

Lessons from history: Impunity undermines peace **Jyoti Sanghera and Terry Savage ***

The transformation from conflict to peace, from a bloody past to a stable future is neither easy nor smooth. It cannot be. The history of such journeys, from conflict to peace, based on the experiences of many post-conflict societies around the world, signals many invaluable lessons for Nepal. One such lesson is that the past cannot be wished away, nor brushed under the carpet or denied and ignored. For many of those Nepalis who have suffered gross violation or abuse, loss and disappearance of loved ones, the past is not finished yet. Its violence continues to ravage their daily lives - vivid in its detail, heartrending in its continual reminders of loss, brutal in its continuing impact. For the victims of the conflict the past is still happening. And unless confronted, resolved and reconciled, this troubled past will continue to hamper the present and the future of Nepal.

As in many post-conflict societies, reluctance to address violations and abuses perpetrated amid the turmoil of the conflict is becoming a worrying trend in Nepal. Having taken the brunt of the conflict, victims of human rights violations are now being asked to accept a peace in which their voices, their presence even, have become an inconvenience. *Achanoko chot khukurile k bujhos!* The knife does not feel the pain of the chopping board.

Beginning in 2008, large numbers of criminal cases involving violations of human rights were withdrawn by Government, under pressure from political parties, ostensibly because the acts had been "politically motivated". The practice has continued, despite a Supreme Court interim order in 2008 directing that further withdrawals be suspended. More recently, the Supreme Court has suspended proceedings in several cases on the basis that such allegations should be the domain of the Truth and Reconciliation Commission (TRC) envisaged under the Comprehensive Peace Accord (CPA) and the Interim Constitution. Despite the fact that legislation for the commissions has been with the Legislature-Parliament over a year and that the mandate of the commissions, and specifically how the commissions will relate to the courts, has not yet been established.

Any attempt to withdraw conflict related cases from the courts, would suggest an interest in some quarters in an impunity, formalized, among other means, through the long awaited transitional justice commissions.

The political appeal, in the short term, of not acknowledging reprehensible criminal acts committed during the conflict is obvious. For one, Nepal's peace process inevitably includes figures who established their leadership credentials in the context of conflict. It was here that many gained the trust of communities and proved their readiness to struggle for shared principles. Among these leaders will be at least a few determined to conceal their responsibility for a particular incident, or an order, in which human rights violations ensued. Opening up discussion that directly touches or potentially implicates any public figure is sure to draw the ire of partisans and can be expected to have consequences for the peace process.

A second argument for not tackling gross violations and abuses perpetrated during the conflict is the challenge that the needs of victims will pose to a public keen to move on. Victims live with intimate recollections of what they have endured, mixed in with irrepressible questions: What was done to my loved one? Where are their remains? How can I let the past now rest? Do I even want to?

Merely listening to such heartrending questions is a painful reminder for any nation of the continuing impact of the conflict.

It has, been precisely in response to victims' needs that truth commissions have been established in numerous societies in quest of peace. Their role is not to undermine criminal prosecutions, , but to complement them by offering alternative strategies of establishing, in the words of one Chilean commissioner, "the whole truth and as much justice as possible."

The complementarity of truth commissions derives chiefly from the priority they give to victims and the innovative - often transformative - approach to truth they espouse.

In criminal justice proceedings, victims may, at most, participate in proceedings strictly focused on someone else - the alleged perpetrator. Courtrooms simply do not have the capacity, or the mandate, to work with the intimate effects of violations or to offer means of restoring, to the extent possible, an individual victim's life. Their task is to establish culpability, punish the criminal, and thereby uphold publicly accepted norms, as reflected in the law of the land, as well as international obligations contained in treaties to which a State is party. Truth commissions, by contrast, grapple with repairing the harm done to those who bore the brunt of the conflict. That process begins with the simple courtesy of *listening* - of creating conditions in which victims can openly recount their stories and trust that they will be heard with respect. A next step is simple to ask, what would help now?

A growing body of international jurisprudence reflects the answers victims have been giving, in numerous, different post-conflict contexts. Consistently, primacy is given to establishing the truth - finding the remains of a loved one forcibly disappeared, knowing whether a loved one died peacefully or what their last words were, establishing who gave the order to torture or to go into a village and commit pillage and rape. And it is here too, with *truth recovery*, that truth commissions may be helpful in their complementarity to criminal prosecutions.

The type of truth pursued in a courtroom is based on verified evidence subjected to legal analysis. It is therefore crucial for setting the record straight, ensuring justice for crimes committed and providing victims a measure of public vindication. Yet it will prove limited given that the crimes under investigation took place in conditions of violent conflict, amid the chaos of which evidence may be easily destroyed.

Prioritizing the voices of victims produces a heightened sensitivity to truth, as well as to its transformative potential. The truth and reconciliation commission in South Africa identified at least four types of truth: factual truth; narrative truth, to refer to the stories recounted by victims, as well as by perpetrators who sought, often at great personal cost, to explain their acts; dialogical truth, to describe the honesty that sometimes emerged through stakeholders' interactions; and restorative truth, to refer to the sort of truthfulness that helped people put their lives back together, such the apology of several public figures for participating in acts or policies they now saw had wreaked immense damage.

A similar commission in Peru focused specifically on truth recovery in a few high profile cases in order to identify patterns of culpability and to propose a comprehensive overhaul of corrupt policies and institutional cultures. East Timor's

commission initiated reconciliation between victims and perpetrators of non-lethal crimes, such as property theft, who were willing to acknowledge fault.

Truth commissions such as these have sought to avoid the creeping impunity that may now be evident in Nepal. They sought out open discussion of the worst of crimes, perpetrated in the worst of times, among those who got the worst of it and those who did it to them in order to help establish measures for assuring non-repetition. And central to those measures is accountability in the institution established to preserve the rule of law in the land – the courts. It is the least a society can do, in the words of one prosecutor at the Nuremberg trials, to answer those “in their graves, crying out not for vengeance, but that this shall not happen again.”

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