and representative crimes while granting definitive benefits (such as amnesties and waivers of criminal prosecution) to those whose contribution to criminal patterns and policies has been less.

While its purpose is to reach judicial decisions that provide legal certainty to those who appear before it, the rights and interests of the victims are at the center of its work. This has led to the fact that in all types of proceedings carried out by the Jurisdiction, from granting amnesties to reviewing unjustly handed down convictions, there is a strong component of participation by those who suffered the harm caused by the war and its perpetrators.

In order to organize its work, the SJP has initiated 11 macro cases.[23] They focus on different issues, depending on whether they concentrate on the perpetrator of the crime, a particular

[21] Truth, Coexistence and Non-Recurrence Commission, supra note 9 at 193.

[22] Legislative Act 01 / 2017, Art. tr. 5 (2017)

[23] Special Jurisdiction for Peace, *The Cases from the SJP,* available at https://www.jep.gov.co/Paginas/casos.aspx (Accessed on Feb. 4, 2025)

criminal dynamic, a region that suffered from the violence in a certain way, or a specific type of victim subject to special protection.

Although none are focused explicitly on forced disappearance, in several of them the SJP has been able to identify the commission of disappearances and is expected to impose sanctions on those most responsible. In any case, as will be discussed below, given that many of the disappeared persons were buried as unidentified bodies in various cemeteries in the country or clandestine locations, the Jurisdiction undertook the task of protecting these sites through the figure of precautionary measures. This strategy has allowed the discovery of several of these bodies and, in some cases, their identification and delivery to their relatives.

Finally, aware of the drama of forced disappearance and the need to adopt measures that would contribute to the search for these persons, the FPA provided for the creation of the Unit for the Search for Persons deemed as Missing (USPM) in the context of and due to the armed conflict. According to the norm of its creation, it is a humanitarian and extra-judicial mechanism, whose objective is 'to direct, coordinate and contribute to the implementation of humanitarian actions for the search and location of persons reported missing in the context and due to the armed conflict, who are found alive, and in cases of death, when possible, the recovery, identification and dignified delivery of skeletonized bodies, [...] guaranteeing a territorial, differential and gender approach'.[24]

Since this mechanism is specifically intended to search for missing persons and respond to their families, its nature, operation, and some of its results will be discussed in more detail below.

a. The Work and Operation of the USPM

Since in most cases the missing persons have died as a consequence of their disappearance, the work of the USPM focuses on finding their body, identifying it, handing it over to their loved ones in a dignified manner and burying it in accordance with their traditions. However, it is also important to note that some of the disappeared may still be alive, so the USPM also devotes its efforts to finding these people alive and providing answers about what happened to them.

To ensure that the USPM could exercise its mandate freely and independently, it was given

[24] Decree Law 589 of 2017, Art. 2 (2017)(Decreto Ley 589 de 2017, Art. 2 (2017)

two transcendental characteristics: it is a humanitarian and extrajudicial entity.

The fact that it is humanitarian implies that its purpose is to alleviate suffering without generating further victimization. It obliges the search for all persons who have disappeared in the context of the armed conflict without discrimination of any kind. It empowers the Unit to establish contact with any actor who can provide information that contributes to the search. It also involves family members and others in the search for missing persons.[25]

On the other hand, its extrajudicial nature ensures that the information gathered during its investigations cannot be used to determine responsibilities in judicial proceedings; it allows it to carry out the search regardless of the role played in the conflict by the missing person or the person who is searching for them; it prevents it from being required to obtain any authorization for its search activities; and it guarantees the confidentiality of the information it receives, to the extent that the Unit and its members are not obliged to file criminal complaints for the facts that come to their knowledge.[26]

With regard to the methodology applied by the Unit[27], it is important to emphasize that the search process begins with an extensive collection and analysis of information, based on the consultation of various sources related to the dynamics and context of the disappearance. After that, the Unit's teams locate the site of forensic interest where the body of the missing person could be found (or the location of the living person and their reunion with their loved ones, in case the available information points in that direction and that is the will of the previously missing person).

Subsequently, if the information indicates that the person may be dead, the Unit explores and verifies the location where it is believed the body may be, after which it canvasses the site to recover the body. These bodies are handed over to another entity with forensic technical capabilities (the National Institute of Legal Medicine and Forensic Sciences) for identification. Once the identity of the missing person is known, and in the event that their relatives or loved ones are located, the Unit moves towards a dignified or culturally relevant

[25] Unit for the Search for Persons deemed as Missing in the context of and due to the armed conflict, ABC of The Search Unit for Persons Reported Missing 10 and 11, available at https://unidadbusqueda.gov.co/wp-content/uploads/2024/08/AbeceUBPD-agosto-2024.pdf (Abecé de La Unidad de Búsqueda de Personas Dadas Por Desaparecidas 10 and 11, available at https://unidadbusqueda.gov.co/wp-content/uploads/2024/08/AbeceUBPD-agosto-2024.pdf) (Accessed on Feb. 4, 2025)

[26] *Id.* at 12 and 13.

[27] *Id.* at 17–19.

handover of their mortal remains.

Throughout this process, the participation of the relatives of the missing person is fundamental, since the Unit's work has as its starting point '[guaranteeing] the right to participation of the persons who are searching in all humanitarian actions, [recognizing] their experience [and incorporating it] in the search processes'.[28]

b. Some of the Results Achieved by the Unit for the Search for Persons Deemed as Missing[29]

Until December 2024, and thanks to the implementation of this methodology based on a rigorous and complete collection of information, supported by the participation of the searching families, in its seven years of operation the USPM has involved 39,042 searchers (communities, organizations and relatives of missing persons who are looking for their loved ones and support the search for any person), together with whom it has taken 17,520 genetic samples from relatives, to make comparisons that allow identification.

In carrying out its mandate, the Unit has conducted 4,385 prospections, during which it recovered 2,490 bodies. Along its operation, it identified 211 bodies and handed over 418 bodies to their families in a dignified manner (including some identified by other entities or before it entered into operation). Finally, it is also worth noting that the Unit has found 160 people alive, of whom 31 have been reunited with their families.

Although these figures reveal the hard work being done by the State to respond to the victims of forced disappearance, it is also true that the results pale in comparison to the magnitude of the task to be carried out.

4. Interaction and Coordination with the SJP

Given that the implementation of the Final Peace Agreement is characterized by this particular combination of judicial and extrajudicial mechanisms, it is important to refer to the way in which the SJP and the USPM interact to achieve the main objective of finding persons reported missing.

In this interaction, precautionary measures to safeguard places of forensic interest are among the most essential tools the SJP uses, in order to exercise its judicial authority and adopt binding decisions that protect individuals' rights.

[28] Unit for the Search for Persons deemed as Missing in the context of and due to the armed conflict, supra note**,** 21

[29] Figures taken from Unit for the Search for Persons deemed as Missing in the context of and due to the armed conflict, *This is How We Are Progressing. Management and Results Report 2024, 14 (2025),* (*Así Avanzamos. Informe de Gestión y Resultados 2024*, 14 (2025), available at https://unidadbusqueda.gov.co/wp-content/uploads/2025/02/Informe-de-Resultados-y-Gestion-2024.pdf). (Accessed on Feb. 5, 2024)

a. What are Precautionary Measures and how have they been used in Relation to Missing Persons?

In 2018, the SJP took up[30] the first request for precautionary measures of this type, filed by a victims' organization requesting the protection of 18 places in the national territory where bodies of victims of forced disappearance could be found. In that decision, it was decided to involve the USPM with the objective of 'obtaining its accompaniment and technical support about: (i) the need and appropriateness of the measures requested; (ii) what it was aware of the security conditions of the places subject to the request; (iii) whether they were included in the national or regional plans for the search, location, recovery, identification and delivery of bodies of possible victims of the crime of forced disappearance and (iv) whether there were obstacles or lack of support from the authorities for the execution of their functions'.[31]

That would be the starting point for an arduous task that, over time, has led to the issuance of orders to protect more than 80 sites, including official cemeteries and clandestine burial sites such as marshes, irregular border crossings, rivers, and garbage and construction debris dumps.

In the midst of these tasks the SJP has found 'great deficiencies in care and conservation'[32] of Unidentified Corpses (UC) and Unclaimed Identified Corpses (UIC), which include '(i) practices of 'adoption' of UC; (ii) alteration of the information of UC that arrived in at least one cemetery as a consequence of the above; (iii) administrative exhumations by cemetery managers without judicial order or forensic protocols; iv) irregular burial of UC in common ossuaries; v) institutional weakness in the management of information related to persons reported missing and lack of a universe of victims of forced disappearance; vi) absence of clear and expeditious routes for the access of victims of disappearance to administrative reparations; v) insufficient human, technical and budgetary resources of the National Institute of Legal Medicine and Forensic Sciences that prevent it from advancing the identification process in an agile and timely manner; vi) lack of inter-institutional coordination among the entities responsible for the search

[30] Special Jurisdiction for Peace - First Instance Chamber in Cases of Absence of Acknowledgement of Truth and Responsibility, Writ SAR AT-001 (2018)

[31] Special Jurisdiction for Peace - First Instance Chamber in Cases of Absence of Acknowledgement of Truth and Responsibility, Writ SAR AI–017 2 (2024)

[32] *Id.* at 4.

of missing persons; vii) weaknesses in the processing, timeliness and dignity of victims in the delivery of their loved ones; vii) lack of institutional commitment on the part of mayors, governors and the Church as co-responsible for the management, care and custody of UC and UIC in the cemeteries'.[33]

To that extent, the imposition of precautionary measures and the monitoring of their execution have become a joint strategy between the SJP and the USPM to take care of the sites and try to solve the problems identified. Hence, the orders issued are not limited to preventing the destruction of these sites, but go beyond that, including, for example, the creation of technical coordination tables in which the institutions with competences in the matter participate together with the victims' organizations,[34] the ealization of inter-institutional events of attention to victims of disappearances,[35] the development of a methodology for the forensic approach to common ossuaries given the finding that some of them were mixing UC and UIC with identified corpses,[36] or the design of strategies for the collection of biological samples from family members of missing persons,[37] among others.

The application of this tool, accompanied by methodologies coordinated between the SJP, the USPM and the other institutions involved, has had a positive effect in guaranteeing the rights of victims and is part of the positive results obtained in the process of searching for persons reported missing. This was recognized, for example, by the Kroc Institute, which is in charge of monitoring compliance with the commitments established in the Peace Agreement:

'The SARVR, within the framework of the powers granted by Law 1922 of 2018, and in compliance with international standards for the protection and guarantee of victims' rights, adopted a series of precautionary measures that, although not linked to a specific process, are intended to ensure the purpose of the system, that is, the implementation of restorative justice and the

[33] Special Jurisdiction for Peace - First Instance Chamber in Cases of Absence of Acknowledgement of Truth and Responsibility, Writ SAR AI–017 2 (2024)

[34] Special Jurisdiction for Peace - First Instance Chamber in Cases of Absence of Acknowledgement of Truth and Responsibility, Writ SAR AT-216 (2021).

[35] Special Jurisdiction for Peace - First Instance Chamber in Cases of Absence of Acknowledgement of Truth and Responsibility, Writ SAR AI-028 (2023).

[36] Special Jurisdiction for Peace - First Instance Chamber in Cases of Absence of Acknowledgement of Truth and Responsibility, Writ SAR AI-073 (2023).

[37] Special Jurisdiction for Peace - First Instance Chamber in Cases of Absence of Acknowledgement of Truth and Responsibility, Writ SAR AI-075 (2023).

centrality of the victims. In this regard, the SARVR adopted, among others, precautionary measures aimed at the protection of places where remains of persons reported missing are possibly found, these were the result of a request made by the National Movement of Victims of State Crimes (MOVICE) in August 2018. In the framework of these precautionary measures, the SARVR has materialized the State's duty of dignified handing over of bodies which implies 'the process of inter-institutional agreement that, hand in hand with the victims, attending to their context, traditions and needs makes possible the handing over and burial in integral conditions of a person reported missing whose identification has been possible'. The above also recognizes the guarantee of the right to a dignified burial, which implies 'the possibility of having a place of burial that respects the wishes and beliefs of the victims and allows them to advance their mourning, restore their rights and feel dignified' and which is based 'on four aspects associated with the condition of human dignity: its continuum, its relational nature, its universality and imprescriptibility'.[38]

b. Paradigmatic Case: The long Search in La Escombrera, which is Beginning to Yield Results

One of the most emblematic cases of forced disappearance in Colombia, for which there is also a precautionary measure and an articulated work between the SJP and the USPM, is that of *La Escombrera*, in the city of Medellín. This is an open field site used mainly for the disposal of construction waste, where many victims have claimed that the bodies of their relatives may have been hidden after having been disappeared by paramilitary groups, acting with the collaboration of the security forces. This information initially emerged in the testimony of a former member of these groups, who stated that the purpose of the structure to which he belonged, and with which he operated in Medellín, had been to combat the alleged presence of guerrilla organizations in the peripheral neighborhoods of that city and that, to do so, they attacked people they considered members, collaborators, sympathizers or even relatives of these groups, after which '[m]any of these people were murdered and buried in mass graves',[39] including

[38] Kroc Insitute for International Peace Studies / Keough School for Global Affairs, Six Years of Implementation of the Final Accord: Challenges and Opportunities in the New Political Phase 202–203 (2023), available at https://www.fondoeuropeoparalapaz.eu/wp-content/uploads/2023/07/Seis-anos-de-implementacion-del-Acuerdo-Final-Instituto-Kroc.pdf (Accessed on Mar. 12, 2025)

[39] The alliance between the Metro Bloc and the gangs of Medellín, Open Truth, Oct. 2011,(La alianza entre el Bloque Metro y las bandas de Medellín, Verdad Abierta, Oct.2011), available at https://verdadabierta.com/la-alianza-entre-el-bloque-metro-y-las-bandas-de-medellin/ (Accessed on Feb. 7, 2025)

burials in the aforementioned landfill site.

Faced with this information, and mainly thanks to the insistence of the victims that the necessary work be carried out to try to locate the bodies that might be in that place, in 2015 the Attorney General's Office led the initiation of prospecting work in two significant areas where it was expected that some bodies would be found.

This was a large-scale intervention, which involved the participation of the Ministry of the Interior, the Victims Attention Unit and the Mayor's Office of the city, which required enormous financial, logistical and coordination efforts to achieve the extraction of 'approximately 24.000 mts3, of which 3,000m mts3 were removed by mechanical excavation and the rest was done manually; all under the supervision of the criminalistics team of the CTI and with the support of personnel hired by the Mayor's Office of Medellín. All national and international protocols (Minnesota and Istanbul Protocols) were applied'.[40]

Despite the above, after several months of work, the intervention was lifted without finding human remains. However, with the satisfaction of having done what was possible to comply with the relatives of the missing persons, for whom this intervention represented 'the disposal of the Attorney General's Office and the governmental institutions that have begun to listen to us to carry out the process that is just a drop of hope in a sea of impunity'.[41] However, they hoped that the commitment of the authorities would allow 'extending the intervention to other perimeters indicated in the Escombrera sector and in the other sectors of Comuna 13, where it is presumed that there may be more bodies buried'.[42]

This desire came to fruition years later, when the coordinated work between the SJP and the USPM led to the initiation of a new intervention in a sector different from the one in which they had worked in 2015. Indeed, in 2020, the SJP adopted precautionary measures for the protection of the sectors of *La Escombrera* where remains of missing persons could be found, thanks to which, in May 2024, a new phase of intervention of the area began, in charge of the forensic teams of the SJP and the USOM.

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[40] Office of the General Attorney, *Prosecutor's Office Provided Details About Judicial Intervention in La Escombrera (Jul.15,2015) (Fiscalía Entregó Detalles Sobre Intervención Judicial En La Escombrera,* (Jul.15,2015)), available at https://www.fiscalia.gov.co/colombia/noticias/fiscalia-entrego-detalles-sobre-intervencion-judicial-en-la-escombrera/ (Accessed on Feb. 7, 2025)

[41] *Id.*

[42] *Id.*

On the occasion of this work and after removing 36,450 cubic meters of earth, on December 18, 2024, the first human bone structures were finally found in *La Escombrera.*[43] Subsequently, on January 10, 2025, two more bodies were found,[44] while the search continues with the expectation of making more discoveries that will put an end to years of waiting for the relatives of the people who could have been buried in that place.

As highlighted by the SJP and the USPM in their joint press release, this is a result achieved 'thanks to the articulated action of the entities of the Comprehensive Peace System, which dignifies the struggle of the searching families of Comuna 13. For decades, mothers, fathers, wives, and children have insisted on intervening in such a complex place for the search. Today, their requests have found a concrete answer. This is an unprecedented achievement, an institutional response to their demands, and a tangible protection of victims' rights in Colombia. The effective action of the State dignifies the victims'.[45]

This type of exercise highlights the importance of working together towards a common goal that includes the victims and searchers, that listens to them and that does not lose sight of the fact that its ultimate goal is to provide comfort and answers to people who have spent years searching for any clue that could lead them to the whereabouts of their missing loved one and that would allow them to close the cycle of anguish, pain and uncertainty that began the day they were left waiting for a return that did not happen.

5. Conclusion

i. Dealing with a past that is painful for a nation, while respecting the rights of the victims and the obligations of the State in judicial matters, requires the implementation of a multidimensional and interconnected System that attends to the different realities and needs of all sectors of the population, especially those whose rights were most affected.

ii. This comprehensive framework must consider the particularities and the demographic, his-

[43] Special Jurisdiction for Peace - Unit for the Search for Persons deemed as Missing, *The SJP and The Search Unit of Search Find The First Bone Structures In La Escombrera of Commune 13 of Medellín, (Dec. 18, 2024) (La JEP y La Unidad de Búsqueda Hallan Las Primeras Estructuras Óseas En La Escombrera de La Comuna 13 de Medellín,* (Dec. 18, 2024)), available at https://www.jep.gov.co/Sala-de-Prensa/Paginas/-la-jep-y-la-unidad-de-busqueda-hallan-las-primeras-estructuras-oseas-en-la-escombrera-de-la-comuna-13-de-medellin.aspx. (Accessed on Feb. 7, 2025)

[44] Special Jurisdiction for Peace - Unit for the Search for Persons deemed as Missing, *The Search Unit of and The SJP Found Two New Bodies In La Escombrera, (Jan. 10, 2025) (La Unidad de Búsqueda y La JEP Encontraron Dos Nuevos Cuerpos En La Escombrera,* (Jan. 10, 2025)), available at https://www.jep.gov.co/Sala-de-Prensa/Paginas/la-unidad-de-busqueda-y-la-jep-encontraron-dos-nuevos-cuerpos-en-la-escombrera.aspx. (Accessed on Feb. 7, 2025)

[45] Special Jurisdiction for Peace - Unit for the Search for Persons deemed as Missing, supra note 43.

torical, and social context of the communities where it is to be implemented, to design solutions with a greater likelihood of success. In these situations, there are no one-size-fits-all models.

iii. The international community and its representatives can become partners and facilitators of these processes, instead of being seen as obstacles.

iv. It is essential that the victims participate in the design and execution of the tools that are to be implemented. This is especially important in the search for missing persons, as the information available to the relatives of the missing, their commitment, and their tenacity make them valuable allies in the search while legitimizing the actions of the institutions.

v. Satisfying the rights of the victims of forced disappearance is a long, costly process that encompasses various angles and dimensions. It is not limited to the search for the bodies or their identification. Still, it is necessary to consider other facets, especially the dignified delivery to their relatives, the considerations of their ethnic belonging when appropriate, and the dignification and preservation of the memory of what happened.

vi. Although each of the entities participating in this multi-comprehensive framework must be clear about their functions and exercise them with independence and autonomy, it is essential that they act in a harmonious and coordinated manner, sharing information, carrying out joint tasks and responding jointly to the actors involved, especially the victims.

संक्रमणकालीन न्याय प्रक्रियामा सरकारी वकीलको भूमिका र जिम्मेवारी

लोकराज पराजुली

सारांश

सम्वत् २०५२ साल फागुन १ गतेदेखि २०६३ साल मंसिर ५ गतेसम्म राज्य पक्ष र तत्कालीन नेपाल कम्युनिष्ट पार्टी (माओवादी) बीच भएको सशस्त्र द्वन्द्वका क्रममा द्वन्द्वरत पक्षबाट भएका मानव अधिकारको उल्लंघन र मानव अधिकारको गम्भीर उल्लंघनका घटनाको छानबिन गरी तार्किक निष्कर्षमा पुऱ्याउने कुरालाई नेपालमा संक्रमणकालीन न्याय प्रक्रियाको रूपमा कानूनले निर्धारण गरेको छ। नेपालको अन्तरिम संविधान, २०६३ को अनुसूची ४ मा समावेश गरिएको नेपाल सरकार र तत्कालीन नेपाल कम्युनिष्ट पार्टी (माओवादी) बीच सम्वत् २०६३/०८/०५ मा भएको विस्तृत शान्ति सम्झौताको धारा ५.२ को उपधारा ५.२.५ र धारा ७ को उपधारा ७.१.३ तथा ७.१.४ एवं नेपालको अन्तरिम संविधान, २०६३ को धारा ३३ को खण्ड (त), (थ), (द) र (ध) को व्यवस्था र सो व्यवस्थालाई कार्यान्वयन गर्न जारी भएको बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ नै नेपालको संक्रमणकालीन न्याय व्यवस्थापनका मुख्य कानून हुन्। यो ऐनमा सम्वत् २०८१/०५/१३ मा तेस्रो संशोधन भएको छ। यो ऐनले संक्रमणकालीन न्याय प्रक्रियामा महान्यायाधिवक्ता वा निजबाट अधिकारप्राप्त सरकारी वकीललाई बेपत्ता पारिएका व्यक्तिको छानबिन आयोग र सत्य निरूपण तथा मेलमिलाप आयोगले मुद्दा चलाउनु पर्ने भनी सिफारिस गरेका मानव अधिकार उल्लंघन र गम्भीर मानव अधिकार उल्लंघनका घटनामा संलग्न व्यक्ति उपर मुद्दा चलाउने नचलाउने निर्णय गर्ने, मुद्दा चलाउने निर्णय गरेमा विशेष अदालतमा मुद्दा दायर गर्ने, मुद्दा दायर गर्दा प्रचलित कानून बमोजिमको सजायमा पच्चीस प्रतिशत सजायको मागदावी लिन सक्ने अभियोजनात्मक स्वविवेक प्रयोग गर्ने, विशेष अदालत गठन हुँदाका वखत अन्य अदालतमा विचाराधिन अवस्थामा रहेका सशस्त्र द्वन्द्वको क्रममा भएका मानव अधिकारको उल्लंघनसँग सम्बन्धित मुद्दा विशेष अदालतमा सार्न कारवाही प्रारम्भ गर्ने जस्ता महत्वपूर्ण र संवेदनशील जिम्मेवारी प्रदान गरेको छ। यी जिम्मेवारीसँगै विशेष अदालतमा दायर भएका त्यस्ता मुद्दामा साक्षी प्रमाण प्रस्तुति तथा परिक्षण प्रक्रियामा संलग्न हुने, वहस पैरवी र प्रतिरक्षा गर्ने तथा निवेदन पुनरावेदन सम्बन्धी कारवाही गर्ने जिम्मेवारी पनि सरकारी वकीलले वहन गर्नुपर्ने गरी आवद्ध भएर आउछन्। यस आलेखमा संक्रमणकालीन न्याय प्रक्रियामा सरकारी वकीलले वहन गर्नुपर्ने यिनै भूमिका र जिम्मेवारीका बारेमा चर्चा गरिएको छ।

१. विषय प्रवेश

नेपालमा सम्वत् २०५२ साल फागुन १ गतेदेखि २०६३ साल मंसिर ५ गतेसम्म राज्य पक्ष र तत्कालीन नेपाल कम्युनिष्ट पार्टी (माओवादी) बीच भएको सशस्त्र द्वन्द्वका क्रममा द्वन्द्वरत पक्षबाट भएका मानव अधिकारको उल्लंघन

नायब महान्यायाधिवक्ता, महान्यायाधिवक्ताको कार्यालय, रामशाहपथ, काठमाडौं

र मानव अधिकारको गम्भीर उल्लंघनका घटना बारेमा छानबिन गरी पीडितलाई न्याय प्रदान गर्ने र पीडकलाई जिम्मेवार बनाउने सन्दर्भमा भएका कानूनी प्रबन्धलाई संक्रमणकालीन न्याय सम्बन्धी नेपाल कानूनका रूपमा लिइन्छ । नेपालको अन्तरिम संविधान, २०६३ को अनुसूची ४ मा समावेश गरिएको नेपाल सरकार र तत्कालीन नेपाल कम्युनिष्ट पार्टी (माओवादी) बीच सम्वत् २०६३/०८/०५ मा भएको विस्तृत शान्ति सम्झौताको धारा ५.२ को उपधारा ५.२.५ र धारा ७ को उपधारा ७.१.३ तथा ७.१.४ एवं नेपालको अन्तरिम संविधान, २०६३ को धारा ३३ को खण्ड (त), (थ), (द) र (ध) संक्रमणकालीन न्याय सम्बन्धी व्यवस्था हुन् । संविधानका ती व्यवस्थाको कार्यान्वयनका लागि सम्वत् २०७१/०१/२८ मा बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ जारी भयो । यो ऐन बमोजिम संक्रमणकालीन न्याय व्यवस्थापनका लागि सम्वत् २०७१/१०/२७ मा बेपत्ता पारिएका व्यक्तिको छानबिन आयोग र सत्य निरूपण तथा मेलमिलाप आयोग (यसपछि यस आलेखमा आयोग भनिएको) गठन भई संक्रमणकालीन न्याय व्यवस्थापनका लागि कार्य प्रारम्भ भएको छ । नेपालको संविधानको धारा ३०४ को उपधारा (२) ले नेपालको अन्तरिम संविधान, २०६३ बमोजिम शान्ति प्रक्रिया सम्बन्धी कार्यहरू यसै संविधान बमोजिम भएको मानिनेछ भन्ने व्यवस्था गरी संक्रमणकालीन न्याय सम्बन्धी विगतमा भएका काम कारवाहीलाई वैधानिकता प्रदान गरिएको छ । बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ मा सम्वत् २०८१/०५/१३ मा तेस्रो संशोधन भएको छ । पछिल्लो पटक सम्वत् २०७९ साल साउन १ गतेदेखि पदाधिकारी विहिन भएका संक्रमणकालीन न्याय सम्बन्धी दुई वटा आयोगमा पदाधिकारी नियुक्ति गरी संक्रमणकालीन न्याय सम्बन्धी अवरूद्ध प्रक्रियालाई सुचारू गरी तार्किक निष्कर्षमा पुऱ्याउने प्रयास भइरहेको छ । यस प्रक्रियाको मुख्य कानूनको रूपमा रहेको तेस्रो संशोधन सहितको बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ (यसपछि यस आलेखमा ऐन भनिएको) ले सरकारी वकीललाई महत्वपूर्ण भूमिमा र जिम्मेवारी प्रदान गरेको छ । यस आलेखमा सोही भूमिका र जिम्मेवारीका बारेमा प्रकाश पार्ने प्रयास गरिएको छ ।

२. ऐनले सरकारी वकीलको भूमिका र जिम्मेवारी सम्बन्धमा गरेको व्यवस्था

सशस्त्र द्वन्द्वको अवधिमा द्वन्द्वरत पक्षबाट सशस्त्र द्वन्द्वका क्रममा भएका मानव अधिकार उल्लंघन तथा मानव अधिकारको गम्भीर उल्लंघनका घटनामा मुद्दा चलाउनुपर्ने देखिएका व्यक्ति उपर मुद्दा चलाउन घटना हुँदाको परिस्थिति, कारण, छानविन प्रतिवेदन र प्रमाण सहित महान्यायाधिवक्ता समक्ष सिफारिस गर्नुपर्ने र यस्तो सिफारिस प्राप्त भएपछि महान्यायाधिवक्ता वा निजबाट अधिकारप्राप्त सरकारी वकीलले प्राप्त प्रमाणको आधारमा आयोगबाट सिफारिस प्राप्त भएको मितिले एक वर्षभित्र मुद्दा चलाउने वा नचलाउने सम्बन्धमा आधार र कारण खुलाई निर्णय गर्नुपर्ने व्यवस्था गरेको छ ।[१] मुद्दा चलाउने निर्णय भएमा महान्यायाधिवक्ता वा निजबाट अधिकारप्राप्त सरकारी वकीलले विशेष अदालतमा मुद्दा दायर गर्नुपर्ने व्यवस्था छ ।[२] जिल्ला अदालत वा उच्च अदालतमा विचाराधीन रहेका सशस्त्र द्वन्द्वको क्रममा भएका मानव अधिकारको उल्लंघन तथा मानव अधिकारको गम्भीर उल्लंघनसँग सम्बन्धित मुद्दा, पुनरावेदन,

[१] बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ को दफा २९ को उपदफा (१) र (३)

[२] ऐ.ऐ.को दफा २९ को उपदफा (४)

निवेदन तथा प्रतिवेदन विशेष अदालतमा सार्न महान्यायाधिवक्ताले सम्बन्धित अदालतमा लेखी पठाउनुपर्ने व्यवस्था ऐनले गरेको छ।[३]

ऐनले संक्रमणकालीन न्यायको प्रक्रियामा सरकारी वकीलले गर्नुपर्ने गरी निर्धारण गरेको उपरोक्त व्यवस्था र त्यससँग आवद्ध भएर आउने आधारमा सरकारी वकीलको भूमिका र जिम्मेवारी निम्नानुसार हुने देखिन्छः-

१. मुद्दा चलाउने वा नचलाउने निर्णय गर्ने,
२. मुद्दा दायर गर्ने,
३. अन्य अदालतमा विचाराधिन मुद्दा विशेष अदालतमा सार्ने कारवाही प्रारम्भ गर्ने,
४. साक्षी प्रमाण प्रस्तुति तथा परीक्षण प्रक्रियामा सहभागी हुने,
५. निवेदन पुनरावेदन सम्बन्धी कारवाही गर्ने,
६. वहस पैरवी र प्रतिरक्षा गर्ने।

३. सरकारी वकीलको भूमिका र जिम्मेवारीको विश्लेषण

३.१. मुद्दा चलाउने वा नचलाउने निर्णय गर्ने

संक्रमणकालीन न्याय प्रक्रियामा छानबिन आयोगहरूले सशस्त्र द्वन्द्वको अवधिमा द्वन्द्वरत पक्षबाट सशस्त्र द्वन्द्वका क्रममा भएका मानव अधिकार उल्लंघन तथा मानव अधिकारको गम्भीर उल्लंघनका[४] घटनामा मुद्दा चलाउनुपर्ने देखिएका व्यक्ति उपर मुद्दा चलाउन महान्यायाधिवक्ता समक्ष सिफारिस गरेपछि सरकारी वकीलबाट मुद्दा चलाउने नचलाउने निर्णय गर्ने चरणको शुरूवात हुन्छ। नेपालको संविधानले यस संविधानमा अन्यथा व्यवस्था भएकोमा बाहेक कुनै अदालत वा न्यायिक निकाय वा अधिकारी समक्ष नेपाल सरकारको तर्फबाट मुद्दा चलाउने वा नचलाउने भन्ने कुराको अन्तिम निर्णय गर्ने अधिकार महान्यायाधिवक्तालाई हुने[५] र यो अधिकार तोकिएको शर्तको अधिनमा रही प्रयोग र पालना गर्ने गरी मातहतका सरकारी वकीललाई प्रत्यायोजन गर्न सक्ने व्यवस्था गरेको छ।[६] सशस्त्र द्वन्द्वको अवधिमा द्वन्द्वरत पक्षबाट सशस्त्र द्वन्द्वका क्रममा भएका मानव अधिकारको उल्लंघन र मानव अधिकारको गम्भीर उल्लंघनका घटना नेपाल सरकारवादी हुने फौजदारी प्रकृतिको मुद्दा हुने भएकोले संविधानको उक्त व्यवस्थाको रोहमा आयोगहरूले ती मुद्दा चलाउने नचलाउने निर्णय गर्न नसक्ने भएकोले महान्यायाधिवक्ता समक्ष तत् सम्बन्धमा सिफारिस गर्नुपर्ने व्यवस्था ऐनले गरेको हो। आयोगहरूबाट यस्तो सिफारिस प्राप्त भएपछि अनन्तकालसम्म महान्यायाधिवक्ताले मुद्दा चलाउने नचलाउने निर्णय नगरी अनिर्णयको अवस्थामा आयोगको सिफारिस नरहोस् भन्ने ध्येयले महान्यायाधिवक्ता वा निजबाट अधिकारप्राप्त सरकारी वकीलले आयोगबाट सिफारिस प्राप्त भएको मितिले एक वर्षभित्र मुद्दा मुद्दा चलाउने वा नचलाउने सम्बन्धमा आधार कारण खुलाई निर्णय गर्नुपर्ने व्यवस्था ऐनले गरेको हो। संविधानले महान्यायाधिवक्तालाई प्रदान गरेको अभियोजनको अन्तिम निर्णय गर्ने अधिकार

[३] बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१.को दफा २९ ख को उपदफा (१)

[४] ऐ.को दफा २ को खण्ड (ञ) र (ञ १)

[५] नेपालको संविधानको धारा १५८ को उपधारा (२)

[६] ऐ.ऐ.को धारा १५८ को उपधारा (७)

विशिष्ट र स्वायत्त प्रकृतिको अधिकार हो । महान्यायाधिवक्तालाई यो अधिकार संविधानद्वारा सिधै प्रदान गर्नुको पछाडि महान्यायाधिवक्ताको संस्था एउटा व्यावसायिक र न्यायिक संस्थाको रूपमा रहेको र त्यस्तो संस्थाले कुनै खास राजनीतिक उद्देश्यले कसैउपर दुर्भावनापूर्वक अभियोजन लगाउन वा कसैउपर मरमोलाहिजावश वा राजनीतिक कारणले लगाउनुपर्ने अभियोजन नलगाउने अवस्था आउन नदिन र फौजदारी अभियोग विशिष्ट कानूनी एवं न्यायिक आवश्यकता अनुरूप सही र निष्पक्ष रूपमा हुन सकोस् भनेर नै यस्तो संस्था खडा गरी अभियोजन सम्बन्धी सम्पूर्ण जिम्मेवारी सुम्पिएको हो भनी सर्वोच्च अदालतबाट महान्यायाधिवक्ताको अभियोजन सम्बन्धी संविधानप्रदत्त अधिकारको व्याख्या समेत भएको छ ।[७] महान्यायाधिवक्ता वा निजबाट अधिकारप्राप्त सरकारी वकीलले संक्रमणकालीन न्यायको प्रक्रियामा मानव अधिकार उल्लंघन तथा मानव अधिकारको गम्भीर उल्लंघनका घटनामा आयोगको सिफारिस पश्चात् पीडक उपर मुद्दा चलाउने नचलाउने निर्णय गर्दा संविधानले निजलाई प्रदान गरेको तत् सम्बन्धी अधिकार उक्त विधिशास्त्रीय पक्षलाई आत्मसात् गरी पूर्णतः व्यावसायिकता प्रदर्शन गरी हुनेछ भन्ने अपेक्षा सबैले गर्नु पर्दछ ।

३.२. मुद्दा दायर गर्ने

आयोगबाट सिफारिस भए बमोजिम मानव अधिकारको उल्लंघन र मानव अधिकारको गम्भीर उल्लंघनका घटनामा महान्यायाधिवक्ता वा निजबाट अधिकारप्राप्त सरकारी वकीलले मुद्दा चलाउने निर्णय गरेमा विशेष अदालतमा मुद्दा दायर गर्नुपर्ने व्यवस्था ऐनले गरेको छ ।[८] यसरी मुद्दा दायर गर्दा महान्यायाधिवक्ता वा निजबाट अधिकारप्राप्त सरकारी वकीलले मुद्दा चलाउनुपर्ने व्यक्तिले आयोग समक्ष आफूलाई लागेको आरोपको सम्बन्धमा थाहा भएसम्मको सत्य तथ्य विवरण प्रकट गरेको, आयोगलाई छानबिन तथा प्रमाण संकलनमा सहयोग गरेको, आफूले गरेको कार्यमा संलग्न भएकोमा पश्चाताप गरेको, पीडितसँग क्षमायाचना गरेको, भविष्यमा त्यस्तो किसिमको कार्य नगर्ने प्रतिज्ञा गरेको अवस्था विद्यमान भएको लगायत घटना हुँदाको परिस्थिति, कारण तथा संक्रमणकालीन न्यायको सिद्धान्तलाई ध्यान दिई जबर्जस्ती करणी वा गम्भीर यौनजन्य हिंसाका घटना बाहेकका मानव अधिकारको गम्भीर उल्लंघनका अन्य घटना र मानव अधिकार उल्लंघनका घटनामा तत्काल प्रचलित कानून बमोजिमको सजायमा पच्चिस प्रतिशत सजायको माग दाबी लिन सक्ने व्यवस्था ऐनले गरेको छ ।[९]

यो कानूनी व्यवस्थाले महान्यायाधिवक्ता वा सरकारी वकीललाई मुद्दा चलाइने व्यक्तिलाई कस्तो अवस्थामा प्रचलित कानून बमोजिम हुने पूरै सजायको माग दाबी लिने र कस्तो अवस्थामा त्यस्तो सजायको पच्चीस प्रतिशतमात्र सजाय हुन मागदावी लिने भन्ने कुराको अभियोजनात्मक स्वविवेक (Prosecutorial discreation) प्रयोग गर्ने संवेदनशील तथा महत्वपूर्ण अधिकार प्रदान गरेको छ । ऐनले निर्धारण गरेको आधारको होशियारपूर्वक समुचित प्रयोग गरेर महान्यायाधिवक्ता वा निजबाट अधिकारप्राप्त सरकारी वकीलबाट यो अधिकार प्रयोग भई अभियोजन

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[७] ने.का.प. २०७१, अंक १२, नि.नं. ९३०४ (प्रकरण नं. ७४)

[८] पूर्वपाद् २

[९] बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ को दफा २९ को उपदफा (६)

निर्णय तथा मुद्दा दयार हुने अपेक्षा गर्नु वाञ्छनिय हुन्छ ।

३.३. अन्य अदालतमा विचारधिन मुद्दा विशेष अदालतमा सार्ने कारवाही प्रारम्भ गर्ने

नेपाल सरकारले नेपाल राजपत्रमा सूचना प्रकाशन गरी सशस्त्र द्वन्द्वको क्रममा घटेका ऐन बमोजिम दायर हुने मुद्दाको कारवाही र किनारा गर्न न्याय परिषद्को परामर्शमा तीन सदस्यीय विशेष अदालत गठन गर्ने व्यवस्था ऐनले गरेको छ ।[१०] यो अदालत गठन भई कार्य प्रारम्भ गर्नु अघि जिल्ला अदालत वा उच्च अदालतमा विचाराधीन रहेका सशस्त्र द्वन्द्वको क्रममा भएका मानव अधिकारको उल्लंघनसँग सम्बन्धित मुद्दा, पुनरावेदन, निवेदन तथा प्रतिवेदन विशेष अदालतमा सार्न महान्यायाधिवक्ताले सम्बन्धित अदालतमा लेखी पठाउनुपर्ने ऐनको व्यवस्था बमोजिम[११] यो कारवाही प्रारम्भ गर्ने भूमिका र जिम्मेवारी महान्यायाधिवक्ताको रहने देखिन्छ । यसका लागि महान्यायाधिवक्ताको कार्यालयले त्यस्ता मुद्दा, पुनरावेदन, निवेदन तथा प्रतिवेदनको लगत संकलन गरी विशेष अदालत गठन हुनासाथ सो वखतसम्ममा फछर्यौट हुन बाँकी रहेका त्यस्ता मुद्दा, पुनरावेदन, निवेदन र प्रतिवेदन सो अदालतमा सार्ने कारवाही प्रारम्भ गर्नका लागि तयारी अवस्थामा रहनुपर्ने देखिन्छ ।

३.४. साक्षी प्रमाण प्रस्तुति तथा परीक्षण प्रक्रियामा सहभागी हुने

विशेष अदालतमा दायर भएका मुद्दाको वा सो अदालतको आदेश वा फैसला उपरको पुनरावेदकीय कारवाहीमा अदालतको आदेशानुसार साक्षी प्रमाण प्रस्तुति गर्ने तथा तिनको परीक्षणको कारवाहीमा सहभागी हुने जिम्मेवारी वादी नेपाल सरकरको तर्फबाट सरकारी वकीलले वहन गर्नु पर्दछ । यस प्रयोजनका लागि मुद्दाका पीडित र साक्षीसँग सम्पर्कमा रहिरहने तथा आवश्यक भएमा उनीहरूको संरक्षण गर्ने समेतको जिम्मेवारी सरकारी वकीलले वहन गर्नु पर्दछ ।

३.५. निवेदन/पुनरावेदन सम्बन्धी कारवाही गर्ने

विशेष अदालतले गरेको फैसला वा अन्तिम आदेशमा चित्त नबुझ्ने पक्षले त्यस्तो फैसला वा अन्तिम आदेश भएको मितिले पैंतीस दिनभित्र सर्वोच्च अदालतमा पुनरावेदन दिन सक्ने व्यवस्था ऐनले गरेको छ ।[१२] त्यस्तो पुनरावेदन सुन्ने प्रयोजनका लागि सर्वोच्च अदालतमा संक्रमणकालीन न्याय सम्बन्धी संयुक्त इजलास रहने प्रबन्ध गरिएको छ ।[१३] वादी नेपाल सरकारको तर्फबाट त्यस्तो पुनरावेदन वा विशेष अदालतको अन्तरकालीन आदेश उपर निवेदन गर्नुपर्ने अवस्थामा सो सम्बन्धी कार्य सरकारी वकीलले गर्नुपर्ने हुँदा यो जिम्मेवारी सरकारी वकीलले वहन गर्नुपर्दछ ।

३.६. वहस पैरवी र प्रतिरक्षा गर्ने

विशेष अदालतले सुनुवाई गर्ने मुद्दा तथा सो अदालतले गरेको फैसला वा आदेश उपरका पुनरावेदन/निवेदन उपरको सुनुवाइमा नेपाल सरकारको तर्फबाट वहस पैरवी र प्रतिरक्षा गर्नु महान्यायाधिवक्ता वा निजबाट अधिकारप्राप्त

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[१०] बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ को दफा २९ क को उपदफा (१)

[११] पूर्वपाद् ३

[१२] बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ को दफा २९ ङ को उपदफा (१)

[१३] ऐ.ऐ.को दफा २९ ङ को उपदफा (२)

सरकारी वकीलको जिम्मेवारी हुन्छ । नेपाल सरकार वादी वा प्रतिवादी भई दायर भएका मुद्दा मामिलामा नेपाल सरकारको तर्फबाट प्रतिरक्षा गर्ने महान्यायाधिवक्ताको अधिकार हुनेछ ।[१४] महान्यायाधिवक्ताले आफ्नो काम, कर्तव्य र अधिकार तोकिएको शर्तको अधीनमा रही प्रयोग र पालना गर्ने गरी मातहतका सरकारी वकीललाई प्रत्यायोजन गर्न सक्नेछ ।[१५] संविधानको व्यवस्था अन्तर्गत महान्यायाधिवक्ता वा निजबाट अधिकारप्राप्त सरकारी वकीलले यो जिम्मेवारी वहन गर्नु पर्दछ ।

४.निष्कर्ष

सम्वत् २०५२ साल फागुन १ गतेदेखि २०६३ साल मंसिर ५ गतेसम्म राज्य पक्ष र तत्कालीन नेपाल कम्युनिष्ट पार्टी (माओवादी) बीच भएको सशस्त्र द्वन्द्वका क्रममा द्वन्द्वरत पक्षबाट भएका मानव अधिकारको उल्लंघन र मानव अधिकारको गम्भीर उल्लंघनका घटनाको छानविन गरी तार्किक निष्कर्षमा पुऱ्याउने कुरालाई नेपालमा संक्रमणकालीन न्याय प्रक्रियाको रूपमा कानूनले निर्धारण गरेको छ । बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ ले यस प्रक्रियाको निर्धारण गरेको छ । यस प्रक्रियामा यो ऐनले निर्धारण गरेको सरकारी वकीलको भूमिका र जिम्मेवारी तथा त्यससँगै आवद्ध भएर आउने भूमिका र जिम्मेवारी संवेदनशील र महत्वपूर्ण रहेको छ । संक्रमणकालीन न्यायका सिद्धान्त र मान्यताको मर्म र भावना अनुरूप उक्त प्रक्रियामा सरकारी वकीलले वहन गर्नुपर्ने भूमिका र जिम्मेवारीलाई उच्च व्यावसायिकता प्रदर्शन गरी वहन गर्न सम्बन्धित सबैको ध्यान गएमा तत् सम्बन्धमा कानूनले गरेको व्यवस्थाले मूर्त रूप लिने कुरामा विश्वास गर्न सकिन्छ ।

[१४] नेपालको संविधानको धारा १५८ को उपधारा (६) को खण्ड (क)

[१५] ऐ.ऐ.को धारा १५८ को उपधारा (७)

संक्रमणकालीन न्यायको सन्दर्भमा बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐनको तेस्रो संशोधन र तत्पश्चात् आयोगहरूको भूमिका

पाराश्वर ढुंगाना

सारांश

सशस्त्र द्वन्द्वको क्रममा द्वन्द्वरत पक्षहरूबाट द्वन्द्वको समयमा भएको ज्यादती र मानव अधिकारको उल्लंघनलाई सम्बोधन गर्ने र समाजमा मेलमिलाप गरी दिगो शान्ति स्थापना गर्ने पद्धतिलाई संक्रमणकालीन न्याय भनिन्छ । यस अन्तर्गत द्वन्द्वकालीन समयमा घटेका मानव अधिकार उल्लंघनका घटनाको सत्यको खोजी, पीडित र पीडकको पहिचान, पीडितको उद्धार, राहत र परिपूरण, पीडकद्वारा पीडितको पीडाको बोध, मेलमिलाप र पुनः सामाजिकरण, क्षमादान, गम्भीर मानव अधिकार उल्लंघनमा पीडक उपर अभियोजन आदि उपायद्वारा दिगो शान्ति कायम गर्ने कार्य पर्छन् । नेपालको विगतको सशस्त्र द्वन्द पश्चात् संक्रमणकालीन न्यायलाई टुंगोमा पुऱ्याउन अझै सकिएको छैन । संक्रमणकालीन न्याय सम्बन्धी ऐनमा हालै भएको संशोधनले संक्रमणकालीन न्याय सम्बन्धी आयोगहरूको पुनःगठन गर्ने र चार वर्षे कार्यावधि भित्र नै संक्रमणकालीन न्याय र शान्ति प्रकृयाका सम्पूर्ण कार्यहरू सम्पन्न गर्नुपर्ने गरी आवश्यक व्यवस्था गरेको छ । यस संशोधनले मूलतः सशस्त्र द्वन्द्वको क्रममा भएको मानव अधिकारको उल्लंघनलाई "मानव अधिकारको उल्लंघन" र "मानव अधिकारको गम्भीर उल्लंघन" गरी दुई वर्गमा बर्गीकरण गरी मानव अधिकारको गम्भीर उल्लंघनका घटनामा क्षमादान नहुने, आयोगले उजुरी छानबिन गर्दा अन्य निकायसँग विवरण माग गर्ने अधिकार हुने, अभियोजन गर्दा जबरजस्ती करणी र गम्भीर यौनजन्य हिंसा बाहेकका मानव अधिकारको उल्लंघनका घटनामा प्रचलित कानूनले हुने सजायमा पच्चीस प्रतिशत सजाय माग दावी लिन सकिने, यस सम्बन्धी मुद्दा हेर्न विशेष अदालत गठन गरिने लगायतका व्यवस्था गरेको छ । यस संशोधनले ती आयोगहरूको भूमिका र जिम्मेवारीलाई थप स्पष्ट र गहन तुल्याएको छ ।

१. संक्रमणकाल

कुनै कुराको एक स्थानबाट अर्को स्थानमा वा एक वस्तुबाट अर्को वस्तुमा सर्ने कार्य सङ्क्रमण हो । कुनै शासन, स्थिति, नियम आदि दिगो भई नसकेको अव्यवस्थित वा अस्थिर समय, संक्रमणको अवधिलाई संक्रमणकाल भनिन्छ ।[१] हरेक विषयमा संक्रमणकाल हुन सक्छ । राज्य व्यवस्थाको सन्दर्भमा शासन प्रणालीमा परिवर्तन भएको अवस्थामा साविकको शासन प्रणाली समाप्त गरेको तर नयाँ शासन प्रणाली पूर्ण रूपले स्थापना र संस्थागत भइनसकेको अवस्थालाई संक्रमणकाल भन्ने गरिन्छ । यस्तो अवस्थामा एकातर्फ साविकको शासन प्रणालीका अवशेषहरू बाँकी नै रहेका हुन्छन् भने अर्को तर्फ विगतको सशस्त्र द्वन्द्वकालीन अवस्थाका घटनाहरूले समाजमा उथलपुथल ल्याएको अवस्थाको व्यवस्थापन गर्नुपर्ने हुन्छ ।

सचिव, सत्य निरूपण तथा मेलमिलाप आयोग ।

[१] प्रज्ञा नेपाली बृहत् शब्दकोष, २०७९, नेपाल प्रज्ञा प्रतिष्ठान, कमलादी काठमाडौं ।

संक्रमणकालीन न्यायलाई टुङ्गोमा पुऱ्याई समाजमा न्याय, मेलमिलाप र दिगो शान्ति स्थापना गर्ने दिशामा राज्य अग्रसर भइरहेको हुन्छ । नेपालमा दश वर्षे सशस्त्र द्वन्द्वको शान्तिपूर्ण व्यवस्थापन गरिए तापनि संक्रमणकालीन न्यायलाई टुङ्गोमा पुऱ्याउन नसकिएको हुँदा त्यस दृष्टिकोणबाट संक्रमणकाल नै रहेको छ भन्न सकिन्छ ।

२. संक्रमणकालीन न्याय

कुनै देशको शासन प्रणालीमा परिवर्तन भए पछि पहिलाको शासन प्रणाली परिवर्तनका लागि भएको द्वन्द्वको क्रममा द्वन्द्वरत पक्षहरूबाट द्वन्द्वको समयमा भएको ज्यादती र मानव अधिकारको उल्लंघनलाई सम्बोधन गर्ने र समाजमा मेलमिलाप गरी दिगो शान्ति स्थापना गर्ने पद्तिलाई संक्रमणकालीन न्याय भनिन्छ । यो परम्परागत फौजदारी न्याय प्रणाली भन्दा भिन्न हुन्छ । यस पद्तिमा द्वन्द्वका पीडितका परिपूरण, क्षतिपूर्ति र पुनःस्थापनना जस्ता अधिकारहरू स्थापना गर्ने गरिन्छ । शासन प्रणाली परिवर्तन भएमा परिवर्तनलाई आत्मसात गरी नयाँ शासन प्रणाली प्रति विश्वास जगाउन, द्वन्द्व कालका ज्यादती र मानव अधिकारको उल्लंघनलाई यथोचित सम्बोधन गरी समाजमा स्थायित्व र मेलमिलाप कायम गर्न, दिगो शान्ति कायम गरी लोकतान्त्रलाई संस्थागत गर्न संक्रमणकालीन न्याय अत्यावश्यक हुन्छ ।

संक्रमणकालीन न्यायको उद्देश्य दण्डहीनताको अन्त्य गरी कानूनी राज्यद्वारा लोकतान्त्रिक शासन प्रणाली स्थापित गर्नु हो । विगतको मानव अधिकार उल्लंघन र ज्यादतीका घटनाको छानविन गरी सत्य तथ्य पत्ता लगाउने र पुनः त्यस्तो कार्य हुन नदिने, मानव अधिकार उल्लंघनकर्ताको पहिचान गरी जिम्मेवार बनाउन पीडकलाई दण्ड दिने, पीडितलाई परिपूरण र राहत दिई न्याय प्रदान गर्नु र समाजमा मेलमिलापको वातावरण तयार गरी दिगो शान्ति कायम गर्नु संक्रमणकालीन न्यायको अभिष्ट हो ।

संक्रमणकालीन न्यायमा मूलतः देहायका कार्यहरू समावेश हुन्छन्:-[२]

१. सशस्त्र द्वन्द्वको अवधिमा घटेका मानव अधिकार उल्लंघन र ज्यादतीका घटनाका सम्बन्धमा तथ्य र प्रमाणहरूको सङ्कलन, परीक्षण, विश्लेषण आदिका माध्यमद्वारा सत्यको खोजी गर्ने, त्यस्ता घटनाका पीडित र पीडकको पहिचान गर्ने,

२. सशस्त्र द्वन्द्वको अवधिमा घटेका मानव अधिकार उल्लंघन र ज्यादतीका घटनाका पीडितलाई तत्काल अन्तरिम राहत प्रदान गर्ने,

३. सशस्त्र द्वन्द्वमा बेपत्ता पारिएका व्यक्तिको अवस्था पहिचान गरी उनीहरूको उद्धार गर्ने, पुनर्स्थापनाको आवश्यक प्रबन्ध गर्ने,

४. सशस्त्र द्वन्द्वको अवधिमा घटेका मानव अधिकार उल्लंघन र ज्यादतीका घटनाका पीडितलाई परिपूरण र पुनःस्थापन गरी समाजमा सम्मानपूर्वक जीवनयापन सुनिश्चित गर्ने,

५. विगतको सशस्त्र द्वन्द्वकालका कटुता र तिक्ततालाई सामान्यीकरण गरी मेलमिलापलाई प्रवर्धन गरी समाजमा मेलमिलाप, आपसी सद्भाव र दिगो शान्ति स्थापना गर्ने,

६. सशस्त्र द्वन्द्वको अवधिमा घटेका मानव अधिकार उल्लंघन र ज्यादतीका घटनाका पीडकहरूको पहिचान गरी

[२] https://www.ictj.org/sites/default/files/ICTJ-Global-Transitional-Justice-2009-English.pdf

उनीहरूलाई कारबाही गरी जिम्मेवार बनाउने,

७. मानव अधिकार र दिगो शान्तिको सुनिश्चितताका लागि राज्यको संरचनागत तथा संस्थागत सुधार गर्ने, अधिकारको दुरुपयोग र भ्रष्टाचार रोक्ने, त्यस्ता कार्यमा संलग्न हुनेहरूलाई सार्वजनिक पदमा नियुक्ति, मनोनयन र बहालीका लागि अयोग्य मान्ने,

८. कानूनी शासन र सुशासनको प्रवर्धन गर्दै लोकतन्त्रको सुदृढीकरणका लागि संस्थागत सुधार गर्ने आदि।

संक्रमणकालीन न्यायमा द्वन्द्वकालका घटनाहरूको समग्र मूल्याङ्कनद्वारा सत्यको अन्वेषण (Truth Seeking), पीडितलाई हानिपूरण (Reparation), पीडक उपर अभियोजन (Prosecution), संस्थागत सुधार (Institutional Reform) जस्ता प्रकृयाहरू अवलम्बन गरिन्छ।

३. संक्रमणकालीन न्यायको अन्तर्राष्ट्रिय अभ्यास

दोस्रो विश्वयुद्धको समयमा युद्ध अपराधको कसूरमा कारबाही गर्न 'टोकियो ट्रिबुनल' र 'न्यूरेम्बर्ग ट्रिबुनल' नामक अस्थायी न्यायाधिकरणहरू गठन भएका थिए। यी न्यायाधिकरणहरूको स्थापना र अभ्यासबाट नै संक्रमणकालीन न्यायको सिद्धान्तको अभ्यास सुरु भएको मानिन्छ। सन् १९७० को दशकदेखि यस सिद्धान्तको स्वरूप र क्षेत्रहरू विस्तार भएका छन्। सन् १९७० र ८० को दशकदेखि मानव अधिकार उल्लंघनको विषयलाई फौजदारी न्याय अन्तर्गत कारबाही गर्ने पद्धतिको विकास भएको थियो। सन् १९७५ मा ग्रीसमा र १९८३ मा अर्जेन्टिनामा मानव अधिकारको उल्लंघनका घटनामा कारबाही गरिएको पाइन्छ। सन् १९९० को दशकमा मानव अधिकार र मानवीय कानूनको उल्लंघनमा पीडकलाई जिम्मेवार बनाई कारबाही गर्ने र पीडितलाई परिपूरणसहित सम्मानजनक जीवनयापनको सुनिश्चितता गर्ने र दिगो शान्ति स्थापना गर्ने पहलकदमी स्वरूप संक्रमणकालीन न्यायको विकास भएको हो। तत्पश्चात् खासगरी सशस्त्र द्वन्द्व भएका देशहरूमा सो द्वन्द्वको समाप्ति पश्चात् द्वन्द्वका अवशेषहरू साम्य पार्न संक्रमणकालीन न्यायको अभ्यास गरिदै आएको छ।

४.सत्य निरूपणका लागि आयोग प्रणाली

संक्रमणकालीन न्यायका विभिन्न आयामहरू मध्ये सत्यको खोजी एक महत्त्वपूर्ण आयाम हो। सशस्त्र द्वन्द्वको समयमा भएका ज्यादती र मानव अधिकार उल्लंघनका घटना र त्यस्तो घटनाबाट पीडित तथा पीडकको पहिचान गरी सत्य तथ्यको खोजी गर्ने उद्देश्यले सत्य निरूपण आयोग गठन गर्ने गरिन्छ। यस्तो आयोगले सशस्त्र द्वन्द्वको समयमा भएका ज्यादती र मानव अधिकार उल्लंघनका घटनाको खोजी गरी पीडितको पीडाको सुनुवाइ गर्ने, पीडितलाई परिपूरण र पुनःस्थापनको सिफारिस गर्ने, मानव अधिकार उल्लंघनकर्तालाई सजायको सिफारिस गर्ने, क्षमादान दिनुपर्ने व्यक्तिहरूको पहिचान गरी मेलमिलापको वातावरण तयार गर्ने जस्ता कार्य गर्छन्। दक्षिण अफ्रिका, टिमोर र मोरक्कोमा यस्ता आयोगलाई क्षमादान प्रदान गर्ने, सामुदायिक मेलमिलाप गर्ने र क्षतिपूर्ति प्रदान गर्ने लगायतका अधिकार प्रदान गरिएको थियो।

नेपालमा पनि सशस्त्र द्वन्द्वको अवधिमा घटेका मानव अधिकारको ज्यादती र उल्लंघनका घटनाहरूको सत्य निरूपण गरी पीडितलाई परिपूरण सिफारिस गर्न र पीडकलाई जबाफदेही बनाउन पहिलो पटक वि.सं. २०७१ साल माघ २८

गते सत्य निरूपण तथा मेलमिलाप आयोग र बेपत्ता पारिएका व्यक्तिको छानबिन आयोग गठन भएका थिए। दुबै आयोगहरू संवत् २०७९ श्रावण ३१ देखि पदाधिकारीविहीन अवस्थामा रहेका छन्।

५. नेपालको सशस्त्र द्वन्द्व र संक्रमणकालीन न्याय

सशस्त्र द्वन्द्व कालमा घटेका मानव अधिकार उल्लंघनका घटनाहरू के कसरी भएका थिए ? प्रत्येक घटना विशेषमा वास्तविकता के थियो ? प्रत्येक घटना विशेषका पीडित को को थिए ? पीडकहरू को को थिए ? प्रत्येक घटनाको कारण के के थिए ? पत्ता लगाउन अनुसन्धान गर्ने र पत्ता लगाउने कार्य नै सत्यको अन्वेषण हो। सशस्त्र द्वन्द्वको क्रममा घटेका अपराधिक घटनामा कारबाहीको सिफारिस गर्ने वा मेलमिलापको लागि पहल गर्ने गराउने प्रयोजनले सरोकारवालाहरूको सहमतिमा बनाइने गैरन्यायिक प्रकृतिको संयन्त्र वा आयोगले गर्ने कामलाई सत्य निरुपण तथा मेलमिलाप भनिन्छ।

नेपालमा वि. सं. २०५२ सालदेखि नेपाल कम्युनिष्ट पार्टी माओवादीले सुरु गरेको सशस्त्र द्वन्द्व वि. सं. २०६३ साल मंसिर ५ गते भएको वृहत् शान्ति सम्झौता भए पछि विधिवत् अन्त्य भएको थियो। सो दश वर्ष लामो सशस्त्र द्वन्द्वको क्रममा द्वन्द्वरत पक्षहरूबाट भएका मानव अधिकारको ज्यादती र उल्लंघनका घटनाहरू सम्बोधन गरी समाजमा दिगो शान्ति र मेलमिलाप गर्नका लागि नेपालको अन्तरिम संविधान, २०६३ जारी भई सो संविधानले सशस्त्र द्वन्द्वको क्रममा मानव अधिकारको गम्भीर उल्लंघन गर्ने तथा मानवता विरुद्धको अपराधमा संलग्न व्यक्तिहरूको बारेमा सत्य अन्वेषण गर्न तथा समाजमा मेलमिलापको वातावरण निर्माण गर्न उच्चस्तरीय सत्य निरूपण तथा मेलमिलाप आयोग गठन गर्ने व्यवस्था गरेको थियो।[३] तर सो संविधानको कार्यावधिभर यस्ता आयोगहरू गठन हुन नसके तापनि वि.सं. २०७१ सालमा बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ जारी भयो। संवत् २०७२ सालमा संविधान सभाबाट नेपालको संविधान जारी भए पछि संक्रमणकालीन न्यायको लागि दुई छुट्टा-छुट्टै आयोग गठन भएका थिए। वि. सं. २०७९ देखि यी आयोगहरू पदाधिकारी विहीन रहेका छन्। हालै मात्र उक्त ऐनमा तेस्रो संशोधन भई पदाधिकारी नियुक्ति प्रकृया अघि बढेकोमा पदाधिकारी नियुक्तिको पहिलो प्रयास असफल भएको छ।

६. नेपालमा संक्रमणकालीन न्यायको सन्दर्भमा भएका व्यवस्थाहरू

१. संवैधानिक व्यवस्थाहरू

नेपालको अन्तरिम संविधान, २०६३ मा सशस्त्र द्वन्द्वको क्रममा बेपत्ता पारिएका व्यक्तिहरूको पीडित परिवारलाई राहत उपलब्ध गराउन तथा सशस्त्र द्वन्द्वको क्रममा मानव अधिकारको गम्भीर उल्लंघन गर्ने तथा मानवता विरुद्धको अपराधमा संलग्न व्यक्तिहरूको बारेमा सत्य अन्वेषण गर्न र समाजमा मेलमिलापको वातावरण निर्माण गर्न उच्चस्तरीय सत्य निरुपण तथा मेलमिलाप आयोग गठन गर्ने कुरा उल्लेख थियो।[४]

[३] नेपालको अन्तरिम संविधान, २०६३ को धारा ३३ को खण्ड (थ) र (द)।

[४] नेपालको अन्तरिम संविधान, २०६३ को धारा ३३ को खण्ड (थ) र (द)।

नेपालको अन्तरिम संविधान, २०६३ को अंकको रूपमा रहेको नेपाल सरकार र नेपाल कम्युनिष्ट पार्टी (माओवादी) बिच सम्पन्न विस्तृत शान्ति सम्झौतामा सशस्त्र द्वन्द्वको क्रममा मानव अधिकारको गम्भीर उल्लंघन गर्ने तथा मानवता विरुद्धको अपराधमा संलग्नहरूको बारेमा सत्य अन्वेषण गर्न र समाजमा मेलमिलापको वातावरण निर्माण गर्न आपसी सहमतिबाट उच्चस्तरीय सत्य निरूपण तथा मेलमिलाप आयोगको गठन गरिने उल्लेख भएको थियो ।[५]

नेपालको संविधानको प्रस्तावनामा नेपाली जनताले पटक-पटक गर्दै आएका ऐतिहासिक जन आन्दोलन, सशस्त्र संघर्ष, त्याग र बलिदानको गौरवपूर्ण इतिहासलाई स्मरण एवं शहीदहरू तथा बेपत्ता र पीडित नागरिकहरूलाई सम्मान गर्दै सो संविधान जारी भएको उल्लेख छ ।[६]

नेपालमा अग्रगामी लोकतान्त्रिक परिवर्तनको लागि भएका सबै जनआन्दोलन, सशस्त्र संघर्ष र क्रान्तिका क्रममा जीवन उत्सर्ग गर्ने शहीदका परिवार, बेपत्ता पारिएका व्यक्तिका परिवार, लोकतन्त्रका योद्धा, द्वन्द्वपीडित र विस्थापित, अपाङ्गता भएका व्यक्ति, घाइते तथा पीडितलाई न्याय एवम् उचित सम्मान सहित शिक्षा, स्वास्थ्य, रोजगारी, आवास र सामाजिक सुरक्षामा कानून बमोजिम प्राथमिकताका साथ अवसर पाउने मौलिक हक हुने व्यवस्था गरिएको छ ।[७] असहाय, अनाथ, अपांगता भएका, द्वन्द्वपीडित, विस्थापित एवं जोखिममा रहेका बालबालिकालाई राज्यबाट विशेष संरक्षण र सुविधा पाउने हकको व्यवस्था गरेको छ ।[८]

नेपालको संविधानमा खास किसिम र प्रकृतिका मुद्दाहरूको कारबाही र किनारा गर्न संघीय कानून बमोजिम अन्य विशिष्टीकृत अदालत, न्यायिक निकाय वा न्यायाधिकरणको स्थापना र गठन गर्न सकिने व्यवस्था छ । सो बमोजिम सशस्त्र द्वन्द्वकालीन मुद्दाको निरूपण गर्न एक छुट्टै विशेष अदालत गठन गर्न सकिन्छ ।[९] सोही व्यवस्थाबमोजिम बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग अध्यादेश, २०६९ आएको भए तापनि सो अध्यादेश बमोजिम आयोगहरू गठन हुन सकेन ।

२. बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१

यो ऐन मुख्यतः देहायका उद्देश्यले बेपत्ता पारिएका व्यक्तिको छानबिन आयोग तथा सत्य निरूपण तथा मेलमिलाप आयोगको गठन सम्बन्धमा आवश्यक व्यवस्था गर्नका लागि बनेको देखिन्छः-

- नेपालको अन्तरिम संविधान, २०६३ र विस्तृत शान्ति सम्झौताको मर्म र भावनालाई आत्मसात् गरी सशस्त्र द्वन्द्वका क्रममा भएका मानव अधिकारको गम्भीर उल्लंघन तथा मानवता विरुद्धको अपराध सम्बन्धी घटना र त्यस्तो घटनामा संलग्न व्यक्तिहरूको बारेमा सत्य अन्वेषण तथा छानविन गरी वास्तविक तथ्य जनसमक्ष ल्याउन, र
- समाजमा मेलमिलाप गराई पारस्परिक सद्भाव तथा सहिष्णुताको भावना अभिवृद्धि गर्दै दिगो शान्ति र मेलमिलापको वातावरण निर्माण गर्न, सो घटनाबाट पीडित व्यक्तिलाई परिपूरणको व्यवस्था लगायत त्यस्तो घटनासँग सम्बन्धित

[५] विस्तृत शान्ति सम्झौताको दफा ५.२.५ ।

[६] नेपालको संविधानको प्रस्तावनाको तेस्रो अनुच्छेद् ।

[७] नेपालको संविधानको धारा ४२ को उपधारा (५) ।

[८] नेपालको संविधानको धारा ३९ को उपधारा (९) ।

[९] नेपालको संविधानको धारा १५२ को उपधारा (१) ।

गम्भीर अपराधमा संलग्न व्यक्तिलाई कानूनी कारबाहीको लागि सिफारिस गर्न।

यो ऐनले दुई वटा छुट्टा छुट्टै आयोगहरू गठन गरी बेपत्ता पारिएका व्यक्तिको छानबिन गरी सत्य निरूपण गरी जनसमक्ष ल्याउने र मानव अधिकारको उल्लंघनका पीडित र पीडकको पहिचान गरी पीडितलाई राहत, पुनर्स्थापना, क्षतिपूर्ति र पीडकलाई कानूनी कारबाही गर्ने, मेलमिलापद्वारा दिगो शान्ति कायम गर्ने लगायतका व्यवस्था गरेको छ।

संवत् २०७१ वैशाख २७ गते बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ जारी भयो। सो ऐनले आयोगहरूको कार्यावधि दुई वर्षको हुने र आवश्यक परेमा अर्को एक वर्ष कार्यावधि थप गर्न सकिने व्यवस्था गरेको छ।[१०] सो व्यवस्था बमोजिम २०७१ माघ २७ गते बेपत्ता पारिएका व्यक्तिको छानबिन आयोग र सत्य निरूपण तथा मेलमिलाप आयोगहरू गठन भए। ती आयोगहरूको कार्यावधिभित्र र थपिएको अवधिभित्र समेत संक्रमणकालीन न्याय सम्बन्धी कार्य पूरा हुन सकेन। त्यसैले सो ऐनमा दोस्रो संशोधन[११] गरी पुनः दोस्रो पटक आयोगहरू गठन गरिएका थिए। दोस्रो पटकका आयोगहरूको कार्यावधि सकिए पछि ऐनको व्यवस्था बमोजिम एक वर्ष म्याद थप गर्दा पनि संक्रमणकालीन न्याय सम्बन्धी कार्य पूरा गर्न नसके पछि ऐनको बाधा अड्काउ फुकाउने व्यवस्था बमोजिम[१२] आयोगको कार्यावधि थप गरिदै आएको छ। यसरी आयोगहरूको कार्यावधि २०७९ असार मसान्तसम्म रहेको छ।

यसै वर्ष बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ मा २०८१।५।१३ मा तेस्रो संशोधन गरिएको छ। सो संशोधनले व्यवस्था गरे बमोजिम आयोग गठनका लागि सिफारिस समिति गठन भई सो समितिले आयोगका पदाधिकारी नियुक्तिका लागि नाम सिफारिस गर्न नसकेको हुँदा हालसम्म आयोगहरू पदाधिकारी विहीन अवस्थामा नै रहेका छन्।

सो ऐनमा भएको तेस्रो संशोधनले सर्वोच्च अदालतले आदेश गरे बमोजिम गम्भीर मानव अधिकारको उल्लंघनका घटनाहरूका पीडकलाई माफी नदिई छानबिनद्वारा दोषी देखिएमा अभियोजन गर्नुपर्ने व्यवस्था समेत गरेको छ।

७. बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ को तेस्रो संशोधनले गरेको मुख्य व्यवस्थाहरू

१. पदाधिकारीको पदावधि र आयोगको कार्यावधि पुनः निर्धारण

बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ मा भएको तेस्रो संशोधनले आयोगका पदाधिकारीको पदावधि नियुक्ति भएको मितिले चार वर्षको हुने र आयोगको कार्यावधि पनि पदाधिकारीको नियुक्तिको मितिले चार वर्षको हुने व्यवस्था गरेको छ। त्यसैगरी यस संशोधनले आयोगका पदाधिकारीको नियुक्तिको

[१०] बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ को दफा ३८।

[११] ऐ. ऐनको दफा ३८ मा उपदफा (३) थप गरी आयोगका पदाधिकारीको पदावधि सकिए तापनि आयोगको कार्यावधि समाप्त भएको नमानिने व्यवस्था गरिएको थियो।

[१२] बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ को संशोधित दफा ४२।

सिफारिस सम्बन्धी समितिले देहायको प्रकृया अवलम्बन गरी आयोगका पदाधिकारीको सिफारिस गर्नुपर्ने व्यवस्था गरेको छः[१३]

- आयोगमा नियुक्तिको लागि योग्य व्यक्तिको संक्षिप्त सूची तयार गरी सार्वजनिक प्रतिक्रियाको लागि प्रकाशन गर्ने,
- संक्षिप्त सूचीमा परेका व्यक्तिहरूको पृष्ठभूमि र निजको सम्बन्धमा प्राप्त भएको प्रतिक्रिया समेतको आधारमा उपयुक्त व्यक्तिलाई नियुक्तिका लागि सिफारिस गर्ने,
- छनौट सम्बन्धी अन्य कार्यविधि समिति आफैले निर्धारण गर्ने।

सो समिति गठन भएको दुई महिना भित्र अध्यक्ष र सदस्यको नाम सिफारिस गरी सक्नु पर्ने व्यवस्था समेत यस संशोधनद्वारा थप गरिएको छ।

आयोगको कार्यावधि भित्र शान्ति प्रकृयाको काम सम्पन्न हुन नसकेमा नेपाल सरकारले कार्य प्रगतिको आधारमा काम सम्पन्न गर्न लाग्ने समयको आँकलन गरी पदाधिकारीहरूको पदावधि र आयोगको कार्यावधि थप गर्न सक्ने व्यवस्था गरेको छ। त्यसैगरी सो चार वर्षे कार्यवधि समाप्त हुनु अगावै आयोगले शान्ति प्रकृयाको काम सम्पन्न भएको घोषणा गरेमा सोही मितिदेखि पदाधिकारीको पदावधि र आयोगको कार्यावधि समाप्त भएको मानिने व्यवस्था समेत यो संशोधनले गरेको छ।[१४]

२. **मानव अधिकारको उल्लंघनको वर्गीकरण**

यस संशोधनले सशस्त्र द्वन्द्वको क्रममा भएको मानव अधिकारको उल्लंघनलाई "मानव अधिकारको उल्लंघन" र "मानव अधिकारको गम्भीर उल्लंघन" गरी दुई वर्गमा विभाजन गरेको देखिन्छ। केही गम्भीर र जघन्य प्रकृतिका अपराधहरूलाई "मानव अधिकारको गम्भीर उल्लंघन" अन्तर्गत राखेको छ। "मानव अधिकारको उल्लंघन" र "मानव अधिकारको गम्भीर उल्लंघन" हुने कार्यहरू देहाय बमोजिम परिभाषित गरिएको छः-

- **मानव अधिकारको उल्लंघन**

यस संशोधनले सशस्त्र द्वन्द्वको क्रममा निःशस्त्र व्यक्ति वा जनसमुदाय विरुद्ध लक्षित गरी वा योजनावद्ध रूपमा सशस्त्र द्वन्द्वका पक्षबाट मानव अधिकारको गम्भीर उल्लंघन बाहेकका प्रचलित नेपाल कानून, अन्तर्राष्ट्रिय मानव अधिकार वा मानवीय कानून विपरीत गरिएको जुनसुकै कार्यलाई मानव अधिकारको उल्लंघनमा समावेश गरेको छ।[१५]

- **मानव अधिकारको गम्भीर उल्लंघन**

सशस्त्र द्वन्द्वको क्रममा द्वन्द्वरत पक्षले गरेको जबर्जस्ती करणी वा गम्भीर यौनजन्य हिंसा, निःशस्त्र व्यक्ति वा जनसमुदाय विरुद्ध लक्ष्यित गरी वा योजनाबद्ध रूपमा सशस्त्र द्वन्द्वका पक्षबाट नियतपूर्वक वा स्वेच्छाचारी रूपमा गरिएको हत्या

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[१३] बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ को दफा ६ को उपदफा (५),(६) र (७)।

[१४] बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग (तेस्रो) संशोधन ऐन, २०८१ द्वारा संशोधित दफा ६ को उपदफा (२) र दफा ३८ को उपदफा (२)।

[१५] ऐ. ले मूल ऐनको दफा २ को खण्ड (ञ) को सट्टा नयाँ खण्ड (ञ) राखी संशोधन गरेको छ।

(आर्बिट्ररी किलिंग), व्यक्ति बेपत्ता पार्ने कार्य र अमानवीय वा क्रूर यातनालाई "मानव अधिकारको गम्भीर उल्लंघन" भित्र राखेको देखिन्छ।[१६]

साथै सो संशोधनले सशस्त्र द्वन्द्वको क्रममा सशस्त्र द्वन्द्वका पक्षबाट बेपत्ता पारी फेला नपरेको व्यक्तिलाई नै "व्यक्ति बेपत्ता पार्ने कार्य" भनी स्पष्टीकरण गरी परिभाषा गरेको देखिन्छ। यस परिभाषाले सशस्त्र द्वन्द्वका पक्षबाट बेपत्ता पारी फेला नपरेको व्यक्तिलाई नै व्यक्ति बेपत्ता पार्ने कार्य मानेको देखिन्छ। यस परिभाषा अनुसार जो पीडित व्यक्ति हो ऊ नै बेपत्ता पार्ने कार्य हुन गएको छ। यो परिभाषा बिल्कुल असङ्गत छ, अनर्थ छ। ऐनको कार्यान्वयनमा नै यस परिभाषाले समस्या पार्ने देखिन्छ। यसलाई पुनः संशोधन गर्नुपर्ने हुन्छ। मूल ऐनको परिभाषा नै ठीक रहेको थियो। मूल ऐनको दफा सो परिभाषालाई विधि निर्मात्री संस्था संसद्ले किन हटायो र सोको सट्टा किन यस्तो अर्थ नलाग्ने र पीडितलाई नै कसूरजन्य कार्य मान्नु पर्ने परिभाषा राखियो ? विचारणीय छ। जे भए पनि यसमा गम्भीर त्रुटि भएको हुँदा पुनः तत्काल यो विषय संशोधन गर्नुपर्ने देखिन्छ। अन्यथा आयोगको काम कारबाहीमा अवरोध सृजना हुन सक्ने देखिन्छ।

३. सशस्त्र द्वन्द्वका क्रममा भएका भएका घटनामा उजुर दिने म्याद थप

यस संशोधनले यस अघि उजुरी दिन नसकेका देहायका अवस्थाका घटनामा उजुरी दिन सकिने गरी तीन महिनाको म्याद दिई उजुरी माग गर्ने व्यवस्था गरेको छः-

- जबरजस्ती करणी वा गम्भीर यौनजन्य हिंसामा तीन महिना भित्र उजुरी दिन सकिने

  यस संशोधनले मानव अधिकारको गम्भीर उल्लंघन सम्बन्धी घटनाको छानबिन गर्ने प्रयोजनको लागि सम्बन्धित आयोगले सशस्त्र द्वन्द्वको क्रममा जबरजस्ती करणी वा गम्भीर यौनजन्य हिंसामा परेका पीडित वा निजको तर्फबाट उजुरी दिन छुट भएको भए आयोगमा उजुरी दिन एक पटकको लागि तीन महिनाको म्याद दिई सार्वजनिक सूचना प्रकाशन गरी उजुरी माग गर्ने र सो बमोजिम उजुरी दिन सकिने व्यवस्था गरेको छ।[१७]

- काबु बाहिरको परिस्थिति परी यस अघि उजुरी दिन छुट भएकोमा उजुरी दिन सकिने

  आयोगले यस अघि उजुरी माग गरेको अवधि भित्र काबु बाहिरको परिस्थिति परी उजुरी दिन नपाएको पीडितले त्यस्तो उजुरी दिन नसकेको आधार र कारण खोली पदाधिकारी नियुक्ति भएको तीन महिनाभित्र सम्बन्धित आयोग समक्ष उजुरी दिन सक्ने र आधार र कारण मनासिव देखिएमा आयोगले उजुरी उपर छानविन गर्न सक्ने व्यवस्था यो संशोधनले गरेको छ।

४. आयोगले उजुरी छानबिन गर्दा अन्य निकायसँग विवरण माग गर्ने अधिकार थप

राष्ट्रिय मानव अधिकार आयोग वा राष्ट्रिय महिला आयोग लगायत अन्य निकायमा सशस्त्र द्वन्द्वको क्रममा भएको मानव अधिकारको उल्लंघन वा मानव अधिकारको गम्भीर उल्लंघनको उजुरी विचाराधीन रहेको कुरा पीडितको निवेदन वा अन्य कुनै स्रोतबाट आयोगलाई जानकारी भएमा सम्बन्धित आयोगले छानविन प्रयोजनका लागि

[१६] बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग (तेस्रो संशोधन) ऐन, २०८१ ऐ. ले मूल ऐनको दफा २ को खण्ड (ञ) पछि नयाँ खण्ड (ञ१) थप गरी मानव अधिकारको गम्भीर उल्लङ्घनको परिभाषा गरेको छ।

[१७] ऐ. ले संशोधन गरेको दफा १३ को उपदफा (६क) र (६ख)।

त्यस्तो उजुरी र सोसँग सम्बन्धित विवरण माग गर्न सक्ने अधिकार यस संशोधनले संक्रमणकालीन न्याय सम्बन्धी आयोगहरूलाई दिएको छ । त्यसरी माग गरेको विवरण सम्बन्धित निकायले आयोगलाई पठाउनु पर्ने बाध्यात्मक व्यवस्था पनि गरिएको छ ।

५. आयोगले तल्लो तहमा कार्यालय वा संयन्त्र स्थापना गर्न, सामुदायिक परिपूरणका कार्यक्रम सञ्चालन गर्न र सहकार्य गर्न सक्ने व्यवस्था

पीडित समक्ष आयोगको प्रभावकारी पहुँचका लागि आयोगले आवश्यकताअनुसार प्रदेश र जिल्ला वा स्थानीय तहमा कार्यालय वा संयन्त्र स्थापना गर्न सक्ने व्यवस्था गरिएको छ । आयोगले पीडित र आश्रित सदस्य समेतलाई लक्षित गरी परिपूरणका कार्यक्रम सञ्चालन गर्न सक्ने व्यवस्था पनि यस संशोधनले गरेको छ । त्यसैगरी आयोगले परिपूरण उपलब्ध गराउँदा आवश्यकता अनुसार प्रदेश सरकार, स्थानीय तह, सामुदायिक संस्था, पीडितले गठन गरेका संघ संस्था तथा निजी क्षेत्रसँग समेत सहकार्य गर्न सक्ने अधिकार यो संशोधनले आयोगलाई दिएको छ ।

६. मानव अधिकारको गम्भीर उल्लंघनमा मेलमिलाप हुन नसक्ने, मेलमिलापका लागि पीडितको स्वतन्त्र सहमति आवश्यक हुने र जुनसुकै चरणमा रहेको उजुरीमा मेलमिलाप हुन सक्ने

ऐनको साविक व्यवस्थामा पीडक र पीडितका बीच मेलमिलाप हुँदा पीडितको स्वतन्त्र सहमति हुनु आवश्यक हुने कुरा उल्लेख थिएन । यस संशोधनले मानव अधिकारको गम्भीर उल्लंघनमा मेलमिलाप हुननसक्ने र सोबाहेकका मानव अधिकारको उल्लंघनका घटनामा पीडितको स्वतन्त्र सहमतिमा आयोगले उजुरी जुनसुकै चरणको कारबाहीमा रहेको भए पनि मेलमिलाप गराउन सक्ने व्यवस्था गरेको छ । त्यसैगरी मानव अधिकारको गम्भीर उल्लंघनका घटनामा मेलमिलाप हुन नसक्ने व्यवस्था गरिएको छ ।[१८]

७. पीडितको परिपूरणको अधिकारको सुनिश्चितता सम्बन्धी व्यवस्था थप

यस संशोधनले पीडितलाई परिपूरणको अधिकार सुनिश्चित गरेको छ । पीडकको पहिचान नभएको, पीडित र पीडक बीच मेलमिलाप भएको वा नभएको, पीडकलाई क्षमादान दिन वा मुद्दा चलाउन सिफारिस भएको वा नभएको जुनसुकै अवस्था भए तापनि पीडितको परिपूरण प्राप्त गर्ने अधिकारमा कुनै असर नपर्ने सुनिश्चित हुने व्यवस्था यस संशोधनले गरेको छ ।[१९]

त्यसैगरी सशस्त्र द्वन्द्वको क्रममा कुनै घटनामा परी मृत्यु भएका, घाइते वा अपाङ्गता भएका सुरक्षाकर्मी वा निजका परिवार, त्यस्तो घटनामा परी मृत्यु भएका, घाइते वा अपाङ्गता भएका अन्य कुनै व्यक्ति वा निजको परिवार वा सशस्त्र द्वन्द्वको व्यवस्थापनको क्रममा भएको हतियार र सेना व्यवस्थापनको अनुगमन सम्झौता, २०६३ बमोजिम दर्ता हुन नसकेका बहिर्गमित व्यक्ति, सशस्त्र द्वन्द्वको क्रममा विच्छ्याइएका बारूदी सुरूङ, राखिएका विस्फोटक पदार्थको सो द्वन्द्वका बखत वा सो पछि पनि विस्फोटनमा परी मृत्यु भएका, घाइते वा अपाङ्गता भएका व्यक्ति वा निजका परिवारका सदस्यले समेत आवश्यक राहत तथा सहयोग सहितको परिपूरण पाउने अधिकार यस संशोधनले सुनिश्चित

[१८] बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप ऐन, २०७१ (तेस्रो संशोधन सहित)को दफा २२ क.।

[१९] बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप ऐन, २०७१ (तेस्रो संशोधन सहित)को दफा २६ को उपदफा (२) र (६ख) ।

गरेको छ । आयोगले त्यस्ता व्यक्तिको अधिकारको प्राप्तिका लागि नेपाल सरकार समक्ष नीतिगत सिफारिस गर्ने व्यवस्था समेत यस संशोधनले गरेको छ। पीडकको आर्थिक विपन्नताको कारणले पीडितलाई क्षतिपूर्ति दिन नसक्ने भएमा नेपाल सरकारले दिनु पर्ने व्यवस्था समेत गरिएको छ।[२०]

८. **आयोगको सिफारिस चित्त नबुझे पीडितले विशेष अदालतमा निवेदन दिन सक्ने**

आयोगले परिपूरणका लागि गरेको सिफारिसमा चित्त नबुझेमा पीडितले त्यसको आधार र कारण खोली विशेष अदालतमा निवेदन दिन सक्ने र सो आधार र कारण मनासिव देखिएमा विशेष अदालतले उपयुक्त आदेश दिन सक्ने व्यवस्था यस संशोधनले गरेको छ।[२१]

९. **बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलापका लागि कोषको स्थापना**

बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलापको लागि आयोगको छानविन, राहत, परिपूरण तथा सोसँग सम्बन्धित आवश्यक अन्य कार्यमा खर्च गर्नका लागि कानून, न्याय तथा संसदीय मामिला मन्त्रालयमा सचिवालय रहने गरी एउटा कोष रहने व्यवस्था यस संशोधनले गरेको छ। सो कोषको सञ्चालनको लागि नीतिगत मार्गदर्शन गर्न सो मन्त्रालयको मन्त्रीको संयोजकत्वमा बढीमा सात सदस्य रहेको कोष सञ्चालन निर्देशक समिति रहने व्यवस्था गरेको छ।[२२]

१०. **मुद्दा चलाउने नचलाउने निर्णय गर्ने हदम्याद एक वर्ष हुने र त्यसरी मुद्दा चलेकोमा हदम्याद भित्र दायर भएको मानिने**

आयोगले पीडक उपर मुद्दा चलाउन सिफारिस गरेको एक वर्ष भित्र मुद्दा चल्ने वा नचल्ने निर्णय गरिसक्नु पर्ने हदम्यादको व्यवस्था यस संशोधनले गरेको छ। साविकको व्यवस्थामा त्यस्तो हदम्याद राखिएको थिएन। त्यसरी मुद्दा चलाइएकोमा त्यस्तो मुद्दा प्रचलित कानूनको हदम्याद भित्र दायर भएको मानिने व्यवस्था गरिएको छ।[२३]

११. **पच्चीस प्रतिशत सजायको माग दावी लिनसक्ने व्यवस्था**

जबरजस्ती करणी र गम्भीर यौनजन्य हिंसाका घटना बाहेकका मानव अधिकारको गम्भीर उल्लंघनका अन्य घटना र मेलमिलाप हुन नसकेको घटनामा सरकारी वकीलले पीडक उपर मुद्दा दायर गर्दा तत्काल प्रचलित कानून बमोजिमको सजायमा पच्चीस प्रतिशतको सजायको माग दाबी लिन सक्ने व्यवस्था यस संशोधनले गरेको छ।[२४]

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[२०] बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप ऐन, २०७१ (तेस्रो संशोधन सहित) को दफा २५ क.।

[२१] ऐ. को दफा २९ ग.।

[२२] बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप ऐन, २०७१ को तेस्रो संशोधनले संशोधन गरेको को दफा २३ क.।

[२३] ऐ. को दफा २८ को उपदफा (५)।

[२४] ऐ. को दफा २८ को उपदफा (६)।

१२. स्वतः निलम्बन भएको मानिने व्यवस्था

सार्वजनिक पद धारण गरेको व्यक्ति उपर मानव अधिकारको गम्भीर उल्लंघनमा मुद्दा दायर भई थुनामा वा न्यायिक हिरासतमा रहेमा त्यस्तो अवधिभर निज आफ्नो पदबाट स्वतः निलम्बन भएको मानिने व्यवस्था गरिएको छ।[२५]

१३. विशेष अदालतको गठन सम्बन्धी व्यवस्था

सशस्त्र द्वन्द्वको क्रममा घटेका घटनाहरूमा आयोगको सिफारिसमा सरकारी वकीलले दायर गर्ने मुद्दाको कारबाही र किनारा गर्नका लागि नेपाल सरकारले न्याय परिषद्को सिफारिसमा एक तीन सदस्यीय विशेष अदालत गठन गर्ने व्यवस्था गरिएको छ। उच्च अदालतका न्यायाधीशहरू मध्येबाट न्याय परिषद्को सिफारिसमा नेपाल सरकारले त्यस्तो विशेष अदालतका अध्यक्ष र सदस्य तोक्ने व्यवस्था रहेको छ। त्यस्तो अदालतले मुद्दाको फैसला गर्दा अधिकार क्षेत्रको प्रयोग र कार्यविधि विशेष अदालत ऐन, २०५९ बमोजिम अवलम्बन गर्नु पर्ने र सो अदालतलाई शुरु मुद्दा हेर्ने अदालतलाई भए सरहको अधिकार हुने व्यवस्था राखिएको छ। जिल्ला र उच्च अदालतमा विचाराधीन सशस्त्र द्वन्द्व अवधिका सोसँग सम्बन्धित रहेका मुद्दाहरू विशेष अदालतमा सर्ने व्यवस्था यस संशोधनद्वारा गरिएको छ।[२६]

१४. संक्रमणकालीन न्यायका सिद्धान्तलाई ध्यान दिई सजाय निर्धारण गर्नुपर्ने व्यवस्था

अन्य प्रचलित कानूनमा जुनसुकै कुरा लेखिएको भए तापनि विशेष अदालतमा दायर भएको मुद्दामा सो अदालतले त्यस्तो घटना हुँदाको परिस्थिति, कारण तथा संक्रमणकालीन न्यायका सिद्धान्तलाई ध्यान दिएर निर्धारण गर्नु पर्ने र सजाय निर्धारण गर्दा विचार गर्नुपर्ने अन्य कुराहरू समेत यस संशोधनले व्यवस्था गरेको छ।[२७]

१५. सर्वोच्च अदालतको संक्रमणकालीन न्याय सम्बन्धी संयुक्त इजलासमा पुनरावेदन लाग्ने व्यवस्था

विशेष अदालतले गरेको फैसला वा अन्तिम आदेश उपर पुनरावेदन सुन्नका लागि सर्वोच्च अदालतमा संक्रमणकालीन न्याय सम्बन्धी संयुक्त इजलास रहने व्यवस्था यस संशोधनले गरेको छ। विशेष अदालतको फैसला वा अन्तिम आदेशमा चित्त नबुझेमा त्यस्तो फैसला वा अन्तिम आदेश भएको पैँतिस दिन भित्र सर्वोच्च अदालतमा संक्रमणकालीन न्याय सम्बन्धी संयुक्त इजलासमा पुनरावेदन दिन सक्ने व्यवस्था छ। सो इजलासले पुनरावेदनमा सुनुवाई गर्दा र निर्णय गर्दा संक्रमणकालीन न्यायका मान्य सिद्धान्तलाई ध्यान दिने व्यवस्था गरेको छ।[२८]

१६. बेपत्ता पारिएको व्यक्तिका परिवारको अंशबण्डा र सम्पत्ति हस्तान्तरण र सुविधा भुक्तानी सम्बन्धी व्यवस्था

संशोधन प्रारम्भ हुँदाका बखत बेपत्ता पारिएको व्यक्तिको स्थिति पत्ता नलागेको व्यक्तिको सगोलको सम्पत्तिमा निजको भाग छुट्याई बाँकी सम्पत्ति बाँकी अंशियार बीच अंशबण्डा गर्न सक्ने व्यवस्था यो संशोधनले गरेको छ। त्यस्तो

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[२५] बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप ऐन, २०७१ को तेस्रो संशोधनले संशोधन गरेको को दफा २८ को उपदफा (७)।

[२६] बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप ऐन, २०७१ (तेस्रो संशोधन सहित)को दफा २९ क.।

[२७] ऐ. को दफा २९ घ.।

[२८] ऐ. को दफा २९ ङ.।

बेपत्ता व्यक्तिको बैंक खातामा रहेको रकम निजले इच्छाईएको व्यक्तिलाई र इच्छाईएको व्यक्ति नभए हकवालालाई बैङ्कले भुक्तानी दिनुपर्ने र त्यस्तो बेपत्ता व्यक्तिले सरकारी निकाय, संस्था वा प्रतिष्ठानबाट निवृत्तभरण, उपदान लगायतका सेवा सुविधा प्राप्त गर्ने रहेछ भने त्यस्तो सेवा सुविधा निजको हकवालालाई उपलब्ध गराउनु पर्ने व्यवस्था समेत यस संशोधनले गरेको छ।[२९]

१७. दोहोरो सजाय नहुने व्यवस्था

तत्काल प्रचलित नेपाल कानून बमोजिम गठित कुनै अदालतबाट सशस्त्र द्वन्द्वसँग सम्बन्धित घटनामा मुद्दा दायर भई पहिला नै सजाय भईसकेको रहेछ भने त्यस्तो व्यक्ति उपर सोही विषयमा पुनः मुद्दा दायर गरी सजाय नगरिने सुनिश्चतता यस संशोधनले गरेको छ।[३०]

८. संशोधनमा रहेका कमजोरी

बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ को तेस्रो संशोधनले संक्रमणकालीन न्याय टुंगोमा पुऱ्याउन महत्वपूर्ण व्यवस्था राखेको र यसबाट संक्रमणकालीन न्यायको टुङ्गो लगाउन धेरै विषयमा सहजता हुने देखिन्छ। तर यो संशोधन गर्दा केही गम्भीर विषयहरूमा त्रुटि हुन गएको छ जसका कारण ऐनको कार्यान्वनयमा कठिनाई उत्पन्न हुन सक्ने देखिन्छ। त्यस्ता केही त्रुटिहरू देहाय बमोजिम रहेका छन् :-

- **त्रुटिपूर्ण परिभाषाले ऐन कार्यान्वयनमा कठिनाई**

  संशोधन ऐनले मानव अधिकारको गम्भीर उल्लंघन अन्तर्गत पर्ने व्यक्ति वेपत्ता पार्ने कार्यको परिभाषा नै अनर्थ गरेको देखिन्छ। बेपत्ता पार्ने कार्य भन्नाले बेपत्ता पारिएको व्यक्ति (पीडित) लाई नै सम्झनु पर्छ भन्ने परिभाषाले त पीडितलाई नै कसूरदार मान्नुपर्ने जस्तो अर्थ दिन्छ। यस परिभाषाले व्यक्ति बेपत्ता पार्नेजस्तो गम्भीर मानव अधिकार उल्लंघनको घटनाको अनुसन्धान, अभियोजन र फैसला गर्दा असहज मात्र नभई असंभव नै देखिन्छ। यस विषयमा पुनः संशोधन गरी मिलाउनु पर्ने देखिन्छ।

- **परिभाषा गर्नुपर्ने शब्दहरूको परिभाषा छुट्यो**

  यस संशोधनले बर्गीकरण गरेको मानव अधिकारको गम्भीर उल्लंघन अन्तर्गतको "गम्भीर यौनजन्य हिंसाका घटना" शब्दावलीको परिभाषा आवश्यक हुन्छ। कुन घटना गम्भीर यौनजन्य हिंसाको हो र कुन घटना सामान्य यौनजन्य हिंसाको हो भनी निर्धारण गर्न समस्या हुन सक्छ। त्यसैले यस शब्दको परिभाषा संशोधनबाट नभएकोले कार्यान्वयनमा कठिनाई हुन सक्छ।

  यो ऐन अन्तर्गतको मुद्दामा कुनै सार्वजनिक पद धारण गरेको व्यक्ति थुनामा वा न्यायिक हिरासतमा रहेमा स्वतः निलम्बन हुने व्यवस्था संशोधन ऐनमा गरिएको छ।[३१] तर "सार्वजनिक पद धारण गरेको व्यक्ति" को हो भन्नेमा विभिन्न ऐनको आ-आफ्नै प्रयोजनको लागि सो शब्दावलीको परिभाषा गरेको देखिन्छ। कुन ऐनको परिभाषा मान्ने भन्नेमा द्विविधा

[२९] बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप ऐन, २०७१ को तेस्रो संशोधनले थपेको दफा ४० क.।

[३०] ऐ. को दफा २९ घ.को उपदफा (३)।

[३१] बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप ऐन, २०७१ को तेस्रो संशोधनद्वारा संशोधित दफा २९ को उपदफा (७)।

हुनगई ऐन कार्यान्वयनमा विवाद आउन सक्ने देखिन्छ । यस संशोधन ऐनमा प्रयोग भएको "सार्वजनिक पद धारण गरेको व्यक्ति" शब्दावलीको परिभाषा यस संशोधनबाट हुन जरूरी रहेकोमा त्यसतर्फ विचार गरिएन ।

त्यस्तै काबु बाहिरको परिस्थिति परी उजुरी दिन नपाएको पीडितले आधार र कारण खोली आयोगमा तीन महिना भित्र उजुरी दिन सक्ने व्यवस्था ऐनमा गरिएकोमा कस्तो अवस्थालाई "काबु बाहिरको परिस्थिति" मान्ने भन्ने अस्पष्टता सृजना हुन सक्छ । आयोगले पीडितले उल्लेख गरेका सबै प्रकारका अवस्थालाई "काबु बाहिरको परिस्थिति" मान्नु पर्ने बाध्यात्मक स्थिति भई काल्पनिक विषयमा पनि उजुरी बढ्न सक्ने सम्भावना देखिन्छ । यस शब्दावलीको परिभाषाले उक्त प्रावधानको कार्यान्वयनमा सहजता प्रदान गर्नमा सहयोग पुऱ्याउने थियो ।

त्यसैगरी मानव अधिकारको गम्भीर उल्लंघन बाहेकका घटनामा पीडितको स्वतन्त्र सहमतिमा मात्र मेलमिलाप हुन सक्ने भन्ने व्यवस्था यस संशोधनले गरेको छ । तर कस्तो अवस्थालाई "स्वतन्त्र सहमति" मान्ने भन्नेमा द्विविधा उत्पन्न हुन सक्छ । त्यसैले "स्वतन्त्र सहमति" शब्दको परिभाषा गर्नु आवश्यक छ । मानव बेचबिखन,जबरजस्ती करणी जस्ता कसूरमा सामान्य कानूनमा "स्वतन्त्र सहमति" शब्दको परिभाषा गरे जस्तै यहाँ पनि सो शब्दको परिभाषा आवश्यक छ । परिभाषा नगरिदा पीडितको स्वतन्त्र सहमति सम्बन्धमा विवाद र असहजता उत्पन्न हुन सक्छ ।

- **अवधि राख्नुपर्ने केही विषयमा अवधि राखिएन**

संक्रमणकाल लम्बिन गएको र संक्रमणकालीन न्याय टुङ्ग्याउन ढिलो भईसकेको विषय सर्वत्र महशुस गरिएकै विषय हो । सरकारी वकीलले मुद्दा चलाउने वा नचलाउने सम्बन्धी निर्णय गर्ने अवधि आयोगबाट सिफारिस प्राप्त भएको मितिले एक वर्ष राखिएको छ ।[३२] तर मुद्दा दायर गर्ने अवधि नै राखिएको छैन । यसलाई मुद्दा चलाउने वा नचालउने निर्णय गर्ने अवधि नराखी मुद्दा दायर गर्ने अवधि एक वर्ष राखेको भए उपयुक्त हुन्थ्यो । यो विषय नियमावलीमा सम्बोधन गर्न छुटाउनु हुँदैन । अन्यथा मुद्दा चल्ने निर्णय भए पछि पनि मुद्दा लामो समय थन्किन सक्ने संभावना देखिन्छ ।

त्यसैगरी विशेष अदालतको गठन कति अवधि भित्र गर्ने भन्ने व्यवस्था राखिएको छैन । सरकारी वकीलबाट मुद्दा चलाउने निर्णय भए पनि विशेष अदालत गठन नभएमा त्यस्ता मुद्दाहरू त्यत्तिकै थन्किन सक्ने सम्भावना देखिन्छ ।

१८. कानून मस्यौदाका दृष्टिले अस्पष्ट र त्रुटिपूर्ण लेखाई

यस संशोधनमा कतिपय विषयहरू अस्पष्ट लेखिएको छ भने कतिपय विषयहरू मस्यौदाको दृष्टिकोणले त्रुटिपूर्ण रहेको देखिन्छ । ठाउँ ठाउँमा यो दफा प्रारम्भ भए पछि भन्ने शब्दावली प्रयोग भएको छ । यसबाट संशोधन ऐनका विभिन्न दफाहरू विभिन्न मितिमा प्रारम्भ हुने रहेछन् भन्ने अर्थ लाग्छ । तर त्यसो नभई दफा १ को उपदफा (२) मा यो ऐन तुरून्त प्रारम्भ हुनेछ भन्ने वाक्यांश लेखिएको हुँदा यो दफा प्रारम्भ भए पछि भन्ने वाक्यांश बोधगम्य र स्पष्ट छैन ।

त्यसैगरी मूल ऐनको दफा १३ मा संशोधन गरी थप गरेको उपदफा (६क) मा "आयोगले" भन्ने शब्द अनावश्यक दोहोऱ्याएर लेखाईलाई अस्पष्ट र भद्दा बनाइएको छ र पठनयोग्य छैन । सोही दफामा उपदफा (६क) थप गरी

[३२] बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप ऐन, २०७१ को तेस्रो संशोधनद्वारा संशोधित दफा २९ को उपदफा (३)।

"यस ऐन अन्तर्गत बनेको नियमावलीमा जुनसुकै कुरा लेखिएको भए तापनि" भन्ने वाक्यांश लेखिएको छ । व्याकरणका नियमले सरल कारकमा "यस ऐन अन्तर्गत" नभई "यो ऐन अन्तर्गत" हुनुपर्थ्यो । तिर्यक कारकमा मात्र कर्ताको रूप परिवर्तन हुन्छ । संशोधन ऐनमा "यस ऐन" भन्ने शब्दावलीले मूल ऐनलाई नजनाई संशोधन ऐनलाई नै जनाउने हुनाले संशोधन ऐन भन्दा अगाडि नै सो संशोधन ऐन अन्तर्गत नियमावली बनाएको भन्ने अस्पष्ट र नमिल्ने अर्थ निस्कन्छ । ऐन संशोधन भए पछि नियमावली बन्छ भन्ने सिद्धान्तको विपरीत राखिएको यो व्यवस्था मस्यौदाका नियमले त्रुटिपूर्ण मात्र होइन, सन्देहात्मक समेत छ ।

"यस ऐन अन्तर्गत बनेको नियमावलीमा जुनसुकै कुरा लेखिएको भए तापनि" भन्नाले मूल ऐन अन्तर्गत बनेको नियमावलीलाई जनाउँदैन । किनभने संशोधन ऐनभर मूल ऐनलाई मूल ऐन नै भनिन्छ । अब नियमावली अनुसार ऐन मिलाउनु पर्ने भन्ने उल्टो अर्थ निस्कने देखिन्छ । सोही उपदफामा उपदफा (६) बमोजिम छानबिन गर्ने भनिएको छ । उपदफा (६) मा छानबिनको प्रकृया वा तरिका लेखिएको नभई छानबिनका आधारहरू मात्र उल्लेख छ । उपदफा (६) का आधारमा छानविन गर्नेछ लेख्नु पर्थ्यो । आयोगले सो विषय अनुमान गरेर कार्यान्वयन गर्नुपर्ने देखियो । अनुमानले कार्यान्वयन गर्दा विवाद उत्पन्न हुने मात्र नभई गलत अर्थ लाग्न सक्छ ।

मूल ऐनको दफा ७ को उपदफा (१) को खण्ड (ग) मा संशोधन गर्दा "... नेपाल सरकारले हटाएमा" हुनुपर्नेमा "... नेपाल सरकारले हटेमा" हुने गरी संशोधन गरिएको मस्यौदा दृष्टिले त्रुटिपूर्ण र अस्पष्ट देखिन्छ । त्यसैगरी व्याकरणात्मक अशुद्धिहरू संशोधन ऐनभर धेरै नै रहेका छन् । शब्द प्रयोगमा पनि एकरूपता छैन । कुनै स्थानमा *मानव अधिकारको उल्लंघन* त कतै *मानव अधिकार उल्लंघन* लेखिएको छ ।

- **केही व्यवस्थाहरू अझै अस्पष्ट**

आयोगको अध्यक्ष र सदस्यको छनौटका लागि दफा ३ को उपदफा (३) बमोजिम गठन हुने सिफारिस समितिले समिति गठन भएको दुई महिना भित्र सिफारिस गरी सक्नु पर्ने व्यवस्था संशोधनले थपेको उपदफा (७) मा गरिएको छ । तर सो अवधिभित्र सिफारिस गर्न नसकेमा वा नगरेमा के हुने ? अस्पष्ट छ । त्यस्तो अवस्थामा पुनः अर्को सिफारिस समिति गठन गर्न मिल्ने वा नमिल्ने भन्ने सम्बन्धमा र त्यसरी आयोगका पदाधिकारी सिफारिस नगर्ने समितिका पदाधिकारीलाई जिम्मेवार बनाउने स्पष्ट व्यवस्था राखिनु पर्थ्यो । त्यस्तो स्पष्ट व्यवस्था नहुँदा अन्योल सृजना हुन सक्छ ।

त्यसैगरी पीडकलाई प्रचलित कानून बमोजिम हुने सजायको पच्चीस प्रतिशत माग दावी लिन सक्ने व्यवस्था अस्पष्ट छ । कस्तो कस्तो अवस्थामा त्यस्तो माग दावी लिन सक्ने हो, ती अवस्थाहरू ऐनमा नै स्पष्ट हुनु पर्थ्यो । सो मागदावी लिँदा घटनाको परिस्थिति, कारण र संक्रमणकालीन न्यायको सिद्धान्तलाई आधार लिने भनिएको छ, यी विषयहरू ठोस र वस्तुनिष्ठ आधार होइनन्, त्यसैले यो विषय पनि सरकारी वकीलको विवेकमा छोडिएको देखिन्छ । विवेक प्रयोगको ठोस आधार ऐनमा लेख्नु पर्थ्यो ।

९. बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ को तेस्रो संशोधन पश्चात् आयोगहरूको भूमिका

बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ को तेस्रो संशोधन पश्चात् संक्रमणकालीन न्याय सम्बन्धी आयोगहरूको भूमिकामा थप स्पष्टता र गहनता थपिएको छ। साविक ऐनको बेपत्ता व्यक्तिको स्थितिको पहिचान, सत्य निरूपण, पीडित र पीडकको पहिचान, पीडितलाई परिपूरण सिफारिसका साथै पीडकलाई अभियोजन सिफारिस गर्ने आयोगको जिम्मेवारीलाई यस संशोधनले थप स्पष्ट पारेको छ। यसबाट आयोगलाई आफ्नो कार्य सम्पादनमा थप सहजता मिल्नेछ। यस संशोधन पश्चात् संक्रमणकालीन न्याय सम्बन्धी आयोगहरूको भूमिकालाई देहाय बमोजिम उल्लेख गर्न सकिन्छः-

- **प्राप्त थप जिम्मेवारी वहन**

यस संशोधनले मूल ऐनको दफा १३,२२,२३,२५,२६ मा संशोधन गर्दै दफा २२क., २५क. थप गर्दै आयोगहरूलाई थप जिम्मेवारी प्रदान गरेको छ। आयोगहरूले देहाय बमोजिम सो थप जिम्मेवारी कुशलतापूर्वक वहन गर्न भूमिका खेल्नु पर्ने देखिन्छः-

१. मानव अधिकारको उल्लंघन तथा मानव अधिकारको गम्भीर उल्लंघनको प्रकृति, गम्भीरता तथा सशस्त्र द्वन्द्वका क्रममा द्वन्द्वका पक्षहरूले गरेका कार्यहरूको विश्लेषण गर्ने,
२. मानव अधिकारको उल्लंघन तथा मानव अधिकारको गम्भीर उल्लंघनको बारेमा अन्वेषणको प्रकृया निर्धारण गरी सत्य अन्वेषण गर्ने,
३. सत्य अन्वषेणका लागि उजुरीको प्रारम्भिक छानबिन गरी सकेपछि यथाशीघ्र पीडितलाई मनोसामाजिक परामर्श, अन्तरिम राहत र राहत तथा क्षतिपूर्ति प्रदान गर्न, पुनर्स्थापना गर्न वा अन्य उपयुक्त व्यवस्था गर्न नेपाल सरकार समक्ष सिफारिस गर्ने,
४. पीडितलाई कानूनको अधीनमा रही उचित र मनासिव परिपूरण सिफारिस गर्ने,
५. कुनै पीडकको आर्थिक विपन्नताको कारण पीडितलाई क्षतिपूर्ति दिन नसक्ने देखिएमा नेपाल सरकारलाई सो रकम पीडितलाई प्रदान गर्न सिफारिस गर्ने,
६. मानव अधिकारको गम्भीर उल्लंघन बाहेकका घटनामा पीडित वा पीडकले आयोग समक्ष मेलमिलापका लागि निवेदन दिएमा त्यस्तो व्यहोरामा पीडितको स्वतन्त्र सहमति भए नभएको यकिन गर्ने र पीडितको स्वतन्त्र सहमति रहेको सुनिश्चित भए पछि पीडित र पीडक बीच एक आपसमा मेलमिलाप गराउने,
७. मानव अधिकारको गम्भीर उल्लंघन बाहेकका घटनामा पीडितलाई हुन गएको क्षति र पीडकले आयोग समक्ष व्यक्त गरेको भनाई समेतको आधारमा पीडितको स्वतन्त्र सहमतिमा क्षमादानको सिफारिस गर्ने,
८. मानव अधिकारको गम्भीर उल्लंघन सम्बन्धी घटना र मेलमिलाप हुन नसकेको मानव अधिकारको उल्लंघनको घटनामा पीडकलाई अभियोजनका लागि महान्यायाधिवक्ता समक्ष सिफारिस गर्ने,
९. मानव अधिकारको गम्भीर उल्लंघनको घटनामा संलग्न व्यक्तिलाई परीक्षण (भेटिङ्) का लागि सिफारिस गर्ने,
१०. पीडित केन्द्रित, लैङ्गिक मैत्री तथा अपाङ्गमैत्री हुने गरी पारदर्शी र वस्तुनिष्ठ रूपमा कार्य सम्पादन गर्ने,

११. भविष्यमा मानव अधिकार उल्लंघन तथा मानव अधिकारको गम्भीर उल्लंघनका घटना हुन नदिने सुनिश्चितताको लागि गर्नुपर्ने नीतिगत, कानूनी तथा संस्थागत सुधारको सम्बन्धमा सिफारिस गर्ने, र

१२. सशस्त्र द्वन्द्वका अन्तर्निहित कारणहरूको पहिचान गर्ने, संक्रमणकालीन न्यायको लागि राहत, परिपूरण सम्बन्धमा नेपाल सरकारलाई नीतिगत सुझाव दिने।

- **प्राप्त जिम्मेवारीलाई कुशलतापूर्वक वहन गर्ने**

आयोगहरूले आफूलाई तोकिएको जिम्मेवारी कुशलतापूर्वक वहन गर्नका लागि देहायको भूमिका निर्वाह गर्नुपर्ने देखिन्छः-

१. ऐनका प्रावधान (संशोधनले थप गरेका व्यवस्था र साविकका व्यवस्था) मा स्पष्टता ल्याउने, संशोधन नै गर्नुपर्ने भएमा शीघ्र संशोधनको पहल गर्ने,

२. आयोगमा कार्यरत पदाधिकारी र कर्मचारीले इमानदारिता र कुशलतापूर्वक जिम्मेवारी वहन गर्ने वातावरण सृजना गर्ने,

३. आयोगमा पीडितमैत्री वातावरण सृजना गर्न आयोगका पदाधिकारी र कर्मचारीलाई बेलाबेलामा संक्रमणकालीन न्याय सम्बन्धी विषयमा अभिमुखिकरण र तालिम दिने,

४. आयोगका पदाधिकारीको जिम्मेवारी र दायित्व न्यायोचित र क्षमतामा आधारित भएर बाँडफाँट गर्ने,

५. सबै पीडित समक्ष आयोगको पहुँच विस्तार गर्न आवश्यकता अनुसार तल्लो तहमा समेत आयोगका कार्यालय वा संयन्त्रको विकास गरी त्यस्तो संयन्त्रलाई प्रभावकारी र चुस्त राख्ने,

६. आयोगमा परेका उजुरीहरूको छानविन र अनुसन्धानका लागि विज्ञ जनशक्तिको व्यवस्थापन गर्ने,

७. आयोगसमक्ष पीडितहरूको सहज पहुँचका लागि आवश्यक व्यवस्था गर्ने, पीडितप्रति आयोगका कर्मचारीले गर्ने व्यवहार पीडितमैत्री भए नभएको अनुगमन र सुपरीवेक्षण गरी पीडितमैत्री व्यवहार भएको सुनिश्चित गर्ने,

८. आयोगको कार्य सम्पादनलाई छिटो छरितो र चुस्त बनाउन आवश्यक उपायहरू अवलम्बन गर्ने,

९. ऐनमा भएको तेस्रो संशोधनले तोकेको चार वर्षको कार्यावधि भित्र नै आयोगहरूलाई तोकिएको संक्रमणकालीन न्याय सम्बन्धी सम्पूर्ण कार्य सम्पन्न गर्ने गरी आयोगहरूको काम कारबाही द्रुत गतिमा सम्पन्न गर्ने।

१०. निष्कर्ष

नेपालमा संक्रमणकालीन न्याय र शान्ति प्रकृयालाई निष्कर्षमा पुऱ्याउनका लागि विगत लामो समयदेखि विभिन्न प्रयासहरू हुँदाहुँदै पनि टुंगोमा पुग्न सकेको अवस्था छैन। हालै यस सम्बन्धी आधारभूत कानून बेपत्ता पारिएका व्यक्तिको छानविन, सत्य निरूपण र मेलमिलाप आयोग ऐन, २०७१ मा महत्वपूर्ण संशोधन गरिएको छ। सो संशोधनले आयोगको पुनः गठन गर्ने र चार वर्षे कार्यावधि भित्र नै संक्रमणकालीन न्याय र शान्ति प्रकृयाका सम्पूर्ण कार्यहरू सम्पन्न गर्नुपर्ने गरी आवश्यक व्यवस्था गरेको हुँदा सोही बमोजिम आयोगहरूले भूमिका निर्वाह गर्नु पर्ने देखिन्छ। आयोगको भूमिकाका बारेमा चर्चा गर्नु अघि आयोगको गठन नै शिघ्र हुनु पर्ने देखिन्छ। आयोगको गठन नै हुन नसकेमा यो लेखको सुझावको कुनै औचित्य रहने छैन।

Public Hearing: Its Importance in Transitional Justice

Pooja Khatri

Abstract

Public hearings are a critical component of transitional justice, offering victims a platform to share their experiences, fostering accountability, and promoting reconciliation in post-conflict societies. This paper examines the role of public hearings in addressing historical human rights violations, highlighting their significance in truth-telling, transparency, and societal healing. Through case studies from Argentina, South Africa, Sierra Leone, and Nepal, the study explores legal frameworks governing public hearings, their contributions to national reconciliation, and the challenges they face, such as political resistance, victim protection, and legal constraints. While public hearings contribute to historical accountability and healing, their effectiveness depends on strong institutional support, security measures for participants, and a commitment to justice. The paper concludes by recommending strategies to enhance the legitimacy and impact of public hearings in transitional justice processes, particularly within Nepal's evolving legal framework.

1. What is Transitional Justice?

Transitional justice (TJ) is a complex and multidimensional approach that helps societies confront and address past large-scale human rights violations, particularly during transitions from conflict or authoritarian rule to peace and democracy. In the 2004 report titled "The Rule of Law and TJ in Conflict and Post-Conflict Societies," the United Nations Secretary-General defined transitional justice as:[1]

"the 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."

Joint Secretary, Commission of Investigation on Enforced Disappeared Persons, Nepal

[1] United Nations, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies,* U.N. Doc. S/2004/616 (Aug. 23, 2004), available at https://digitallibrary.un.org/record/527647?ln=en, (Accessed on Feb. 1, 2025).

It is basically based on four pillars[2] which are truth, justice, reparation and guarantee of non-occurrence. The Max Planck Encyclopedia of Public International Law describes TJ as a branch of international law focused on addressing past atrocities during political transitions. It applies mainly in two contexts: post-conflict justice and redressing abuses by authoritarian regimes. The overarching goal of TJ is to eliminate impunity, uphold the rule of law, and support democratic governance by implementing legal, institutional, and societal reforms.[3]

TJ comprises measures to address severe human rights violations during conflicts or oppressive regimes. It includes acknowledging past wrongs, prosecuting offenders through legal procedures, compensating victims, and, when suitable, granting amnesty with victims' consent, ensuring their dignity. TJ aims to promote reconciliation, justice, and reparation, ultimately fostering a fair society and lasting peace in post-conflict settings by supporting victims and ensuring justice.[4]

The United Nations' Guidance Note on TJ, issued in March 2010 outlines the key components of TJ, such as prosecution, truth-seeking, reparations, institutional reform, and national consultations, tailored to each society's context and international legal standards. Recommendations for strengthening UN activities include addressing the root causes of conflict, integrating human rights and TJ into peace processes, and coordinating disarmament and reintegration efforts with TJ. This framework aims to help societies achieve sustainable peace and the rule of law.[5]

TJ prioritizes truth commissions to document past human rights abuses, recognize victims, and shape historical narratives. It also involves providing reparations, including financial aid, healthcare, and education, to support victims. Additionally, it focuses on reforming state institutions like the judiciary, police, and military to prevent future abuses. Memorialization efforts, such as museums and monuments, play a key role in honoring victims and promoting

[2] Special Rapporteur on Truth, Justice and Reparation on Apologies for Gross Human Rights Violations and Serious Violations of International Humanitarian Law, U.N. Doc. A/74/147 (2019)

[3] Anja Seibert-Fohr, *Transitional Justice in Post-Conflict Situations,* in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, Rüdiger Wolfrum ed., (Oxford University Press 2012), cited in *European Parliament,* DROI 2006/28, available at https://www.europarl.europa.eu/meetdocs/2004_2009/documents/fd/droi20060828_definition_/droi20060828_definition_en.pdf, (Accessed on Feb. 1, 2025)

[4] Inseconline, Transitional Justice in Post-Conflict Societies and Nepal's Efforts, INSEC ONLINE (Nov. 15, 2018), available at https://inseconline.org/en/forum/transitional-justice-in-post-conflict-societies-and-nepals-efforts/, (Accessed on Feb. 1, 2025)

[5] Security Council Report, Transitional Justice: A Framework for UN Engagement, available at https://securitycouncilreport.org (Accessed on Feb. 3, 2025)

awareness of past atrocities.[6] Public hearings in TJ provide victims and witnesses a platform to share their experiences with truth commissions, ensuring public acknowledgment, historical documentation, and societal healing. They promote reconciliation, transparency, and inclusivity, allowing communities to engage with past atrocities and reflect on justice.[7]

2. What is the Relation between Public Hearing and Transitional Justice?

A public hearing is a formal and transparent forum in which various stakeholder including victims, perpetrators, government representatives, and, at times, the general public assemble to discuss, testify to, or witness events related to human rights violations, systemic injustices, or abuses that transpired during periods of armed conflict, authoritarian governance, or political repression.[8] Additionally, it serve as a pivotal mechanism within truth-telling processes, typically facilitated by Truth and Reconciliation Commissions (TRCs) or analogous bodies.

These hearings are strategically designed to foster transparency, accountability, and recognition of victims' experiences, while simultaneously contributing to societal healing and the reconciliation of formerly divided communities in post-conflict or post-authoritarian contexts. Through such proceedings, it aims to provide a structured environment for confronting the past, establishing an official record of historical injustices, and facilitating the collective process of rebuilding trust and social cohesion.[9]

Public hearings in TJ are typically conducted after a period of initial stabilization following conflict or authoritarian rule. This timing allows for the establishment of necessary legal and institutional frameworks, ensuring that the hearings are conducted in a manner that upholds due process and the rule of law. The specific timing can vary based on the unique

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[6] United Nations, Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence: Memorialization Processes in the Context of Serious Violations of Human Rights and International Humanitarian Law: The Fifth Pillar of Transitional Justice, U.N. Doc. A/HRC/45/45 (2020)

[7] U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, ABOUT TRANSITIONAL JUSTICE AND HUMAN RIGHTS, available at https://www.ohchr.org/en/transitional-justice/about-transitional-justice-and-human-rights, (Accessed on Feb. 3, 2025)

[8] Richard Ashby Wilson, THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA: LEGITIMIZING THE POST-APARTHEID STATE 98 (Cambridge University Press 2001)

[9] Aneta Wierzynska, *Consolidating Democracy Through Transitional Justice: Rwanda's Gacaca Courts,* Vol. 79(5), NEW YORK UNIVERSITY LAW REVIEW 1935 (2004)

circumstances of each society, including the severity of past abuses, the readiness of institutions, and the needs of the affected communities.

3. How Public Hearings contribute in Transitional Justice Process?

Public hearings are a crucial aspect of TJ, providing victims a platform to share their experiences and allowing perpetrators to acknowledge their guilt. These hearings contribute to national reconciliation and collective memory, enhancing the legitimacy of TJ processes, especially in contexts of skepticism about legal fairness or accountability. They play a significant role in addressing the legacies of human rights violations, armed conflict, or authoritarian regimes, facilitating truth-telling, accountability, and societal healing. Top of FormBottom of Form

a. Platform for Victims

Public hearings provide a space for victims to testify, ensuring their voices are heard and their experiences are validated. This contributes to both personal healing and the accurate documentation of human rights violations, which is essential for historical accountability.[10] It serves as a vital platform for victims to publicly share their experiences, offering them an opportunity to have their suffering recognized and validated by both the commission and society at large.

b. Accountability for Perpetrators

In the early stages of truth commissions, particularly those initiated in Latin America during the 1980s, public hearings were not a common practice. Several factors contributed to this absence. In some instances, confidentiality was crucial in encouraging perpetrators to step forward, while in other cases, concerns about potential retribution outweighed the advantages of public exposure.

It allows perpetrators to admit guilt in exchange for amnesty or reduced sentences. This process of accountability is crucial for restoring trust in the legal system and fostering transparency regarding the crimes committed.[11]

c. National Reconciliation

The hearings facilitate national reconciliation by contributing to collective memory, encour-

[10] Comisión por la Memoria, *Informe Nunca Más 1984,* COMISIÓN POR LA MEMORIA, available at https://www.comisionporlamemoria.org/por-que-mienten-los-negacionistas/informe-nunca-mas-1984/, (Accessed on Feb. 4, 2025)

[11] Truth and Reconciliation Commission of South Africa, *Report of the Truth and Reconciliation Commission* (1998)

aging dialogue between victims and perpetrators, and promoting societal healing. They help build a shared understanding of the past, which is vital for overcoming societal divisions.[12]

d. Legitimacy of TJ: The public nature of the hearings enhances the legitimacy of TJ processes. Transparency and public scrutiny are essential, particularly in contexts where there are doubts about the impartiality of the legal system or the effectiveness of other accountability measures.[13]

4. Global Implementation of Public Hearings in Transitional Justice

Public hearings in TJ evolved in the late 20th century as part of efforts to address past atrocities and promote justice, truth-telling, and reconciliation in post-conflict societies.[14] However the practice of public hearing through different modes had been adopted in history as a part of TJ mechanism.

a. Truth Commissions in the 1980s

The concept of public hearings within the framework of TJ began to emerge in the 1980s. One of the earliest instances occurred in Argentina following the end of the 'Dirty War' (1976-1983). In September 1985, nine members of Argentina's military junta, whose successive regimes covered the period known as the 'Dirty War,' faced a trial that included public testimonies. This trial marked a significant moment in the use of public hearings for addressing past human rights violations.[15] The Argentine Truth and Reconciliation Commission (1983), known as the National Commission on the Disappearance of Persons (CONADEP), marked an early example of a truth-seeking body where public hearings allowed victims and witnesses to testify about the atrocities committed by the military dictatorship.[16]

The trial featured public testimonies from victims and witnesses, providing a platform for sharing experiences of state-led repression. Over approximately eight months, the court held

[12] Truth and Reconciliation Commission of Sierra Leone, *Final Report* (2004)

[13] United Nations, GUIDANCE NOTE ON TRANSITIONAL JUSTCIE (2010)

[14] Comisión Nacional sobre la Desaparición de Personas (CONADEP), *Nunca Más* (1984); Truth and Reconciliation Commission of South Africa, *Report of the Truth and Reconciliation Commission* (1998); Truth and Reconciliation Commission of Sierra Leone, *Final Report* (2004); Commission for Historical Clarification (Guatemala), *Memory of Silence: The Guatemalan Truth Commission Report* (1999)

[15] *See generally*, Ellen L. Lutz & Caitlin Reiger eds., PROSECUTING HEADS OF STATE (Cambridge University Press, 1st ed., 2009)

[16] The Report of the Argentine National Commission on the Disappeared (CONADEP), *Nunca Más* (1984)

78 public hearings, during which more than 700 witnesses delivered their accounts. These sessions were meticulously documented, resulting in around 530 hours of audiovisual recordings. The public nature of the testimonies aimed to acknowledge past abuses, contribute to the historical record, and promote societal understanding and reconciliation.[17]

b. Truth Commissions (1995-2002)

The South African Truth and Reconciliation Commission (TRC), established in 1995, was a crucial mechanism in addressing the human rights violations of the apartheid era. Between 1996 and 1998, the TRC held public hearings to uncover the truth about the atrocities committed during apartheid, foster healing for victims, and promote national reconciliation. These hearings were designed to allow victims and survivors to share their experiences and give perpetrators the opportunity to admit their wrongdoings. Perpetrators who fully disclosed their involvement in violations were granted amnesty, creating an incentive for open dialogue and truth-telling. The TRC's focus was on restorative justice, with legal and psychological support offered to victims and a commitment to public accountability for those responsible for the abuses.[18] The hearings were structured in stages, beginning with outreach and preparation, followed by sessions focused on gross human rights violations and then thematic hearings on specific issues like political violence and abuses by security forces.

The TRC's hearings were organized into three committees[19] the Human Rights Violations Committee (HRVC), which collected testimonies from victims and held public hearings across the country; the Amnesty Committee, which granted amnesty to perpetrators who fully disclosed their involvement in human rights violations; and the Reparation and Rehabilitation Committee, which focused on compensating victims and providing support for their rehabilitation. Each committee had a distinct role in addressing the consequences of apartheid violence and contributing to the healing process. The HRVC was responsible for documenting atrocities and gathering testimonies related to racial violence, torture, and forced

[17] Plan Cóndor, *The Argentine Trial of the Military Juntas,* available at https://plancondor.org/en/node/1473, (Accessed on Feb. 3, 2025)

[18] Truth and Reconciliation Commission of South Africa, *Final Report,* Volume 1: *The Truth and Reconciliation Commission of South Africa Report* 16-20 (Truth and Reconciliation Commission 1998)

[19] John Doe, *Reconciliation: The South African Truth and Reconciliation Commission's Contribution to Dealing with the Past, Reconciling, and Building the Nation,* RESEARCHGATE, available at https://www.researchgate.net/publication/266285662_Reconciliation_The_South_African_Truth_and_Reconciliation_Commission's_contribution_to_dealing_with_the_past_reconciling_and_building_the_nation, (Accessed on Feb. 4, 2025)

removals. The Amnesty Committee's role was to provide a legal framework for perpetrators to disclose the truth in exchange for amnesty. Finally, the Reparation and Rehabilitation Committee worked on delivering reparations and aiding victims' recovery. Together, these hearings and committees helped South Africa reconcile with its past and establish a more just society.

c. International Criminal Court and Hybrid Tribunals

While international criminal tribunals like the International Criminal Court (ICC) or ad hoc tribunals (e.g., for the former Yugoslavia and Rwanda) focus primarily on criminal accountability, some hybrid tribunals and TJ mechanisms, like those in Cambodia or East Timor, have included elements of truth-telling and public hearings. These public hearings aim to hold perpetrators accountable in a way that engages the public and facilitates understanding of the broader societal impacts of mass atrocities.[20]

Public hearings in Cambodia and East Timor, complement the criminal accountability focus of international tribunals like the ICC and ad hoc courts. These hearings aim to document atrocities, provide a platform for victims to testify, and promote national reconciliation by engaging the public. In East Timor, the Truth and Reconciliation Commission (CAVR) held public hearings to address human rights violations during the Indonesian occupation, broadcasting testimonies to foster societal healing and understanding. Similarly, in Cambodia**,** the Extraordinary Chambers in the Courts of Cambodia (ECCC) integrated public hearings to offer a space for truth-telling, accountability, and public engagement in understanding the Khmer Rouge crimes.

d. Public Hearings in Transitional Justice: Global Case Studies

i. South Africa

The TRC organized 83 public hearings across South Africa, allowing victims to share their stories in diverse public spaces such as town halls, schools, and churches. These hearings, broadcasted on television and radio, reached millions of South Africans, helping to humanize the process and create a national dialogue around the injustices of apartheid. Through this openness and media coverage, the TRC aimed to confront the past, foster collective understanding, and facilitate societal reconciliation.[21] These hearings, broadcast on television

[20] Naomi Roht-Arriaza, *Hybrid Justice in East Timor, Sierra Leone, and Cambodia: Lessons Learned and Prospects for the Future,* Vol. 43 (1), STANFORD JOURNAL OF INTERNATIONAL LAW, Stanford Law School, 2007.

[21] International Center for Transitional Justice, *Public Hearings: Platforms for Truth and Dignity.*

and radio, reached a broad audience, enabling the public to engage directly with the nation's painful history. The hearings served two primary functions: first, truth-telling**,** by allowing victims and witnesses to share their experiences and enabling perpetrators to apply for amnesty in exchange for full disclosure of their actions; and second, reconciliation**,** by fostering national healing and mutual understanding through their public and transparent nature.[22]

ii. **Sierra Leone**

The modality and strategy employed by Sierra Leone's Truth and Reconciliation Commission (TRC) (2002-2004) centered on restorative justice, with a focus on truth-telling and national reconciliation. The public hearings served as a crucial platform for victims to share their painful experiences and for perpetrators to confess their involvement in war crimes in exchange for the possibility of amnesty. This non-punitive approach promoted transparency and accountability, shedding light on the atrocities committed during the civil war. The TRC's strategy included extensive outreach to encourage wide participation, as well as providing legal and psychological support to help victims navigate the emotional challenges of testifying. [23]

Through these public hearings, the TRC aimed to foster healing by validating the suffering of victims and creating a national dialogue on the country's violent past. The outcomes of this strategy were significant, including the documentation of war crimes, the establishment of a collective memory of the conflict, and the promotion of reconciliation among Sierra Leoneans.[24]

iii. **Guatemala**

In Guatemala, the Commission for Historical Clarification (CEH) held public hearings from 1997 to 1999 to investigate human rights violations during the civil war (1960-1996), particularly the genocide against indigenous communities, and to provide a public record of the conflict[25]. Likewise, in Chile, public hearings were part of the Truth and Reconciliation Commission (1990-1991), which aimed to document abuses during Augusto Pinochet's dic-

[22] Truth and Reconciliation Commission of South Africa, *Report of the Truth and Reconciliation Commission* (1998)

[23] Truth and Reconciliation Commission of Sierra Leone, *Final Report* (2004); Commission for Historical Clarification (Guatemala), *Memory of Silence: The Guatemalan Truth Commission Report* (1999)

[24] Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission,* Volume I (Sierra Leone Truth and Reconciliation Commission 2004)

[25] Guatemala Truth Commission, FROM MADNESS TO HOPE: THE 12-YEAR WAR IN GUATEMAMA (Commission for Historical Clarification 1999)

tatorship and facilitate national healing.[26] Other countries, such as Liberia[27], Timor-Leste[28], and Morocco[29], have also conducted public hearings as part of their TJ frameworks, focusing on truth-telling, reparations, and fostering reconciliation after periods of conflict or authoritarian rule. These hearings are essential in promoting transparency, accountability, and social healing by confronting painful pasts through a shared public dialogue.

iv. **Peru**

The Peruvian Truth and Reconciliation Commission (TRC), established in 2001 after the end of the Fujimori regime, was tasked with investigating human rights violations during Peru's internal armed conflict from 1980 to 2000. The conflict involved the government, insurgent groups like the Shining Path, and paramilitary forces, resulting in around 69,000 deaths or disappearances, mostly among Indigenous people in rural areas[30]. The TRC aimed to investigate the causes of the violence, identify responsible parties, document its impact, and promote reconciliation. Public hearings were a key element, with approximately 12 hearings held across the country, including rural areas, allowing victims to share their experiences and raising awareness about the scale of the atrocities. These testimonies were crucial in countering official narratives that minimized the violence and documenting its human toll. [31]

5. Is Victims Satisfaction a Key Component in Public Hearing?

Public hearings conducted by truth commissions in various countries have had mixed outcomes in terms of victim satisfaction. In South Africa, the TRC allowed victims to share their stories but left many dissatisfied due to the amnesty granted to perpetrators, which prevented prosecutions.[32] Similarly, in Rwanda, the Gacaca courts provided some

[26] Chile Truth and Reconciliation Commission, *Report of the Chilean Truth and Reconciliation Commission* (1991)

[27] Truth and Reconciliation Commission of Liberia, *Final Report of the Truth and Reconciliation Commission of Liberia,* available at www.trcliberia.org (Accessed on Feb. 4, 2025)

[28] Comissão de Acolhimento, Verdade e Reconciliação de Timor-Leste, *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste,* Relief Web, available at https://reliefweb.int/report/timor-leste/chega-report-commission-reception-truth-and-reconciliation-timor-leste (Accessed on Feb. 4, 2025)

[29] Equity and Reconciliation Commission, *Final Report of the Equity and Reconciliation Commission,* National Human Rights Council, available at https://archive.cndh.ma/an/rubriques/documentation/publications/report-equity-and-reconciliation-commission-ier (Accessed on Feb. 4, 2025)

[30] Lisa J. Laplante & Kimberly Susan Theidon, *Truth with Consequences: Justice and Reparations in Post-Truth Commission Peru*, 29 Hum. Rts. Q. 228 (2007)

[31] Franka Winter, *Giving Voice to the Voiceless? Second Thoughts on Testimony in Transitional Justice,* Vol. 6(3), A JOURNAL ON SOCIAL HISTORY AND LITERATURE IN LATIN AMERICA 90 (Contra Corriente) 2009.

[32] International Center for Transitional Justice, *Disarmament, Demobilization, and Reintegration: The Case of South Africa* (2009), available at https://www.ictj.org/sites/default/files/ICTJ-DDR-South-Africa-CaseStudy-2009-English.pdf. (Accessed on Feb. 10, 2025)

justice, but many victims felt the sentences were too lenient, and safety concerns emerge.[33] Chile's Rettig Commission offered victims a chance to voice their suffering, but many were frustrated by the lack of accountability, as the commission could not prosecute perpetrators.[34] In Peru, the CVR gave victims a platform to speak, but the lack of prosecution left many dissatisfied. Sierra Leone's TRC allowed victims to testify but did not hold perpetrators accountable, especially due to the amnesty granted.[35] In all of these cases, victims valued the recognition and opportunity to speak out, but the absence of full justice and accountability led to widespread dissatisfaction.

The dissatisfaction stemmed from several key issues. While truth commissions like South Africa's TRC and Chile's Rettig Commission allowed victims to share their stories, the failure to pursue criminal prosecutions left perpetrators unaccountable. In Rwanda, lenient sentences for perpetrators led to frustration as victims felt justice was not fully served. In Liberia, victims felt that the process lacked reparations, leaving their suffering unaddressed. Additionally, in community-based processes like Rwanda's Gacaca, safety concerns arose, with victims worried about retribution due to the absence of adequate protection. In Peru and Sierra Leone, the truth-telling process was seen as incomplete, with many grievances left unaddressed. The focus on lower-level perpetrators and the exclusion of powerful elites also deepened dissatisfaction, as victims felt that the powerful escaped justice. Ultimately, the lack of criminal accountability, lenient sentencing, insufficient reparations, safety concerns, and incomplete truth-telling were common sources of dissatisfaction across all these processes.

In many transitional justice processes, the issue of consent varied between countries and specific commissions. In South Africa, the TRC sought victims' consent to participate in public hearings, but victims sometimes felt pressured to testify. While efforts were made to inform them about the process, consent was not always rigorously documented or emphasized. Similarly, in Rwanda, victims were encouraged to participate in the Gacaca courts, but

[33] International Center for Transitional Justice, *Disarmament, Demobilization, and Reintegration: The Case of Rwanda* (2009), available at https://www.ictj.org/sites/default/files/ICTJ-DDR-Rwanda-CaseStudy-2009-English.pdf. (Accessed on Feb. 10, 2025)

[34] International Coalition of Sites of Conscience, *International Journal of Transitional Justice: Article* (Nov. 2010), available at https://www.sitesofconscience.org/wp-content/uploads/2017/07/International-Journal-of-TJ-Article-Nov.-2010-3-1.pdf.(Accessed on Feb. 10, 2025)

[35] Elizabeth Jelin, *Public Memorialization in Perspective: Truth, Justice and Memory of Past Repression in the Southern Cone of South America,* 1 Int'l J. Transitional Just. 138 (2007), posted May 19, 2009, available at SSRN: https://ssrn.com/abstract=1405081. (Accessed on Feb. 10, 2025)

concerns about safety and retribution arose, and not all victims may have been fully aware of the risks involved. In Chile, the Rettig Commission invited victims to share their testimonies, but some felt pressured to participate, particularly given the limited opportunities for justice.[36] In Peru, while participation in the CVR was voluntary, the traumatic nature of the process meant that some victims might have participated out of a desire for recognition, rather than being fully informed of the process's limitations.[37] In Sierra Leone and Liberia, victims were similarly invited to testify in their respective TRCs, but the emotional and psychological pressure to participate may have influenced their decision to consent. In all these cases, while consent was generally sought, the process was not always as formal or comprehensive as it should have been, and victims often faced significant emotional pressure when deciding whether or not to participate

6. Does Nepali Legal Provision Regarding Public Hearing Address the TJ Mechanism?

Nepal's Truth and Reconciliation Commission (TRC) and the Commission of Investigation on Enforced Disappeared Persons (CIEDP) were established under the Comprehensive Peace Accord (CPA) [38] of 2006 and the Interim Constitution of 2007 to address past human rights violations committed during the decade-long armed conflict (1996-2006). The CPA recognized the need for transitional justice mechanisms to ensure accountability and provide justice for victims, which was further reinforced by Article 33 of the Interim Constitution, mandating the creation of truth-seeking commissions in line with international human rights standards. In this context, the Supreme Court's ruling in *Rajendra Prasad Dhakal v. Government of Nepal*[39] distinguished enforced disappearances as a separate category of human rights violations, necessitating an independent investigative mechanism. This landmark decision led to the enactment of the Enforced Disappearances Enquiry, Truth and

[36] Chilean National Commission on Truth and Reconciliation, Report of the Chilean National Commission on Truth and Reconciliation (Notre Dame, Indiana: University of Notre Dame Press, vol. I/II. (1993)

[37] Amnesty International, *Peru: The Truth and Reconciliation Commission – A First Step Towards a Country Without Injustice,* AI Index: AMR 46/003/2004 (August 2004), available at https://www.amnesty.org/es/wp-content/uploads/2021/09/amr460032004en.pdf. (Accessed on Feb. 15, 2025)

[38] Comprehensive Peace Accord (CPA) of 2006 5.2.5, 2006, available at https://www.peaceagreements.org (Accessed on Feb. 17, 2025).

[39] N.K.P., 2064 BS., Decision No. 7817

Reconciliation Commission Act (2014), which formally established both the TRC and CIEDP, reinforcing the principles of victim-centered justice, transparency, and accountability.

The TRC Act, deriving its authority from Article 83 of the Interim Constitution[40], grants the commissions the mandate to investigate serious human rights abuses, including enforced disappearances, extrajudicial killings, and torture. Its objectives include uncovering the truth, ensuring justice for victims, promoting national reconciliation, and recommending reparations and reforms to prevent future violations. A key mechanism outlined in the Act is the public hearing process, which provides victims and communities with a platform to share their experiences, fostering collective healing and reinforcing transparency and accountability. To operationalize this, Section 18(1) of the Act[41] empowers both commissions to conduct public hearings, ensuring an effective truth-seeking process.

To standardize and streamline public hearings, the 2017 Directive[42] for Public Hearings was introduced, setting clear objectives such as identifying perpetrators, promoting peace, recommending legal action, supporting mediation, and ensuring reparations for victims. By reinforcing impartiality and neutrality, the Directive enhances the legitimacy of transitional justice mechanisms while upholding victims' right to truth. Public hearings, organized in open forums, serve multiple purposes, including uncovering the truth about enforced disappearances, identifying those responsible, assessing the adequacy of relief measures, and gathering recommendations for legal and policy reforms. These hearings facilitate dialogue and reconciliation among various stakeholders, including victims, the general public, senior citizens, government officials, human rights activists, legal professionals, NGOs, INGOs, women's organizations, and media representatives.[43]

However, to maintain the integrity of the process and safeguard participants' rights and security, the Directive excludes certain issues from public hearings. Cases under judicial review are omitted to avoid influencing legal proceedings, while confidential matters, including classified state information, are excluded to comply with legal requirements. Additionally, hearings do not address situations that could compromise the safety of victims, complainants, or witnesses, or harm an individual's dignity, privacy, and self-respect. Matters

[40] The Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2071, Pmbl

[41] The Enforced Disappearance Enquiry, Truth and Reconciliation Act, 2014 (3rd Amendment) S. 18.

[42] Directive for Public Hearings, 2017, (Nepal), Pmbl

[43] Directive for Public Hearings, 2017 (Nepal) R. 2(g) (Nepal), R. 3

that may disrupt societal peace, good governance, or the integrity of the investigation are also excluded. [44]

In line with these principles, the Directive emphasizes that the primary purpose of public hearings is to uncover the truth, determine appropriate compensation, and ensure victims' rehabilitation while protecting the security of all participants. It mandates the documentation of testimonies and encourages participants to share their experiences without direct blame, considering the sensitivity of the issues involved. To oversee these hearings, a dedicated committee is formed, comprising experts such as psychosocial counselors and commission officials, ensuring that proceedings are conducted fairly and efficiently. The Directive further outlines pre-hearing preparations, the hearing process, and guidelines for report documentation. Additionally, if deemed necessary, hearings may be broadcast on social media to enhance transparency and public engagement, reinforcing the broader objective of justice and reconciliation in Nepal's post-conflict society

7. Evaluating Public Hearings in Nepal's TRC: Challenges, Clarity, and the Path Forward

The concept of public hearings, as laid out in Nepal's TRC Act, is integral to the country's process of transitional justice, with the primary aim of addressing human rights violations during the 1996-2006-armed conflict. These hearings are meant to serve as a platform for truth-seeking, allowing victims and affected communities to share their experiences, uncovering the truth behind serious human rights abuses, and fostering accountability and reconciliation. However, the TRC Act, specifically under Section 18(1), states that conducting public hearings is not an obligatory provision. Rather, it is a discretionary measure, allowing the Commission to decide when and where the hearings should take place, based on its assessment of the situation.

This flexibility, while providing room for discretion, raises concerns about the clarity of the process. The Act does not explicitly state when public hearings should be conducted or the stage at which they should take place within the broader framework of transitional justice. Additionally, the Act lacks clarity on whether the purpose of public hearings should include granting amnesty or if it is strictly limited to revealing the truth about human rights

[44] Directive for Public Hearings, 2017 (Nepal), R. 3(2)

violations. This vagueness undermines the transparency and consistency that the hearings should embody.

Furthermore, the Act needs to clarify the meaning of "truth" and "facts" in the context of human rights violations. While the goal is to uncover the truth about the violations committed during the conflict, the language used in the Act is not precise enough to differentiate between "truth" as facts presented by victims and witnesses, and the broader "truth" sought in post-conflict societies, which may include root causes and larger societal dynamics. The lack of specificity regarding the analysis of the conflict itself and the inclusion of such analysis in the final report raises questions about the comprehensiveness of the TRC's findings. It is important for the Commission to provide clarity on whether public hearings should address only the violations, or if they should also explore the causes behind the conflict and suggest solutions to prevent future human rights abuses.

The recent amendment of the TRC Act in 2081/05/13 presents an opportunity for the Commission to refine its approach. The Commission should establish clear guidelines regarding when and how public hearings should be conducted, and under what circumstances. Drawing lessons from international experiences in countries like South Africa and Sierra Leone, where public hearings were an integral part of truth and reconciliation processes, the Nepalese TRC can benefit from a more structured approach to public hearings. These countries have shown that public hearings should be part of a larger, well-organized process that ensures transparency, builds public trust, and addresses root causes of conflict.

The Commission must also address the question of amnesty and whether it should be granted in exchange for full disclosure of the truth. Such decisions should be made with clear legal and moral guidelines, ensuring that victims' rights are upheld, and that the integrity of the reconciliation process is not compromised. In the case of Nepal, it would be important for the TRC to provide specific guidance on whether the aim of public hearings is purely to uncover the truth, or if it also includes broader social and legal measures like amnesty or reparations.

In conclusion, the concept of public hearings under the TRC Act is a valuable tool for uncovering the truth and promoting reconciliation, but it requires further refinement. The victim should also be asked whether they want public hearing or not. The Commission must clarify its vision regarding public hearings specifically the stage at which they should occur, their

purpose, and the principles guiding their conduct. By learning from international examples and ensuring that the process is transparent and victim-centered, the TRC can strengthen its effectiveness in achieving justice and healing for Nepal's post-conflict society.

8. What approaches can Enhance the Effectiveness of Public Hearings in Nepal?

Public hearings are a central element of TJ processes, as they provide a platform for victims and witnesses to share their experiences and for societies to confront past atrocities. However, several challenges hinder their effectiveness:

a. Strengthening the Legal and Institutional Framework

One of the major challenges in Nepal's public hearing process is the lack of a clear legal and institutional framework. While the TRC Act (2014) provides a foundation for truth-seeking, it does not clearly define the scope, procedures, or criteria for public hearings. The Third Amendment to the TRC Act, which introduces conditional amnesty in Article 26, remains controversial as it lacks transparency on whether public hearings will be required for granting amnesty, similar to South Africa's TRC model.[45] Without strong legal provisions, the risk of arbitrary decision-making and selective justice increases.

To enhance transparency and accountability, Nepal's TRC Act should clearly define public hearing guidelines, establishing a structured framework for the process. Adopting South Africa's model, where perpetrators must publicly confess their crimes to receive conditional amnesty, would ensure that amnesty is granted only in exchange for full disclosure. This approach would promote accountability and transparency, reinforcing the importance of truth-telling in the reconciliation process.

b. Addressing Psychological Support and Preventing Retaliation Risks

Victims and witnesses may suffer further trauma or fear reprisals after sharing their stories. This may prevent full participation or create additional harm for those already vulnerable. Fear of retaliation is a significant challenge in public hearings, as victims, witnesses, and even commissions members may fear reprisals from those responsible for violations. This fear can discourage participation and hinder the sharing of critical information. In Nepal, where political and social tensions remain high, ensuring the security of participants is a

[45] Louise Mallinder, AMNESTY, HUMAN RIGHTS AND TRANSITIONAL JUSTICE: A PHILOSOPHICAL INQUIRY 154 (Oxford University Press, 2008)

crucial issue for the success of the TJ process.[46]

Public hearings often require victims to relive traumatic experiences, which can lead to psychological distress and re-traumatization. In Nepal, many victims of torture, sexual violence, and enforced disappearances hesitate to testify due to the absence of adequate psychosocial support.[47] Rwanda's Gacaca courts incorporated community-based healing and counseling programs, which helped survivors process their trauma.48Nepal's TJ process lacks such victim-centered psychological support mechanisms, making participation in public hearings a challenge.

c. Ensuring Independence from Political Interference and Influence

Nepal's TJ process has been highly politicized, with leaders of major political parties often protecting perpetrators within their ranks. Political actors have used public hearings as tools to manipulate public opinion rather than genuinely addressing past violations.[49] South Africa's TRC ensured political neutrality by live-broadcasting hearings to maintain transparency and prevent political influence.[50] Nepal currently lacks similar safeguards, raising concerns about the credibility of the hearings.

It is important to establish independent oversight of public hearings to safeguard against political interference. Additionally, enhancing media transparency, such as through live broadcasts similar to South Africa's approach, would ensure openness and prevent manipulation of the process.

d. Enhancing Security and Protection of Victim and Witnesses

A significant barrier to public hearings in Nepal is the lack of witness protection mechanisms. Victims, witnesses, and even hearing facilitators face threats, intimidation, or violence for speaking out.[51] The fear of retaliation prevents many from testifying openly, leading to incomplete narratives. In Argentina, during its human rights trials, the government introduced anonymous testimonies and relocation programs for witnesses, ensuring their

[46] Lisa J. Laplante & Kimberly Susan Theidon, supra note 31.

[47] International Center for Transitional Justice, NEPAL'S LONG ROAD TO JUSTICE: CHALLENGES AND OPPORTUNITIES IN THE TRC PROCESS (2019)

[48] Phil Clark, THE GACACA AND POST-GENOCIDE JUSTICE AND RECONCILIATION IN RWANDA (Cambridge University Press, 2010)

[49] Prakash Adhikari, THE POLITICS OF TRANSITIONAL JUSTICE IN NEPAL (2020)

[50] Desmond Tutu, *Truth and Reconciliation Commission of South Africa Report* vol. 1, at 25 (Truth and Reconciliation Comm'n 1999)

[51] Human Rights Watch. NEPAL: TRUTH AND RECONCILIATION AT A CROSSROADS (2018)

safety.[52] Nepal needs similar protective measures to encourage survivor participation.

To enhance witness safety and participation, Nepal should implement anonymous testimonies and create a national witness protection program with legal safeguards. Additionally, providing trauma counseling and adopting community-based healing programs like those in Rwanda would support victims' emotional recovery. Public hearings often force victims to relive trauma, but Nepal's lack of adequate psychosocial support deters many survivors from testifying, making the process more difficult. Rwanda's Gacaca courts offer a model for integrating community-based healing services, which Nepal could adapt to support victims in their recovery

e. Overcoming Cultural and Social Barriers to Participation

Nepal's patriarchal social structure and caste-based discrimination create barriers for marginalized groups, including women, Dalits, and indigenous communities, in public hearings. Survivors of sexual violence often face stigma and societal exclusion, making it difficult for them to testify openly. Rwanda's post-genocide hearings incorporated gender-sensitive approaches to encourage women to participate.[53] Nepal's TJ process must address social hierarchies and cultural sensitivities to ensure inclusivity.

It is crucial to establish safe spaces for women and marginalized groups to participate in testimony, ensuring their voices are heard without fear of stigma or retribution. Furthermore, lessons should be drawn from Rwanda's gender-sensitive hearings, which effectively supported survivors of sexual violence, to create an environment that facilitates the active and secure involvement of these individuals in the TJ process.

f. Promoting Public Awareness and Engagement

Many survivors in Nepal are unaware of their rights and the importance of public hearings due to limited outreach efforts. Unlike South Africa's TRC, which conducted nationwide media campaigns and live broadcasts, Nepal's hearings remain largely inaccessible to the public.[54] Without adequate awareness programs, participation remains low, undermining the

[52] Kathryn Sikkink, THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS (New York W.W. Norton & Company, 2011)

[53] Nerina Nowrojee, SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH Human Rights Watch (2005)

[54] Alex Boraine, A COUNTRY UNMASKED: INSIDE SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION (Oxford University Press, 2000)

legitimacy of the process.

To broaden public engagement, it is essential to expand media campaigns, radio broadcasts, and social media outreach, drawing on South Africa's successful model. Furthermore, organizing village-level hearings would enhance accessibility, ensuring that victims from rural areas can meaningfully participate in the TJ process.

g. Strengthening Implementation and Follow-Up Mechanisms

Findings from public hearings must lead to policy changes, prosecutions, or reparations, but Nepal's TJ bodies lack enforcement power. Reports from hearings are often ignored by authorities, reducing public trust in the TRC and CIEDP.[55] Argentina ensured that findings from its truth commission led to prosecutions and institutional reforms.[56] Nepal must establish a strong follow-up mechanism to implement the recommendations of public hearings.

It is imperative to connect the outcomes of public hearings to justice policies, reparations, and institutional reforms to ensure tangible results. Additionally, there should be a system to monitor governmental actions, akin to Argentina's post-dictatorship accountability framework, to guarantee the implementation of the recommendations and foster long-term accountability.

9. Conclusion

In conclusion, while public hearings outlined in Nepal's TRC Act are essential for uncovering the truth and fostering reconciliation after the 1996-2006-armed conflict, the Act's lack of clarity and flexibility has limited their full effectiveness. The broad discretion granted to the Commission regarding the timing and nature of these hearings, along with uncertainties surrounding their purpose whether they involve amnesty or are solely focused on revealing violations has complicated the process. To ensure that justice and healing are truly achieved, the TRC must clarify its approach by establishing clear guidelines, defining the scope of the hearings, and drawing from international best practices.

For Nepal's public hearings, it is essential to create an environment that fosters trust and satisfaction among victims. This includes establishing clear mechanisms for criminal

[55] International Center for Transitional Justice, NEPAL'S LONG ROAD TO JUSTICE: CHALLENGES AND OPPORTUNITIES IN THE TRC PROCESS (2020)

[56] Sikkink, supra note 53.

accountability to ensure perpetrators are held responsible, addressing victims' concerns about the lack of justice. Additionally, informed consent should be a priority, ensuring victims fully understand the process, its possible outcomes, and any risks before participation. Transparency and voluntary participation are crucial to avoid any perception of coercion. Victim protection must also be prioritized, particularly in community-based hearings, to prevent retribution or intimidation. Furthermore, the process should be inclusive, ensuring that all perpetrators, including those in positions of power, are held accountable. By focusing on these key elements-accountability, consent, protection, and inclusivity-Nepal can enhance the effectiveness of its public hearings and improve victim satisfaction within the transitional justice process. By taking these steps, the Commission can ensure a more transparent, victim-centered, and comprehensive approach to reconciliation.

Transitional Justice and the Realisation of Victims' Economic, Social, and Cultural Rights

Pradeep Shanker Wagle

Abstract

This paper examines the intersection of transitional justice and the realisation of economic, social, and cultural rights (ESCR) in Nepal's post-conflict landscape. While Nepal's transitional justice mechanisms, including the Truth and Reconciliation Commission (TRC) and the Commission of Investigation on Enforced Disappeared Persons (CIEDP), have recorded significant grievances from victims of conflict addressing the structural inequalities and socio-economic injustices that fueled the conflict remain at the heart of the problems. The paper argues that transitional justice must move beyond civil and political rights to include economic and social reparations, as neglecting these rights perpetuates cycles of marginalisation, poverty, and instability. Drawing on international human rights frameworks and comparative experiences, the paper emphasises the need for a comprehensive approach that integrates economic, social and cultural rights, in particular those rights that were at the heart of the conflict such as land reform, employment programs, and institutional guarantees to ensure lasting peace. It concludes that meaningful transitional justice in Nepal requires constitutional commitments to ESCR to be fully implemented as a foundational component of sustainable reconciliation and justice.

1. Introduction[1]

The Comprehensive Peace Agreement (CPA)[2] of 2006, which was signed by the Government of Nepal and the then Communist Party of Nepal (CPN Maoist), marked the end of the ten-year long armed conflict in Nepal.[3] The CPA laid down the groundwork for Nepal's transitional

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[1] Pradeep Shanker Wagle, keynote speech at the Discussion Programme on Transitional Justice and the Realization of Victims' Economic, Social, and Cultural Rights, National Human Rights Commission, Nepal (10 Feb. 2025)

[2] *Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal (Maoist), 21 November 2006,* available at https://reliefweb.int/report/nepal/full-text-comprehensive-peace-agreement-held-between-government-nepal-and-communist (Accessed on Mar. 3, 2025)

[3] *See generally,* International Center for Transitional Justice (ICTJ), *Nepal,* n.d., available at https://www.ictj.org/location/nepal (Accessed on Mar. 3, 2025)

justice process with its promises for justice, accountability, reparations, truth-seeking, and institutional reforms.[4] In addition to promoting national reconciliation and socio-political change, it pledged to remedy historical human rights violations and abuses committed by the parties of the armed conflict. Despite the CPA's extensive commitments to justice and human rights, progress has been slow; marred by poor political will, financial and human resources constraints, and unfulfilled attempts to overcome legacies of the past.[5] Central to this piecemeal progress has been the lack of recognition that violations of economic and social rights take the form of both causes and effects of conflict,[6] as has been the case in the context of Nepal's armed conflict. Concrete methods to analyse and remedy economic and social injustices have been lacking, notwithstanding provisions for tackling marginalisation and structural inequalities. Conflict victims still experience socio-economic difficulties, such as lack of access to healthcare,[7] education, employment opportunities,[8] landlessness,[9] and displacement.[10]

This paper argues that the transitional justice process cannot be transformative without incorporating economic, social, and cultural rights in its response. It further argues that transitional justice cannot be meaningful without addressing the economic, social, and cultural rights violations that lie at the root of conflict. Neglecting these rights perpetuates cycles of injustice, fuelling future instability and conflict. To create the enabling environment for transitional justice, Nepal's transitional justice process must fully integrate economic,

[4] International Center for Transitional Justice (ICTJ), *Nepal*, n.d., available at https://www.ictj.org/news/nepal-reparations-walk-freely-wide-heart (Accessed on Mar. 3, 2025)

[5] Human Rights Watch, *Nepal: 15 Years On, Act on Peace Agreement Pledges,* Nov. 20, 2021, available at https://www.hrw.org/news/2021/11/20/nepal-15-years-act-peace-agreement-pledges (Accessed on Mar. 3, 2025)

[6] Amanda Cahill-Ripley, *Economic and Social Rights Must be Addressed to Stop Conflict and Sustain Peace,* The Conversation, May 24, 2018, available at https://theconversation.com/economic-and-social-rights-must-be-addressed-to-stop-violent-conflict-and-sustain-peace-97031 (Accessed on Feb. 25, 2025)

[7] Laxmi Vilas Ghimire & Matiram Pun, *Health Effects of Maoist Insurgency in Nepal,* 368(9546), THE LANCET 1494, 2006, available at https://doi.org/10.1016/S0140-6736(06)69634-7 (Accessed on Mar. 3, 2025)

[8] *See generally,* Hari Sharma, *Civil Conflict and International Migration in Nepal.* (2020) (PhD thesis, The University of Waikato) available at: https://researchcommons.waikato.ac.nz/handle/10289/13682 (Accessed on Mar. 3, 2025)

[9] Ruben Carranza, International Center for Transitional Justice, *Relief, Reparations, and the Root Causes of Conflict in Nepal,* 4, 8, 11, Apr. 10, 2012, available at https://www.ictj.org/publication/relief-reparations-and-root-causes-conflict-nepal#:~:text=Relief%2C%20Reparations%2C%20and%20the%20Root%20Caus es%20of%20 Conflict,civil%20war%20between%20the%20government%20and%20Maoist%20rebels (Accessed on Mar. 3, 2025)

[10] Sonal Singh et al., *Conflict Induced Internal Displacement in Nepal,* 23(2), MEDICINE, CONFLICT AND SURVIVAL 103-110, 2007, available at https://doi.org/10.1080/13623690701248088 (Accessed on Mar. 3, 2025)

social and cultural considerations into its policies and programs. It further argues that the constitutional provisions on economic, social and cultural rights must be implemented as envisaged to achieve crucial transformations.

2. Economic, Social and Cultural Rights in Transitional Justice Processes: The Key Challenges

There is a wealth of literature and policy guides on transitional justice grounded in international human rights norms and standards. As the focus of this paper is on economic, social, and cultural rights, it will not delve into the details of academic and policy arguments around transitional justice. It is, however, important to recall that transitional justice has been defined as 'the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of largescale past abuses, in order to ensure accountability, serve justice and achieve reconciliation'. It has noted that 'these may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof'.[11] The United Nations further calls for transitional justice to be normative,[12] strategic, inclusive, gender-responsive and transformative.[13] The United Nations also calls for the respect of victim's rights and corresponding obligations of the States which include but are not limited to justice, truth, reparation and prevention of recurrence.[14]

Historically, transitional justice mechanisms have focused predominantly on violations of civil and political rights.[15] Conflict-related human rights violations such as enforced disappearances, torture, extrajudicial killings, summary execution, and restrictions on other freedoms have been well documented and have been central to the mandates of transitional

[11] United Nations Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General,* U.N. Doc. S/2004/616 (Aug. 23, 2004) available at https://digitallibrary.un.org/record/527647?v=pdf#files (Accessed on Apr. 14, 2025)

[12] United Nations Secretary-General, *Transitional Justice: A Strategic Tool for People, Prevention and Peace,* 5, Oct. 2023, available at https://peacemaker.un.org/en/documents/transitional-justice-strategic-tool-people-prevention-and-peace (Accessed on Apr. 14, 2025)

[13] *Id,* 10-11.

[14] *Id,* 5.

[15] Ruti Teitel, *Transitional Justice Genealogy (Symposium: Human Rights in Transition),* Vol.16, HARVARD HUMAN RIGHTS JOURNAL 69-94 (2003), available at https://journals.law.harvard.edu/hrj/wp-content/uploads/sites/83/2020/06/16HHR J69-Teitel.pdf (Accessed on Mar. 3, 2025)

justice mechanisms in comparison to similar violations of economic, social and cultural rights. In other words, civil and political rights violations are considered distinct and individualised violations, whereas economic, social, and cultural rights violations are framed as structural issues, relegating them to the background of justice efforts.[16] This false dichotomy undermines the transformative potential of transitional justice to transform societies into new societies based on peace and justice and limits its effectiveness in addressing the root causes of conflicts.[17]

The failure to recognise economic, social and cultural rights violations as human rights violations in-and-of themselves has led to insufficient documentation, weak policy responses, and a lack of direct redress for affected populations. This conception also prevents countries from addressing the structural issues and root causes that prompted the conflicts and ensuing human rights violations. Cases such as post-apartheid South Africa and post-conflict Peru highlight how transitional justice mechanisms have essentially treated socio-economic and cultural injustices as peripheral concerns, rather than central issues requiring redress. In South Africa, for instance, the Truth and Reconciliation Commission acknowledged the structural inequalities of apartheid but did not frame them as human rights violations.[18] Similarly, Peru's Truth and Reconciliation Commission identified economic and social marginalisation as root causes of conflict but neglected to address them within the framework of legal obligations and reparative justice.[19]

In addition, the implementation of transitional justice undermined by the significant lack of understanding and application of the indivisibility of human rights. Under international law, all human rights are equal and universal and should be respected on an equal footing, meaning civil and political rights, such as freedom of expression and association, as well as access to justice and legal aid, are on par with economic, social, and cultural rights, such

[16] Sam Szoke-Burke, *Not Only 'Context': Why Transitional Justice Programs Can No Longer Ignore Violations of Economic and Social Rights,* Vol. 50(3), TEXAS INTERNATIONAL LAW 474, 2015.

[17] *See generally,* Cosmas Emeziem, *A Tale of Two Rights? The Manifest Functions of Truth and Reconciliation Commissions and the Ambivalence Towards Economic, Social, and Cultural Rights,* Vol. 20(1), SEATTLE JOURNAL FOR SOCIL JUSTICE 15, 2021, available at: https://digitalcommons.law.seattleu.edu/sjsj/vol20/iss1/15 (Accessed on Mar. 3, 2025)

[18] Elizabeth Stanley, *Evaluating the Truth and Reconciliation Commission, Vol.* 39(3), THE JOURNAL OF MODERN AFRICAN STUDIES 525–546, 2001, available at: http://www.jstor.org/stable/3557322 (Accessed on Feb. 24, 2025)

[19] Lisa J. Laplante, *On the Indivisibility of Rights: Truth Commissions, Reparations, and the Right to Development, Vol.* 10 (1), Article 3, YALE HUMAN RIGHTS AND DEVELOPMENT JOURNAL 141-177, 2007, available at https://openyls.law.yale.edu/handle/20.500.13051/5718 (Accessed on Mar. 3, 2025)

as the right to food, education, health, and an adequate standard of living. The Universal Declaration of Human Rights (UDHR), which serves as the foundation of all human rights treaties and conventions, made no distinction between civil, political, economic and cultural rights. With the exception of a few non-derogable rights enumerated under Article 4(2) of the International Covenant on Civil and Political Rights, the legal obligations set out under the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights are of equal binding effect. The 1993 Vienna Declaration and Programme of Action rejected any hierarchy between human rights and reaffirmed their universality, interdependence, interrelation, and indivisibility,[20] which has been reiterated by the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, adopted in 2008. It must also be noted that the Committee on Economic, Social and Cultural Rights, has stipulated the human rights obligation of the right to remedies in conjunction with the provisions on economic, social and cultural rights through its views and recommendations on various cases.[21]

The challenges to the indivisibility of human rights and their application in transitional justice processes are many and in the ensuing paragraphs, these aspects are briefly elaborated.

The first issue arises from an inconsistent understanding of the legal obligations that State parties undertake with respect to economic, social, and cultural rights, which merits analysis in its own domain.[22] Looting and wanton destruction of properties, illegal occupation of land, including farms and agricultural fields, denial of medical treatment for wounded and

[20] World Conference on Human Rights, Vienna, June 14-25, 1993, *Vienna Declaration and Programme of Action,* para. 5, U.N. Doc. A/CONF.157/23, (Jul. 12, 1993) available at https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action (Accessed on Mar. 3, 2025)

[21] *See generally*, *I.D.G. v. Spain,* U.N. Doc. E/C.12/55/D/2/2014 (Committee on Economic, Social and Cultural Rights, Decision 2014), & *Marcia Cecilia Trujillo Calero v. Ecuador,* U.N. Doc. E/C.12/63/D/10/2015, (Committee on Economic, Social and Cultural Rights, Decision 2018)

[22] Philip Alston and Gerard Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights,* 9(2), HUMAN RIGHTS QUARTERLY 156-229, 1987, available at https://doi.org/10.2307/762295 (Accessed on Mar. 3, 2025); Francesca Bignami and Carla Spivack, Social and Economic Rights as Fundamental Rights, 62, THE AMERICAN JOURNAL OF COMPARATIVE LAW 561-587, 2014, available at http://www.jstor.org/stable/26425410 (Accessed on Mar. 3, 2025); Scott Leckie, *Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights,* 20(1), HUMAN RIGHTS QUARTERLY 81-124, 1998, available at http://www.jstor.org/stable/762697 (Accessed on Mar. 3, 2025)

sick persons, restriction on access to food and social services, and freedom of movement are key human rights issues that have manifested in many conflicts and wars, including in Nepal.

Internal displacement is another primary concern that challenges the respecting for both civil and political rights and economic, social and cultural rights but rarely features in transitional justice responses.[23] These acts are inherently economic, social and cultural, and clear violations of international human rights norms and standards.

The second issue is the lack of recognition of the role of duty-bearers who commit violations of economic, social and cultural rights. Both state and non-state actors have systematically denied the public access to economic opportunities, land, and essential services.[24] The deliberate impoverishment of marginalised communities, for example, which often happens in conflict through legal and political means as well through other methods such as blockades and establishment of checkpoints, must be acknowledged as a type of oppression that is as serious as direct acts of violence against the civilian population. The lack of incorporation of these issues in the transitional justice processes not only prolongs post-conflict recovery but also sustains poverty and social exclusion cycles, strengthening the power dynamics that fuelled the conflict.

Thirdly, the structural issues underpinning conflicts often lie in violations of economic, social and cultural rights. Land dispossession, for instance, has been a significant cause of conflict worldwide, especially in post-colonial nations where indigenous or marginalised communities have been systematically denied land ownership.[25] In transitional justice systems, compensation or restitution for confiscated land is crucial for enduring peace and economic fairness.[26] Nonetheless, numerous transitional justice efforts overlook the significance of land reform, even though it is essential for socio-economic stability. The

[23] Jamie Draper, *Justice and Internal Displacement,* 71(2), POLITICAL STUDIES 314-331, 2021, available at https://doi.org/10.1177/00323217211007641 (Accessed on Mar. 3, 2025)

[24] Dimitrios Katsikas, *Non-State Authority and Global Governance,* 36, REVIEW OF INTERNATIONAL STUDIES 113–135, 2010, available at http://www.jstor.org/stable/45301278 (Accessed on Mar. 3, 2025); Shaun Breslin and Helen E. S. Nesadurai, *Who Governs and How? Non-State Actors and Transnational Governance in Southeast Asia, Vol.* 48(2), JOURNAL OF CONTEMPORARY ASIA 187–203, 2017, available at https://doi.org/10.1080/00472336.2017.1416423 (Accessed on Mar. 3, 2025)

[25] Land Portal, *Land and Conflicts,* n.d., available at https://landportal.org/issues/land-conflicts (Accessed on Mar. 3, 2025)

[26] Urmilla Bob, *Land-related Conflicts in Sub-Saharan Africa,* Vol. 10(2), AFRICAN JOURNAL ON CONFLICT RESOLUION 49-64, 2010, available at https://www.accord.org.za/ajcr-issues/land-related-conflicts-in-sub-saharan-africa/ (Accessed on Mar. 3, 2025)

South African Truth and Reconciliation Commission acknowledged the financial damage caused by apartheid but failed to execute land redistribution policies that were critical to address the systemic economic disparities.[27] Inequity in healthcare, social security and education represents another unaddressed pattern during transitional justice.[28]

A challenge also exists regarding the methods of human rights monitoring and reporting. In conflict and post-conflict nations, violations of civil and political rights are systematically reported, monitored and published. The transitional justice process is shaped by the number of documented cases or observed patterns of violations and abuses; however, the deprivation of economic, social, and cultural rights is inherently less visible compared to civil and political rights, leading to less focus from transitional justice institutions. The absence of structured monitoring and reporting of economic, social and cultural rights violations is a significant deficiency in transitional justice. The focus of investigations and documentation tends to centre on apparent violence, overlooking the systemic injustices that generate and maintain socio-economic disparities. This not only refers a superficial understanding of human rights violations during conflict but also prevents these injustices from being addressed. The sidelining of ESCR results in a narrow conception of justice that overlooks the prolonged economic and social oppression. which drives conflicts and post-conflict instability. In particular, it allows transitional justice to ignore evidence of discriminatory policies, forced evictions, and the denial of healthcare and education as clear violations of human rights.

Finally, the attribution of accountability for the violation of socio-economic rights is also a complex challenge, requiring thorough groundwork and clarity on "who should be held accountable, how and by when". Truth commissions and judicial systems typically emphasise individual accountability, holding individuals responsible for the violations and abuses they have committed.[29] However, ESCR violations are frequently collective and systemic, complicating their attribution to specific offenders within conventional legal

[27] Jon D. Unruh & Musa Adam Abdul-Jalil, *Housing, Land and Property Rights in Transitional Justice, Vol.* 15(1), INTERNATIONAL JOURNAL OF TRANSITIONAL JUSTICE 1–6, 2021, available at https://doi.org/10.1093/ijtj/ijab004 (Accessed on Mar. 3, 2025)

[28] Kelsey Larsen & Elizabeth Stanley, *How Stress, Trauma, and Emotion May Shape Post-Conflict Environments – with Implications for International Peacekeeping,* 31(3), INTERNATIONAL PEACEKEEPING 332–359, 2024, available at https://doi.org/10.1080/13533312.2024.2321434 (Accessed on Mar. 3, 2025)

[29] Donald W. Shriver, *Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?* Vol.16(1), JOURNAL OF LAW AND RELIGION 1–33, 2001, available at https://doi.org/10.2307/1051506 (Accessed on Mar. 3, 2025)

structures.[30] Therefore, a paradigm shift is required for transitional justice mechanisms to effectively provide justice-one that incorporates all human rights violations as fundamental to accountability, truth-seeking, institutional reforms and reparations.

This necessitates a comprehensive strategy that recognises violations of economic, social, and cultural rights as legal obligations requiring effective remedies. Truth commissions and various transitional justice bodies, therefore, should expand their mandates to encompass thorough inquiries into land dispossession, economic disenfranchisement, and the denial of healthcare and education as essential human rights abuses. Unless the socio-economic injustices of inequality, discrimination, poverty, and lack of access to resources - which drive conflict and marginalisation - are addressed, transitional justice will remain incomplete with and increased risk of renewed instability.

3. The Case of Nepal: Context and Opportunities

A need for sufficient attention to underlying root causes

Until 1990, Nepal's socio-economic and political system was profoundly influenced by historical exclusion, feudal systems, unequal power-sharing and, and pervasive inequality.[31] These root causes often led to significant but inconclusive discontent and protests against successive regimes. The feudal landholding structure centralised wealth and authority among a small group of elites, while the majority of people, especially peasants and workers, remained trapped in cycles of poverty and economic dependence.[32] The strict caste system and ethnic bias intensified disparities, with Dalits, Indigenous populations, and marginalised groups systematically excluded from political participation, public sector representation, education, and economic opportunities.[33] Women suffered disproportionate levels of oppression, as patriarchal norms limited their access to property and decision-making authority both in

[30] Susie Talbot, University of Bristol Human Rights Implementation Centre, *More Than the Sum of Our Parts: Reflections on Collective Implementation of Economic, Social and Cultural Rights Decisions,* n.d., available at https://www.bristol.ac.uk/media-library/sites/law/hric/2021-documents/11.%20Collective%20ESCR%20im plementation_Talbot%20ENG.pdf (Accessed on Mar. 3, 2025)

[31] *See generally,* Axel Michaels, NEPAL: A HISTORY FROM THE EARLIEST TIMES TO THE PRESENT (Oxford University Press, 2024)

[32] *See generally,* Jeevan R. Sharma, POLITICAL ECONOMY OF SOCIAL CHANGE AND DEVELOPMENT IN NEPAL (Bloomsbury Publishing, 2021)

[33] *See generally,* Michael Hutt, HIMALAYAN PEOPLE'S WAR: NEPAL'S MAOIST REBELLION (Indiana University Press, 2004)

the public and private sectors. The absolute monarchy and the state's partnership with the governing aristocracy perpetuated centralised political authority, preventing any significant reforms.

These systemic injustices sparked increasing resentment among the working class, landless agricultural workers, and marginalised groups, resulting in several movements advocating for socio-economic and political rights. The 1951 revolution ended the Rana regime; however, the lack of significant land reforms and inclusive governance continued to fuel discontent.[34] The establishment of the non-partisan Panchayat system in 1960 further stifled democratic hopes, heightening the frustration within marginalised groups and political activists.[35] By the late 1980s, economic struggles, lack of political rights, and persistent inequalities and discrimination had escalated to a tipping point, resulting in the People's Movement (Jana Andolan), which eventually overthrew the absolute monarchy and set the stage for a multi-party democracy. The democratic transition in 1990 promoted civil and political rights, including the right to vote. Nonetheless, deep rooted socio-economic inequalities remained unaddressed, sustaining dissatisfaction, disempowerment, unequal power distribution, and inadequate pro-poor policies.[36]

In response to these circumstances, a communist faction of Nepal presented a list of demands to the government in 1996, five years after the political transition.[37] These demands emphasised various issues related to economic, social, and cultural rights, including ending patriarchal exploitation and discrimination against women and girls, allowing daughters to inherit paternal property, eliminating racial exploitation and oppression, abolishing untouchability, guaranteeing equal opportunities for every language and dialect, and enacting land reforms to assist tenants and the landless. These demands sought to tackle fundamental problems of inequality and financial imbalance. The then government's lack of an adequate response triggered the armed conflict, which lasted for ten years, killing around 13,000

[34] Dhaka Ram Sapkota & Dol Raj Kafle, *The First Decade of Democracy in Nepal: Challenges, Experiments, and Lessons Learned*, Vol. 3(12), GLOBAL MEDIA JOURNAL 6-15, 2024, available at https://doi.org/10.55640/gmj/ Volume03Issue2-02 (Accessed on Mar. 3, 2025)

[35] *See generally,* Leelanteshwar Sharma Baral, AUTOCRATIC MONARCHY: POLITICS IN PANCHAYAT NEPAL (Martin Chautari, 2012)

[36] *See generally,* Axel Hadenius ed., DEMOCRACY'S VICTORY AND CRISIS (Cambridge University Press, 1997) available at https://doi.org/10.1017/CBO9780511558740.016 (Accessed on Mar. 3, 2025)

[37] *See generally,* Nabiha Gul, *Question of Nepal: Political Instability and Maoist Insurgency, Vol.*55(3), PAKISTAN HORIZON 27–40, 2002, available at http://www.jstor.org/stable/41394409 (Accessed on Mar. 3, 2025)

people, displacing hundreds of thousands, and resulting in serious violations of international human rights and humanitarian law.[38]

OHCHR's Nepal conflict report and reports from civil society organisations document systematic human rights violations. However, less attention has been given to economic, social and cultural rights in those analysis. One area that received even less attention is the field of cultural rights. Various groups have experienced restrictions on using their native languages, practising traditional customs such as land tenure systems, and accessing education in their mother tongues leading to cultural erosion.[39] Conflict-related confrontations and factions have damaged temples, monasteries, and other cultural landmarks, hampering communities' cultural practices. Forced displacements in various regions of the country have additionally disrupted traditional ways of life, leading to core issues of cultural identity among affected populations.[40]

The 2006 Comprehensive Peace Agreement (CPA) in Nepal pledged to create an environment where citizens could fully exercise their civil, political, economic, social, and cultural rights. Nonetheless, the CPA's execution has faced criticism for its inadequate effectiveness in addressing deep-rooted structural problems like poverty, discrimination, nd unemployment.[41] Although the agreement established a basis for political change, it failed to implement

[38] Human Rights Watch, *Between a Rock and a Hard Place: Civilians Struggle to Survive in Nepal's Civil War,* Oct. 6, 20024, available at https://www.hrw.org/report/2004/10/06/between-rock-and-hard-place/civilians-struggle-survive-nepals-civil-war (Accessed on 3 Mar. 2025]; Human Rights Watch, *Clear Culpability: "Disappearances" by Security Forces in Nepal: II. Background,* Feb. 2025, available at: https://www.hrw.org/reports/2005/nepal0205/2.htm (Accessed on Mar. 3, 2025); OHCHR, *Nepal Conflict Report*, Oct. 2012.

[39] Baburam Bhattarai, *40 Point Demand,* reprinted in UNDERSTANDING THE MAOIST MOVEMENT OF NEPAL 391, Deepak Thapa ed., (Martin Chautari, 1996) available at https://satp.org/satporgtp/countries/nepal/ document/papers/40points.htm (Accessed on Apr. 15, 2025)

[40] *See generally,* International Commission of Jurists, *Challenges to Freedom of Religion or Belief in Nepal: A Briefing Paper,* Jul. 2018, available at https://www.icj.org/wp-content/uploads/2018/08/Nepal-Freedom-of-religion-brief-Advocacy-Analysis-brief-2018-ENG.pdf (Accessed on Apr. 14, 2025) and Cultural Survival, *Convention on the Rights of the Child Shadow Report Submission: Indigenous Children's Rights Violations in Nepal Submission by State of Indigenous Human Rights in Nepal in Light of the UN Declaration on the Rights of Indigenous Peoples to United Nations Human Rights Council: Universal Periodic Review,* Mar. 2015*,* available at https://www.ohchr.org/en/hr-bodies/upr/uprnp-stakeholders-info-s23 (accessed on Apr. 14, 2025)

[41] Renée Jeffery, *Nepal's Comprehensive Peace Agreement: Human Rights, Compliance and Impunity a Decade On,* 93(2), INTERNATIONAL AFFAIRS (ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS 1944-) 343–364, 2017, available at https://www.jstor.org/stable/48569546 (Accessed on Mar. 3, 2025)

comprehensive socio-economic reforms necessary to eliminate systemic disparities and protect the rights of marginalised groups.[42]

Following the conclusion of the CPA, a few notable achievements stand out. The democratic and inclusive constitution that recognises rights and freedoms is an important advancement. The establishment of two transitional justice institutions-the Truth and Reconciliation Commission (TRC) and the Commission of Investigation on Enforced Disappeared Persons (CIEDP)- to investigate human rights abuses that occurred during the decade-long Maoist insurgency (1996-2006).[43] Although the advancement of justice through these transitional justice mechanisms has been gradual, they have recorded thousands of grievances from victims and their families, revealing the scale of wartime atrocities. The establishment of these mechanisms has enabled public acknowledgement of human rights violations that were earlier concealed due to political sensitivities. This contributed to reducing the culture of impunity to some extent and established an official pathway for victims to pursue truth and recognition. However, much remains to be done, including ensuring the commission's independence and capacity to effectively address conflict-related violations. While the two transitional justice bodies, namely the Commission of Investigation on Enforced Disappearance and the Truth and Reconciliation Commission's mandates, have been reestablished with a new legislative change, the delay in appointing their leadership and operationalising of the mandate continues to create uncertainty about the transitional justice response.

The other achievement concerns the integration of Maoist ex-combatants into the Nepal Army and government institutions through security sector reforms. The Nepal Army integrated thousands of former Maoist fighters, while other individuals were provided with financial

[42] National Human Rights Commission, *Ten Years of Comprehensive Peace Agreement: Human Rights Situation- A Brief Report,* Nov. 20, 2016, available at https://www.nhrcnepal.org/uploads/publication/Nepal _NHRC_CPA_10Yrs_Report_Eng_2016.pdf (Accessed on Apr. 15, 2025)

[43] National News Agency, Nepal, *17 Years After Comprehensive Peace Accord, Conflict Survivors Still Yearning for Justice,* my Republica, Nov. 20, 2023, https://myrepublica.nagariknetwork.com/news/17-years-after-comprehensive-peace-accord-conflict-survivors-still-yearning-for-justice (Accessed on Mar. 3, 2025); Human Rights Watch, *Breaking Barriers to Justice: Nepal's Long Struggle for Accountability, Truth and Reparations,* Mar. 5, 2024, available at https://www.hrw.org/report/2024/03/05/breaking-barriers-justice/nepals-long-struggle-accountability-truth-and (Accessed on Mar. 3, 2025)

assistance for rehabilitation. These steps were vital in preventing a return to conflict and sustaining political stability.

4. Towards a more Robust Framework: Embedding Economic, Social and Cultural Rights in Transitional Justice Measures in Nepal

The Role of Economic Policies in Transitional Justice

Transitional justice cannot be fully realised without broader socio-economic reforms. legal accountability and truth-seeking processes are vital, failing to redress economic injustices, dismantle structural barriers, and guarantee the enjoyment of economic, social, and cultural rights perpetuates inequalities and heightens the risks of recurring conflicts. International human rights, norms, and standards clearly acknowledge the right to an adequate standard of living and equitable access to quality education, employment, and social security as essential to human dignity.[44] In addition, the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation emphasises that reparations should be comprehensive, including restitution, compensation, rehabilitation, satisfaction, and guarantees of non-recurrence. Nevertheless, in numerous post-conflict societies like Nepal, justice in terms of socio-economic and cultural equality has remained an afterthought instead of a core component of transitional justice.

In the period since the conflict, Nepal has made some progress in terms of macroeconomic indicators, with an average economic growth rate of 4.35% from 1993 to 2023[45] alongside a moderately high inflation rate (5.4 percent in 2024).[46] Nevertheless, a more nuanced breakdown of socioeconomic indicators reveals systematic disparities that remain far distanced from the progressive realisation of economic, social, and cultural rights.

The Nepal Living Standard Survey Report[47] highlights that while basic school attendance is nearly universal at 96.2%, the net enrolment rate (NER) for secondary education falls below

[44] Zhihang Zheng, *The Right To An Adequate Standard Of Living,* in THE LEGAL ISSUES OF THE EMERGING RIGHTS 287-342, Jianzong Yao ed., (Springer, 2024) available at: https://doi.org/10.1007/978-981-97-0499-6_9 (Accessed on Mar. 3, 2025)

[45] The World Bank, *The World Bank in Nepal: Overview,* Apr. 3, 2025, available at: https://www.worldbank.org/en/country/nepal/overview#1 (Accessed on Apr. 15, 2025)

[46] *Id*

[47] National Statistics Office, Government of Nepal, *Nepal Living Standard Survey IV 2022/23,* Jun. 2024, available at https://data.nsonepal.gov.np/dataset/b6c3c19b-4b15-44bf-8653-1571e76dad14/resource/e2d52301-1c25-498b-8732-4326c62a2372/download/nlss-iv.pdf (Accessed on Apr. 15, 2025)

50%, and for tertiary education, it drops to just 17%. These figures suggest that although Nepal has made commendable strides in expanding primary education, retention of students beyond primary levels is still an issue, particularly among economically disadvantaged groups. The Report further illustrates improvements in per capita consumption, which increased from NPR 6,802 in 1995/96 to NPR 130,853 in 2022/23, signalling enhanced living standards. Nevertheless, significant income inequality remains, with the richest 20 per cent of the population enjoying an annual per capita consumption of NPR 254,806, while the poorest 20 per cent subsist on just NPR 57,855. Employment trends indicate vulnerabilities, with the unemployment rate at 12.6% in 2022/23, disproportionately affecting youth, whose unemployment rate stands at 22.7%.

The Survey[48] reveals both the gains and gaps in healthcare, access to drinking water, and housing, which are crucial components of economic, social, and cultural rights. Findings indicate an overall increase in healthcare accessibility, with 80.4% of households now living within 30 minutes of a health facility. However, disparities persist between urban and rural areas, where residents often face limited availability of specialised care and higher out-of-pocket expenses for medical treatment. These trends underscore that inequalities in education, employment, and income distribution continue to hinder the enjoyment of socio-economic rights.

The conflict had profound effects on migration patterns, particularly among the youth. The conflict triggered both internal displacement and international migration as individuals sought safety and economic opportunities.[49] Thousands of people migrate domestically and internationally, with an average of 2,000 youths leaving daily through the official channels.[50] Migration, primarily driven by a lack of economic opportunities, is reshaping the social fabric of communities. As individuals leave in search of better livelihoods, families become fragmented, eroding traditional support systems and cultural cohesion. Rural areas experience

[48] National Statistics Office, Government of Nepal, *Nepal Living Standard Survey IV 2022/23,* Jun. 2024, available at https://data.nsonepal.gov.np/dataset/b6c3c19b-4b15-44bf-8653-1571e76dad14/resource/e2d52301-1c25-498b-8732-4326c62a2372/download/nlss-iv.pdf (Accessed on Apr. 15, 2025)

[49] Adrian Khan and Jennifer Hyndman, *Navigating Civil War through Youth Migration, Education, and Family Separation, Vol.* 31(2), REFUGE: CANADA'S JOURNAL ON REFUGEES 75-84, 2015, available at https://www.jstor.org/stable/48649037 (Accessed on Mar. 3, 2025)

[50] Hari Bansh Jha, Observer Research Foundation, *Massive Outflow of Youth From Nepal: A Security Issue in the Making,* Aug. 3, 2023, available at https://www.orfonline.org/expert-speak/massive-outflow-of-youth-from-nepal (Accessed on Mar.3, 2025)

depopulation, leading to labour shortages and a decline in agricultural productivity, while urban centres face increased pressure on housing, infrastructure, and public services. The absence of working-age populations in villages disrupts the transmission of generational knowledge and erodes communal cohesion. Additionally, remittances, though financially beneficial, can create dependency and alter social dynamics. Addressing economic disparities and creating sustainable job opportunities is crucial to mitigating these disruptions and preserving social harmony.

The progressive realisation of economic and social rights, as outlined by the International Covenant on Economic, Social and Cultural Rights, requires the government of Nepal to allocate the maximum amount of its available resources. It is realised through increasing and safeguarding public expenditure, particularly in the social sector. In this regard, measures should be taken to ensure that human rights-based principles in fiscal policy are applied to tax and budget policies to maximise their impact on livelihoods, alongside measures to strengthen government accountability in resource distribution. According to data from the Financial Comptroller General's Office (FCGO),[51] Nepal's real per capita public expenditure increased from NRs. 26.5 thousand in 2018/19 to NRs. 34.4 thousand in 2022/23. It should be noted, however, that this measure of growth in public spending remains heavily reliant on indirect taxes, with taxes on goods and services accounting for nearly 50% of total tax revenue.[52] This dependence on indirect taxes unfairly burdens lower-income populations, worsening existing economic disparities, particularly for conflict-affected communities. Although higher tax revenue enhances the government's financial capability, it is crucial to ensure that tax policies do not excessively burden those who can least afford it. In addition, public debt must be carefully managed to ensure fiscal sustainability. A policy shift is needed to address Nepal's debt burden effectively which may include introducing sound fiscal policies, as it has increased by more than twofold over the last five years. Efforts must be made to decrease interest payment burden and prevent resource diversion from critical sectors such as health or education. The government should prioritise strategic fiscal measures, including "ringfencing" overseas loans, to mitigate the risks of austerity policies

[51] Financial Comptroller General's Office (FCGO), Government of Nepal, *Consolidated Financial Statement 2022-2023,* Jul. 21, 2024, available at https://www.fcgo.gov.np/storage/uploads/report_publication/2024-07-21/20240725124752_cfs.pdf (Accessed on Apr. 15, 2025)

[52] Financial Comptroller General's Office (FCGO), Government of Nepal, supra note. 51 at *22.*

that disproportionately impact vulnerable populations, especially in key economic, social and cultural rights.

National economic policies directly influence victims' capacity to reconstruct their lives in post-conflict societies. With reforms that enhance access to public services, health, education, livelihood, safer housing or more comprehensive social protection, victims will be able to seek and achieve justice, as well as meaningfully participate in public and political spheres. In Nepal, communities most affected by the conflict, especially in rural and remote regions, require intensified measures to fulfil their rights to employment, land, resources and services. As identified by the National Human Rights Commission of Nepal, numerous conflict victims, such as displaced families and former combatants, still lack the necessary government assistance for them to be able to enjoy adequate resources and livelihoods.[53] The dependence on remittances in the functioning of the economy, which accounts for more than 25% of Nepal's GDP, highlights the urgent needs to boost the local economic prospects in both the short and long run. Focusing on economic reforms could help reduce the increasing migration of war-affected individuals who often face hazardous labour conditions abroad. Meaningful reparations should take into consideration these push factors which disproportionately affect those already marginalised by the root causes of conflict.

The role of broader economic reforms alongside reparations is critical for achieving meaningful and lasting change. Colombia is an insightful comparative case, where economic reintegration initiatives have been a fundamental aspect of transitional justice. The Colombian government adopted a reintegration strategy focused on victims, which featured specialised job programs, financial aid for war-affected individuals, and land redistribution initiatives to tackle historical wrongs. Consequently, communities that previously experienced high levels of violence have reported a reduction in recidivism and improved social stability.[54] In

[53] National Human Rights Commission, *Ten Years of Comprehensive Peace Agreement: Human Rights Situation- A Brief Report,* Nov. 20, 2016, available at https://www.nhrcnepal.org/uploads/publication/Nepal _NHRC_CPA_10Yrs_Report_Eng_2016.pdf (Accessed on Apr. 15, 2025)

[54] United Nations Verification Mission in Colombia, The New Reintegration Landscape, Eight Years After the Final Peace Agreement Signature, UN Verification Mission in Colombia, Jan. 9, 2025, https://colombia.unmissions.org/en/new-reintegration-landscape-eight-years-after-final-peace-agreement-signature; United Nations, *Nearly Five Years into Colombia's Historic Peace Agreement, Unprecedented Achievements in Transitional Justice Notched, Special Representative Tells Security Council,* Jul. 13, 2021, available at https://press.un.org/en/2021/sc14579.doc.htm; Ted Piccone, Brookings, *Peace with Justice: The Colombian Experience with Transitional Justice,* Jul. 2019, available at https://www.brookings.edu/articles/peace-with-justice-the-colombian-experience-with-transitional-justice/ (Accessed on Apr. 15, 2025)

Nepal, former combatants and victims of conflict have received minimal lasting economic assistance, recovery and solutions. The government's one-time payments are insufficient to restore lives, and thousands of victims suffer from severe poverty, rehabilitation and limited access to healthcare and education. Therefore, incorporating socio-economic strategies into transitional justice frameworks is crucial to breaking vicious poverty and social exclusion cycles. As Nepal prioritises addressing the issue of economic justice, it must adopt a rights-based economic recovery plan that prioritises the long-term socio-economic well-being of victims. This requires substantial government investment in public infrastructure, job creation initiatives, health care, and education, particularly in conflict-affected areas. Additionally, it calls for redesigned support programmes that ensure access to healthcare, vocational training, and land reform measures, empowering victims rather than leaving them dependent on short-term financial assistance.

Strengthening the implementation of the constitutional provisions on economic, social and cultural rights

The 2015 Constitution of Nepal is considered among the most advanced in South Asia which recognises economic, social and cultural rights as enforceable fundamental rights and essential to achieving social justice.[55] Grounded in the ideals of inclusiveness and fairness, the Constitution[56] guarantees various socio-economic rights in line with international human rights norms and standards as outlined in Part 3 (Fundamental Rights and Duties) and Part 4 (Directive Principles, Policies, and Responsibilities of the State). Important provisions include the right to education (Article 31), the right to health (Article 35), the right to food (Article 36), the right to housing (Article 37), and the right to work and labour (Article 34). In principle, these provisions require the government of Nepal to ensure their implementation as fundamental human rights, alongside other fundamental freedoms, by providing essential services and livelihood opportunities to all citizens, especially marginalised and vulnerable

[55] Sabrina Singh, *Realizing Economic and Social Rights in Nepal: The Impact of a Progressive Constitution and an Experimental Supreme Court,* Vol. 33, HARVARD HUMAN RIGHTS JOURNAL 275–310, 2020, available at: https://journals.law.harvard.edu/hrj/wp-content/uploads/sites/83/2020/10/33HHRJ275-Singh.pdf (Accessed on Mar. 3, 2025)

[56] Michael Hutt, *Before the Dust Settled: Is Nepal's 2015 Settlement a Seismic Constitution?* Vol. 20(3), CONFLICT, SECURITY & DEVELOPMENT 379–400, 2020, available at https://doi.org/10.1080/14678802.2020.1771848 (Accessed on Mar. 3, 2025); Jayanta Rai, *Including the Excluded? The Political Economy of the Constituency Development Fund in Post-War Nepal, Vol.* 21(6), CONFLICT, SECURITY & DEVELOPMENT 805–830, 2021, available at https://doi.org/10.1080/14678802.2021.2001197 (Accessed on Mar. 3, 2025)

populations. These rights can be enforced by aggrieved parties and individuals if they are not fulfilled, violated or abused. Additionally, the Constitution aims Nepal to shift towards a socialist-oriented economy, focusing on fair resource allocation and affirmative measures to support historically marginalised groups.[57]Although these strong constitutional guarantees exist, people can only realise these rights if government introduces enhanced measures backed by sufficient resources and robust enforcement mechanisms are crucial for addressing structural inequalities.

A key constitutional guarantee concerning economic, social and cultural rights is Article 42, which enshrines the right to social justice. This article specifically focuses on the rights of women, Dalits, Indigenous communities, Madhesis, individuals with disabilities, and conflict victims, guaranteeing affirmative action measures to enhance their socio-economic involvement. Article 43 guarantees the right to social security, encompassing protections for the elderly, single mothers, individuals with disabilities, and economically disadvantaged groups. These guarantees align with Nepal's commitments under international human rights law, including the treaties Nepal has ratified or acceded.

While protection and safeguards exist, bridging the gap between legal protections and effective policy implementation remains a priority. As discussed in earlier chapters, numerous marginalised communities, especially in rural and post-conflict areas, continue to lack access to opportunities designed to alleviate economic hardship, despite existing constitutional safeguards. Ensuring adequate budget allocation, efficient resource utilisation under good governance principles, rigorous anti-corruption measures, streamlined bureaucracy, and political stability is essential to strengthening Nepal's capacity to implement right-related provisions as mandated by the constitution. To uphold the constitutional commitment to decentralisation and federalism, equitable resource distribution and allocation within and between regions should adhere to the principles of transparency, inclusiveness and accountability, which will strengthen province and local level governments, currently constrained by limited fiscal autonomy and other structural challenges.

Furthermore, the government should develop and implement policies that foster cultural interaction, mutual understanding, and the sharing of diverse historical perspectives. Historical narratives are important elements of cultural heritage, playing a decisive role in collective identity. Therefore, history education, and curricula should adopt a comparative

[57] NEP. CONST., (2015), pmbl

and multi-perspective approach that acknowledges the complexity of history and practices. In this regard, Nepal can ensure that their long-term strategies incorporate memorialization processes that allow affected communities to express their diverse narratives in culturally meaningful ways. Effective memorialization requires inclusive collaboration between the authorities, citizens and civil society, especially representatives of those directly impacted by past events.[58]

Good governance is essential for protecting economic, social and cultural rights as it establishes the conditions necessary for securing decent work, adequate standards of living and access to basic services, such as healthcare and education, which underpin a country's development.[59] It also helps ensure accountability, transparency, and public participation in decision-making; fostering inclusive economic growth and social progress.[60] Despite some progress in the economic sphere, poor governance remains a major concern for the country. The World Banks's governance indicators show a trend of deterioration in corruption control capacity, regulatory quality, government effectiveness, and rule of law between 1996 to 2023.[61] This lack of good governance continues to impede economic development and the interlinked persistent political tension in Nepal.[62]

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[58] International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights, G.A. Res. 2200A(XXI), U.N. Doc. A/RES/2200(XXI) (Dec. 1966); Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Dec. 1989); E.S.C General Comment No. 21, U.N. Doc. E/C.12/GC/21 (Dec. 21, 2009); Special Rapporteur in the Field of Cultural Rights, *Report on the Writing and Teaching of History,* United Nations General Assembly, U.N. Doc. A/68/296 (Aug. 9, 2013) (by Farida Shaheed); Special Rapporteur in the Field of Cultural Rights, *Report on Memorization Processes in Post-Conflict and Divided Societies,* United Nations Human Rights Council, U.N. Doc. A/HRC/25/49 (Jan. 23, 2014) (by Farida Shaheed); Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, *Memorialization Processes in the Context of Serious Violations of Human Rights and International Humanitarian Law: The Fifth Pillar of Transitional Justice,* United Nations Human Rights Council, U.N. Doc. A/HRC/45/45 (Jul. 9, 2020) (by Fabián Salvioli)

[59] Organization for Security and Co-operation in Europe (OSCE), *Good Governance,* n.d., available at: https://www.osce.org/ocee-a/446335#:~:text=Good%20governance%20at%20all%20levels,Mandate (accessed on Feb. 25, 2025)

[60] *Id*

[61] The World Bank, *Governance Indicators of South Asia,* 2025, available at https://databank.worldba nk.org/Governance-Indicators-of-South-Asia/id/db8b27d6 (Accessed on Feb. 25, 2025)

[62] Ganga Bahadur Thapa & Jan Sharma, *Problems and Prospects of Good Governance and Economic Development in Nepal and Geopolitical Implications,* in GOOD GOVERNANCE AND ECONOMIC DEVELOPMENT 165-184, Ramesh Chandra Das ed., (Routledge India, 2024)

Ensuring rights of victims under the Ambit of Transitional Justice Laws

In accordance with international law, reparations should extend beyond mere monetary compensation to encompass actions that enable victims to reclaim their capacity to live with dignity. It is important for Nepal, as a State party to the UN human rights conventions on economic, social, and cultural rights, to implement its recommendations prioritising access to education, healthcare, and jobs and ensure that victims are not abandoned in situations of hardship.[63] The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation also obligates States to implement comprehensive reparations, including socio-economic rights, to avert future violations.

The incorporation of economic, social and cultural justice into Nepal's transitional justice framework must be a priority, as it strengthens the legitimacy of truth and reconciliation efforts. The right to justice for victims is inseparable from their rights to economic stability and social integration, and this must be embedded in future policy reforms. The ICESCR, the UN Basic Principles on Reparations, and the Sustainable Development Goals (SDGs) all emphasise that recovery after conflict should address inequalities to guarantee lasting peace. The omission of social, economic and cultural rights in Nepal's current transitional justice system is more than a mere policy lapse; it constitutes a basic infringement of human rights.

The transitional justice bill in Nepal, formally known as 'A Bill to Amend the Disappeared Persons' Enquiry, Truth and Reconciliation Commission Act, 2071', was introduced in parliament in March 2023 and was unanimously approved in August 2024. The Act includes several progressive provisions to ensure the economic and social rights of conflict victims and their families. One of its major strengths is its emphasis on comprehensive redress measures, including psychosocial counselling, interim relief, compensation, and rehabilitation.[64] These provisions acknowledge the long-term socioeconomic impact of conflict-related violence and ensure that victims, particularly those affected by rape, sexual violence, and torture, receive priority support.[65] Additionally, the Act outlines institutional support measures, such

[63] Concluding Observations on the Sixth Periodic Report of the Democratic Republic of the Congo, CESCR, Feb. 14-Mar. 4, 2022, para. 7, U.N. Doc. E/C.12/COD/CO/6; Concluding observations on the initial report of Mali, CESCR, Sep. 24 – Oct. 12, 2018, para. 5, U.N. Doc. E/C.12/MLA/CO/1; Concluding observations concerning the initial report of the Central African Republic, CESCR, Mar. 12-29, 2018, para. 10, U.N. Doc. E/C.12/CAF/CO/1.

[64] A Bill to Amend the Disappeared Persons' Enquiry, Truth and Reconciliation Commission Act, 2071, (2023), Art. 23.1.

[65] *Id,* Art. 23.1b.

as free education and healthcare, skill-based training, employment opportunities, interest-free loans, and housing assistance.[66] If effectively implemented, these measures can enhance the livelihoods and long-term economic stability of victims and their families, reducing inter-generational poverty and social marginalisation. The provision for community reparations programs[67] is particularly significant, as it ensures that entire communities affected by the conflict receive support, thereby addressing collective harm and promoting social cohesion in post-conflict Nepal.

However, despite these positive aspects, the Act has several limitations that may hinder the full realisation of victims' economic, social and cultural rights. One major concern is the lack of clarity in implementation mechanisms-while the Act recommends financial compensation, employment, and education support, it does not provide clear timelines, institutional responsibilities, or budgetary commitments to ensure these benefits are actually delivered. Victims, particularly women, linguistic minorities, rural people and marginalised groups, often face bureaucratic hurdles and procedural delays in accessing government services. Furthermore, the focus on individual compensation may overlook the structural barriers that prevent victims from achieving sustainable economic independence. Another critical limitation is the gendered impact of conflict- while Article 23.1(b) prioritises victims of sexual violence, the Act does not address social stigma, reintegration challenges, or the need for specialised long-term support for female survivors. The absence of land or property rights guarantees for female victims further restricts women's economic empowerment, as property restitution (Article 24) may prioritise male family members in Nepal's patriarchal system. Another significant limitation is that Article 23(2), which pertains to provisions such as education and healthcare, is not legally binding on either the government or the Commission. The Commission has the discretion to recommend free education and healthcare only if it deems it necessary. Similarly, the government is not obligated to provide these services unless it chooses to do so. This lack of enforceability creates uncertainty regarding the actual implementation of these provisions.

Several improvements can be made to enhance the Act's effectiveness and inclusivity. First, victim-centred mechanisms should be introduced, such as one-stop support centres that streamline access to healthcare, legal aid, education, and employment programs. Special

[66] A Bill to Amend the Disappeared Persons' Enquiry, Truth and Reconciliation Commission Act, 2071, (2023), Art. 23.2.

[67] *Id,* Art. 23.2f.

provisions should be strengthened for female survivors, including guaranteed land ownership rights, long-term economic reintegration programs, and psychosocial rehabilitation services tailored to their specific needs. Additionally, employment quotas for conflict victims could be introduced in government and private sector jobs, ensuring sustainable economic security rather than short-term relief measures.

Therefore, a policy that incorporates specific measures to address structural inequalities, such as affirmative action policies and targeted community-based programs, is required. Ensuring the active participation of victims in the design and implementation of transitional justice mechanisms would enhance their representation and ensure that their needs are adequately met. By addressing these gaps, the act can better fulfil its promise of providing economic and social justice to all victims and their families, particularly from a gender and economic and social rights perspectives.

5. Way Forward: Human Rights Beyond Transitional Justice for Sustainable Reforms

As outlined in the earlier chapters, the structural issues around prioritising specific categories of human rights violations against others and responding only to those violations without a comprehensive human rights analysis of human rights violations that took place during conflict pose a profound risk towards a successful transitional justice process. Transitional justice, therefore, needs to fully incorporate all human rights violations, including economic, social and cultural rights and must move from the current forms.

A governance approach based on rights acknowledges that individuals' everyday employment, healthcare, education, or housing challenges are closely connected to their fundamental rights. Addressing these issues is not optional but a legal obligation under international human rights law. A responsible government must guarantee that economic and social rights are progressively achieved, adequate fiscal space are in place, and that all citizens, particularly victims of conflict, have uninterrupted access to socio-economic opportunities. The integration of ESCR in the transitional justice system go beyond compensation to encompass institutional reform, livelihood restoration and long-term economic stability.

Moreover, restitution and compensation should not be limited to monetary assistance but should aim at reinstating dignity, security, and self-sufficiency for conflict-affected

individuals. This requires comprehensive support and rehabilitation initiatives, including access to psychosocial assistance, healthcare services, job opportunities, and educational scholarships for victims and their families. These measures should not be viewed as temporary or dependent solely on the effectiveness of transitional justice mechanisms but as the government's broader duty to uphold the rights of every citizen. The success of a fair society depends on a government's capacity to establish sustainable social and economic conditions that are capable of preventing future injustices, guaranteeing that transitional justice focuses not only on rectifying past wrongs but also on fostering a rights-based future.

A truly transformative transitional justice process in Nepal must adopt a holistic approach that fully integrates ESCR into all aspects of justice and reconciliation. This requires the robust implementation of constitutional provisions that guarantee economic and social rights, backed by sufficient budget allocation and institutional capacity. Nepal's 2015 Constitution provides a strong legal foundation for ESCR, but these guarantees remain largely symbolic without dedicated enforcement mechanisms and transparent governance. To bridge this gap, the government must recognise fundamental rights such as education, healthcare, employment, and social security as part of transitional justice.

Comprehensive reparations must extend beyond financial compensation to include economic empowerment measures such as vocational training, land reform, and employment programs. Merely providing one-time financial relief does not address victims' structural barriers in rebuilding their lives. Instead, transitional justice policies must include long-term socio-economic solutions that enhance access to sustainable livelihoods and improve the quality of life for conflict-affected communities. Land reforms, particularly in rural and marginalised areas, should be prioritised to address historical inequalities that have contributed to conflict.

By embedding economic, social, and cultural rights into its transitional justice efforts, Nepal can create a more just and equitable society, breaking cycles of marginalisation and ensuring a foundation for sustainable peace and reconciliation. Nepal's transitional justice process remains incomplete without fully recognising and realising economic, social, and cultural rights. While efforts have been made redress violation through the Truth and Reconciliation Commission and the Commission of Investigation on Enforced Disappeared Persons, these mechanisms have prioritised mainly civil and political rights, neglecting the deep-seated

socio-economic injustices that fuelled the conflict. The failure to integrate ESCR within transitional justice frameworks perpetuates cycles of marginalisation and instability, hindering sustainable peace and reconciliation. Addressing these rights is not merely a matter of development but an issue of justice, requiring comprehensive reparations, economic reforms, and institutional guarantees to ensure long-term transformation.

Repression of Serious Violations of IHL: A Nepali Context

Shreekrishna Mulmi

Abstract

This article explores the legal, institutional, and policy frameworks governing the repression of serious violations of International Humanitarian Law (IHL) within the context of Nepal. It examines Nepal's adherence to international legal obligations under the Geneva Conventions and related treaties, especially in the aftermath of the decade-long internal armed conflict (1996-2006). The study critically assesses Nepal's domestic legislation, including the National Penal Code and relevant procedural laws, highlighting existing provisions on genocide, torture, enforced disappearance, and crimes against humanity, while underscoring significant legislative and enforcement gaps-particularly the absence of explicit war crimes provisions. The article evaluates the roles of national institutions such as the judiciary, the National IHL Committee, the Nepalese Army, and law enforcement agencies, alongside transitional justice mechanisms like the Truth and Reconciliation Commission and the Commission of Investigation on Enforced Disappeared Persons. It also analyzes the contributions of the International Committee of the Red Cross (ICRC) and judicial training institutions in advancing IHL awareness and implementation. The findings emphasize the urgent need for comprehensive legal reform, institutional strengthening, and political will to ensure accountability, prevent impunity, and fulfill Nepal's international obligations. The article concludes by offering policy recommendations for the establishment of specialized mechanisms, ratification of the Rome Statute, and proactive IHL integration to bolster national and international justice.

1. Introduction

Nepal ratified the Geneva Conventions, 1949 in 1964,[1] thereby affirming its commitment to International Humanitarian Law (IHL). The Geneva Conventions are a comprehensive body of international legal instruments designed to protect individuals during armed conflicts.

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[1] International Committee of the Red Cross, *State Parties to the Geneva Conventions and Their Additional Protocols, ICRC*, available at https://ihl-databases.icrc.org/en/ihl-treaties/geneva-conventions-1949/state-parties (Accessed on Feb. 15, 2025)

IHL, as a subset of public international law, comprises rules intended to safeguard those who are not or are no longer actively participating in hostilities, while also imposing restrictions on the means and methods of warfare. IHL encompasses both international treaties and customary rules that address humanitarian issues arising directly from armed conflict, whether international or non-international in nature. Consequently, IHL is often referred to as the 'law of armed conflict' or the 'law of war'.[2]

Within IHL, two key branches are recognized, Geneva Law and Hague Law. The Geneva Law refers to the rules designed to protect individuals in armed conflict, such as military personnel who are hors de combat (out of the fight) and civilians who are not or are no longer directly involved in hostilities. On the other hand, Hague Law establishes the rights and obligations of parties engaged in hostilities, specifically regulating the conduct of warfare and limiting the means and methods employed in such conflicts.[3]

The Geneva Conventions of 1949 provide protection for a range of vulnerable groups, including civilians, prisoners of war, medical and religious personnel, and the wounded during armed conflict. These Conventions explicitly prohibit the use of excessive violence, pillage, and unnecessary destruction of property. While Nepal has ratified the Geneva Conventions and several other IHL treaties, including those concerning chemical, biological, and nuclear weapons, it has yet to ratify the Rome Statute of the International Criminal Court (ICC). As a party to the Geneva Conventions, Nepal is legally bound to impose domestic legal measures to penalize violations of the Conventions, though such legal provisions have not been fully enacted.[4]

During Nepal's decade-long armed conflict (1996-2006), a non-international armed conflict, the importance of adherence to IHL became particularly evident. As Nepal has not yet acceded to the two Additional Protocols of 1977, it only applies Common Article 3 of the Geneva Conventions, which is applicable in non-international conflicts occurring within the territory of a state party to the Conventions.[5] This article applies when the conflict is internal,

[2] International Committee of the Red Cross, *What Is International Humanitarian Law?* ICRC (Oct. 31, 2016), available at https://www.icrc.org/en/document/what-ihl (Accessed on Feb. 15, 2025)

[3] *Id*

[4] Krishna Chandra Chalisey, *Nepal and International Humanitarian Law,* Kathmandu Post (Aug. 10, 2023), available at https://kathmandupost.com/columns/2023/08/10/nepal-and-international-humanitarian-law (Accessed on Feb. 15, 2025)

[5] World Legal Information Institute**,** *International Law and International Human Rights Law: International Human Rights Law and the Use of Force, I*SIL Yearbook of International Humanitarian and Refugee Law**,** 11 (2001), available at http://www.worldlii.org/int/journals/ISILYBIHRL/2001/11.html (Accessed on Feb. 15, 2025)

involving either government forces and rebel groups or among rebel factions themselves. The Additional Protocol II further expands on the protections afforded under Common Article 3. [6]

Common Article 3 provides a minimum level of protection for individuals who are not actively involved in the conflict, including members of the armed forces in specific circumstances outlined in the article. Two fundamental principles under this provision are the humane treatment of all persons and the non-discriminatory nature of such treatment.

The Nepalese judiciary has addressed the application of IHL principles in several key cases, such as in Rajaram Dhakal case. In this case, the Supreme Court of Nepal directed the government to undertake a thorough study and research of IHL and take necessary steps to enact laws in line with the spirit of the Geneva Conventions.[7] However, the process of incorporating the Geneva Conventions into Nepal's domestic legal framework remains ongoing. This is reflected in ongoing discussions surrounding the National Penal Code and other legal structures intended to address the suppression of serious violations of IHL within the context of Nepalese law.

2. Repression of Serious Violations of IHL

The repression of serious violations of International Humanitarian Law (IHL) involves legal and enforcement actions by states and conflict parties to prevent and penalize grave breaches of the laws of war. The Geneva Conventions of 1949 and their Additional Protocols I and II mandate states to implement laws to punish such breaches in both international and non-international conflicts. States are also required to take preventive measures against other IHL violations, even if they are not classified as grave breaches. Additional IHL instruments, like the 1980 Convention on Conventional Weapons, further reinforce the need for legal actions to address violations, strengthening the enforcement of humanitarian law.[8]

National legislation aimed at repressing violations of international humanitarian law (IHL) should include provisions that outline punishments proportional to the seriousness of each offense. This requires laws that criminalize grave IHL breaches, such as war crimes,

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[6] World Legal Information Institute**,** *International Law and International Human Rights Law: International Human Rights Law and the Use of Force, I*SIL Yearbook of International Humanitarian and Refugee Law**,** 11 (2001), available at http://www.worldlii.org/int/journals/ISILYBIHRL/2001/11.html (Accessed on Feb. 15, 2025)

[7] N.K.P. 2064 BS**,** Vol. 12, Decision No. 7274, available at https://www.legal-tools.org/doc/320f25/pdf/ (Accessed on Feb. 15, 2025)

[8] *Id*

genocide, and crimes against humanity. It should establish individual criminal responsibility not only for those who directly commit violations but also for those who order, facilitate, or fail to prevent them, including superior officers. The law must criminalize breaches by omission, ensure that political, military, or national interests cannot be used as excuses for immunity, and disallow superior orders as a defense. Moreover, it should have broad jurisdiction, ensuring accountability for offenders regardless of their nationality or where the crime occurs. The legislation must guarantee fair trial rights, including prosecution in an impartial, regularly established court, and include provisions for international cooperation in extradition and legal assistance.

Effective judicial mechanisms are crucial for prosecuting those responsible for such violations. This may involve collaboration with international bodies, such as the International Criminal Court (ICC) or specialized tribunals, when national courts fail to act. Additionally, preventive measures like military training, clear rules of engagement, and disciplinary actions must be continuously implemented to ensure adherence to IHL.

3. Efforts of ICRC on National Repression of Serious Violations of IHL

For several years, the ICRC has actively encouraged states to fulfill their obligations under International Humanitarian Law (IHL) by adopting relevant national regulations and legislation. Through its Advisory Service on IHL, established in 1995, the ICRC has provided technical assistance to states-at their request or with their consent-on incorporating IHL into domestic legal systems. This includes translating the Geneva Conventions and their Additional Protocols into national languages, supporting the adoption of criminal laws to address war crimes, and promoting measures to safeguard the Red Cross emblem. The Advisory Service also focused on integrating IHL education into official curricula and establishing national information offices to enhance awareness.

In addition, the ICRC conducts training and capacity-building programs like the South Asian Teaching Sessions (SATS) to deepen knowledge of IHL principles among legal professionals, government officials, and military personnel. By collaborating with judicial bodies, academic institutions, and security forces, the ICRC ensures that IHL is effectively

embedded in national legal frameworks, promotes compliance, and fosters a broader culture of respect for human rights and the protection of civilians in conflict.

4. Nepali Measures and Arrangements

The Comprehensive Peace Accord (CPA) of Nepal, signed in 2006, emphasizes the commitment of all parties to uphold International Humanitarian Law (IHL) as a central component of the peace process. It marked the end of a prolonged conflict and laid the foundation for incorporating IHL into Nepal's legal system.[9] The CPA prioritizes the protection of civilians and non-combatants during conflicts, ensures accountability for breaches of humanitarian law, and calls for transitional justice to address past wrongs. By integrating IHL into its broader goals for national reconciliation and justice, the CPA reinforces the obligation of all parties to comply with international standards in both wartime and post-conflict recovery.

As a signatory to the Geneva Conventions of 1949 and other IHL treaties, Nepal has worked to incorporate these principles into its 2015 Constitution and national laws. The Constitution affirms Nepal's commitment to international law, particularly in safeguarding human rights, fundamental freedoms, and the rights of conflict victims.

Nepal's dedication to international law is codified in Article 51(m) of the Constitution, which mandates the country to uphold global legal norms. To ensure compliance, specific constitutional bodies have monitoring and enforcement powers. Article 249(g) grants the National Human Rights Commission (NHRC) the authority to review the implementation of international treaties and recommend corrective actions to the government. Likewise, Article 252(b) gives the National Women Commission the responsibility to monitor the implementation of laws related to women's rights under international treaties, enabling it to suggest measures to ensure effective compliance.

Regarding the relationship between international law and domestic law, Section 9 of the Nepal Treaty Act, 1990 establishes that when a treaty ratified by Parliament conflicts with existing domestic law, the treaty's provisions take precedence, rendering conflicting domestic laws ineffective. If a treaty is signed by the government but not ratified by Parliament, the

[9] Comprehensive Peace Accord, 2006, Art. 7, available at https://www.nhrcnepal.org/uploads/publication/3-year_CPA_(1).pdf (Accessed on Feb. 16, 2025).

government is required to initiate the legislative process to align domestic laws with the treaty's obligations, ensuring Nepal's adherence to its international legal commitments.[10]

5. Nepali Criminal Law

The National Penal Code of 2017 includes several provisions aimed at protecting individuals during armed conflicts, criminalizing acts such as genocide, crimes against humanity, torture, and enforced disappearances. Section 38 of the Code appropriately recognizes 'crimes against humanity' as an important aggravating factor when assessing the severity of an offense. However, the Code does not provide a clear definition or direct prohibition of these crimes. This lack of specificity and substantive legal prohibition undermines the effectiveness of the aggravating factor, raising concerns about the Code's ability to adequately address and penalize these grave offenses.

Section 52 of the National Penal Code prohibits genocide, defining it as intentional acts aimed at destroying, in whole or in part, a specific ethnic, racial, national, or religious group. Genocide includes acts such as mass killings, causing severe harm, deliberately creating living conditions that lead to destruction, forcibly preventing births within the group, and transferring children to another group. The penalties for genocide range from life imprisonment to up to ten years, depending on the gravity of the act. Those found guilty, including public officials who cannot justify their actions on the grounds of superior orders, will be held equally liable, even if the acts were carried out by a group or under someone else's direction. This provision highlights Nepal's strong opposition to genocide and its commitment to upholding international humanitarian law.[11]

Section 134 of Penal Code, 2017, comprehensively prohibits all activities related to nuclear, chemical, and biological weapons. This provision strictly forbids the manufacture, production, procurement, sale, acquisition, ownership, transfer, stockpiling, storage, transportation, export, import, investment, and management of such weapons, as well as inducing others to engage in these activities. The code explicitly references international conventions, defining 'chemical weapons' according to the 1993 Paris Convention and 'biological or toxin weapons' based on the 1972 London, Moscow, and Washington Convention. Violations of this section are subject to severe penalties, including imprisonment for up to twenty years

[10] Nepal Treaty Act, 1990, S. 9.

[11] *National Penal Code, 2074*, Prohibition of Genocide, S. 52.

and a fine of up to two hundred thousand rupees, underscoring Nepal's commitment to preventing the proliferation and use of these devastating weapons.

Section 167 of the Penal Code explicitly prohibits any form of torture by a competent authority during investigations, prosecutions, or while detaining individuals. It forbids subjecting any person to physical or mental torture or to cruel, brutal, inhuman, or degrading treatment-acts that include, for example, inflicting pain to extract information, force confessions, punish, or intimidate. Violators face penalties of up to five years of imprisonment, a fine of up to fifty thousand rupees, or both, with the same sanctions applying to those who order or assist in such acts. Notably, the provision denies any defense based on following superior orders, thereby reinforcing strict accountability and the protection of human dignity.[12]

Section 206 of the Penal Code criminalizes enforced disappearance, defining it as the act of arresting, detaining, or otherwise depriving someone of their liberty, while authorities or groups conceal information about the person's whereabouts, condition, or the reasons for their detention, and fail to present the individual before a judicial authority within twenty-four hours. The provision clarifies that both those who directly commit the act and those who order or facilitate it are considered principal offenders. Even superiors who overlook such violations are held accountable. The law imposes joint liability on all involved parties and stipulates severe penalties, including up to fifteen years of imprisonment and fines of up to five hundred thousand rupees. Additional sentences are applied for offenses involving women, children, or the misuse of government resources.[13]

The Criminal Procedure Code, 2017 and the Sentencing Act, 2017 reveal a deliberate legal strategy concerning particularly grave offenses. Specifically, offenses under Sections 167 and 206 are designated as 'negative offenses' within the Section 116 in Criminal Procedure Code, effectively barring their withdrawal from prosecution. Similarly, the Sentencing Act, 2017, through Sections 29, 24, and 39, classifies crimes against humanity, torture, and enforced disappearance as negative factors that preclude parole, sentence suspension, and remission. This consistent treatment of these offenses across both legal frameworks demonstrates a clear intent to deny leniency and ensure rigorous prosecution and punishment

[12] *National Penal Code, 2074*, Prohibition of Torture, S. 167.

[13] *National Penal Code, 2074*, Prohibition related to Enforced Disappearance, S. 206.

for these severe violations, making these provisions crucial for analyzing the legal handling of such crimes.

Nepal's current legal framework reveals significant gaps and ambiguities in holding individuals accountable for serious international crimes. While the Penal Code includes provisions for certain offenses, it lacks clear definitions or penalties for war crimes and does not provide a solid legal foundation for prosecuting crimes against humanity. Moreover, recent amendments to the TRC and CIEDP Act have raised concerns that individuals accused of serious crimes during the armed conflict may receive amnesty, undermining the principle of no impunity and potentially jeopardizing Nepal's adherence to international obligations. Human rights advocates have criticized aspects such as the lack of clarity in defining crimes, the statute of limitations, and the prosecutor's authority to reduce sentences by up to 75%. These issues highlight the need for stronger and clearer legal provisions to ensure accountability and justice for victims. The Criminal Procedure Code states that these crimes fall under the jurisdiction of district courts, and such cases cannot be withdrawn from prosecution.[14]

6. Nepalese Army Act

The Nepal Army plays a vital role in ensuring compliance with international humanitarian law (IHL) during military operations. To prevent violations, IHL is integrated into the Army's training programs at all levels, ensuring that officers and soldiers understand the rules of armed conflict. Section 20 of the Nepal Army Act, 2063 mandates that recruits undergo training in military education, ethics, human rights, and IHL. Since 1997, the Army, including personnel preparing for UN peacekeeping missions, has incorporated IHL training. The Army Act of 2006 made IHL training a legal requirement for all recruits. Section 13 disqualifies individuals convicted of human rights violations from joining the Army, while Sections 61 and 62 address illegal detention and the establishment of a committee for investigating cases before court proceed

7. Nepal Armed Police Force (APF) Act, 2001

The Nepal Armed Police Force (APF) Act of 2001 outlines the APF's duties in internal security,[15] counterinsurgency, and disaster response, while emphasizing adherence to national

[14] *Criminal Procedure Code. 2074*, R. 116.

[15] Prem Raj Khanal, *Human Rights Violations during Armed Conflict in Nepal,* available at https://www.nepjol.info/index.php/kmcrj/article/view/28247/23246 (Accessed on Feb. 18, 2025)

and international legal standards. Ensuring compliance with human rights and international humanitarian law (IHL) is crucial for justice and accountability, particularly in post-conflict Nepal.[16] Despite legal provisions, the APF has faced allegations of human rights violations during the armed conflict (1996–2006) and in security operations.[17] Efforts like human rights education and cooperation with international organizations have been made,[18] but challenges remain, including excessive force, lack of independent investigations, and political influence Strengthening oversight, transparent investigations, and aligning policies with international standards is key to restoring trust and upholding justice

8. Nepal Police

The Nepal Police is responsible for maintaining public order, preventing and investigating crimes, and ensuring internal security. As a state institution, it is obligated to uphold human rights and international humanitarian law (IHL), particularly during conflicts, unrest, and law enforcement operations. The Police Rules, 2071 BS, mandate that the Inspector General of Police and department heads work to protect human rights.[19]

While the Nepal Police has played a key role in maintaining stability, especially during the armed conflict (1996-2006) and post-conflict periods, allegations of excessive force, torture, arbitrary detention, extrajudicial killings, and enforced disappearances have raised concerns about its adherence to human rights.

In response, the police have integrated human rights training into their programs, improved accountability mechanisms, and promoted community policing. Additionally, the Nepal Police has collaborated with international organizations to enhance human rights standards. However, challenges like political influence, insufficient oversight, and slow judicial processes still under mine accountability. Strengthening legal frameworks, ensuring

[16] Narendra Bam et al., *Importance of International Humanitarian Law (IHL) Training in Armed Police Force, Nepal,* Vol.3(1), JOURNAL OF APF COMMAND AND STAFF COLLEGE, 2020 available at https://www.nepjol.info/index.php/JAPFCSC/article/view/27532 (Accessed on Feb. 18, 2025)

[17] Armed Police Force Rules, R. 105.

[18] Bam et al., supra note 17.

[19] *Nepal Police Rules, 2071 BS,* R. 53, 54, 55, 57, 59, 60, 62, 63, 64.

transparent investigations, and fostering a human rights culture within the police are crucial for aligning Nepal's law enforcement practices with international standards.

9. National IHL Committee

The National IHL Committee of Nepal, chaired by the Minister of Law, Justice, and Parliamentary Affairs, includes representatives from various organizations dedicated to promoting and implementing international humanitarian law (IHL) in the country. Its key responsibilities include drafting legislation to enforce IHL, advising the government on relevant policies, conducting awareness campaigns, and providing recommendations to ensure Nepal meets its obligations under the Geneva Conventions. The Committee previously drafted the Geneva Conventions Act, but it is currently not under discussion in Parliament, although it may be considered in the future.[20] The National IHL Committee has been urged to prioritize finalizing the draft for approval. While Nepal has made significant progress in training and awareness activities, it still lags behind in treaty participation and the development of national implementation mechanisms.

The Committee has also played a crucial role in incorporating IHL into military training programs. Since 1997, the Nepalese Army has included IHL in its standard training for all personnel,[21] including those preparing for United Nations peacekeeping missions, with over 42,000 army personnel having received education in IHL and International Human Rights Law. Through these efforts, the National IHL Committee of Nepal aims to cultivate a culture of respect for humanitarian law, ensuring its effective application across military, judicial, and civil society sectors.

10. IHL, Nepali Judiciary and the Training

The judiciary of Nepal plays a vital role in protecting human rights and ensuring compliance with international humanitarian law (IHL), particularly in relation to conflict-era human rights violations and transitional justice. The Supreme Court has issued landmark rulings on issues like criminalizing torture,[22] addressing enforced disappearances, and protecting constitutional rights. For example, in the case of *Rajendra Dhakal and Others v. Government*

[20] Chalisey, supra note, 5.

[21] Military Act, 2063 BS. S. 20.

[22] Rajendra Ghimire & others v. Office of Prime Minister & Council of Ministers & others, available at https://thehimalayantimes.com/nepal/sc-order-sought-to-criminalise-torture (Accessed on Feb. 19, 2025)

of Nepal, the Court instructed the government to criminalize enforced disappearances and prosecute responsible officials, as well as provide compensation to victims' families.[23] The Court has also ordered the return of forfeited property and compensation for victims of the armed conflict.[24]

Nepal, as a signatory to human rights conventions[25]like the ICCPR and the Geneva Conventions, is bound to uphold fair trial principles and accountability for violations. However, challenges such as delayed case proceedings, lack of enforcement, and political interference persist.

Non-governmental and civil society organizations in Nepal actively advocate for IHL adherence and public awareness. The National Judicial Academy (NJA) plays a key role in strengthening the judiciary's capacity by providing specialized training for judges, legal officers, and law enforcement, often in partnership with organizations like the ICRC and UNDP. These efforts help integrate IHL into Nepal's judicial system, improving the handling of conflict-era cases and promoting a more transparent, accountable judiciary.

11. Transitional Justice Mechanisms

The Commission of Investigation on Enforced Disappeared Persons (CIEDP) and the Truth and Reconciliation Commission (TRC) were established by the Government of Nepal in 2015 through the Commission of Investigation on Enforced Disappeared Persons and Truth and Reconciliation Commission Act to address human rights violations during the decade-long armed conflict (1996-2006). Although the Act was amended in 2024, the appointment of chairs and members for both commissions is still pending, hindering their work. CIEDP was created to investigate enforced disappearances, determine the fate and whereabouts of the missing, and recommend legal actions or reparations. However, political will, slow progress, insufficient resources, and legal ambiguities have delayed its operations. Similarly, the TRC was tasked with investigating human rights violations such as extrajudicial killings, torture, and sexual violence, and providing justice through truth-seeking, reparations, and possible

[23] Rabindra Dhakal on behalf of Rajendra Dhakal v. The Government of Nepal & others, available at https://ihl-databases.icrc.org/en/national-practice/rabindra-prasad-dhakal-behalf-rajendra-prasad-dhakal-advocate-v-nepal-government (Accessed on Feb. 19, 2025)

[24] N.K.P. 2071 BS., Vol. 12, Decision No 9303.

[25] Nepal's Participation in Human Rights Conventions and Protocols**,** available at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=122&Lang=EN (Accessed on Feb. 19, 2025)

prosecutions. Both commissions face challenges like political interference, lack of victim trust, and delays in legal amendments for prosecution, leading to criticism for their failure to meet their initial mandates. Despite amendments being introduced, the full functioning of the commissions depends on the appointment of commissioners, and they are under increasing pressure to align with international human rights standards in the transitional justice process.

12. Past Efforts Without Success

In June 2006, the Nepalese Parliament unanimously passed a "commitment resolution" (Sankalpa) urging the government to ratify the Rome Statute, with various government ministries expressing support for the ICC ratification.[26] During the ICC's missions to Nepal in 2006 and 2007,[27] the government reiterated its support for joining the international legal framework for prosecuting war crimes, genocide, and crimes against humanity. This step was seen as a crucial part of Nepal›s transitional justice process, particularly in addressing future human rights violations. However, despite this initial support, Nepal has yet to ratify the Rome Statute.[28] Although the Ministry of Law and Justice, through the IHL Committee, drafted a bill on the implementation of IHL, it has remained pending for several years, highlighting the government's reluctance to fully commit to international accountability mechanisms. Political transitions, concerns over the potential prosecution of individuals from both state and rebel forces, and lack of consensus among political leaders have contributed to these delays. Consequently, Nepal continues to face pressure from human rights organizations and the international community to fulfill its commitments to justice and accountability. In response, NJA Nepal conducted a study on Nepal's accession to the Rome Statute and provided recommendations to the government, emphasizing the need for separate legislation addressing crimes and penalties,[29], as well as provisions for complementarity to collaborate with the ICC if the national system fails to deliver justice.

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[26] Campaign for Global Justice, available at https://www.coalitionfortheicc.org/nepal#:~:text=CAMPAIGN%20FOR%20GLOBAL%20JUSTICE%20In%20June%202006%2C,have%20been%20made%20by%20Nepalese%20government%20ministries (Accessed on Feb. 19, 2025).

[27] *Id*

[28] Chalisey, supra note, 5

[29] Dr. Anand Mohan Bhattarai et al., *Preparing to Implement the Rome Statute: A Study of the Laws and Procedures in Place in Nepal and the Need for Reform,* available at https://insecresources.org.np/pages/download_progress.php?ref=38267&size=&ext=pdf&k=029fa8401c (Accessed on Feb. 19, 2025)

13. Conclusion and Recommendations

Nepal, with its history of armed conflict and vulnerability to future instability, faces significant challenges in implementing International Humanitarian Law (IHL). Despite efforts to promote IHL, there are gaps in legal frameworks, particularly the lack of clear definitions and penalties for crimes like genocide, war crimes, and crimes against humanity. As a state party to the Geneva Conventions, Nepal is obligated to uphold IHL but needs stronger legal frameworks, specialized mechanisms for investigation, and prosecution to ensure accountability.

To address these gaps, Nepal must establish clear national laws for prosecuting grave IHL violations, create a dedicated framework for genocide, war crimes, and crimes against humanity, and improve the functioning of the TRC and CIEDP commissions by appointing chairs and commissioners to resolve pending cases. Additionally, Nepal should prioritize IHL promotion during peacetime and strengthen the capacity of its justice system, including specialized and impartial prosecutors and judges.

Becoming a party to key international legal instruments like the Rome Statute, cooperating with international mechanisms like the ICC, and conducting studies on joining other IHL-related treaties are crucial steps. Strengthening domestic frameworks and fostering public awareness through collaboration with civil society and international organizations will reinforce Nepal's commitment to IHL, helping to ensure justice, peace, and stability.

Access to Justice to the Victims of Sexual Violence during Armed Conflict in Nepal

Smriti Rai

Abstract

Sexual violence is often used as a tool to achieve military and political objectives. It is one of the prevailing and devastating human rights violations, disproportionately affecting women, girls and other vulnerable groups. Despite having international legal frameworks and mechanisms aimed at addressing such crimes, access to justice for victims remains a significant challenge during and after the conflict. This paper examines the barriers faced by victims of sexual violence while seeking justice during and after armed conflicts, including legal, social, cultural and institutional obstacles in countries like Nepal with patriarchal norms and a victim-blaming approach. It explores the role of international humanitarian law, human rights law, national law and transitional justice mechanisms of the nation in addressing these challenges. The paper also highlights the importance of victim-centered approaches, which prioritize the needs, dignity and rights of survivors of crime. Case studies from conflict zones around Nepal are analyzed to illustrate the gaps in justice delivery and the impact of impunity on victims and societies. The paper concludes with recommendations for strengthening legal frameworks, enhancing institutional capacity and fostering international cooperation to ensure that victims of sexual violence during armed conflict have meaningful access to justice. By addressing these issues, this paper aims to contribute to the ongoing global and national efforts to combat impunity and promote accountability for conflict-related sexual violence.

1. Introduction

Nepal faced a decade-long armed conflict from 1996 till 2006 A.D. between the governmental forces and the Communist Party of Nepal-Maoists (CPN-Maoist). The armed conflict had

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impacted the government system, people who were directly involved in the conflict and the citizens of the nation.

The conflict started with the notion to overthrow the constitutional monarchy and bring the socialist republic, but it resulted in gross violations of human rights of the citizens, for instance, torture, property seizure, enforced disappearance and sexual abuse.

The decade-long armed conflict finally came to an end after the Government of Nepal and the CPN-Maoist signed the Comprehensive Peace Accord (CPA) in 2006 A.D.[1] The CPA was signed to bring political, economic and social change in the country and adherence to humanitarian law and human rights principles, including through the establishment of a National Human Rights Commission, a Truth and Reconciliation Commission and a National Peace and Rehabilitation Commission.[2]

The decade-long non-international armed conflict in Nepal was marked by several gross violations of human rights, including rape and other forms of sexual violence, which majorly affected women and girls. They had to go through various situations like widowhood,[3] reversal of traditional gender roles,[4] unwanted pregnancies resulting from sexual violence, and children born as a consequence of rape, all of which led to their social exclusion by family members and the community.[5] The armed conflict had left thousands of victims of sexual violence.

2. Despite the end of the conflict, access to justice for victims of sexual violence remains a significant challenge. This article provides a detailed analysis of the barriers to justice faced by victims of sexual violence in post-conflict Nepal, the legal and institutional frameworks in place and recommendations for ensuring justice and reparations for survivors.Understanding Sexual Violence during Armed Conflict in Context of Nepal

In 2011, the World Health Organization (WHO) defined sexual violence as 'any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic or

[1] Comprehensive Peace Accord, 2006, Art. 7.1.3, available at Comprehensive Peace Agreement between the Government of Nepal and the Communist Party of Nepal (Maoist) | UN Peacemaker, (Accessed on Feb. 12, 2025)

[2] *Id* Art. 8

[3] International Centre for Transitional Justice (ICTJ) & Advocacy Forum, Across the Lines, The Impact of Nepal's Conflict on Women, 2010, available at https://www.ictj.org/sites/default/files/ICTJ-Nepal-Across-Lines -2010-English.pdf, p. 28., (Accessed on Feb. 12, 2025)

[4] *Id,* 32.

[5] *Id,* 34.

otherwise directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work'.[6] The Secretary General of the United Nations defines Conflict-Related Sexual Violence (CRSV) as 'rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys'.[7]

Sexual violence is often used as a tool by either party involved in armed conflict as a tool of suppression to create a fear among the general public by the gross violation of individual human right and dignity. It is used as a tool worldwide during the situation of conflict. Sexual violence in armed conflict is a pervasive and devastating phenomenon, often used as a deliberate tactic to achieve military, political and social objectives. This form of violence is not merely a byproduct of conflict but is frequently used as a strategic tool to terrorize populations, displace communities and assert dominance over conquered groups.[8] Sexual violence does not only target women and girls but it also targets men and boys, but it is often not reported as much due to the social stigmatization and cultural norms.[9] The consequence of sexual violence during the conflict time is often profound and over lasting due physical injuries, psychological trauma and social stigmatization.

The armed conflict in Nepal was marked by widespread human rights abuses, including sexual violence perpetrated by both state security forces and Maoist insurgents.[10] Women and girls were subjected to rape, sexual slavery, forced marriages and other forms of gender-based violence. These acts were often used as weapons of war to intimidate, punish, or control communities. However, some reports suggested that rape and sexual violence

[6] World Health Organization, *Violence Against Women: Intimate Partner and Sexual Violence Against Women* (2011), available athttps://www.who.int/publications/i/item/violence-against-women-intimate-partner-and-sexual-violence-against-women., (Accessed on Feb. 12, 2025)

[7] Representative of the Secretary-General on Conflict-Related Sexual Violence, U.N. Doc. S/2023/413, 5 (July 6, 2023).

[8] *Id*

[9] International Committee of the Red Cross, *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women* (2001)

[10] U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, NEPAL COUNTRY REPORT 168 (2005)

were committed by the security forces as a 'common practice' as a way to punish women for their alleged connection with the 'other side' (then rebels-the Maoists).[11]

Even though the report on sexual violence is scarce due to lack of proper documentation, the available data indicate that, during the armed conflict, more than one-third of the victims of sexual violence were children, with many under 15 years of age.[12] Women and girls were raped in front of their family members; some were reported to be taken into custody and raped over the custody and killed later on. Women and girls were also sexually harassed in other forms, such as being asked for sex, touched inappropriately and using filthy words during the time of conflict.[13]

The victims of sexual violence compared to other violence during the armed conflict had no access to justice. The primary as well as secondary victims had to suffer in silence due to the fear of the security force and Maoist insurgents, as they were not guaranteed any form of security from their perpetrator. A report by the International Centre for Transitional Justice (ICTJ) and Advocacy Forum highlights that sexual violence during the conflict was systematic and targeted, with many victims suffering long-term physical, psychological and social consequences.[14] Some victims could not bear the shame and the pain and chose death; some women had already moved on and had built a new family where they did not want to drag their traumatic past with them, which resulted in a lack of report against the violence committed against them during the conflict period and some victims passed away before they could even file the report because of the long wait for the justice mechanism to be formed. Survivors often endure physical injuries, psychological trauma and social ostracization, which can persist long after the conflict has ended.[15] There are still some survivors of sexual violence during armed conflict who want to share their story but want to stay anonymous because of the fear of social stigmatization.

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[11] ICTJ & Advocacy Forum, supra note 3, at 11.

[12] Institute of Human Rights Communication Nepal (IHRICON), SEXUAL VIOLENCE IN THE PEPPLE'S WAR: THE IMPACT OF ARMED CONFLICT ON WOMEN AND GIRLS IN NEPAL 18 (2006)

[13] ICTJ & Advocacy Forum, supra note 3, at 53.

[14] ICTJ & Advocacy Forum, supra note 3, at 28.

[15] Elisabeth Jean Wood, *Variation in Sexual Violence During War,* Vol. 34(3), POLITICS & SOCIETY 307- 342 (2006) available at https://doi.org/10.1177/0032329206290426 (Accessed on Feb. 12, 2025)

3. International and National Legal Framework

a. International Legal Framework

Nepal is party to six international human rights instruments among seven international human rights instruments[16] that obligate the state to ensure justice and reparation for the victims of sexual violence either during the time of armed conflict or during the peace period. Some of the major international instruments playing an active role can be stated as:

- **Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW):** [17] Nepal has ratified CEDAW on April 22, 1991 which requires Nepal to eliminate discrimination against women, to form the legislation in the manner to change the social norms and ensure their access to justice. CEDAW addresses the rights of women, including those affected by sexual violence during armed conflict. While CEDAW itself does not explicitly focus on armed conflict, the CEDAW Committee has issued General Recommendations that interpret and apply the Convention to such contexts. General Recommendation No. 30 on Women in Conflict Prevention, Conflict, and Post-Conflict Situations specifically addresses sexual violence during armed conflict.
- **International Covenant on Civil and Political Rights, 1966 (ICCPR):**[18] Nepal ratified ICCPR on May 14, 1991 which guarantees the right to an effective remedy for victims of human rights violations. Article 2(3),[19] 7[20] and 14 majorly focus on addressing the right to an effective remedy, freedom from torture and inhuman treatment and right to fair trial. These mentioned provisions are often interpreted for the protection of victims of sexual violence

[16] International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).
International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).
International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 660 U.N.T.S. 195 (entered into force Jan. 4, 1969). Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987).
Convention on the Rights of the Child, opened for signature Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, opened for signature Dec. 18, 1990, 2220 U.N.T.S. 3 (entered into force July 1, 2003).

[17] Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

[18] International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

[19] *Id,* Art. 2(3) (Right to an Effective Remedy for Violations of Rights)

[20] *Id,* Art. 7 (Prohibition of Torture and Inhuman Treatment)

and ensure their access to justice. General Comment No. 32[21] and General Comment No. 36[22] by the Human Rights Committee which monitors the ICCPR provides the proper interpretation of the application to the victims of sexual violence and their access to justice.

- **Rome Statute of the International Criminal Court (ICC), 1998:**[23] The Rome Statute of the International Criminal Court (ICC), 1998 is a key international treaty that establishes the ICC and defines the crimes under international law. It recognizes sexual violence as a war crime, against humanity and act of genocide. Articles 7[24] (crimes against humanity), 8[25] (war crimes), and 68[26] (protection of victims and witnesses) are particularly relevant to victims of sexual violence and their access to justice.

  The United Nations Security Council Resolution 1325 on Women, Peace and Security emphasizes the need to address gender-based violence in conflict and post-conflict settings.[27] These international human right instrument has ensured the protection of the victims and their access to justice. Despite these obligations, Nepal has made limited progress in implementing these standards at the national level due to various challenges, such as instable government and the social norms.

b. National Legal Framework

Nepal's national legal framework includes several laws and policies aimed at addressing sexual violence, being guided by the international instruments and change in societal needs:

- **The Constitution of Nepal (2015)**: The constitution of Nepal guarantees fundamental rights, including the right to equality, dignity and protection from violence. Article 16 guarantees the right to live with dignity, which encompasses protection from violence, including sexual violence.[28] Article 38 specifically ensures women's rights and protection from gender-based violence.[29] Article 51 includes the commitment of nation to transitional justice and repara-

[21] Human Rights Comm., *General Comment No. 32: Article 14, Right to Equality Before Courts and Tribunals and to a Fair Trial,* U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007)

[22] Human Rights Comm., *General Comment No. 36: Article 6 (Right to Life),* U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

[23] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

[24] *Id,* Art. 7 (1) (G) (sexual violence as a crime against humanity)

[25] *Id,* Art. 8 (2) (B) (XXII) and 8 (2) (E) (VI) (sexual violence as a war crime in international and non-international armed conflicts)

[26] *Id,* Art. 68 (Protection of Victims and Witnesses and their Participation in Proceedings).

[27] S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

[28] NEP. CONST. (2015), Art. 16.

[29] NEP. CONST. (2015), Art. 38

tions for victims of conflict-related violations, including sexual violence.[30]

- **The Nation Penal Code (2017)**: The code criminalizes rape, sexual harassment and other forms of sexual violence.[31] However, it does not explicitly address conflict-related sexual violence or provide adequate provisions for reparations. The code includes provisions for the prosecution of sexual violence but lacks specific mechanisms for addressing crimes committed during the armed conflict.[32]
- **Truth and Reconciliation Commission (TRC) Act, 2014**: TRC established the legal framework for addressing human rights violation, including sexual violence committed during the decade long armed conflict (1996-2006).[33] The Act ensured the investigation of conflict era crimes, reparation for the victims and access to justice for the victims and their family. Section 2[34] defines the gross violation of human rights which includes rape and sexual violence. It establishes the jurisdiction of TRC to investigate and recommend reparations for the victims of conflict related violations[35] and provide reparations and rehabilitation for the victims.[36]
- **The Comprehensive Peace Accord (CPA)** of 22 November 2006 had provisioned to set up a 'High-level Truth and Reconciliation Commission to investigate the truth about people seriously violating human rights and involved in crimes against humanity'.[37]

Despite these legal provisions, the lack of specific laws addressing conflict-related sexual violence and the weak enforcement of existing laws remain significant challenges along with the social stigmatization.

4. Barriers to Access to Justice

Survivors of violence, particularly sexual violence, face significant barriers in countries like Nepal, where deeply rooted societal norms, stigmatization and a lack of awareness create substantial challenges. Nepal is a society which is heavily influenced by traditional

[30] NEP. CONST. (2015), Art. 51.

[31] *National Penal Code, 2017*

[32] *Id*

[33] Truth and Reconciliation Commission Act, 2014, Nepal.

[34] *Id,* 2 (j).

[35] *Id,* 23.

[36] *Id,* 29.

[37] Comprehensive Peace Accord, Nepal Gov't & Communist Party of Nepal (Maoist), 5.2.5 (Nov. 21, 2006)

values and patriarchal structures, where maintaining family and community honor is often prioritized over individual rights and justice. In such a context, survivors of sexual violence are frequently blamed for the abuse they endure, with the responsibility placed on them to protect their dignity and uphold the family's reputation. This pervasive mindset worsens the physical and emotional trauma experienced by survivors, as they are further subjected to societal stigmatization and ostracization.[38]

There are many barriers faced by the survivors of the violence, especially sexual violence, in the context of a country like Nepal, where there exists lots of stigmatization and lack of awareness among people. Those barriers are created because of the hostile environment created by the societal norms and values which prioritizes the community acceptance, fear of losing social status and being alienated from the social network. The patriarchal nature of the Nepali society also reinforces the harmful stereotypes placing the burden on the survivors rather than the perpetrator. The victim blaming mentality discourages the survivors to come forward to seek the justice. The fear of judgment, rejection, and further victimization often outweighs the desire for legal redress, leaving many survivors without access to the support and resources they need. Some of the major barriers can be classified as below:

a. Sociocultural Stigma and Patriarchal Norms

In Nepal, survivors of sexual violence face profound socio-cultural stigma, which often prevents them from seeking justice. The deeply entrenched patriarchal norms in society place the burden of shame on victims rather than perpetrators, perpetuating the idea that sexual violence brings dishonor to victims and their families rather than holding the perpetrator accountable. As a result, many survivors fear being ostracized by their families and communities, which discourages them from reporting crimes or pursuing legal action.[39]

The stigmatization is further intensified by a lack of knowledge about victims' rights and the presence of a victim-blaming attitude. In many cases, survivors are accused of provoking the violence or are seen as complicit in the crime, which reinforces their marginalization.[40] Fear of losing social standing, being abandoned by their spouse and family and the situation

[38] ICCPR, supra note 19

[39] ICTJ and Advocacy Forum, *supra* note 3, at 53.

[40] IHRICON, supra note 12, at 18.

where they were raped in front of their family members and not going through the same trauma has played a significant role in deterring seeking justice.

b. Legal and Institutional Challenges

Nepal's legal system has historically failed to address conflict-related sexual violence adequately and the legal gap has left the survivors without recourse. The absence of specific laws criminalizing conflict-time sexual violence and the lack of gender-sensitive judicial processes has hindered victims' access to justice.

In search of justice, the survivors of sexual violence are made to relive the very trauma and make them revictimized, while the survivors just seek justice and live a peaceful life. While the Nepalese Penal Code criminalizes rape and other forms of sexual violence, it does not explicitly address sexual violence committed during armed conflict.[41]

The Nepal's justice mechanism has majorly been focusing on other violations of human rights rather than majorly focusing on the sexual violence during the time of armed conflict. The survivors of sexual violence have different needs, such as reparations and psychosocial support and being recognized as distinct violation of human rights, but the justice mechanism is not being able to do so at the present time.

Many women have been denied reparations and psychosocial support, leaving them to grapple with the physical, emotional and social consequences of their experiences without adequate assistance.[42] This lack of accountability has also perpetuated a culture of impunity, sending a message that sexual violence during conflict will not be punished.

To address these shortcomings, there is an urgent need for legal and institutional reforms. Specific laws criminalizing conflict-related sexual violence must be enacted and the mandates of the Truth and Reconciliation Commission (TRC) and Commission of Investigation on Enforced Disappeared Persons (CIEDP) should be revised to prioritize gender-based violence and ensure that survivors' needs are addressed.[43] Along with it, greater efforts are

[41] OHCHR, supra note 10, at 168.

[42] ICTJ and Advocacy Forum, supra note , at 57.

[43] IHRICON, supra note 12, at 22.

needed to make to raise awareness about survivors' rights and to provide them with access to legal, medical and psychosocial support services as per the needs of the survivors.

c. Impunity and Lack of Accountability

Impunity for perpetrators of sexual violence remains a significant obstacle to justice for the survivors. Most of the alleged perpetrators hold positions of power within the government, security forces, or political parties, making it difficult for victims to pursue legal action against them. This entrenched culture of impunity is further perpetuated by the slow pace of investigations, weak enforcement mechanisms and political interference in the judicial process.[44] The power play often shields perpetrators from accountability, leaving survivors without recourse and undermining public trust in the legal system. Many victims fear that reporting sexual violence will result in further harm, either to themselves or their families, particularly in cases where perpetrators are politically or socially influential,[45] leaving survivors vulnerable to intimidation and retaliation. Which results in, many survivors reluctant to come forward and testify against their perpetrators, which further entrenches the cycle of impunity.

Political interference in the judicial process has also been a major barrier to justice, which denies justice to survivors along with leaving the impression that sexual violence will not be punished, reinforcing the culture of impunity. The slow pace of investigations and the lack of gender-sensitive procedures within the legal system further increase the challenges faced by survivors. Many women who attempt to seek justice encounter a lack of sensitivity and support from law enforcement and judicial authorities, which discourages them from pursuing their cases.[46]

Establishing effective witness protection programs is critical to ensuring that survivors can come forward without fear of retaliation.[47] To address these challenges and encourage survivors to come forward to seek justice, there is an urgent need for systemic reforms, such

[44] OHCHR, supra note 10, at 172.

[45] ICTJ & Advocacy Forum, supra note 3, at 58.

[46] OHCHR, supra note 10, at 174.

[47] ICTJ and Advocacy Forum, supra note 3, at 60.

as strengthening the independence of the judiciary and reducing political interference in legal processes. These are also essential to restoring public trust in the justice system.

5. Case Study

Many women and girls were sexually assaulted and raped repeatedly across the country during the armed conflict by both the security forces and Maoist insurgents. There was the environment of terror for people living around the nation. The security forces or the insurgents would ambush their houses and villages and torture people living around there. They would be tortured, beaten up, verbally abused, sexually violated and raped. Some of the cases can be stated as:

i. The Case study of Gayatri (pseudonym)[48]

Gayatri, a minor and student in 2001, was forcibly recruited by Maoist combatants who threatened to kill her and her parents if she refused to comply. After a few days of walking through the jungle, she fell ill and was left in a village, where later she was captured by security forces. Despite her protests that she had been forcibly recruited, security forces detained her, blindfolded and bound her and subjected her to repeated sexual violence during her 25-day detention.

Gayatri was raped repeatedly by multiple officers, often under the disguise of bringing food or taking her to the toilet or cleaning her room. She was also forced to provide oral sex and endure other forms of sexual abuse. When she resisted, she was beaten and threatened with death. The physical and psychological toll of the abuse was severe: she experienced heavy vaginal bleeding, eye problems from prolonged blindfolding and lasting back pain from beatings. After her release, Gayatri received medical treatment, but her family destroyed the records to protect her from further stigmatization.

Despite her desire for justice, Gayatri has not been able to report the crimes due to fear of retaliation and the potential impact on her marriage. Her case highlights the dual victimization of survivors, first by perpetrators and then by a society that stigmatizes and silences them. It

[48] Human Rights Watch, Silenced and Forgotten: Survivors of Nepal's Conflict-Era Sexual Violence (Sept. 23, 2014), available at https://www.hrw.org/report/2014/09/23/silenced-and-forgotten/survivors-nepals-conflict-era-sexual-violence. (Accessed on Feb. 17, 2025)

also underscores the systemic failures of Nepal's legal and justice systems to address conflict-related sexual violence and provide remedy for survivors.

ii. The Case study of Madhavi (pseudonym)[49]

Madhavi lived with her husband, his brother and her brother's wife during Nepal's conflict. In August 2004, Maoists visited their home and left a suitcase, assuring the family they would retrieve it soon. Days later, security forces surrounded the house. When her husband revealed a hidden gun, the soldiers accused Madhavi of being a Maoist too. They separated her from her husband, beat her severely and dragged her into a cowshed, where she was raped by multiple soldiers. Madhavi described losing consciousness during the assault and waking up bruised, swollen and covered in cow dung.

The soldiers took her husband and brother-in-law, whose bodies were later found by villagers. Madhavi was traumatized and physically injured; she sought medical treatment but did not report the rape to police due to fear of further stigma and accusations of being a Maoist. She suffers from chronic pain and emotional scars and she desires justice and compensation for the crimes committed against her.

Madhavi's case illustrates the dual victimization of women during Nepal's conflict, targeted by both state and non-state actors and the enduring physical and psychological toll of sexual violence. It also highlights the barriers survivors face in seeking justice, including fear of retaliation and societal stigma.

In the above case studies, we can see the victimization of innocent women who were victims of rape in a very brutal manner, who also had to endure long-term physical and psychological trauma. The fear of stigmatization has stopped a lot of people from seeking justice, similar to Gayatri (pseudonym) and Madhavi (pseudonym).

6. Mechanisms to be considered for Ensuring Access to Justice

To address the barrier faced by the survivors of sexual violence, the following mechanisms needs to be considered besides the justice mechanism practiced at the present time:

a. Legal Reform: Specific legislation must be enacted to criminalize conflict-related sexual violence and ensure that existing laws are gender-sensitive and inclusive while it aligns with

[49] Human Rights Watch, supra note, 39.

the international human rights instrument. Existing laws should be amended to address to create a safe and supportive environment for survivors and encouraging them to seek justice without fear of stigmatization or retribution.

This includes amending the Penal Code to explicitly address wartime sexual violence and incorporating international standards into domestic law.[50] Ex posto facto laws need to be introduced to address past instances of sexual violence. It will help to ensure that perpetrators of sexual violence will be held accountable, even if the crimes were not explicitly criminalized at the time. Removing or extending the time limitation for the sexual violence during the war time can help to ensure that the survivors will have more time to report the crime after overcoming the trauma that may be physical or mental.

b. **Strengthening Transitional Justice Mechanisms:** The TRC and CIEDP needs to ensure that they prioritize gender-based violence and provide reparations to victims. This includes establishing specialized units within these institutions to investigate and address sexual violence cases.[51] It will help the justice mechanism to understand the special need for the survivors and work accordingly to address this necessity as the survivors of sexual violence have the special need as they go through different mental and physical trauma.

National legislations must follow the international human rights instrument guidelines and implement it to ensure that it aligns with the international instruments. The justice mechanism must be survivors sensitive and special trained individuals must be assigned to deal with the survivors and the family of the survivors.

c. **Awareness Campaigns:** Community-based awareness programs should be conducted to combat stigma and encourage victims to come forward to seek justice for themselves. These campaigns should focus on educating the public about victims' rights and challenging patriarchal norms that perpetuate victim-blaming.[52] These campaigns must focus on victims and society to bring the change in their patriarchal values and victim blaming culture.

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[50] U.N. Women, Transitional Justice and Women's Rights in Nepal (2018), available at https://www.unwomen.org/en/digital-library/publications/2018/10/transitional-justice-and-womens-rights-in-nepal.(Accessed on Feb. 17, 2025)

[51] U.N. Dev. Programme, Gender Equality and Women's Empowerment in Nepal (2018), available at https://www.np.undp.org/content/nepal/en/home/library/womens_empowerment/gender-equality-and-women-s-empowerment-in-nepal.html., (Accessed on Feb. 17, 2025)

[52] U.N. Population Fund, Strengthening the Health Sector Response to Gender-Based Violence in Nepal (2017), available at https://www.unfpa.org/resources/strengthening-health-sector-response-gender-based-violence-nepal. (Accessed on Feb. 17, 2025)

The special legal awareness programs should be conducted to ensure that the survivors and their family have the proper knowledge regarding the legal protection and right provided to them.

d. **Capacity Building:** Train law enforcement officials, judges, healthcare providers lawyers, police officers, public prosecutors human right activist and whoever are working as the first responders are or who directly comes into contact with the survivors, to handle cases of sexual violence with sensitivity and professionalism. This includes providing training on international human rights standards and best practices for supporting survivors.[53] Sexual violence being the sensitive issue and victims already being through mental and physical trauma must be considered while dealing with them.

e. **Witness Protection Programs:** Establish robust witness protection programs to ensure the safety of survivors and witnesses who come forward to testify. This is critical for addressing the culture of impunity and ensuring accountability for perpetrators.[54] The protection and security will help the survivors and their family to come forward to seek the justice from the system with the hope of getting some form of closure and hope of actually being provided with justice for the violence they had to bear.

f. **Reparations Programs:** Develop comprehensive reparations programs that provide financial compensation, mental health support and rehabilitation services to survivors of sexual violence. These programs should be designed in consultation with victims and civil society organizations.[55] These programs need to focus on the reintegration of victims back into the society. Different psychological supports need to be provided to those survivors to overcome the trauma caused to the victim due to rape and sexual assault, as medical treatment can cure the physical traumas and injuries but it is the psychological trauma that causes more harm to the survivors to live a healthy and happy life.

Along with perpetrator getting the punishment, victims being compensated financially is also important to help the victims to get reintegrated back into the society. Those compensation

[53] Int'l Comm'n of Jurists, Nepal: Ensuring Justice for Conflict-Related Sexual Violence (2016), available at https://www.icj.org/nepal-ensuring-justice-for-conflict-related-sexual-violence/ (Accessed on Feb. 17, 2025)

[54] U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, NEPAL: TRANSITIONLA JUSTICE AND ACCOUNTABILITY (2021), available at https://www.ohchr.org/en/countries/nepal. (Accessed on Feb. 20, 2025)

[55] Int'l Ctr. for Transitional Just., Reparations for Conflict-Related Sexual Violence (2014), available at https://www.ictj.org/publication/reparations-conflict-related-sexual-violence.(Accessed on Feb. 20, 2025)

can help the survivors to get the necessary help they need to overcome the physical and psychological trauma and look for the new beginning.

7. Conclusion

Access to justice is one of the most pressing issues for the survivor of sexual violence during the armed conflict in Nepal. Due to various social stigma, patriarchal norms, power play, lack of proper legal framework and interference in the independence of judiciary, the barriers are being formed between victims and justice. It is about to mark two decades of end of the non-international armed conflict in Nepal and we are still not being able to provide the safe space for the victim of gross violation of human right.

Sexual violence is the gross violation, disregarding any situation and survivors of such violence must be provided with safer space to open up about the abuse and seek justice. It is about to mark two decades since the end of armed conflict and the government still does not have the accurate data regarding the abuse and survivors of sexual violence during conflict, which is the bigger challenge. There are many underlying social, legal and political challenges for the survivors for access to justice.

Addressing this challenge requires a comprehensive approach that includes legal reforms, institutional strengthening and societal change. By prioritizing the rights of victims and holding perpetrators accountable, Nepal can move closer to achieving transitional justice and ensuring that such atrocities are never repeated.

Transitional Justice and Institutional Reform: The Promise and Challenges of Vetting Mechanism in Nepal

Sudeep Shakya

Abstract

Vetting is a crucial yet often overlooked mechanism in transitional justice, particularly in post-conflict societies striving to uphold the rule of law and prevent future human rights violations. In Nepal, where the legacy of conflict continues to shape governance, the recent amendment to the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act introduces vetting as a tool for institutional reform and ensure non-recurrence of conflict. This article explores the concept of vetting within the broader framework of transitional justice, highlighting its role in ensuring accountability, rebuilding public trust, and fostering democratic governance. It examines the legal and operational aspects of vetting, differentiating it from criminal prosecution while emphasizing its significance in screening public officials for integrity and adherence to human rights standards. Furthermore, the paper analyzes Nepal's evolving legal framework on vetting, its challenges, such as political resistance, weak institutional capacity, and information reliability-and potential pathways for effective implementation. This study argues that a well-structured and transparent vetting process is essential for Nepal's long-term stability and democratic consolidation.

1. Introduction

The Comprehensive Peace Accord (CPA) of Nepal, signed on November 21, 2006, marked the end of a decade-long armed conflict between the Nepalese government and the Communist Party of Nepal (Maoist). This event was a significant milestone in Nepal's transition from conflict to peace. The CPA laid the foundational provisions to address human rights violations committed during the conflict through the Transitional Justice (TJ) process.

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To facilitate the TJ process Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act was passed in April 2014 and subsequently Truth and Reconciliation Commission (TRC) and Commission of Investigation on Enforced Disappeared Persons (CIEDP) was established in 2015. However, the law was heavily criticized for not being victim centric and for provisions allowing amnesty for serious human rights violations and others. This issue reached the Supreme Court and the court struck down several provisions and issued a directive order to make the laws victim centric and in line with International Human Rights standards. The law has been amended thrice with the latest amendment made in March of 2023. Major amendments include, dividing and defining the crimes into "violation of human rights" and "serious violation of human rights"; remission of sentence by 75 percent in crimes other than "serious violation of human rights"; establishment of a Special Court for adjudication of cases to name a few. One addition made by the amendment which is of significant importance but has gone under the radar is vetting. The act has mandated the two commissions to make recommendations for vetting individuals who were involved in the incidents of gross violation of human rights.[1]

According to United Nations, Transitional Justice incorporates four classic pillars - Truth Seeking, Criminal Prosecutions, Reparations and Guarantees of Non-recurrence (GON). GON includes learning from past mistakes to prevent human rights violations in the future which mainly focuses on institutional reform and ensuring accountability for violations of human rights. Vetting is widely recognized as an important institutional reform measure to ensure minimum standards of integrity in public service in post conflict settings. Most basically, the measures involve screening of individuals in public institutions, semi-public positions and/or loosely defined positions of public trust in order to verify that personnel have the integrity and capacity to fulfill their positions in a way that supports the goals of the new regime.[2] Individuals found lacking in certain integrity or capability criteria are either compulsorily removed from their positions, prevented from taking new positions, encouraged to voluntarily resign from positions or publicly disclose their past actions, affiliations or behaviors, or alternately required to confess their past involvement as a form

[1] The Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2014, S. 13 (a4)

[2] United Nations, *Rule-of-Law Tools for Post-Conflict States: Vetting: An Operational Handbook* (United Nations 2006); Alexander Mayer-Rieckh and Pablo de Greiff (eds) *Justice as Prevention: Vetting Public Employees in Transitional Societies* (SSRC 2007).

of accountability. In essence there are potential and actual employment consequences for individuals in the new regime based on their previous actions, affiliations or behaviors.[3]

Also, some of the organizations like Human Rights Watch and Advocacy have been stating for the independent investigations. The have stated that 'in some cases of alleged wartime human rights, violations, the alleged perpetrators are being promoted, appointed into senior government positions, or allowed to go on peacekeeping duties without ever facing a genuine and independent investigation.[4] There is no direct mention of vetting but their essence is to conduct investigation and take departmental/disciplinary actions similar to vetting for the alleged human rights abusers. This, thus shows a need to consider personal and institutional reform.

Unlike purge and lustrations, vetting requires state officials to be individually considered and to have their fitness to remain in office accessed with regard to objective criteria. The criteria will vary depending on the institution in question but should generally enable the vetting authority to determine whether the individual possesses the integrity that is required for their role by examining their past conduct including any responsibility for human rights abuses.

2. The Concept of Vetting in Transitional Justice

In post conflict societies, the sustainability of long-term peace and democratic stability can be achieved only if the population is confident that redress for grievances can be obtained through legitimate procedures. Transitional Justice processes, intends to build a legitimate and sustainable peace after conflict, mass violence or systematic human rights abuses through reforming previous institutions to guarantee non recurrence.

According to UN Secretary General Report on Rule of Law and Transitional Justice in Conflict and Post - Conflict Societies, transitional justice compromises:

[...] the 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,

[3] Cynthia M. Horne, *Transitional Justice: Vetting and Lustration*, Research Handbook in Transitional Justice (Western Washington University, 2022).

[4] Human Rights Watch & Advocacy Forum- Nepal: *Adding Insult to Injury: Continued Impunity for Wartime Abuses* (December 2011), p 3, available at https://www.advocacyforum.org/downloads/pdf/publications/impunity/adding-insult-to-injury-nov-30-2011-english-version.pdf (Accessed on Feb. 2, 2025)

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.[5]

As stated in the definition of the report, the key elements of transitional justice involve prosecutions, truth seeking: revealing the truth about past crimes, providing victims with reparations and reforming abusive institutions.

The most researched and studied mechanism of transitional justice is, without any doubt, prosecutions. However, truth seeking and reparations to the victims of human rights abuses have generated considerable attention and study as well. On the other hand, vetting as an element of institutional reform mechanism and transitional justice itself, has received the less attention from the academics, transitional justice professionals, and its stakeholders in general.[6] The main reasons for such lack of the attention and familiarity with the term comes from misconception of the meaning of the process, lack of its clarity in the literature, and minor efforts taken to distinguish it from massive dismissals, lustration or purges.[7] This was very similar in Nepalese context was well. First, the promulgated laws were very much directed towards criminal prosecutions. With second amendment and moreover with the third amendment, truth seeking, reparation have been prioritized along with the scope of vetting.

Vetting as a TJ mechanism is primarily a measure to reform abusive institutions in post conflict societies and therefore, a very complex phenomenon. Borrowing the UN Secretary-General's definition, vetting in post conflict setting "… usually entails a formal process

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[5] *The Rule of Law and Transitional Justice in Conflict and Post – Conflict Societies: Report of the Secretary-General*. UN Security Council S/2004/616, 23 August 2004.

[6] Alexander Mayer- Rieckh, 'Guarantees of Non- Recurrence. An Approximation' (2017) 39 Human Rights Quarterly 416.

[7] M. Kova, *Vetting as an Element of Institutional Reform and Transitional Justice*, Zbornik IKSI, nos. 1-2, at 53-75 (2007).

of the identification and removal of individuals responsible for abuses, especially from the police, prison services, the army and judiciary"[8].

Similarly, The UN Operational Guide defines vetting as, "…assessing integrity to determine suitability for public employment. Integrity refers to an employee's adherence to international standards of human rights and professional conduct, including a person's financial property."[9] Therefore, vetting involves a process of assessing integrity to determine suitability for public service engagement. The aspect of employment exclusion, either by disqualifying individuals from holding certain public positions or by preventing their appointment to new roles due to concern regarding their past integrity or competence. However, vetting not only entails identification and removal of individuals responsible for past abuses, but also aims at screening of integrity and capacity of new candidates for public employment. Also, vetting is the process in which criteria of assessment relate to individual responsibility, which, thus calls for individual review, and for offering individuals some procedural guarantees.[10]

The aim of vetting is to transform the state institutions involved in the conflict, so that the institution and their members are less likely to commit further human rights abuses and are better able to restrain non-state actors to prevent further conflict. According to UN Special Rapportuer on the promotion of truth, justice, reparation and guarantees of non-recurrence, personnel reforms that succeed tend to do so by helping dismantle networks; ensuring that victims do not have to deal with those who abused them when accessing state services; and signaling to the public at large that the institution is committed to acting in according with fundamental rights thereby strengthening public trust.[11]

Observing the vetting process in various jurisdiction it can be concluded that vetting has been primarily focused on military and security forces, and secondarily on the judiciary. The theory has been that bad actors will continue old patterns of behavior even in new conditions and circumstances, and will therefore act to sabotage the process of transformation. For

[8] Human Rights Watch & Advocacy Forum- Nepal, supra note 4.

[9] UN (2006), supra note 2.

[10] Pablo de Greiff, *Vetting and Transitional Justice* in JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETIES 524, Mayer-Rieckh, Alexander & Pablo de Grieff eds., (Social Science Research Council, New York, 2007)

[11] *See generally,* Pablo de Greiff & Mayer-Rieckh (eds); Roman David *Lustration and Transitional Justice* (University of Pennsylvania Press 2011); Teitel, Transitional Justice.

example, in El Salvador the peace accords set up an Ad-Hoc Commission that recommended the dismissal of over hundred officers. South Africa, on the other hand decided against vetting as being contrary to the goal of integrating former enemies into a single security force. Argentina used control over promotions to oust problematic military officers. In Eastern Europe, vetting often took the form of lustration. In Bosnia and Herzegovina, international organizations were mandated to program and execute vetting process.[12]

3. Vetting, Lustration and Purges: How do they Differ?

Besides vetting, other tools like lustrations and purges have also been used in conflict ridden societies as a measure for public institution and personal reform. Though sometimes they are used interchangeably by the scholars, there are intrinsic differences in their nature which have been discussed below.

Vetting is primarily concerned with removing a person having history of human rights abuse from a position or determining a person illegible for holding any public office. Lustration has been described as 'a cousin of vetting'[13] or a regional variation of personnel reform, which originates in Central and Eastern Europe. Vetting and lustration differ in defining the factors that bear implications for public employment. Vetting centers on the broad issue of personal integrity and capacity, taking into account a range of factors and behaviors related to both the present and the past, such as performance records, tax avoidance, associations, corruption, etc. In contrast, the central criteria for lustration focuses only on the past.[14] The scope of lustration is broader than vetting extending in the range of public institutions. For example, laws in CEE have included a range of traditional public institutions like the parliament, the police and the president, public oversight institutions like judiciary, quasi-public institutions like banking sector, universities, and railroads, and social institutions like unions, churches, and heads of cultural centers. Poland's 2006 lustration legislation included provisions for the screening of 56 categories of workers or persons in 'positions and profession of public trust',

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[12] Pablo de Greif & Mayer-Rieckh Alexander,Justice as *Prevention: Vetting Public Employees in Transitional Societies*, International Center for Transitional Justice, Social Science Research Council, New York 2007, https://s3.amazonaws.com/ssrc-cdn1/crmuploads/new_publication_3/%7B57EFEC93-284A-DE11-AFAC-001CC477EC70%7D.pdf

[13] Oskar N.T. Thoms et al., *The Effects of Transitional Justice: A Summary of Empirical Research Findings and Implications for Analysts and Practitioners*, (CIPS Working Paper, 2008)

[14] Roman David & Cynthia M. Horne, Vetting and Lustrations in TRANSITIONAL JUSTICE: THEORY, MECHANISM AND DEBATES, Hakeem Yusuf & Robert Cryer eds, (London, Routledge, forthcoming, 2021)

including teachers, academics, journalists, state company executives, school principals, diplomats, lawyers, police and other civil servants.[15]

Purges can be defined as 'a method that involves the removal of individuals from employment positions through dismissal, job transfer, or retirement, bans of individuals from future employment or restrictions on civil and political rights'.[16] There is a normative aspect of purge as well, as it is associated with a type of victor's justice, capturing the punitive personnel changes made by the winers of a transition against the losers.[17] Whereas, vetting does not result in the wholesale replacement of the public sector, as can be seen in purges. In this context, purges can be taken as a revenge or retribution by the winning party against the losing party where as vetting is mostly aimed towards cleansing the organization which has a violent past.

4. Key Characteristics of Vetting[18]

Vetting is based on the assumption that fair and efficient public institutions are crucially important to prevent future human rights abuses. Vetting processes are therefore undertaken to (re) establish public trust in institutions, increase their legitimacy and efficiency in delivering services to all citizens; and to signal a break with the abusive past.

Vetting is generally less expensive and less complex than large-scale criminal prosecutions, but still provides a form of individual accountability for those who were responsible for violations, or who should have prevented them but did not, and where undertaken, generally addresses a far larger number of cases than will be subject of any criminal proceedings.

Vetting aims at excluding from certain positions of public office those who:

- are responsible for past human rights violations; or
- hold anti-constitutional views or are involved in terrorist groups or organized crime.

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[15] Act of 2018 October 2006 on the disclosure of information on documents of state security in the years 1944-1990; and Amending act of February 2007. Government of Poland.

[16] Moira Lynch, *Purges* in ENCYCLOPEDIA OF TRANSITIONAL JUSTICE, Lavinia Stan & Nadya Nedelsky, eds., (Cambridge: Cambridge University Press)

[17] Helga Malmin Binningsbø et al., *Armed Conflict and Post Conflict Justice,1946-2006:* A *Dataset*, Vol. 49(5), JOURNAL OF PEACE RESEARCH 731-740 Sage Publication Ltd., 2012.

[18] United States Institute of Peace, TRANSITIONAL JUSTICE: INFORMATION HANDBOOK (2008)

There are two basic forms of vetting processes:

a. Retrospective Review

This review process aims at excluding public officials who were involved in serious abuses. A special transitional mechanism is usually established to screen serving public officials with the aim of removing those who lack integrity and capacity to hold the position.

b. Prospective Appointment and Reappointment Review

In this process, first the public institution in question is disbanded, a successor institution is established, and current employees are required to re-apply for their positions and be vetted for possible involvement in past abuses, possible in addition to a review of other qualifications, and new candidates for those positions must apply and be subject to the same vetting process.

5. Basic Conditions for Ensuring Vetting Process[19]

Post-conflict settings present both significant challenges and unique opportunities for meaningful institutional reform. In these fragile contexts, it is essential to carefully consider key factors when designing a vetting process to ensure fairness, transparency, and long-term stability. At the same time, certain fundamental conditions must be met before initiating vetting, including political commitment, institutional preparedness, and legal clarity. A well-planned approach can help rebuild trust in public institutions, promote accountability, and support lasting peace by ensuring that those in positions of power uphold principles of justice and integrity.

a. Political Conditions

A successful vetting process requires government stability, authority, and political will. As vetting regulates access to power, it is inherently political, especially in post-conflict settings where resistance to reform is common. Individuals at risk of losing power or exposure for past abuses may obstruct the process, while governments with tenuous authority may struggle to enforce it. Effective implementation demands a careful analysis of the political landscape, anticipation of resistance, and identification of reform-minded constituencies to support the process. Without strong political backing and institutional control, vetting efforts risk being ineffective or easily undermined.

[19] United Nations Development Programme Bureau for Crisis Prevention and Recovery Justice and Security Sector Reform, *Vetting Employees in Post Conflict Settings: Operational Guidelines*, Publication II, 2006.

b. Institutional Conditions

A well-structured vetting process requires clear identification of positions subject to review. Post-conflict institutions often face fragmentation, governance gaps, and outdated structures that fail to reflect the rule of law. To ensure effective vetting, broader institutional reforms-such as merging, restructuring, or downsizing agencies-must precede or accompany the process. Without these reforms, individuals may be vetted for roles that become obsolete, weakening credibility. In prolonged transitions, targeted vetting may be necessary. Ultimately, institutional reform is both a prerequisite and an achievement of transitional justice, fostering accountability, stability, and equitable representation in post-conflict governance.

c. Individual Conditions

Vetting process requires clear identification of individuals subject to review. In post-conflict settings, institutional membership is often unclear, requiring a census or registration process to establish a defined target group. Reliable integrity records are essential but often absent due to destroyed, manipulated, or suppressed evidence. Vetting may extend beyond existing personnel to include external candidates, whose competence and integrity must also be assessed. Information must be proactively gathered from personnel files, court records, NGOs, truth commission reports, and public input to ensure a comprehensive vetting process that prevents circumvention and strengthens institutional accountability.

d. Legal Conditions

A strong legal foundation is essential for an effective vetting process, as it helps counter political resistance and ensures legitimacy. Embedding vetting provisions in peace agreements strengthens commitment and reduces the risk of circumvention. Peace negotiators should advocate for explicit vetting obligations in agreements. If domestic legislation is required, it must be clear, precise, and aligned with constitutional requirements and international standards. A well-defined legal mandate ensures transparency, accountability, and compliance, making the vetting process more enforceable and resilient against political challenges.

e. Operational Conditions

The success of a vetting process depends on a thorough assessment of operational needs and the availability of adequate time and resources. In post-conflict settings, limited capacities and competing reform priorities often lead to underestimated vetting requirements. Vetting is a complex, resource-intensive, and time-consuming process, especially for large insti-

tutions, requiring multi-disciplinary expertise. Ensuring sufficient financial, technical, and human resources is crucial for effective implementation. Additionally, international support often plays a key role in facilitating and sustaining the process, making it a critical factor in achieving a transparent and credible post-conflict institutional reform.

f. Temporal Conditions

The timing of a vetting process is crucial, as it must align with other transitional justice mechanisms and political developments. Post-conflict settings involve competing agendas, such as elections, truth-seeking efforts, and political transitions, which may be influenced by or conflict with vetting. Proper sequencing and coordination are essential to avoid undermining governance stability. Vetting must be strategically timed to ensure its effectiveness while adapting to evolving political conditions. The chosen timeframe also impacts key decisions, such as which institutions or groups to target, ensuring the process supports, rather than disrupts, broader transitional justice efforts.

6. Vetting: Different to Criminal Prosecution

One of the pertinent issues discussed during the hearing of cases relating to vetting in the Supreme Court was whether court conviction is mandatory to vet individuals accused of human rights violations or not. According to Mayer-Rieckh, vetting is a form of administrative justice involving the application of administrative rules and procedures, rather than criminal law, and includes[20]

- Initiating proceedings within a reasonable time and generally, in public;
- Notifying parties that they are under investigation and of the case against them;
- Providing the opportunity to prepare a defense, including access to relevant data;
- Providing the opportunity to present arguments and evidence and to respond to opposing arguments and evidence before the vetting body;
- Providing the opportunity to be represented by counsel;
- Providing notification of the decision and the reasons for the decision;
- The right to appeal to a court or other independent body.

Similarly, Mayer-Rieckh further argues that "…vetting differs from criminal proceedings also in terms of the required evidentiary standards of proof. It is not necessary in administrative

[20] Alexander Mayer-Rieckh, *Building Trust and Strengthening the Rule of Law: Vetting the Security Sector in Nepal* (ICTJ Briefing, 2012)

proceedings to prove beyond reasonable doubt that an officer committed a crime. A vetting decision should be based on evidence that is substantiated by multiple reliable sources. A 'balance of probabilities' or 'preponderance of evidence' standard is generally appropriate in administrative proceedings. According to such an evidentiary standard, an officer would be removed when the evidence indicates that it is more likely than not that he or she committed the alleged abuse. A mere suspicion or allegation is not sufficient evidence to remove an officer from office."[21]

Although vetting is not considered as typical judicial proceedings impartial procedures need to be followed. The UN Human Rights Council's Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity recognized that the removal of individuals from public office 'shall comply with the requirements of due process of law and the principle of non-discrimination.'[22] The vetted person enjoys certain rights of:

a. Right to Review

All individuals have a right to review the results of the investigation against them. In addition, persons under investigation are entitled to notification of the allegations levied against them within a reasonable timeframe, as well as the opportunity to respond to any statements before the vetting body.[23]

b. Right of Appeal

In addition, individuals have a right to challenge a decision against them. Individuals who are excluded from government service following vetting procedures have a right to appeal the decision to a court or another independent body.[24]

c. Additional Rights

Several international organizations have called upon states to expand the rights provided to individuals in vetting processes. The Parliamentary Assembly of the Council of Europe, for instance, has maintained that individuals undergoing vetting have a right to defense, the pre-

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[21] Rieckh, supra note 20.

[22] Diane Orentlicher, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Principle* 36, delivered to Economic and Social Council, Commission on Human Rights, U.N. Doc. E/CN.4/2005/102 (Feb. 18, 2005).

[23] Greiff, supra note 10 at 523-537.

[24] *Id*

sumption of innocence, and the right to appeal the decision against them to a court of law.[25] Further, international guidelines provide that such individuals should be afforded the right to a public hearing; the right to have the proceedings conducted in an expeditious manner; and additional guarantees under the right to respond that include being given sufficient time to prepare a response, access to all documents required for responding, the chance to present one's evidence, and the right to counsel.[26]

The above discussion clarifies that vetting is an administrative process distinct from criminal law, focusing on evaluating public employees' suitability rather than proving criminal guilt. Unlike criminal proceedings, vetting does not require proof beyond a reasonable doubt or a court conviction where decisions are made based on substantiated evidence from multiple reliable sources. This allows vetting to assess administrative conduct without the need for criminal conviction, prioritizing professional conduct and integrity rather than criminal liability while following the due process of law.

7. Vetting in Nepal's Context

As already mentioned in previous chapters until the recent amendment of Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, there was no legal provision for vetting. The Supreme Court had time and again directed the government to promulgate necessary law and set standards for vetting.[27] The new amendment has provided under the function, duties and powers of the commission to, "make recommendations for vetting the persons involved in the incidents of gross violations of human rights".[28] This marks an important step towards for institutional reform and ensuring non recurrence of the incidents in the future. The amendment has provided the scope of setting the procedures and standards of vetting to the commission. Therefore, the two commissions now have to investigate the cases in line with prosecution and vetting concurrently.

Vetting is an integral part of determining the character, integrity and qualification of a person. Though Nepal has not resorted to vetting individuals involved in human rights violations.

[25] Federico Andreu-Guzmán, *Due Process and Vetting*, in JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETIES 466 Alexander Mayer-Rieckh & Pablo de Grief eds., (Social Science Research Council New York, 2007)

[26] Federico Andreu-Guzmán, *Due Process and Vetting*, in JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETIES 466 Alexander Mayer-Rieckh & Pablo de Grief eds., (Social Science Research Council New York, 2007)

[27] Greif & Rieckh, supra note 12.

[28] The Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2014, S. 13 (a4)

International agencies have already vetted several of Nepal's security officers by ordering the return of Nepali peacekeepers after it became known that there was prima facie evidence of their involvement in serious human rights violations in Nepal.[29]

a. Legal Provision of Vetting in Nepal

The amended act has only mentioned about vetting in the function duties and powers of the commission, but fails to provide any detail regarding the procedure, methods, standards or types of vetting to be applied. Furthermore, the law does not clarify whether the commission has the authority to formulate such standards and procedures independently, resulting in a significant legal and operational gap in the implementation of vetting measures. The legislation also remains ambiguous on several fundamental aspects. It does not specify the appropriate stage at which vetting - related recommendations are to be made, nor it address the burden of proof or the evidentiary requirements needed to vet individuals alleged to have been involved in gross human rights violations.

This lack of clarity has created uncertainty about the legal mandate and operational framework necessary for meaningful vetting. Without well-defined guidelines, there is a risk of inconsistency, political manipulation, or legal challenges that could undermine the credibility of the process. To ensure that vetting serves its intended purpose-promoting accountability, restoring public trust, and reforming institutions - future amendments must address these legal deficiencies by explicitly providing for comprehensive procedures, objective criteria, institutional responsibilities and safeguards to uphold fairness, transparency and due process.

b. Supreme Court on Vetting

The Supreme Court on 12 August ordered the government to frame vetting laws strictly regulating the promotion and transfer of government officials including those from the security apparatuses. Deciding on the case[30] of AIG Kuber Singh Rana's promotion to Inspector General of Nepal Police. The court held that there were no reasonable ground and legal provision to halt Rana's promotion but the government should take extreme caution regarding recruitment, transfer and promotion of officials implicated in human rights violations in the future by promulgating necessary laws and procedures related to vetting. The court further stated that offenses related to the violation of human rights must be dealt by related laws and solution cannot be sought through writ petitions.

[29] Advocacy Forum – Nepal, VETTING IN NEPAL: CHALLENGES AND ISSUES 11 (2014)

[30] N.K.P., 2069 BS, Decision No. 8933

Similarly in another writ related to the promotion of an army officer, the Supreme Court stated that in absence of specific laws related to transitional justice and vetting the suspected person cannot be denied of his right to promotion and further provided directive order to the government, to promptly promulgate laws related to vetting and hold the perpetrators accountable.[31] The court has adopted positivist jurisprudence in both cases.

8. Challenges of Vetting

After transition, implementing personnel and institutional reforms across all state institutions or at every hierarchical level can be highly challenging. In some cases, powerful individuals occupying senior positions may be indispensable to the transition process, not because of their integrity, but because of the influence and control they wield. Their cooperation may be critical, as they possess the capacity to obstruct or even derail the fragile progress of the transition.

Hence, institutional reform is a difficult endeavor. Vetting in transitional or post-conflict societies face many challenges. Some of these include:[32]

- Scarce resources
- Weak state institution
- An overstaffed and inefficient bureaucracy
- Strong political resistance to reform
- A weak or incomplete legal framework
- Nepotism and corruption in government appointments

In Nepal's context whole transitional justice process seems to be in a challenging situation. As we are nearing two decades of signing of CPA, the transitional justice process is still in a limbo. The two commissions established in 2014 did start some preliminary investigation but detailed investigation is still incomplete. The major challenges this delay pose is the availability of quality of information. As with other aspects of transitional justice, vetting also heavily relies on the availability and authenticity of information. Vetting programs that rely on incompetent and flawed information could result in biased transitional justice processes and therefore fail to achieve trust-building goals.

Second, temporal conditions might not be in favor because, many security personals have already retired or have been out of service leading to the questions 'whom to vet?' and

[31] N.K.P., 2075 BS, Decision No. 10002

[32] Pablo de Greiff, supra note 10.

'is there any rationality in vetting now?' Also, many securities personal accused of grave human rights violations had been promoted to higher ranks of their respective organizations and have retired leading to question the credibility of vetting.

Third, Nepal's transition from conflict to peace is very unique in the sense that then rebel Maoist leaders joined mainstream politics and have become the head of the government many times. Will the commissions and the government be willing and capable to vet them, is a glaring question. Also, ex combatants of the then People's Liberation Army (Maoist) have been reintegrated into Nepal Army. Therefore, it will be difficult to define vetting approach and determine the vetting type in today's context.

Fourth, power dynamics and political bargaining often limit the scope of reforms, as those implicated in past abuses may still hold significant leverage. Fifth, institutional resistance can emerge from within the very bodies meant to undergo reform, leading to obstruction or manipulation of the vetting process. Sixth, there is the risk of selective vetting, where political expediency rather than consistent application of principles dictates who is vetted and who is spared. Seventh, capacity constraints, including a lack of reliable records, trained personnel, or legal frameworks, can hinder the fair and effective screening of individuals. Lastly, vetting can create social and political tensions, especially if large segments of the bureaucracy or security forces are affected, potentially destabilizing the transition rather than supporting it. Therefore, vetting in transitional justice must be approached carefully, balancing the pursuit of accountability with the pragmatic needs of peacebuilding and institutional stability.

As rightly pointed out by Mayer-Rieckh, "…vetting is never easy and will inevitably face political, legal, and operational challenges, but it will help to move the peace process forward and consolidate the democratic rule of law in Nepal."[33]

9. Way Forward: Designing of Vetting Process

Vetting is very sensitive as it involves taking action against an institution which might involve high ranking officials. Vetting process must respect both specific contextual needs and international standards. While designing a vetting process certain important priorities and criteria must be ensured. UNDP's operational guidelines for vetting can be a guiding

[33] Greiff & Mayer-Rieckh (eds), supra note 11.

tool for designing a vetting process. According to the guidelines following steps can be taken to design a transparent and accountable vetting process.[34]

a. Inform and Consult the Public

Rebuilding civic trust and restoring the legitimacy of public institutions require transparency and public engagement. Open communication about vetting objectives fosters confidence, reduces uncertainty among affected personnel, and ensures the process addresses the needs of victims and society. Since vetting strategies must be context-specific, public consultations help shape fair and effective approaches. Raising awareness can also prevent future challenges to the process's legitimacy. Therefore, vetting must include public information mechanisms and incorporate insights from civil society, victims, and reform advocates, allowing them to contribute valuable information for informed and just decision-making.

b. Determine Vetting Priorities and Vetting Type

In post-conflict settings, public administration as a whole may benefit from a vetting process. However, priority should be given to institutions critical to upholding the rule of law, such as the military, civilian security forces, intelligence agencies, and the judiciary. These institutions have often been implicated in past human rights abuses while also bearing the primary responsibility for ensuring stability, security, and justice. Reforming them is essential for a smooth transition to peace and the rule of law. Based on key contextual factors, the most suitable vetting approach should be identified to ensure accountability and institutional integrity.

c. Establish Vetting Standards and Consequences

The integrity of public employees in post-conflict settings is crucial, encompassing adherence to human rights, professional conduct, and financial propriety. Vetting criteria should balance integrity, competence, and representation, ensuring fair and efficient institutions. While those involved in serious human rights violations should be disqualified, other employees may face reassignment, probation, or retraining. Broader personnel reforms must accompany vetting to address qualifications, skills, and diversity. Formal compliance, such as attending interviews and submitting documents, is also essential. Additionally, support measures like alternative employment and severance pay can help mitigate the impact of removals for reasons beyond integrity deficits.

[34] Pablo de Greiff, supra note 10.

d. Develop Vetting Mechanism

In post-conflict settings, regular disciplinary mechanisms are often insufficient for vetting, necessitating an independent ad-hoc commission. This commission must be impartial, with respected members unaffiliated with former warring factions, appointed through broad consultations. It requires a well-staffed secretariat, financial resources, and security measures due to potential threats. While domestic ownership enhances legitimacy and sustainability, international support-both political and operational-may be crucial, especially where resistance exists. International involvement can bolster credibility, though efforts should ensure local engagement and legal integration. A seamless transition from ad-hoc vetting to regular domestic procedures is essential for long-term institutional stability.

e. Respect International Procedural Standards

Vetting must align with international standards to uphold human rights and civic trust. It should assess individual conduct rather than group affiliation, avoiding mass exclusions that may overlook culpable individuals or dismiss those with needed expertise. Due process in vetting includes timely proceedings, notification, defense opportunities, legal representation, and appeal rights. Judges require special protections to ensure judicial independence, with vetting ideally conducted by peers. In reappointment processes, candidates must prove suitability without entitlement to selection or review. Political appointees removed by executive order generally lack appeal rights. A fair, transparent approach is essential for sustainable institutional reform.

In practice, there is no one size fits all approach to vetting; the political, social, legal circumstances might be different in each case (jurisdiction). The designers of a vetting process must make a number of basic decisions concerning what they want to achieve and how they want to achieve. There are nine basic decisions which have been considered while designing vetting process in various jurisdictions, which can also be the baseline for Nepal. These are:[35]

1. Targets: What are the institutions and positions to be vetted?
2. Criteria: What misconduct is being screened for?
3. Sanctions: What happens to positively vetted individuals?
4. Design: What are the types, structure, and procedures of the vetting process?
5. Scope: How many people are screened? How many people are sanctioned?

[35] Roger Duithe, Justice as Prevention: Vetting Public Employees in Transitional Societies, International Center for Transitional Justice, Social Science Research Council New York, 2007

6. Timing and Duration: When does vetting occur and how long does it last?
7. Rationale: How is vetting justified? What are the reasons of vetting?
8. Coherence: How does the vetting relate to other measures of institutional reform? How does it relate to other transitional justice measures?

While designing the vetting process Nepal needs to be very careful determining the targets and sanctions of vetting. The delay in concluding the transitional justice process might make it difficult to prove the rationality of vetting. Similarly, vetting mechanism should be in line with other measures of transitional justice, mainly prosecution and guarantee of non-recurrence.

10. Conclusion

Vetting is a crucial mechanism for reinforcing public trust, ensuring accountability, and promoting institutional reform in post-conflict societies. Unlike criminal prosecutions, which focus on individual liability, vetting assesses the integrity and suitability of public officials to uphold democratic governance and human rights. Its advantages include strengthening the rule of law, preventing recurrence of abuses, and fostering inclusive, merit-based institutions. However, for vetting to be effective, it must be transparent, impartial, and embedded within broader institutional reforms.

In Nepal, the challenges of vetting are significant due to political instability, weak governance structures, and lingering influence of former conflict actors. The lack of a comprehensive human resources management system, the risk of politicization, and limited institutional capacity further hinder its implementation. If not carefully designed and executed, vetting may erode trust rather than rebuild it.

To ensure success, Nepal must adopt a well-resourced and strategically planned vetting process, tailored to its unique historical and socio-political context. This should be conducted in conjunction with other transitional justice measures, including judicial prosecutions, truth-seeking, and reparations for victims. Delays in vetting can undermine its effectiveness, allowing unqualified and compromised individuals to remain in positions of power. Therefore, Nepal must prioritize timely and well-structured vetting as an integral part of broader institutional reforms to promote justice, accountability, and long-term stability.

Ambiguous Loss of Family Members and its Impact: A Psychosocial Perspective

Sunita Shrestha

Abstract

The decade-long civil war in Nepal (1996–2006) led to significant human suffering, including the disappearance of over 13,000 individuals. Families of the disappeared grapple with ambiguous loss, a psychological state of unresolved grief that affects their mental health, social roles, and economic stability. This article explores the nature of ambiguous loss, its psychological and social implications, and the legal challenges faced by affected families. Drawing on Pauline Boss's theoretical framework, it examines trauma recovery processes, coping mechanisms, and the role of community and government interventions. Legal barriers surrounding inheritance, compensation, and truth-seeking are analysed, with recommendations for policy reforms that align with international human rights standards. By integrating psychological and legal perspectives, this study underscores the need for holistic interventions to support affected families and ensure justice for the disappeared.

1. Introduction

The decade-long civil war in Nepal (1996-2006) inflicted profound hardships on its people, leading to significant loss of life, widespread displacement, economic disruption, and enduring social and psychological trauma. Estimates suggest that over 13,284 individuals were killed (INSEC,2007),[1] and hundreds of thousands were displaced during the conflict. Access to essential services such as education and healthcare was severely compromised, particularly in rural areas, disproportionately affecting women and children. The Civil war also resultant in disappearance of thousands more are disappeared living

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[1] Human Rights Year Book 2007, INSEC,10, available at https://www.insec.org.np/hr-yearbook/nepal-human-rights-yearbook-2007/ (Accessed on Feb. 7, 2025)

families is prolonged grief and uncertainty. According to an ICRC report, 3237 people disappeared, and over1300 families are still uncertain about the fates of their loved ones.[2]

Many families of the missing person continue to grapple with profound emotional distress, unable to mourn, move forward, or find a resolution regarding their loved ones' fates. The situation is known as Ambiguous loss, a concept introduced by Pauline,[3] describes a unique form of grief that arises when a loss remains uncertain, unresolved, and lacks closure. Unlike conventional bereavement, where death is confirmed and mourning follows a defined process, ambiguous loss leaves families trapped in limbo, oscillating between hope and despair.

2. Theoretical Framework: Ambiguous loss and Trauma Recovery

a. Ambiguous loss

Ambiguous loss refers to a distinct type of grief that lacks clarity and closure, leaving individuals in a state of unresolved grief. This concept, introduced by researcher Pauline Boss (2006),[4] further categorizes ambiguous loss into two types:

(1) when a loved one is physically absent but psychologically present, as in cases of disappearances, and

(2) when a loved one is physically present but psychologically absent, as in cases of dementia. The inherent uncertainty complicates the grieving process, often leading to chronic sorrow and unresolved emotional distress.

In Nepal, the repercussions of ambiguous loss are profound due to the nation's history of conflict and social upheaval. Families of the disappeared experience 'frozen grief,' alternating between hope and despair due to the lack of confirmation about their loved ones' fate. The ambiguous loss disrupts family structures, creates role confusion, and increases psychological disorders such as depression, anxiety, and post-traumatic stress disorder (PTSD).

b. Understanding the Trauma Recovery Process

Addressing ambiguous loss within Nepalese society requires a culturally sensitive approach

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[2] *Hatemalo Accompaniement Programme ICRC's Comprehensive Psychosocial Support Programme To The Families of Missing Persons in Nepal (2010-2016) (ICRC) (August 2016AD) 2*

[3] Pauline Boss, AMBIGOUS LOSS: LEARNING TO LIVE WITH UNRESOLVED GRIEF 7-8 (Harvard University Press, 1999)

[4] Pauline Boss, LOSS, TRAUMA, AND RESILINCE: THERAPEUTIC WORK WITH AMBIGIOUS LOSS 27 (New York: W.W. Norton & Company, 2006)

that considers its unique socio-political and cultural dynamics. Integrating Judith Herman's trauma recovery framework provides valuable guidance in facilitating healing. Her model follows a three-phase process:[5]

i. **Establishing Safety-** The first phase focuses on creating a sense of stability and security. For Nepalese individuals experiencing ambiguous loss, community-based interventions can offer safe spaces to express emotions and share experiences. Establishing safety may also involve efforts to locate missing persons or provide official acknowledgment of their status, thereby reducing uncertainty.

ii. **Remembrance and Mourning-** The second phase involves processing grief through remembrance and mourning. In Nepalese culture, communal gatherings and rituals play a crucial role in coping with loss. Facilitating culturally appropriate mourning practices, even without physical remains, can support healing. Symbolic ceremonies and memorials can serve as meaningful ways to honour the missing.

iii. **Reconnection-** The final phase focuses on rebuilding life and forging new connections. For those affected by ambiguous loss, fostering community support networks can help individuals engage in social, economic, and cultural activities, rediscovering purpose beyond their grief. Empowerment initiatives, such as vocational training or community projects, can further aid in this reconnection process.

3. Psychosocial Impact on Families of the Missing

The needs of families of the missing evolve over time and are shaped by factors such as the duration of their loved one's absence, geographical location, economic status, and the missing individual's role within the family. Study[6] indicated these needs generally fall into three primary categories. First, 64% of families seek clarification of the missing person's fate, longing to know whether their loved one is dead or alive. Second, 62% require economic support, including compensation or privileges related to education, medical treatment, and employment opportunities for surviving family members. Finally, 29% demand justice, seeking accountability and punishment for those responsible for the disappearances. Families of individuals who have gone missing due to conflict, political violence, or other circumstances face severe and persistent psychosocial challenges. Unresolved loss and

[5] Judith Herman, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE FROM DOMESTIC ABUSE TO POLITICAL TERROR (Basic Books,1997)

[6] International Committee of the Red Cross, *Families of Missing Persons in Nepal: Needs and Responses 9* (ICRC, 2009)

uncertainty take a lasting toll on mental health, family dynamics, and socio-economic stability, often extending for years after the conflict has ended.

a. Prolonged Grief and Psychological Distress

The prolonged uncertainty surrounding the fate of missing loved ones contributes to complicated grief disorder, characterized by persistent yearning, intrusive thoughts, and emotional numbness. Family members often experience symptoms of PTSD, depression, and anxiety due to the unresolved nature of their loss. There is significant prevalence of depression and suicidal thoughts among affected individuals.

The prevalence of Major Depressive Disorder (MDD) was found to be 17.5% among those uncertain about their loved one's fate, compared to only 6% among those with confirmed deaths. Similarly, Prolonged Grief Disorder (PGD) showed a 22% prevalence in individuals facing uncertainty, versus 7% in those with confirmed losses. Vulnerability factors for these disorders included being a mother, wife, older family member, or having a family history of mental illness, which made individuals more susceptible to developing these conditions. The study further found that approximately 70% of adults with prolonged grief symptoms also experienced other complicated grief reactions, including depression, anxiety, and PTSD, with 46% reporting two or more co-occurring symptoms. The review also highlighted that higher co-occurrence rates were observed in studies with a longer mean time since the loss and when assessments were conducted through interviews rather than questionnaires. These findings underscore the significant psychological toll of ambiguous loss and emphasize the need for comprehensive assessments that address the complex interplay of various mental health symptoms in bereaved individuals.[7]

b. Family and Social Disruptions

The disappearance of a family member often results in role confusion and marital conflict, particularly for widows who face both social and economic instability. In many cases, children of the missing experience intergenerational trauma, struggling with emotional distress and identity-related issues as they grow up without a clear understanding of their family's history. Additionally, social stigma and community polarization exacerbate these

[7] Katrine B. Komischke-Konnerup, Robert Zachariae, Maja Johannsen, Louise Dyrvig Nielsen & Maja O'Connor, *Co-occurrence of Prolonged Grief Symptoms and Symptoms of Depression, Anxiety, and Posttraumatic Stress in Bereaved Adults: A Systematic Review and Meta-analysis,* Vol. 4, JOURNAL OF AFFECTIVE DISORDERS REPORTS (2021), available at https://doi.org/10.1016/j.jadr.2021.100140 (Accessed on, Feb. 17, 2025)

difficulties, leading to isolation and a lack of social support. Families of the missing may be perceived as politically sensitive or associated with past conflicts, further marginalizing them from their communities.

c. Socio-Economic Hardships

The loss of a primary breadwinner deeply disrupts families, causing financial instability and emotional distress. Without alternative income, children often drop out of school or enter child labour to support their families. Though government compensation exists, bureaucratic barriers make access difficult. The resulting stress leads to anxiety, helplessness, and long-term psychological effects like low self-esteem and depression. Children forced into work experience emotional numbness and social withdrawal. The inability to secure aid intensifies frustration and feelings of injustice. Over time, unresolved grief and financial struggles contribute to intergenerational trauma, shaping the mental well-being of future generations.

d. Legal Barriers

In Nepal, legal barriers further exacerbate the suffering of families of the disappeared. Despite constitutional recognition of forced disappearances, Nepal lacks statutory laws to formally acknowledge or document such cases. Families of disappeared persons face significant legal obstacles, as there are no formal procedures to establish or record disappearances. Existing mechanisms, such as petitions to local peace committees or district administration offices, are not legally recognized and primarily serve to access government benefits rather than provide official legal status. The absence of disappearance certificates further complicates matters, preventing families from obtaining legal recognition of their missing relatives. Wives of disappeared individuals encounter additional challenges in securing citizenship cards and proving their marital status, particularly when marriages were informal or lacked familial approval. Many women, especially those from marginalized castes like Dalits, face rejection from in-laws who refuse to acknowledge their marriage, often due to economic concerns or social stigma. This lack of legal recognition restricts their ability to register marriages and births, leading to further social and legal marginalization.[8]

4. Coping Mechanisms in Families Experiencing Ambiguous Loss

Coping mechanisms vary widely and are influenced by cultural, social, and individual resilience factors. Research indicates that families adopt diverse strategies to manage the

[8] International Committee of the Red Cross, *Civil Legal Issues Related to the Families of the Missing in Nepal* 20-21, (2015)

emotional distress associated with ambiguous loss, ranging from psychological adaptation to community support and advocacy efforts.

a. Psychological Adaptation

Meaning-making and religious practices help families construct narratives around the disappearance. Neimeyer[9] suggests that reframing the loss within a broader social or political context provides purpose and mitigates emotional distress. Hope and denial serve as paradoxical yet essential coping strategies that families employ when confronted with prolonged uncertainty, particularly in situations of ambiguous loss, chronic illness, or unresolved trauma. While these mechanisms can sometimes extend distress by preventing individuals from fully processing or accepting difficult realities, they also serve as crucial psychological buffers that foster resilience and allow families to maintain a sense of normalcy and continuity.

Hope provides emotional sustenance, encouraging individuals to envision positive outcomes and sustain efforts toward adaptation, even in the face of adversity. It can act as a motivational force that helps families persist through uncertainty, fostering optimism and emotional endurance. Hope enables individuals to find meaning in their struggles, build emotional connections, and maintain a forward-looking perspective that can be essential for long-term adjustment.

Denial, on the other hand, can act as a temporary protective mechanism, shielding individuals from overwhelming emotional pain. In the short term, denial allows families to function and carry out daily responsibilities without being paralyzed by fear or grief. For example, in situations where a loved one is missing, family members may cling to denial as a way to cope with the ambiguity of loss, enabling them to avoid premature grief and hold onto the possibility of resolution.

However, the dual-edged nature of these strategies lies in their potential to hinder psychological processing and long-term adaptation. Persistent hope in unrealistic outcomes can prevent individuals from taking necessary steps toward adjustment, while prolonged denial can lead to avoidance behaviours, emotional suppression, and delayed grief. Despite these risks,

[9] James Gillies & Robert A. Neimeyer, *Loss, Grief, and the Search for Significance: Toward a Model of Meaning Reconstruction in Bereavement,* Vol. 19, JOURNAL OF CONSTRUCTIVE PSYCHOLOGY 31 (2006), available at http://dx.doi.org/10.1080/10720530500311182 (Accessed on Feb. 17, 2025)

the interplay between hope and denial often provides a crucial foundation for resilience, allowing families to navigate distressing circumstances with strength and perseverance.[10]

A study[11] found that 68% of affected families in Nepal engaged in religious rituals to seek solace and emotional relief.

b. Social and Community Support

Community-based coping mechanisms play a vital role in alleviating the psychological burden of ambiguous loss. Support groups offer a crucial space for emotional validation and resilience-building.

The implementation of the 'Hatemalo Programme' by the International Committee of the Red Cross (ICRC) in Bardia and Kathmandu highlighted the profound yet distinct impacts of social support. In Kathmandu, families of the missing often faced both emotional and economic hardships, having migrated to the city in search of justice, work, or answers. Group interventions enabled them to build support networks, facilitating the sharing of resources, legal knowledge, and emotional strength. One mother, who had spent years navigating government offices in search of her missing son, described feeling completely isolated and exhausted. However, after joining the group, she found renewed strength to continue her search, reassured that she was not alone.

5. Resilience among Families of the Missing

Resilience plays a crucial role in navigating ambiguous loss, with social support networks serving as a vital buffer against psychological distress. Hobfoll[12] highlights that individuals with strong kinship and community ties experience a 40% lower incidence of depression and anxiety compared to those without such support. Additionally, adaptive coping strategies, such as problem-solving skills, strengthen emotional endurance. Bonanno[13] found that individuals

[10] Boss, supra note 4, at 27

[11] Brandon A. Kohrt et al., *Social Ecology of Child Soldiers: Child, Family, and Community Determinants of Mental Health, Psychosocial well-being, and Reintegration,* Vol.*49*(5), TRANSCULTURAL PSYCHIATRY, 515-539 (G. Eric. Jarvis and et al. eds.) Sage UK (1), 2012.

[12] Stevan E. Hobfoll, STRESS, CULTURE AND COMMUNITY: THE PSYCHOLOGY AND PHOLOSOPHY OF STRESS 181 (Springer 1998)

[13] George A. Bonanno, *Loss, Trauma, and Human Resilience: Have We Underestimated the Human Capacity to Thrive After Extremely Aversive Events?* Vol. 59(1), AMERICAN PSYCHOLOGIST, 20-28 (Harris Cooper and et al. eds.) American Psychological Association, Unted States, 2004, available at https://psycnet.apa.org/doi/10.1037/0003-066X.59.1.20 (Accessed on Feb. 20, 2025)

who engage in proactive coping mechanisms exhibit lower levels of post-traumatic stress symptoms.

Advocacy and collective action further contribute to resilience by transforming grief into meaningful social engagement. A study[14]emphasizes that families involved in justice movements demonstrate higher psychological resilience, with 65% reporting a greater sense of empowerment and reduced symptoms of depression. In Nepal, grassroots initiatives like mothers' groups (Aama Samuha) and local women's collectives provide both emotional and practical support. These groups create safe spaces where individuals can express grief while collectively advocating for justice and recognition, fostering a sense of shared strength and hope.

Many families also turn to rituals and cultural practices to cope with loss. In the absence of official confirmation about their loved ones' fate, symbolic funerals and annual remembrance ceremonies offer a sense of closure and continuity, alleviating emotional distress.

Organizations such as the Conflict Victims' Common Platform (CVCP) and the National Network of Families of the Disappeared and Missing (NEFAD) empower families through legal assistance. Lawyers from these networks help file habeas corpus petitions, seek investigations, and register cases with the Truth and Reconciliation Commission (TRC) and the Commission on Investigation of Enforced Disappeared Persons (CIEDP). Their efforts support truth-seeking initiatives and advocate for reparations.

Beyond legal assistance, these networks connect families to vocational training, mental health services, educational support, and jo b placement opportunities. By addressing both emotional and practical needs, they play a critical role in fostering resilience and helping affected individuals rebuild their lives.

6. Interventions to Overcoming Ambiguous Loss

a. Guidelines to Assist Individuals and Families to Manage Ambiguous Loss

Dr. Pauline Boss,[15] who pioneered the concept of ambiguous loss, provides six key guidelines to help individuals and families navigate this complex experience. Finding meaning in the sit-

[14] Martín-Beristain, C., González, R., & M Rodríguez, *The Power of Social Justice Movements,* Vol. 4(2), INTERNATIONAL JOURNAL OF CONFLICT AND VIOLENCE, 267–284 (Wilhelm Heitmeyer and et al. eds.) Bielefeld Germany.2010.

[15] Boss, supra note 3, at 7-8.

uation, even without clear facts, can offer comfort and direction. This may involve personal reflection or engaging in activities that honour the missing person, such as a parent raising awareness about missing children. Adjusting mastery is another crucial step, as recognizing that some situations are beyond one's control can help reduce distress. In problem-solving cultures, this may require accepting the inability to change circumstances, while others may focus on proactive steps. For instance, a spouse caring for a partner with dementia must accept the disease's unpredictability while managing caregiving responsibilities. Reconstructing identity is also essential, as ambiguous loss can alter one's sense of self.

A woman whose husband is missing, for example, may struggle with identifying as neither a wife nor a widow and must work toward establishing a new self-concept. Normalizing ambivalence acknowledges that conflicting emotions are a natural response to ambiguous loss. Individuals may simultaneously desire closure while feeling guilty about it, but discussing these emotions with others in similar situations can provide validation and support. Revising attachment allows individuals to adjust their emotional connection to the missing person without forgetting them, integrating their memory in a way that promotes forward movement. Symbolic connections through rituals or memorials can facilitate this process. Finally, discovering new hope involves focusing on aspirations and goals that provide a sense of purpose. Engaging in activities that honour the missing person or finding new sources of fulfilment can foster resilience and healing.

b. Trauma Informed Care

Incorporating trauma-informed care ensures that interventions are sensitive to the emotional and psychological needs arising from ambiguous loss. This approach emphasizes understanding trauma's widespread impact, recognizing its signs, and integrating trauma knowledge into care practices. In Nepal, this would involve training caregivers, community leaders, and mental health professionals to identify the effects of ambiguous loss and respond with empathy and cultural competence.

By integrating Herman's trauma recovery model with trauma-informed care principles tailored to Nepal's context, individuals and communities can better navigate the challenges of ambiguous loss. This approach fosters resilience and holistic healing. Families experiencing ambiguous loss use a combination of psychological, social, and advocacy-based coping mechanisms. Community support, resilience-building strategies, and mental health interventions play a vital role in providing comprehensive care. Further research is necessary to explore culturally spe-

cific coping strategies and develop tailored interventions.

c. Counselling and Psychotherapy

Counselling and psychotherapy play a vital role in addressing the psychosocial needs of families experiencing ambiguous loss. A multidimensional approach is essential, with trauma-informed therapy facilitating coping and adaptation. Cognitive Behavioural Therapy (CBT) has been particularly effective in managing grief-related distress, with a study by Bryant et al.[16] reporting a 55% reduction in PTSD symptoms among individuals receiving CBT interventions. Similarly, Narrative Therapy helps individuals and families reconstruct their experiences through storytelling, fostering meaning-making and psychological resilience research suggests that storytelling as a therapeutic intervention enhances coping mechanisms and reduces distress in trauma survivors.[17] Given that more than 1,300 individuals remain missing in Nepal, structured mental health interventions are crucial in supporting affected families, helping them navigate grief while fostering a renewed sense of hope.

d. Cultural and Community-based Approach

Beyond clinical interventions, cultural and community-based approaches are essential in supporting families of the missing. Spiritual and religious rituals provide solace and a sense of closure for grieving families, while community solidarity programs create peer support networks that reduce isolation and foster resilience. Art-based and storytelling interventions help families process grief and preserve the memory of the missing, offering emotional expression and collective healing.[18] Additionally, memorialization initiatives, such as creating memorial quilts, erecting stone monuments, or building memory gates, serve as acts of collective remembrance, benefiting both the families of the missing and the broader community. A fifteen-week program designed to support conflict victims and their families has significantly contributed to community well-being, with economic empowerment initiatives-such as skills development in sewing and farming-leading to reductions in domestic violence and improvements in mental

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[16] Richard A. Bryant, Michelle Moulds, Rachel Guthrie, & Reginald DV Nixon, (2011). *Treating Acute Stress Disorder Following Mild Traumatic Brain Injury,* Vol. 168(6) AMERICAN JOURNAL OF PSYCHIATRY 592-599, American Psychiatric Publishing, 2011, available at https://psychiatryonline.org/doi/10.1176/appi.ajp.160.3.585 (Accessed on Feb. 23, 2025)

[17] Robert A. Neimeyer, *Narrative Strategies in Grief Therapy,* Vol. 12(1), JOURNAL OF CONSTRUCTIVE PSYCHOLOGY 65- 85, 1999, available at https://doi.org/10.1080/107205399266226 (Accessed on Feb.17, 2025)

[18] Simon Robins, Constructing Meaning from Disappearance: Local Memorialisation of the Missing in Nepal, Vol. 8(1), INTERNATIONAL JOURNAL OF CONFLICT AND VIOLENCE 104 (Leena Malkki and et al. eds.) IJCV, 2014, available at https://doi.org/10.4119/ijcv-3048 (Accessed on Feb. 27, 2025)

health[19] (International Alert, 2022, Family-Centered Approach: Supporting Women Conflict Victims in Nepal). By integrating psychological support with cultural and community-based interventions, affected families can find meaningful ways to cope with ambiguous loss, rebuild their lives, and foster resilience.

e. Government Initiatives

In response to the widespread issue of enforced disappearances, Nepal established the Truth and Reconciliation Commission (TRC) and the Commission of Investigation on Enforced Disappeared Persons (CIEDP) in 2015. These institutions were formed under the Enforced Disappearance Enquiry, Truth and Reconciliation Commission Act of 2014[20] to facilitate the transitional justice process-uncovering the truth, ensuring justice for victims, and promoting reconciliation. However, progress has been hindered by political interference, legal ambiguities, and institutional limitations, making the implementation of transitional justice slow and ineffective.

Since their inception, these commissions have received over 63,000 complaints from conflict victims. Despite the overwhelming number of cases, they have struggled to conduct thorough investigations and deliver justice. Instead of functioning as independent transitional justice bodies, the TRC and CIEDP are often perceived as political instruments. Their inability to operate without political influence has perpetuated a culture of impunity in Nepal, leaving victims without closure and deepening societal divisions.

Several factors contribute to the slow progress in transitional justice. Political unwillingness to hold perpetrators accountable remains a significant obstacle, as many of those implicated hold positions of power or have strong political affiliations. Furthermore, a lack of transparency in the commissions' operations, failure to engage victims in decision-making, inadequate financial and technical resources, and limited judicial intervention have further weakened these institutions.

While the 2014 Act[21] includes provisions for compensation, psycho-social support, and livelihood programs, transitional justice should not be reduced to financial compensation alone. It

[19] International Alert (2022) *Family-Centered Approach: Supporting Women Conflict Victims in Nepal,* available at https://www.international-alert.org/stories/family-centered-approach-nepal/ (Accessed on Feb.29, 2025)

[20] Enforced Disappearance Enquiry, Truth and Reconciliation Commission Act, 2014

[21] Enforced Disappearance Enquiry, Truth and Reconciliation Commission Act, 2014

must prioritize truth, accountability, and reparations that address victims' psychological and social needs. A meaningful path forward requires amending the 2014 Act to align with international human rights standards, ensuring that serious crimes-such as torture, enforced disappearances, and sexual violence-are not granted amnesty.

Political commitment is essential to ensuring the commissions' independence and efficiency. Adequate resource allocation, including legal and forensic expertise, is necessary for credible investigations. Additionally, active engagement of victims and civil society organizations must be prioritized, along with effective compensation mechanisms, trauma-informed psychosocial support, and sustainable livelihood programs.

Without a firm commitment to truth and accountability, Nepal's transitional justice process risks becoming another chapter of historical injustice. To prevent this, a victim-centred approach must be at the heart of reconciliation and justice efforts. Only through genuine initiatives toward justice and accountability can Nepal heal the wounds of its past and build a more just and inclusive society.

f. Local Government Initiatives

Local governments are integrating mental health services into community programs by establishing psychosocial support centres in municipal offices, health posts, and community centres. These centres provide counselling, group therapy, and emotional support to individuals affected by trauma, grief, and social stigma, particularly families of the missing.

To ensure sustainability, local actors such as community health workers, teachers, and social mobilizers are being trained in basic psychosocial skills. This community-driven approach reduces reliance on external professionals while fostering local capacity. Additionally, awareness campaigns and community dialogues help break stigma, strengthen social cohesion, and promote collective healing.

By incorporating psychosocial well-being into local policies, such as social protection programs for conflict survivors, local governments are fostering long-term resilience. This holistic, community-embedded approach ensures sustainable mental health support in post-conflict societies.

g. NGO and INGO Initiatives

NGOs and INGOs have played a crucial role in providing psychological and social support to the families of the missing. Organizations like NEFAD facilitate truth-seeking dialogues and

offer mental health assistance, while the ICRC engages in forensic investigations to help locate missing individuals and supports families in documenting cases of disappearance.

The Transcultural Psychosocial Organization (TPO) Nepal implements trauma-informed care programs, offering counselling and mental health support to affected families. ANTARANG Psychosocial Research and Training Institute strengthens local capacity by training individuals as psychosocial service providers, counsellors, and community-based psychosocial workers. Additionally, organizations such as Amnesty International and Human Rights Watch advocate for policy reforms and legal justice, ensuring that victims' families have a voice in national and international forums.

7. Recommendation for Further Interventions

a. Strengthening Legal Frameworks

To promote justice for the families of the missing, the government must prioritize accelerating investigations into enforced disappearances and ensure accountability for perpetrators. Reforms to existing policies, such as the TRC Act of 2014, are needed to address inconsistencies, particularly regarding the definition of serious violations. The current appointment of TRC and CIEDP commissioners from various political parties has led to concerns about bias; therefore, steps should be taken to guarantee impartiality in these processes. Moreover, redefining gross human rights violations according to international standards can simplify access to compensation and support services by eliminating bureaucratic obstacles that hinder families from obtaining the necessary aid.

b. Enhancing Mental Health and Psychosocial Support Services

It is critical to expand trauma-informed counselling services in communities impacted by enforced disappearances. Training local counsellors and community leaders in culturally sensitive mental health support can improve accessibility and ensure that families receive care tailored to their unique psychological needs. This approach can help nurture resilience and provide the necessary emotional and psychological care that families require during this challenging time.

c. Promoting Community-Based Healing Approaches

Integrating traditional healing methods with professional psychosocial interventions can significantly enhance the effectiveness of support services. Facilitating collaboration between traditional healers and mental health professionals, while training traditional healers to recognize mental health symptoms, can empower local communities to provide more comprehensive

care. This synergy can elevate the voices of victims' families and increase societal awareness of their challenges. For example, incorporating traditional healers, such as Dhami, into structured support systems can create a culturally relevant healing process that resonates with affected families.

d. Improving Coordination Between Stakeholders

It is essential to strengthen cooperation among government agencies, NGOs, and INGOs to provide comprehensive support for the families of victims. Establishing robust monitoring systems to evaluate the effectiveness of interventions will help identify gaps and ensure that resources are utilized efficiently. A coordinated effort will improve service delivery and ensure greater accountability in addressing the needs of victims' families.

e. Compensation Claims and Financial Assistance

Enhancing financial support requires streamlining the compensation claims process to ensure timely disbursement of funds. Offering legal and administrative assistance can guide families in navigating complex government relief programs more effectively. Additionally, the introduction of financial literacy and economic empowerment programs can promote long-term self-sufficiency. These initiatives have proven successful in other post-conflict settings, where economic empowerment programs resulted in a 60% increase in financial independence among beneficiaries.[22]

f. The Role of Humanitarian Organizations

NGOs and international agencies play a pivotal role in advocating for justice and providing direct support to affected families. Organizations such as the ICRC, local NGOs, and legal aid groups offer pro bono legal services to help families navigate Nepal's intricate legal framework. They document cases of forced disappearances, pushing for justice and reparations, and engage in policy advocacy to ensure the implementation of victim-centred legal frameworks. Their efforts have been instrumental in advancing transitional justice, strengthening the overall support system for affected families**.**

8. Conclusion

Ambiguous loss resulting from Nepal's civil conflict has profoundly impacted the psychosocial well-being of families whose loved ones remain missing. These families continue to live with unresolved grief, identity disruption, legal uncertainty, and socio- economic hardship. While

[22] Brandon Hamber, TRANSFORMING SOCIETIES AFTER POLITICAL VIOLENCE: TRUTH RECONCILIATION AND MENTAL HEALTH 174 (Springer, 2009)

traditional healing practices, community solidarity, and psychological coping strategies contribute to resilience, the absence of structural support-particularly in legal recognition, reparations, and trauma-informed care-exacerbates their suffering.

Addressing these layered challenges requires the integration of culturally responsive trauma recovery models, such as Judith Herman's trauma framework and Pauline Boss's theory of ambiguous loss, in tandem with professional mental health services and grassroots interventions. Strengthening coordination between government institutions, NGOs, and local communities is vital to cultivating inclusive, compassionate, and sustainable systems of support. Ongoing research and policy reform are essential to ensure justice, promote healing, and uphold the dignity of families enduring the ongoing pain of ambiguous loss in Nepal.

संक्रमणकालीन न्याय व्यवस्थापनमा राज्यको दायित्व, हाम्रो अवस्था र भावी मार्गचित्र

ठाकुरप्रसाद बस्ताकोटी

सारांश

संक्रमणकालीन न्याय सम्बन्धी बाँकी रहेका कामहरू शीघ्र पूरा गर्ने प्रतिबद्धता राजनीतिक तहबाट दोहोरिइरहेको पाइए तापनि प्रतिबद्धता अनुरूप काम हुन सकेको देखिदैन । सर्वोच्च अदालतबाट गत वर्ष माघ १५ गते सत्य निरूपण तथा मेलमिलाप र बेपत्ता पारिएका व्यक्तिको छानबिन आयोगमा पदाधिकारी नियुक्तिबारे एक महिनाभित्र समिति गठन कार्य सम्पन्न गरी नियुक्ति प्रक्रिया प्रारम्भ गर्नू भनी परमादेश जारी भएको थियो । अदालतले पदाधिकारी नभएका बखत पनि प्रारम्भिक काम कारबाही अघि बढाउने व्यवस्था मिलाउन सरकारलाई आदेश दिएको थियो । पीडितको शीघ्र सत्य तथ्य जान्न पाउने र न्यायको हक सुनिश्चित र संरक्षित गर्नका लागि भएको आदेश कार्यान्वयनका सिलसिलामा समिति गठन भयो । तर समितिले सिफारिस गर्न नसके तापनि सशस्त्र द्वन्द्वबाट पीडित व्यक्तिहरूको संस्थाका प्रतिनिधिहरू र दुवै आयोगका सचिवहरूसँग परामर्श गरी पदाधिकारीहरू नभएको अवस्थामा आयोगका सचिवले कार्यटोली गठन गरी पीडितमैत्री वातावरण सिर्जना गर्न सर्वोच्च अदालतले दिएको आदेश कार्यान्वयन गर्नुपर्ने दायित्व यथावतै छ । आयोगहरूले प्रारम्भिक छानविनको कार्य प्रारम्भ गर्न गराउन सक्ने गरी आवश्यक र उपयुक्त प्रबन्ध गर्न गराउन सर्वोच्च अदालतले देखाएको न्यायिक सक्रियताको प्रभाव देखिनु जरूरी भएको छ । पीडितहरूको आर्थिक, सामाजिक, सांस्कृतिक, मानसिक र कानूनी समस्याहरूको सम्बोधन गर्न कुनै पनि निहुँमा द्वन्द्वपीडितलाई न्याय दिनमा बिलम्ब नगर्नू भनेर अदालतले दिएको आदेशको कार्यान्वयन हुनु जरूरी छ । वर्षौंदेखिको न्यायको पर्खाइ अझैसम्म प्रतीक्षामा सीमित भएको अनुभवलाई अन्त्य गर्दै यसलाई अन्तर्राष्ट्रियकरण हुन नदिन संक्रमणकालीन न्याय हाम्रो प्राथमिकतामा पर्नु अपरिहार्य छ ।

१. पृष्ठभूमि

बेपत्ता पारिएका व्यक्तिको छानबिन आयोग र सत्य निरूपण तथा मेलमिलाप आयोगका अध्यक्ष तथा सदस्यको नियुक्तिका लागि सर्वोच्च अदालतका पूर्वप्रधानन्यायाधीश ओमप्रकाश मिश्रको नेतृत्वमा सरकारले सिफारिस समिति गठन गरे तापनि निर्धारित अवधिभित्र आयोगका पदाधिकारी र सदस्य सिफारिस हुन सकेनन् । अल्पमत र बहुमतका आधारमा आयोगका पदाधिकारी र सदस्य नियुक्त गर्न उपयुक्त नहुने भन्दै अर्को प्रक्रिया शुरू गर्न उक्त समितिले सरकारलाई आग्रह गरेपछि संक्रमणकालीन न्यायको संस्थागत व्यवस्थापनमा चुनौती थपिएको छ । सिफारिसका लागि समितिभित्र मतैक्य हुन नसकेकोले नियुक्ति विश्वसनीय र स्वीकार्य बनाउन पुनः प्रक्रिया प्रारम्भ गर्न सरकारलाई

उपसचिव, सर्वोच्च अदालत, रामशाहपथ, काठमाडौं ।

समितिले सुझाव दिए तापनि यो लेख तयार पार्दासम्म नयाँ प्रक्रिया भने प्रारम्भ भइसकेको छैन । बेपत्ता पारिएका व्यक्तिको छानबिन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन, २०७१ जारी भएपछि यसअघि दुई पटक आयोगको गठन भइसकेको हो । तापनि यसमा निर्णायक चरणमा काम हुन सकेको छैन ।

दश वर्षे सशस्त्र द्वन्द्व अन्त्य गरेको बृहत् शान्ति सम्झौता र २०६३ सालको नेपालको अन्तरिम संविधान अनुसार गठन गरिएको सत्य निरूपण तथा मेलमिलाप आयोग र बेपत्ता पारिएका व्यक्तिको छानबिन आयोग २०७१ साल माघ २८ गते दुई आयोग छुट्टाछुट्टै बनाउने गरी कानून निर्माण गर्न मार्गदर्शन[१] भएको पाइन्छ र सोही अनुसार दुई छुट्टा छुट्टै आयोग गठन भए । २०६३ मङ्सिर ५ गते सरकार र तत्कालीन नेकपा माओवादी बीच भएको सम्झौतामा ६ महिनाभित्र संक्रमणकालीन न्यायका विषय टुङ्गो लगाउने[२] भनिएको थियो । तर हालसम्म पनि संक्रमणकालीन मुद्दा सम्बन्धी मामिला टुङ्गिन नसक्दा आयोगहरूलाई प्राप्त जिम्मेवारी सम्पन्न हुने दिशातिर अग्रसर हुन सकेको छैन । २०७९ श्रावण ३१ देखि पदाधिकारीविहीन अवस्थामा रहेका आयोगहरूको कामकारबाही धेरै हदसम्म प्रभावित भएको देखिन्छ । यसरी द्वन्द्वपीडितहरूको न्यायको अधिकारको सम्बोधन मृगमरीचिका जस्तै बनेको छ आयोगहरूमा पदाधिकारीहरू नभएको अवस्थामा समेत प्रारम्भिक छानबिनको कार्य अगाडि बढाउन सक्ने गरी पीडितमैत्री वातावरण निर्माण गर्न न्यायिक सक्रियतामार्फत् निर्देशनात्मक आदेश भएको पाइन्छ ।[३]

२. संक्रमणकालीन न्यायको हालको अवस्था

संक्रमणकालीन न्यायको मुद्दालाई राजनीतीकरण मात्र गरिएको तर पीडितका पक्षबाट सहानुभूतिपूर्वक टुङ्ग्याउन कुनै पनि दल र सरकारहरू तयार भएको अनुभूति नभएको हालको अवस्था हो । ऐन संशोधन गरेर सशस्त्र द्वन्द्वका क्रममा भएका मानव अधिकार उल्लंघन र ज्यादतीका घटनामा न्याय, जवाफदेहिता र उपचार प्राप्त गर्ने विषयमा नयाँ प्रावधानहरू समेटिएको अवस्था भए तापनि संशोधित ऐनका प्रावधानप्रति असन्तुष्टि नरहेका होइनन् । यसका कतिपय प्रावधान उद्देश्य अनुरूप सफल परिणाम हासिल गर्ने सवाललाई कमजोर पार्ने खालका रहेको भनी पीडित र अन्तर्राष्ट्रिय समुदायबाट समेत आशंका व्यक्त भएको पाइन्छ । विशेष गरी पीडितहरूलाई सत्य र न्यायबिना क्षतिपूर्ति मात्र स्वीकार गर्न उत्प्रेरित गर्ने अभ्यासको रूपमा यसलाई हेर्न थालिएको छ । युद्धकालमा भएका अपराधहरूमा जिम्मेवार पक्षहरूलाई अभियोजनबाट जोगाउने गरी तर्जुमा गरिएको र पीडकहरूलाई न्यायको कठघरामा उभ्याइएको हेर्न पीडितहरूले संघर्ष गर्नुपर्ने अवस्था यसले ल्याउन सक्ने तर्क समेत गरिएको पाइन्छ ।

यस्ता गम्भीर अपराधमा जवाफदेहिताको अभावले मानव अधिकारको उल्लंघन र दण्डहीनताको संकट निम्तिन सक्ने र विगतमा द्वन्द्वकालीन जघन्य अपराधहरूमा सत्य, न्याय र परिपूरण दिलाउन असफल हुँदै आएको अवस्थाले निरन्तरता पाउन हुने बेला अब छैन । विगतमा आयोगका पदाधिकारीहरूको नियुक्तिमा राजनीतिक प्रभाव हुँदा पदाधिकारीहरूले पीडितको विश्वास जित्न सकेको नदेखिएको र अब नियुक्त हुने पदाधिकारीहरूको काम प्रभावकारी र विश्वसनीय बनाउन पनि पीडितको आकांक्षा अनुरूप मनोनयन र नियुक्ति प्रक्रिया पारदर्शी गराउन ध्यान दिनुपर्ने

[१] नेकाप २०६४, नि.नं. ७८१७, अंक २, प्रकरण १६ ।

[२] नेकाप २०६० नि.नं. ७२७४, अंक १२, प्रकरण ११ र १२ ।

[३] अधिवक्ता वीरेन्द्रप्रसाद थपलिया वि. राष्ट्रिय मानवअधिकार आयोग समेत (०७२-WO-०४५०), आदेश मिति २०८०।१०।१५ ।

अवस्था छ। यसका लागि सक्षम, निष्पक्ष र कुनै पनि राजनीतिक दलबाट पूर्णतया स्वतन्त्र हुनुपर्ने सुनिश्चित मापदण्ड तय गर्न पर्याप्त ध्यान दिनुपर्ने अवस्था छ।

संक्रमणकालीन न्यायको लगाम हाम्रै देशभित्र राख्न हाल रिक्त रहेका आयोगहरूमा पदपूर्ति समेतका कार्यमा शीघ्र ध्यान जानु आवश्यक देखिन्छ। यस विषयलाई घरेलु मैदानभन्दा बाहिर जान नदिन नेपालको सर्वोच्च अदालका फैसला निकै महत्वपूर्ण हुने देखिन्छ। संक्रमणकालीन न्यायसम्बन्धी सर्वोच्चका फैसलालाई हुबहु कार्यन्वयन गरे 'शान्ति प्रक्रियाको नेपाली मोडेल' साँच्चिकै सफल हुनेमा कुनै शंका छैन भन्नेमा हामीले जोड दिंदै आएका छौं।

सर्वोच्च अदालतले २०७१ फागुन १४ गतेको फैसलामा अदालतमा विचाराधीन मुद्दाहरू द्वन्द्वसँग सम्बन्धित भए/नभएको टुंगो समेत अदालतले नै लगाउने र आयोगमा परेका अदालतमा परेभन्दा बाहेकका घटनाका निवेदनउपर आयोगले अनुसन्धान गरी द्वन्द्वसँग सम्बन्धित भए/नभएको निर्क्यौल गर्ने उल्लेख गरेको थियो। उक्त फैसलामा पीडितको आत्मसम्मानमा ठेस लाग्नेगरी एकातर्फी मेलमिलाप लाद्न नसकिने भएकाले पीडितको अनिवार्य सहमतिमा मात्र मेलमिलाप हुने अदालतले आदेश गरेको थियो। सर्वोच्च अदालतले गम्भीर अपराधका पीडकलाई न्यायको दायरामा ल्याई सजाय गर्ने आधार खोजी गर्नु आयोगको संविधान र कानूनसम्मत् दायित्व भएको जनाउँदै गम्भीर अपराधमा माफी हुन नसक्ने आदेश दिएको थियो। सोही क्रममा अदालतमा विचाराधीन मुद्दाहरूमा अदालतको क्षेत्राधिकार नै समाप्त पार्ने गरी आयोगले हेर्न नसक्ने भनी व्याख्या समेत भएको छ।[४]

यस्तै २०७० पुस १८ को दोस्रो फैसलामा[५] अदालतले सत्य निरूपण तथा मेलामिलाप सम्बन्धी १ चैत २०६९ मा सरकारले जारी गरेको अध्यादेश अन्तरिम संविधान तथा प्राकृतिक न्यायको सिद्धान्त विपरीत भएको ठहर गरेको थियो। उक्त फैसलामा सर्वोच्च अदालतले बलपूर्वक व्यक्ति बेपत्ता पार्ने कार्यको छानबिन गर्न छुट्टै आयोग गठन गर्नुपर्ने, पीडितको सहमतिमा मात्र माफी दिइने गरी अध्यादेश परिमार्जन र संशोधन गर्नुपर्ने, आमनरसंहार, मानवता विरूद्धको अपराध, युद्ध अपराध, जबर्जस्ती बेपत्ता, यातना, गैरन्यायिक हत्या तथा बलात्कार लगायतका यौन हिंसा जस्ता गम्भीर प्रकृतिका अपराधलाई दण्डनीय बनाउने कानून निर्माण गर्नुपर्ने, गम्भीर मानव अधिकार उल्लंघनका घटनामा मुद्दा चलाउनका लागि राखिएको ३५ दिने हदम्याद पुनरावलोकन गर्नुपर्ने, पीडित एवं पीडितको परिवारलाई यथेष्ठ आर्थिक, कानूनी एवं संस्थागत व्यवस्था सहित परिपूरणको व्यवस्था र मेलमिलापको भावना प्रवर्द्धनका लागि कानूनी व्यवस्था गर्नुपर्ने परमादेश सरकारलाई दिएको थियो। यस्ता धेरै प्रावधानलाई कानूनमा समेट्ने प्रयास भए तापनि व्यवहारमा भने राष्ट्रिय एकता र समन्वयको प्रबर्द्धनमा कमी हुँदा संक्रमणकालीन न्यायको प्रक्रिया लम्बेतान हुँदै आएको छ।

[४] नेकाप २०७१, नि.नं.९३०३, अंक १२, प्रकरण ५६।

[५] नेकाप २०७०, नि.नं.९०५१, अंक १०, प्रकरण ५४।

३. नेपालको संशोधित कानूनका विशेषता

सर्वोच्च अदालतले २०७१ फागुन १४ गते बेपत्ता पारिएका व्यक्तिको छानबिन तथा सत्यनिरूपण र मेलमिलाप आयोग ऐनका कतिपय व्यवस्था त्रुटिपूर्ण रहेको भनेको थियो। ऐनका केही व्यवस्था खारेज गरिदिएपछि[६] अदालतको फैसला स्वीकार गर्नुपर्ने भनी व्याख्या भएको छ भने स्वेच्छाचारी रूपमा माफी दिन सकिने कुराको कल्पना गर्न नसकिने भनी उल्लेख गरिएको छ। सरकारले २०७२ साउन ११ त्यस विरूद्ध पुनरावलोकनको निवेदन दर्ता गरे तापनि उक्त निवेदन खारेज हुन पुग्यो। सर्वोच्च अदालतको आदेश कार्यान्वयनकै सिलसिलामा २०८१ को संशोधनले मानव अधिकार उल्लंघन भन्नाले सशस्त्र द्वन्द्वका क्रममा निःशस्त्र व्यक्ति वा समुदाय विरूद्ध लक्षित गरी वा योजनाबद्ध रूपमा गरिएको कार्य सम्झनु पर्ने भन्दै विभिन्न अपराधलाई राखिएको छ। हत्या, यौनजन्य हिंसा, शारीरिक वा मानसिक यातना, अपहरण तथा शरीर बन्धक बनाउने, गैरकानूनी थुनामा राख्ने, कुटपिट गर्ने, अंगभंग वा अपांग बनाउने, व्यक्तिगत वा सार्वजनिक सम्पत्ति लुटपाट, कब्जा, तोडफोड वा आगजनी गर्ने, घर जग्गाबाट जबर्जस्ती निकाल्ने वा अन्य कुनै किसिमको विस्थापन गर्ने र अन्तर्राष्ट्रिय मानव अधिकार वा मानवीय कानून विपरीत गरिएका जुनसुकै अमानवीय कार्यलाई सम्झनु पर्ने भनिएको छ।

गम्भीर मानव अधिकार उल्लंघन पनि चार प्रकारको अपराधलाई सूचीकृत गरिएको छ। जसमा क्रूर यातना दिई निर्ममतापूर्वक ज्यान मारेको, जबर्जस्ती करणी, जबर्जस्ती व्यक्ति बेपत्ता पार्ने कार्य र अमानवीय वा क्रूरतापूर्वक दिएको यातना भनी राखिएको छ। यसरी गम्भीर र मानव अधिकार उल्लंघन भनेर छुट्याउनु राम्रो भएको तर, हत्याको सम्बन्धमा क्रूरता भनेर अरू परिभाषा गर्दा भोली त्यही आधारमा टेकेर अनुसन्धान हुन सक्ने वा नसक्ने भन्ने तथ्यको ख्याल गरिएको पाइँदैन। युद्धमा संलग्न नै नभएको व्यक्तिलाई हत्या गर्नु आफैंमा गम्भीर मानव अधिकार उल्लंघन भएकाले त्यसमा कति क्रूर वा यातनापूर्वक थियो भनी फेरि खोजी गर्दा कानूनी छिद्रता रहने आशंका समेत पीडितहरूले उठाएको पाइन्छ।

संशोधनमा आयोगले गरेको सिफारिस पछि महान्यायाधिवक्ता वा सरकारी वकिलले प्राप्त प्रमाणको आधारमा ६ महिनाभित्र मुद्दा चलाउने वा नचलाउने सम्बन्धमा निर्णय गर्ने भनिएको छ। ६ महिनाभित्र द्वन्द्वकालीन मुद्दाको अनुसन्धान समाप्त नहुन पनि सक्ने, भएका प्रमाणहरूको आधारमा मात्र मुद्दा दायर हुँदा पछि अदालतबाट सफाइ पाउन सक्ने चिन्ता पीडित र जानकारहरूको छ। अदालतले फैसला सुनाउँदा प्रमाण हेर्ने भएकाले पर्याप्त प्रमाण नभएमा कसैलाई पनि अदालतले दोषी ठहर गर्न सक्दैन।

सत्य निरूपण तथा मेलमिलाप आयोग र बेपत्ता पारिएका व्यक्तिको छानबिन आयोगले झण्डै क्रमशः ६३ हजार र ३ हजार भन्दा बढी उजुरी सङ्कलन गरेको देखिन्छ। उजुरी उपरको कारबाहीलाई टुंगोमा पुऱ्याउने तथा पीडितलाई न्याय र परिपूरणको काम दिने कार्यमा भने खासै उपलब्धी भइसकेको छैन। विसं २०७९ फागुन २५ मा संसद्मा दर्ता भएको 'बेपत्ता पारिएका व्यक्तिको छानविन, सत्य निरूपण तथा मेलमिलाप आयोग ऐन २०७१ लाई संशोधन गर्न बनेको विधेयक विसं २०८० को वैशाख १५ गते संसद्मा सामान्य छलफल भएपछि त्यसलाई प्रतिनिधिसभाको

[६] सुमन अधिकारी विरुद्ध प्रधानमन्त्री तथा मन्त्रिपरिषद्को कार्यालयसमेत। साबित्री श्रेष्ठ वि.प्रधानमन्त्री तथा मन्त्रिपरिषद्को कार्यालय समेत (नेकाप, संवैधानिक इजलास खण्ड, भाग १, २०७५, नि.नं.००२)।

कानून, न्याय तथा मानव अधिकार समितिमा पठाइएको थियो। त्यसका कतिपय प्रावधानहरू न्यायमैत्री नभएको भनी समितिले त्यसबारे अध्ययन गर्न उपसमिति निर्माण गरी छलफल गरेको थियो। विधेयक पारित हुँदा मानव अधिकार उल्लंघनको विषयलाई मानव अधिकारको उल्लंघन र मानव अधिकारको गम्भीर उल्लंघन भनी दुई वर्गमा विभाजन गरी पछिल्लोको हकमा मात्र क्षमा दिन नसकिने उल्लेख गरिनुलाई बढी संवेदनशील रूपमा हेरिंदै आएको छ।

संशोधन ऐनबाट मूल ऐनको दफा २ मा संशोधन गर्दै सशस्त्र द्वन्द्वको बेला निःशस्त्र व्यक्ति वा जनसमुदाय विरूद्ध लक्षित गरी वा योजनाबद्ध रूपमा भएको क्रूर यातना दिई वा निर्ममतापूर्वक ज्यान मारेको, जबर्जस्ती करणी, जबर्जस्ती बेपत्ता पारिएको कार्य तथा अमानवीय वा क्रूरतापूर्वक दिइएको यातनालाई मात्र "मानव अधिकारको गम्भीर उल्लंघन" भनी व्याख्या गरेको पाइन्छ। हत्या, यौनजन्य हिंसा, शारीरिक तथा मानसिक यातना, अपहरण, घरजग्गाबाट विस्थापन जस्ता अपराधलाई भने "मानव अधिकारको उल्लंघन" मात्र भनिएको छ। यस्तै, मूल ऐनको दफा २२ मा संशोधन गर्दै "पीडक वा पीडितले आयोग समक्ष मेलमिलापका निम्ति निवेदन दिएमा आयोगले पीडितको स्वतन्त्र सहमतिमा मानव अधिकारको गम्भीर उल्लंघन बाहेकका मानव अधिकार उल्लंघनका घटनाका पीडक र पीडित बीच एक आपसमा मेलमिलाप गराउन सक्ने भनिएको छ।

यस्ता प्रावधान मानव अधिकारका अन्तरराष्ट्रिय सिद्धान्तसँग प्रतिकूल रहेको भनी आलोचकहरूले व्याख्या गरेका छन्। यसमा नेपाल संयुक्त राष्ट्रसंघीय मानव अधिकार परिषद्को सदस्यमा लगातार दोस्रो कार्यकालका लागि निर्वाचित भएको अवस्थामा संक्रमणकालीन न्याय सुल्झन नसक्दा बारम्बार आलोचित बन्नुपर्ने अवस्था नआएको भनी समेत टिप्पणी हुन पुग्यो। शान्ति सम्झौताको झण्डै आठ वर्ष पछि मात्र २०७१ मा नेपालले संक्रमणकालीन न्याय सम्बन्धी कानून बनाए तापनि प्रयोगको अवस्था कमजोर भएको र त्यसको एक दशक पछि भएको संशोधनबाट पनि समाधान ननिस्किए पीडितको न्यायको अधिकार टाढाको विषय हुने चिन्तालाई कम गर्न सरोकारवालाहरूको ध्यान केन्द्रित हुनुपर्ने देखिन्छ।

संशोधित कानूनमा विशेष गरी मानव अधिकारको "गम्भीर उल्लंघन" बारे गरिएको परिभाषाबारे आलोचना भएको पाइन्छ। यातना स्वभावतः नै अमानवीय वा क्रूर हुने हुँदा आरोपित पीडकहरूले निश्चित शर्त पूरा गरेमा र पीडितहरूको सहमति भएमा सत्य निरूपण तथा मेलमिलाप आयोगले ती घटनामा माफी दिन सक्नेबारे कानूनको भाषाले अस्पष्टतालाई अंगीकार गरेको पाइन्छ। विशेष अदालतको कार्यादेशको विस्तारले न्याय प्राप्तिमा सुधारको बाटो देखिए तापनि गम्भीर अपराधका लागि कुनै पनि माफी नेपाली र अन्तर्राष्ट्रिय कानून र मापदण्ड विपरीत हुने तथ्यलाई ख्याल नगरिएको भन्ने देखिन्छ। यसले पीडितको प्रभावकारी उपचार र परिपूरणको अधिकारको उल्लंघन हुन सक्ने जोखिम कायमै रहेको देखिन्छ।

मानवता विरूद्धका अपराध र युद्ध अपराध लगायत अन्तर्राष्ट्रिय कानून अन्तर्गतका कतिपय अपराधमा जवाफदेहिताबाट उन्मुक्ति सिर्जना गर्न सक्ने अवस्था समेत रहेको पीडितहरू समेतको भनाइ रहेको सार्वजनिक हुँदै आएको अवस्था पनि छ। जबरजस्ती करणी वा यौनहिंसासम्बद्ध मुद्दा बाहेक गम्भीर उल्लंघनमा दोषी ठहरिएकाहरूलाई सजायमा ७५ प्रतिशत छुटको व्यवस्था दण्डसजाय र अपराधको गम्भीरतासँग समानुपातिक

हुनुपर्ने सिद्धान्त विपरीत रहेको देखिन्छ। यसबाट अभियोजनका क्रममा तथ्य र प्रमाणहरूका आधारमा तय गरिएको आधारमा सजायमा के कति कमी गर्नूपर्ने भन्नेबारे निर्णय र निक्यौंल गर्दा निकै ध्यान दिनुपर्ने अवस्था छ।

आयोगहरूका लागि साङ्गठनिक संरचना र कानूनी व्यवस्था सुनिश्चित गरिए तापनि पीडितका मुद्दा अनुसन्धान गर्ने र मुद्दा चलाउने मुख्य विषयमा प्रवेश हुन ढिलाइ भइरहँदा द्वन्द्वकालीन न्यायको विषय अन्त्यहीन लडाइँजस्तो बनेको द्वन्द्वपीडितहरूको अनुभूति निवारण हुन सकेको देखिदैन। यही अवस्था रहिरहे आयोगहरूको औचित्य पुष्टि हुन नसक्ने जोखिम कम गर्न द्वन्द्वकालीन मुद्दाको फछर्योटका काममा सबैको गम्भीरता आवश्यक छ।

४.अन्तर्राष्ट्रिय अनुभव

सशस्त्र द्वन्द्वपछि नेपालमा जस्तै धेरै देशमा यस्ता आयोग गठन भए पनि त्यसमा सफलता हात लागेका उदाहरण पनि छन्। कतिपय देश पीडितलाई न्यायको महशुस गराउन असफल भएका हुँदा यो विषय अन्तर्राष्ट्रिय तहसम्म पुगेका उदाहरण छन्।[७]

- **केन्या**

केन्यामा सन् १९६३ देखि सन् २००८ सम्म भएको जातीय युद्धमा गरिएको हत्या-हिंसा र मानव अधिकार उल्लंघनका घटनामा यथार्थ पत्ता लगाउन सत्य निरूपण आयोगको स्थापना गरिएको थियो। आयोगले ५ वर्षमा प्रतिवेदन संसद्मा बुझाउनुपूर्व त्यो प्रतिवेदन पीडक भनी तोकिएका विरूद्ध कारबाही चलाउन विशेष अदालतको माग गऱ्यो। यदि माग पूरा नभएमा त्यो प्रतिवेदन अन्तर्राष्ट्रिय अपराध न्यायालय (आइसीसी) लाई बुझाउने भन्दै सरकालाई धम्की समेत दिइएको थियो। त्यसै अनुरूप अन्ततः प्रदिवेदन आइसिसी पुग्यो। आइसिसीले सन् २०११ मा त्यहाँका तत्कालीन उपप्रधानमन्त्री उहुरू केन्याटा र अन्य ५ मन्त्रीहरू, सचिव र प्रहरी प्रमुख लगायतलाई अदालतमा उपस्थितिको लागि पत्र काट्यो। सन् २०१३ मा अदालतमा मुद्दा चलिरहेकै अवस्थामा केन्याटा मुलुककै चौथो राष्ट्रपतिमा निर्वाचित भए। त्यसपछि प्रमाण नपुगेको भन्दै आइसिसीले उनको मात्र मुद्दा फिर्ता लियो।

- **कंगो**

त्यस्तै अर्को अफ्रिकी देश, डीआर कंगोमा सन् १९६० देखि सन् २००३ सम्म चलेको द्वन्द्वमा भएको जनधनको क्षतिको अनुसन्धान गर्दै पीडितलाई परिपूरण, राष्ट्रिय एकता र मेलमिलाप गराउने उद्देश्यका साथ सत्य निरूपण तथा मेलमिलाप आयोगको स्थापना गरिएको थियो। तर, राम्रोसँग काम नगरेका कारण पटक पटक आयोगहरू गठन भए। त्यसक्रममा द्वन्द्वमा प्रत्यक्ष रूपमा संलग्न रहेका व्यक्तिलाई नै आयोगको सदस्यको रूपमा नियुक्ति दिएका कारण प्रतिवेदन फितलो आयो।

देशभित्रै पीडितलाई न्याय दिएको विश्वास दिलाउन नसकेपछि यो मुद्दा आइसिसीमा पुग्यो। युद्ध अपराध तथा मानवता विरूद्धको अपराधमा आइसिसीले त्यहाँका पूर्वराष्ट्रपति जिन पिएरे बेम्बा तथा विद्रोही नेता थोमस लुबाङ्वालाई

[७] विरेन्द्र थपलिया वि. राष्ट्रिय मानवा अधिकार आयोग समेत, ०७२-WO-०४५०, आदेश मिति २०८०।१०।१५, पृष्ठ ३१।

बाल सेना प्रयोग गरेकोमा दोषी ठहर गर्यो। लुबाङ्वा हेगस्थित आइसिसी अदालतमा १४ वर्षको सजाय भोगिरहेका छन्।

- **कोलम्बिया**

कोलम्बियाको युद्धको प्रकृति धेरै क्रूर थियो। शान्ति वार्ताका धेरै प्रयास असफल भएका थिए। यसका बाबजुद सन् २०१२ र २०१६ बीच क्युबाको हवानामा शान्ति भयो। वार्ताको सबैभन्दा कठीन बिन्दु न्याय र सत्यको प्रणाली विस्तार थियो। न्यायका अपेक्षालाई कसरी सन्तुलनमा राख्ने र पूर्वलडाकूहरूले स्वीकार्ने न्याय सम्पादन कसरी गर्ने भन्नेमा छलफल भयो। त्यसपछि नोभेम्बर २०१६ मा शान्ति सम्झौतामा हस्ताक्षर भयो। सोही समयमा विशेष अदालतका रूपमा ट्राइवुनल कोर्ट गठन भएर अहिलेसम्म काम गरिहेको छ।

कोलम्बियामा कम्युनिस्ट छापामार समूहसँग छापामार युद्धको विशेषता थियो। द्वन्द्वका समयमा थुप्रै मानव अधिकार कानून र मानवीय कानूनको उल्लंघन भयो। कोलम्बियामा आन्तरिक सशस्त्र द्वन्द्व लागू पदार्थको तस्करीमा जकडिएको थियो। लागू औषधको तस्करीले छापामार युद्धलाई आर्थिक सहयोग गर्‍यो। कोलम्बियामा न्यायिक प्रक्रिया छ, शान्ति कायम भएको छैन। न्यायिक प्रणाली स्थापित भएर पनि शान्ति कायम भएको छैन, अझै धेरै हिंसा भइरहेको छ। संयुक्त राष्ट्र संघले हतियार राखिएको प्रमाणीकरणमा महत्त्वपूर्ण भूमिका खेलेको छ र यसले पूर्वलडाकुहरूले सुरक्षित महशुस गर्न र समाजलाई पनि सुरक्षित महशुस गर्न महत्त्वपूर्ण भूमिका खेलेको छ।

५. अन्य अनुभव

हालसम्म ६० भन्दा बढी देशहरूमा संक्रमणकालीन न्यायलाई निष्कर्षमा पुर्‍याउन आयोगहरू गठन भएका छन्। ती मध्ये अफ्रिकी महादेशका १९, एसिया-प्यासिफिक क्षेत्रका १०, युरोपका ११, अमेरिकी महादेशका १४ र मध्य पूर्वका ८ देशमा यस्ता आयोगहरू गठन भएका छन्। तर, धेरै देशमा संक्रमणकालीन न्यायका लागि स्थापना गरिएका ती आयोगको म्याद तीन गुणासम्म थप गरिएका छन्। पीडितले न्याय पाउन निकै समय पनि लाग्न सक्छ। तर पीडितको पीडा लामोसमयसम्म रहँदा सिंगो समाजले यसको असर भोग्नुपर्ने अवस्था हुन्छ। पहिले बेवास्ता गरिए पनि दशकौंपछि आएर पनि दोषीले सजाय पाएका अवस्था भने नरहेको होइन। त्यसको एउटा उदाहरण हो-बंगलादेश। सन् १९७१ को स्वतन्त्रता संग्रामका बेला बंगलादेशमा भएका आमनरसंहार, युद्ध अपराधमा संलग्न पीडकलाई दण्ड दिन त्यहाँको संसद्ले अन्तर्राष्ट्रिय अपराध न्यायालय ऐन १९७३ जारी गरेको थियो।

लामो समयसम्म पनि त्यो ऐन कार्यान्वयनमा नआएपछि सन् २००९ मा संसद्ले उक्त ऐनमा महत्वपूर्ण संशोधन गर्‍यो। परिणामस्वरूप देशभित्रै अन्तर्राष्ट्रिय अपराध न्यायालयको स्थापना गरियो, जसको मुख्य लक्ष्य भनेको १९ वर्ष लगाएर १३ जना अनुसन्धानकर्ताले गरेको युद्ध अपराध सम्बन्धी अनुसन्धानमा उल्लेख गरेका पीडकलाई दण्ड दिलाउनु थियो। उक्त न्यायलयले झन्डै ४० वर्षपछि युद्ध अपराधमा संलग्न भएकालाई सन् २०१०-२०१६ सम्ममा दण्ड सुनायो। १७ जनालाई मृत्युदण्ड नै दिइसकेको छ, जसमा १५ जना उपल्लो हैसियत भएका नेताहरू थिए। मृत्युदण्ड पाउने नेताहरूमा बंगलादेशकै सबभन्दा ठूलो दल मुस्लिम जमात ई-इस्लामिक पार्टीका ९ जना छन्।

६. नेपालमा समस्या नसुल्झनुका प्रवृत्ति र कारण

विगतको असफलताका कारण सरोकारवालाबीच असन्तुष्टि र संशय देखिन्छ। तथापि अब केही होला कि भन्ने उत्सुकता र उत्साह पनि यस पटक धेरैमा देखिएको छ। आयोग मार्फत द्वन्द्वको कारण र दुष्परिणामको यथोचित

सम्बोधन गर्ने सन्दर्भमा राज्यका तर्फबाट अन्तिम प्रयास हुन लागेको भन्ने बुझाइ राष्ट्रिय मात्रै नभएर अन्तर्राष्ट्रिय तहमा पनि विकसित हुँदै गएको देखिन्छ । यस स्थितिमा सबै सरोकारवाला बीच विश्वासको वातावरण निर्माण गरेर संक्रमणकालीन न्याय प्रक्रियालाई सफल बनाउने तर्फ गम्भीर रूपमा लाग्नुको विकल्प छैन । मूलभूत रूपमा निम्न रणनीतिक उपायको अवलम्बनले संक्रमणकालीन न्याय प्रक्रियाको सफलतालाई सुनिश्चित गर्नेछ भन्ने कुरा हेक्का राख्न जरूरी छ । समयसीमाको नाममा पदाधिकारीको खोजी गर्ने प्रक्रियालाई यान्त्रिकीकरण गर्नु उचित हुँदैन ।

द्वन्द्वोत्तर न्याय प्रक्रियालाई निर्देशित गर्ने सन्दर्भमा संशोधित ऐनलाई संविधानको आलोकमा प्रयोग गर्ने अवसर छ भन्ने भुल्नुहुँदैन । विस्तृत शान्ति सम्झौता हुनु अघिदेखि नै सर्वोच्च अदालतले संक्रमणकालीन न्यायका विविध आयाममा महत्त्वपूर्ण नजिर र कानूनी सिद्धान्त प्रयोग हुन सक्ने अवस्था छ । संक्रमणकालीन न्यायका सम्बन्धमा द्वन्द्वकालीन मुद्दाहरूको समग्रता हेरी यसको रणनीतिक उपचार गर्ने सम्बन्धमा व्याख्या भएको छ । जसमा अपराध अनुसन्धान र अभियोजन, सत्य अन्वेषण र क्षतिपूर्ति, संस्थागत क्षमता विकास तथा परीक्षण लगायत विधिहरूको चरणबद्ध परीक्षण हुनुपर्ने भनिएको छ ।[८] साथै, नेपाल अन्तर्राष्ट्रिय मानव अधिकार कानून र मानवीय कानूनको पक्ष राष्ट्र समेत रहेकोले नागरिक तथा राजनीतिक अधिकार अनुबन्ध, यातना विरूद्धको महासन्धि एवं जेनेभा महासन्धि अन्तर्गतका कानूनी दायित्व पनि यस सम्बन्धमा महत्त्वपूर्ण मार्गदर्शकका रूपमा रहने अवस्था छ ।

संक्रमणकालीन न्यायको विश्वव्यापी अभ्यासबाट सिक्ने अवसर पनि हामीलाई छ । विगतका उतार चढावबाट सिकेर त्रुटिहरू नदोहोऱ्याउने र न्यायको सन्दर्भमा शून्यको स्थिति फेरी पनि सिर्जना हुने अवस्था ल्याउनु हुँदैन । संक्रमणकालीन न्याय प्रक्रियाका लागि आवश्यक पर्ने नियमात्मक आर्थिक स्रोत, भौतिक पूर्वाधार र विशेषज्ञता सुनिश्चित गर्नु आवश्यक छ । पर्याप्त स्रोतको उपलब्धता भएमा आयोगहरूलाई सक्षम रूपमा काम गर्न मद्दत पुऱ्याउँछ । यसका लागि कार्यादेश अनुसार आवश्यक बजेट सुनिश्चित हुनु पर्छ । यो संघीय सरकारको मात्र जिम्मेवारी होइन, प्रदेश र स्थानीय तहले पनि पीडितका तत्कालीन आवश्यकता पूरा गर्न र संक्रमणकालीन न्याय प्रक्रियामा उनीहरूको पहुँच सहज बनाउन बजेट र कार्यक्रम मार्फत महत्त्वपूर्ण भूमिका खेल्न सक्छन् ।

सीमित स्रोत वा राष्ट्रिय एकताको अभावको अवस्था देखाएर प्रक्रिया अगाडि बढ्न नसकेको भन्नु राजनीतिक स्वार्थलाई ढाकछोप गर्नु मात्रै भए जस्तो देखिन्छ । सर्वोच्च अदालतको द्वन्द्वकालीन मुद्दामा अन्तर्राष्ट्रिय कानून र मानव अधिकार सिद्धान्तका आधारमा जघन्य द्वन्द्वका अपराधहरूमा समेत उन्मुक्ति दिन नमिल्ने आदेश सुनाएको र यस्तै विषयहरूलाई लिएर संयुक्त राष्ट्र सङ्घ सहितका अन्तर्राष्ट्रिय संस्थाहरूले 'नेपालको असल नियत हुनुपर्ने' मा जोड दिंदै आएको पाइन्छ । नेपाल मानव अधिकार परिषद्को सदस्य हुँदा समेत देश भित्रको मानव अधिकारको विषयमा यसरी बाहिर प्रश्न उठाइन सक्ने अवस्था कायम रहिरहनु उपयुक्त देखिदैन ।

नेपालको संविधानले संवैधानिक मान्यता दिएको राष्ट्रिय मानव अधिकार आयोगले विगत २० वर्षमा गरेका सिफारिसहरूको कार्यान्वयनको अवस्थाको प्रतिवेदन हेर्दा मानव अधिकार उल्लंघन कर्ताको नेपाल प्रहरी, नेपाली सेना र निजामती प्रशासनका उच्च अधिकारीहरू सहित २८६ जनाको नाम सार्वजनिक गरेको थियो । आयोगले दुई

[८] नेकाप २०६५, नि.नं. ८०१२, अङ्क ९, प्रकरण २ ।

दशकको अवधिमा झन्डै १,२०० सिफारिसका आधारमा सार्वजनिक गरेको विवरणमा त्यसमा अधिकांश घटना सशस्त्र द्वन्द्वसँग सम्बन्धित रहेको जनाएको थियो।

विस्तृत शान्ति सम्झौता भएको १८ वर्ष बितिसकेको र ऐन जारी भएको एक दशक बित्दा समेत सोही ऐनले निर्माण गरेको आयोगले प्रभावकारी रूपमा काम गरी सत्य निरूपण र मेलमिलापको वातावरण कायम नहुनु तथा बेपत्ता व्यक्तिहरूको छानबिनको अवस्था नटुंगिनुले दण्डहीनताको अवस्थालाई संकेत गरेको छ। आफू विरूद्ध भएको अन्यायको उपचार खोज्न पीडित पक्ष पूर्ण सार्वभौम र स्वतन्त्र रहने भनी त्यस्तो अधिकारलाई संक्रमणकालीन न्यायले संकुचन वा नियन्त्रण गर्न नसक्ने भनी उल्लेख गरिएको छ।[९] यति लामो समयसम्म पीडितले न्याय नपाउनु र वि.सं. २०६३ सालको नेपालको अन्तरिम संविधानले समेटेको कुरालाई सोही संविधान खारेज भई नयाँ संविधानले एक दशकको कार्यान्वयन अवधि पार गरिसक्न लाग्दा समेत यो अवस्था रहिरहनु कुनै पनि हिसाबाट शोभनीय होइन।

द्वन्द्वनिवारणसँग सम्बन्धित सेना समायोजन लगायतका कामहरू पूरा भएको लामो समय भइसक्दा पनि संक्रमणकालीन न्याय सम्बन्धी प्रक्रियाहरू यसरी बाँकी रहिरहेमा[१०] संक्रमणकालीन न्याय सम्बन्धी शान्ति प्रक्रियाका बाँकी कामलाई पूर्णता दिन बेपत्ता पारिएका व्यक्तिको छानबिन र सत्य निरूपण तथा मेलमिलाप आयोगलाई आवश्यक पर्ने ऐन, कानून बनाउने विधेयक संघीय संसद्बाट पारित भएको भनी खुशी हुनुको सार्थकता पूरा हुन सक्ने देखिदैन। यसको पीडित केन्द्रित कार्यान्वयन हुन नसक्ने हो भने हाम्रा राजनीतिक शक्तिहरूले शान्ति प्रक्रियाको दिगो समाधानमा गम्भीरता प्रकट गरेको अवस्था समेत देखिन सक्दैन।

७. हाम्रो नीतिगत ढाँचाको अबको मार्ग

राजनीतिक तहमा शीर्ष नेताहरूबीच अब कसरी अघि बढ्ने भन्ने बारे साझा धारणा नबनेकाले प्रक्रिया अलमलमा पर्दा पूर्वप्रधानन्यायाधीश ओमप्रकाश मिश्र नेतृत्वको समिति निष्प्रभावी देखिन पुग्यो। खुला रूपमा आह्वान गर्दा निवेदन दिएका १५६ उम्मेदवार मध्येबाट आठ जना अध्यक्षका लागि र ३२ जना सदस्यका लागि छनौट चरणमा नाम छानिएका नाममा कसलाई छान्ने भन्नेमा नै दलीय हस्तक्षेप भए पछि नै यस्तो अवस्था आएको छिपेको छैन।

सरकारले अवरूद्ध प्रक्रियालाई अघि बढाउन थप पहल नगरेमा पीडितहरूको न्याय पाउने अधिकार थप कुण्ठित हुन सक्ने देखिन्छ। अन्तर्राष्ट्रिय मानव अधिकारवादी संस्था एमनेस्टी इन्टरनेसनल, ह्युमन राइट्स वाच र इन्टरनेसनल कमिसन अफ जुरिस्टले प्रधानमन्त्रीलाई संयुक्त पत्र लेख्दै अर्को सिफारिस समिति गठन गरेर अघि बढ्न आग्रह गरेका पनि हुन्। पीडित र अन्य सरोकारवालाहरूले पनि यसमा चिन्ता प्रकट गरिरहेको अवस्था हो। तर यसप्रति थप गम्भीरता प्रकट नहुने हो भने यसबाट शान्ति प्रक्रियाको महत्वपूर्ण काम संक्रमणकालीन न्यायको भविष्य अझै ओझेलमा परेको अनुभूत अझ घनीभूत हुँदै जाने अवस्था रहने देखिन्छ।

यस्तै अवस्था रहिरहे मामिला अन्तराष्ट्रिय तहमा पुग्न सक्ने अवस्थाप्रति सजग रहनु आवश्यक देखिन्छ। यसको यथोचित सम्बोधनले मुलुकको दिशा परिवर्तन गर्न सघाउने ठानिन्छ। अहिले यसलाई तार्किक निष्कर्षमा पुऱ्याउन

[९] नेकाप २०७०, नि.नं. ९०९१, अंक १२, प्रकरण ३५।

[१०] नेकाप २०६४, नि.नं. ७८१७, अंक २, प्रकरण १६।

एकीकृत प्रयासको खाँचो छ । लामो समयदेखि निष्प्रभावी आयोगहरूमा पुनःपदाधिकारी नियुक्ति पक्कै पनि संक्रमणकालीन न्याय प्रक्रियालाई चलायमान बनाउने मूल आधार हो । तर संक्रमणकालीन व्यवस्थापनको चुनौतीको विहंगम अवलोकन र एकताबिना नियुक्तिले मात्रै संक्रमणकालीन न्यायको सफलता सुनिश्चित हुन सक्दैन भन्ने पनि सँगसँगै ख्याल गर्नुपर्ने विषय छ । संक्रमणकालीन न्याय प्रक्रियाको गाम्भीर्यले मागे अनुरूपका पदाधिकारी सहितको आयोगसँगै तहगत सरकार र अन्य सरोकारवाला बीचको प्रभावकारी परिपूरक भूमिका पनि अपरिहार्य हुने विषयमा हाम्रो ध्यान पुग्नु आवश्यक छ ।

संशोधित ऐनले तय गरेको सत्य र परिपूरणका लागि महत्त्वपूर्ण आधारलाई यसको अन्तर्राष्ट्रिय कानूनी मापदण्डको आलोकमा समस्याग्रस्त देखिएका भनिएका प्रावधानको असरलाई न्यूनीकरण गर्ने भन्ने सवाल पनि महत्त्वपूर्ण हुने देखिन्छ । यस्तो सुनिश्चितताका लागि बढी भन्दा बढी व्यक्तिको सहभागितामा प्रतिस्पर्धात्मक छनौट सुनिश्चित गर्न ध्यान दिनु उपयुक्त हुन सक्छ । संक्रमणकालीन न्यायमा अन्तर्राष्ट्रिय सहयोगको सम्भावना पनि छ । त्यसलाई कसरी र कुन प्रयोजनका लागि उपयोग गर्ने भन्नेबारे स्पष्ट नीतिगत ढाँचा आवश्यक पर्न सक्ने देखिन्छ । ऐनले परिकल्पना गरेको संक्रमणकालीन न्याय कोषको यथाशीघ्र स्थापना गरी त्यसको अधिकतम मितव्ययी उपयोग सुनिश्चित गर्ने कुरामा समेत प्रशस्त ध्यान दिनु जरूरी छ ।

८.पीडितको अधिकार र क्षतिपूर्तिको प्रश्न

पीडितका लागि तत्काल परिपूरणीय सहायता निकै जरूरी रहेको अवस्थालाई राम्ररी ध्यान दिनुपर्ने देखिन्छ भने राहत तथा परिपूरण पाउने कुरा केवल संक्रमणकालीन न्याय प्रक्रियासँग सीमित नठानी पीडित र प्रभावितहरूको हक अधिकारसँग जोडेर हेर्नुपर्ने देखिन्छ । नेपालको संविधानले प्रत्येक नागरिकलाई सम्मानजनक रूपमा बाँच्न पाउने अधिकार, सामाजिक न्याय र सामाजिक सुरक्षाको अधिकार प्रत्याभूत गरे तापनि प्रयोगको प्रभावकारिताबिना यो व्यवहारमा सुनिश्चित हुने अवस्था रहँदैन । बेपत्ता व्यक्तिको खोजी गर्ने, दोषीलाई सजाय र पीडितलाई संरक्षण गर्ने समेतका कार्य सरकारको उच्च प्राथमिकतामा पर्नुपर्नेमा त्यसो हुन नसकेको भनी सर्वोच्च अदालतबाट सरकारको ध्यानाकर्षण गराएको समेत पाइन्छ ।[११] तसर्थ अन्तरिम राहत, दीर्घकालीन परिपूरण र पुनःस्थापनाको हक अधिकारको समेत ख्याल गरी पीडितको अधिकारको सम्बोधनका मोडालिटीहरूलाई व्यवहारमा सुनिश्चित गर्ने तर्फ हाम्रो ध्यान केन्द्रित हुनुपर्ने देखिन्छ ।

पीडितको यथोचित पहिचान र सूचीकरण प्रभावकारी परिपूरण कार्यक्रमको पूर्वशर्त हो । तर विस्तृत शान्ति सम्झौता भएको दुई दशक पुग्न लागिसक्दा पनि सम्पूर्ण पीडितको पहिचान तथा पञ्जीकरण हुन नसक्नु यसप्रतिको सरोकारवालाहरूको बेवास्ताको परिणाम बाहेक अरू केही होइन भन्न सकिन्छ ।[१२] विगतमा यसको सूचीकरण गर्ने प्रयास भए तापनि त्यसले निष्कर्ष प्राप्त गर्न सकेन । यो किन हुन सकेन भन्ने कुरालाई निकै गम्भीरतापूर्वक ग्रहण गर्नुपर्ने अवस्था छ । सम्पूर्ण पीडितको यकिन अभिलेख तयार गर्न नसक्दा राज्यका परिपूरणीय योजनाहरूमा उनीहरूको पहुँच स्थापित भइसक्ने अवस्थाको सुनिश्चितताको आधार तयार हुन नसकेको जगजाहेर छ । परिपूरणलाई पीडितको अधिकारका रूपमा मान्यता दिइसके पछि उनीहरूको यथोचित पहिचान र आवश्यकताका आधारमा वैज्ञानिक र तथ्यगत वर्गीकरण गर्नु जरूरी हुन्छ । यसकै आधारमा परिपूरणीय आवश्यकताको परिपूर्ति सुनिश्चित गर्न सकिने

[११] राजेन्द्रप्रसाद ढकाल वि. गृह मन्त्रालय समेत (नेकाप २०६४, अंक २, नि.नं. ७८१७, प्रकरण नं.१६)।

[१२] ज्ञानेन्द्रराज आरण समेत वि.प्रधानमन्त्री तथा मन्त्रिपरिषद् समेत, मुद्दाःउत्प्रेषण समेत (०७९-WO-१२६१, आदेश मिति-२०८१।१।१७) ।

हुँदा पीडितमैत्री संक्रमणकालीन न्यायलाई प्राथमिकतामा राखी पीडितमैत्री न्यायिक प्रक्रियालाई पुनःस्थापकीय न्यायका विश्वव्यापी मान्यतासँग जोडेर अघि बढ्नु अत्यन्तै जरूरी भइसकेको छ।

संक्रमणकालीन न्याय प्रक्रिया पीडित केन्द्रित बनाउन परामर्श, सहभागिता जस्ता विषयलाई देखाउन मात्रै होइन, व्यवहारगत रूपमा सुनिश्चित गर्नु जरूरी हुन्छ। यसले यान्त्रिक सम्बोधन होइन, पीडितलाई आफ्ना मुद्दामा सुसूचित भई अर्थपूर्ण रूपमा न्यायप्रति आश्वस्त हुने अवस्था तयार गर्नु अपरिहार्य हुन्छ। पीडितको सहभागिता र परामर्शले न्याय प्रक्रियाको विश्वसनीयता र पीडितको पीडामा मल्हमपट्टी समेत लगाउन सक्छ। पीडित, प्रभावित परिवार र समुदायका सदस्यको दृष्टिकोणलाई संक्रमणकालीन न्याय प्रक्रियामा विहंगम रूपमा समेटेर उनीहरूको भावना र आवश्यकता बुझ्दै अगाडि बढ्नु अत्यावश्यक हुन्छ। मुद्दामा संक्रमणकालीन विषयसँग सम्बन्धित कुनै उजुरी तामेली राख्नुपर्ने देखिन आएमा सो को स्पष्ट आधार कारण खुलाई तामेली राख्नु अघि पीडित पक्षलाई आफ्नो भनाइ समेत राख्ने मौका प्रदान गर्नू भनी परमादेश जारी भएको पाइन्छ।[१३]

९. मानव अधिकार संस्थासँगको निर्भरता

संक्रमणकालीन न्याय प्रक्रियालाई सफल बनाउन यसलाई राष्ट्रिय अभियानका रूपमा लिनु जरूरी भइसकेको छ। दुई आयोगका कार्यादेशमा कतिपय समानता छन्, र धेरै विषय अनेक कारणबाट अन्तरसम्बन्धित रूपमा आपसमा जोडिएका छन्। यातना, हत्या, र बेपत्ता पार्ने अपराधहरूमा समन्वयपूर्ण छानबिन आवश्यक हुन्छ भने बेपत्ता भएकाहरूले यातना भोगेका हुन सक्छन् र उनीहरूको हत्या भएको हुन सक्ने जस्ता द्वन्द्वकालीन विषयहरूलाई संवेदनशील रूपमा सम्बोधन गर्न पनि विशेष ध्यान दिएर छानविन गर्नुपर्ने आवश्यकता छ।

द्वन्द्वका कारक तत्त्वहरूको खोजी गर्दै यस्ता कार्यलाई भविष्यमा आउन सक्ने जोखिमको मूल्यांकन तथा त्यसको न्यूनीकरणमा दीर्घकालीन सोंच अवलम्बन गर्नुपर्ने हुन सक्छ। यसमा हाम्रो संस्थागत सुधारका उपाय सिफारिस गर्ने, पुनःउल्लंघन नदोहोरिने सुनिश्चितताका आधारहरू तयार पार्न ध्यान दिने, परिपूरण र पुनःस्थापनाका राजनीतिक तथा सामाजिक आयामहरूको विकल्प सहितको सोंच तयार गर्ने तथा समाजमा मेलमिलाप र सामाजिक मूल्य सहितको वातावरण सिर्जना गर्ने जस्ता कार्य प्रभावकारी बनाउन दुवै आयोगहरूले आफ्ना साझा कार्यक्षेत्र पहिचान गर्नु आवश्यक हुन्छ। सत्यको उजागर बहुआयामिक प्रक्रिया भएकोले यसमा द्वन्द्वपीडित र प्रभावित पक्ष, द्वन्द्वमा संलग्न पक्ष र अन्य सबै सरोकारवालाहरूको विहंगम समन्वय र साझेदारीमा अपनत्वको विकास गर्न ध्यान दिनुपर्ने हुन्छ।

शान्ति प्रक्रियासँगै हामीले राज्यका अनेक तहमा यसका असरहरू अहिलेसम्म बहुआयामिक रूपमा महशुस गरिरहेको अवस्था छ। यसरी यो केवल शान्ति सुरक्षा, जनाधिकार र राज्यको एउटा विशेष कालखण्डसँग जोडिएको विषय मात्र नभएकोले यसमा तहगत सरकारहरू बीच समन्वयका बहुक्षेत्र छन् भन्ने बोध गर्नुपर्छ। समन्वय र सहकार्यका यस्ता बहुआयामिक पक्षहरूलाई समेटेर स्पष्ट ढाँचा तयार गर्नु समीचीन हुन आउँछ। राष्ट्रिय मानव अधिकार आयोग, राष्ट्रिय महिला आयोग, दलित आयोग र अन्य विषयगत आयोगको परिपूरक भूमिकालाई समेत जोडेर संक्रमणकालीन न्यायलाई सफल बनाउन सहयोगका क्षेत्रहरू अंगीकार गर्न सकिन्छ। सत्य र परिपूरणका सन्दर्भमा सामाजिक र सांस्कृतिक क्षेत्रका भूमिकाहरू पनि महत्त्वपूर्ण हुन सक्नेमा शंका छैन। राष्ट्रिय मानव अधिकार आयोगको भूमिका

[१३] कमला राई तिमिल्सिना समेत वि. प्रधानमन्त्री तथा मन्त्रिपरिषद् कार्यालय समेत, मुद्दाः उत्प्रेषण समेत (०७३-WC-००२३ समेत, आदेश मिति २०८०।०९।०४, संवैधानिक इजलास)

यसमा उत्तिकै महत्त्वपूर्ण हुन आउँछ भने समग्र प्रक्रियाको अनुगमन, सूचना प्रदान गर्ने र छानबिनमा सहयोग पुऱ्याउने कार्यमा सहयोगका अन्य क्षेत्रहरू समेत पहिचान गरी अघि बढ्नु आवश्यक छ।

यो प्रक्रिया आफैंमा राष्ट्रिय एवं अन्तर्राष्ट्रिय महत्त्वको भएकाले नागरिक समाज र अन्तर्राष्ट्रिय समुदायसँगको सार्थक सहकार्य, समन्वय र उनीहरूको सहयोगको परिचालन पनि त्यत्तिकै महत्त्वपूर्ण हुन्छ। उजुरीको संख्या हेर्दा यसको फछर्यौटमा लाग्ने समय र यसको गम्भीरतालाई जोडेर हेर्नुपर्ने अवस्था देखिन्छ। गुनासो गर्ने र उल्लंघन बारे सूचना उपलब्ध गराउने पीडितको नैसर्गिक अधिकार तथा कर्तव्य दुवै हो। पीडितको संरक्षणको अधिकार समेतलाई ध्यान दिई त्यस्ता उजुरी पुनः प्राप्तिका लागि अवसर प्रदान गरिनु न्यायिक र प्रासंगिक हुने देखिन्छ। यसका आधारमा अझ धेरै उजुरीहरू थपिने अवस्था आउने देखिन्छ।

१०. सत्य निरूपण र बेपत्ता व्यक्तिको छानबिनको सिलसिला

सत्य निरूपणको शुरूवात कहाँबाट गर्ने भन्ने प्रश्न निकै महत्त्वपूर्ण हुन्छ। बेपत्ता पारिएका व्यक्तिहरूको संख्या, बेपत्ता भएका व्यक्तिको अवस्था, त्यसमा संलग्न पक्ष र व्यक्तिहरूको पहिचान जस्ता कतिपय त्यस्ता घटनामा केही हदसम्म सत्य उजागर भइसकेको अवस्थाहरू पनि छ। विगतमा राष्ट्रिय मानव अधिकार आयोग, संयुक्त राष्ट्रसंघीय मानव अधिकार उच्चायुक्तको कार्यालय र अन्य नागरिक संघ संस्थाले यसबारे छानबिन गरेर कतिपय सत्यतथ्यका घटना बाहिर ल्याएको अवस्था यस कार्यका लागि शुरूवाती बिन्दु मानिनु उपयुक्त हुन्छ।

यस्ता घटना केन्द्रित छानविनले न्यायका बृहत्तर पक्षलाई उजागर गरी विस्तृत अध्ययनको आधार निर्माण गर्न सक्छ। यसो गर्दा आयोगहरूले छानबिनलाई परिणाममुखी बनाउन सक्ने अवस्था हुन्छ भने बहुपक्षीय सहयोग र विशेषज्ञताको क्षेत्र प्रबर्द्धन गर्दै विश्वासको वातावरण सबल गराउन सकिने देखिन्छ। यसले आयोगहरूको औचित्य पुष्टि गर्ने तथा वैधताको मार्ग फराकिलो बनाई पीडित पक्षले न्याय प्राप्ति गर्ने दिशामा महत्त्वपूर्ण फड्को मार्न सक्ने देखिन्छ।

सत्यको उजागर गर्ने, फौजदारी न्यायको प्रयास अगाडि बढाई परिपूरणीय आवश्यकता पूर्ति गर्ने कुराहरूको बीच सन्तुलन मिलाउन हाम्रो आफ्नै विशेषज्ञताको क्षेत्रहरू बीच समन्वयपूर्ण भूमिका प्रबर्द्धन गराउन आयोगको संस्थागत क्षमता विकास र विशेषज्ञ जनशक्तिको पर्याप्तता आवश्यक छ। यस सम्बन्धमा मानव अधिकारको उल्लंघन वा दुरूत्साहन गर्ने व्यक्ति विरूद्ध मुद्दा चलाउन राष्ट्रिय मानव अधिकार आयोगले सिफारिस गर्ने व्यक्तिका हकमा महान्यायाधिवक्ताको कार्यालयले मुद्दा चलाउन वा नचलाउन पाउने भन्ने नहुने[१४] भनी न्यायिक व्याख्या समेत भएको छ। पीडा पुन: बल्झिने अवस्था अन्त्य गर्न प्रमाणको अभावका कारण अभियोजन हुन नसक्ने स्थिति बन्न नदिन यस्तो अवस्थामा जोड दिइएको हो। राज्य र सार्वजनिक निकायहरू पीडितको पछाडि छन् भन्ने प्रत्याभूतिको सुनिश्चितता यसको महत्त्वपूर्ण पक्ष हो। यस कुराले यथाशक्य न्यायका लागि प्रयास गरेको अवस्थालाई प्रतिविम्बित गर्ने हुँदा पीडितले विश्वास गर्ने आधार सिर्जना गरिनु यस प्रक्रियाको महत्त्वपूर्ण आयाम हो भन्ने बोध हुनु आवश्यक छ।

सार्वजनिक सुनुवाइ, पीडितको भनाइ र अभिलेख, पीडकको बयानको अभिलेखीकरण, फरेन्सिक तथा चिकित्सकीय विशेषज्ञ अनुसन्धान, विषयगत ज्ञान र अध्ययन, औपचारिक दस्तावेजको प्रत्यक्ष अवलोकन र समुचित विश्लेषण, उल्लंघनको प्रवृत्ति तथा त्यसको ढाँचाको अभिलेख र विश्लेषण, समुदायको सहभागिता,

[१४] ओमप्रकाश अर्याल वि. राष्ट्रिय मानव अधिकार आयोग समेत (नेकाप,२०७०, अंक ७, नि.नं. ९०२९, प्रकरण १०)।

संस्थागत अध्ययन तथा विश्लेषण आदिको माध्यमबाट सत्यको गहिराइमा पुग्न सकिन्छ । सत्य भनेको तथ्य मात्रै नभई यसले धेरै कुरा समेट्छ । यसका सामाजिक, ऐतिहासिक, मनोवैज्ञानिक, भावनात्मक लगायत धेरै पाटाहरू छन्, जसलाई विशेष ध्यान दिएर संक्रमणकालीन न्याय प्राप्तिलाई निश्चित पद्धतिमा ढाली विश्वसनीय र तथ्यपरक बनाउन जरूरी हुन्छ ।

द्वन्द्वकालमा अत्यधिक पीडित भएका समुदाय अहिले पनि क्षतिपूर्ति र पुनःस्थापनाको पर्खाइमा आर्थिक र सामाजिक कठिनाइ झेलिरहेका अवस्था छ । यस वास्तविकतालाई आत्मसात् गरी प्रत्येक प्रक्रियामा समावेशिता र अन्तरसामूहिक भावना बुझ्ने मान्यता अपनाउनु पर्छ । पीडितको संवेदनशीलता, मर्यादा, स्वायत्तता र आत्मसम्मानलाई विशेषत ख्याल गरेर पहिचानको प्रक्रिया सम्पन्न गर्नुपर्ने अवस्था छ भने पीडित सम्बन्धी सूचनाको प्रशोधन, अभिलेखन लगायत सम्पूर्ण प्रक्रियामा गोपनीयताको मानकको पालना पनि सुनिश्चित हुनु पर्दछ । सत्य निरूपण तथा मेलमिलाप आयोग र बेपत्ता पारिएका व्यक्तिको छानबिन आयोग गठन भई पीडितहरूका कतिपय उजुरी संकलन भएर शान्ति सम्झौतासँग सम्बन्धित लडाकू समायोजन लगायत कतिपय काम सम्पन्न भए । तर संक्रमणकालीन न्याय प्रक्रियाको निश्चित ढाँचा हुने गर्दछ । यसमा यस प्रक्रियाको स्वतन्त्रता, निष्पक्षता र पारदर्शिता एवं जवाफदेहिताको उच्चतम् मापदण्ड निर्धारण गरी त्यसको समुचित अवलम्बन जरूरी हुन्छ । यसबाट हरेक पक्ष र नागरिकको विश्वास जागृत गराउन सत्य निरूपण, न्याय, क्षतिपूर्ति र मानव अधिकार उल्लंघन हुन नदिने अवस्थाको सुनिश्चितता जरूरी हुन्छ । यसमा हाम्रो संस्थागत क्षमता अभिवृद्धि र समग्र वातावरण सुधार गरी आमजनताको विश्वास र भरोसा आर्जनको वातावरण समेत तयार गर्नु पर्छ । यसको समग्र प्रक्रियालाई सुशासन र पारदर्शिताकाका मान्यतामा हिंडाउने कुरामा कुनै सम्झौता हुन सक्दैन । यो नै यसको सफलताका सूत्र हो । यसलाई व्यवहारमा अवलम्बन गर्ने रणनीति तय गरी इमान्दारिपूर्वक काम हुनु अहिलेको अपरिहार्य आवश्यकता हो ।

११. निष्कर्ष

संक्रणकालीन न्याय सम्बन्धी मुद्दा टुंगो नलगाए त्यसमा अन्तर्राष्ट्रिय क्षेत्राधिकार आकर्षित हुने र कुनै पनि मुद्दा अन्तर्राष्ट्रियकरण हुने दृष्टान्त छन् । यसरी संक्रणकालीन न्यायको मुद्दामा विदेशीलाई खेल्न नदिनका लागि पीडितलाई चित्त बुझाउनु अनिवार्य हुने देखिन्छ । हामीहरूले यस तथ्यलाई ध्यान दिएर अघि बढ्नुपर्ने अवस्था छ । नेपालका द्वन्द्वपीडित र सरोकारवालाहरू यो मुद्दालाई घरेलु मैदानमै मिलाउन चाहेको बताउँदै आएका छन् । हामीले आफ्नो काम नगर्ने, अनि अरू किन बोलेको भनेर मात्रै नपुग्ने अवस्था आउन नदिन समयमै ध्यान दिनुपर्ने अवस्था हुन्छ । संक्रमणकालीन न्यायबारे हाम्रो सर्वोच्च अदालतले निर्देशन दिएकोले सर्वोच्च अदालतको निर्देशनात्मक आदेश प्रचलित राष्ट्रिय तथा अन्तर्राष्ट्रिय कानूनका मूल्य मान्यता समेतको आलोकम संक्रमणकालीन न्यायको निरूपण हुनुपर्ने देखिन्छ ।

नेपालले अपराध स्वीकार्ने पक्ष, मेलमिलापसँगै गम्भीर अपराधमा अन्तरराष्ट्रिय अदालतको संलग्नता गराउन सकिने दृष्टान्त र मेलमिलाप प्रक्रियामा पीडितको मुख्य भूमिका रहने गरी दक्षिण अफ्रिका, सिएरालिएन र कोलम्बियाजस्ता विभिन्न देशले अपनाएका मोडलको अध्ययन गर्न सकिन्छ । यस मार्फत् हाम्रा प्रणालीलाई थप निष्पक्ष, पारदर्शी र प्रभावकारी बनाउन सम्भव छ । यसरी नेपालमा दीर्घकालीन मेलमिलाप र शान्ति कायम गर्न सरोकारवालाहरूको एकता र भएका संस्थागत व्यवस्थाको सुदृढीकरण गर्नु अनिवार्य देखिन्छ ।

Ensuring Victim-Centric Approaches: Transitional Justice in Nepal

Trishna Thapa

Abstract

Transitional Justice (TJ) in Nepal remains a contested and incomplete process[1], with victims of the armed conflict (1996-2006) still awaiting truth, justice, and reparations. Despite multiple state-led efforts toward addressing past atrocities, a fully integrated victim-centric approach has yet to be realized within Nepal's justice mechanisms. Various commissions and legal frameworks have been established, yet the victims have still not received any substantive justice due to political interference, lack of accountability, and inadequate victim participation. In particular, conflict-affected women continue to endure not only the consequences of war but also entrenched structural violence rooted in Nepal's patriarchal society. They face intersectional discrimination, compounded by their gender, caste, ethnicity, and socio-economic status, limiting their access to justice, economic opportunities, and psychosocial support. The ongoing political and institutional challenges, including the reluctance of political elites to confront historical injustices, further hinder the effective implementation of transitional justice, leaving many victims hopeless and without redress. This paper examines the necessity of a victim-centered transitional justice approach in Nepal, incorporating feminist perspectives and conflict transformation theories to analyze existing gaps, propose meaningful policy reforms, and highlight community-led peacebuilding efforts as a sustainable solution to post-conflict reconciliation. Recognizing that justice extends beyond legal mechanisms, the paper emphasizes holistic approaches that address economic empowerment, psychosocial healing, and community reintegration as essential pillars of a truly transformative justice process.

1. The Discourse on Transitional Justice in Nepal

The discourse on transitional justice in Nepal is shaped by the country's struggle to address past human rights violations while ensuring long-term peace and reconciliation.

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[1] U. N OFFICE OF THE HIGH COMM'R.FOR HUMAN RIGHTS, NEPAL 14 (United Nations) (2012)

The decade-long armed conflict between the state and the Maoist insurgents led to killings, enforced disappearances, sexual violence, and other grave human rights violations.[2] Despite Nepal's commitment to transitional justice through the establishment of the Truth and Reconciliation Commission (TRC) and the Commission for Investigation of Enforced Disappeared Persons (CIEDP), both institutions have been criticized for their lack of victim participation, slow progress, and susceptibility to political influence. The politicization of transitional justice mechanisms has resulted in delays in truth-seeking processes, inadequate reparative measures, and an overall lack of accountability. As a result, victims, particularly women and marginalized groups, remain excluded from decision-making spaces, reinforcing their continued disenfranchisement.[3]

2. A Feminist Approach to Transitional Justice

A feminist approach to transitional justice is essential in Nepal, where patriarchal norms and structural inequalities have historically silenced women's voices in political and justice-related decision-making. Women who were directly impacted by the decade-long armed conflict-such as widows, survivors of sexual violence, internally displaced women, and those who lost family members-continue to experience systemic marginalization. Their lived experiences of conflict-related harm are distinct from those of men, requiring a justice process that is gender-sensitive, inclusive, and survivor-centered.[4]

Unlike conventional justice mechanisms that often prioritize legal redress and monetary compensation, a feminist approach recognizes that justice for conflict-affected women extends far beyond these measures. These women seek truth-telling mechanisms that acknowledge their suffering and the specific gendered harms they endured. Public acknowledgment of past atrocities, along with reparations that address their current social and economic realities, is crucial. Many survivors face economic hardship, social ostracization, and psychological

[2] Susan Risal, MUSIC FOR PEACEBUILDING AND CONFLICT RESOLUTION NEPAL, Peace Review, 297-301 (2019).

[3] Rita Manchanda, WOMEN, WAR AND PEACE IN SOOUTH ASIA BEYOND VICTIMHOOD TO AGENCY 146 (Sage Publications 1st ed., 2001)

[4] United Nations Entity for Gender Equality and the Empowerment of Women A Gender-Responsive Transitional Justice Process: Challenges and Opportunities in Nepal 10 (1st ed., 2021)

trauma, making livelihood support, access to education and vocational training, and comprehensive psychosocial care integral components of justice.

Furthermore, legal and political inclusion is vital to ensuring that women's rights and perspectives are not only recognized but actively shape the transitional justice process. This includes their meaningful participation in policy formulation, institutional reforms, and decision-making bodies related to truth, justice, reconciliation and non-occurrence of the conflict. By embedding feminist principles into transitional justice, Nepal can move toward a more inclusive and equitable justice framework-one that acknowledges and addresses the gendered dimensions of conflict and works toward sustainable peace and transformation.

3. Theoretical Framework: Conflict Transformation and Structural Violence

The application of John Paul Lederach's[5] conflict transformation theory offers a crucial perspective for analyzing Nepal's transitional justice process. Lederach emphasizes that sustainable peace cannot be achieved through short-term legal or punitive measures alone; rather, it requires deep structural and relational changes that address the root causes of conflict. According to his theory, meaningful and lasting peacebuilding efforts must be participatory, engaging local communities in shaping justice mechanisms at every stage-from planning and design to implementation and monitoring. In the Nepali context, transitional justice processes have often been dominated by top-down approaches driven by political and legal institutions. However, such approaches frequently overlook the lived experiences of victims, particularly those from marginalized communities. A more effective model would prioritize victim-centered, community-driven justice processes that incorporate local knowledge, traditions, and healing practices, ensuring that affected individuals and communities play an active role in shaping justice and reconciliation efforts.[6]

In parallel, Johan Galtung's[7] theory of structural violence provides a critical framework for understanding the systemic inequalities that continue to affect conflict victims in Nepal. Galtung conceptualizes structural violence as the indirect but persistent harm caused by unjust social, economic, and political structures that marginalize certain groups. In Nepal,

[5] John Paul Lederach, THE LITTLE BOOK OF CONFLICT TRANSFORMATION (New York, NY 10018. 2014)

[6] *Id*

[7] Johan Galtung *Violence, Peace and Peace Research.* JOURNAL OF PEACE RESEARCH 167-191 (Johan Galtung) Norwegian sociologist,1969

conflict-affected women-especially those from historically disadvantaged and marginalized communities such as Dalits, indigenous groups, and Madhesi women-face multi-layered structural violence that extends beyond the war and into their daily lives. These women continue to experience economic deprivation, limited access to justice, and exclusion from decision-making processes, exacerbating their post-conflict vulnerabilities.

To address these deep-seated injustices, transitional justice in Nepal must adopt a transformative approach that goes beyond symbolic reparations and legal remedies. This requires comprehensive policy reforms aimed at dismantling gender discrimination in institutions, ensuring the economic empowerment of conflict-affected women through redistributive justice measures, and fostering inclusive governance structures that amplify their voices. Additionally, community-based reconciliation programs should be strengthened to mend the social fractures caused by the conflict, promoting trust-building and healing at the grassroots level. By integrating conflict transformation principles with a structural violence analysis, Nepal's transitional justice process can move beyond superficial legal frameworks to create meaningful, long-lasting peace and justice for marginalized conflict victims. Also, without transforming attitudes and behaviors, our social context will remain unchanged and people will be forced to live in a state of negative peace.[8]

4. Challenges in Nepal's Transitional Justice Process

Nepal's transitional justice process has reached a crucial juncture,[9] with renewed efforts to amend the Truth and Reconciliation Commission (TRC) Act offering hope for victims who have long awaited justice. The TRC and the Commission of Investigation on Enforced Disappeared Persons (CIEDP) play a pivotal role in addressing past human rights violations and fostering national reconciliation. As the amended TRC Act includes victim participation in delivering meaningful justice, it will make the process more inclusive and restorative and forward looking. The renewed emphasis on these commissions signifies a crucial step in ensuring that transitional justice is not merely a formal process but one that is embedded in the collective aspirations of the Nepali people, particularly victims of conflict.[10]

A robust transitional justice process requires that victims, particularly women and marginalized groups, are not just recipients and beneficiaries of reparations but active

[8] Galtung *Violence,* supra note, 8.

[9] National Human Rights Commission, STATUS OF HUMANS OF RIGHTS IN NEPAL 56 (2023)

[10] Sharan Mahat, TRANSITIONAL JUSTICE IN NEPAL: CHALLENGES AND PROSPECTS 112 (Himalayan Institute Press, 2022)

participants in shaping justice mechanisms as decision-makers. The TRC and CIEDP can facilitate this by institutionalizing survivor-led consultations, ensuring that policies and reparative measures reflect the real needs of conflict-affected communities. A gender-sensitive approach-incorporating psychosocial support, livelihood programs, and legal aid-will be instrumental[11] in addressing the unique challenges faced by women survivors, including widows and survivors of sexual violence.

Furthermore, as the commission's work toward truth-seeking and reconciliation, they have the potential to strengthen social cohesion[12] by promoting dialogue and community-based healing initiatives, they can foster an environment in which victims and their communities can heal together.

The expression of victims' experiences, acknowledgment of past atrocities, and implementation of reparations programs tailored to current socio-economic realities will contribute to restoring public trust in the TJ process.[13] Institutional reforms that reinforce the commissions' independence and efficiency will ensure that they serve as credible platforms for justice, ultimately helping Nepal move toward a more inclusive and sustainable peace. Such reforms are necessary to ensure that transitional justice in Nepal moves beyond symbolic gestures to truly transformative processes that benefit all sectors of society.[14]

With the ongoing amendments to the TRC Act and the renewed commitment to transitional justice, victims and their families look forward to a process that not only acknowledges their suffering but also provides concrete steps toward truth, justice, and reparation. By embracing a survivor-centered approach, the TRC and CIEDP can play a transformative role in delivering long-awaited justice while contributing to national healing and reconciliation.

[11] Asia Justice and Rights, In Their Own Words: CONTEXTUALIZING TRANSITIONAL JUSTICE FOR VICTIMS IN NEPAL 29 (2019)

[12] United Nations Development Programme (UNDP), GENDER EQUALITY AND SOCIAL INCLUSION IN NEPAL: A WAY FORWARD 18 (2017)

[13] Pramila Singh, WOMEN AND PEACEBUILDING IN NEPAL: A GENDERED PERSPECTIVE ON TRANSITIONAL JUSTICE 75 (2021)

[14] Ramesh Shrestha, JUSTICE FOR THE DISAPPEARED: NEPAL'S TRUTH COMMIISSION AND RECONCILIATION EFFORTS 184 (South Asia Press, 2023)

This approach, which prioritizes the dignity and needs of victims, holds the potential to build a more inclusive and sustainable peace for Nepal.[15]

5. Community-Led Peacebuilding and Ownership

Community led peacebuilding and ownership are essential for ensuring the sustainability and inclusiveness of transitional justice efforts at the national level. When communities are empowered to take ownership of peacebuilding processes, the results are more likely to reflect the actual needs and aspirations of the people most affected by conflict. Local actors have contextual knowledge, historical memory, and relational trust that enable them to mediate tensions, promote healing, and support co-existence in ways that external or top-down mechanisms often cannot. Moreover, community driven initiatives ensure that peace is not limited to national level agreements but is rooted in everyday life, embedded in relationships, institutions and social norms. Such locally grounded processes build resilience against future violence, promote accountability from the bottom up and cultivate civic responsibility. When victims and communities lead the conversation around justice and reconciliation, the outcomes are more participatory, relevant and durable, ultimately reinforcing national unity and democratic development.

In this regard, some of the institutions are dedicated to mainstream the idea of feminism in TJ process for enduring and long-lasting peace. Nagarik Aawaz (NA) has been one of the forefronts of adopting a feminist approach to peacebuilding in Nepal, recognizing that sustainable peace must be inclusive and transformative. It has pioneered initiatives prioritizing healing, transformative peace leadership, conflict transformation, and social reintegration. These efforts recognize that justice must transcend legal mechanisms to encompass mental, emotional, economic, and social well-being. The feminist approach ensures that the voices and experiences of women-who have historically been marginalized in transitional justice and peace processes-are at the center of reconciliation efforts. By centering the experiences of women, the organization has worked to bridge the gap between policy and the lived realities of conflict-affected communities, ensuring that justice is not merely symbolic but deeply transformative. The coordination between and among institution who works for the

[15] Sudhir K.C., A SURVIVOUR-CENTERDE APPEROACH TO TRANSITIONAL JUSTICE IN NEPAL 99 (Nepal Peacebuilding Publications, 2022)

cause of justice should develop a uniform and consensus idea of mainstreaming the victim of conflict in peace process.

The peacebuilding initiatives of those organizations who work in these field are designed in co-creation with survivors, fostering a sense of ownership among victims in every process. Survivor-centered peacebuilding efforts include trauma healing programs, livelihood support, and leadership training, ensuring that victims become active agents in their own recovery and reconciliation journeys.[16] These initiatives are not just about addressing past wounds but also about empowering survivors to play a leadership role in shaping the future of their communities. Through holistic and gender-sensitive programs, NA has created safe spaces where survivors, particularly women, can share their stories, heal from trauma, and rebuild their lives with dignity.

By applying Lederach's conflict transformation principles, NA has successfully built trust between victims and communities, ensuring that reconciliation remains an inclusive and continuous process. This approach acknowledges that peacebuilding is not a one-time intervention but an evolving journey that requires long-term commitment, community engagement, and structural change. NA's work in Nepal demonstrates how a feminist approach to peacebuilding can create sustainable, survivor-led peacebuilding mechanisms that contribute to lasting social transformation and a more equitable and just society.

6. Collective Responsibility for Peacebuilding

Peacebuilding should not be confined to conflict-affected communities alone; rather, it is a shared societal responsibility that requires the active participation of all segments of society. Sustainable peace can only be achieved when justice, reconciliation, and social cohesion are embraced as collective goals, transcending geographical, social, and economic divides. This means that individuals, institutions, and communities that were not directly affected by conflict must also engage in peace efforts to foster an environment of inclusivity, healing, and long-term stability.

Non-affected communities play a crucial role[17] in breaking the cycle of exclusion and discrimination often faced by conflict survivors and to build shared a sense of shared

[16] Nagarik Aawaz, TWO DECADES OF FEMINIST PEACEBUILDING: REFLECTIONS AND LEARNING 12 (1st edition, 2023)

[17] International Alert, REIMAGINING PEACE: A GENDER-RELATIONAL APPROACH TO PEACEBUILDING IN PRACTICE 24 (1st ed., 2019)

accountability. Many victims-particularly women who were widowed or subjected to violence-continue to experience stigma and marginalization even after the formal end of conflict. To challenge these societal prejudices, broader community engagement is essential. This includes promoting awareness campaigns, fostering inter-community dialogue, and creating spaces where survivors can share their stories without fear of judgment or isolation.

Businesses and cooperatives, particularly those run by conflict-affected women, can also contribute significantly to peacebuilding by creating economic opportunities that promote resilience and self-sufficiency. Supporting survivor-led enterprises not only aids in the economic empowerment of victims but also fosters social integration by demonstrating the capabilities and leadership of conflict-affected individuals. Encouraging non-affected individuals and institutions to invest in and collaborate with these enterprises can be a powerful way to dismantle lingering biases and build solidarity across different social groups.

Ultimately, collective responsibility in peacebuilding means that society as a whole must actively work to ensure that victims are not left to navigate their recovery alone. By fostering empathy, challenging discrimination, and promoting inclusive economic and social initiatives, all members of society can contribute to a more just and peaceful future.

7. Intergenerational Peacebuilding

The long-term success of Nepal's transitional justice (TJ) process is intricately linked to the concept of intergenerational peacebuilding. This approach emphasizes the importance of engaging younger generations in conversations about justice, reconciliation, and historical truth-telling, ensuring that the painful lessons of the past are not forgotten but actively inform future societal dynamics. By involving youth in these crucial discussions, intergenerational peacebuilding fosters a deeper understanding of the root causes of conflict and the need for systemic changes to prevent its recurrence. Engaging young people also creates a sense of responsibility, equipping them with the tools to challenge structural violence and discrimination in the future.

Intergenerational approaches ensure that historical knowledge, both the atrocities of the past and the lessons learned, are passed down in a way that enables future generations to build a more inclusive and peaceful society. Without this transmission of knowledge, there is a risk that the mistakes of the past may be repeated, leaving structural inequalities unaddressed

and allowing cycles of violence to resurface. Therefore, it is essential to nurture a culture of remembrance and healing that transcends generations and unites people in their shared goal of peace.

In this context, peace education becomes a critical tool. It serves to promote empathy and understanding, helping young people grasp the significance of reconciliation and the need for justice in the broader social fabric. This education includes not only traditional classroom learning but also activities that encourage empathy, such as empathetic listening and youth-led storytelling initiatives.[18] These initiatives provide a platform for young people to engage with the experiences of survivors, particularly those who have lived through conflict. Through such dialogues, youth can better appreciate the complexity of conflict, while also creating an opportunity for older generations to share their experiences in a safe, respectful environment.

8. International Human Rights Standards

International human rights standards play a pivotal role in guiding Nepal's transitional justice (TJ) process. At the core of these standards are the principles that truth, justice, reparations, and guarantees of non-recurrence must serve as the fundamental pillars of any effective TJ mechanism. The United Nations Principles on Impunity and the International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED) offer crucial frameworks that Nepal must adhere to in order to ensure the protection of victims' rights and the promotion of long-term peace. These frameworks stress the need for comprehensive accountability, victim participation, and a transparent process that addresses the multiple dimensions of harm experienced by victims.

International Examples can provide valuable lessons. For instance, the experience of post-apartheid South Africa, particularly through its TRC, provides a strong model for victim participation and healing process. The South African TRC's efforts to ensure that victim's voices were central to the truth-seeking process[19]offer a roadmap for how Nepal could enhance the role of survivors in its own transitional justice process. Similarly, Colombia's ongoing peacebuilding efforts and the role of Special Jurisdiction for Peace (JEP) highlight

[18] John Paul Lederach, THE MORAL IMAGINATION: THE ART AND SOUL OF BUILDING PEACE 198 (Oxford University Press, 2005)

[19] Pumla Gobodo-Madikizela, A HUMAN BEING DIED THAT NIGHT: CONVERSATIONS WITH A SOUTH AFRICAN EX-POLICE CAPTAIN 98, (Houghton Mifflin Harcourt, 2003)

the importance of gender-sensitive reparations and the integration of truth telling within peace processes,[20] which could serve as a reference for Nepal, where women, particularly mother and widows of the disappeared, have suffered profound and disproportionate impacts.

Additionally, the experience of Timor-Leste offers another valuable lesson. After gaining independence, Timor-Leste implemented a truth and reconciliation commission that focused not only on establishing the truth but also on promoting national healing.[21] The commission's work centered on dialogue between victims and perpetrators, which helped create opportunities for mutual understanding and reconciliation. This approach can inform Nepal's own efforts to foster dialogue between conflict-affected communities and state institutions, ensuring transitional justice is not merely about legal reparation but also about social repair and rebuilding trust.

Another example is Post-Soviet Latvia, which although not a traditional post-conflict society, faced its own challenges regarding the legacy of Soviet occupation. Latvia's National Program on Human Rights, which includes initiatives to address past abuses and promote justice,[22] can be instructive for Nepal in how to address both historical injustices and more contemporary challenges through legal reforms and public accountability, especially when the wounds of history still affect society at large.

A victim-centric approach to transitional justice, particularly in the context of enforced disappearances, is critical for restoring dignity to families and individuals affected by conflict. The Disappearances Commission must operate with full transparency and inclusivity, ensuring that victims and their families are actively involved in the process. This involves not only empowering victims but also ensuring accountability for perpetrators, facilitating investigations that are impartial and thorough, and creating clear, actionable reparation strategies. Such mechanisms must be designed to prioritize the families of the disappeared, acknowledging the enduring trauma they face and offering the necessary support to cope with the loss. Lessons from countries like Argentina, which has navigated decades of efforts to address enforced disappearances during its war, underscores the importance of long-term

[20] Francisco de Roux, COLOMBIA'S SPECIAL JURISDICTION FOR PEACE: GENDER-SENSITIVE REPARATIONS AND TRUTH TELLING 212 (University of Notre Dame Press, 2020)

[21] Anthony Regan, TIMIR-LESTE'S TRUTH AND RECONCILIATION COMMISSION: LESSONS FOR TRANSITIONAL JUSTICE 145 *(*Oxford University Press, 2009*)*

[22] Marju Luts, LATVIA'S NATIONAL PROGRAM ON HUMAN RIGHTS: ADDRESSING THE LEGACY OF SOVIET OCCUPATION *103* (Routledge, 2012)

support for victims, including mental health services and reparations that contribute to societal healing.

Moreover, truth-seeking mechanisms must be sensitive to the gendered dimensions of disappearances. Women, particularly widows and mothers of the disappeared, face unique and disproportionate impacts as a result of enforced disappearances. The psychological, emotional, and social consequences for these women are profound, and a gender-sensitive approach must be embedded in the TJ process. This means not only recognizing the distinct experiences of women but also providing tailored support, such as specialized psychosocial services and gender-sensitive reparations that address their current needs. As highlighted by the UNHRC in 2020, without such a gendered lens, transitional justice will fail to provide the holistic healing that women survivors require.

The below mentioned mechanism could be adopted by Nepal to ensure the inclusive and transformative transitional justice.

a. Strengthen Victim Participation

The establishment of survivor-led advisory bodies within the TRC and CIEDP would ensure that victims are not mere passive recipients but active participants in decision-making processes. This will allow victims to directly influence policies and strategies that affect their recovery and justice. International experience from Sierra Leone's Truth and Reconciliation Commission, where victim-led input was instrumental in the design of reparations programs, illustrates the value of this participatory model.[23]

b. Ensure Gender-Sensitive Reparations

Reparations programs must be designed to address the specific socio-economic needs of conflict-affected women. This includes ensuring access to land rights, providing livelihood support, and offering comprehensive psychosocial care. Reparations should be seen not just as a form of compensation but as a transformative process that restores victims' dignity and empowers them to rebuild their lives. A key example from the international community can be seen in the case of Guatemala, where reparations efforts for women survivors of sexual violence during the civil war incorporated both economic and psychosocial components to address their unique needs.[24]

[23] Ibrahim Abdullah, SIERRA LEONE'S TRUTH AND RECONCILIATION COMMISSION: THE PARTICIPATORY MODEL OF JUSTICE 88 (Cambridge University Press, 2009)

[24] Victoria Sanford, BURIED SECRETS: TRUTH AND HUMAN RIGHTS IN GUATEMALA 112 (Palgrave Macmillian, 2003)

c. Enhance Institutional Accountability

To prevent political interference and ensure the impartiality of the justice process, legal and structural reforms must be implemented. Strengthening institutional frameworks will allow the TJ mechanisms to operate independently, without undue influence, ensuring fair and equitable justice for all victims. The experience of Chile, where reforms were put in place to ensure the independence of its human rights commissions, can serve as a strong example of how institutional credibility can be enhanced.[25]

d. Support Community-Led Peace Initiatives

Grassroots organizations like Nagarik Aawaz (NA) play a critical role in leading reconciliation and social reintegration efforts. By strengthening these local peace initiatives, Nepal can foster a sense of community ownership over the peacebuilding process. Community-led efforts are essential for long-term social cohesion and healing, as they create spaces where victims, survivors, and the broader society can come together, share their experiences, and work towards rebuilding trust. International experiences, such as those seen in Bosnia and Herzegovina, show the impact of community-based initiatives in rebuilding trust between divided groups after conflict.[26]

By adopting these strategies, Nepal can to large extent ensure a transitional justice process that is genuinely inclusive, transparent, and gender-sensitive, thereby offering a path towards healing, justice, and lasting peace for all its people.

9. Conclusion

In today's increasingly complex international political landscape, national peacebuilding efforts are profoundly shaped by global trends, shifting geopolitical alliances, and foreign policy interests. These external forces often influence the course of national policies and can, at times, sideline the unique needs of local communities. This makes grassroots, community-led peacebuilding initiatives more vital than ever. As Nepal navigates its transitional justice process, it is essential that these mechanisms remain rooted in the needs and experiences of the victims, rather than being solely dictated by external geopolitical

[25] Judith S.Kimerling, TE CHILEAN EXPERIENCE WITH TRUTH COMMISSION AND TRANSITIONAL JUSTICE 27 (Cambridge University Press, 2009)

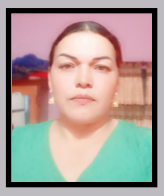
[26] International Crisis Group, BOSNIA'S FUTURE: TIME FOR A NEW APPROACH 15 (2016)

concerns. In this context, the organization who raises their voice in this regard should be consulted to make the process victim centric which ultimately foster the justice and peace.

The coordination among the organization is necessary because their approach to peacebuilding, rooted in feminist principles, has been a beacon of hope and a model for victim-centered justice. By prioritizing the needs of women, marginalized groups, and survivors of violence, the inclusion of these often-overlooked voices is crucial to creating a just and lasting peace. It will work as a testament to the importance of local, context-specific approaches to peacebuilding that respect the culture, history, and specific challenges of the community.

Looking ahead, it is clear that Nepal's transitional justice process must integrate these grassroots, feminist approaches if it is to succeed in creating meaningful and lasting peace. Victim-centered justice that is rooted in the local context, inclusive of all stakeholders, and deeply sensitive to gendered experiences of conflict, is the key to addressing the root causes of violence and ensuring that peace endures. By continuing to amplify the voices of victims and embracing community-driven peacebuilding strategies, Nepal can build a more just, equitable, and cohesive society where healing and justice are accessible to all.

श्रीमान्को पर्खाईमा छु



राधिका खत्री

मेरो १८ वर्षको उमेरमा गण्डकी प्रदेश लमजुङ जिल्ला साविक नेटा गा.वि.स. वडा नं. ३ भै हाल मध्येनेपाल न.पा. वडा नं. १० निवासी हरि बहादुर खत्रीको छोरा पदम बहादुर खत्रीसँग परम्परा अनुसार २०५२ सालमा विवाह भयो। २०५४ साल मंसिर ११ गतेका दिन छोरा प्रज्वल खत्रीको जन्म भयो। मेरो श्रीमान् पदमबहदुर खत्री नेपाल आर्मिमा कार्यरत हुनुहुन्थ्यो। मेरो श्रीमान्लाई काठमाडौंमा रहेको कालीप्रसाद गणमा सिपाहीमा भर्ना भई तालिम सकेर धरान २ फिल्ड गुल्ममा पठाएको थियो। मेरो श्रीमान् धरानस्थित २ फिल्ड गुल्ममा काम गरिरहेको र घर जान्छु भनी छुट्टी लिई घर आउने क्रममा बाटोबाट बेपत्ता हुनु भएको हो। श्रीमान् घर आउने क्रममा बाटोबाटै हराएको थाहा पाए पछि म र मेरो ससुरा धरानको २ फिल्ड गुल्ममा सोधखोज गर्न गयौं। आफ्नो श्रीमान्को बारेमा त्यस ठाउँमा पुगी सोधखोज गर्दा केही पत्ता लागेन। तर पछि सबैसँग बुझ्दै जाँदा मेरो श्रीमान्लाई तत्कालीन माओवादीले घरमा आउने क्रममा बाटैबाट समातेर पार्टीमा नै लिएर गएको रहेछन्। पछि २०५७ साल तिर मलाई लमजुङ जिल्लाको दुराडाँडा भन्ने ठाउँमा एउटा मात्र फोन थियो त्यही फोनबाट २०५७ सालमा मेरो श्रीमान्सँग सम्पर्क भयो। सोही फोन मार्फत उहाँ घरबाट निस्केर हिँडेको केही समयमा नै तत्कालीन माओवादीका कार्यकर्ताहरुले उनीहरुसँगै जान बाध्य बनाएको सुनाउनु भयो। उहाँ कहिले रुकुम, कहिले रोल्पा, विभिन्न ठाउँमा माओवादीले जहाँ लग्छन् त्यही ठाउँमा गएको र जानु पर्ने भनी सुनाउनु भयो। मेरो चिन्ता नलिनु म सकुशल छु, म मिलेसम्म दशैंमा घर आउँछु भनेर मलाई मेरो श्रीमान्ले फोनमा भन्नु भएको थियो। फोनमा घर आउँछु भने तापनि उहाँको बाटो कुर्दाकुर्दै धेरै समय बिताएँ। धेरै समयपछि मेरो श्रीमान घर नआएपछि मैले २०६१ साल तिर पोखराको बसपार्कमा रहेको माओवादी क्याम्पमा श्रीमान्को खोजी गरिपाउँ भनी निवेदन दिनको लागि गएको थिएँ। तर तपाईंले उजूरी नदिनुस् तपाईंको मान्छे बेपत्ता भएको छैन, तपाईंको मान्छे जीवितै छन् भन्ने आश्वासन दिई मलाई उजुरी दर्ता गर्न समेत दिएनन्। मेरो श्रीमान्लाई के कारणले तत्कालीन माओवादीका कार्यकर्ताहरुले लिएर गएका हुन् ? मेरो श्रीमान्लाई बेपत्ता पार्ने व्यक्तिलाई कानूनी कारवाही गरी मेरो श्रीमान्को सत्यतथ्य पत्ता लगाई हामी बेपत्ता पीडितलाई यथार्थ जानकारी र उचित क्षतिपूर्तिको व्यवस्था हुनुपर्नेमा सो केही पनि भएको छैन। हालसम्म मेरो पति मरेको बाँचेको केही थाहा लागेको छैन। छोराको पालनपोषण गर्नको लागि विभिन्न प्रकारका दुखः कष्ट झेल्दै कहिले साग बेच्ने, कहिले सेक्युरिटी गार्डमा काम गर्ने, कहिले दोहोरी साँझमा गीत गाउने अनेक गरेर बाबुलाई पढाएँ। छोरा पनि रोजगारी नपाएर देश बाहिर जानको लागि आवेदन गरिरहेको छ। मेरो श्रीमान् त साथमा रहेनन् अब छोरा पनि साथमा नहुने भयो भनी रातदिन त्यही चिन्ताले सताउँछ। मेरो श्रीमानको हालसम्म मर्दो जिउँदो केही पत्ता लागेको छैन।

बेपत्ता पीडित परिवार

एक त एकल महिला अर्को श्रीमान्को खोजखबर नभएको अनि त्यहाँ माथि पनि मलाई पालनपोषण गर्ला भन्ने छोराले समेत बाध्यताले मलाई छोडी विदेश जान लागेको हुँदा र परिवारको एउटा सदस्य बेपत्ता हुँदा परिवारमा हुन जाने दीर्घकालीन असर म र मेरा जस्ता घटनाबाट गुज्रिरहेका परिवारले मात्र यो पीडा महशुस गर्न सक्दछन् । यस्ता घटनाले पुस्तौंपुस्तासम्म आर्थिक रूपमा त असर गर्ने नै भयो । त्यस परिवारले भोग्ने मनोसामाजिक पीडाको त लेखाजोखा नै गर्न सकिँदैन् ।

यो समाजले हामी जस्ता पीडित महिलालाई हेर्ने दृष्टिकोण र घर परिवारबाट हुने हेलाहोँचो त्यतिकै जटिल रहेको छ । हामीलाई हेर्ने दृष्टिकोण कहिले बदलिने हो ? यसमा मेरो के गल्ती छ ? छोरा पढाउँदा हुर्काउँदा मैंले अपनाएको पेशामा सधैं म माथि औंला उठ्ने अनि सधैं मैले स्पष्टीकरण दिनुपर्ने ? के यो समाजमा एकल महिला र आमा भएर बाँच्नु नै अपराध हो त ? राज्यले निम्त्याएको यो मेरो हविगत अनि हालतको सम्बोधन राज्यले के गरेर गर्दछ ? यसको लेखाजोखा कसले गर्ने ? मेरो पीडाको आवाजलाई कसले सुन्ने ? श्रीमान्को खोजिको अन्त्य कहिले हुने ? नगरेको अपराधको सजाय मैंले कहिलेसम्म भोगिरहने ? यो राज्यले कहिले मलाई सुन्छ अनि कहिले मेरो घाउमा मल्हम लगाउने काम गर्छ ? म अहिलेसम्म पनि मेरो श्रीमान्को पर्खाईमा छु । मेरो श्रीमान कुनै दिन फर्किएर घर आउनु हुन्छ होला जस्तो लाग्छ । यही आशामा मैले निकै संघर्षपूर्ण जीवन बाँचिरहेकी छु ।

खै राज्य कहाँ छ ?

सरिता थापा

मेरो बुबाको नाम श्यामबहादुर थापा हो । मिति २०५५/०४/२३ गते बेपत्ता हुनुभएको हो । आमा बिहानै उठेर नुहाइ धुवाई गरी भान्सामा जानुभयो र सात प्रकारको तरकारी पकाउनु भयो । नुहाएर बुबा तयार भएर बस्नु भएको थियो । मलाई आज पनि याद छ त्यो दिन जनै पूर्णिमा रक्षा बन्धन थियो । बुबा जनै फेरेर रम्मापुर जानको लागि तयार हुनुभयो । आमाले आज पर्व हो नजानु भोली जानु होला भन्नु भयो । बुबाले काम छ धेरै भनेर निस्कनु भयो । हातमा छाता बोकेर निस्किएको झलझली आँखा वरिपरी अहिले पनि आइरहन्छ । सानो परिवार सुखी परिवार भने झै हाम्रो परिवार पनि त्यस्तै परिवार थियो । बुबा, आमा, दाई, बहिनी भाई र म । बुबा साधारण मान्छे, खेती किसानी गरेर घर व्यवहार चलाउनु भएको थियो । खाना खाएर बुबा रम्मापुर निस्कनु भयो । हामी घरमा बसेका थियौँ । बुबा घरबाट निस्किएको केही समय पछि आकाशमा हवाइजहाज उडिरहेको थियो । हामी हवाइजहाज हेर्न बाहिर निस्किएर रमाएर करायौं पनि । तर हामीलाई थाहा थिएन त्यो हवाइजहाज हेर्नु हाम्रो लागि अशुभ थियो ।

२०५५ साल साउन २४ गते रम्मापुरमा नेपाली कांग्रेसको नेतालाई माओवादीले मारेका रहेछन् । मेरो बुबालाई के थाहा त्यहाँ मान्छे मारेको छ भनेर । जयनगरबाट पुलिस आएर बुबा बसेको घरमा गएर बुबालाई माओवादी हो भन्दै पिटेर लगेछन् । बुबालाई लग्दा सेतो गन्जी र कट्टु मात्र लगाउनु भएको थियो । बुबालाई लग्दा म १३ वर्षकी थिएँ । बुबालाई लगेको अर्को दिन घरमा पुलिस आएर घर खोजतलास गरी घरको सबै सामान बाहिर आगनमा फालिदिए । के-के राखेको छ भनेर सबै सामान भाताभुङ्ग पारिदिए । आमालाई तेरो श्रीमान् भागेर गयो खोज्न हिँड भनेर समातेर लग्यो । आमाको पछि पछि बहिनी पनि गइन । त्यो बेला बहिनी ११ वर्षकी थिइन । आमालाई ७ दिनसम्म यातना दिएर राखे । बहिनीलाई नजिकै मेरो काइली आन्टीको घरमा छोडिदिए । आमालाई खुट्टा र हातमा फलामको साङ्गलोले बाँधेर पैतालामा बेसरी कुटे । आमालाई अहिले पनि त्यति बेलाको कुटाईले खुट्टा दुख्छ ।

चौकीबाट आएपछि आमा राति राम्रोसँग सुत्न समेत सक्नु भएन । रातभरी पैतालामा आगोले पोल्नु हुन्थ्यो दुखाइले गर्दा आमालाई चौकीबाट छुटाउन धेरै गाह्रो भयो । हाम्रा दुःखका दिनहरू शुरू भए । गाउँमा आमालाई छुटाउनको लागि भन्न जाँदा घरको आँगन नपुग्दै तिमीहरू माओवादी हौं नआओ भनेर फर्काइ दिन्थे । हामीसँग कोही बोल्दैन थिएँ । सबै टाढिएर भाग्थे । हामीलाई माओवादी भनेको के हो भन्ने कुरा नै थाहा थिएन, अनि हामी कसरी माओवादी भयौँ ? भनेर म सोचिरहन्थे । आमालाई जसोतसो गरी ७ दिन पछि तारिखमा छुटायौं । हामीलाई राजीपुरमा बस्ने वातावरण नभए पछि हामी भुरीगाउँ आयौँ । दाई १६ वर्षको हुनुहुन्थ्यो । दाईलाई पनि लग्छन् भनेर ठूलो बाबाको घर काठमाडौं पठायौँ ।

बेपत्ता पीडित परिवार

भन्छन् चेलीलाई दुःख पर्दा सबैभन्दा पहिले माइत जान्छन् भनेर हो आमाले पनि हामीलाई लिएर भुरिगाउँ मामाघरमा लग्नुभयो । तर हामीले त्यहाँ बास पाएनौ किनकि हामीलाई माओवादीको विल्ला लगाइएको थियो । हामी त्यहाँ बस्यौ भने आर्मी पुलिस आएर सताउँछन् भनेर बस्न दिनु भएन । तर वास्तविकता त्यही थियो । त्यतिखेर धेरै दुःख लाग्यो । अब कहाँ गएर बस्ने ? के खाने ? बुबाको एक जना साथी हुनुहुन्थ्यो । बुबाको साथीले थाहा पाएर आफ्नो घरमा हामीलाई बस्न भन्नुभयो । बुबाको साथीको सबै परिवार बुटवलमा बस्नु हुन्थ्यो । त्यसपछि हामी त्यही घरमा बस्न थाल्यौँ । घरको कमाउने मूल खम्बा बेपत्ता भएपछि आमालाई साह्रै गाह्रो भयो । आमालाई फेरि पनि लग्छन कि भन्ने डर र कति खेर के हुन्छ भनेर पीरले सताइरहन्थ्यो । हामीले बुबालाई खोज्नै सकेनौँ र पाएनौँ । साँझ के खाने र बिहान के खाने भयो । आमाले जंगलबाट दाउरा ल्याई बेच्न थाल्नु भयो ।

दाउरा बेचेको पैसाले १ के.जी. साँझ १ के.जी. बिहान चामल किनेर हाम्रो पेट भर्नुहुन्थ्यो । बुबाको चिन्ता, पुलिसको पिटाई, घरको व्यवहारले आमा कमजोर बन्दै जानु भयो । तर पनि हिम्मत हार्नु भएन । आफ्नो दुःख लुकाएर आफ्नो पेट भोको राखेर हाम्रो पेट भर्नु भयो । आमाले धेरै दुःख र संघर्ष गर्नुभयो । २० रूपैयाँ भारी दाउराले साँझ बिहान छाक टार्न धेरै गाह्रो भयो । हाम्रो दुःख देखेर मामाले आमालाई सात सय रूपैयाँ दिएर बजारमा चिया नास्ता पसल गर्न भन्नु भयो । आमाले बजारको घुम्तीमा चिया बनाउन थाल्नु भयो र पसल पसलमा गएर चिया खान्छौ भनी चिया बेच्न थाल्नु भयो । किनकि हामीलाई पैसाको एकदमै अभाव थियो त्यो पनि पेट भर्नको लागि । बुबा बेपत्ता भए पछि मेरो पढाई रोकियो पढ्न पाइन ।

हाम्रो दुःख देखेर कान्छो मामाले भाईलाई म पढाउँछु भनेर आफ्नो घरमा लग्नु भयो । म बुबाको प्यारी छोरी बुबाले मलाई छोरी होइन छोरा हो भन्नु हुन्थ्यो । कहिले मलाई मेरो नामले बोलाउनु भएन । बुबाले कि छोरो कि त मैयाँ भनेर बोलाउनु हुन्थ्यो । हामीलाई पाल्ने तैँले हो भन्नुहुन्थ्यो । त्यसैले अहिले बुबाको सबै जिम्मेवारी मैँले लिनु परेको छ । समाज र आफन्तले हामीलाई माओवादी भनेर बोलाउँथे । माओवादी भनेर सबैले हेला गर्थे । बुबा नहुँदा सबैले हेला गर्दा रहेछन् । काम खोज्यो कति पढेको छ भनेर सोध्थे । कामको लागि पनि पछि पढें र एस.एल.सी. पास गरे । बुबा नभएको छोराछोरीलाई हेर्ने नजर नै फरक पर्ने रहेछ ।

उमेर बढ्दै गयो । जिम्मेवारी पनि बढ्दै गयो । पढाईतिर ध्यान जान छाड्यो । जसोतसो १२ कक्षा पास गरें, आफ्ना इच्छा चाहानाहरू दवाएर परिवारको खुशी खोज्न थालें । मेरो इच्छा चाहानाहरू कहिले पनि अनुभव गर्न पाइन । मलाई केही गुनासो छैन । मैले जे भोगे जे गुमाएँ ती सबै मेरो परिवारको खुशीको लागि थियो । तिनै भोगाईबाट मैँले धेरै कुराहरू सिकेको छु ।

बुबालाई बेपत्ता पारेको करिब २६ वर्ष भयो । सरकार किन मौन छ ? मेरो आमा दोधारमा हुनुहुन्छ । उहाँले सिउँदोमा सिन्दुर लगाउन सक्नुहुन्छ ? न त सिन्दुर लगाएजस्तो गर्न सक्नुहुन्छ । बुबाको पर्खाईमा बस्नुभएको छ । हामी छोराछोरी अझै बुबा आउनुहुन्छ कि भनेर पर्खाइमा बसेका छौं । तेरो बुबालाई मारिसके काज किरिया गर भनेर आफन्तले दवाव दिइरहन्छन् । परिवारमा कोही बिरामी भयो भने हामीलाई दोष दिन्छन् । तेरो बुबाको काज किरिया गरेको छैनौ त्यसैले कुल बिग्रियो र हामी बिरामी भयौ भनेर । हाम्रो पीडा कसले बुझिदिने ? हामीले सरकार भएको आभाष कहिले गर्ने ? सरकार किन मौन छ यो विषयमा ? सरकारसँग मेरो धेरै प्रश्नहरू छन् ।

के हाम्रो मान्छेको स्वतन्त्ररूपमा बाँच्न पाउने हक थिएन ? के हामीलाई हाम्रो मान्छे कहाँ कस्तो अवस्थामा छन् भनी सोध्न पाउने अधिकार छैन ? के मेरो आमाको खुशी खोस्ने अधिकार उनीहरूलाई छ ? के हाम्रो अधिकार खोस्ने अधिकार उनीहरूलाई छ ? मेरो आमा सधवा कि विधुवा ? मेरो आमाको खुशीको क्षतिपूर्ति कसले दिने ? हाम्रो खुशीको क्षतिपूर्ति कसले दिने ? हामीले भोगेका दर्दनाक पीडको क्षतिपूर्ति कसले दिने ? मैँले फेरी बुबा भन्न पाउँछु कि पाउँदिन भन्दिनु पऱ्यो सरकारले । दिन प्रतिदिन रोग र शोकले गल्दै गएकी मेरो आमाले बुबाको आउने बाटो हेर्दाहेर्दै अस्ताउनु पर्ने हो ? सरकाले छिटो भन्दा छिटो हामीलाई जवाफ दिनु पऱ्यो ।

हाम्रो बाबा खोई ?

शोभा भट्ट

मिति २०५८ असोज १८ गते विहान ८:०० बजेको समयमा चार/पाँच जनाको समूहमा आएका मानिसहरूले मेरो श्रीमान् श्याम भट्टलाई काठमाडौं जिल्ला पुरानो नैकापस्थित आफ्नै घरमा रहेको किराना पसलबाट केही कुरा सोधपुछ गर्नु छ भनी लगेर अहिलेसम्म पनि बेपत्ता बनाएका छन् । मेरो श्रीमान् कुनै पनि पार्टीमा लागेर सक्रिय राजनीति गर्नुभएको थिएन । उहाँलाई किन र कसरी बेपत्ता बनाएका हुन् भन्ने अहिलेसम्म यकिन जानकारी पाउन सकेको छैन । मेरो श्रीमान् सर्वसाधरण परिवारको मान्छे हो, हामी आफ्नो दुःख सुख गरेर बसेका थियौं । उक्त समय पश्चात् मेरो श्रीमान् श्याम भट्ट आजसम्म पनि बेपत्ताको सूचीमा रहनु भएको छ । मेरो एक छोरा र एक छोरी छन् । मेरो श्रीमान् बेपत्ता भएको दुई वर्ष पछि मेरो सासुआमा पनि छोरा कै पीर चिन्ताले २०६० सालमा बित्नु भयो ।

सासुआमा बित्नु भएको १० महिनापछि ससुराबालाई पनि चिन्ता नै चिन्ताले अचानक हृदयघात भई उहाँ पनि बित्नुभयो । त्यसपछि झनै मेरो परिवारमा ठूलो दुःख कष्ट आइपऱ्यो । मैंले मेरा साना दुई बच्चाहरूलाई पालन पोषणको लागि म एक्लो महिलालाई साह्रै कष्ट झेल्न पऱ्यो । छोराछोरीलाई बाबा बेपत्ता हुनु भएको भन्ने समेत थाहा थिएन । छोरी ४ वर्ष र छोरा ३ वर्षका थिए । उनीहरूले बुझ्ने भएपछि हाम्रो बाबा खोइ भनेर सोध्दा मैंले जवाफ दिन नसकी रोएर बसेको थिएँ । दिन प्रतिदिन बच्चाहरू आँफै बुझ्ने भएपछि हाम्रो बाबा बेपत्ता हुनु भएको रहेछ भन्ने थाहा पाए । मेरो छोराछोरीले आमा हाम्रो बाबाको खबर हामीले कसरी थाहा पाउन सक्छौं भन्ने कुरा सधैं सोध्ने गर्थे ।

त्यसपछि पनि म श्रीमान्को खोजी गर्न सबै संघ/संस्था, निकायमा भौतारी रहँे तर आजसम्म पनि मेरो श्रीमान् कहाँ हुनुहुन्छ भन्ने थाहा पाउन सकेको छैन । दुई बच्चा लिएर एक्लै जीवन बिताई रहेकी छु । आज २३ वर्षसम्म छोराछोरीको पठन पाठनको निमित्त साह्रै दुःख कष्ट सामना गर्नु परिरहेको छ । कुनै पनि निकायबाट सहयोग पाएको छैन । मेरो श्रीमान् रहरले आँफू बेपत्ता हुनु भएको होइन, राज्यसत्ता परिवर्तन गर्नको लागि बेपत्ता पारिएको हो । मेरो श्रीमान्को कि त लाश कि त सास चाहियो भनी म सधैं भौतारिँदै हिंडिरहेको छु, मलाई कसले जवाफ दिन्छ त ? बेपत्ताको पीडा कति दर्दानक छ, यो कसले बुझ्ने आजसम्म पनि मेरो श्रीमान् अहिले पनि कतैबाट आउनु हुन्छ कि भनी आशा गरी बसिरहेकी छु ।

बेपत्ताको श्रीमतीको पीडा कति पीडादायक हुन्छ न त एकल न त श्रीमान्को खबर जीवनमा सधै दुःख र कष्ट भोगिरहेकी छु । श्रीमान्को खोजीमा हिंड्दाहिंड्दै आफूलाई पनि अनेकौ रोगहरूले सताएको छ । अब म कति हिड्न सक्छु र भन्ने पीर लाग्न थालेको छ । राज्यबाट न्याय, क्षतिपूर्ति तथा परिपूरणको व्यवस्था गरिदिएमा थप सहज हुने थियो । साथै राज्यले मेरो श्रीमान्को स्थिति यथाशक्य चाँडै सार्वजनिक गरिदिए हुने थियो भन्ने आश लिएर बसिरहेकी छु ।

बेपत्ता पीडित परिवार

पीडाको ऐठनको हिसाब कसले राख्ने ?

सुशिला चौधरी

बेपत्ता पारिएका व्यक्तिको छानविन आयोगको सातौ संस्करणको रुपमा आयोगले स्थापनादेखि गरेको काम, कारवाहीको विषयमा सार्वजनिक गर्ने माध्यमको रुपमा निरन्तर जर्नल प्रकाशन गर्दै गर्दा मलाई आफ्नो अनुभूति राख्ने अवसरको लागि विशेष आभार तथा धन्यवाद ज्ञापन गर्न चाहन्छु। आयोगमा पदाधिकारीको रिक्तताको बीचमा पनि हाम्रा प्रियजनहरुको खोजबिन कार्य गर्ने आयोगले प्रकाशन मार्फत आयोगका गतिविधि कार्यविधिगत तयारी विभिन्न निर्देशिका र बेपत्ता आयोगले बेपत्ता पारिएका व्यक्तिहरु पत्ता लगाउँदा गर्नुपर्ने तयारी, पदाधिकारीहरुको आचार संहिता जस्ता विषयको तयारी आयुक्त आउँदा काम गर्ने आवश्यक वातावरण तयार गरेर स्थायी संरचना त जीवित छ भन्ने विश्वास (आस) चाँहि यो प्रकाशनले जगाएको छ।

लामो समय बेपत्ताको अवस्था सार्वजनिकीकरण गर्न माग गर्दै पहिलो पुस्ताका अभिभावकहरु रोग र शोकले थला पर्नु भएको छ भने कोही कोही त वेखबर स्वर्गीय समेत भै सक्नु भएको छ। नेपालमा विगत दश वर्षे सशस्त्र द्वन्द्व (जनयुद्ध) शुरु भएको ३० वर्ष पुगिसक्यो। युद्धविराम गरी सात दलको जनआन्दोलन पश्चात् विस्तृत शान्ति सम्झौता भएको पनि १८ वर्ष पूरा भई १९ वर्षमा हिँडिरहेको छ। आज भोलि प्रविधिको सेवा सुविधाका कारण घरमा रहेको वस्तु कुनै माल सामान जनावर समेत एक दुई घण्टा सम्पर्कविहिन हुँदा छटपटी हुने यो समाज हाम्रा प्रियजनहरुको जानकारी र खबर नपाएको विस्तृत शान्ति सम्झौता गर्दा ५.२.३ मा साठी दिनभित्र सूचना परिवारलाई स्थायी ठेगानामा पुऱ्याई दिन दुवै पक्ष मञ्जुर छौ भनी हस्ताक्षर भएको थियो। त्यो साठी दिनलाई घटाउँदा पनि मेरो दिदीलाई बेपत्ता पारिएको आजको मितिसम्म आठ हजार पैँतीस दिन हुन्छ। परिवारलाई ती प्रत्येक दिन ऐठन परिरहेको महशुस कस्ले गर्ने ? "अचानोको पीडा खुकुरीले जान्दैन" भने जस्तै जसलाई परेको छ त्यो बाहेक कसैलाई दुख्दो रहनेछ र यदि अनुभूत गर्न सक्ने र दुखित हुने नै भए सरकार, सम्बन्धित शीर्षस्थ नेतृत्वलाई हाम्रो दायित्व हो यसलाई गम्भिरताका साथ लिनु पर्छ, भन्ने भन्दा पनि सत्ताको बार्गेनिङ्ग प्वाइन्ट मात्र बनाएको अनुभूति भएको छ। सर्वोच्च अदालतमा परिवारले हालेको रिट निवेदन र आमा, बुवा, हजुरआमा, श्रीमतीहरुले गरेको धर्ना आन्दोलनका बावजुद विस्तृत शान्ति सम्झौता भएको ८ वर्ष पछि मात्र कानून आयो, आयोग बन्न नौ वर्ष लाग्यो। देशमा राजनीतिक परिवर्तन सँगसँगै संविधान निर्माण, जनमुक्तिसेना (लडाकु) तथा हातहतियार व्यवस्थापन पनि भयो। ठूलो संख्यामा रहेको घाइते अपाङ्ग, शहिद, बेपत्ताहरुको सत्यतथ्य जानकारी र उचित राहत तथा स्वास्थ्य उपचार र शिक्षादिक्षाको विषय आजसम्म पनि राज्यको प्राथमिकतामा पर्न सकेको छैन।

बेपत्ता पीडित परिवार

देशमा संघीय लोकतान्त्रिक गणतन्त्र स्थापना गर्न हाम्रा प्रियजनहरु जसको भौतिक बली वेदीमा अन्यायी ढंगबाट आजको मितिसम्म पनि सूचना परिवारलाई दिइएको छैन । राज्य र नेतृत्वदायी भूमिकामा रहेकाहरुको जवाफदेहिता, गम्भीरता समेतका सन्दर्भमा हामीलाई अनुभूति हुने गरी इमानदार प्रयास गरेका छैनन् । परिवारलाई तपाईंको श्रीमान्, बुवा, दाजुभाई, दिदीबहिनीहरुलाई यहाँ राखिएको छ, थियो, अनि यहाँ लगेर मारियो, हत्या गरिएको थियो भन्न आँट नगर्ने कति निर्दयी मन लुकाउनेहरु बाँचेकामा आत्माग्लानी हुँदैन होला त ? जस्तो लाग्छ "युद्ध र प्रेममा जे पनि हुन्छ भन्ने कहावत छ" । हाम्रो देशमा त्यो पनि त होइन, विना हतियार घरमा काम गर्दै गर्दा, उपचार गराउन विशेषज्ञबाट सेवा लिने क्रममा, गाउँको पूजापाठ गर्दागर्दै, गाई गोठ गएको बेला, घरमा सुतिरहेको अवस्थामा सामान्य सोधपुछको लागि भनी लगिएको मान्छे परिवारले सोधखोज गर्न जाँदा तपाईंको मान्छे छैन, थाहा भएन भनी बेपत्ता पार्ने जस्तो जघन्य अपराध गर्न कसले छुट दियो ? युद्धको पनि आफ्नो नियम हुन्छ । घरमा सुतिरहेको समयमा उठाएर लैजानु, सामूहिक पूजापाठ गर्दागर्दै, सामूहिक रुपमा काम गरिरहेको स्थानबाट जवरजस्ती गिरफ्तार गरी लगेपछि आजको मितिसम्म अवस्था नै अज्ञात बनाउने जस्तो क्रुरता अरू के हुन सक्छ ? यस्तो गम्भीर मानव अधिकार विरुद्धको कार्यमा संलग्न व्यक्ति वा संस्थाले समयमा राज्यलाई जानकारी दिई हामीलाई सत्यतथ्य जानकारी गराउने दायित्वबाट पन्छिने कार्य आजको मितिसम्म पनि भैरहेको छ । भुकम्प जान्छ, पहिरो लड्छ, बाढी आउँछ, बेपत्ता नागरिकहरुको अवस्था सार्वजनिक गर्ने विषय ओझेलमा पर्छ । पहिलो प्राथमिकतामा कहिले पर्ने हाम्रा प्रियजनहरु ? कहाँ कुन अवस्थामा लुकाई राखेको हो वा मारेको के हो ? खुलस्त रुपमा जानकारी देऊ, राष्ट्रिय अन्तर्राष्ट्रिय रुपमा पीडित प्रभावित परिवारलाई राष्ट्रिय सम्मान आत्मसन्तुष्टि हुने गरी कदर गर "लाश वा सास देउ" भनी माग्दामाग्दा रोग, शोक, भोकले अभिभावकत्व गर्दै शिक्षा, स्वास्थ्य, रोजगार र सन्तानविहिन हुन बाध्य बनाइएका आमा बुवाहरुको सहारा बनिदेऊ र अपराध गर्नेलाई कानूनी दायरामा ल्याई कारवाहीको प्रकृियामा ल्याऊँ र अनन्तकालसम्म दण्डहिनतालाई प्रश्रय दिने वातावरणबाट नयाँ पुस्तालाई जोगाऊँ ।

बेपत्ता पार्ने राज्यले त्यही राज्यमा छोराछोरीको नागरिकता बनाउन जादाँ बुवाको नागरिकता ल्याउ भन्छ । श्रीमान्को मृत्यकालीन स्वघोषणा गरी ल्याउ, अनि मात्र अंशवन्डा गर्न मिल्छ भन्छ । ऋण लिएका रहेछन् भने जिउँदो घरमा रहेका जिउँदो श्रीमती वा नाबालक सन्तानले तिर्नु पर्छ । देवानी दायित्व लिनु पर्ने तर सम्पत्ति भने चलाउन नमिल्ने बेपत्ता व्यक्ति ल्याउनु/आउनु पर्ने नभए न्यायिक मृत्युको घोषणा गर्न लगाउने कसको लागि सरकार । हामी जस्ता पीडित बनाइएका परिवारलाई राज्यले हाम्रा प्रियजनहरुको अवस्था अज्ञात बनाएर रजाई गर्ने ? धैर्यता चाँहि हामीले गर्नुपर्ने, सजायमा छुट पनि हामीले दिनुपर्ने, निरन्तरको अपराधबाट थप पीडित हुनुपर्ने ? राज्य छ भने हामीलाई अनुभूति हुने गरी कुन परिवारको कस्तो अवस्था छ, हाम्रा आवश्यकताका बारेमा राज्यका कुनै सम्वन्धित निकायले सोधखोज गरेको छ ? हामी जस्तो अवस्था पनि बुझ्न तयार छौं तर सत्य जानकारी दिने सरकारले आँट त गर्नु पर्छ होला नि ? मिति २०८१ साल भाद्र महिनाको १३ गते संशोधित कानून पास भयो । अब आयोगका पदाधिकारी नियुक्ति होलान र एकल न दोकलको पहिचान पाउन नसकेका बेपत्ता पारिएकाका श्रीमतीहरुले सामाजिक सुरक्षा वापतको सहुलियत पाउलान् सम्पत्ति हस्तान्तरणमा सहजता होला । कार्यविधिहरु बनाउँदा हाम्रो पनि अर्थपूण सहभागिता भयो भने परिवारले के चाहन्छन्, कसरी समन्वय गर्ने, जस्ता विषयमा छलफल होला भनी बनेको कानूनमा परिभाषामा समस्या हुँदाहुँदै पनि छिटो जानकारी पाउने हो भने, हामीले नै प्रकृया ढिलो बनाउने विषयमा मलजल गर्ला भनी आवश्यकतामा हामी हातेमालो गरी आयोगसँग खबरदारी र सहकार्य दुवै गर्न सक्छौ भनी सरकारलाई समेत आश्वस्त पारी आयोगका सदस्य

बन्ने व्यक्तिहरुलाई आवेदन दिनमा समेत सहयोग पुऱ्याइयो । विडम्बना दुई महिनाको समयावधि पाएको सिफारिस समितिले पदाधिकारीहरुको नाम सिफारीस गर्न सकेन । राजनीतिक दलको दाउपेचको कारण फेरि पनि प्रकृयालाई तुहाउने कार्य राजनीतिक दलका शीर्षस्थ नेताहरुले संक्रमणकालीन न्याय प्रकृया नै बन्धक बनाएर सत्ता लुछाचुँडिमै रमाउने र विस्तृत शान्ति सम्झौताको मूल मर्मलाई नै लत्याउने कार्य निरन्तर गरी नै रहेका छन् । हाम्रा मान्छेहरुको अवस्था पत्ता लगाउन हाल गठित सिफारिस समितिले सक्षम, निष्पक्ष र पारदर्शी प्रकृयाबाट आयोगका पदाधिकारीहरू छनोट गर्न माग गर्दछु । अबको खोजी प्रकृया अगाडि बढाउँदा संविधानको धारा ४२ को उपधारा (५) मा उल्लिखित अधिकारहरु अनुसन्धानको कार्य सँगसँगै उक्त हक अधिकारलाई पनि लिएर परिवारको बाँच्न पाउने वातावरणको समेत सुनिश्चितता गरेर पीडित परिवारको अर्थपूर्ण सहभागितालाई समेत प्राथमिकतामा राखेर आवश्यक समन्वयबाट अगाडि बढ्न सकेमा मात्र साच्चिकै नेपाली मौलिकता हुन सक्छ, न कि अन्तराष्ट्रिय मूल्य मान्यता संयुक्त राष्ट्रसंघको सदस्य राष्ट्रको नाताले पनि मानव अधिकारका आधारभूत मूल्य र मान्यतालाई ध्यानमा राखेर गर्नुपर्ने कार्य हो । हामी हाम्रा आफन्तको खोजी अभियानमा लाग्दै गर्दा राज्यमा रहेका शीर्ष नेतृत्वको बुझाईमा भन्दा गम्भीर छौं भन्ने तर छिन मै बिसर्ने प्रवृत्तिले गर्दा व्यवहारत गम्भीर भएको पाइएन । अन्तर्राष्ट्रियस्तरको कुनै कार्यक्रममा रिपोर्टिङ गर्नुपर्ने भए नेपालमा संक्रमणकालीन न्याय प्रकृया निरन्तर अगाडि बढिरहेको छ भन्ने र गरेको जस्तो देखाउने कस्मेटिक समाधानको विषय देखाउने तर आत्मैदेखि भने शान्ति प्रकृयाको अन्तिम तथा महत्वपूर्ण कार्य गर्न भने रुट कज पत्ता लगाई पुनः द्वन्द्व नदोहोरिने सुनिश्चितताका लागि भुँइतहबाट गर्न नखोज्ने प्रवृत्ति आजसम्म पनि विद्यमान छ । दिगो समाधान र दण्डहिनताबाट राष्ट्रलाई मुक्त बनाउने हो भने तन, मन र धन सँगसँगै योजनामा राख्दै शक्तिशाली अधिकारसम्पन्न सक्षम आयोग र आयुक्त नियुक्ति गर्नु पर्छ । उक्त आयोगलाई काम गर्ने स्वतन्तत्रा पनि हुनु पर्दछ, न कि राजनीतिक दाउपेचको टुल (Tool) बनाउने प्रवृति विद्यमान छ । नेतालाई जेल हालिन्छ जस्ता कुरा मात्र गर्ने अनि प्रकृया धुमिल्याउने वास्तविक परिणाम वा सत्य जानकारी दिन नसक्ने त्यसतर्फ कसैको चासो नहुनु आजको तीतो यर्थाथता यहि हो । पीडित प्रभावितहरुका अधिकारको लागि निरन्तर अभियानमा अभियन्ताको भूमिकामा छु भन्दै गर्दा राज्यले संक्रमणकालीन न्यायका प्रकृयामा आवश्यकता अनुसार सहयोग, खबरदारी सँगसँगै सहकार्य गर्न तयार छौं भन्दा समेत राज्यले वास्ता नगर्नु, परिवारलाई के हुँदैछ, अब कति दिनमा हाम्रा सदस्यहरुको खबर पाउँछौ भन्ने ठोस जानकारी नहुँदा अन्यौलता सिर्जना भएको छ । नाजवाफ हुनुपर्ने परिस्थितिले गर्दा कहिँकतै हाम्रो पछाडि आउने तेस्रो पुस्ताले बदलाको (रिभेन्ज) भावना लियो भने देश कतातिर जान्छ होला ? हेक्का हुन जरुरी छ, सरकार र नेतृत्वहरुलाई गम्भीरताका साथ हिजो अभिभावकको रुपमा राज्यले दायित्व बहन गर्न आफ्ना अभिभावकहरुले आर्जेका सम्पत्तिको सदुपयोग गर्न नपाउँदा तर ऋण भने तिर्न आउ है भनी ३५ दिने १५ दिने सूचना जारी गरिरहँदा त्यो परिवारले आफ्नो दैनिकी कसरी व्यतित गरिरहेको होला, परिवारको आ-आफ्नै आवश्यकता अनुसारको रोजगारी र सहायताको अवस्था कसले र कहिले बुझ्ने ? सत्य जान्न पाउनु पहिलो शर्त हो भने सत्य थाहा पाउनको लागि पनि बाँच्न पाउनु, स्वाथ्य उपचार पाउनु, सामजिक रुपमा आत्मसम्मानको वातावरण बनाउनु, राज्यको दायित्व भित्र पर्छ । कहिँकतै राज्यले नि बिर्सन्छ की भनी बेलाबेलामा सम्मानीत सर्वोच्च अदालतबाट परमादेशको आदेश तथा निर्देशन भएका पनि छन्, त्यसलाई आत्मसात गरी आफ्नो दायित्वबाट पन्छिन मिल्दैन । राज्य आयोगमा पदाधिकारी छान्ने प्रकृया सिफारिस समितिको दुई महिने कार्यकाल समाप्त भएसँगै प्रकृया ओझेलमा पार्ने कार्य सरकारले गर्न मिल्दैन । तत्काल अबरुद्ध प्रकृया, कानूनी रुपमा रहेको बाधा अड्काउ फुकाउने र प्रकृया अगाडि बढाउन

पर्दछ र अब बन्ने सम्पूर्ण प्रकृयामा पीडित परिवारको तर्फबाट उचित तथा अर्थपूर्ण सहभागिता र समन्वयमा अगाडि बढाइनु पर्दछ। परिवारको आर्थिक, सामाजिक, सांस्कृतिक अधिकारलाई पनि सगँसँगै अगाडि बढाउनु पर्दछ, अनि मात्र सरोकारवालाहरुको आवश्यक महत्वपूर्ण भूमिकाले साँच्चिकैको तार्किक समाधानको मार्गमा नेपालको संक्रमणकालीन न्याय प्रकृया हिड्न सक्छ।

हालै संशोधन भई आएको ऐनमा केही अपुग हुँदाहुँदै पनि धेरै सकारात्मक पाटाहरु रहेका छन, छुटेकालाई उजुरी संकलन तथा पुनरावेदनको पाटो, विभिन्न इकाईहरुको व्यवस्था र परिपूरण पीडितहरुको अधिकारको रुपमा स्थापित गरेको छ। अब पीडित परिवारहरुको आर्थिक, सामाजिक र सांस्कृतिक अधिकारलाई सुरक्षित गर्दै परिपूरणको समग्र आ-आफ्नो आत्मसन्तुष्टिका आधारमा प्रदान गरिनु पर्दछ। बेपत्ताको हकमा सम्पत्ति हस्तान्तरणको प्रकृयाबारे तत्काल र प्राथमिकतामा राखेर कार्यविधिहरु तयार पार्नु पर्दछ। कानून मस्यौदाहरु प्राविधिक विषय भए तापनि पीडित परिवारको आवश्यकता र परामर्शको आधारमा तयार गर्नु पर्दछ। राजेन्द्र ढकाल विरुद्ध नेपाल सरकार भएको मुद्दा होस्, सुमन अधिकारी समेत भएको मुद्दामा होस् या भागीराम चौधरी समेत भएको मुद्दामा र लिलाधर भण्डारी भएको मुद्दाहरुमा प्रतिपादित नजिर सिद्धान्तको आधारमा परिवारलाई सत्यको अन्वेषण सगँसँगै परिपूरण उपलव्ध गराउने विषयमा बाधा नपर्ने समिति बनाएर मनोसाामाजिक परार्मश, स्वास्थ उपचार, रोजगारीको व्यवस्था राज्यले गर्नुपर्ने, त्यसको लागि छुट्टै कानून नभए तापनि गर्न सकिने समेत भनेको छ तर विडम्वना फैसलाको अक्षरशः परिपालना समेत भएको छैन, राज्यलाई अपहेलना लाग्दैन ? साधारण नागरिकलाई भने ऐन कानून मान्नु पर्ने राज्यलाई र सत्तासिनहरुलाई (नागरिकलाई ऐन, नेतृत्वलाई चैन) भने जस्तो प्रवृत्तिले गर्दा अदालतको आदेश, निर्देशनात्मक आदेश र परमादेश लागू गर्न परेको छैन। अब पनि पन्छिन पाईदैन र प्रकृया लम्बाएर न्यायको उपहास उडाउन पाउने छुट कसैलाई पनि छैन। मुख्य नेतृत्व, सदन सुचारु हुँदा अब पहिलो प्राथमिकतामा संक्रमणकालीन न्याय प्रकृयाले पाउनु पर्दछ। यो सबै पीडित परिवारहरुको साझा माग हो। स्वतन्त्र, सक्षम र योग्य अधिकारसम्पन्न पारदर्शी प्रकृयाबाट आयोगका पदाधिकारीहरुको छनौट गरी इमानदारीताका साथ पूर्णता दिनु पर्दछ।

Commission of Investigation on Enforced Disappeared Persons (CIEDP) Nepal

About this Journal

This journal article collection presents scholarly perspectives, field investigations, and legal analysis focused on the enforced disappearances during Nepal's decade-long conflict. It highlights the efforts of the Commission on Enforced Disappeared Persons (CIEDP) to document, investigate, and bring justice to the victims and their families.

The journal serves as a resource for academics, human rights activists, legal practitioners, and policymakers engaged in transitional justice.

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