

JUSTICE KEPT ASIDE IN THE INSTITUTION OF IMPUNITY – A CRITICAL SKETCH OF NEPAL



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'The Government of Nepal is fully committed to establishing Constitutional supremacy, ensuring the rule of law, good governance and human rights, as well as providing a positive conclusion to the peace process by eliminating insecurity and addressing impunity. Addressing impunity entails addressing the past and maintaining the rule of law at present. Nepal is fully committed to work on both fronts.' (Human Rights Council 2011: 51)

One emblematic case is the cold blood murder of Ujjan Kumar Shrestha on June 24 2008. After shooting him dead, Balkrishna Dhungel (Constituent Assembly (CA) member) and his associates had allegedly thrown the dismembered body into the Likhu River near by the spot. Dhungel's case is well known. It is a murder case for which Dhungel has been convicted in both the Okhaldhunga District Court and the Supreme Court. However, the government recommended amnesty to Dhungel stating that the case is 'political' in nature. Sabitri Shrestha, sister of Ujjan Kumar Shrestha, threatened to commit suicide if the government grants amnesty to the murderer. And she is suffering, as the only thing that is political about this whole situation is how justice has been avoided.

Her elder brother, Ganesh Kumar Shrestha, was also murdered by a group of Maoists in 2002. It is suspected that he got murdered because he had filed a First Information Report (FIR) against Dhungel and his cohorts for Ujjan's murder. It is said that Dhungel was not there at the scene, but he was publicly talking about killing Ganesh and threatened him. Now, Sabitri has been receiving death threats, as she has been fighting for her brother's justice and fears her life, said Sabitri.

Six years have passed since the significant peace agreement was signed specifically promising greater respect for human rights and accountability impunity remains firmly entrenching in Nepal. No member of security forces or Maoists has been held to account in civilian court for grave human rights abuses committed during the decade long internal armed conflict that took the lives of more than 17,000 citizens, more than thousand disappeared, thousands tortured, thousands displaced, hundreds sexually abused; most cases

that have been filed are mired. The conflict emerged in 1996 with the announcement of 'people's war' initiated by the Communist Party of Nepal (Maoist) (CPN-M) against the 'ruling classes', which included the monarchy and the political parties. Human rights violations committed since the end of armed conflict also remain unpunished: cases against suspects are routinely withdrawn, adding insult to injuries of victims, the reports of Advocacy Forum depict. Critically, Nepal at present stands at crossroads between a future that tributes and protects human rights and rule of law by combating impunity, and a future that merely perpetuates past functioning and abuses that further impunity to be institutionalized.

Despite the current practice in international scenarios, which expresses that the states are increasingly pivoting on de facto amnesties to avoid accountability and to strengthen impunity as de jure amnesties are defined as being against international law, Nepal has witnessed adopting both practices, with mounting political pressure and the introduction of various measures that are indifferent to ensure accountability for human rights violations. There have been various attempts made by groups, either of the current warring parties, to introduce blanket amnesty in the legislation of transitional justice mechanisms, including the Truth and Reconciliation Commission (TRC) and the Disappearances Commission. In addition, the moves of successive governments after the Constituent Assembly (CA) election, held in April 2008, acting on the legislation, have proved that the legislation is found to be used for an opportunity to put in place blanket amnesty provisions, as the current Maoist led government has passed the ordinance of the legislation frankly mentioning general amnesty provisions to those

who were allegedly implicated in crimes of human rights violations. And such tendency have clearly thrived the widespread practice of impunity in Nepal. On the other hand, during the Universal Periodic Review in January 2011, the Government of Nepal accepted recommendations made by Germany 'to undertake legal and administrative efforts to end torture and related impunity'. (ibid.: 107.2) And similarly, it also accepted the recommendation made by New Zealand 'to review legislation, and amend it where necessary, to remove provisions which allow government and military personnel to act with impunity'. (ibid.: 107.3) There are several other recommendations accepted by the Government of Nepal in regard to combating impunity. Despite official commitments to end impunity, and intensive litigation and campaigning by families of those killed or disappeared during armed conflict, no one has been arrested, let alone brought to justice in civilian courts for the crimes they committed.

The quest of family members of victims for justice and clarity on what happened to their loved ones continues to be blocked by both de facto and de jure impunity. The political parties and the government are seen completely indifferent in addressing the issues of victims. Besides, there are some articles and provisions in the Interim Constitution and the Comprehensive Peace Agreement (CPA), signed in November 2006, which have had enormous influence in institutionalizing impunity. The CPA, which is accepted as the most influential document to conclude conflict to logical end, was a promise to establish a TRC.¹ There are many hurdles in the laws that impede effective criminal investigations into past human rights violations. Since

the peace agreement was signed none of the successive governments has introduced any changes to the laws, including the State Cases Act, Army Act, Police Act, Evidence Act, Commission of Inquiry Act, Public Security Act and Country Code.(Advocacy Forum and Human Rights Watch 2009: 7) Instead, there has been negative progress toward establishing the transitional justice mechanisms, which is supposed to submit strong and obligatory recommendations to provide comprehensive justice to the conflict victims, including effective investigation and prosecution provision to the perpetrators, as the current government has recently submitted the legislation with apparent amnesty provision to the President. Across the country FIRs are filed in 120 different cases, referring to Advocacy Forum, Nepal. This documents the continuing failure of state authorities to initiate meaningful investigations and prosecutions relating to past grave human rights abuses. Some relatives are losing hope and are no longer actively pursuing the case, tired of constantly fighting obstacles put in their way by the police and other authorities. Some of the relatives are even too afraid for registering FIR. The police authorities often refuse to register the complaints, sometimes in the face of a court order to do so. However, the large majority of the relatives of victims have been continuing their fight for justice, despite repeated delays and obstacles erected by the authorities.

From several years to date, successive governments have evaded delivering justice and accountability for gross human rights violations by promising a transitional justice mechanism; perverting the effects of those mechanisms from complementing the normal cri-

minal justice system to replacing it. It is contrary to the clear decision rendered in June 2007 by the Supreme Court of Nepal² and the views issued by the UN Human Rights Committee in 'Giri v. Nepal' (Communication 1761/2008) and 'Sharma v. Nepal' (Communication 1469/2006).

At another level, the political parties have put pressure on the police not to investigate certain cases in order to protect their members. Institutions long opposed to accountability, most notably the Nepal Army refused to cooperate with ongoing police investigations. The governments have promoted several officers of Nepal Police and Nepal Army, who are allegedly charged of being responsible for grave human rights violations. Similarly, among the Maoists elected to CA are alleged perpetrators of human rights abuses who are found absconding at the documents of Nepal Police. The National Human Rights Commission (NHRC) is mandated to investigate alleged violations of human rights. However, it has repeatedly expressed concern about the lack of implementation of its recommendations by the governments. (NHRC 2009)

Nepal has witnessed several ad hoc Commission of Inquiry (COIs) forming to investigate into cases of public concern, including incidents of serious human rights violations, and to recommend the Government and/or authorities concerned for subsequent remedial action. Experiences collected in Nepal and around the world, as the report states, suggest that continuing practice of setting up COIs is not effective in providing remedies to victims of human rights violations unless there is significant reform in law and practice. The COIs, nevertheless, have promoted impunity by influencing investigation of human rights

1) The Comprehensive Peace Agreement is held between the Government of Nepal and the Communist Party of Nepal, Section 5.2.5, November 22, 2006 – <http://reliefweb.int/report/nepal/full-text-comprehensive-peace-agreement-held-between-government-nepal-and-communist>.

2) Rajendra Dhakal and Others v. The Government of Nepal, Writ No. 3575, Supreme Court decision, 1 June 2007. In this landmark ruling on a number of enforced disappearance cases including 80 habeas corpus writs, the Supreme Court of Nepal issued directive orders, inter alia, for the Government to enact legislation consistent with international law that would criminalise enforced disappearance; establish a high level 'Investigation Commission for Disappeared People' for inquiry into past enforced disappearances in compliance with international criteria on such commissions on inquiry; require investigations and prosecutions of persons responsible for disappearances and provide interim relief to the families of the victims without prejudice to the final outcome of these cases.

violations with political interference rather than make it go through the criminal justice process. (ICJ 2012: i)

The Government of Nepal has the duty to promptly investigate and prosecute serious crimes. In ignoring this duty the Government perils further deterioration of the justice system in Nepal and denies the right of all persons to an effective remedy. It further depicts the possibility of a repetition of past crimes if they are left unpunished. Under domestic law, where any inconsistency



© Gautam | Victim families and members of Civil Society making sit-in protests as the Maoist-led government prepares to recommend amnesty to Balkrishna Dhungel, a convicted murderer.

between domestic and international law exists, Nepal is obliged to implement the provisions of any international treaty ratified by Nepal. Nepal, like all nations, is obligated to adhere to jus cogens and provide effective remedy to the victims, bringing all the alleged perpetrators to book for criminal investigation.

The practice of withdrawing cases, including murder and rape, filed in several district courts across the country, has been accustomed in Nepal: numbering in approximately 1500, which has strengthened impunity. The governments formed after CA election have used executive power to withdraw a substantial number of cases stating in the name of steering the peace process and to implement Clause 5.2.7 of the CPA. Misinterpreting the Clause 5.2.7 of the CPA, which clearly states that the cases charged against individuals of warring parties due to political reasons are to be withdrawn, as reads, 'withdraw accusations, claims, complaints and cases under consideration leveled against various individuals due to political reasons' (Clause 5.2.7 of the CPA), the governments deliberately misused the Clause as a justification for the withdrawal of cases which constitute evident violations of international humanitarian and human rights laws. It is however

against international law to withdraw cases of gross violations of human rights.

Impunity is seen in de jure form, which is reflected in the Clemency Clause in the Interim Constitution of Nepal³. Invoking the Article 151 of the Interim Constitution the UCPN-Maoist formally requested the then Prime Minister and Home Minister to pardon Bal Krishna Dhungel, who was convicted by the Supreme Court for the murder of Ujjan Kumar Shrestha. Mr. Dhungel was a Constituent Assembly member and is yet to be arrested. And Dhungel has been collecting political strength within the Maoist party and showed his ability to pervert the course of justice and that he is escaping punishment moving around publicly. Hence, the case depicts a symbolic effort to show how Ujjan's killing is illustrative of the failure to prosecute even a single perpetrator for the thousands of cases during and in the aftermath of armed conflict in Nepal.

All these illustrations have evidently shown that the practice of politicization of crimes and criminalization in politics have been the mutually reinforcing two main scourges that are affecting the whole system of the country, the polity and the society in Nepal; when one has been acting as the cause the other has been appearing as the effect and vice versa. The apathy exposed by the Government of Nepal as well as the vague concept of articles and clauses of the laws and documents concerned have plainly depicted the de facto and de jure impunity as the most challenging and threatening hurdles to combat with in order to provide justice to victims and to envision sustainable peace in the country. ■

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3) Article 151 of the Interim Constitution of Nepal-2007 allows the cabinet to 'grant pardons (to persons convicted), and suspend, commute or reduce any sentence imposed by any court, special court, military court or by any other judicial or quasi-judicial, or administrative authority or institution.'