

Kathmandu School of Law Review

ISSN 2091-2110
Human Rights and Democratisation

Volume 3

Special Issue

May 2013

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Economic, Social and Cultural Rights in the Transitional Justice Remit

Shreejana Pokhrel¹

This paper begins by explaining why confronting the past is essential for securing lasting peace, justice and sustainable reconciliation in the society through appropriate and comprehensive transitional justice approaches. Then the paper argues about the notion of the indivisibility of economic and social rights (hereinafter ESCR) in terms of injustices which may have been both a root and a product of conflict, including the possible remedies for violations. The paper also deals with the international legal framework and practices towards the justiciability of ESCR in relation to TJ and illustrates two country specific case examples where the TJ initiatives have embraced economic disparity, social injustices and discrimination in an attempt to audit the past for forward-looking strategies. This is followed by concluding remarks to reinforce arguments of the entire essence of the paper.

Introduction

Transitional justice (hereinafter TJ) can be defined as the full range of processes and mechanisms associated with a society's attempt to address large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation consisting of both judicial and non-judicial process and mechanism in unveiling truth, delivering reparations, institutional reform and national consultations,² in order to build a more democratic, just, or peaceful future, upon which a more tolerant, open, just and democratic, future is expected to reinstate.³

¹ Nepalese student at university in United Kingdom.

² 'United Nations Rule of Law' <http://www.unrol.org/article.aspx?article_id=29>, accessed 17 April 2013

³ Macmillan Reference, *The Encyclopaedia of Genocide and Crimes Against Humanity* (Macmillan 2004) 1045-1047.

Referring to the ‘large-scale past abuses’, the dominant understanding is generally limited to civil and political rights often ignoring the need to address gross violations of economic, social, and cultural rights associated with conflict. If transitional justice’s broader objectives of social transformation and the prevention of conflict are to be achieved, it is not only important to build dispute resolution; the root cause of the conflict that led to the transition or contributed to it must be addressed; if unaddressed, they are likely to fuel the next conflagration⁴

Violations of civil and political rights are intrinsically linked to violations of economic, social, and cultural rights, whether they are causes or consequences of the latter.⁵ In the course of conflict, in some cases, the entire minority communities or groups of victims sharing a common cultural ideology, identity, geographical location, culture, religion and economic status often end up suffering more harm than other.⁶ Nepal, East Timor, South Africa, Peru, Cambodia and Sri Lanka are some of the examples of such victims. Obviously, such groups’ post-transition needs are beyond usual business and deserve securing coping means as the basic elements of survival ranging from shelter to food to medical care. Thus, effective realisation of economic and social rights becomes the duty of the state in the TJ package.⁷ For example, during the decade-long conflict era (1996-2006), thousands of victims and survivors of the conflict in Nepal lost their bread-winning member of the family leaving the dependents in total destitute and without instant economic relief package; their very survival has remained at stake.⁸

Inclusive Approach to Past Abuses

Societies confronting the past due to histories of exclusion, racism, and, conflict and autocratic regimes and other forms of violence often create deep vertical division and exploring an amicable solution to the past crimes becomes extremely difficult.⁹ Such societies struggle to find the way to devise new state where rule of law, social reconciliation and culture of tolerance can be

⁴ L. Arbour, ‘Economic and Social Justice for Societies in Transition’ (2007) 40 *International Journal of Law and Politics* 1.

⁵ *Ibid.*

⁶ ICTJ, ‘The Rabat Report: The Concept and Challenges of Collective Reparations’ (Swiss Confederations, 12-14 February 2009).

⁷ *Ibid.*

⁸ See Ruben Carranza, Relief, *Reparations, and the Root Causes of Conflict in Nepal* (International Centre for Transitional Justice, October 2012).

⁹ See Advocacy Forum and International Centre for Transitional Justice, *Awakening: Impact of Nepal’s Conflict on Women (Illustrated)*(AF & ICTJ 2010).

institutionalized so that massive and systematic violations of human rights would not reoccur in the days to come.¹⁰

States are under the obligation to respect, protect and fulfill human rights and to abide by certain international human rights treaties in curbing rights violation irrespective of time and nature of the occurrences.¹¹ Providing reparations to victims and preventing future abuse is a precondition towards preserving and enhancing lasting and just peace.¹²

Recently there has been increased consensus among campaigners, scholars and practitioners that the basic tenants of transitional justice are civil and political right together with economic social and cultural rights.¹³ Such development accepts the fundamental scope that domestically engineered strategies to confront past human rights abuses, depending on the specifics of the local socio-political, economic and legal context, can add tremendous value to accountability and the rule of law.¹⁴ In a war-torn society, designing complementary approaches to justice would contribute to comprehensive justice at a critical political transition.¹⁵ Such efforts at the national level are considered to be more effective provided a major historical research is conducted, the cause of the conflict is revisited, victims' testimonials or oral histories are compiled and archived.¹⁶

Mainstreaming ESCR in TJ

It is extremely important to assess the traditional marginalization of ESCR as a core agenda of TJ processes and to explore the complexities associated in a transitional society for such exclusion. Mainstreaming ESCR in the TJ is a big challenge because the perception is heavily inspired by civil and political rights (herein after CPR) being the only justiciable elements resulting in gross neglect of economic, social, and cultural rights.¹⁷ TJ must create a clear corridor with an aim to lend a hand to the transformation of the closed and

¹⁰ Michelle Maiese, 'Beyond Intractability, Social Structural Change' (2003)

< <http://www.beyondintractability.org/bi-essay/social-structural-changes>> accessed 17 April 2013.

¹¹ UN Office of the High Commissioner for Human Rights, 'International Human Rights Law'

< <http://www.ohchr.org/en/professionalinterest/Pages/InternationalLaw.aspx>> accessed 17 April 2013.

¹² Macmillan (n 2) 1045-1047.

¹³ See Edel Hughes et al (eds), *Atrocities and international accountability: Beyond transitional justice* (United Nations University Press 2007).

¹⁴ Priscilla Hayner, 'Fifteen truth commissions – 1974 to 1994: a comparative study' (1994) 16 *Human Rights Quarterly*, 604.

¹⁵ Report of the Secretary-General, *The rule of law and transitional justice in conflict and post-conflict societies* (23 August 2004).

¹⁶ Hughes (n 13).

¹⁷ Macmillan (n 3).

repressed societies into open and equitable one.¹⁸ This can be done by meaningfully tackling the atrocities, discrimination and systematic abuses of the past so that a more equitable common future can be built founded on justice. TJ mechanism is expected to draw a framework in which the human rights violations predating the conflict and resulted in such a situation caused or contributed to it can effectively be addressed. The ESCR must be brought on board in the TJ initiatives with a view to render justice to the victims and survivors.¹⁹

ESCR in Relation to TJ

With the well-established notion of indivisibility of CPR and ESCR, full enjoyment of human life is determined by the adequate social conditions for meeting necessary basic needs.²⁰ The main obstacle is lack of commitment on the part of concerned stakeholders whose responsibility is to respect, protect and promote these rights for the benefit of all human beings, and misunderstanding about what ESCR involves.²¹ On logical grounds, in any discourse, core minimums are fundamental and this is equally applicable to the enjoyment of rights. All societies, the transitional societies in particular, have to be involved in determining these minimums.

There is no reason why the promotion of ESCR should not be a built-in component of TJ mechanism. Living under severe economic challenge and deprivation from resources does not mean that one deserves the denial of justice. Although ESCR are perceived to be progressively realized, with the political will for the allocation of resources, they can be implemented instantly too. Theoretically, the principle of indivisibility, universality, interdependence need more sharpening while developing a discourse on TJ but making these rights justiciable is not a herculean task.

The achievements on ESCR are supposed to be scored with steady graduation. For instance, it will take some years to achieve free universal primary education or accessible and good quality health care. However, two points should be noted: (i) there is a core minimum obligation under each right which

¹⁸ University of Essex, 'International Research Seminar: Towards a Conceptualisation of the Economic and Social Dimensions of Transitional Justice' (2012) <www.essex.ac.uk/.../SEMINAR%202012%20Discussion> accessed 17 April 2013.

¹⁹ Shedrack C. Agbakwa, 'A Path Least Taken: Economic and Social Rights and the Prospects of Conflict Prevention and Peace Building in Africa' (2003) 47 *Journal of African Law* 38.

²⁰ Icelandic Human Rights Centre, 'The Right to an Adequate Standard of Living' <<http://www.humanrights.is/the-human-rights-project/humanrightscasesandmaterials>> accessed 11 April 2013.

²¹ Kristina Touzenis & Lisa Tousek, 'Irregular Migrants' Access to Economic and Social Rights in the Country of Destination and in Origin: Particular Focus on the Netherlands' <<http://www.rechten.vu.nl>> accessed 17 April 2013.

must be met²² and, (ii) the state has an obligation to undertake steps, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights in the ICESCR rights by all appropriate means, including in particular the adoption of necessary legislation.²³ Thus, the term ‘progressively’, must not be misinterpreted as justifying inaction or action that renders the state’s obligation meaningless. Rather, it refers to the need for flexibility, ‘reflecting the realities of the real world and the difficulties involved for any country’. The *raison d’être* of the Covenant remains to establish clear obligations for states parties in respect of the full realisation of the rights in question.²⁴

ESCR Violation and Remedies

In spite of the doctrine of indivisibility of human rights, auditing violations with clear indicators are both challenging and contentious aspects of ESCR.²⁵ Controversy still surrounds what exactly constitutes a violation which leaves room for discretionary definition resulting in weak enforcement of ESCR.²⁶ ‘Progressive realisation’ clause of the Covenant is a soft area due to which states may interpret the above clause to avoid any accountability for non-compliance.²⁷ Also, absence of political will on the part of policy-makers and failure of the human rights movement to hold the regime accountable for economic injustice has led to undermining of the effective enjoyment of ESCR.²⁸

The first category of violations is based on the much-debated provision in the Covenant that state parties are obligated to ‘progressively’ realize ESCR ‘to the maximum of available resources.’²⁹ However, economic index of a given country cannot be an excuse for economic injustice, repression, marginalization, discrimination and disparity.³⁰ These rights are therefore violated when a government fails to dedicate adequate resources towards social services, or when these services are siphoned for militarization or embezzled by the public officials or politicians, or when there is an absence of political

²² International Covenant on Economic, Social and Cultural Rights (entered into force 3 January 1976) 999 UNTS 3 (ICESCR) art. 2(1).

²³ Ibid.

²⁴ Richard Bennet, former Representative of the UN High Commissioner for Human Rights in Nepal, Synopsis of the Speech (Interaction Programme on Community and Economic, Social and Cultural Rights, organized by NGO Federation of Nepal, Kathmandu, 17 June 2009).

²⁵ ‘Violation of ESCR’ (*The Centre for Economic Social Rights*) <<http://www.cesr.org/downloads/Violations>> accessed 17 April 2013.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

²⁹ ICESCR (n 22) art. 2(1).

³⁰ Committee on Economic Social and Cultural Rights (CESCR), General Comment 3 (1990) UN Doc E/C.12/1990/12 paras 8-11.

will and institutional mechanisms necessary to ensure these services as part of the citizens' rights.

Here, the school of thought is directed towards claiming that the rights represented in these instruments are merely inspirational and do not have legal basis for claiming them. 'In contrast, the provision of basic standards of living including housing or a healthy environment 'to the maximum of...available resources' necessarily requires a particular allocation of funding by government.³¹ For some, ESCR tends to attract the criticism that they are complex and costly to implement, and governments often consider them as burdensome to fulfill. However, the fact is that a State's practical ability in safeguarding CPR will be jeopardized without considering the indivisible impact of ESCR.³²

In support of this argument, the Committee on ESCR General Comment 3 provides that: 'While great emphasis has sometimes been placed on the difference between the formulations used in this provision and that contained in the equivalent article 2 of the ICESCR, it is not always recognized that there are also significant similarities.'³³

International Legal Framework

The effective realisation of the ESCR is enshrined in the UDHR, 1948 and in the ICESCR, 1966. Article 2(1) of the ICESCR states that 'Each State Party undertakes to take steps...to the maximum of its available resources... [to achieve] progressively the full realisation of the rights recognized in the present Covenant by all appropriate means'. The reference to progressive realisation means that less developed countries are not expected immediately to ensure the same level of economic, social and cultural benefits as rich ones. However, the CESCR, which oversees the implementation of the ICESCR, has clarified that all state parties have an immediate obligation to provide a minimum essential level of ESCR and to take deliberate, concrete and targeted steps towards full realisation of the rights.³⁴

Since indivisibility of human rights is a well-accepted doctrine and all human rights are universal, interdependent and interrelated, it is improper to pick and

³¹ Morton Winston, 'Human Rights, On the Indivisibility and Interdependence of Human Rights' (*College of New Jersey*) <<http://www.bu.edu/wcp/Papers/Huma/HumaWins.htm>> accessed 17 April 2013.

³² Julia Mansour, 'Rights in Action? The justiciability of Economic, Social and Cultural rights in Australia' (2007) 17 *HRightsDef* 25.

³³ ICESCR (n 22) art 2(1).

³⁴ *Ibid.*

choose among human rights.³⁵ Misinterpreting some human rights as optional, less deserving, dispensable, non-obligatory, or even as unreal is an entirely wrong approach. The rapidly emerging conviction within UN system is that every right must be regarded as complementary and interdependent.³⁶

The general comment issued by Committee on ESCR in 2005 illustrates on how to interpret the 'equal right of men and women to the enjoyment of all economic, social and cultural rights'.³⁷ In implementing article 2 of ICESCR, states parties should take into account that such laws, policies and practice can fail to address, or can even perpetuate, inequality between men and women because they do not take account of existing economic, social and cultural inequalities, particularly those experienced by women and the traditionally marginalized population.³⁸

Other key international standards which address the right to food include the Convention on the Rights of the Child (CRC)³⁹ and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁴⁰. In addition, in 2004, the Governing Council of the FAO unanimously adopted the Voluntary Guidelines to support the progressive realisation of the right to adequate food in the context of national food security.⁴¹

International Practices

In the judgment of *La Cantuta v. Peru*, referring to article 63(1) of the American Convention, court expresses an accepted principle, that is, a fundamental principle of the contemporary International Law on the responsibility of States. The occurrence of a wrongful act that is attributable to a State gives rise to the State's international liability, and fulfilling its obligation and its resulting duty to make reparation for and remove the consequences of the violation. The obligation to compensate is governed by International Law and it may be neither modified nor disregarded by the State in reliance upon its domestic law.⁴² Similarly, litigation on varieties of cases in connection with ESCR has been considered by the

³⁵ Diana Ayton-Shenker, *The Challenge of Human Rights and Cultural Diversity* (DPI/1627/HR, United Nations Department of Public Information 1995)

³⁶ United Nations Rule of Law (n 2).

³⁷ ICESCR (n 22) art 3.

³⁸ Convention on Elimination of Racial Discrimination (entered into force 4 January 1969) 660 UNTS 195 (CERD) General Recommendation XXV56th Session(2000) Gender-Related Dimensions of Racial Discrimination UN Doc A/55/18 (2000) 152.

³⁹ Convention on Rights of the Child (entered into force 2 September 1990) 1577 UNTS (CRC).

⁴⁰ Convention on Elimination of Discrimination against Women (entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

⁴¹ Standing Committee on Nutrition, *Closing the Gap on the Right to Adequate Food* (2005) <<http://www.unsystem.org/scn/Publications/SCNNews/scnnews30.pdf>> accessed 11 April 2013>

⁴² *La Cantuta V. Peru* (2006) 132 IACtHR 11 para. 200.

European Court of Human Rights which includes discrimination in educational languages, housing rights and the right to a healthy environment. India has developed a rich tradition of ESCR-based litigation following the judgment in *Fertilizer Corporation Kamgar Union v Union of India* in 1981.⁴³

Justiciability of ESC Rights

Despite the variety of states that have now given some form of judicial expression to ESCR, it seems clear that governments would be undertaking no bold new experiment by legislating for ESCR protection.⁴⁴ While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.⁴⁵

Adjudicating economic, social and cultural rights claims does not require courts to take over policy making from governments. Courts have neither the inclination nor the institutional capacity to do so. Rather, just as in civil and political rights cases; courts and other bodies adjudicating ESCR review government decision-making, to ensure consistency with fundamental human rights.⁴⁶

Under the ICESCR, it is required that states only demonstrate in good faith the fulfillment of the rights over time within their capacities. Where courts and other bodies have adjudicated ESCR claims, they have shown considerable deference to governments' decisions about resource allocation, and intervened only to ensure that governments take reasonable steps, without discrimination, and subject to available resources, to respect, protect and fulfill the rights.⁴⁷

It is often underestimated that social and economic discrimination and structural violence can be 'powder kegs' that, if left unaddressed, threaten to sabotage peace building processes. Zimbabwe is an ample evidence to demonstrate how deliberately marginalizing economic and social imperatives in the transition from repression results in a dangerous path.⁴⁸ Ignoring the issues altogether, treating inequality or structural violence as contextual

⁴³ *Fertilizer Corporation Kamgar Union v Union of India*, AIR 1981 344 SCR (India) para 52; This acknowledged that rules of standing could be liberalised to allow for submissions regarding a wide range of rights protection. Indian case law has also been an important influence on the development of housing rights protection for citizens subject to forced evictions in Bangladesh.

⁴⁴ Ibid.

⁴⁵ The Vienna Declaration and Program of Action (June 1993) UN Doc A/CONF.157/23 para 5.

⁴⁶ Coalition for an OP to the ICESCR, 'Advocacy Kit, Fact Sheet No. 7 The question of justiciability' <http://www.iwraw-ap.org/documents/OP_to_ICESCR_Advocacy_Kit> accessed 14 April 2013.

⁴⁷ Ibid.

⁴⁸ Ismael Mvingi, 'Sitting on Powder Kegs Socioeconomic Rights in Transitional Societies' (2013) 21 (2) *The International Journal of Transitional Justice* 171.

background rather than core themes in the transitional endeavors, or ejecting economic concerns from the broader discourse of reparations may result in further chaos and dissatisfaction among victims.⁴⁹ Thus, in complementing this historic opportunity, TJs could be engaged in post-conflict rebuilding first by demystifying the socio-economic genesis of conflict and then by recommending future directions that would reframe national political agendas toward addressing the politics of poverty and structural inequity.⁵⁰

ESCR in TJ

Case Example-I: Kenya

The Kenyan Rift Valley region has experienced pre and post-election violence since 1992, the first election following the re-introduction of multi-party politics. The underlying cause of the violence in the region was the land question and access to associated resources; an issue with its genesis in the post-independence attempt at resolving landlessness caused by colonial occupation of the central highlands.⁵¹ Most of the people affected by the hegemonic land policies of the colonial regime were from the Kikuyu community, the largest and most politically active community in the country.⁵² After independence, the new regime under a Kikuyu president oversaw the resettling of most of these people in the Rift Valley region, a cosmopolitan province hitherto largely occupied by the Kalenjin Community. The Kikuyus in Rift Valley prospered economically, largely as a result of hard work, but also through what was perceived by some as patronage from the Jomo Kenyatta (1st President of Kenya) regime.⁵³ Kenyatta was succeeded by Moi of the Kalenjin community in 1978, but the latter's rule was plagued with opposition, mainly led by members of the Kikuyu community.

The violence witnessed in pockets of the Rift Valley before and following the general elections in 1992 and 1997 were thus the result of politicization of the land issue and economic grievances; an elevation of these perceptions and

⁴⁹ Zinaida Miller, 'Effects of Invisibility: In Search of the 'Economic' in Transitional Justice (2013) 21(2) *The International Journal of Transitional Justice* 175.

⁵⁰ Lisa J. Laplante, 'Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework' (2012) 31 (1) *The International Journal of Transitional Justice* 133.

⁵¹ Humanitarian Policy Group, 'Crisis in Kenya: land, displacement and the search for 'durable solutions'', Humanitarian Policy Group Policy Brief 31/2008 <<http://www.odhpn.org.uk/sites/odhpn.org.uk/files/odhpn-assets/publications-opinion-files/2263.pdf>> accessed 17 April 2013.

⁵² *Ibid.*

⁵³ Maurice N. Amutabi, 'Kenya Studies Review, Beyond Imperial Presidency in Kenya: Interrogating the Kenyatta, Moi and Kibaki Regimes and Implications for Democracy and Development' (2009) 1 *KSR* 1.

grievances into key parameters in political competition.⁵⁴ The poor people in the Rift Valley were made to see their poverty as caused either directly or indirectly by the intruders originally from the Central highlands.⁵⁵ Following a disputed presidential election in December 2007, where both incumbent President Mwai Kibaki and his challenger Raila Odinga claimed victory, large-scale violence erupted in various parts of Kenya, in particular the Rift Valley and Nairobi slums.⁵⁶

Under the auspices of the Panel of Eminent African Personalities, headed by former U.N. Secretary-General Kofi Annan, an internationally-sponsored mediation process known as the 'Kenyan National Dialogue and Reconciliation' (hereinafter KNDR) enabled a settlement to the dispute as a part of the TJ.⁵⁷ While debates about TJ have taken place on a number of occasions in Kenya's history, the discussions about accountability, truth-seeking, and a number of related issues tend to be specifically linked to the violence in 2008. Nonetheless, some of the measures established, including the Truth, Justice, and Reconciliation Commission (hereinafter TJRC), are intended to address political violence and other injustices in a comprehensive manner, covering the entire post-colonial period.⁵⁸

TJRC was mandated to inquire into human rights violations, including those committed by the state, groups, or individuals. This included but was not limited to politically motivated violence, assassinations, community displacements, settlements, and evictions.⁵⁹ It was also mandated to inquire into major economic crimes, historical land injustices, and the illegal or irregular acquisition of land, especially as these relate to conflict or violence.⁶⁰ The 2007 general elections and the associated violence were yet another reflection of how ethnicity has eroded the social and political fabric of the Kenyan society. In sum, the social economic inequalities played a role in this violence, fueled by ethnic differences. Although overt incidences of

⁵⁴ Synopsis of the transcript of the informal skype interview with *Jelvas* Musau, Protection Officer, UNHCR, Iran and a Kenyan humanitarian worker (Tehran, Iran, 12 April 2013).

⁵⁵ *Ibid.*

⁵⁶ 'Report of the Commission of Inquiry into post-election violence'
< <http://www.dialoguekenya.org/docs/PEV%20Report.pdf>; > accessed 12 April 2013.

⁵⁷ 'Introduction to KNDR' <<http://www.dialoguekenya.org/>> accessed 13 April 2013.

⁵⁸ Thomas Obel Hansen, 'Transitional Justice in Kenya? An Assessment of the Accountability Process in Light Of Domestic Politics and Security Concerns' (2011) 42 *California Western International Law Journal* 1.

⁵⁹ Amnesty International 'Kenya: Amnesty International's Recommendations to the African Union Peace and Security Council' (AI Index: Afr 32/007/2008)
< <http://www.amnesty.org/en/library/info/AFR32/007/2008/en>> accessed 13 April 2013.

⁶⁰ *Ibid.*

post-election violence were triggered by the fraud and fraudulent activities in the elections, in fact, the root causes behind the eruption of such violence was contributed by other historical injustices including deeply entrenched disenfranchisement, discrimination and disparity.⁶¹ The above body was entrusted to inquire into such events which took place between December 12, 1963 and February 28, 2008. However, it, as necessary, looked at antecedents to this date in order to understand the nature, root causes, or context that led to such violations, violence, or crimes and to manage a broad reform agenda and other mechanisms that would address the root causes of conflict.⁶²

Land reform, tackling poverty and inequity, as well as combating regional development imbalances, particularly promoting equal access to opportunity, reform of the Public Service, strengthening of anti-corruption laws/public accountability mechanisms and addressing issues of accountability and transparency are other salient features of the transitional justice initiative.

TJRC was also entrusted to create database of the victims/survivors of these violations *along* with charting an appropriate future direction as a part of remedies. The ultimate goal set in the TJ initiative was to upscale reparation, for sustainable reconciliation and by creating a conducive climate for co-existence among former adversaries.⁶³

In 2010, as part of the reform dialogue, the country passed a new and very progressive constitution the implementation of which may see to a seismic shift in the accountability framework in the country. In line with the new constitution, the judiciary has been reformed and would currently rank as the one institution that commands trust across the country. These are critical building blocks for the TJ agenda in the country, and products of the commitment to accountability heretofore mentioned.⁶⁴

Case Example-II: Nepal

In Nepal, violation of ESCR was both a root cause of the conflict – and political turmoil. The conflict (1996–2006) was fought on grounds of social backwardness, economic challenges, undevelopment, landlessness, and overall exclusion of the

⁶¹ Yvette Selim, 'Transitions: creating space to address injustice after conflict or political turmoil.; Open Security, Reconciliation and Conflict' <<http://www.opendemocracy.net/opensecurity/yvette-selim/transitions-creating-space-to-address-injustice-after-conflict-or-politica>> accessed 1 February 2012.

⁶² 'Kenya National Dialogue and Reconciliation Retreat' <<http://legacy.ushahidi.com/incident.asp?id=214>> accessed 14 April 2013.

⁶³ Evelyne Asaala, Rapporteur, Truth, Justice and Reconciliation Commission, Exploring transitional justice as a vehicle for social and political transformation in Kenya (2010) African Human Rights Law Journal <<http://repository.up.ac.za>> accessed 17 April 2013.

⁶⁴ Interview with Jelvas Musau (n 54).

poverty-stricken population from the mainstream development, gender and caste-based discrimination. Ensuring the ESCR of poor and marginalized individuals is one of the crucial elements of the peace process.⁶⁵ The rights to environment and health, education and culture, employment and social security, as well as to property, religion, labor and food sovereignty are enshrined in the Interim Constitution including equitable distribution of economic gains based on social justice without any discrimination.⁶⁶

The Comprehensive Peace Agreement (hereinafter CPA) between the Government and the CPN (Maoist) concluded on 22 November 2006 is part of the Interim Constitution which is considered to be a fundamental instrument towards serving TJ through overall restructuring of the state and with provision for the establishment of a 'Truth and Reconciliation Commission' (hereinafter TRC).⁶⁷ Although an ordinance towards the establishment of the TRC has been recently issued by the President, the body is yet to be established since the Supreme Court of Nepal has issued a stay order against the amnesty provisions of the Ordinance.⁶⁸

Key Arrangements for ESCR in the CPA

Article 3: Political, Economic, Social Transformation and Conflict Management: The CPA has a specific provision to carry out an inclusive, democratic and progressive restructuring of the state by ending the current centralized and unitary form of the state in order to address the problems related to women, Dalit, indigenous people, and other minority communities by ending discrimination based on class, caste, language, gender, culture, religion, and region.⁶⁹ Also, a commitment is expressed for gradual implementation by deciding through mutual agreement a minimum common program for the economic and social transformation to end all forms of feudalism⁷⁰ and adopting a policy of implementing a scientific land reforms program by ending feudal land ownership.⁷¹

Adopting policy of establishing the rights of all citizens to education, health, housing, employment and food security⁷² and ensuring the adoption of policy

⁶⁵ Interim Constitution 2007 chp Responsibilities, Directive Principles and Policies of the State.

⁶⁶ Ibid arts 12-32.

⁶⁷ Comprehensive Peace Agreement (2006) (herein after CPA) <<http://reliefweb.int/report/nepal/full-text-comprehensive-peace-agreement>> accessed 17 April 2013

⁶⁸ Truth and Reconciliation Commission ordinance 2013 <<http://www.myrepublica.com>> accessed 18 April 2013.

⁶⁹ CPA, sub-clause 3.5.

⁷⁰ Ibid sub-clause 3.6.

⁷¹ Ibid sub-clause 3.7.

⁷² Ibid sub-clause 3.9.

of providing land and other economic protection to socially and economically backward classes including landless squatters, bonded laborers and pastoral farmers are other salient features of the CPA in relation to securing TJ.⁷³

Article 7.1: Human Rights: Both sides have agreed to create an atmosphere to enjoy CP and ESC rights and are committed to create an atmosphere where such rights are not violated in the future under any condition⁷⁴ and express the commitment that impartial investigation and action would be carried according to law against people responsible creating obstructions to the exercise of the rights.⁷⁵

Article 7.5: Economic and Social Rights: The CPA has a provision to ensure that both parties are committed to respect and protect the individual's right to livelihood through freely chosen or accepted employment⁷⁶ along with a significant component binding both parties to commit towards respecting and guaranteeing the rights of food security to all, including the⁷⁷ right to health and education.⁷⁸

Conclusion

Several efforts are underway for dealing with economic, social, and cultural rights adequately or systematically in the TJ initiatives. It is advisable that TJ should embrace the challenges to which mainstream justice is reluctant to rise especially in developing or underdeveloped countries, where rights remain in hierarchy, with ECSR having fallen in the lower step of the ladder. Along with peace agreements and TJ endeavors, the economic, social and cultural rights unconditionally deserve constitutional protection, legislative promotion, administrative arrangements, institutional safeguards and judicial enforcement. A comprehensive strategy for TJ would, therefore, address the gross violations of all human rights during the conflict as well as the gross violations that gave rise to or contributed to the conflict in the first place so that these violations will not be perpetuated in the future.

⁷³ Ibid sub-clause 3.10.

⁷⁴ Ibid sub-clause 7.1.2.

⁷⁵ Ibid sub-clause 7.1.3.

⁷⁶ Ibid sub-clause 7.5.1.

⁷⁷ Ibid sub-clause 7.5.2.

⁷⁸ Ibid sub-clause 7.5.4.