

NEPAL'S STALLED TRANSITIONAL JUSTICE ACT

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Summary

On March 9, 2023, a bill proposing amendments to the *Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2014*, has registered in the House of Representatives (HoR). While the sub-committee in the Law, Justice, and Human Rights Committee of the HoR has agreed on many aspects of the bill, the bill is currently pending in the committee. The victims of the conflict have demanded that the points to be discussed in the current bill should be changed and passed soon. The delay in its passage is attributed to political negotiations and the conflicting interests of the ruling party and the opposition. Therefore, it is crucial to pass the bill and conclude the work related to transitional justice with the participation and cooperation of the victims.

1. Introduction

The then Communist Party of Nepal (Maoist) [CPN (Maoist)] started an armed insurrection against the state on February 13, 1996 with demands regarding nationalism, democracy, and the livelihood of Nepali people. During this armed struggle, both the rebel CPN (Maoist) and the government forces were involved in committing violence and counter violence which resulted in thousands being victims of arbitrary killings, enforced disappearances, maiming, torture, and rape and sexual violence. The escalation of violence also led to people being displaced from their native places.

After the success of the people's movement jointly organized by the seven political parties and CPN (Maoist), the rebel CPN (Maoist) came into mainstream politics. The Comprehensive Peace Accord (CPA) signed on November 21, 2006 between the CPN (Maoist) and Nepal government marked the formal end of the decade-long armed struggle. After this agreement, both sides were on the same page

regarding the formation of a high level committee Truth and Reconciliation Commission, which would investigate the truth regarding the cases of serious violation of human rights and crimes against humanity, and foster a reconciliatory environment. Based on the CPA, the *Interim Constitution, 2007* of Nepal had created provisions for families of people killed during the conflict and for people who had become disabled to receive proper compensation, respect, and reparations. Furthermore, based on the report provided by the Enforced Disappearances Commission formed to investigate the disappearances of people during the course of the armed conflict, the families of disappeared victims would receive compensation.

The major three points of the peace process were—management of armies and arms, promulgation of constitution through Constituent Assembly, and implementation of Transitional Justice. While the first two issues have been resolved, the issue of transitional justice has yet to be tackled. On March 14, 2013 the *Enforced Disappearances Enquiry, Truth and Reconciliation Commission Ordinance, 2012* was issued. Under this, a single commission was to be formed for the investigation of enforced disappearances and truth and reconciliation. After a case was filed in the Supreme Court against this, the Supreme Court ordered two different commissions to be formed for the two issues. On May 10, 2014, the *Enforced Disappearances Enquiry, Truth and Reconciliation Act, 2014* was issued. This Act had a provision for giving general amnesty to people responsible for conducting gross human rights violations during the conflict. In addition, the Supreme Court decided that additional provisions in this Act were in opposition to the internationally established human rights principle and ordered for amendment of such clauses. Although the Act had been amended twice, there had not been the amendment in the clause regarding general amnesty that had been

ordered by the Supreme Court. In accordance with the Act, on February 10, 2015 Truth and Reconciliation Commission and Commission of Investigation on Enforced Disappeared Persons, Nepal was formed. While the Commission of Investigation on Enforced Disappeared Persons worked in keeping the record of enforced disappearances during the conflict and providing relief to families of victims, the Truth and Reconciliation process has not seen any progress. Even after 17 years since the peace agreement, the victims have been deprived of truth and the perpetrators have not been punished.

On March 9, 2023 the Pushpa Kamal Dahal led government registered a bill in the House of Representatives (HoR), created to amend the *Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2014*. A sub-committee was formed by the Law, Justice, and Human Rights Committee in the HoR for this matter. Although the sub-committee has managed to get agreement for most of the topics presented in the bill, it is still under consideration. This Political Situation Update explores the reasons for this legislative delay.

2. Transitional Justice Bill under Consideration in the HoR

In the context of Nepal, there were various problems regarding the understanding of the issue of transitional justice. As a result, the policies regarding this issue were motivated by the concerns of political leaders in decision making positions and the security forces rather than addressing the concerns raised by the victims of armed conflict. This context has further been explained in a report as follows, “Authorities promote, at best, a version of transitional justice that is limited to an ill-defined notion of truth and an emphasis on forms of reconciliation and relief for victims wherein protection of perpetrators is privileged over victims’ right to remedy. In contrast, civil society is more focused on criminal justice and individual accountability, with less attention paid to other components of transitional justice, including truth seeking, reparations, and institutional reform.”¹ In this regard, the conflict victims have been consistently raising their voices concerning overlooked issues in the transitional justice process in an organised manner. By taking this perspective into account, the government has been working to improve the past weaknesses and amend the *Enforced Disappearances*

Enquiry, Truth and Reconciliation Commission Act, 2014. The victims have said that the current bill that incorporates the amendment proposed by the parliamentary committee is relatively victim-centric. However, there are still agreements to be made regarding a few clauses.

In the current bill, separate definitions have been provided for violation of human rights and serious violation of human rights. The definition of human rights violations has been stated as any other acts committed against Nepal’s prevailing law, international human rights and humanitarian law, excluding targeted and planned serious violations of human rights committed against unarmed persons or communities during the armed conflict. The definition of serious violation of human rights includes targeted or planned arbitrary killings against unarmed persons and communities/killings excluding armed confrontation; sexual coercion and serious sexual violence; enforced disappearances; and brutal torture. The committee has decided not to recommend people involved in incidents of serious human rights violations for receiving general amnesty. The previous Act had provisions of such accused perpetrators being recommended for general amnesty.

The amended bill has created a provision for victims of sexual coercion or serious sexual violence who have not filed their complaints whereby the victims themselves or someone representing them can file a complaint after a one-time public notice is issued for the period of three months by the commission. The commission can also investigate complaints in cases of human rights violation and serious human rights violations which have been registered with the National Human Rights Commission or National Women Commission and are under consideration or complaints received from other sources.

In the *Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act, 2014* reparations had been stated as facilities and concessions provided to the victims rather than the rights of the victims.² However, in this bill reparation, interim relief, compensations, and re-establishment have been mentioned as the rights of the victims. The right to property of relatives of disappeared

¹ International Center for Transitional Justice and Martin Chautari. 2017. *We Cannot Forget: Truth and Memory in Post-conflict Nepal*. Available at www.ictj.org/sites/default/files/hami%20birsana%20sakdainau%20book.pdf; accessed November 25, 2023.

² Reparations are not just limited to compensatory damages. “Compensation generally only includes monetary support and cash payment whereas reparations includes other ideas including recovery, restoration, satisfaction, guarantee that such incidents will not repeat. Reparations can be personal or collective and physical or symbolic or a mixture of all the above. Providing justice, addressing past harms and damages, establishing victim’s identity, preserving collective memory, addressing restitution for violations and damages, establishing victim’s trust on government, and the government following laws are aims of reparations.” (Chaudhary, Sushil. 2078. Necessity of Reparations for Conflict Victims. *Hamar Pahura*. Bhadra 22. Available at <https://hamarpahura.com/17737>; accessed November 26, 2023.

persons has also been ensured. The bill has prioritized the reparations for the victims of rape, sexual coercion, and brutal torture. In case the victims are not satisfied with the reparation recommended by the commission, they are allowed to register a case in Special Courts by mentioning the basis and reasons for dissatisfaction. The provisions for introduction of a separate fund for relief distribution has also been made.

The bill mentions that Truth Investigation and Enquiry Unit, Reparation Unit, Investigation for Serious Human Rights Violation Unit, Sexual Coercion and Sexual Violence Unit, and Victim Cooperation Unit will be formed under the Enforced Disappearances Enquiry, Truth and Reconciliation Commission. The victims claim that this will help the commission work in a victim centric and transparent manner. They also feel that it will help the commission be gender inclusive and disabled people friendly.

In the original Act, there was no arrangement for victims to appeal their cases. However, in this bill, there is provision for establishment of a joint bench in the Supreme Court regarding transitional justice which will deal with appeals from the victims. The bill also recommends structural, legal, and institutional changes that need to be made so as to address the underlying reasons of the armed conflict and to prevent violations of human rights and serious violations of human rights in future.

The sub-committee of Law, Justice and Human Rights Committee of the House of Representatives has suggested the following four issues to be concluded via discussions:

1. Whether to include the phrase arbitrary killing or armed confrontation in the definition of serious violations of human rights
2. How to address people who were involved in or were affected by armed conflict
3. What should be done in cases where reconciliation cannot be reached in cases of human rights violations
4. How to proceed in case of reduced sentencing- by making arrangement to provide justification for reduced sentencing or by allocating such sentencing based on percentages.³

As the parliament has not passed the transitional justice bill, the position of commissioners in the commission have remained vacant and the commission has not been able to work. The armed conflict victims have demanded quick

³ Law, justice, and human Rights Committee. 2023. Report by Subcommittee formed from Law, Justice and Human Rights Regarding Enforced Disappearances Enquiry, Truth and Reconciliation Commission (Third Amendment) Bill. Kathmandu: Law, Justice, and Human Rights Committee, House of Representatives, Federal Parliament.

resolution regarding the issues that need to be discussed so that the bill can be passed.

3. Victim-centric Transitional Justice

In Nepal, two sides of debate are mainstream in terms of transitional justice. One is advocacy for general amnesty and reconciliation for everything that happened during the armed conflict. Another side advocates for criminal justice to conclude transitional justice cases. The friction between these two sides has caused transitional justice to be a tricky issue. An expert on the issue of transitional justice states that a mixture of these two processes which centers the victims should be used to solve the issue of transitional justice.⁴

It is an international belief that post-conflict transitional justice should be victim-centric. In Nepal's context too, political party leaders, and representatives of human rights organizations have been saying that transitional justice should be victim-centric. However, the victims feel that such statements have only been said for public consumption. Active participation of conflict victims in various transitional justice processes is the only way for them to feel connected to the overall process. Most conflict victims are from geographically, economically, and socially marginalized groups. A report states, "People from indigenous and Dalit communities were disproportionately affected in regards to human rights violations. The reason for people from these communities being victimized was because of the long-rooted caste and caste -discrimination system. In the case of armed conflict, Dalit and indigenous communities were in danger of suffering from human rights violations."⁵ The government forces used to suspect the people from these communities of holding affinity towards the rebel forces. The rebel forces would recruit and ask for other material support from these communities which put them in a doubly vulnerable position. However, these communities have often been forgotten in post-conflict climates. Victims say that they have been forgotten in the process of writing the bill and formation of commission. The Coordinator of National Forum for Victims of Serious Human Rights Violations says, "A lot of victims are not aware about what transitional justice entails. The government should have consulted with the victims regarding what would be considered as

⁴ Neupane, Sagar. 2023. Closing the Issue of Transitional Justice through Majority Could Cause It to 'Reopen' in the future. *Nepalkhabar*. Available at <https://nepalkhabar.com/interview/162864-2023-4-8-21-4-42>; accessed November 27, 2023.

⁵ International Center for Transitional Justice and Martin Chautari. 2017. *'We Cannot Forget': Truth and Memory in Post-conflict Nepal*. Available at www.ictj.org/sites/default/files/hami%20birsana%20sakdainau%20book.pdf; accessed November 25, 2023.

justice for victims, what would give satisfaction to victims. However, no one tried to ask questions to victims in such a manner. No process tried to include the needs of victims.” In addition, no space was created where victims could themselves go and share their experiences, and the victims themselves were not in position to be able to create such space. The victims demand that instead of just focusing on the legal and prosecution led justice process, attention should be paid to investigate truth and ensure that the victims receive adequate monetary compensation, social justice, preservation of memory, and self-respect.

4. Political Consensus on the Bill

After the parliamentary elections held in November 2022, Pushpa Kamal Dahal, the Chairperson of CPN (Maoist Centre), assumed the position of Prime Minister on December 25, 2022. Subsequently, the *Commission for Investigation, Truth and Reconciliation (Third Amendment) Bill, 2023*, was introduced in Parliament on March 9, 2023. Acting on behalf of the then Prime Minister and the Minister of Law, Justice, and Parliamentary Affairs; Rekha Sharma, the Minister of Communication and Information Technology, presented the bill to the House of Representatives of the Federal Parliament on March 19, 2023. The following day (March 20, 2023), while securing a vote of confidence, Pushpa Kamal Dahal also raised the issue of the bill that was submitted in the Parliament the previous day.⁶ He said, “This is not an issue or concern of any particular party, but a national issue that the country must resolve. The government has given top priority to the remaining work of the peace process and the speedy completion of transitional justice.” He emphasized that transcending political affiliations is imperative for all stakeholders in fulfilling their responsibilities toward transitional justice.

This bill is currently pending in the Law, Justice and Human Rights Committee of the House of Representatives. Earlier, by forming a sub-committee, consensus was reached on many aspects of the bill. However, the sub-committee has pointed out four issues that require further discussion. The top political leaders must find consensus on these

⁶ Following the parliamentary elections in November 2022, Pushpa Kamal Dahal assumed the role of Prime Minister on December 25, 2022, leading a coalition comprised of seven parties (CPN [UML], CPN [Maoist Centre], Rashtriya Swatantra Party [RSP], Rashtriya Prajatantra Party [RPP], Janata Samajwadi Party [JSP], Nagarik Unmukti Party, and Janamat Party). On January 19, 2023, he sought a vote of confidence, securing the support needed. After the CPN (UML) and the RPP withdrew their support to the Dahal-led government and left the government, Dahal had to take a vote of confidence from the House of Representatives to continue as Prime Minister.

issues. The chairperson of the Law, Justice and Human Rights Committee said, “There is no disagreement on the principle aspect of the bill. Political consensus could not be reached on some definitional clarity. Therefore, it points to the need for consensus at the top level of political parties. If a solution is not reached through consensus, the path of parliamentary procedure (majority and minority) has to be adopted. But it is also the emphasis of the committee that consensus is the best way to deal with this serious issue.”

Among the eight parties involved in the CPA, the main three parties are Nepali Congress, Communist Party of Nepal (Unified Marxist-Leninist) [CPN (UML)] and CPN-Maoist. Among them, the leaders of Nepali Congress and CPN-Maoist have said that CPN (UML) has obstructed the formation of a consensus of political parties on transitional justice law. Also, the leaders of the ruling coalition have argued that cooperation with the opposition parties has been done so that an environment of consensus can be created to pass the bill registered in the House. In this context, a member of the Standing Committee of the CPN (Maoist Centre) said, “In Parliament, it is customary for the opposition party to take the position of chairperson of the Public Accounts Committee, while the ruling party takes all the rest. However, in order to pass the Transitional Justice Bill through the House as soon as possible, we have arranged for the opposition parties including UML and Rashtriya Prajatantra Party to be chairpersons of three parliamentary committees. It was agreed to proceed with the bill in a sensible manner. If the decision is to be made by the majority, Nepali Congress and Maoists have majority in the House. But it was done so that the transitional justice as well as other main works of the House should be carried out through consensus. The main opposition party has backed away from the deal on transitional justice.”

One of the central members of the ruling coalition Nepali Congress also said that CPN (UML) tried to cause trouble and destroy the ruling coalition by creating confusion regarding the matter of transitional justice. He argued that CPN (UML) might have put pressure on Prime Minister Pushpa Kamal Dahal to support the passing of the Transitional Justice Bill only when the ruling coalition is changed. Arguing similarly, a leader of CPN (Maoist Centre) said, “CPN (UML) does not want to push forward the bill with the strategy of putting pressure on CPN (Maoist Centre) Chairman and Prime Minister Pushpa Kamal Dahal by ‘hanging the sharp sword of transitional justice on his neck.’ CPN (UML) has created obstruction regarding this bill by seeking appointments in various constitutional bodies.”

Contrary to these claims, Deputy Secretary General of the main opposition party CPN (UML), Pradeep Gyawali, asserts that CPN (UML) has no political interest in transitional justice and highlights the need to resolve the issue by ensuring justice for the victims.⁷ An analyst who has researched on transitional justice claimed that the position of chairperson of the Parliamentary Committee is not very important for the CPN (UML), and indicated that Prime Minister Pushpa Kamal Dahal himself is reluctant to push the forward bill, as it passing could potentially lead to legal action against the Maoist leadership.

The bill that has reached the House of Representatives is stuck in the name of the consensus of the top leadership, which has also raised questions about the sovereignty of the House. The unresolved consequences of the conflict poses a risk of rekindling another such armed conflict. Hence, all political parties should share collective responsibility to work towards establishing sustainable peace by delivering justice to the victims.

5. Conclusion

A transitional justice mechanism is established as a supplement to the criminal justice system to ensure justice and sustainable peace in society by investigating cases of human rights violations during the armed conflict. In the context of Nepal, this should be carried out in accordance with the universal declaration of human rights, international humanitarian law, and principles related to human rights, the CPA and the Constitution of Nepal.

⁷ Online khabar. 2023. UML has no Political Interest in the Issue of Transitional Justice: Pradeep Gyawali. Available at www.onlinekhabar.com/2023/11/1395013; accessed November 27, 2023.

Even after 17 years after the signing of comprehensive peace accords, victims of the conflict have yet to see justice, which has resulted in increasing frustration and indignation among them. It is a fundamental principle of justice that justice delayed is tantamount to justice denial. When transitional justice is postponed, evidence disappears, victims tire out and become apathetic, and perpetrators are free from punishment. The issue of transitional justice not being resolved means that the peace process has not been completed. It is a lamentable act for political parties to make transitional justice a bargaining chip. The priority given by political parties to transitional justice appears to be different depending on whether they are in government or not. This disparity has made the transitional justice process slow and complex. Transitional justice cannot be achieved without the strong commitment of political parties.

The Law, Justice and Human Rights Committee of the House of Representatives formed a sub-committee to discuss the bill. The bill was discussed in detail and has been amended. However, there are still some issues that need to be clarified in the bill. This has caused the bill to be delayed due to political negotiations and the division of interests between the ruling party and the opposition. The victims of the conflict have demanded that the points of contention between the parties be agreed upon and the bill be passed by the House as quickly as possible. Transitional justice is necessary to conclude the peace process and reduce the impact of the conflict. This is also the way to mitigate the suffering of the victims and eliminate impunity. Therefore, it is essential to pass the bill and bring the transitional justice process to completion with the involvement and collaboration of the victims.

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Founded in 2014, the Democracy Resource Center Nepal (DRCN) is a national non-governmental organization dedicated to the study and research of social and political issues. Since its establishment, DRCN has consistently undertaken in-depth and evidence-based research into various aspects of Nepal's transitional political landscape, including the implementation of federalism, local-level restructuring, and election observation. The outcomes of these studies are shared with stakeholders, fostering discussions and debates. DRCN's overarching objective revolves around advancing efficient governance within Nepal's federal framework through these rigorous research endeavors and thoughtful discourse.



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