

Article

Why Political Appointments to Truth Commissions Cause Difficulties for these Institutions: Using the Crisis in the Transitional Justice Process in Nepal to Understand How Matters of Legitimacy and Credibility Undermine Such Commissions

Jeremy Sarkin and Ram Kumar Bhandari*

Abstract

Over five decades and with dozens of examples of truth commissions to look back on, an undeniable aspect of their legacy is that the world has become far more focused on dealing with the past and uncovering the truth about past atrocities. While there is typically a focus in the literature on the more widely publicized and famous truth commissions, scores of other processes have taken place, especially since the 1990s. Post-conflict or divided societies have designed institutions in ways that achieve specific objectives but at the same time conform to international standards, creating a reputation of being both democratic and accountable. Using the prism of Nepal, this article examines why the process to establish transitional justice mechanisms, and specifically truth commissions, needs to be legitimate and credible for them to be effective and be impactful. It specifically examines issues relating to appointments to such institutions and why such appointments need to be done independently and not overtly politically. It scrutinizes why appointment mechanisms and processes are so important to enhancing the legitimacy and independence of such bodies. The case of Nepal is used as an example to extrapolate conclusions about the problems that affected its processes, and the various crises that have

* Jeremy Sarkin is Distinguished Visiting Professor of Law and member of CEDIS at NOVA University, Lisbon Law School, Portugal; Research Fellow, University of the Free State, South Africa; and an Attorney in South Africa and in New York State. Ram Kumar Bhandari is founder and president of National Network of Families of the Disappeared and Missing, Nepal (NEFAD), and co-founder and advisor of Conflict Victim Common Platform for Transitional Justice; he is a researcher in transitional justice, and a member of CEDIS, at NOVA School of Law in Lisbon, Portugal.

emerged in those processes. The article argues that commissioners ought to be chosen on the basis of their impartiality, moral integrity, and known commitment to human rights and disclosure of the truth. This is essential to ensure that the process is seen to be independent and credible.

Keywords: appointment processes; dealing with the past; enforced disappearances; Nepal; transitional justice; truth commissions

Introduction

In the modern age, dealing with the past is a common focus of states after conflict (Sarkin 1999). In some cases, dealing with the past is a direct result of a peace agreement that mandates such a course of action. In these circumstances, the peace agreement is an agreement not only to end the conflict but also to dictate what will be done at a defined point or during a defined period in the future to uncover past wrongdoing and reconcile the divisions within the post-conflict society. Such peace agreements can be controversial at the time they are drafted or some time later if they contain provisions that are not widely accepted or unanimously agreed upon. A provision can relate to a variety of matters, although the most frequently contested are those providing amnesty to people who have committed human rights violations.

After a state has moved to a situation of peace or greater peace, the question of how to deal with the past is canvassed (Sarkin and Davi 2017b: 2). In states where there has been more of a reform process or where the parties have agreed to compromise, a truth commission is often the vehicle of choice used to deal with wartime human rights violations (Sarkin 2018). As Freeman noted in 2006, a truth commission's remarkable ability to shed light on contested historical events and to disseminate information is the most powerful attraction and reason for the burgeoning popularity of the mechanism (Freeman 2006: xiv).

These processes are more successful and are better received if they attract public support. This occurs, in part at least, if the process of setting them up and the people appointed to them are credible. Trust is an essential element of a transitional justice process (Barton et al. 2017). Without trust, such processes will be stymied in what they set out to achieve. The attitudes towards such processes are fundamental (Aguilar et al. 2011). How they are viewed has a huge bearing on the role that they play and whether they are seen to have a positive effect (Sarkin and Davi 2017a: 19). The truth issues under investigation will only be viewed as non-political and non-partisan if the processes to establish the institution itself and to appoint its members have been undertaken in ways that promote these ideals. The 'truth' which emerges will be trusted only if it is viewed as resulting from processes that were not subject to political manipulation. Therefore it is unsurprising that generally truth commissions are established in ways that try to avoid perceptions of political control and political interference by the state. While it is recognized that dealing with the past is highly political, and the process to do so falls squarely in the political arena, the critical issue is the extent to which the process is politically controlled. If overt political control by government, or by political parties, is perceived by the community at large to have occurred, then often the institution and the process will be viewed as problematic. In those cases, the perception will be that political control is occurring to manipulate what truth emerges and what the process achieves. Avoiding even the slightest perception of government or political

party influence over such processes is essential to ensure that all role-players work with, and accept the work and results of these institutions. This is essential if such bodies are to affect the societies that they work in. The process will really only work if the community as a whole buys into the process and views what the institution does and who serves on the organization as appropriate and credible.

Critically, problematic appointments to the positions of commissioners often undermine these institutions and therefore have negative effects on the process as a whole. Inappropriate appointments are often when people are appointed not for their skills or experience, but for political reasons. It is clear that appropriate appointments to a commission are fundamental to its success, as they determine whether the institution comprises people who can be trusted, people with whom the community wants to work, and whether they have the requisite skills and experience to carry out the task at hand (Sarkin 2016: 306). Despite well-chosen appointments being central to the success of a truth commission, it has been found that '[l]ittle scholarship on commissioners—their selection processes, best practices, experiences or impact—has been conducted, and discussions about commissioners focus on only a few broad questions' (Lanegran 2015: 71), and that 'the lack of careful study of truth commissioners is lamentable given the emerging evidence of their impact on a commission's success or failure' (ibid: 44).

In this context, Nepal is a useful country to explore these issues. It is a country that needed to take action to resolve issues of post-conflict. It is a recent example where a peace agreement ended a conflict, setting in motion a transitional justice model that for a variety of reasons, including its amnesty provisions, has been contested (Amnesty International 2007). The process to deal with the past presently under way in Nepal is not the first such process to be established in the country. The Commission of Inquiry to Locate the Persons Disappeared during the Panchayat Period was established in 1990 but was only mandated to examine approximately one hundred cases (Hayner 2001). That unsuccessful process saw further conflict erupt later, resulting in one of the highest-intensity internal armed conflicts in the world (Murshed and Gates 2005). In the period between February 1996 and November 2006, 12,686 people were killed in the conflict (UN OHCHR 2012: 7). Both sides committed summary executions, torture, arbitrary arrests and disappearances and abductions based on political association (Human Rights Watch 2004: 2). The Maoist forces recruited child soldiers (Human Rights Watch 2005: 3) and committed mutilations such as the cutting out of victims' tongues, breaking individuals' bones until they died, and killing people by burning them (Human Rights Watch 2004: 53–5). Specifically, the Royal Nepal Army (RNA, now the Nepal Army) committed many abuses, including sexual violence (INSEC 2007).

Nepal's peace process has been hailed a success because armed conflict has not resumed. Domestically, political elites laud a successful transition through which they have re-established a polity in which all major political actors, from both sides of the conflict, have consolidated their positions and power. While the political transition appears to be complete, the transformation promised by the Comprehensive Peace Agreement (CPA) remains a distant prospect. The CPA envisaged 'progressive political, economic and social transformation in the country', 'eliminating the current centralized and unitary form of the state [and] ending discrimination based on class, caste, language, gender, culture, religion and region', and 'ending feudal land ownership'. Such ambitions remain elusive and are not reflected in today's reality. The CPA foresaw an addressing of horizontal inequalities that

map on to caste and ethnic difference, precisely the fractures along which dramatic tensions remain and which have failed to be settled by the promulgation of the new constitution.

However, the Nepalese process of dealing with conflict-related crimes and the factions in post-war society has taken many years to establish, its legislation has been found wanting by the Supreme Court on a number of occasions, and the two truth commissions have had tremendous problems. Both commissions have failed to function effectively due to flaws in their legal mandate, a politicized appointment process that led to problematic appointments, a lack of financial, human and technical resources, and a lack of political will. The government has also failed to take necessary steps to implement the Supreme Court verdicts that ruled that the amnesty provisions were unconstitutional.

This article examines why the process to establish transitional justice mechanisms, and specifically truth commissions, needs to be legitimate and credible. It specifically examines issues relating to appointments to such institutions and why such appointments need to be done independently and not overtly politically. Also examined is why appointment mechanisms and processes are so important to enhancing the legitimacy and independence of such bodies. While it is clear that, on its own, even a properly constructed appointment process cannot serve to ensure independence and legitimacy, the location of the power to decide who will comprise and staff these structures and how appointment decisions are made are pivotal concerns.

The case of Nepal is used as an example from which to extrapolate conclusions about the problems that affected its processes, and the various crises that emerged. One of the major problems that beset the commissions in Nepal is a lack of legitimacy and credibility. These have been problems for the process from the outset. A central issue has been the method of selecting the commissioners. This article sets out to add to the literature on this issue using the recent Nepal processes to examine the importance of appointments.

Why truth commission processes need legitimacy and credibility

Truth commissions are today often resorted to in post-conflict states (Sarkin 2018). However, many of them have difficulties. Many of these problems can be laid at the door of those who drafted the enabling legislation and made decisions on a range of matters that determine whether the institutions can achieve their goals effectively. It is true that some of the blame for problems can be attributed to time limitations. The way these commissions are created, established, run, and the decisions they take are viewed by different political parties and by the diverse communities affected by them in differing ways. Their views are deeply affected by whether they believe that a commission is politically biased or slanted towards one particular outlook. The politics of the situation and the past conflict means that everything is viewed through a political lens. Thus the population, especially those from the warring factions, watch these bodies closely to look for signs that they are biased in favour of one group or against others. Issues and reservations regarding the commissions are firmly held in such matters and can obstruct processes even before they begin (ICTJ/AF 2008). As a result, issues relating to inclusivity and independence of such bodies are fundamental to their existence.

The issue of competence is also important as those appointed through a political process are less likely to be sufficiently knowledgeable and experienced in human rights and other matters that the institution will deal with. A lack of knowledge and experience on the part of commissioners will undermine the effectiveness of the institution in its bid to achieve its

goals. Incompetence of truth commissioners, or their having overt political roles, will have a variety of deleterious effects, including undermining donor support. This has obstructed processes in the past such as that of the Oputa Commission that operated in Nigeria between 1999 and 2002. Not being able to raise donor funding can limit the range of tasks that truth commissions should do within their mandates and therefore can have dramatic effects on the institution's outcomes and legacy. The way the institution is perceived, and how its commissioners are viewed, usually has an effect on the extent of civil society engagement. It also usually has an effect on the level of participation in the process on the sides both of victims and of perpetrators. In the Kenyan process, that ran from 2009 to 2011 in the wake of the post-election violence of 2007, despite having international commissioners, a variety of issues including, most importantly, problems concerning the role of the Commission's Chairperson, himself accused of committing human rights violations, severely affected the process (Lanegran 2015). While attempts at reducing the role of politics in the process are not always successful, they need to be made, and limiting the blatant role of politics in the appointment process is essential.

Once an institution is politically tainted, it is difficult for it to restore its credibility and regain the trust of the group that believes the institution does not favour them. For this reason, it must be a priority to insulate such processes and their institutions from such beliefs as far as possible. It is crucial that truth commissions are established, and commissioners and staff are selected, in ways that promote the notion of inclusivity of all groups while not being controlled or influenced by any of those groups. For this reason, the government should not attempt to control any aspect of such institutions, as government is almost always seen to represent one or more groups, who are then inevitably perceived as the beneficiary of bias from the body.

Legitimacy and credibility are fundamental for transitional justice processes. In this context legitimacy means 'the belief that authorities, institutions, and social arrangements are appropriate, proper, and just' (Tyler 2006). This is an important issue as Stuart Ford has argued: 'Numerous studies by psychologists and sociologists have concluded that legitimacy is important to political and legal institutions because individuals are more likely to voluntarily adopt the norms of such institutions to regulate their own conduct when the institutions are perceived as legitimate' (Ford 2012).

Legitimacy can be partially obtained by officially designating a truth commission as a non-partisan entity. This has the legal effect of avoiding control by government. Whether that is complied with in practice is another matter, but at least there is at least a semblance of *de jure* independence. It also ensures that the commission or others can challenge governmental control or attempts to influence what the commission does, and that attempts by government to interfere in the creation and set-up of the commission can be rebuffed. However, simply designating a commission as non-partisan and putting in place provisions to legally protect it need to be backed up with statements confirming the independence of the commission. Steps need to be taken against those who threaten the independence of the commission or take action to undermine it. While there is debate between political parties on how the commission ought to be established, as it is in their interest to do so, once the process actually begins to work these parties should be kept at arm's length with regard to their dealings with the institution. Unfortunately, this is not always the case, and government and political parties often attempt to pull the strings of the commission in a variety of ways. Sometimes they believe that there will be no fallout from doing so, and sometimes they believe that they can do so secretly. However, as the victims, media and others affected

within the society are so interested in the process, and so vested in the outcome, inevitably there is extended scrutiny, and these types of indiscretions and underhand activities are uncovered. This then severely undermines the process as a whole.

Another issue that undermines legitimacy, credibility and functioning of a truth commission is the availability of resources. This is an issue of fundamental importance, as a commission needs to have sufficient resources to investigate, conduct research, establish databases, and all the other aspects necessary for its mandate. Inadequately resourced processes lead to extreme difficulties. They cannot exercise their mandates and victims often feel short-changed. If the perception is that this has been done for political reasons, to impede the commission and prevent it from achieving its goals, it will negatively affect the way the role of the commission is viewed.

Most of the bodies that have been established until now have been created in the global South, where resources are limited anyway. Part of the reason for relatively successful processes in countries such as Argentina, Chile and South Africa was the presence of sufficient resources.

Shortages of resources mean that such institutions do not have the ability to optimally deliver on their mandates. There are few resources to implement wide-ranging investigations, hearings, education, and advocacy for the community in its work, as well as to provide sufficient training for its staff, and so on. Because these institutions are established and last for only two or three years, they do not always attract the most skilled and experienced individuals. Such individuals are able to find positions elsewhere that are able to offer more certainty of a long-term work contract, and find a short-term post less desirable. This is exacerbated by the fact that scarcity of resources means that relatively few people can be employed. The numbers of employees in previous commissions have varied greatly depending on the country context. South American commissions have had relatively large numbers while those in Africa have had relatively few.

These institutions also have high initial establishment costs and things are rushed as a result of constricting time limitations. They also operate in a political environment where most, if not all, things that are done are viewed through a political lens.

Governments can and do use resources for political reasons. In Kenya, for example, resources were used as a weapon. They were minimized deliberately so that the Truth, Justice, and Reconciliation Commission (TJRC) was not fully able to achieve its mandate. As former TJRC commissioner Betty Muruigi has noted, this ensured that the truth commission there was 'a non-performing, un-resourced TJRC with little or no capacity to find the truth but to keep it alive nonetheless so that it can be buried forever' (Otieno 2013).

Appointments

The success of a truth commission is often determined by who are the persons selected to run it. The people who staff the truth commission often have a deep effect on the institution's legitimacy. Thus, whether the community accepts a truth commission has much to do with those in the organization and how they are perceived. Positive community perceptions of truth commission processes are enhanced when the process of appointments to such institutions avoids government interference and control, and when it appoints people not closely aligned with political parties or with government. Also, independence and a 'high level of competence are indispensable prerequisites if a truth commission is to have moral authority' (Matarollo 2001: 27). However, a range of issues affect the independence of

commissioners, such as the process to dismiss commissioners, their tenure and whether their appointment is to be renewed, how salary determinations are made, whether adequate and guaranteed budgets are given to the institution, and the reporting and accountability processes of such mechanisms, among many other things.

Max du Plessis recognizes that a 'key criterion in selecting commissioners is that they must—as a prerequisite—be respected nationally and preferably also enjoy international respect' (du Plessis 2002: 19). He adds that 'the commissioners are not only the public face of the [truth and reconciliation commission (TRC)] but their perceived credibility directly affects perceived TRC legitimacy' (ibid: 20).

A common problem in the creation of truth commissions is that often governments want to appoint people over whom they have influence, or people they believe will protect their interests. As a result, appointments to such bodies are often carried out in ways that ensure outcomes that the ruling group, or other interested factions, wish for as occurred in Kenya and Nepal. Often these political groups or political parties are the ones that have committed violations and therefore have a vested interest in the commission's findings. In view of this, government and political parties see commissioners as a vehicle for controlling the commission, and therefore go out of their way to affect the choice of appointments. However, it is necessary to question whether those who have an interest in the outcome can appoint individuals who will allow the commission to come to conclusions from their investigations without giving the perception that they do so with the aim of influencing the results. To use the analogy of guarding a chicken house—can we appoint the fox to do so when the fox has an interest in ensuring there will not be an effective technique to protect the chickens?

On the practice of appointing commissioners there is no one template (Sarkin 1999). There have been a variety of models for choosing commissioners in the many countries that have established such processes. Sometimes the process is only domestic in nature, and sometimes there is a combination of local and international persons. A number of countries have used the combination model, but within this model there is diversity in the number of commissioners, the proportion of internationals to locals, and the process to appoint them.

In Haiti in 1995, four commissioners were Haitian and three were internationals. In the 1996 Ecuadorian process, four were Ecuadorian and three were internationals. In Guatemala in 1997, there was one international and two local commissioners. The international commissioner, in consultation with political parties, chose the local members. In Mauritius in 2009, there were four local commissioners and one international commissioner, selected by the President of the country, who was appointed the Chairperson of the Commission (Article 3(3) Truth and Justice Commission Act No. 28). In the Honduras Commission of 2010, two of the commissioners were domestic and three were internationals.

Using international commissioners, while intended to achieve a variety of purposes including legitimacy and credibility does not always achieve those goals. Thus, in Sierra Leone in 2002, because the local commissioners were perceived to be affiliated to the governing political party, the Truth and Reconciliation Commission's perceived independence was undermined even though there were also international commissioners (International Crisis Group 2002: 18).

At times, to increase the legitimacy and perceived independence of the institution, as in Timor-Leste, Kenya and Sierra Leone, the United Nations and other institutions, such as the African Union, play roles and even specifically appoint certain commissioners. The UN

Secretary-General appointed the international member of the Guatemalan commission. In Kenya in 2009 the three international commissioners were nominated by the Panel of African Eminent Personalities, which had played other key roles in the country in the wake of the post-electoral violence; the President of the country then formally appointed them (Hansen 2013).

Truth commissions have, however, often been set up, and commissioners appointed, using domestic processes only. The members of these institutions have been appointed, at times by the President, sometimes by the Parliament, sometimes in combination, and at other times by using a range of other processes to ensure greater inclusivity. This is because it is widely accepted that how the commission is created usually has an important bearing on how commissioners are appointed and who they are. Thus, if the President sets up the commission by decree then that person usually appoints the members. In the past, that type of process has been very problematic. In fact, the earlier, completely domestic, processes usually had completely secret practices that saw few positive outcomes. This is certainly true for both processes in Uganda in 1974 and 1986, for example. The Chilean process that began in 1990 was more transparent, even though the President chose all the commissioners. However, in that instance, importantly, the President chose four commissioners who were allied to the old regime and four who were perceived as opponents of that government. That diversity has been seen as a useful model that later institutions have replicated, because it led to more positive perceptions about the role of the commission.

In Panama in 2001, the President appointed the domestic commissioners, as did the President of Paraguay in 2004. In Morocco in 2004, the King appointed the commissioners to the Equity and Reconciliation Commission. While some of the commissioners were political activists who had been previously imprisoned or in exile, the independence of the process was still questioned. In Nigeria, the President appointed all the commissioners (Onyegbula 2001).

However, to seemingly reduce the effect of direct political influence, other types of processes are used for appointment of truth commissioners. Thus, in Argentina in 1983, the President chose ten commissioners and the Chamber of Deputies of the Congress selected three. This was done to ensure that it was not the President who chose all the commissioners. While the country's Senate was requested to choose some commissioners, it did not do so. In Peru in 2001, all 12 commissioners were local persons, appointed by the President. However, they had to be approved by the Council of Ministers. The 2005 South Korean truth commission saw eight commissioners being appointed by Parliament, four by the country's President, and three appointed by the Chief Justice of the Supreme Court. In Liberia (Amnesty International 2006) the process of appointment saw the then transitional head of state selecting the commissioners, however later the President of the country, Ellen Johnson-Sirleaf, had to approve them. Usefully, as has occurred in a number of other countries to make the process more transparent and accountable, a public nomination process took place in the country, which included some degree of vetting. An International Technical Advisory Committee was established in terms of the legislation, to give international input into the process. In fact, the legislation provided that they had the same role in the appointment process except they could not vote. Two of the International Technical Advisory Committee members were selected by the Economic Community of West African States (ECOWAS) and one was chosen by the UN High Commissioner for Human Rights (Liberia TRC Act 2014).

Other countries have used representative panels (with members from a variety of sectors including people from civil society) to sit together, interview and then select the commissioners to reduce the influence of political parties (Sarkin 2004: 27).

While in the past the appointment processes to such institutions have often been carried out secretly and have lacked transparency, today more and more one sees an attempt, at least for appearance's sake, to use processes that are more transparent. Today the practice largely is to ensure a process at least rhetorically that is not overtly political.

In general, internationally and in international law, the issue of appointments is seen to be a key issue in the creation of institutions. Looking at what is done, and expected, for national human rights institutions (NHRIs) gives good guidance on these matters. For NHRIs, the issue of independence is seen to be vital for such institutions to achieve their objectives (Sarkin 2016: 327). In fact, at the heart of the Paris Principles on National Human Rights Institutions, the international law relating to such institutions, is the issue of independence. These Principles state that

The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights. (UN General Assembly 1993. Paris Principles: Composition and guarantees of independence and pluralism, para. 1)

The UN report on National Human Rights Institutions in this regard states that 'an effective national institution will be one which is capable of acting independently of a government, of party politics, and of all other entities and situations which may be in a position to affect its work' (UN OHCHR 1995: 10.). The report also notes that 'any institution can only ever be as independent as the individuals of which it is composed' (ibid: 11) and 'the method by which members of national institutions are appointed can be critical in ensuring independence' (ibid.). The document also proclaims that the 'founding legislation of the institution should specify all matters relating to method of appointment, including voting and other procedures to be followed. Criteria for appointment should set out the prerequisites (including nationality, protection, qualifications, etc.) for appointment to a national institution' (ibid.).

The OHCHR has stated 'Truth commissions will garner the greatest public and international support if their members are selected through a consultative process' (UN OHCHR 2006: 13). This is because, as Burgess and Wandita have stated: 'Commissioners are crucial to the success of any TRC. If the public feels it was not consulted in the selection of commissioners, the community is more likely to be alienated from all that the commission later achieves and less likely to cooperate and support it' (Burgess and Wandita 2014: 164).

Joanna Quinn and Mark Freeman conclude, 'Perhaps the most important task for the framers [of truth commissions] is the appointment of the commissioners.' As has been noted by Sarkin, it is problematic if 'the life and work of the commission ... [are] at the whim of the government' (Sarkin 1999: 805). Fombad has noted that in African truth commissions many of the 'commissioners have simply been appointed by the government without consultation and this often gives rise to a feeling that they are there to serve the government's interests and this diminishes the credibility of the commission' (Fombad 2008). Mallinder, relying on Brahm's statement that the commissioners must be 'perceived as above politics', argues that this is vital for ensuring that the truth commissions are not viewed as being

biased (Mallinder 2007: 225). Brahm has further argued that ‘the identity of those asked to serve as commissioners has also been implicated as significant for how the commission’s work will be received’ (Brahm 2007: 30). The OHCHR rule-of-law tool on truth commissions states that: ‘Any inclination to put political leaders or representatives of political parties, factions or former armed groups on the commission should be strongly resisted’ (OHCHR 2006: 13). As noted above, diversity is important. This is because issues of diversity in background including ethnicity, religion, language, cultural, and political association, as well as in some instances issues such as urban, rural and regional upbringing, have all been seen to be important in who is appointed, to ensure the process is seen to be more legitimate. Thus, for example the Peruvian truth commissioners were heavily criticized as being from urban backgrounds when the majority of victims were not. They were also seen to be less credible because the commissioners did not speak the language of the victims and needed interpreters. In South Africa, some questioned the appointment of Desmond Tutu to be Chairperson of the TRC because in their view his religious background did not comply with some of the activities and ideals of the TRC (Quinn and Freeman 2003: 1128). However, Tutu was deeply respected and he was therefore seen by many to be a suitable choice. Moreover, people from other religions and backgrounds were appointed to allow many communities to feel represented in the institution (Sarkin 2004).

Taking all the factors into consideration, it is clear that appointment processes usually have a major effect on all types of institutions including for example the courts (Sarkin 1996). For example, individuals who are appointed from a non-human rights background may be unwilling to be forceful and robust when it comes to raising concerns about human rights transgressions involving the state (Sarkin 1997). Reappointment or future appointments may also be an issue that undermines independence, in that an individual’s desire to be reappointed to an institution knowing that those who appoint them need to be at least somewhat pleased with their performance in that position often affects the extent to which they operate completely independently. But it is weak appointments that severely hamper the manner in which institutions, including commissions, function. Negative perceptions around appointments can disrupt public faith and trust in an institution to such an extent that all work done by the institution is undermined (Sarkin 1999).

Besides the issue of independence and the stance that the individuals on the commission, and the commission as a whole, take on human rights, the way appointments to these structures are made has a critical impact on their potential strength or weakness (Sarkin 1999). For instance, experience and expertise in human rights, or in the specific issue that the commission is responsible for, should be a prerequisite for anyone appointed (Sarkin 2016). Can someone with little or no background in the field oversee the promotion and protection of human rights, or another function, at a national level? (Sarkin 1999). Individuals who are appointed with little or no experience will have to learn the necessary principles and may in fact not be sufficiently dedicated, or willing, to do so (Sarkin 2016). Individuals appointed must be seen to be leaders in the field, ensuring respect and a following from the public and groups such as the non-governmental organizations (NGOs) with which they will be working. Poor appointments reduce the esteem in which the institution is held (Sarkin 1999). Unknown individuals, or individuals with little appropriate background or experience are likely to be negatively perceived by the public.

If individuals are appointed for their ideological or political beliefs rather than their skill, commitment, passion, or human rights background, this will impact on their decisions, and therefore on the credibility of the institution. It will also impact on the

willingness of the institution to criticize the state on a human rights matter and the timing of any criticism it may voice as it may wait for others to criticize before it decides to do so. Removing party politics from a selection process improves the chances of incumbents serving independently and effectively.

It is clear that, on its own, even a properly constructed appointment process cannot serve to ensure independence and legitimacy. Pivotal concerns for determining how well the public good is served are the way in which appointments are made and where the power to ratify appointments lies.

There are at times attempts to make political interference in these processes not so obvious. Provisions in the legislation do this, such as in Nepal, which seemingly exclude those with direct political affiliation. These attempts often fail when people are appointed who are widely viewed as connected to a political party, even if they do not hold political office or have not held a senior position in the party. Problems in the appointment process lead to other problems as well. For example, in the case of the process for the Truth and Reconciliation Commission, Republic of Korea (TRCK), it has been noted that ‘under the Framework Act, the commissioners were to be selected by political authorities, such that political orientation played a central role in the TRCK’s composition. This had an important constraining effect on the TRCK’s work . . . because the political backgrounds of the Commissioners inhibited reaching consensus’ (Melish 2012: 18). This is borne out in the experience in the Democratic Republic of the Congo (DRC) where it was observed that ‘the Congolese TRC suffered a number of critical problems from the start: the selection process for commissioners was not transparent, and many observers felt that the resulting membership as a whole was weak, and in particular it lacked strong leadership’ (Davis and Hayner 2009).

It is therefore important for truth commissions and other similar processes to be seen to appoint people in ways that bolster the process and its legitimacy. Openness and transparency boost notions of the process being one worth supporting. The idea of things being done openly and publicly is important for a democratic ethos to take hold or to be cemented further. Truth commissions can contribute in this regard. Taylor and Dukalskis have found that in a truth commission, ‘publicness does indeed contribute to democratization of the state in which the commission is held, even when taking into account initial levels of democracy’ (Taylor and Dukalskis 2012). They note that while such mechanisms are often usually formed and steered by the interests of elites, permeating them with ‘publicness’ can limit some of the ‘pernicious effects that result’ (ibid.). However, openness and transparency are just a necessary first step in an acceptable and viable appointment process. These processes also need to be inclusive so that certain parties do not feel excluded, and so that the process is representative of all groups in the country, or at least representative of all groups who have a stake in the process. If some are excluded from the process then they will believe that the process is biased against them and working in favour of others. Truth commissions in other parts of the world have suffered when one community, who were either perpetrators or victims, are excluded from the workings of the process. Those communities are then unwilling to participate fully, or even, at times, at all, believing that the process from the outset is biased against them. Therefore, it is crucial that commissions are well balanced and inclusive, with appointed commissioners who are widely respected. In this regard the OHCHR rule-of-law tool on truth commissions notes that: ‘Ultimately, no factor will more define the commission than the persons who serve as its members’ (UN OHCHR 2006: 13). Balanced findings are more likely to be achieved when its

commissioners come from a variety of backgrounds that are representative of the country and specifically the groups that were involved in the conflict. If the divisions in the society are ethnic, religious, linguistic or political, those divisions need to be represented on the commission. This is not to argue that the individuals should specifically represent their constituencies or factions, but rather that people with such backgrounds will enhance the credibility of the process. These individuals ought not to be selected as a spokesperson to represent particular groups, but rather be appointed in an unbiased, trustworthy independent process that enhances overall respect for the process as a whole by the community in general. It has been noted that ‘as important as it is to establish a selection process designed to achieve the greatest possible legitimacy of the truth-seeking body, excellent plans are only as good as the work of people who implement them’ (Lanegran 2015).

Using appointment panels, in which a diverse mix of people from different backgrounds and positions appoint commissioners, has become a widely used means to enhance respect for truth commission processes. It is a method employed to try to reduce the role of politics in the process. The panel method of appointment has been used in a variety of processes, including Timor-Leste, where commissioners were elected in an open and transparent way. In South Africa, a panel was established to appoint commissioners to enhance respect and legitimacy for the process. It was designed to promote the idea of a balanced approach in appointing the commissioners. Seven members of the panel were appointed, four politicians, one from each main political party, as well as three people from civil society. This was a positive move in the process of creating a credible structure; it reduced fears that government would manipulate the outcome of the process by determining who the commissioners would be. The panel created a distance between government and the commission. This panel was tasked with getting nominations, circulating their curriculum vitae (CV), interviewing candidates and then shortlisting. The listed criteria for appointment were: impartiality, moral integrity, known commitment to human rights, reconciliation and disclosure of the truth, absence of a high party political profile, and lack of intention to apply for amnesty. Two hundred and ninety-nine nominations were received, of which 47 were chosen for public interviews. Civil society made full use of the opportunity to provide input highlighting concerns about specific candidates.

Creating a transitional justice process to deal with the past in Nepal

The Nepal transitional justice process has been in crisis throughout its existence. Even before the process began issues arose due to the way it was established. Throughout the life of the commissions they have suffered a variety of problems. These have continued throughout their existence. They were seen as not having been created as a result of thorough consultation with all political parties, especially not with victims and victims’ groups (Robins 2012). In this regard, the Supreme Court in its verdict on two victims’ petitions (2 January 2014 and 26 February 2015) directed the government to consult victims and guarantee wider consultations with victims to ensure their active participation and representation in the transitional justice process. Other reasons for crises in the transitional justice mechanisms are because, as mentioned earlier, the appointed committee members are not respected or are viewed as politically connected, and as appointed to their positions for political reasons. Many people have boycotted the process in general, and many who could have been good commissioners refused to be nominated. Resources have been a problem and staffing has been insufficient. Unresolved legal issues, the striking down of parts of the

legislation have all affected the ability of the truth commissions to work optimally. These problems, as well as the lack of political will, will be explored below.

The process to establish a transitional justice model in Nepal since 2006 has been highly contested. Specifically, victims have challenged the process. They have felt ignored and excluded in general from the design and creation of the commissions. They have argued that the process was not established in a transparent or inclusive way, and that they have not been kept informed. In fact, they argue that the process has often been kept secret and they have been denied access to laws and other documents. One such contested draft where this arose was in 2012 when the Council of Ministers drafted an ordinance and gave it to the President all in secret. This recommended replacing the two envisaged commissions with one body. Civil society was only able to receive the document clandestinely ([Amnesty International 2013](#)).

On 21 November 2006 ([Pokharel and Sengupta 2006](#)) the Government of Nepal and the CPN (Maoist) signed the Comprehensive Peace Accord (CPA) ([International Crisis Group 2006](#)). The CPA ended the decade-long armed conflict ([Hutt 2004](#)) and created a road map to developing a new constitution ([Tamang 2011](#)), and restoring peace and reconciliation ([Aguirre and Pietropaoli 2008](#)). The CPA established that both parties were committed to telling the truth about the war and ensuring the victims of the conflict received justice and reparations ([Nepal CPA 2006](#)). The CPA promised to make the fate of the disappeared citizens public in 60 days and to establish a Truth and Reconciliation Commission (TRC) to address other violations. The issue of disappearances and a TRC were also mentioned in the 2007 Interim Constitution (2007) ([Pasipanodya 2008](#)). Article 33(s) of the Interim Constitution provides for: ‘[A] high-level Truth and Reconciliation Commission to investigate the facts about those persons involved in serious violations of human rights and crimes against humanity committed during the course of conflict, and to create an atmosphere of reconciliation in the society’ ([Nepal Interim Constitution 2007](#)).

It must be noted that there are historical reasons for having two commissions. Thus, the CPA provided for a ‘High-Level Truth and Reconciliation Commission’ to investigate violations committed in the conflict, but the Interim Constitution of 2007 provided for an ‘Investigation Commission’ as well as a TRC. The early draft bills set out that the disappearances commission would ‘establish the truth by investigating the cases in relation to the disappeared or missing persons’ (Disappearance Bill 2010), while the TRC would ‘carry out inquiries on the matters relating to gross violations of human rights during the course of armed conflict for investigating and establishing the truth’ (TRC Bill 2010). After the first Constituent Assembly election ([Rawski and Sharma 2012](#)), the newly elected Maoist-led government proposed and made public a draft Bill on Enforced Disappearance (Crime and Punishment) 2008 ([Singh 2009](#)) to criminalize the act of enforced disappearance and to establish a Commission of Inquiry to address conflict-related disappearances. Despite criticism by local and international actors, the government unilaterally adopted the law through a presidential decree ([Malagodi 2012](#)), while the Assembly was in recess. This Ordinance expired in May 2009 before parliamentary enactment (*ibid.*). The new coalition government led by the Communist Party of Nepal however introduced the law as a bill into the Parliament with no major changes. The Cabinet approved the Disappearance Bill on 29 October 2009 and registered it in parliament on 4 December. The Truth and Reconciliation Commission (TRC) Bill was approved by the Cabinet on 1 February 2010 and registered in parliament on 17 February ([Thapa 2012](#)). The new law was approved by the President in March 2013. However, the Supreme Court in 2014 rejected its amnesty provisions and

directed the government to draft a new bill, created in wider consultation with the victims and their organizations (Sajjad 2016). Complying with the Supreme Court decision, the government drafted a new bill that allowed the formation of two commissions, namely the Truth and Reconciliation Commission (TRC) and the Commission on Investigation of Enforced Disappeared Persons (CIEDP) on 10 February 2015 (Nepal TRC Act 2014). Thus, it had taken more than eight years after the CPA was signed for the commissions to be created. The TRC and CIEDP were given two-year mandates to deal with the human rights violations of the 1996–2006 armed conflict (Gellner 2007). Because the process was far from finished within the two-year mandated period, the government twice extended the mandates of the two commissions by an additional one-year period, first on 10 February 2017 and again on 10 February 2018 in order to allow them to complete their work. In 2019, the terms of the commissions were again extended but new commissioners were to be appointed. At the end of 2019 new commissioners still had not been appointed. This was because of deep disagreements on how the process to appoint them should take place.

Problems with the law on the commission in Nepal: issues of independence and political interference

The law creating the commissions is problematic on many fronts. The legislation has many issues that undermine the way the process is seen. It was established in a highly political way and was not fully consultative with all affected parties (Brass 2010). That has deeply affected its legitimacy. These issues will be returned to below.

A significant problem with the legislation is that parts of it were struck down as unconstitutional. The Supreme Court of Nepal annulled the amnesty provisions of the Act on the basis that they were incompatible with established principles of justice, various constitutional provisions, and international law (Mahaseth 2017) as well as with earlier findings of the Supreme Court on victims' demands (Bhandari 2015). The law has not been redrafted, leading to some degree of legal limbo. The Chairperson of the TRC, Surya Kiran Gurung, has stated: 'we recommended legal provisions to amend [the law], ... we are still waiting for the new amended act for the extended mandate'. Similarly, CIEDP Chairperson Lokendra Mallick has stated that 'The government should criminalize the act of disappearance, without a law on disappearance, we cannot recommend prosecution' (Bhandari 2017).

Such legislation can be questionable when it also fails to properly insulate the commissions from political interference. The work of the commissions in Nepal has been undermined by developments such as an agreement between the ruling party Chairperson of the Communist Party of Nepal Unified Marxist–Leninist (CPN-UML) and then Prime Minister K. P. Sharma Oli and the Chairperson of the Maoist Centre Pushpa Kamal Dahal. On 5 May 2016 they signed a nine-point deal (Kathmandu Post 2016c) to try and save the coalition government from falling apart (Human Rights Watch 2016). Provision 7 of that agreement directs the authorities to withdraw all wartime-related prosecution cases before the courts, and to provide amnesty to alleged perpetrators (Ginsbach 2014). This is seen by civil society to be particularly problematic and is seen as interfering with the transitional justice mechanisms. It certainly affects the legitimacy of the process. In a press statement by the International Commission of Jurists (ICJ), its Asia-Pacific Director Sam Zarifi stated that 'this political deal between the ruling parties is extremely damaging to the credibility of an already deeply politicized and flawed transitional justice process in the eyes of

Nepal's victims and the process must be free of any political interference' ([Kathmandu Post 2016c](#)). Brad Adams, Asia Director at Human Rights Watch, also stated that 'Nepal's political deal jeopardizes the war victims' last best hope for justice and accountability' ([Human Rights Watch 2016](#)).

While section 19(1) of the legislation which applies to both commissions asserts that 'the activities of the Commission must be open and transparent' and section 20(1) states that 'the Commission must perform its activities independently and impartially', this is undermined by who the commissioners are and how they were appointed. The process is then called into question because it was not seen to be transparent. The view taken by some parties is that the government ministry controls the process. The reality is that victims and the general public are not fully informed about the commission process and their activities.

A further issue with the legislation, which undermines the commissions, is that the law does not allow the commissions to administer their own funds (sections 10 and 12) or recruit their own staff. In fact, personnel of the commissions come largely from, and are appointed by, the government. Given that controlling the funds is a way to control an institution, this is obviously problematic. Section 10 provides that the government appoints the Secretaries of the commissions. Apart from the Chairperson and commissioners, this position is the most important in the commission. They are arguably the most powerful officials after the Chairperson of these institutions. Each Secretary controls the finances, logistics and operations of the commissions. The government can effectively influence the way the commission operates through this appointment. This section of the legislation undoubtedly deprives the commission of its autonomy. On appointing the rest of the staff, section 11(1) requires that the ministry provide the employees for the commission. In this way, the commission is left unable to recruit its own staff and has no control over government staff who are appointed—the government can exercise control over the staff through human resources and other processes. Another pertinent fact is that government employees generally do not have the particular expertise needed by the commissions. Personnel can however be employed on a contractual basis if there are no government personnel available with the expertise needed, or if the Ministry cannot provide all the personnel necessary. This allows a very limited ability for the commission to appoint its own staff. Staff control problems came to the fore specifically when in April 2017 almost all the staff members, including all four under-secretaries, were removed from the CIEDP and deployed for the local elections during May and provincial and federal elections at the end of 2017. In a three-year period, CIEDP has had five secretaries, many of their trained personnel have been transferred away from the commission, and it still does not have all the required staff ([Himalayan Times 2017a](#)). TRC member Madhavi Bhatta has noted that 'The commission is plagued by employees with vested political interests. So, TRC alone should not be blamed. I think political leadership is equally responsible for resolving the cases' ([Himalayan Times 2017b](#)).

How the process of establishing the commissions and appointing its commissioners has undermined the legitimacy and credibility of the transitional justice process

The transitional justice process in Nepal, in general, does not promote independence and legitimacy. These have been issues all the way through the process ([ICTJ 2007](#)). In almost every instance there have been difficulties in this regard. A variety of issues have undermined the legitimacy of the process, including a widespread belief that impunity continues

(Amnesty International, International Commission of Jurists and Human Rights Watch 2011). The ongoing debate about the granting of amnesty plays into these attitudes (A. Adhikari 2011).

Politicization is implicit in the process, but is also specifically part of the way the process is designed. It must be remembered that there was a schism between what the political parties wanted on one issue and what civil society sought (Human Rights Watch 2013). That issue was on amnesty. Political parties generally wanted an amnesty while civil society sought some accountability (*ibid.*). This was a major obstacle in the transitional justice process from the very beginning. Few senior leaders of major political parties (both ruling and opposition parties) dealt with the process openly and they did not allow its discussion in Parliament. It was approved within a limited time without consultation. This was reflected even in the Constituent Assembly, where there was competition and political division. The Maoist party wanted to deal with a Disappearance Commissions Bill first. They did not show much interest in the truth commission. Other political parties like the Nepali Congress and CPN-UML however wanted to prioritize the truth commission.

On the other hand, the Nepal Army and Nepal Police opposed the adoption of the Disappearance Commission and continuously fought to stop the criminalization of enforced disappearances. A major development in this regard was when the Nepal Army, in 2017, rejected the verdict of a civilian court against the conviction of three Army officers on war-related crimes concerning the Maina Sunuwar case. She was 15 years old when she was disappeared, tortured and killed in Army custody in February 2004. The Army has claimed that the soldiers involved had appeared at a court martial and had been punished with a six-month term of imprisonment. The Army claimed that the civilian courts should not be dealing with the case. The Army has filed a petition at the Supreme Court against the 2017 decision of the Kavre district court. This not only challenges the civilian court's verdict in the case, but also threatens the rights of victims and the whole transitional justice process (My Republica 2017).

It is important to note that Article 23 of the Act specifically dealt with amnesty. It provided that amnesty for specific individuals could be suggested to the government if it 'deemed' it to be 'reasonable'. This ability to recommend amnesty was qualified by a direction to the Commission not to recommend amnesty where there had been 'serious crimes ... including rape'. No definition of a serious crime was provided. The law also provided that those who were not commended for amnesty 'may' be recommended for 'action' although what type of action was not spelled out.

Appointing commissioners in Nepal

Regarding the appointment of commissioners, the law requires that a Recommendation Committee, composed of five persons, make recommendations for appointments as the Chairperson and members of the commissions. The way that this process was created places that decision-making in the hands of those who are politically connected to the government. The Recommendation Committee is composed of a former Chief Justice designated by the government, the Chairperson of the National Human Rights Commission, or a member appointed by the Chairperson of the Commission, and three other persons nominated by government from civil society. Therefore the government directly chooses four of the five members of the Recommendation Committee, but not the member from the National

Human Rights Commission. However, it could be argued that in reality they have a hand in all five appointments.

The government announced the Recommendation Committee on 16 June 2014. It hand-picked all appointees, apart from the member from the National Human Rights Commission. At the time of the appointments to the Recommendation Committee, the positions on the National Human Rights Commission were vacant. The government appointed the members of the Recommendation Committee only in September 2014. These appointees are people affiliated to major political parties ([Kathmandu Post 2014a](#)). Pradip Pokharel was nominated by the Maoist party, Ghanashyam Lal Das was nominated by the Nepali Congress, and Sapana Malla Pradhan, a former CPN-UML member of the Constitutional Assembly, was nominated by the CPN-UML. Later the CPN-UML nominated Ms Shanti Devi Khanal to replace Pradhan. The National Human Rights Commission nominated Mr Sudip Pathak in September 2014 after the commissioners were appointed to the National Human Rights Commission. Thus, in choosing the members of the Recommendation Committee the government was heavily influenced by major political parties and the appointment process was highly politicized ([Kathmandu Post 2014b](#)). This was one way that the process and the institutions have been delegitimized. While there were consultations with some political parties, it seems as though no wider consultations took place. It is widely accepted that generally speaking extensive consultations with various role-players before appointing commissioners are vital ([Hayner 2011](#)). This did not happen in Nepal. This is important to take account of, because if a retributive justice approach to dealing with the past is to be avoided, and rather a restorative justice process is adopted, then all parties need to be involved. Restorative justice has been defined as ‘a process whereby *all parties* with a stake in a particular offence come together to *resolve collectively* how to deal with the aftermath of the offence and its implications for the future’ [emphasis added] ([Llewellyn and Howse 1999](#)). This has not been the case in Nepal, with the notable omission of the victim community.

The Nepal process is not alone in the problems that have existed in this regard. In Kenya, Hansen found that the political elites were able to undermine the Truth, Justice, and Reconciliation Commission by having a flawed selection process that allowed little public participation ([Hansen 2013](#)). Nevertheless, the Nepali Recommendation Committee received a total of 37 applications for the TRC and 27 applications for the CIEDP ([Nepal Ministry of Peace and Reconstruction 2015](#)).

Regardless of these criticisms of the process, the Recommendation Committee was given the authority to nominate chairpersons and members. In doing so, they had to publish a public selection process. However, while the TRC Act 2014 sets out that there had to be a public process, it did not provide for what that process should be. It did not set out that there should be a transparent process wherein the general public, victims’ groups and civil society were to be given a reasonable time period in which to nominate candidates, that they would be given the candidates’ CVs, that they could comment on shortlisted candidates, and that they would be able to lodge objections. Neither the nomination nor the selection process were as consultative or as transparent as they should have been. The Committee did organize a few limited consultations. It organized a number of regional consultations, and whilst government officials and a few members of civil society and political party representatives were invited, they were very limited in nature. In Kathmandu, the Committee organized consultations with diplomatic missions, the UN, the European Union, and political parties, as well as some civil society organizations, human rights

groups, victims' groups affiliated with the political parties, with broader victims' organizations and the wider human rights community (S. Adhikari 2014).

The Recommendation Committee called for applications on 19 September 2014. Applications could be submitted only until 27 September 2014 (Kathmandu Post 2014b). This was far too short a time to elicit a wider spectrum of applications that may have occurred had there been more opportunity to do so.

Due to these perceived flaws in the appointment process and political interference, transitional justice experts, human rights activists, victims and prominent lawyers refused to submit applications and boycotted the process. In fact, civil society groups and international actors adopted a non-cooperation strategy and appealed to victims not to participate in the process. While victims' groups have encouraged their members, families and victims to register their cases with the commissions, and have launched efforts in rural communities to ensure that families understand their rights and are able to file complaints, they continually criticize the process and call for reforms to the process.

Before the Recommendation Committee released the names of those shortlisted for appointment to the commissions it held a meeting on 9 December 2014 at the Prime Minister's residence, with the then Prime Minister Sushil Koirala (Nepali Congress), K. P Sharma Oli, the Chairperson of the CPN-UML, and the opposition leader, former rebel leader and former Prime Minister, Pushpa Kamal Dahal, the Chairperson of the Maoist party. Thus, the final selection was either discussed with politicians or the appointments were made in consultation with major political parties. This completely undermined any possibility of the process being seen to be independent and individuals being chosen outside of a political process.

On 12 January 2015, the Recommendation Committee made public the list of the 68 shortlisted candidates (Bhandari 2015) to solicit public opinion. Again, very little time (five days) was given for comment. Because of the manner in which the names were released, the majority of civil society organizations and the victims' community were not able to respond within the time period (ibid.). The committee did not use local radio stations and local newspapers to publicize the process and obtain comments (ibid.). Unsurprisingly, no objections were received from the public. The government approved the list of members and the chairpersons of both commissions on 10 February 2015 (The Rising Nepal 2015).

As far as who the commissioners are, the law determined that the commissions should each consist of five members including the Chairperson, at least one of whom is supposed to be a woman. The law establishes that the Chairperson should be one of the former Chief Justices, selected by the government of Nepal. One of the members should be a Chairperson of the National Human Rights Commission or a member of the Commission designated by the Chairperson. Three of the members should be selected by the government from among human rights activists, psychologists, legal forensic experts, conflict experts, sociologists, women's rights activists or persons involved in the peace process. The legislation also establishes the qualifications necessary for the Chairperson and members. To be eligible as Chairperson or a member the person has to have a bachelor's degree, cannot be a member of any political party at the time of appointment, has to be of high moral character, to have worked in the field of human rights, peace, law, conflict management or sociology, and to be at least 35 years old, to have worked as 'a justice of the Supreme Court or Chief Judge of the Appellate Court, worked at the post of special class of the Nepal Judicial Service or possesses the qualification for the justice of the Supreme Court in the case of the

Chairperson'; the Chairperson and the members should hold their offices until the dissolution of the Commission ([Nepal TRC Act 2014](#)).

Section 4(b) of the TRC Act 2014, which provides that a member cannot be someone who was 'a member of any political party at the time of appointment', enabled individuals to resign membership from their political party before their appointment. There were no methods, checks or provisions set out in the TRC Act to examine potential political affiliation, or appointees' expertise in requisite fields. Section 5 does, however, specify that a 'person involved in the armed conflict' shall be ineligible for appointment. Despite these issues, the perception that exists in Nepal is that government and opposition appointed 'friendly' members to these posts that unduly affect the appointment process and create bias.

The Recommendation Committee appointed as TRC Chairperson Surya Kiran Gurung, and as CIEDP Chairperson Lokendra Mallick ([The Rising Nepal: 2015](#)). Mr Surya Kiran Gurung is a former ambassador and was General Secretary in the Parliament Secretariat. He was seen to be close to the Nepali Congress (at that time the ruling party), but was not politically active. Mr Lokendra Mallick is a Former Chief Judge at the Appellate Court. The appointments of both individuals have been criticized in regard to their lack of skills and experience in the field of transitional justice ([Kathmandu Post 2015a](#)).

Other members have been criticized in reference to allegations that the various political parties handpicked them to their own ends. These other members of the TRC are: senior advocate Mr Lila Udasi Khanal, who is alleged to be close to the CPN-UML; sociologist Ms Madhabi Bhatta, supposedly affiliated with the Nepali Congress; sociologist, Ms Manchala Jha, who was a recommendation of the Madhesi-based regional party, and Mr Shree Krishna Subedi, who was an advocate and affiliate of the Maoist party.

As far as the CIEDP is concerned, among other appointees were Mr Bijul B. K. Dulal, a former parliamentary member of the Nepali Congress party and Chairperson of the National Dalit Commission who is alleged to have been appointed by the Nepali Congress. Other appointees are Mr Bishnu Pathak, an academic who is seemingly close to the CPN-UML, Ms Nara Kumari Gurung, an advocate, supposedly affiliated with the CPN-UML, and Mr Ai Bahadur Gurung, a commercial lawyer, believed to be affiliated to the Maoist party. None of the members are believed to have a human rights background and they are supposedly unknown in the human rights field. Victims' groups and civil society raised critical questions about the selection process as a result, doubting the qualifications and the human rights backgrounds of the commissioners ([Kathmandu Post 2015b](#)). Sushil Pyakurel, a former member of the National Human Rights Commission, has stated: 'We have never worked with the appointees' ([Kathmandu Post 2015a](#)). The limited knowledge of commissioners on the subject matters of the commissions, as well as political party domination, have been seen as one of the main constraints of the process. It is also believed that the political division between commissioners has been visible in the commissions' work and has created internal rifts and challenges.

Problems facing the two Nepali transitional justice commissions

The government established the commissions without all the necessary preparations and without the required infrastructure. As a result, they have had immense difficulties and obstacles along the path to their findings. Both the commissions were based in Kathmandu, the capital city, without field offices or district chapters to reach out to rural victims. The commissions focused their attention on obtaining offices, hiring staff, receiving approval

for their regulations, as well as introducing themselves to the conflict victims and concerned agencies, and limited visits to the districts. All of this has been made challenging due to the commissions' inability to hire their own staff and have control over their finances. For example, it took 14 months to get approval of the regulations. These were finally approved and published in Nepal Gazette on 13 March 2016. Before the regulations were gazetted, both commissions did very little work.

The TRC has also had serious internal challenges such as bad working relations and political differences between the commissioners, problematic relations between staff and commissioners, problems at the level of coordination, and a lack of collaborative approaches with other actors outside the commission. It has been argued that the TRC is not functioning efficiently or effectively enough, that it is constrained by the politicization of the process and that it lacks a strong political will to resolve transitional justice concerns. It is also alleged that internal conflicts between the commissioners have paralysed the process.

Internal conflict began as a discussion about the extension of the term of the Commission. A majority of the commissioners, including the Chairperson and two others, maintained that the government should express its commitment to fulfil the Commission's legal prerequisites and provide the necessary logistics before an extension. The other two commissioners pushed for the Commission's term extension without first soliciting the government's full commitment. These differences, which were very public, meant that the Chairperson was out of the office for a long period and had no contact with the Commission. This has affected the Commission's daily work ([Himalayan Times 2017a](#)). The Secretary of the Commission was also out of the office. There was also a petition submitted to the Cabinet and the Prime Minister's office to investigate one of the commissioners, Madhabi Bhatta, over alleged misconduct, accusing her of violating the code of conduct, incompetence, politicizing issues inside the TRC, making all internal issues public, and transgressions concerning security. The TRC Chairperson stated that either he would resign or the member who was destroying the TRC and abusing the power of authority had to be removed. This situation has shattered working relations at the Commission.

How resource shortages have also undermined the process

Without the ability to function effectively, the transitional justice mechanisms in Nepal have become paralysed. Both commissions have become invisible, rapidly losing credibility. The commissions have failed to build trust among the victims' community, and have become yet another politicized government body showing loyalty to the political bosses who appointed them. Despite the end of two years' initial mandate since their appointment, they still had no staff, no clear road map towards their goals, or commitment to address victims' concerns and agendas. While the government has extended their mandates by additional one-year periods, both commissions still lack the required staff. They also still face challenges due to the transference of existing staff and because they still have not received adequate resources.

The issue of resources is important when noting that Nepal is the first country to use two truth-seeking institutions at the same time. There have been courts and commissions at the same time in other countries but never two truth commissions with supposedly different areas of work.

In 2013, the interim elected government, headed by the then Supreme Court Chief Justice, approved an ordinance to establish a commission that merged the previous two

commissions into a single TRC. Political parties in coordination with the security services agreed to move forward this TRC ordinance. In spite of an agreement being in place, a resulting problem was that the victims' joint alliance challenged the amnesty provisions at the Supreme Court. On 2 January 2014 the Supreme Court ruled against the amnesty provisions and directed the government of Nepal to draft new laws through a participatory process. The post-election government drafted two separate bills again at the top level without consultation. The politically negotiated bills were registered in parliament and approved without due process. Thus, the democratic process was not followed, was not transparent and was unresponsive to the resolution of the conflict-related violence, instead serving the interests of the major political parties.

With regard to the ways in which resources control and influence the commission, the TRC Act requires that the Ministry of Peace and Reconstruction shall provide 'for an amount, building, means and other sources necessary for the business of the Commission'. That is to say that the determination of the amount, and on what it can be spent, is all in government hands and limits the independence of the commissions yet further. There is no obligation imposed upon the government to provide adequate resources. This means that the commissions cannot get economic assistance from external sources or donor agencies, and are effectively controlled by the government.

Because of limited funding it is not surprising that the commissions have achieved few results. The Chairperson of the TRC, Surya Kiran Gurung, has stated: 'we ... asked the government many times to provide necessary staff, financial and technical support to the commission's work, but we didn't get required assistance, we are still waiting for ... adequate resources that would open a door for external support to the commission' (Bhandari 2017).

Problematically, deep into the mandate of both the commissions, they had not begun investigating the complaints they had received. This has further widened the distrust of the commissions, which has seriously called their credibility into question. No investigations took place, because both commissions lacked the necessary resources, as well as technical assistance to carry out such investigations (Bhandari 2017). CIEDP Chairperson Lokendra Mallick has stated in this regard that 'the government should provide legal and logistic [sic] support to proceed with the investigation into the complaints received' (*ibid.*).

Nevertheless, during that period the CIEDP received 3,300 complaints and the TRC 63,000 complaints from victims of the conflict. These numbers are quite surprising considering the challenges and long delays in establishing the commissions. Some of those delays were down to political wrangling that was linked to perpetrators' fear of prosecution (Nepal 2016). The figures are extraordinary, especially when taking into account the threats to the victims from both security forces and political parties during the process, hoping to pressure the victims into silence, with many victims in rural districts too scared to complain (Bhandari 2016). Both truth institutions (Kathmandu Post 2016a) had to use local peace committees to collect complaints. These local peace committees are created by 'political consensus' and are headed by local political parties. For this reason, the complaint registration process was not seen to be safe or confidential. Victims generally did not feel comfortable registering their cases. It seems that many rape and sexual abuse cases were not registered because of security concerns. Victims often received threats. For example, in the Rukum District, a remote district in the Midwestern Hills, a Nepal Army battalion requested details of victims who submitted complaints at the local peace committee. This

was seen to be an intimidation tactic ([Kathmandu Post 2016b](#)). Such intimidation undoubtedly affected the process and reduced the quality of evidence.

Both commissions have received many complaints concerning senior government and political leaders, the security forces and other individuals involved in conflict-era incidents. There is little consensus concerning how to proceed with these complaints; there is no political support and security intervention, and that, together with the lack of human and financial resources discussed above, has caused the commissions to struggle in their basic functions, and fulfil their mandates. It is difficult for the commissions to establish any sort of historical truth concerning the events that took place and in turn what actions must be taken to reconcile grievances.

Conclusion

With over 50 years and dozens of examples of truth commissions to look back on, an undeniable aspect of their legacy is that the world has become far more focused on uncovering the truth about past atrocities. This is undoubtedly connected with the rising popularity of truth commissions as a methodology. Whilst there is typically a focus in the literature on the more widely publicized and famous truth commissions, scores of processes have taken place, especially since the 1990s.

Post-conflict or divided societies often have to (re-)build or (re-)structure their institutions. They have often designed institutions in ways that achieve specific objectives but at the same time conform to international standards, creating a reputation of being both democratic and accountable. When the demand for the truth is strong, often a truth commission becomes the most popular option for previously oppressed people, and has now become commonplace in transitional societies. However, whether those bodies are able to achieve the desired effect and expected results is dependent on a myriad of factors.

Whilst some may point to the fact that a large portion of truth often remains hidden, either because the perpetrators of atrocities do not come forward, or because they blatantly lie in their testimony, it is beyond doubt that truth commissions have a positive impact on bringing truth to light, particularly as victims are invited to come forward and publicly share their stories. However, an important condition for the success of a truth commission is whether or not it is considered to be independent from government. This affects how the objectives and results of the commission are seen. This is particularly so for the general public. For this reason, it is vital that commissions are set up in credible and legitimate ways. Otherwise they will not be accepted by all parties, and whatever results they arrive at will be questioned.

Thus, a commission must have political legitimacy. In the absence of such legitimacy, whatever record of past human rights abuses the commission produces will be contested. For this reason, other recent truth and reconciliation processes have tried to create processes that will not be perceived as biased towards any particular political party or faction.

This was not the case in Nepal, where the commissioners are seen to be close to government and may well have exercised their mandates to their own political ends. For some, political narratives rather than constructive engagement drive the transitional justice process in Nepal. The commissions have also been undermined by the fact of the victims' exclusion from the process and a lack of effort to address victims' needs in a sustainable, comprehensive, and inclusive manner. Furthermore, neither commission has been able to build civic

trust or create an environment for victims and the broader society to discuss the past openly, and they have been seen to have failed to stay true to their mandates.

There are, therefore, some clear lessons to be learned from the Nepal process. The problems the commissions are facing have a lot to do with the manner in which they have been established, the commissioners appointed, and the outside influences over the two institutions. The fact that commissioners are viewed as being close to several of the main political parties has clearly undermined the process. What we can take from this is that commissioners ought to be chosen on the basis of their impartiality, moral integrity, known commitment to human rights, reconciliation and disclosure of the truth, as well as the absence of a political connection. Those appointed ought to be representative of the specific society they come from including its religious, ethnic, political, rural or urban, gender and other component parts of its diversity, but not be representative of political organizations, especially those that were responsible for the violations. Membership needs to be carefully balanced to ensure all sides of the political spectrum are included but they must not be overtly political and must not specifically represent political organizations. If balance is achieved, a commission will instil greater trust and exude credibility, avoiding potential accusations of partisanship or bias. If all sectors of a society feel represented on the commission, it is more likely to be widely regarded as credible, non-partisan and therefore legitimate. Most crucially, it is also then more likely to achieve its goals.

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