

BRIEFING PAPER

FEBRUARY 2019

THE STATE OF TRANSITIONAL JUSTICE IN NEPAL



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LIST OF ABBREVIATIONS

AF	Advocacy Forum-Nepal
AG	Attorney General
AWC	Accountability Watch Committee
CIEDP	Commission for Investigation of Enforced Disappeared Persons
CPA	Comprehensive Peace Agreement
CSO	Civil Society Organization
CVCP	Conflict Victims' Common Platform
CVNA	Conflict Victims' National Alliance
HRD	Human Rights Defender
ICCPR	International Covenant for Civil and Political Rights
LPC	Local Peace Committee
MoPR	Ministry of Peace and Reconstruction
NA	Nepal Army
NHRC	National Human Rights Commission
PLA	Peoples' Liberation Army
TJ	Transitional Justice
TRC	Truth and Reconciliation Commission
UNHRC	United Nations Human Rights Committee
UNOHCHR	United Nations Office of the High Commissioner for Human Rights

1. EXECUTIVE SUMMARY

The path towards Transitional Justice (TJ) in Nepal has been murky since the beginning. Increasing mistrust among stakeholders and the lack of political will of the Government has been and continues to be the key hurdle in taking the TJ process forward. A number of past failures of the Government, particularly persistent secrecy and refusal to have a consultative approach in designing the TJ process, have contributed significantly to this mistrust. This has to be altered if the TJ process is to achieve the goals of TJ. The current deep mistrust can be addressed only by the Government demonstrating political will that it is serious and committed in taking the TJ process forward, keeping the interests of the victims at the centre and by adopting a transparent process including all stakeholders involved with a forward-looking approach to ensure non-recurrence of the horrors that Nepali society experienced during the conflict.

In June 2018, victims and civil society received a draft bill to amend the existing ‘Commission of Investigation on Enforced Disappeared Persons, Truth and Reconciliation Act, 2014’ (hereafter TRC Act), under which two TJ bodies - the Truth and Reconciliation Commission (TRC) and Commission of Investigation on Enforced Disappeared Persons (CIEDP) - were established back in February 2015. This draft was a long overdue attempt to follow the orders of the Supreme Court (SC) and demands of the victims and civil society.

However, victims, civil society organisations, the National Human Rights Commission (NHRC), international human rights organisations and United Nations Office of the High Commissioner for Human Rights (OHCHR) were all concerned by the bill. It too had been drafted without wider consultations and did not pay full respect to the SC orders. Unfortunately, the same old pattern was repeated: non-transparent and non-consultative process, widening the mistrust even further apart.

Although the Government had promised holding such consultations among the victims and civil society and to

take into account the concerns they raised, this promise is yet to be fulfilled. The pattern of lies and lack of consultation throughout the last 12 years has not only widened the mistrust but also made victims and civil society feel vulnerable and suffer in anguish. Just less than two weeks before the deadline for submission of the bill, the Ministry for Law, Justice and Parliamentary Affairs called for a consultation with the victims, which was largely ignored by the victims. In the end, the government decided not to substantially amend the TRC Act but to simply extend the two commissions’ mandates for another year, with the provision of changing the mandate holders in mid-April 2019, buying some time.

Advocacy Forum (AF) believes this extension of the mandate provides opportunities once again to repair the damage made in the past by holding consultations and wider debate about what Nepal wants to achieve through its TJ process. In this context, AF is publishing this brief summarizing the recent history of TJ and analysing key legal issues. The briefing also draws on key concerns raised by victims and civil society in recent dialogues organized in 13 districts around the country between July 2018 and December 2018.¹

The focus of these dialogues was the draft June 2018 bill. When the bill was made public, AF called for wider consultation with the victims and all other stakeholders. As the drafters of the bill told Human Rights Defenders (HRDs) that the time for such consultations and for providing comments and inputs was limited, AF took the initiative of holding dialogues with the victims and civil society in different provinces on different aspects of the bill to promote their informed participation in eventual consultations organised by the Government to solicit their inputs.

Many of the concerns of victims and human rights defenders in the districts in relation to TJ in general and the bill in particular were found to focus on three

¹ Those places include Surkhet, Bardiya, Nepalgunj, Dhangadi, Pokhara, Baglung, Kathmandu, Chitwan, Janakpur, Butwal, Biratnagar, Panchthar and Ilam. The list of participants is available/secured at AF.

major issues: **1) mistrust between the victims and civil society and the Government 2) inability of the two commissions to fulfil their mandates; and 3) not knowing the future course of TJ process.**

This briefing is structured around these three issues, which need to be unpacked to improve victims and civil society's participation in the TJ process and to garner public support for the TJ process in the country to move forward. The key recommendations to bring TJ on track are:

1. Publish a plan of action, identifying the responsible agency and officials taking the plan forward (starting with a timeline for the consultations).

2. Organise meaningful consultations with wider stakeholders on different aspects of the TJ process, including but not limited to those set out in this briefing, including the recommendation committee (which should include people who have moral authority and are respected by society), appointment process, mandate, punishment, amnesty, reconciliation, Special Court, applicable law, etc.

3. Draft a new law after the consultations making it in line with Nepal's international law obligations and the Supreme Court judgements.

4. Enact other laws required for the implementation of the new TJ Act.

5. Publish the bill to bring a new TJ Act with ample time for meaningful consultations.

6. Only then appoint new commissioners under the new fully compliant TJ Act, and provide necessary resources to the new commissions to ensure they deliver TJ.

2. BACKGROUND

The Comprehensive Peace Agreement (CPA), signed between the Government of seven party alliance and the Nepal Communist Party (Maoist) in November 2006 formally halted Nepal's ten-year (1996-2006) armed conflict and provided hope for TJ in the country.² Although the official record is yet to be established, the conflict resulted in nearly 20,000 deaths, and the whereabouts of more than 1,300 disappeared remain unknown. Thousands of people were displaced and tortured.³ The plight of victims of sexual violence is yet to surface, while hundreds of children that were forcefully recruited as child soldiers continue to agitate for recognition of the abuses suffered by them.⁴

While signing the CPA, both parties agreed to release and make the status of people under their custody public within 15 days,⁵ to make the whereabouts of the disappeared and killed during the conflict public within 60 days,⁶ to provide relief and rehabilitation the conflict victims and to establish a high-level Truth and Reconciliation Commission (TRC).

Instead of implementing these CPA commitments, successive Governments made different attempts in the last 12 years to close the book on these past atrocities and this has contributed to the mistrust between the Government and victims and civil society. In the view of the victims and HRDs, a lack of political will to take the

² As reported by Office of the High Commissioner for Human Rights (OHCHR) in its Nepal Conflict Report, 2012, the armed conflict resulted in the death of about 16,729 persons, displacement of about 78,689 persons, disappearance of about 1,327 people, and severe damage to public infrastructures valued at approximately 5 billion Rupees. For more detail see UNOHCHR 'Nepal Conflict Report 2012: An analysis of conflict-related violations of international human rights law and international humanitarian law between February 1996 and 21 November 2006' (October 2012), https://www.ohchr.org/Documents/Countries/NP/OHCHR_Nepal_Conflict_Report2012.pdf; accessed 28 January 2019.

³ <https://thehimalayantimes.com/nepal/call-to-incorporate-torture-sexual-violence-in-definition-of-conflict-survivors/>

⁴ <https://www.aa.com.tr/en/asia-pacific/nepali-former-child-soldiers-arrested-for-protest/681145>

⁵ Article 5.2.2 of the CPA.

⁶ Article 5.2.3 of the CPA.

TJ agenda forward; repeated lies; defiance of court orders and indifference to the plights of victims has deepened the mistrust.

Four years after the TRC and CIEDP were set up, the process has virtually collapsed costing millions of taxpayers', including victims of conflict's, rupees. Years of investment by the international community on the TJ front has not resulted in concrete achievement. As the TJ process is at a critical juncture, AF calls for an unpacking of the reasons behind the failure of previous interventions, the mistrust that exist between the Government and victims and civil society, why the commissions failed and what causes the current lack of clarity, so the way ahead could be clarified and designed based on the lessons learned from past mistakes.

2.1 WHY SUCH MISTRUST? WHAT HAPPENED? WHAT NEEDS TO BE AVOIDED?

As discussed, the mistrust has been caused by a culmination of different past mistakes on the part of the Government. An analysis of these past mistakes, not only exposes the factors behind increasing mistrust among the actors but also the troubled route to TJ in Nepal. Below we set out some factors, which contributed to develop, widen and deepen this mistrust.

2.1.1 ATTEMPTS TO ESTABLISH COMMISSIONS AS THE VEHICLE TO OFFER IMPUNITY

The Government attempted to establish a TRC by executive decision as early as 2007. However, it met with significant concerns by the victims and wider sectors of society, forcing the Government to back track on the decision. The demand of victims and civil society was to establish a Commission under an Act passed by the Parliament to set out the mandate and power of such commissions ensuring its independence. This demand was largely influenced by the experience they had with many previous commissions of inquiry set up under the Commission of Inquiry Act, which lacked independence and failed to deliver time and again.

Nepal has established around four dozens Commissions in the past to investigate allegations of human rights violations.⁷ Often calls for investigation in cases of human rights violations result in a Government's decision to establish a commission of inquiry and to pay one off monetary compensation to the victims. The likelihood of establishing such commission and getting monetary compensation would depend on the size of the mobilization victims could muster, the duration of time they could take to the street and the political backing they could garner. However, once established, these commissions' reports hardly get published and their recommendations rarely get implemented. These commissions were mainly used to defuse public demand for accountability and to buy time to pacify voices calling for truth, justice and accountability.⁸

Key examples include the *Rayamajhi Commission* and *Mallik Commission*. An analysis of their work and how they were handled by then governments would be sufficient to explain the lack of appetite among the victims and civil society to have commissions appointed by executive decision, using the Commission of Inquiry Act.

In 2006, immediately after the political change, the *Rayamajhi Commission* (named after the chair of the Commission) was established to investigate cases of human rights violations that took place during the *Jana Andolan II*. This Commission did not have the mandate to look into cases of the conflict era, which the TRC was expected to address. During the *Jana Andolan II* more than 24 people had died and hundreds of others injured with many cases of arbitrary arrest, detention and torture. The Commission provided a report to the Government recommending the suspension of certain individuals from public posts and the prosecution of some who had roles in committing the atrocities. However, the report was not made public and the recommendations were never implemented.

⁷ International Commission of Jurists, 'Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity' (June 2012).

⁸ International Commission of Jurists, 'Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity' (June 2012).

The *Rayamajhi Commission's* report met similar fate as the previous *Mallik Commission*. The *Mallik Commission*, established immediately after the restoration of multiparty democracy in 1990, investigated the allegations of human rights violations during the *Jana Andolan I* in 1990 and recommended legal action against those involved in those violations among others.⁹ However, its recommendations were never implemented. The very same people who were active in suppressing the movements in 1990 later came to power, preventing any efforts towards accountability, some even suppressing the *Jana Andolan II*.¹⁰

These experiences with more than four dozens of such Commissions in recent decades, including those to investigate cases of enforced disappearances, explain why victims and HRDs were looking for a commission established by a separate Act of parliament where the mandates, power and independence are ensured in the Act, their report has to be made public and their work contributes towards victims' right to truth, justice, reparation and towards guarantee of non-repetition. However, that path has not been that easy, although the Government finally agreed to establish a Commission under a new Act.

2.1.2 LACK OF TRANSPARENCY IN LAW DRAFTING PROCESS

The Government accepted the call for the establishment of the Commissions through an Act passed by the parliament as the SC of Nepal had also questioned the independence of the Commissions established under the Commission of Inquiry Act.¹¹

⁹ International Commission of Jurists, 'Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity' (June 2012).

¹⁰ International Commission of Jurists, 'Commissions of Inquiry in Nepal: Denying Remedies, Entrenching Impunity' (June 2012).

¹¹ Rabindra Prasad Dhakal on behalf of Advocate Rajendra Prasad Dhakal v. Nepal Government, Council of Ministers' et al. Nepal Kanoon Patrika, SC of Nepal, Case 2064/2007, Nepal Law Reporter, Vol. 49, Issue 2, at p. 169. *Rajendra Dhakal and Others v. The Government of Nepal*, Writ No.3575, registration date 21 January 1999: Order rendered by Hon. Justice Khila Raj Regmi and Hon. Justice Kalyan Shrestha on 18 Jestha 2063 (2007).

In 2007, the Government established a committee to draft the law to establish the TJ mechanisms. The political parties handpicked the members of the drafting committee. The drafting process was kept confidential. When the draft was leaked to HRDs, it outraged them. The draft had proposed amnesty to those 'committing crimes in the course of achieving political objectives' and to those 'committing crimes while performing their duty'.¹² The victims and civil society suspected that these provisions would ensure de-facto amnesty for all those involved in past human rights violations as all crimes committed by Maoists would be labelled as crimes committed during the course of achieving political objectives and those by the security personnel as crimes while performing their duty.¹³

Because of these efforts of the Government, the victims and civil society started to scrutinise the proposed legal framework carefully as they started to suspect these mechanisms being used to provide de-jure impunity.

Responding to the wider concerns, the Ministry for Peace and Reconstruction (MOPR) agreed to have consultations on the bill. In 2009, nineteen rounds of consultations were held to discuss the draft bill. Victims, civil society and the OHCHR supported these consultations and engaged constructively with this process. After 19 rounds of consultations, a high-level meeting was organised by the Ministry (AF was invited, its director joined the meeting) in Kathmandu to finalise the draft.

Considering the difficult political negotiations parties were engaging in, understanding the power balance in the country and also the global legal landscape, it was agreed that the Commissions will focus on truth-seeking process and making recommendations for reparation and reforms while also offering and facilitating amnesty and

¹² Mandira Sharma, 'Transitional justice in Nepal Low priority, partial peace' in Mandira Sharma in Deepak Thapa and Alexander Ramsbotham, *Two steps forward, one step back The Nepal peace process* (Conciliation Resource, Issue 26, March 2017).

¹³ Mandira Sharma, 'Transitional justice in Nepal Low priority, partial peace' in Mandira Sharma in Deepak Thapa and Alexander Ramsbotham, *Two steps forward, one step back The Nepal peace process* (Conciliation Resource, Issue 26, March 2017).

mediation in less serious crimes. It was agreed that the Commissions would not have a mandate to recommend amnesty for four categories of serious violations: murder, enforced disappearances, torture and rape and sexual violence against women, and that prosecutions would be initiated in relation to these crimes.¹⁴

Although civil society and the UNOHCHR had some reservations, in terms of reparation and categories of violations requiring prosecution, among others, they supported the bill, as it was the result of a process. They also hoped that the public would have an opportunity to provide their inputs to improve the bill further once it was tabled in parliament. Two bills (one for the TRC, and one for the CIEDP) were tabled in the parliament in February 2010. Each bill received 100 plus amendment proposals from parliamentarians. Many victims and civil society organisations were active to register their concerns through sympathetic parliamentarians. However, those bills were never passed as law.

2.1.3 WITHDRAWAL OF BILL FROM THE PARLIAMENT AND ORDINANCE

While the bills were pending before the parliament, the parliament was dissolved in May 2012 for elections of the Constituent Assembly for a second time. The Government led by Dr. Baburam Bhattarai, quickly withdrew the bills under the consideration of the parliament and adopted instead an ordinance on the TRC on 14 March 2013. Although it was claimed that the content of the ordinance was similar to the bill presented in the parliament, victims and civil society quickly found that the provisions limiting the TRC's mandate to recommend amnesty in the four categories of crimes were removed from the text of the Ordinance. This made the victims and civil society suspect that the objective of the ordinance was to have a commission facilitating amnesty.

Victims, with the support from civil society, challenged the ordinance in the SC on 24 March 2013.¹⁵ The SC found the ordinance violated the rights of the victims and laid down a number of principles to be followed in designing the legal framework on transitional justice issues.¹⁶ The SC said:

- (a) Draft the bill with the help of an expert team,
- (b) Establish the TRC after having wider consultation among stakeholders, especially victims,
- (c) Restrict amnesty, pardon and withdrawal of cases in gross violations of human rights,
- (d) Enact legislation to criminalise gross violations, such as torture, enforced disappearances,
- (e) Provide effective reparation for the victims,
- (f) Ensure victims mandatory consent in offering amnesty or conducting mediation in those cases where amnesty and mediation can be done.¹⁷

2.1.4 DEFIANCE OF THE COURT ORDERS

Successive governments have so far largely ignored this decision in relation to the ordinance and other judgements related to TJ of the SC.

In the meantime, as there was no progress in setting up the TJ process, HRDs started to support victims to access the courts using the criminal justice system, devising strategies to involve the courts in the legal aspects of the TJ process.

Although many violations that were committed during the conflict such as torture, enforced disappearances were not criminalised under the prevailing laws, murder is. Advocacy Forum assisted a number of families who had experienced the murder of their family members were assisted to bring their complaints demanding a criminal investigation. One such case was filed by Devi Sunuwar, mother of 15-year-old girl Maina Sunuwar, who was

¹⁴ Advocacy Forum, Special Brief, Transitional Justice at Crossroads, January 2014. <http://www.advocacyforum.org/downloads/pdf/publications/tj/transitional-justice-at-crossroads-2014.pdf>

¹⁵ *Suman Adhikari and Ors. v. Government of Nepal*, Writ No 0058 of the Year 2069 B.S., Writ No 0057 of the Year 2069 B.S.

¹⁶ *Madhav Kumar Basnet and Ors. for JuRI-Nepal v. Government of Nepal*, Writ No 0058 of the Year 2069 B.S., Writ No 0057 of the Year 2069 B.S.

¹⁷ Rabindra Dhakal, JuRI-Nepal, Suman Adhikari.

illegally arrested, detained, disappeared and tortured to death in Panchkal army barrack.¹⁸

This case gained significant public attention because of coordinated efforts by several national and international organisations, ultimately resulting in the exhumation of Maina's body and the prosecutor in Kavre District filing murder charges against four army officers involved in the case.¹⁹

As there was no progress in the investigation, the role of the police and prosecutor was challenged by filing a writ in the SC. In response, the SC provided not only a time bound order to complete police investigations but also laid down a number of principles that helped a number of other victims subsequently. Those principles include:

- Non-applicability of military court jurisdiction in the case of murder involving civilians,
- TJ does not supersede the criminal justice system but complements it,
- Justice cannot be denied to victims on the ground that it will be provided by as yet to be established TJ mechanisms,
- Police and prosecutor have an obligation to investigate and prosecute if evidence warrants so in conflict era cases of human rights violations such as murder.²⁰

Following this jurisprudence in Maina's case a number of other victims' families also filed First Information Reports (FIRs, complaints to police demanding criminal investigation). The SC made a number of decisions in relation to many of these cases. However, the Government and public authorities defied the decisions of the court and refused to carry out investigations on conflict era cases, a problematic practice which continues even today

in relation to both conflict and contemporary cases of human rights violations.

The Kavre District Court had issued arrest warrant against four army officers involved in the Maina Sunuwar's case back in January 2008, but none of them were arrested. After years of failed efforts to get the cooperation of the army and the alleged perpetrators, the District Court Kavre in April 2017 held a trial, following normal legal procedures, convicting those officers *in absentia* for murder.²¹ However, they are still to be arrested and the Court judgment is yet to be implemented.

As the Government would not even listen to the Court, some of the victims were also accompanied to the UN Human Rights Committee with their complaints. More than a dozen complaints have been filed before the UN Human Rights Committee, under the Covenant on Civil and Political Rights (ICCPR, one of the human rights treaties that Nepal has ratified). The Committee has also taken the view that the government has breached a number of treaty provisions and that it has an obligation to take actions to provide effective remedies to the victims, including prosecution in serious violations.²² Despite the Government repeatedly promising the UN that the TJ mechanisms will ensure such effective remedies, nothing concrete has been done to follow-up the Views expressed by the Committee in these cases.²³

2.1.5 MISCHIEF AGAIN, PASSING THE ACT

After the decision of the SC on the ordinance and some other judgements setting out a number of principles related to TJ, one would hope that the ground for TJ was clear for the Government and that it understood its obligations and would be prepared to take them into

¹⁸ Advocacy Forum, *Maina Sunuwar: Separating Fact from Fiction*, 2010. <http://advocacyforum.org/downloads/pdf/publications/maina-english.pdf>; accessed 20 January 2019.

¹⁹ Advocacy Forum, *Maina Sunuwar: Separating Facts from Fiction*, 2010. <http://advocacyforum.org/downloads/pdf/publications/maina-english.pdf>; accessed 20 January 2019.

²⁰ Advocacy Forum, *Maina Sunuwar: Separating Fact from Fiction*, 2010. <http://advocacyforum.org/downloads/pdf/publications/maina-english.pdf>; accessed 20 January 2019

²¹ <http://www.advocacyforum.org/news/2017/04/maina.php>

²² *Giri v Nepal* UN, Comm No 1761/2008, CCPR/C/101/D/1761/2008 (2008), *Sharma v Nepal* UN Comm 1469/2006, CCPR/C/94/D/1469/2006 (2008), *Dev Bahadur Maharjan v Nepal*, UN Comm No 1863/2009, CCPR/C/105/D/1863/2009. *Dev Bahadur Maharjan v Nepal*, UN Comm No 1863/2009, CCPR/C/105/D/1863/2009.

²³ For more information see <http://realrightsnow.org/en/campaign/>; accessed 9 February 2019.

account while drafting the new law on the TRC and designing the framework for the TJ process.

As one of the orders of the SC was to seek support from experts working in this field and to have consultations among stakeholders, primarily the victims and civil society started to demand such a process. In March 2014 the Ministry for Peace and Reconstruction (MOPR) established a committee of 'experts' to draft the Bill for the TJ mechanisms, considering the decision of the SC.²⁴ Although it was given a very short period of time, the committee on 2 April 2014 handed over a draft bill to the MOPR expecting wider consultations.

While victims and civil society were waiting for the consultations, suddenly a bill (different than what was presented by the committee) was tabled in the Parliament. The media reported that it was a bill drafted by the political parties in consensus. No parliamentarians were allowed to make any comments on the bill, let alone the victims and civil society. Parties issued a whip to prevent their parliamentarians going against the bill and adopted it using a fast track procedure. Around midnight on 25 April 2014, the bill was passed as an Act, namely the Commission of Inquiry on Disappearances, Truth and Reconciliation Commission Act, 2014, under which the existing two Commissions were established.

Feeling betrayed by the Government and the political parties, victims and HRDs again knocked the door of the SC, filing a writ challenging a number of sections in the Act. Victims, national and international civil society organisations and the OHCHR requested the government not to establish the commissions before the SC makes its decision on this writ. The leading human rights organisations in the country and OHCHR publicly announced their inability to support the Commissions because some sections in the Act violated Nepal's constitution and international human rights commitments. They requested the Government to refrain from

²⁴ The government formed an 11-member "Task Force", including representatives of victims' groups, to implement the SC's decision and to make recommendations to the government on the legal framework within 10 days.

establishing the Commissions until the Court reached its decision.²⁵

However, the Government went ahead and established the Commissions in early February 2015. Later in the month, the SC found that a number of sections of the Act violated previous SC's decisions, the constitution and Nepal's international obligation.²⁶

These provisions, which the SC held as falling short, are important to analyse as they continue to affect the debate we continue to have in relation to some of the content in the new proposed draft amendment bill.

Reconciliation/ mediation: Section 22 of the Act empowers the Commission to mediate between victims and perpetrators. It states that if a perpetrator or a victim files an application to the Commission for mediation, the Commission can facilitate mediation to reconcile them.²⁷ While facilitating the mediation, the Commission shall ask the alleged perpetrator to apologise to the victims,²⁸ and can make the alleged perpetrators pay compensation to the victims for damages suffered.²⁹

In their SC petition, victims have raised the vulnerability and pressure that this provision would create on victims in the given power balance in society where the perpetrators are in the government and sit in the most powerful institutions. The OHCHR had also raised serious concerns over these provisions. Although it recognised the use of reconciliation in the context of TJ, it found its use even in cases of serious violations as the Act had proposed to be problematic and inappropriate.³⁰

²⁵ 'OHCHR Technical Note 'the Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2071 (2014)'.

²⁶ *Suman Adhikari et al vs. Prime Minister and Cabinet of Minister et al*, 070-WS-0050.

²⁷ TRC Act, S 22.1.

²⁸ TRC Act, S 22.2.

²⁹ TRC Act, S 22.3.

³⁰ 'OHCHR Technical Note 'the Nepal Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation 2071 (2014)' No. 3 page 5.

It is further highlighted that if Section 22 is read in conjunction with other sections of the Act such as Section 29, then it would provide impunity for the perpetrators. Section 29 provides that if the cases are reconciled, the Commission will not make a recommendation for prosecution. Victims viewed this provision as one aiming to provide impunity for the perpetrators in an indirect way and in fact as an encouragement to alleged perpetrators to pressurize victims into reconciliation.³¹

In response to these concerns of the victims in the Act, the SC stated reconciliation could not be imposed on victims and cannot be done without their willingness and consent.³² It cannot be used as a tool to let perpetrators go free from criminal liability for their involvement in gross violations of human rights.³³ Although the decision of the Court does not prevent the Commissions' power to facilitate mediation in its entirety, it limits its power in relation to gross human rights violations.

Amnesty: Amnesty is one of the most contested subjects in the TJ process. Victims also challenged the provisions related to amnesty in the Act, which provides powers to the Commission to recommend amnesty except for rape.³⁴ Section 25 provides that 'if an application is submitted to the Commission for amnesty, the Commission must decide to make recommendation for amnesty upon considering agreement and disagreement of the victim as well as the gravity of the incident for granting amnesty to that perpetrator.'³⁵

Challenging this section on amnesty, victims argued that it not only violated a previous SC order that required a victim's mandatory consent for offering amnesty but also violated victims' right to equality before the law³⁶ and their right to effective remedy.³⁷ They argued that the provision of amnesty makes them subject to different treatment compared to other victims. Just because some people were subject to gross violations during conflict, that does not provide the Government the authority to derogate victims' constitutional rights.³⁸

The SC reasoned that amnesty is impermissible in cases of gross violations where a duty to prosecute exists³⁹ as it impairs the rights of victims to have effective remedies.⁴⁰ On this basis, the SC also found that the provision of amnesty in the Act violating the Constitution and the jurisprudence that the SC had already established.⁴¹ The OHCHR has also time and again highlighted the limit that international law sets on the use of amnesty. Although international law accepts the use of amnesty in less serious crimes, it is impermissible for international crimes and gross human rights violations including extra-judicial killings, torture, enforced disappearances, sexual abuse and rape.⁴²

Indirect route to prosecution: The victims had also challenged how the TRC's work was envisioned to be linked with prosecutions. Section 29 provided that if the TRC makes a recommendation for prosecution, it will first write to the Ministry, then the Ministry will write to the Attorney General (AG), then the AG will make the decision whether to prosecute or not.⁴³ Having a Ministry in between allows space for the Government not to write

³¹ *Suman Adhikari et al vs. Prime Minister and Cabinet of Minister et al*, 070-WS-0050, page 79. The SC of Nepal has declared the section ultra-virus finding it contradictory to the constitution and Nepal's international obligation. The Court states reconciliation cannot be imposed on victims and cannot be done without the willingness and consent of the victims. It cannot be used as a tool to let perpetrators free from their criminal liability for their involvement in gross violations of human rights.

³² *Suman Adhikari et al vs. Prime Minister and Cabinet of Minister et al*, 070-WS-0050, page 79.

³³ *Suman Adhikari et al vs. Prime Minister and Cabinet of Minister et al*, 070-WS-0050, page 79.

³⁴ TRC Act, S 26(2).

³⁵ TRC Act, S 25(5).

³⁶ Interim Constitution of Nepal, Art 13.

³⁷ Interim Constitution of Nepal, Art 24.9.

³⁸ *Suman Adhikari et al vs. Prime Minister and Cabinet of Minister et al*, 070-WS-0050, page 81.

³⁹ *Suman Adhikari et al vs. Prime Minister and Cabinet of Minister et al*, 070-WS-0050, page 80.

⁴⁰ *Suman Adhikari et al vs. Prime Minister and Cabinet of Minister et al*, 070-WS-0050, page 82.

⁴¹ *Suman Adhikari et al vs. Prime Minister and Cabinet of Minister et al*, 070-WS-0050, page 83.

⁴² 'Rule of Law Tools for Post Conflicts States Amnesties' (OHCHR, 2009).

⁴³ TRC Act, Section 29.

to the AG for prosecution.⁴⁴ The victims suspected that with that provision, this commission would also face the same fate of previous other commissions such as *Mallik* and *Rayamajhi*, whose recommendations were never implemented.

The SC recognised the prerogative of the AG in making a decision whether to prosecute or not, but it also recognised that having the ministry in between the Commission and the Court has created unnecessary hurdles and suspicion among the victims, and ordered to amend this provision, to allow the TRC to send evidence directly to the AG asking for prosecution. Thus, the SC had reinforced some of its earlier reasoning articulated in the writ related to the ordinance to restrict the use of amnesty, mediation and reconciliation, among others.

The fact that the Act has not been amended even after 4 years since the SC gave this February 2015 verdict exposes not only the complexities of the issues at hand but also the lack of political will in supporting the Commissions. As the Government aims to amend the TRC Act, these concerns of the victims and the SC decisions must be taken into consideration to avoid the mistakes made in the past to deepen the mistrust between the victims, civil society and the Government.

3. WHY THE COMMISSIONS FAILED?

Many other concerns that came up during the dialogues in the districts flow from the failure of the commissions to deliver their mandates despite the cooperation of the victims. As the TJ process continues, it is important to unpack some of those underlying factors that made the TRC and CIEDP fail, so lessons can be learned.

3.1 LACK OF CREDIBILITY OF THE COMMISSIONS

One of the major reasons behind the failure of the commissions is their lack of credibility. The way the Government passed the law, it established the commissions, selected the commissioners, and the

qualifications and experiences of the commissioners all contributed to this lack of credibility.

As discussed earlier, while the Act was challenged in the SC and the case was under consideration, both victims and civil society had asked the Government not to establish the Commissions until the Court decided. However, the Government ignored these calls and went ahead. This did not only deprive the commissions of the support from civil society but also affected their credibility.

There were consistent demands from the victims and civil society that the commissions had to be impartial and independent, for which the identity of the commissioners, their selection process, power and mandates all were important. The Government was comfortable appointing commissioners without relevant experience and expertise, choosing rather those with loyalty to the political parties, not only impacting the credibility of the commissions but also resulting in a capacity deficit when it came to their work.

3.2 COMPLEX DESIGN OF THE TRC AND LACK OF CLARITY AMONG THE COMMISSIONS

When the Commissions opened a call for victims to register their complaints, many victims were in a dilemma whether to lodge a complaint or not as some of the victims were also petitioners in the court case challenging the Act.

Nevertheless, desperate after waiting far too long, the victims wanted to give an opportunity to the Commissions to prove themselves by submitting their complaints. More than 60,000 victims lodged their complaints.⁴⁵

However, these commissions could not devise strategies on how best to process these complaints and win the confidence of victims and other stakeholders to garner support for their work. Many victims complained that the TRC and the CIEDP never have got back to them since they filed their complaints.⁴⁶ Many of those complaints

⁴⁵ <http://www.trc.gov.np/news/abc>

⁴⁴ *Suman Adhikari et al vs. Prime Minister and Cabinet of Minister et al*, 070-WS-0050, page 83, 84.

⁴⁶ Devi Sunuwar, Maina Sunuwar's mother said, "I had filed a complaint at TRC with high hopes. Three years have lapsed.

were filed through the Local Peace Committees, amidst many concerns.⁴⁷ In some places, victims also complained that the CIEDP came back to them where they had to go through the traumatic experience of filling out anti-mortem data forms. However, the Commission had never come back to update them on what is happening with those data.

Even though the TRC Act also envisions the commissions to do investigation for the purpose of prosecution,⁴⁸ the Commissions lack understanding of how this process would work and its legal, political and other implication so it could design its strategies accordingly.

The commissions took many months to develop their investigation guidelines. These investigation guidelines, when they finally were put together in July 2016, divide their investigations into two categories: preliminary investigations and detailed investigations. The TRC has reported that they have done detailed investigations into around 6,000 cases out of 60,000 registered. These investigations have also faced serious problems, already reported by a number of organisations.⁴⁹

Although neither the Act nor the SC require all the cases to be prosecuted, the TRC has no capacity to design strategies for the cases that need to be prosecuted and the capacity and process required for that. It has not demonstrated any understanding about how to collect evidence, with the required standards of threshold, capable of determining individual guilt in eventual prosecutions and trials.

Furthermore, some aspects of the mandate and powers of the TRC and CIEDP could put the rights of alleged perpetrators at risk if not used properly. For example,

Commission never contacted nor informed about the progress on my complaints. Both the commissions failed to fulfill their mandate. Hence, victims have demanded reconstruction of these commissions.”

⁴⁷ Elena Naughton, ‘Pursuing Truth, Justice, and Redress in Nepal: An Update on the Transitional Justice Process’ (ICTJ briefing, February 2018).

⁴⁸ Section 13(e) of the TRC Act 2014.

⁴⁹ Elena Naughton, ‘Pursuing Truth, Justice, and Redress in Nepal: An Update on the Transitional Justice Process’ (ICTJ briefing, February 2018).

on the one hand the Commissions have the power to compel testimonies; on the other hand they can provide these testimonies to the prosecuting authorities. The alleged perpetrators have constitutional rights to remain silent and a right against self-incrimination. The use of the commissions’ information, obtained through these powers, for prosecutorial purpose could severely undermine an accused’s right to fair trial. The Commissions seem to have not put any safeguards in place to prevent that. Failure of having such protection in place could render the trial unfair, and resulting in perpetrators being set free on procedural grounds.

3.3 LACK OF REQUIRED LEGAL FRAMEWORK

Both the commissions have complained that they cannot function properly because of the absence of the required legal framework. Delay in amending the TRC Act and other relevant laws not only deprives the Commissions much needed support from the national and international organisations but also impairs its work and credibility.

On the one hand, the Government denies victims access to the existing criminal justice system stating that their cases would be investigated by the TRC/CIEDP and will be prosecuted in a Special Court. On the other hand, neither of these bodies have the capacity to investigate cases nor have they received the required legal and institutional infrastructure for that to happen. Even if the Commissions do investigate cases and recommend prosecution, no prosecution is possible as the legal and institutional settings required for that to happen are not in place.

For example, if the Commissions investigate allegation of torture or disappearances and recommend prosecution, that could not happen in the absence of a legal framework criminalising torture and enforced disappearances and providing appropriate penalty. There are no laws doing that. Even if the violations were criminalised in some cases, the statutory limitation would put a hurdle in prosecuting them. For example, if the TRC investigates cases of rape and sexual violence during the conflict, prosecutors will not be able to prosecute despite the Commission’s recommendations as the limitation for such

case under the prevailing law is 35 days.⁵⁰ Furthermore, the TRC Act requires the Transitional Justice Special Court⁵¹ to prosecute cases recommended by the Commissions. However, as of today, no such court exists.

Although there were several versions of drafts to establish this Special Court, all of them were kept confidential and the process of drafting was secret. The one that the Government worked on in March 2017 was however made public through the SC when the court made its view in relation to the draft bill on TJ Special Court public.⁵² This was prompted by a request from the Government to have a legal opinion on the draft it was working on. Although the bill was kept confidential, the SC gave its opinion on the draft bill in writing and made it public.

In its opinion, the SC stated that some of the provisions of the proposed bill were contradictory to its previous decisions and highlighted a number of sections requiring amendments before the bill could be passed as law.⁵³ The areas that the court found necessary to amend are important as it guides what the TJ Special Court might look like and how the prosecution aspects of the TJ process may be applied in practice.

For example, in the proposed bill, the Government wanted to appoint Special Court judges from among those people having qualifications equivalent to a High Court judge.⁵⁴ It also proposed that the judges for these benches be appointed by consensus among the political parties, considering the 'expertise' of the persons. It was also proposed that the Special Court would have two-tier

⁵⁰ Although the Penal Code, which came into effect from August 2018, extends the statutory limitation in reporting rape to 6 months and criminalises torture, with the maximum penalty of 5 years of imprisonment, the Penal Code has no retroactive effect. Unless it is amended, this provision cannot be used in conflict era cases.

⁵¹ The "Special Court" is defined as the special court constituted by the Government of Nepal pursuant to the law to try and settle the case which has been decided by the AG or the Government Attorney designated by the AG to prosecute against the perpetrator pursuant to sub-section (2) on the basis of the recommendation of the Commission. TRC Act, s 29 (4).

⁵² Opinion and reaction of the SC on the bill to establish Transitional Justice Special Court 2017, no. 4.

⁵³ Interview with former AG, Kathmandu, March 2017.

⁵⁴ Draft made available to Advocacy Forum.

benches, Trial and Appeal,⁵⁵ so the entire process could end within the Special Court.⁵⁶ The entire trial proceeding of the court was set to be completed within 3 months.⁵⁷

However, the SC found these provisions problematic. It advised that, to ensure the independence of the Court, the judges need to be selected from a pool of judges that were already selected by the Judicial Council for the High Court.⁵⁸ While commenting on the two-tier benches of the Special Court, the SC highlighted that, as per Article 128 (2) of the Constitution, the Special Court should be under the SC. So the appeal against the decision of the Special Court should be in the SC.⁵⁹ It also highlighted the need for legislation criminalising and setting penalties for the crimes under the jurisdiction of the Special Court.

3.14 LACK OF CLARITY ABOUT THE FUTURE COURSE

The law under which these commissions were established has not been amended even after four years of the SC's decision. Necessary legal and institutional arrangements have not been put in place. The commissioners were chosen not for their credibility and credentials in the field but for their loyalty to the political parties. All this has made victims and civil society wonder about the purpose of these Commissions.

Lack of clarity about the process and the objectives of the TJ mechanisms has been a problem since the beginning. Until the MOPR was dissolved in February 2018 as part of a wider reform reducing the number of ministries, it was taking initiatives on TJ issues and worked as the interlocutor for civil society and victims. Since it was dissolved, its work has been divided among different ministries, mainly the Ministry of Home Affairs and the Law, Justice and Parliamentary Affairs Ministry. While interim relief related issues are handled by the Ministry of Home Affairs, the law drafting is supposed to be under

⁵⁵ Draft made available to Advocacy Forum.

⁵⁶ Interview with the AG, Kathmandu, March 2017.

⁵⁷ Draft made available to Advocacy Forum.

⁵⁸ Opinion and reaction of the SC on the bill to establish Transitional Justice Special Court 2017.

⁵⁹ Opinion and reaction of the SC on the bill to establish Transitional Justice Special Court 2017.

the Ministry for Law, Justice and Parliamentary Affairs. However, there is no clarity about this, which continues to cause problems even today.

For example, not the Law Ministry but the AG's Office has been active in drafting the legal framework on TJ. Although it was kept confidential to the victims and civil society, in July 2016 then AG Hari Phuyal shared a draft bill to amend the TRC Act with some diplomatic missions in Kathmandu seeking their advice. As the AG was changed because of the changed of the Government in August 2016, following the same path, the next AG also started to work on a TJ related bill. The draft law on the Special Court that reached the SC for comment was prepared by Raman Kumar Shrestha, a previous AG. The AG's Office continued to have an active role until recently. For example, the draft that was made available to HRDs and victims in late June 2018 was also prepared by the AG Office under Agni Prasad Kharel.

Two months after the bill was presented to the victims and civil society, the Minister of Law, Justice and Parliamentary Affairs was changed. The new Minister, Bhanubhakta Dhakal, publicly disowned the bill stating that the Ministry has not been involved in the drafting process and does not recognise the process.⁶⁰ Some of the people who were working on the draft also refused to take any responsibility, stating that they were not formally involved; they were just helping the AG.

There are no designated institutions that could take responsibility and accountability in the TJ drafting process, and with whom the victims and civil society can engage, provide inputs and get updates. The TRC and CIEDP have been found largely unaware of the drafting developments and processes. Thus, the drafting process has been excluding wider sectors to provide their inputs and be part of the debates, which are essential for their support to the process.

⁶⁰ Dewan Rai, 'Fear of What happens next in Transitional Justice divides the victims' (The Record, 14 January 2019), <https://www.recordnepal.com/wire/features/truth-and-reconciliation-commission-and-transitional-justice/>; accessed 28 January 2019.

While the discussions on consultation were ongoing, a new initiative led by an advisor of the President came to light.⁶¹ Although it is not clear whether it was an official process or an initiative by the Advisor in his personal capacity, it got wide attention.

Those involved in the initiative argue that TJ is a political process and that party leaders should have buy-in of the TJ process. Their argument is that the stalemate in the TJ process over the last decade was because of the legal dominance of the discourse. The solution needs to be found politically, considering the power dynamics in society.⁶² It is also argued that in order to have wider ownership it has to be nationally owned and it could follow Nepal's own unique "army re-integration model", referring to the negotiations process through which the People's Liberation Army (PLA) was demobilised after the peace agreement. Four meetings were held with the victims in four different regional hubs and in Kathmandu, resulting in a charter of the victims. This charter included a demand for a 'high level mechanism', gaining significant media attention.⁶³

This initiative divided victims' groups and civil society. The leadership of the Conflict Victims Common Platform (CVCP), a network of victims' associations who have joined the President's advisor's initiative, argues that it joined the initiative to advance the long-simmering TJ process. However, the vice-chairs (2 out of 5) opposed the initiative labelling it as a ploy to divide victims' unity on some of their core concerns over the TJ process.⁶⁴ Recently, those who have held differing views within

⁶¹ Dewan Rai, 'Fear of What happens next in Transitional Justice divides the victims' (The Record, 14 January 2019), <https://www.recordnepal.com/wire/features/truth-and-reconciliation-commission-and-transitional-justice/>; accessed 28 January 2019.

⁶² Binod Ghimire, '12 years on, political leaders still dithers on transitional justice' (Kathmandu Post, November 21 2018), <http://kathmandupost.ekantipur.com/news/2018-11-21/12-years-on-political-leadership-still-dithers-on-transitional-justice.html>; accessed 28 January 2019.

⁶³ 'Conflict Victims' Charter' (November 2018), <http://www.satp.org/Docs/Document/1019.pdf>; accessed 28 January 2019.

⁶⁴ Binod Ghimire, 'Efforts on to unite two factions of rights activists and conflict victims', Kathmandu Post, December 30 2018, <http://kathmandupost.ekantipur.com/news/2018-12-30/efforts-on-to-unite-two-factions-of-rights-activists-and-conflict-victims.html>

the CVCP have organized themselves as the Conflict Victims National Alliance (CVNA), which opposes the charter's provisions on high-level mechanisms and army integration model.

This initiative has also divided human rights defenders active on TJ issues as some of the members of Accountability Watch Committee (AWC) support the process,⁶⁵ others rejecting it as an attempt to let politics trump the justice process.⁶⁶ Many within AWC also argue that it came about to defuse a broader alliance between the victims and civil society that was being formed.⁶⁷

3.5 CONTINUOUS UNCERTAINTY

It is uncertain what will happen next. Although the February 2019 amendment bill has extended the mandates of the Commission for another year with the provision of terminating the tenure of mandate holders in April 2019 and provides some opportunities for the Government to open a credible process in taking the TJ agenda forward by addressing the legitimate demands of victims and civil society, the government is yet to be made public its plan. As witnessed in the last four years, the Government and other actors become active towards the end of the mandate of the commissions and remain largely unbothered otherwise; this also needs to be changed to ensure the process is successful.

The victims have been divided over the recent initiative and have had different demands. Some wanted the establishment of the high-level mechanism; while others saw that as a risk and wanted wider consultations on different aspects of the present bill and appoint

new commissioners after a new Act was passed, not recognising the high-level mechanism. It remains to be seen how this division will develop now the TRC Act has been extended for a year and discussions on substantial changes continue, based on the June 2018 draft bill or otherwise.

For example one concern that victims and civil society have is how the draft bill presented in June 2018 has made categorisation of violations. The proposed bill categorizes the violations into two categories: serious violations of human rights and other acts of human rights violations. Victims have raised concerns about the limitation of this categorization. For example, torture is put as a serious violation requiring prosecution. However, the legal definition of torture is narrow, it would not include torture committed by non-state actors. Thus, some victims argue that during the conflict the Maoists also used torture as a tactic to spread terror. Under the current proposal, torture by the state security forces would be prosecuted and tried in the Special Court but torture by any Maoists would be provided with amnesty, resulting in a discriminatory approach in dealing with similar violations, depending on the perpetrators.

The provision related to amnesty in the draft bill is also a matter of concern. Although victims and civil society are not opposing amnesty in its entirety, they see its use in respect of certain violations as a potential problem. The proposed bill provides possibility of recommending amnesty and mediation between victims and perpetrators when certain criteria are met. It is also possible that the commission may deny amnesty or mediation in those cases where those criteria are not met. However, there is no clarity in the bill about what will happen to those cases where amnesty and mediation are denied. There are no provisions in the bill to bring these cases under the jurisdiction of the Special Court, as the jurisdiction of the Special Court is limited to the four categories of violations defined as serious violations of human rights. As a result, there is no prosecution for acts falling in the category of "other acts of human rights violations" including taking of hostages, beating and mutilation even if alleged perpetrators do not seek or qualify for amnesty.

⁶⁵ For example, former coordinator of Accountability Watch Committee (AWC), network of human rights defenders is now the advisor to the President, taking this initiative. Kanak Mani Dixit, member of AWC also supporting this process, while the current coordinator of AWC, Charan Prasain, opposing it along the other members of AWC.

⁶⁶ Appeal of Civil Society, Human Rights Activists and Victim Community against the Conspiracy to Provide Immunity to Criminals of War Crimes, Crimes against Humanity and Serious Crimes (18 November 2018, Kathmandu).

⁶⁷ Kathmandu Declaration of Conflict Victims' National Alliance (25 January 2019), copy available at AF.

Similarly, concerns have also been raised about the bill's failure to include crimes against humanity and war crimes as within the jurisdiction of the TRC and Special Court.⁶⁸ Many of the violations that are defined as 'other violations of human rights', offering amnesty in the bill could amount to war crimes and crimes against humanity if they have taken place in a widespread and systematic manner.⁶⁹ The bill also does not recognize command responsibilities that apply in gross violations of human rights.⁷⁰

Another concern relates to reparations provisions. The proposed bill defines reparation as the right of the victims but limits the remedy to the NHRC. Section 23 (3) of the proposed bill requires victims to go to the NHRC if they do not receive reparation from the TJ commissions, not to the Court. It makes reparations in the bill less effective and impractical as the NHRC's recommendation power in relation to reparation is limited only to a maximum of 3 lakhs rupees.⁷¹

Victims and civil society have also raised serious concerns in relation to the sentencing regime proposed by the June 2018 bill. For example, the bill proposes alternative and reduced sentences for those cooperating in truth-seeking. Section 30 (3) provides that if the accused of a serious violation confesses and provides the full truth to the Commission and the Court, apologizes to the victims and promises not to repeat such violations in future, such an accused would get a maximum of 3 years' community service, a maximum of 5 lakhs rupees as fine and restrictions on travel abroad for a period of time.

⁶⁸ <http://www.advocacyforum.org/downloads/pdf/press-statement/2018/preliminary-comments-of-CVCP-on-tj-bill-english.pdf>

⁶⁹ <http://www.advocacyforum.org/downloads/pdf/press-statement/2018/preliminary-comments-of-CVCP-on-tj-bill-english.pdf>; <https://www.icj.org/wp-content/uploads/2018/07/Nepal-Transitional-Justice-Advocacy-Analysis-brief-June-2018-ENG.pdf>

⁷⁰ <http://www.advocacyforum.org/downloads/pdf/press-statement/2018/preliminary-comments-of-CVCP-on-tj-bill-english.pdf>; <https://www.icj.org/wp-content/uploads/2018/07/Nepal-Transitional-Justice-Advocacy-Analysis-brief-June-2018-ENG.pdf>

⁷¹ Section 16 (3) of National Human Rights Commission Act, 2012.

The proposed bill provides that the Special Court will also try those cases transferred by other authorities such as the district and high court, NHRC and different UN bodies. In such cases, if the accused discloses the truth, confesses, apologizes to the victims and agrees to pay reparation to the victim as prescribed by the Court, such accused would get a maximum of 7 lakhs of fine, and reduction of up to 75% in punishment that could have been meted out by the prevailing law. Such 25% of the normal sentence can be spent in an open prison.

Although victims and civil society have not opposed the proposed leniency for those helping to establish truth by revealing the truth voluntarily and helping the TJ process, they have raised serious concerns about how these provisions have been crafted. Some of these provisions do not respect the provisions in the Penal Code. In the view of the victims and civil society, if there is no respect for the Penal Code in relation to the sentencing regime, this may violate the principle of equality that the Constitution guarantees.⁷²

For example, under the new Penal Code, the accused can get a maximum of 50% reduction in sentence if they cooperate with the prosecution by admitting their crimes and disclosing the truth to help the prosecution to get evidence about the organized structure of the crime.⁷³ However, the Penal Code prevents community service for those involved in serious crime and a reduction of sentence would be possible only after serving a certain amount of time in prison.⁷⁴ Section 30(i)(10) of the draft TJ bill providing a reduction of 60% in sentences and 50% reduction in the existing penal code punishments, which also amounts to a violation of the principles of equality before the law and equal protection of the law.

Lack of applicable law for sentencing is also a problem in the bill. The bill provides for sentences 'as per the existing laws'. However, in many cases, these laws do not exist.

⁷² <https://www.icj.org/wp-content/uploads/2018/07/Nepal-Transitional-Justice-Advocacy-Analysis-brief-June-2018-ENG.pdf>

⁷³ Section 47.1 of the, Penal Code, 2074.

⁷⁴ Section 25.2 of Criminal Procedure Code, 2074.

For example, it is not clear what the existing legal would be in respect of the violation of torture.

While presenting the draft before HRDs, the drafters had argued that the Penal Code will come into force from August 2018 and will be made applicable for categories of cases like this. However, the Penal Code does not have retroactive effect. Thus, torture that took place during the conflict could not be prosecuted using relevant Penal Code provisions in force from August 2018.

Furthermore, statutory limitations could also put hurdles if these violations are dealt with ‘as per the existing law.’ In principle, for the purpose of the TJ law it seems possible to prosecute past cases, as the whole purpose of the Act is to look into cases of the past. Section 29 (7) provides non-applicability of statutory limitation for prosecuting persons involved in serious human rights violations. Similarly, Section 32 (c) (2) also clarifies that for the purpose of the TJ Act non-criminalization of any of the categories of violations may not prevent prosecution of serious violation of human right under this Act. However, even if this is strictly applied, it will be applicable only to the four categories of violations under the TJ law, not the Penal Code or other law. Thus, as a result, those who committed serious violations, and did not even cooperate with truth-seeking and prosecution could easily escape justice, using such lacunas in the law.

In addition, the overall architecture of the TJ framework where the TRC works as an investigatory arm of prosecution and how that impacts on the truth-seeking mandate also needs to be carefully analysed and discussed before putting into law as that could make both the TRC and prosecution suffer.

4. CONCLUSION

To conclude, the key to address some of the challenges that the TJ process in Nepal is facing is to take the debates of TJ to the victims, civil society and the society at large from the exclusive club of elites in Kathmandu.

It is urged that the TJ process in Nepal should be understood and considered as an opportunity, helping the country to fulfil some of those unaddressed expectations and aspiration of people’s movements and the society at large. Despite significant political changes in the country in recent years, people still suffer from a weak rule of law, political patronage, lack of professionalism in public institutions, impunity, lack of accountability, control of powers by few at the centre and the deficit of public trust in the government institutions, among others. If designed properly and committed to its success, the TJ process can help the country to transform from its longstanding state of poor rule of law towards a society based on the rule of law, human rights and having public institution that enjoy public support and respect.

Some of those problems discussed above will not be addressed simply by having Commissions and ticking the box. The way the Government and political parties are showing their indifference to the call of victims, civil society, the international community and the SC, continues to indicate lack of political will to close the book in a proper way.

As discussed earlier, one of the main challenges for the TJ process in Nepal is the mistrust between the victims, civil society and the Government. Many factors have contributed to such mistrust and lessons need to be learned not to repeat the same. One of the aims of the TJ process is building trust among all actors and foster reconciliation, not widening stakeholders further apart. This can be promoted only through adoption of a transparent process that allows wider and meaningful consultations/debates on different aspects of TJ, including the legal framework. Such consultations should not be limited to the prosecution and amnesty aspects of the process but also focus on how best to use the TJ process to transform society from the existing ills of political patronage, weak rule of law and deficit in public trust in state institutions so non-repetition is guaranteed.