

Transitional Justice: Recent Update

May 2024



On April 12, 2024, the Cabinet of Nepal announced the formation of the Recommendation Committee tasked with appointing office bearers for the two Transitional Justice commissions: the Truth and Reconciliation Commission (TRC) and the Commission for the Investigation and Enquiry into the Enforced Disappeared Persons (CIEDP). The committee comprises prominent figures such as former Chief Justice Om Prakash Mishra, former Supreme Court Justice Jagadish Sharma Paudel, former Ambassador of Nepal to the United States of America Dr. Arjun Kumar Karki, and social activist Stella Tamang. The fifth member was to be the Chief Commissioner from the NHRC or the Commissioner he recommends. However, the NHRC opted not to send its representative until the government commits to passing the law within a specified timeframe.

While this government decision to establish the Recommendation Committee has been viewed as a response to a recent order issued by the Supreme Court of Nepal, tensions have arisen as a result. It is alleged that the Government is delaying the process taking this decision as the excuse without reading the decision together with previous other decisions of the Supreme Court relating to transitional justice (TJ).

WHAT IS THE CASE AND RECENT RULING OF THE SUPREME COURT?

On March 12, 2024, the Supreme Court issued a detailed order in response to a writ petition filed by 21 conflict victims including Gyanendra Aaran, against various government offices, including the Office of the Prime Minister & Council of Ministers, Ministry of Law, Justice and Parliamentary Affairs, and Ministry of Home Affairs, citing the prolonged delay in Nepal's Transitional Justice Process, the Supreme Court was petitioned to issue a mandamus order compelling the Government to promptly establish the TRC and CIEDP Commissions. The petitioners sought order for these Commissions to undertake preliminary tasks under the guidance of their respective Secretaries while the process of appointing Commissioners was underway. They argued that the Government's prolonged delay, coupled with the vacancy in the positions of TRC and CIEDP Commissioners, rendered the Commissions defunct, exacerbating the suffering of conflict victims, violating their right to remedy, and unreasonably delaying the Transitional Justice process.

In response, the CIEDP and TRC maintained that they had been fulfilling their constitutional and legal obligations to the best of their abilities but were powerless in resolving other related matters pending the appointment of the Commissioners. The legislative assembly asserted its exclusive authority to enact laws, thus rejecting the Court's jurisdiction to intervene or issue directives. The Office of the Prime Minister and Council of Ministers stated that they had drafted a bill and submitted it to the Parliament. They also argued that allowing Commission officers to undertake tasks reserved for Commissioners would be unlawful under the current Act. The Ministry of Law, Justice, and Parliamentary Affairs affirmed that the drafted bill within the purview of the sovereign Parliament and contested the issuance of a writ in Parliament's name. Additionally, they emphasized that tasks mandated for the Commissions could not be executed by Commission officers.

In a comprehensive 37-page verdict, the Court acknowledged the ongoing violation of the right to justice, as guaranteed by international treaties such as the International Covenant on Civil and Political Rights (ICCPR), the Universal Declaration of Human Rights (UDHR), and Article 20 of the Constitution of Nepal, due to the Government's disregard. It further noted that the rights of victims to timely and fair justice, enshrined in Article 21 of the Constitution, were also being infringed by the Government's unjustifiable delays in concluding the Transitional Justice Process.

The Supreme Court referencing previous decisions, such as **Suman Adhikari et. al. v. OPMCoM**, *Govind Sharma Bandi v. Office of AG*, *Meera Dhungana et. al v. OPMCoM*, *Gyanendra Aaran et. al. v. GoN*, and *Liladhar Bhandari et. al. v. OPMCoM*, to underscore its consistent stance in ensuring government accountability in advancing the Transitional Justice (TJ) Process. These decisions have established fundamental principles of the TJ mechanism aligned with international standards and provided guidelines to the government for a justiciable approach.

The Court then interpreted Sections 31 and 34 of the TRC Act, recognizing the power of the Commission to establish working groups and sub-committees as necessary, including expert committees, without impinging on its autonomy. It then stated the Court cannot intervene in the autonomy of the Commissions but it is unjustifiable to have Commission staff idle at the expense of the state treasury. Therefore, the Court highlighted Section 42 of the Act, which grants authority to address such difficulties, suggesting the formation of a Commission Working Committee under the leadership of the Secretaries of the Commission to initiate preliminary investigative processes.

In light of these considerations, the Court issues a mandamus order to the Government, directing it to:

- (a) **Establish the Recommendation Committee to appoint Commissioners for both Commissions within one month of receiving the order.**
- (b) **Conduct a victim's consultation within 15 days to devise a working guideline for the Commissions to undertake preliminary tasks under the leadership of the Secretary until the full Commission is constituted.**

MOVE OF THE GOVERNMENT AFTER THE COURT VERDICT

Following the Supreme Court's decision, the Planning Section of the Ministry of Law, Justice, and Parliamentary Affairs arranged a meeting on March 18, 2024, inviting several victim organizations to discuss the matter at the Office of the Prime Minister and Council of Ministers on March 22, 2024. During the meeting, the victims expressed their concerns regarding the appointment of Commissioners without amending the law, emphasizing the urgency of amending the Act. Specifically, they raised apprehensions about the provision of the law concerning the recommendation committee.

RESPONSE OF THE VICTIMS

The Court's decision has led to some confusion regarding whether the Court intended to permit the appointment of Commissioners in the Commission immediately. Drawing from eight years of experience, conflict victims, Civil Society Organizations (CSOs), and international human rights organizations have consistently advocated against appointing Commissioners until the Act is amended. There is widespread advocacy among victims and CSOs for a comprehensive review of court decisions, including previous ones calling for amendments to the Act, to ensure a cohesive approach moving forward.

A National Consultation for Conflict Victims convened on March 21, 2024, following the public announcement of the Supreme Court decision, aimed to deliberate and establish a unified stance among victims in response to the judgment. Sixty-five victims from various regions of the country participated, collectively advocating that the Recommendation Committee should only be constituted through amendments to the TRC Act, aligning with the revised provisions of the TRC Amendment Bill. They emphasized that in the absence of Commissioners, the Commissions should solely engage

in administrative tasks without impeding the autonomy of the victims. Subsequently, a position paper reflecting this consensus was drafted on the same day and disseminated.¹

However, at a later date, a faction within the victim community submitted a separate letter to the Prime Minister, asserting that conflict victims jointly agreed to honor the Supreme Court Decision and advocated for advancing the implementation process urging the Prime Minister to take executive decision to move forward.²

Surprised by this move, again victims, who were also said to be part of this later, issued a press statement and clarified that the contents of the letter sent to the Prime Minister were misleading and did not accurately represent the unified voice of the victims. Some victims alleged that this action was politically motivated and criticized the use of signatures of victims who were not consulted on the matter. While it is expected that the victims' community in Nepal encompasses diverse perspectives due to variations in political affiliations and socio-economic backgrounds, this development underscored a division within victim groups, contradicting efforts to forge a common understanding.

VICTIMS ALSO HAVE CONCERNS OVER THE VERY FORMATION OF THE RECOMMENDATION COMMITTEE

Although the currently considered parliamentary Bill does not propose amendments pertaining to the recommendation committee, the TRC Sub-Committee's proposed amendments aim to revise the process for recommending the Chairperson and Commission Members within a two-month timeframe. However, conflict victims have consistently advocated for the independence of the selection process for Commission officers and the autonomy of the Commission itself. They have suggested including former justices of the Supreme Court in the nomination process, alongside the Chairperson or representative of the National Human Rights Commission. Additionally, they proposed an alternative three-member recommendation committee under the coordination of the former Chief Justice, including representatives from both the government and the NHRC.³

RESERVATIONS FROM CIVIL SOCIETY ORGANIZATIONS

Major Civil Society Organizations (CSOs) working on Transitional Justice (TJ) issues have urged the government to avoid a literal interpretation of the judgment and instead adopt a constructive approach by considering the judgment in its entirety. This stance echoes the position articulated by the Accountability Watch Committee (AWC) on March 19, 2024, emphasizing that any actions, including the establishment of the Recommendation Committee, must occur only through proper amendment of the Bill, in line with previous Supreme Court decisions.⁴

¹ <https://www.advocacyforum.org/downloads/pdf/press-statement/2024/victims-position-on-sc-verdict-21-march-2024-english-version.pdf>

² <https://kathmandupost.com/politics/2024/03/29/dahal-and-de-uba-meet-as-conflict-victims-grow-weary>

³ <https://www.advocacyforum.org/downloads/pdf/press-statement/2024/awc-latest-position-on-tj-process-1-april-2024-nepali-version.pdf>

⁴ <https://www.advocacyforum.org/downloads/pdf/press-statement/2024/awc-latest-position-on-tj-process-1-april-2024-nepali-version.pdf>

THE NATIONAL HUMAN RIGHTS COMMISSION

On April 30, the National Human Rights Commission (NHRC) announced its decision not to appoint a representative until the government commits to endorsing an amendment bill currently under discussion in a parliamentary committee. The NHRC highlighted that despite promises from the government over several years, vacant Commissioner positions remain unfilled pending amendment of the Act. Therefore, the Commission demands a clear government commitment to amending the Act within a specified timeline before it will appoint a representative. Section 3(3)(a) of the TRC Act mandates that the NHRC Chair or an appointed member serve as an ex-officio member of the recommendation committee.

BACKGROUND

The Act on Enquiry of Enforced Disappeared Persons and Truth and Reconciliation Commission (TRC Act) has been awaiting amendments for the past eight years. In 2015, the Supreme Court declared multiple provisions of the Act unconstitutional and inconsistent with international human rights standards. Despite this order, attempts to amend the law failed repeatedly. Finally, on July 15, 2022, the Ministry for Law, Justice, and Parliament Affairs introduced the bill to parliament. While it contained some positive provisions, it also had serious flaws, including:⁵

- The Bill mandated the TRC as the sole investigatory body for prosecuting serious human rights violations, alongside its truth-seeking mandate.
- It limited the possibility of prosecution to only four categories of violations deemed “serious,” such as murder with cruelty, cruel and inhuman torture, disappearance, and rape, excluding crimes against humanity and war crimes.
- For all other violations, perpetrators could qualify for amnesty. Even though victim consent and specific conditions were required for recommending amnesty, no avenue for prosecution or punishment existed for those who did not meet these conditions or if victims did not agree to amnesty, potentially leading to de facto amnesty for individuals involved in crimes against humanity and war crimes.
- The Bill proposed the establishment of a Special Court to try the four categories of serious violations, with judges appointed by the government in consultation with the Judicial Council, instead of being appointed by the Judicial Council itself, undermining their independence and impartiality.
- It suggested that the decisions of the Special Court would be final, contrary to the 2017 Supreme Court ruling and international standards recognizing the right to appeal and a fair trial.
- There was no provision for creating a special investigation team comprising investigators experienced in probing human rights violations and international crimes, including sexual and gender-based violence and violence against children.

The Bill, however, did not survive the end of the parliament’s tenure in 2022 and was reintroduced with some revisions in March 2023. The changes in the 2023 Bill include the following:

⁵ <https://www.advocacyforum.org/downloads/pdf/press-statement/2023/preliminary-analysis-of-the-tj-bill-2079-advocacy-forum-nepal.pdf>

- The provision of appeal, allowing appeals against the decision of the Special Court to the Special bench of the Supreme Court within 35 days.
- The timeframe for the public prosecutor to decide on prosecution is set at one year, as opposed to six months in the previous bill.
- It includes a provision for a Transitional Justice (TJ) fund and a committee to advise on its use.
- The provision for the suspension of public officers from office upon indictment by the prosecutor has been removed.

Despite these revisions, the 2023 Bill continued to have problems concerning the classification of violations and provisions for amnesty, among others. Several amendment proposals were registered in parliament, and the Bill was sent to the Parliamentary Committee on Law, Justice, and Human Rights for further discussion. The committee formed a sub-committee tasked with preparing a report to make revisions after consulting with stakeholders, primarily the Conflict Victims.

After ten consultations with stakeholders over five months, the Sub-Committee submitted its report recommending some positive changes but leaving out four major issues for discussion:

- The definition of unlawful killings within serious violations of human rights. The Sub-committee proposes “arbitrarily killing an unarmed person in a cruel manner” or “killing of a person outside of crossfire” (to be further discussed) as opposed to the former “killing after cruel torture” or “killing in a cruel manner.”
- How to address persons joining or affected by the armed conflict?
- What actions to take if there is no free consent of victims for reconciliation in cases of human rights violations?
- Whether to include a provision for leniency of sentencing by ascertaining the quantum/percentage of reduction based on certain conditions.
- The common position of the victims and civil society organizations following the Committee’s report is that the definition of unlawful killings must align with international standards, preventing the killing of individuals who have laid down their arms and are considered hors de combat, in line with Common Article 3 of the Geneva Conventions. Civil society organizations assert that crimes against humanity and war crimes must be included as punishable offenses in the bill. They argue that crimes where amnesty is possible upon meeting certain conditions should be prosecutable if those conditions are not met, and the appointment process must not be susceptible to political motives, avoiding majority political appointments, among other concerns.

With these submissions in mind, the Parliamentary Committee convened meetings to discuss the Amendment Proposal to the TRC Act on January 11, 2024, and March 3, 2024. The 27th meeting of the Committee on March 3rd made a decision to prepare a report by the Parliamentary Law, Justice, and Human Rights Committee and pass it in the next 28th Meeting scheduled for March 4, 2024. Unfortunately, the political coalition committed to passing the Act dissolved on March 4th (informally), and officially on

March 5th. Consequently, the meeting scheduled for March 4th was postponed, and the Act has yet to be on the agenda of the committee's subsequent meetings.

Following the dissolution of the political coalition, there was a glimmer of hope when the five political parties in the current coalition signed a 7-point agreement on March 12, 2024, affirming their commitment to promptly resolve the transitional justice issue. However, with the parliamentary session having ended, any positive developments regarding the passage of the TRC Bill are yet to be observed.



Advocacy Forum-Nepal (AF) is a leading non-profit, non-governmental organization working to promote the rule of law and uphold international human rights standards in Nepal. Since its establishment in 2001, AF has been at the forefront of human rights advocacy and actively confronting the deeply entrenched culture of impunity in Nepal.

AF's contribution in the human rights advocacy in Nepal has been recognized by Human Rights Watch (HRW) in terms of "One of Asia's most respected and effective Human Rights Organization". AF is a recipient of a number of awards including "Women In Leadership Award" (conferred by Swiss Agency for Development and Cooperation).



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