

A Report of
Discussion Program on Contemporary Transitional Justice in Nepal
May 2, 2018



May 3, 2018

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Background

On 25 April 2014, the Parliament of Nepal passed the Act on Commission on Investigation of Disappeared Persons and Truth and Reconciliation, creating the Commission on Investigation of Disappeared Persons (CIEDP) and the Truth and Reconciliation Commission (TRC). The Act was published on 21 May 2014. On 10 February 2015, the Government of Nepal established these two Commissions.

In June 2014, the Office of United Nations High Commissioner for Human Rights (OHCHR) issued a Technical Note providing an analysis of the Act and offered recommendations to the Government to ensure compliance with international laws and standards. The Note concluded that the provisions in the Act that give the Commission powers to recommend amnesties for gross violations of international human rights law and serious violations of international humanitarian law fail to comply with Nepal's international legal obligations, and are also inconsistent with the United Nations policy on amnesties.

The note recommended the following summaries which the act falls short on and hasn't heeded the call of OHCHR till date:

1. The Act does not contain provisions to ensure the independence and impartiality of the Commissioners or the operation of the two Commissions.
2. Provisions concerning reparations should specify that victims have the right to reparation, and that full and effective reparations include not only restitution, compensation, rehabilitation, but also measures of "satisfaction" and guarantees of non-recurrence.
3. The broad authority to facilitate reconciliation, including without the consent of the victim, is problematic as the nature of reconciliation means it cannot be forced upon people.
4. Terms such as "serious violation of human rights", "act of disappearing a person" and "reparations" used in the Act are not clearly defined and are used inconsistently. These terms should be defined in full conformity with international law

Either there is a minimal understanding of human rights or there is an acute level of indifference for human rights among political leaders in Nepal. Since the signing of Comprehensive Peace Agreement (CPA) in November, 2006, the major political parties have time and again succeeded to influence the legislation with vague and ambiguous interpretations of law and misuse of power as in the case of Truth and Reconciliation Commission. The agony and trauma of tens of thousands who lost family members during the conflict era will be never be addressed in Nepal if Comprehensive Peace Agreement is cited loosely for escaping justice.

The CPA mentions of establishing a National Peace and Rehabilitation Commission which may set up necessary mechanisms for the success of peace campaign. However, with tacit support from both sides, the commission has been used to deny justice rather than provide it.

There are 60,000 petitions registered in Truth and Reconciliation Commission from the conflict victims. Further, 3,000 are complaints are received in Commission of Investigation on Enforced Disappeared Persons (CIEDP). The mandates of both these commission should be to ensure that justice, accountability and reparations are achieved by the victims of Maoist era conflict but these commissions look to serve political interests to escape justice rather than achieve it.

In addition to this, with powers to grant amnesty to even those who were seriously involved in heinous crimes under the banner of politics, parliament passed the TRC Act. When the TRC and Commission on Enforced Disappearance bill was adopted in April, 2014, even the UN High Commissioner of Human Rights had reservations regarding failure to abide by the decisions of Supreme Court (January, 2014) and practice of minimum international standard to be considered in formation of such commissions. There have been repeated calls of amendments and to scrap out the amnesty provisions however none of these calls are heeded till date. We believe that all the Supreme Court directives instructed in cases of Transitional Justice should be adhered to.

There is also a major imbalance of power between the victims and alleged perpetrators in Nepal. The Article 22 of TRC Act states that “if a perpetrator or a victim files an application to the Commission for mediation, the Commission may mediate to reconcile mutually between them”. There are concerns that in criminal matters such reconciliation is very problematic and almost impossible. These concerns highlight the imbalance of power between the victims and perpetrators. The victims are from poor and marginalized communities whereas the alleged perpetrators are from the political parties, police, and military in our case.

The appointment to TRC has been constituted of individuals, which are political in nature and are to serve the vested interest of people in power. For a comprehensive legal proceeding, there needs to be preservation of documents of proofs which the TRC seems unable to carry out. Also, on the government hasn't heeded the directives of the Supreme Court that any mechanism for transitional justice must ensure victims the right to remedy and reparation, which includes right to truth, justice and guarantees of non-repetition and the government is required to make necessary legal and institutional measures to enable and ensure the establishment, adequate resourcing and maintenance of effective victim and witness protection mechanisms.

The 2030 Agenda for Sustainable Development mandates inclusiveness as one of its core value reflected in the pledge to leave no one behind and in a vision of a “just, equitable, tolerant, open and socially inclusive world in which the needs of the most vulnerable are met”. We as a nation if to move forward as a democratic country must not leave behind the victims of armed conflict at any cost.

Objectives

General Objective

The overall objective of this project is to conduct a high level discussion program on Truth and Reconciliation process in Nepal with view to advocate and pressurize the government to provide for the inadequacies in the functioning of the commission and amendments to the TRC Act.

Specific Objectives

1. To advocate for TRC act amendment bill to be passed by the parliament of Nepal.
2. To pressurize the Government of Nepal (GoN) to provide adequate resources as per the request of the commission.
3. To convince the political party members on addressing the issue of TRC for the elimination of impunity and achievement of justice for armed conflict cases in Nepal.

Summary of Paper Presentation by HURON President & Advocate, Mr. Indra Prasad Aryal

Following the Armed Insurgency from 2051 B.S till 2062, Nepal has transitioned into Federal Democratic Nepal. The constitution of Nepal was promulgated in 2015 the implementation of which is essential to the practice of governance and overall development of Nepal. The new political, social and economic development that has ensued in Nepal leaves an indelible mark for the progress of human rights in Nepal.

In apropos to this historical aftermath of armed insurgency, the then rebel Maoists have entered mainstream politics. It is imperative that Nepal should solve the cases of armed conflict and the controversial TRC Act remains a hurdle in implementation of justice in Nepal.

The following are the obstacles of transitional justice in Nepal:

1. Political
2. Policy Level and Structural

Step forward recommended by HURON

- Political agreement on this regards should be fulfilled in providing justice to victims of a decade long insurgency.
- Truth and Reconciliation Commission cannot solve all the 60,000 cases so HURON recommends methodology of categorizing into different themes and the commission should solve at least 10% of these cases at the onset.
- The budget for commission should be provided by the GoN.
- Special Court shouldn't be used for the solving the cases of transitional justice.
- TRC needs to be amended and new provisions should be made.
- The amendment should be done as directed by Supreme Court
- After the perpetrator is realized then the punishment should be done based on consultancy with the victims.

Comments

1:50 PM – Senior Advocate, Mr. Dinesh Tripathi

- Concern of transactional justice is a concern of international community
- International community has always recommended cases against inhumane crimes against humanity. These crimes must be pursued and provided with justice. International Criminal Court is a reality. The actors in Nepal are not prepared for accountability of armed insurgency crimes. It's a concern of political bargaining which shouldn't happen in Nepal. Human Rights cannot be a part of political bargaining.
- Although Nepal hasn't signed Rome convention, Nepal has signed and ratified ICCPR – Article 3- Right to effective remedy.
- UN guideline on Transitional Justice, 2010 states that crime against humanity cannot be given blanket amnesty. UN cannot endorse any political process of such.
- NHRC should be credible in giving recommendation.
- I have no objection on this paper presentation. As this paper states no foundational law has been made till date on TJ. Supreme Court decisions haven't been implemented. Disappearance, Torture and War Crimes hasn't been criminalized in Nepal. So the works of commission has been halted. But recommendation can be done.
- The state actors and non-state actors want blanket amnesty which is opposed to human rights laws (both domestic and international).
- Nature of crime not location is important. International community can intervene. We civil society justice does not want that. We want to build capacity ourselves and conclude the cases of transitional justice ourselves. Extraordinary cases of Cambodia, former Yugoslavia and Bangladesh cannot repeat so all parties should move towards concluding this matter. Else, Nepal will be a playground of international politics.

2: 00 PM- Advocate, Mr. Kalyan Pokhrel

- We need to establish constitution properly for his matter to move forward.
- If new laws are made now which challenge the old laws (on transitional justice) we will fall in legal despair in Nepal.
- On Bangladesh model – 1971 death punishment- Nepal may move towards this model so judiciary process should be strengthened.
- If TJ cases are taken through regular court then then the capacities of judiciary will be built for such cases.
- The system of judiciary accountability will prevail in Nepal if we go through judiciary process.

Open Discussion Session

2: 10 PM – Mr. Om Aryal, Advocate

- On the issues of 10%, I have my reservation. The view of GoN should also be taken into consideration. Emblematic Cases (i.e. persecution token cases) – this is a conflict of politics and justice- when concluding the these emblematic cases we need to take into cases. This is political instrument used in judiciary of Nepal which should be reviewed.
- The actors who have violated the law of war should be persecuted.
- Criminalization of politics and politicization of crime was done in armed conflict. E.g. both parties have killed and tortured people stating them as spies.
- Lack of investigation pertaining to cases of TJ.
- NHRC should be use their rights to investigation and recommendation on TJ . NHRC should also be given rights to monitor TRC and CIEDP.
- Special Court cannot be made. This is a political act. Regular court should be able to decide on cases of TJ.

2:20 PM – Mr. Charan Prasai, former President, HURON

- Commissions should be accountable, victim centered but this paper calls on politics centered TJ in Nepal (I hope this is corrected and withdrawn from this paper).
- On the issue of Special Court, there is reservation.
- Case of Krishna Prasad Adhikari – Chitwan District Court hearing – 4 years in the decision – political influence has now lengthened this process. This shows that our judiciary isn't impartial. So, special court should be established evading political influence. Since it will be based on Kathmandu, it will be monitored by CSOs in Nepal and international community. How can we make Special Court, accountable, independent and capable? I implore you to consider this question.
- Emblematic cases – we cannot let this happen for human rights are universal.
- To chairpersons of commissions- I entreat you not to be an obstacle the TJ process. We don't believe in you and the extension of these commissions for the next four years shouldn't have happened.

2:30 PM -Advocate, Mr. Din Mani Pokhrel

- Peace Process – the essence of CPA should be considered for the issues of TJ. We cannot forget the essence of CPA which should be the process of TJ in Nepal.
- International minimum standard – what does that mean ? This is not universal. Each country has it's process and there is international variation. We need to be compatible with international rules.
- We need to consider these variations e.g. Supreme Court initially decided on cases pertaining to CPA making it the guiding document. We have now developed two parallel structures i.e. Court vs. Commission. We need to debate on this issue. There is dual jurisprudence.
- We need to implement the decision of Supreme Court. NO objection on this.
- The question we need to ponder on is if we should move forward through commissions or courts?
- OHCHR notes (2014) has commented on this emblematic cases.

2:40 PM – Prof. Kapil Shrestha, former HURON President

- TJ system is an exercise in grant failure.

- Contemporary TJ is a politics of appeasement and politics of deception.
- There is hypocrisy of democracy in Nepal which has stood the test of time since Panchayat till date.
- Culture of Impunity prevails in Nepal. As an academic, I repeatedly assert this. There is no implementation of any legal instrument.
- TJ is a part of Human rights universalism. No compromise. No dilution. TJ issue in Nepal is being diluted and deflected.
- This stage in Nepal is the defining stage of human rights processes.

2:45 PM – Mr. Suman Adhikari

- There is no agreement in providing justice. There is agreement in not providing justice.
- Umbrage against two commissions.
- The commissions' vision is the vision of political parties.
- 0 case concluded in three years!
- The actors who created conflict are the ones who have to provide justice. This is a drama. The commission is a weapon for political parties.

2:50 PM – Mr. Rajan Kuikel, President, Amnesty International, Nepal

- We have been repeating these issues in different forums. One positive point of this forum included Minister of Law of most powerful government in Nepal.
- We need to know what the two commissions are doing. No one has an idea, including stakeholders.
- This government is capable of giving justice to TJ cases. If this government cannot do then the cases will move to international forum.
- I don't have any reservation against the commission because the political powers are responsible (Oli, Deuba, Prachanda) hold the key.
- If the victims are to be provided justice, this government has the opportunity to do so.

2:55 PM- Mr. Pradeep Pokhrel

- As a recommendation committee member to the appointment of personals to the two commissions, we have been till date, conducting ideological debate instead of practical debate.
- The ideological forces aren't working for concluding TJ in Nepal.
- We have made two commissions, what international standard are we talking about? The supreme court decided on this issue so we agreed to establish these two institutions. There is a conflict between CIEDP and TRC.
- There are no commissions in the world which have followed international standard. Each country has its own peculiar characteristics.
- The model was based on Sierra Leon and the implementation model was South African model, upon my observation.
- The commission in its fourth year isn't in the condition (budgeting, human resource) to provide any decision. No we CSOs need to come up with a solution to this issue.

3: 00 PM – Mr. Lenin Bisa, former Child Soilder

-As child solider (verified by UNMIN), I have reservation against the whole process in Nepal.

- Is making of a child soldier a crime or not?
- Dil Bahadur Rangtel a 12 old child was declared first martyr by the Maoists.
- Is there a solution to our plight as former child soldier?

3:05 PM – Ms. Devi Sunwar, mother of Maina Sunwar

- I have reservation against the extension of two commissions in Nepal. The commission should have been made 8 months after CPA but it took 8 years for the commissions to be established.
- Case of Maina Sunwar
- The army themselves identified the culprits and I registered case against the four perpetrators.
- It's been 14 years, I haven't given funeral to my daughter.
- The constitution of Nepal is the constitution smirched in blood of our sons and daughters and now the actors who created conflict are now in charge of doling out justice. I entreat the state to give us justice. The cases of Mina Sunwar should be provided justice, such crime is a crime against humanity.

3:15 PM – Mr. Baburam Giri, Senior Advocate

- The chairperson of all three commissions are present here and we all know what the issues are; the constitution has addressed the issues but seems far fetching in lack of implementation.
- The commission was established for the essence of 'forgive and forget' and the nature is depicted in lack of implementation.
- International humanitarian law is always attracted even though the CPA distorts it shrewdly.

3:20 PM – Mr. Subodh Raj Pyakurel, President, INSEC

- This paper depicts the issue of TJ as political. I think it is right. CPA states – "rajnitik dwanda ko kram ma" which means that the issue is political.
- In apropos to establishment of commission – there is no universality.
- Where there is UN or any international community involved there peace process has flopped. The political leaders of Nepal don't take CSOs in consideration at all.
- Without popular faith, TJ mechanism cannot be successful.
- No punishment, no crime – our Supreme Court has already stated.
- I don't think Nepal's economic, social, cultural context was responsible for armed conflict. It was certainly a basis of on conflict.
- We don't need to be afraid of international law. The process needs to be perfect. There are several ways of indicative punishment.

3:30 PM – Ms. Madhavi Bhatta, Commissioner, TRC

- The TRC isn't influenced by political whim, lack of human resource or budgeting constraints.
- We need to consider our own (CSOs) if our own actions are affecting the TJ processes.
- The commission is considering establishing branch offices in all 77 districts.
- The commission needs a road map.
- The commission needs an advisory team (addressing Law Minister) for the deciding on these 60,000 cases.
- For e.g. on the issue raised by child soldier. The commission hasn't been able to decide on it. When I raised this issue, it was given a political issue.

- The political coordination is lacking among political parties which is weakening the process.
- The investigation is effective but there is gap between commission's capacity and expectation of people.

3:50 PM- Mr. Lokendra Mallik, Chairperson, CIEDP

- I welcome HURON on this program
- We at the commission have understood the expectation and anguish of victims against the commission.
- The commission is committed to investigation, recommendation and nature of conflict that occurred in Nepal.
- I am grateful to HURON for making us realize many obstacles that we are facing and suggesting how we should move forward.
- You need to understand how the context of work that our commissions are doing and how delicate it is. 3,300 complaints are being investigated in CIEDP. Now 500 cases remain to be solved (new update).
- If we cannot punish the perpetrators then there justice cannot sustain in Nepal.
- We have been pushing for TRC amendment and human resource with the government.

4:05 PM – Mr. Sher Bahadur Tamang, Minister of Law

- A Pratisthapan bidhyek is being made for the cause
- I understand the urgency to solve the tj cases. The government is earnestly discussing the commission's work, tj mechanism, amendment act, types of punishment.
- If we do not solve these cases, it will sow the seed of future conflict.
- I would like to request the CSOs to keep up the campaigning and incessant pressure to all authorities concerned.
- The government needs consultancy from CSOs, victims and those who are concerned.
- In apropos to commissions grievance, the GoN is looking forward to establishment of mobile institutions.

4:20 PM – Mr. Anup Raj Sharma, Chairperson, NHRC

- NHRC being a constitutional body will always be involved in any HR related issues however, confidential the issue may be.
- On the criticism of reconciliation rather than punishment, we need to understand the context of CPA. The need to move forward with transitional justice cases is explicitly mentioned in its Preamble (4th paragraph) Articles 3(4), 5.2 (2), 5.2(5) which concludes that commissions were not established for reconciliation only. Further mentioned on Articles 7, 7(1) and 7.1(3)
- Commission repeatedly says they need human resource and amendment.
- There are two reports to be produced by these two commissions 1. Preliminary report and 2. Final report. If these reports are made final then attorney general will provide decide.
- The commission needs to categorize complaints (i.e. 60,000) which isn't a hindrance for commission.
- If another individual is not in armed conflict and is murdered then it is a crime and criminal acts can never be political.
- In apropos to Maina Sunwar case, a body (military) of government cannot challenge the government.
- In apropos to Special Court, there is a high chance that the court will come up with uniform decisions in similar cases which the regular court doesn't guarantee. Only specialized judges should preside over the court. Since the cases are special, it needs special court.

Concluding Remarks

4:45 PM – Mr. Indra Prasad Aryal

- The issue of 10% (rate) bin the paper is a methodology (like research methodology) to be used after categorization of TJ cases among over 60,000 cases registered in the commissions.
- I would like to reassert that the cases of TJ are political.
- The case of Krishna Prasad is a crime not a political case or a case in war. There is torture involved also including revenge motive.
- We have to understand that cases registered in commissions can be a seed of future conflict and in order to alleviate the problem we civil society organizations must work together in a unified way.

List of Guests

Chief Guest

Mr. Anup Raj Sharma, Chairperson

Honorable Guests

1. Mr. Sher Bahadur Tamang, Minister of Law, Justice and Parliamentary Affairs
2. Mr. Lokendra Mallik, Chairperson, CIEDP
3. Ms. Madhavi Bhatta, Commissioner, TRC
4. Mr. Kul Bahadur Gurung, Leader, Nepali Congress

Other Distinguished Guests

1. Mr. Subodh Raj Pyakurel, President, INSEC
2. Mr. Charan Prasai, former President, HURON
3. Prof. Kapil Shrestha, former HURON President
4. Mr. Pradeep Pokhrel, Human Rights Activist
5. Mr. Rajan Kuikel, President, Amnesty International, Nepal
6. Mr. Baburam Giri, Senior Advocate
7. Advocate, Mr. Din Mani Pokhrel
8. Mr. Om Aryal, Advocate

Photographs







अहिलेको संक्रमणकालिन न्याय

■ ईन्द्र प्रसाद अर्याल^१

● विषय सन्दर्भ:

वि.सं २०५१ देखि २०६२सम्म चलेको शसस्त्र द्वन्दको कारण नेपाल संवैधानिक राजतन्त्रात्मक शासन व्यवस्थाबाट गणतन्त्रात्मक व्यवस्थामा परिणत भएको तथ्य कसैले पनि ईन्कार गर्न सक्दैन । शसस्त्र द्वन्दबाट मुलुकमा आएको राजनैतिक परिवर्तन र नयाँ रूपमा स्थापना हुन आएको राजनैतिक व्यवस्थाको स्थापना, सुदृढीकरण, स्थायित्वको लागी मुलुकले राजनैतिक संक्रमणको विभिन्न चरणहरु:शान्ति, न्याय एवं पूर्णस्थापना पार गर्नुपर्ने भन्ने कुरा शसस्त्र द्वन्दबाट गुज्रिएका विश्वका विभिन्न मुलुकहरुका अनुभवबाट पाउन सकिन्छ ।

नेपालले राजनैतिक संक्रमणकालको पहिलो र महत्वपूर्ण चरण अर्थात शान्तिको चरण पार गर्नसकेको जस्तो देखिन्छ । तत्कालिन सरकार र विद्रोही माओवादी २०६३ साल मंसिर ५ गते भएको विस्तृत शान्ति सम्झौता, सोही सम्झौतासमेत समाविष्ट भई जारी गरिएको अन्तरिम संविधान २०६३, विद्रोही सेनाको समायोजन, अन्तरिम संविधान बमोजिम गठन भएका संविधान सभाबाट २०७२ सालमा बनेको संविधान बमोजिम भएको तीनवटै तहमा भएका निर्वाचन सम्पन्न भई तिनैवाटै तहको सरकारका कार्यपालिका एवं व्यवस्थापिकामा तत्कालिन विद्रोही दलको सम्मानजनक एवं सार्थक प्रतिनिधित्व भई देशमा अब शान्ति र स्थायित्व हुनेमा नेपाली जनता आशावादी देखिएका छन् । तर, विस्तृत शान्ति सम्झौता एवं अन्तरिम संविधान समेतले अपेक्षा गरेको स्थायी शान्तिको लागी अत्यावश्यक द्वन्दकालिन हिंसा एवं मानव अधिकार उल्लंघनका घटनाका दोषिहरुलाई हालसम्म पनि कारवाहीको दायरामा ल्याउन सकिएको छैन । कारवाहीको दायरामा ल्याइएकाहरुलाई पनि राजनैतिक दबावले कारवाही गरी अन्तिम टुङ्गोमा सकिएको अवस्था छैन । गंगामाया अधिकारीको मुद्दा यसको ज्वलन्त उदारणको रूपमा रहेको छ ।

संक्रमणकालिन न्यायको सैद्धान्तिक एवं व्यवहारिक सन्दर्भमा भन्नुपर्दा द्वन्दको समयमा हिंसात्मक ज्यादतीमा संलग्न दोषीलाई कारवाही नगरिएमा दिगो शान्तिको परिकल्पना गर्न सकिदैन । यसको केही झलक तीनवटै चुनावमा भएका केही घटनामा देखिई नै सकेको छ । यद्यपी द्वन्दकालिन घटनाहरुको सम्बन्धमा छानविन गरी कारवाही गर्न बेपत्ता व्यक्ति छानविन, सत्य निरुपण तथा मेलमिलाप आयोग ऐन २०७१ जारी भई सोही ऐनको व्यवस्था बमोजिम बेपत्ता पारिएका व्यक्तिको छानविन आयोग र सत्य निरुपण तथा मेलमिलाप आयोग समेत स्थापना भई हालसम्म पनि कार्यरत छन् । द्वन्दकालमा भएका विभिन्न घटनाका सम्बन्धमा सत्य निरुपण तथा मेलमिलाप आयोगमा पटकपटक गरी ६१,६१५ वटा र बेपत्ता पारिएका व्यक्तिको छानविन आयोगमा ३,१३८ वटा उजुरीहरु परेका छन् । तर, ती आयोगहरुले पिडितहरुले राहत महशुस हुने किसिमले कुनै काम कारवाही गर्न सकेको छैन । आयोगहरुले काम गर्न नसक्नुमा ती आयोगहरुले द्वन्दकालका घटनामा कारवाही गर्न मिल्ने कानून नबनेको, बजेट र कर्मचारीहरुको कमी आदि कारणहरु रहेको बताउने गरेको भए पनि ती कारणहरुले केही हदसम्म आयोगको कामवाहीलाई असर परेको छ । तथापी समग्र संक्रमणकालिन न्यायमा प्रभावपार्ने तत्वहरु अरुनै रहेको देखिन्छ ।

● नेपालका सन्दर्भमा संक्रमणकालिन न्यायका अवरोधहरु:

क) राजनैतिक:

- ❖ सत्य निरुपण तथा मेलमिलाप आयोगले द्वन्दकालिन घटनाको छानविन र कारवाही गर्न घटनालाई समुहगत रूपमा विभाजन गरी गर्ने भनेता पनि प्राप्त उजुरीमध्ये कस्ता किसिमका उजुरीहरुलाई प्राथमिकिकरणको आधारमा र कति संख्यामा गर्ने भन्ने कुरामा राजनैतिक रूपमा भद्र सहमति नहुनु ।

१. अध्यक्ष, नेपाल मानवअधिकार संगठन

- ❖ द्वन्द्वमा प्रत्यक्षरूपले संलग्न राजनितिक दल र अन्य राजनैतिक दलहरूमा आफ्नो राजनैतिक अभिष्ट पुरा गर्न राजनीति र राजनीतिको आवरणमा गरिएको र गरिने हत्या, हिंसा लगायतका अत्याचारलाई कानून, आचार, नीति, मानवअधिकार उल्लंघनका घटनाभन्दा माथी राखिनु वा राख्ने प्रयत्न गर्नु ।
- ❖ राजनीतिक दलहरूमा भविष्यमा पनि हिंसा र बल प्रयोगलाई आफ्नो राजनीतिको महत्वपूर्ण रणनीतिका रूपमा कायम राख्ने प्रत्यक्ष एवं सुसुप्त मनसुवा रहनु । (वर्तमानमा हिंसात्मक गतिविधी गर्ने दल एवं विगत २५ वर्षको समयावधीको सत्ता पक्ष एवं प्रतिपक्षी दलको व्यवहार)
- ❖ देशलाई प्रजातान्त्रिक रूपमा नियन्त्रण गर्नु भन्दा डर, धाक, धम्किको आधारमा नियन्त्रणमा राख्ने सोच राख्नु । जसका कारण प्रचलित कानून एवं अन्तराष्ट्रिय मानवअधिकार कानून बमोजिम अपराध भनि परिभाषा गरिएको कार्यवाट समेत दाषिलाई उन्मुक्ति दिनु एवं दिने प्रयत्न गर्नु ।
- ❖ संक्रमणकालिन न्यायलाई सत्ता प्राप्तिको दाउपेचको रूपमा राख्नु र राख्न खोज्नु ।
- ❖ संक्रमणकालिन न्यायको आवरणमा न्यायपालिकाको स्वतन्त्रता संकुचित गर्नु वा गर्न खोज्नु एवं न्यायिक प्रक्रियालाई अवरोध एवं कमजोर बनाउने अभिष्ट रहनु ।

ख) नीतिगत/संरचनागत

- ❖ संक्रमणकालिन न्यायको सन्दर्भमा आयोगहरू त बनेका छन् तर त्यसले स्वतन्त्रापूर्वक कार्य गर्न चाहिने आवश्यक कानून, बजेट एवं कर्मचारीहरूको व्यवस्था नहुनु ।
- ❖ द्वन्द्वकालका घटनाका सम्बन्धमा अदालतहरूमा विचाराधिन मुद्दाहरूसमेत आयोगहरूबाट टुङ्ग्याउन खोज्नु ।
- ❖ आयोगहरूका सचिवहरूको छिटो छिटो सरुवा हुनु ।
- ❖ आयोगका सदस्यहरूको पेशागत दक्षताको कमी हुनुको साथै राजनैतिक रूपमा विभाजित हुनु ।
- ❖ सम्मानित सर्वोच्च अदालतबाट संक्रमणकालिन न्यायको सन्दर्भमा जारी भएका आदेशहरू बमोजिम कानूनहरू नबन्नु एवं संशोधन नगर्नु ।
- ❖ द्वन्द्वकालमा भएका घटनाका दोषीहरूलाई विशेष अदालतबाट कारवाही गर्ने वा साधारण अदालतबाट कारवाही गर्ने भन्ने नीतिगत अस्पष्टता रहनु ।
- ❖ द्वन्द्वकालका घटनाबाट पिडीत दलित, महिला, अपाङ्गजस्ता समाजका कमजोर पारिएका वर्गको हकहित संरक्षण र पुर्नस्थापनाको ठोस कार्ययोजना नहुनु ।

● नेपालको वर्तमान परिदृश्यमा संक्रमणकालिन न्याय:

सशस्त्र द्वन्द्वको मुल कारकतत्वको रूपमा रहेको तत्कालिन विद्रोही माओवादीको माग बमोजिमको संविधानसभाले बनाएको नयाँ संविधान बमोजिम भएको ३ वटै तहको निर्वाचन बमोजिम तत्कालिन विद्रोही पक्षको ती सरकारहरूमा सार्थक उपस्थिति रहेको छ । साथै तत्कालिन विद्रोही पक्षको रूपमा रहेको ने.क.पा. माओवादी केन्द्र र ने.क.पा. एमाले विच पार्टी एकिकरण गर्ने सहमति हुनुको साथै प्रदेश सभा र केन्द्रिय संसदको चुनावमा तालमेल समेत भई २ नं नै प्रदेश बाहेकको नेतृत्वमा ती राजनैतिक दलहरूको सरकारसमेत गठन भएको र यसबाट विस्तृत शान्ति सम्झौता एवं स्थानिय चुनावसम्म कायम रहेको द्वन्द्वका वेलाका सत्तापक्ष, प्रतिपक्ष एवं विद्रोही पक्ष रहेको त्रपक्षीय शक्ति सन्तुलन दुईपक्षीय रूपमा कायम हुन गएको र यी दुवै पक्षको मिलिभगतमा द्वन्द्वका वेलाका पिडीतहरूले न्याय नपाउने खतरा एकातर्फ सृजना हुन गएको छ ।

अर्कोतर्फ नेपाल पक्षीय विभिन्न अन्तराष्ट्रिय मानव अधिकार सम्बन्धि कानूनबाट सृजित उत्तरदायित्व पालना गर्ने क्रममा ती अन्तराष्ट्रिय कानूना प्रावधानहरूलाई नेपालको संविधान (स्वच्छ, सुनुवाई, पिडीतको हक आदि) र २०७५/०५/०९ गते देखि नेपालमा लागु हुने मुलुकी अपराध संहिता ऐन २०७४ (यातना, जातिहत्या, व्यक्ति बेपत्ता पार्ने, गोपनियतासंग सम्बन्धित कसुर आदि)ले समाविष्ट गरिएको सन्दर्भमा द्वन्द्वकालिन घटनालाई समेत उल्लिखित संवैधानिक एवं कानून प्रावधान प्रतिकुल नहुने किसिमले सम्बोधन गर्नुको कुनै विकल्प छैन । यदि माथी उल्लिखितशक्ति सन्तुलनका कारण संविधान र कानून विपरित हुने गरी

संक्रमणकालिन न्याय प्रदान गर्ने जमर्को गरिएमा नेपालको लोकतान्त्रिकरण र कानूनी शासनमा ठुलो धक्का लाग्नुका साथै यसबाट अतिवादी निरङ्कुश तत्वले टाउको उठाउने सम्भावना देखिनुका साथै तत्वले बंगलादेशमा जस्तै द्वन्द्वकालिन घटनालाई सिरानी हाली विपक्षीहरूसँग रिसईवी साध्ने खतरा रहिरहने देखिन्छ ।

हाल आएर विद्रोहीसमेत संलग्न भएको करिब २/३ बहुमतको संघिय सरकारले बेपत्ता पारिएको व्यक्तिको छानविन, सत्य निरुपण तथा मेलमिलाप आयोग ऐन २०७१ संशोधन गर्ने भन्ने समाचार प्रकाशित भएको सन्दर्भमा उक्त संशोधन सम्मानित सर्वोच्च अदालतले सुमन अधिकारी समेत विरुद्ध नेपाल सरकार (ने.का.प. २०७१, अंक १२, नि.नं ९३०३, पृष्ठ २०६९) अनुरूप हुनु अत्यावश्यक छ । वर्तमान शक्ति सन्तुलनको अवस्थामा उक्त संशोधन सम्मानित सर्वोच्च अदालतको आदेश विपरित द्वन्द्वकालका घटनाका दोषीलाई नाम मात्रको कारवाही गरी उन्मुक्ति दिने सोचले आउन सक्ने सम्भावना रहेको र यसबाट पिडीतले न्याय नपाउने अवस्था आउनुको साथै नेपालको अन्तराष्ट्रिय छवी विभिन्न, हाल उन्मुक्ति पाउने दोषीहरूले हाल वङ्गलादेशमा स्वतन्त्रता आन्दोलनका दोषीहरूले भोग्नु परेको नियति भोग्नु पर्ने र विश्वव्यापी क्षेत्राधिकार अन्तर्गत अन्य देशबाट कारवाही हुने त्रासमा वस्तुपर्ने हुन्छ । जसबाट संक्रमणकालिन न्यायको उद्देश्य अनुरूप द्वन्द्वको घाउमा मलम नलागी पूनः बल्झ्ने अवस्था रहने देखिन्छ ।

● संक्रमणकालिन न्यायका सम्दर्भमा अवको कदम

- ❖ हत्या, यातना, बलात्कार, लगायतका गम्भिर मानवअधिकार उल्लंघनका घटनामा प्रत्यक्ष संलग्न दोषीहरूलाई कारवाही गर्न राजनैतिक सहमति हुनुपर्ने ।
- ❖ बेपत्ता पारिएका व्यक्तिको छानविन आयोगमा परेको उजुरीवाहेक सत्य निरुपण आयोगमा परेका सबै ६९६१५ वटा उजुरीको कारवाही गर्न लामो समय लाग्ने भएकाले ती उजुरीहरू विभिन्न वर्गमा विभाजन गरी कुल उजुरीको कम्तिमा १० प्रतिशतका दरले हुन आउने उजुरीको छानविन र कारवाही हुनु जरुरी छ । यदि हत्या, यातना, बलात्कार, लगायतका गम्भिर मानवअधिकार उल्लंघनका घटना नै १० प्रतिशत भन्दा बढी हुन आएमा सो भन्दा बाहेकका घटनाका सन्दर्भमा पनि प्रत्येक वर्गबाट कम्तिमा १० प्रतिशत उजुरी माथी कारवाही गर्ने गरी राजनैतिक सहमति हुनुपर्ने ।
- ❖ आयोगहरूलाई चाहिने बजेट, जनशक्तिहरू नेपाल सरकारले उपलब्ध गराउनुपर्ने ।
- ❖ द्वन्द्वकालका घटनाका दोषीहरूलाई विशेष अदालतबाट कारवाही नगरी साधारण अधिकारक्षेत्रबाट कारवाही हुनुपर्ने ।
- ❖ अदालतबाट दोषी ठहर गरेपछि पनि पिडीतको पूर्ण मञ्जुरीमा मात्र दण्ड, जरीवाना, माफि, मिन्हा गर्नुपर्ने ।
- ❖ सर्वोच्च अदालतको आदेश बमोजिम ऐन संशोधन गर्नुका साथै थप कानून बनाउनुपर्ने ।
- ❖ सम्पत्ती सदैव विवाद र हिंसाको जडको रूपमा रहेको सन्दर्भमा दिर्घकालिन शान्तिका निम्ति द्वन्द्वकालमा कब्जामा लिईएको सम्पत्ती पूर्णरूपमा सम्बन्धित मालिकलाई फिर्ता गर्नुपर्ने ।
- ❖ द्वन्द्वकालका घटनाबाट पिडीत दलित, महिला, अपाङ्गजस्ता समाजका कमजोर पारिएका वर्गको हकहित संरक्षण र पुनर्स्थापनाको लागी ठोस कार्ययोजना बनाई लागु हुनुपर्ने ।
- ❖ गंगामाया अधिकारी जस्ता न्यायका याचक द्वन्द्वपिडीतले दिएको जाहेरीबाट हालसम्म अदालतहरूमा विचाराधिन रहेका मुद्दाहरूको सिध्न कारवाही र किनारा लगाउने ।
- ❖ नेपालमा द्वन्द्व पूनः नदोहोरियोस भन्नाको लागी सोको त्रासदि सम्झाउने किसिमले विद्यालय पठ्यक्रम बनाउने, स्मारक, संग्रालय बनाउने आदि कार्य गर्ने ।