Transitional justice as an elite discourse: Human rights practice between the global and the local in post-conflict Nepal

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Abstract

Nepal's conflict emerged as a result of a highly unequal society in which the indigenous, lower castes and women were subject to systematic social, political and economic exclusion. This study seeks to understand how post-conflict agendas to address Nepal's violent past emerge, and compares the agendas articulated by indigenous victims of the conflict from a remote rural district with that of civil society dominated by Kathmandu based elites. An empirical study has been made of the needs of transition of families of those disappeared during the conflict in the Mid-western district of Bardiya, the worst affected by disappearances during the Maoist insurgency. This agenda is then compared and contrasted with that articulated by those leading advocacy for transitional justice in Nepal, namely national and international human rights agencies. Indigenous rural victims remain ignorant of rights and articulate an agenda of addressing basic needs and demanding political change that empowers them. Elite led civil society, notably among human rights agencies, has adopted a highly legalistic agenda that coincides with the dominant global rights discourse in which prosecutorial process is prioritised and the inequalities that led to conflict considered beyond the remit of transitional justice; issues of social and economic rights are ignored. Victims remain marginalised from both the transitional process and from those agencies that purport to represent them. A global rights agenda that uses the language of giving agency to the marginalised actually serves to advance ethnic and caste based elites.

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Introduction

Transitional justice is an effort to respond to the needs of societies emerging from conflict or political violence[2] and has become the preferred lens through which to examine democratising states. Typically, these are institutional responses to violations of international humanitarian law, human rights law or domestic law that occurred during a previous regime. This discourse emerged from a legal tradition, parallel to that of human rights, and as such initially saw such responses as principally legal, concerning retributive justice and prosecution.[3] However, transitional justice has increasingly become dependent upon a broader understanding of the concept of justice that goes beyond prosecutorial mechanisms and includes mechanisms that aim to address issues of truth and reconciliation, reparations and acknowledgment. The justice of transitional justice has also been interpreted in its broadest sense, not only as a legal response, but as a multi-faceted process that seeks to build social relations perceived as equitable.[4] In this sense transitional justice can aim not just to address violations of the conflict and their consequences but the injustices that led to conflict. Such an interpretation has led to the beginnings of an engagement with issues such as development and social exclusion within the transitional justice discourse.[5]

Much has been written critical of the human rights discourse from which transitional justice emerges, notably that it represents a wholly Western tradition,[6] and challenging its claims to universality.[7] Critiques of contemporary approaches to transitional justice are centred around its embodiment in institutional approaches, either national or supra-national,[8] its continuing dominance by a legalist agenda[9] and the fact that it is steered by perspectives deriving almost exclusively from elites.[10] Despite a widespread understanding that it is the poor and disempowered who suffer most in the violence that precedes transition and who constitute most of the victims of conflict, a sustained engagement with such constituencies has not become part of the mainstream practice of transitional justice. Whilst many transitional processes claim to be "victim-centred" (e.g. the much discussed transition in South Africa[11]) this term remains under conceptualised and transitional processes continue to be driven largely by elites in concerned states with the support and guidance of the international community. In many post-conflict interventions both the individual and collective consequences of violations remain largely unexamined.

The human rights discourse is now truly global, both in its stated universality and in the range of states that claim to enforce rights. However human rights has globalised together with other sets of norms, including a broad range of liberal, and sometimes neo-liberal, tenets.[12] In the developing world a discourse of development, rights and liberal democracy has become truly hegemonic, with international donors, NGOs and most governments claiming to ascribe to

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[2] Teitel 2000.
[3] Teitel 2003; Orentlicher, 1991, 2007.
[4] Kriesberg, 2001.
[5] e.g. Mani 2008.
[6] e.g. Pollis and Schwab 1989; Panikkar 1984.
[7] e.g. Donnelly 1984.
[8] Duschinski 2008.
[9] McEvoy 2008.
[10] McEvoy and McGregor 2008.
[11] Republic of South Africa 1999.
[12] Rajagopal 2003.

what are broadly perceived as universal values. The *practice* of human rights however remains far from universal: 'on the ground' human rights is a transnational discourse that must compete with local political and other imperatives. As a result, the study of the practice of human rights is necessarily discursive; to understand how the global rights discourse impacts in particular places upon human actors, given the webs of political and social relationships in which it must operate.[13] The study of rights in practice involves studying how the global discourse of rights is instantiated or constituted in a particular context. Here that context is a conflict affected district of Nepal, remote and rural and with a majority indigenous population. An empirical study has been made as to how the human rights discourse is articulated in this post-conflict setting and how visions of transitional justice arising from that discourse coincide with or contradict those of conflict affected indigenous people. This article begins from the understanding both that there is no such thing as human rights 'in the abstract',[14] and that 'non-elites [...] are very often important human rights theorists'[15]. This article aims to ask where the global discourse of human rights is situated or constituted, and how does the way these norms are constructed in practice impact upon the emancipatory potential of that discourse, in particular in a highly unequal society in transition from armed conflict. This highlights the difference between human rights on a conceptual level, the global and the universal idea that drives the discourse, and how they are instantiated in particular social settings, subject to the power relations that exist between the actors involved.[16]

Nepal's conflict was the product of a society built upon the codified exclusion of a majority of its people. Such social exclusion[17] militates against the engagement of a large fraction of Nepalese in many areas of society, on the basis of caste, ethnicity and gender: it is unsurprising that it also impacts on the transition from conflict. Post-conflict efforts to create transitional justice mechanisms continue to be elite led and to marginalise victims and their agendas, and to be dominated by a narrow legalism that neglects the priorities of victims. The ethnographic research discussed here appears to confirm that the idea and meaning of rights in this transitional context is a product of the conjunction of victims with needs and a global discourse articulated by elites. However, the norms that emerge refer far more to priorities internal to the discourse itself than to the needs or agenda of victims, largely because one is articulated by the powerful and one by the powerless:

> 'human rights is not a product of social relations but immanent in them, internal to their very expression [...] rights are positioned at the conjuncture of the two fields of the social: agency and power'[18]

The aim here is not to devalue human rights discourse in transitional contexts, but to enrich it by demonstrating that rights are mediated by the actors who articulate them: in an unequal society, as any other discourse, they will become subject to existing power relations.

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[13] Goodale and Merry 2007.
[14] Ibid, 25.
[15] Ibid.
[16] e.g. Stammers 1999.
[17] de Haan 1998.
[18] Wilson 1997.

The Tharu of Bardiya: Exclusion and victimisation

Bardiya and the Tharu

Nepal is the poorest country in Asia, and the 12th poorest in the world,[19] with an annual income per capita barely over $400 per year: 30% of the population lives on less than $1 per day. The feudal social relations that have persisted into modern times impact upon livelihoods, with a significant fraction of the rural population being landless and working as sharecroppers for landlords. A lack of access to land is the dominant cause of rural poverty. Nepal is a mosaic of ethnicities, languages and castes, having a unique and complex ethnic geography. The kingdom of Nepal was unified in the 18th century, under a dynasty of peoples who migrated from India in the centuries before. They established themselves as an elite, socially, culturally, economically and racially, through a rigid system of social stratification that placed the Brahmin and Chhetri castes of the migrants above both the indigenous ethnicities and lower Hindu caste groups.[20] As a result of this social exclusion, traditionally non-Hindu indigenous people (*Janajati*) and more recent immigrants into the *Terai* plains of Nepal from neighbouring India, have been systematically excluded from the very idea of the Nepali nation, with many traditionally being denied citizenship. As a result, a majority of the population have been excluded from certain parts of the economy, from what little social services are available and from politics. Indigenous people and the lowest castes face mortality, literacy and income far below the nation's meagre average.[21] Within families and communities most of Nepal's cultures relegate women to a subservient role, and women have been largely absent from decision making at all levels.

Bardiya is one of Nepal's 75 districts, lying in the Terai on its border with India in the Mid-west development region. Predominantly rural, Bardiya is a district of agriculturalists and one of only two where the indigenous Tharu people are a majority. The Tharu constitute around 6.75% of the population of Nepal, 1.5 million people, of whom 83% work in agriculture.[22] Indicators of their exclusion can be seen in education: Tharu literacy rates are half (17.5%) the rate among non-Tharu in Bardiya.[23] The Tharu are traditionally animists and have their own language (or languages) and unique medicinal and spiritual traditions.[24] As a result of efforts to assimilate the indigenous peoples into a narrowly defined Nepali identity, many Tharu now consider themselves Hindu, but continue to practice non-Hindu traditions[25].

In the last three decades of the 20th century the Nepali Government encouraged migrants from the hills, mainly high caste Hindus who shared language and culture with the ruling elite, to migrate to the Terai to exploit land from which malaria had recently been eradicated.[26] High caste migrants were readily able to capture political power because of their education, wealth and access to local authorities with whom they shared ethnicity. For the Tharu

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[19] UNDP 2004.
[20] Höfer 2004.
[21] UNDP 2004.
[22] Danida 2004.
[23] Chhetri 2005: 25.
[24] Guneratne 2004.
[25] During this research a Tharu woman was asked what her religion was, at which point she turned to the other women with her and asked "Are we Hindu or Muslim?". This well summarises the relationship many indigenous people have with the dominant religion of Nepal.
[26] Conway, Bhattarai and Shrestha 2000.

this began what they perceive as the systematic theft of their land, their only economic capital, by migrants, leaving many dispossessed and farming as tenants or share croppers. Most notably, land was seized following the making of loans to Tharu landowners with interest arrangements that ensured payment was impossible.[27] The result of this was the creation of a class of bonded labourers among the Tharu, known as *kamaiya*: entire families constrained for generations to work for a landlord to pay off debts.[28] Control of land passed to high caste landowners, who then employed the Tharu to work the land. Tharu marginalisation was enhanced by their lack of political representation and minimal presence in the institutions of the state. Conflict between the Tharu and the incoming migrants over land had occurred since migration began with the Nepali state violently intervening in support of landlords.[29] A dominant strand of the Tharu land rights movement was that to 'free' the *kamaiya*, and the democratic changes of 1990 eventually led to the Government outlawing this form of contemporary slavery in 2000 and adopting the *Kamaiya* Labour Prohibition Act in 2002.[30] However, both the freed *kamaiya* and many other Tharu families own no land and must rely on casual work, share cropping or tenancy to survive. For many in Bardiya, both among the Tharu and high caste landlords, the Maoist 'People's war' was another episode in this ongoing conflict over land.

The development discourse and exclusion

Despite the limited state presence in much of rural Nepal, people were exposed to an idea of Nepal and of being Nepali constructed by elites in their own image. This disseminated the culture and values of that elite: a concept of Nepalis as a high caste Hindu hill people that justified the exclusion of the indigenous:

> 'non-Hindu ethnic peoples in Nepal had been subjected to a deliberate policy of religious and cultural suppression that converted cultures into castes, assigned each a place in a ranked rituo-political system, and aimed to make people who hailed from non-Brahminical cultures and histories into loyal subjects of the Hindu nation-state.'[31]

In Nepal a liberal discourse, combining ideas of democracy, rights and development, has become hegemonic as a result of the priorities and resources of international agencies and the willing cooption of national elites who have benefitted from an association with it, through access to funds and careers. The ideologies and institutions of development came to be understood as the definition of modernity[32] even though these were created entirely upon the basis of elite understandings of what a Nepali was and should be:

> 'Instead of building on the traditions and knowledge of the villagers in Nepal, the education they received taught them that the places they came from were ignorant and dirty. Their culture, their religious beliefs, and their ways of using the land apparently were what prevented them from entering the bright, shiny modern world, not the reality that in that world there was not enough – enough opportunities, enough resources – to go around. They were taught that their poverty was the result of who they were and

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[27] Personal interview, Gopal Dahit, Kathmandu, August 2008.
[28] Chhetri 2005.
[29] Personal interview, Gopal Dahit, Kathmandu, August 2008.
[30] Cheria, Edwin, Kandangwa and Upadhyaya 2005.
[31] Leve 2007.
[32] Pigg 1996: 160-201; Pigg 1992: 491-513.

where they came from – things they could not change - not the result of the deep inequities in the world they hoped to join.'[33]

For indigenous people, the conflation of this modernising agenda of rights and development with a Nepali culture defined by and in the image of elites created a pressure that actively served to erode indigenous culture.[34]

The process of democratisation after 1990 was driven by these liberal values but singularly failed to address any of the substantive issues of poverty, social exclusion, or the violence implicit in many economic relations. Whilst supported by a broad mass of the people, the 1990 movement was led by traditional elites who saw democracy in terms of competitive elections, rather than a challenging of the narrow ethnic and caste base of economic and political power. With the onset of democracy local elites learnt to run political parties in their areas as machines of patronage and in many areas the rich and powerful were able to ensure that their chosen candidates won elections. Electoral democracy changed very little in terms of who represented the people of Bardiya. Non Tharu elites used the institutions of political parties, networks of patronage, and thuggery to win seats in the new democratic parliament. The fraction of civil servants coming from the most powerful caste and ethnic groups increased from the 1980s to the end of the 20th century,[35] demonstrating that far from addressing issues of social exclusion, the new dispensation that followed the arrival of democracy actually worsened it. At the start of the 21st century the Brahmin and Chhetri castes, which constitute some 30% of the population of Nepal made up 87% of civil service staff.[36] Because the liberal principles on which the democratic state was founded did not challenge the extreme inequalities that existed, indigenous people and others remained excluded. This issue reflects a deeper fault line in the global human rights project that from its inception elevated individual rights over group rights, leading to the neglect of indigenous peoples that Falk has called a 'normative blindness'.[37] This was reflected in the assimilationist policies that post-1990 Nepali Governments attempted.

In both the provinces and the capital the most lucrative jobs lay in foreign development agencies and the national NGOs they supported. Government, which remained substantially corrupt at all levels,[38] could best access funds by articulating the development discourse in its dealings with foreign donors. As a result significant amounts of donor aid were swallowed by elites who had learned the language of development and rights, and rather little reached rural areas,[39] ironically serving to increase the urban-rural economic divide. It was the inability to tackle the fundamental issues affecting many Nepalis, notably exclusion, poverty and uneven development that led to the success of the Maoist People's War.

Conflict and transition

In 1996 a small party from among Nepal's fractious Marxist left, the Communist Party of Nepal (Maoist) [CPN-M], declared a 'People's War' against the newly democratic regime. The

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[33] Armbrecht 2009, 163, discussing a Janajati group in the hills.
[34] Pigg 1996.
[35] Thapa and Sijapati 2003.
[36] Battachan 2008.
[37] Falk 1981.
[38] Upadhay 2004.
[39] Upadhay 2004: According to the report of the Office of Auditor General (2002/3), a total of NRs71.22 billion (nearly one billion in US dollar terms) from various donors has not been accounted for in the annual budgets of the government.

insurgency grew rapidly from its initial base in the hills of the impoverished Mid-west with the Maoists conducting military operations throughout the country. They propounded a politics that explicitly encompassed an end to exclusion on the basis of ethnicity, caste and gender and as a result a significant fraction of their cadres were drawn from marginalised groups.[40] The Maoist insurgency began in those areas, notably the poorest, where the state was largely absent and as a result the conflict was fought almost exclusively in rural areas, in both hills and plains, and rural populations became the victims of both sides. By the later years of the insurgency the CPN-M controlled perhaps 80% of the territory of Nepal, with only the headquarters of the 75 districts and major towns under Government control. Because of the ethnic profile of the insurgent forces, many victims belonged to indigenous minorities, in particular where ethnic groups, like the Tharu, were perceived as being generally sympathetic to the insurgency and targeted by the state as a result.

One favoured tactic of state forces was to arrest and extra-judicially kill those they suspected of being close to the Maoists. In 2003 Nepal was responsible for a greater number of cases of disappearance reported to the UN's Working Group on Enforced Disappearances than any other state.[41] Whilst disappearances[42] were also perpetrated by the Maoists, the vast majority were the responsibility of the forces of the state. The district most affected by disappearances was Bardiya, where more than 250 persons remain unaccounted for,[43] 80% of these Tharu, who constitute 52% of the district population.

The conflict came to a dramatic end in April 2006, with a second 'People's Movement' uniting the Maoists and the constitutional parties against a king who had again seized absolute power. The conflict left a legacy of some 15,000 dead[44] and more than 1,300 unaccounted for nationally.[45] As part of an ongoing peace process the monarchy has been abolished, a republic declared and following elections to a constituent assembly in 2008 the Maoists are now the largest party in the legislature. The Maoist-led Government that emerged after elections showed no enthusiasm in creating mechanisms of transitional justice despite commitments made in the documents of the peace process.[46] This is due to both a general blocking of legislation that has characterised the politics of the post-election period, and a suspicion among all leading political parties of any process that threatens the prosecution of those who waged the war. As such, the post-conflict debate around transitional justice has been between civil society, led by human rights agencies, and a Government that appears to have little interest. Both international and local human rights agencies have focussed many of their initiatives on issues of transitional justice, and these will be reviewed here in the light of the power dynamics between human rights workers and victims and with reference to Tharu victims in Bardiya.

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[40] Hangen 2007.

[41] Human Rights Watch 2004.

[42] According to the definitions of international human rights law only forces linked to a state can perpetrate disappearance (UN Convention on Enforced Disappearance, 2004), whilst arrest and resulting disappearance by a non-state actor, such as the CPN-M, is referred to as abduction. Here, disappearance will be assumed to refer to cases perpetrated by both parties to the conflict in Nepal.

[43] ICRC, 2008.

[44] INSEC 2007.

[45] ICRC, 2008.

[46] Government of Nepal 2006.

Impact of the conflict

The history of dispossession among the Tharu of Bardiya made them receptive to Maoist commitments to ethnic autonomy and land reform and, as a result, the CPN-M found a pool of support in the Tharu community. In districts like Bardiya, where the greatest issue facing the population was that of land and landlessness, as the CPN-M gained effective control of rural areas they also tried to be seen to be addressing such issues. Landlords were targeted, and often forced to flee their lands which were then redistributed to others. However, the conflict took its toll on both individual Tharu farmers and on the Tharu as a community, when the state responded to Maoist success in the district. The Tharu in Bardiya believe that the authorities were unable to discriminate between the Tharu land rights movement and the Maoist insurgency:[47] many of the Tharu people now missing had no connection with the CPN-M.[48] Others taken were community leaders, teachers and activists. However, it appears that the principle reason for the Tharu being targeted by state security forces in Bardiya was as an extension of the struggle over land. From November 2001 the Royal Nepal Army (RNA) was introduced into the conflict against the CPN-M following the failure of the police, along with anti-terrorist legislation that led to a dramatic deterioration in the security situation in Bardiya. Thousands were arrested in Bardiya at this time[49] and disappearances escalated. The greatest number of disappearances occurred following the appointment of a local landowner, from a migrant high caste hill family, to a RNA command position:

> 'His grandfather and father were like kings in this district from a very long time back. They used to pick up any woman they liked from the Tharu village and rape them, entrap Tharu people in their debt [...] If they couldn't pay, they had to work as bonded labourers. [the commander] was the son of those feudatory princes and since his childhood his thinking was negative concerning the Tharu community.'[50]

Methodology of the study

The research agenda is driven by the desire to understand victims' goals for Nepal's transition and compare these with the aims articulated by those driving discussion of transitional justice in Nepal. The research design was therefore developed on a participatory basis with an association of families of the disappeared in Bardiya, the Conflict Victims' Committee (CVC). CVC is the largest and oldest association of families of the disappeared in Nepal, having been founded in 2007 by a schoolteacher whose father was disappeared by the state, and claiming the membership of over 200 families. The engagement with family associations helped to build an ethical relationship between the researcher and the researched.[51]

The sampling frame used for the study is a list, drawn up by the International Committee of the Red Cross (ICRC), of 241 persons missing as a result of the conflict in Bardiya and published at the start of data collection (ICRC, 2008). A random selection was made from the list to select subjects for interview: of the 31 families met, 28 were Tharu. This represents victims of both sides, although 96% of disappearances in Bardiya were state perpetrated.[52]

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[47] OHCHR 2008.
[48] ibid.
[49] ibid.
[50] Personal interview, Tharu CPN-M leader, Bardiya, July 2008.
[51] Robins, 2009.
[52] CVC, Bardiya, 2007: personal communication.

Subjects were interviewed in their homes as a family group, using a semi-structured approach, developed with CVC leaders. Additionally, CVC selected focus group participants allowing peer groups to be constructed. These included Tharu women and wives of the disappeared. Disappearances had occurred between 12 and 2 years prior to the research, with the average time passed being 5 years. Whilst the methodology is qualitative, the sampling approach allows quantitative statements to be made. The methodology and results of this study are described in detail elsewhere.[53] Interviews were also made with the leadership of CVC, as well as with Tharu intellectuals, local authorities and staff of human rights NGOs in Bardiya, the regional centre and Kathmandu. Research was conducted over a six month period in 2008, some 2 years after the end of the conflict.

Victims and the rights discourse

Victim priorities of transition

When asked about their understanding of human rights most victim families in Bardiya believed that 'human rights' were a group of NGOs, responding with comments such as: 'human rights have come to see us a few times, but have done nothing'. They were then asked about their specific understanding of *their* human rights:

> 'I don't know about any   rights. I just heard that   it means n obody should kill human beings, that it's a crime to kill people.'[54]

> 'Sometimes I think that when they took our people, they should not have killed them, they have the right to live. […] It is treating them like beasts to kill them immediately after the arrest. They treated our people like dogs. But I don't know exactly what rights are.'[55]

No family met in Bardiya, other than the leader of the victims' association, was able to show significant understanding of what human rights are. The data of this study of families of the disappeared in Bardiya[56] indicate that families' priorities are for the truth about the fate of loved ones and to retrieve bodies, and economic support so that basic needs for food, healthcare and children's education could be met: large majorities prioritised both issues. Justice was mentioned as a priority by only 7% of families in Bardiya. Whilst victims would welcome retributive justice, this is not their priority. Victims have little understanding of rights and articulate *needs*.

Whilst many agencies and donors are devoting funds and programmes to transitional justice in Nepal, rather few efforts have been made to understand what victims want from transition. One study of conflict victims, using largely quantitative methods, has been published by the International Centre for Transitional Justice, and Advocacy Forum,[57] one of Nepal's leading national human rights agencies. Most of the report's content is concerned with attitudes towards prosecutorial justice and the proposal of a Truth and Reconciliation Commission, while

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[53] Robins 2009; ICRC 2009.

[54] Personal interview, brother of missing Tharu man, Bardiya, August 2008.

[55] Personal interview, focus group participant, Bardiya, August 2008.

[56] ICRC 2009.

[57] ICTJ (International Centre for Transitional Justice) and Advocacy Forum 2008.

the survey confirmed that the priorities of victims and their families were: compensation, education, basic needs, such as food, housing, clothing, health and medical facilities, employment and the whereabouts of the disappeared: a mere 3% of those questioned prioritised the punishing of perpetrators. This strongly suggests that victims and their families prioritise basic needs over legal process, and yet the work of those agencies who commissioned the report remains dominated by a judicial agenda (see below). There are additional questions about the sampling and methodology of the report,[58] not least the apparent underrepresentation of the indigenous and of women among those surveyed.

Victim emphasis on social and economic needs, rather than the judicial agenda of civil society has been remarked on elsewhere.[59] The analysis here will try to understand *why* there remains such a gap between the agendas of human rights professionals and the victims themselves in terms of the priorities of Nepal's transitional process.

Legalism of the rights community

It has been observed that the dominance of legalism in transitional justice, in both scholarship and practice has led to a 'thin' transitional justice that is institutionalised and driven by legal processes[60] that has little relevance for those most affected by violations. The legalist approach is prevalent in Nepal: agencies both national and international advocating for action in response to violations committed during the conflict give primacy to judicial mechanisms, and advocacy has centred on ending impunity, rather than defining justice more broadly. A study of recent publications of Nepali human rights agencies concerning the transition confirm this emphasis: in one[61] the eight "key recommendations" all revolve around prosecution, criminalisation and ending impunity; of the 10 recommendations in a second,[62] whilst some engage with the mechanics of preventing disappearance, most concern prosecutions and none concern the families of those who have disappeared. Both documents understand justice in a narrow prosecutorial way; they are analyses that are perpetrator and violation centred, rather than victim and needs centred. Non-prosecutorial processes, such as the proposed TRC, are seen as a way to name and thus prosecute perpetrators, with other roles considered secondary:

> 'AF [Advocacy Forum] strongly advocates for a Truth and Reconciliation Commission to establish the actual truth and thereby identify and prosecute the perpetrators, provide reparations to victims and create conducive environment for reconciliation in order to provide justice for the victims, end the culture of impunity and reinforce the rule of law.'[63]

This represents an international trend in approaches to transition, what might be called the judicialisation of transition, in which an 'international justice project' is privileged over the goals of those most affected by the events of the conflict and indeed the broader needs of the nation. A senior worker at a UN agency in Kathmandu reported that whilst he could understand the perception that victims were being exploited by human rights workers, his agenda was not driven by that of victims in Nepal: his role was 'to see perpetrators sent to prison'. When a senior national human rights agency worker in Kathmandu was asked about the continuing legal emphasis of his work despite victims' expressed needs, he replied that 'sometimes simple

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[58] Pasipanodya 2008; Robins 2008.

[59] Pasipanodya 2008; Aguirre and Pietropaoli 2008.

[60] McEvoy and McGregor 2008.

[61] Human Rights Watch and Advocacy Forum 2008, 7-8.

[62] INSEC 2008.

[63] Advocacy Forum 2007, 1.

people do not know what they should want.'[64] The rights agenda is being used as a tool to deny agency to victims.

Here, we will consider the legalism of those leading advocacy for transitional justice in Nepal and compare their primarily judicial agenda with that of the victims of Bardiya. The law is an abstract concept to most Tharu and, whilst they have been its victims for as long as they have had contact with the Nepali state, few can conceive of it as something that could have relevance in their lives:

> 'The uneducated people don't know what rights mean and they don't know whether law exists or not. They don't know what provisions there are in law. Some of these people even think that the law is for the sake of rich people.'[65]

Indeed, around one third of victims believe that it is the role of human rights agencies to deliver justice.[66] Confusion over the law was further emphasized when families were asked who they most sought prosecuted: half of families mentioned local informers, who they felt were most responsible for the disappearance, apparently unaware that they are unlikely to have committed a criminal offence. This suggests that what is required in affected communities is not only a formal judicial process, but also something that can bring together members of communities who are divided by the violations of the conflict: a community based process that can address the grievances of victims and promote reconciliation.

The principal risk for victims of the constant emphasis of prosecutions is the marginalisation of basic needs, and the diversion of resources of all types to the judicial agenda. Victim families see justice as being much broader than prosecution: almost half see justice as compensation, truth or acknowledgment, rather than prosecution alone.[67] Almost one third would accept an amnesty for perpetrators, if this allowed the truth about disappearance to emerge, or permitted prosecution of those with greatest responsibility.[68] The leader of the Bardiya Association is frustrated at the failure of the victims' agenda and that of rights agencies to coincide: justice (in all its forms) is perceived by many victims as something that can only be sought by those whose basic needs are met:

> 'For instance, [an HR agency] works in providing legal support. In the course of it, they frequently invite victims for interactions. The victims are tired of taking part in these meetings; they complain that they cannot participate in meetings, abandoning their work, since they get nothing to eat in the evening if they do not work in the day. But [the agency] does not have any programs to support the livelihoods of the people. [...] To me, it seems that if we could make [the wife of a disappeared man] earn her food and clothes she would go to Gulariya [district HQ] to chant slogans. If she does not have food to eat, she will have to confine herself to the struggle to feed herself.'[69]

Not only are basic needs a priority, but their satisfaction is seen as a *prerequisite* to victims being able to campaign for justice.

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[64] Personal interview with senior human rights agency worker, Kathmandu, September 2008.
[65] Personal interview with focus group participant, Bardiya, August 2008.
[66] ICTJ (International Centre for Transitional Justice) and Advocacy Forum 2008.
[67] Robins, 2009.
[68] ibid.
[69] Personal interview with leader of CVC Bardiya, Kathmandu September 2008, discussing the typical female relative of the disappeared.

This legal lens of human rights workers superimposes upon the complexity of post-conflict Nepal a single dominant approach to transition that claims unique importance to the society as a whole, despite the massive diversity of ways in which the conflict was experienced. It implies that the impact of a conflict born of exclusion, oppression and grossly unequal distributions of power and resources can be addressed largely by a judicial process. More than this it homogenises the many complex and varied demands of victims, arising from their unique experiences of the conflict, into something that can readily be addressed by central institutions rather than through solutions that emerge from victims' communities.

An extreme example of this legalism has been the efforts of a UN agency and an INGO to offer legal advice to landlords displaced from Bardiya, in an effort to regain their property following CPN-M seizure and redistribution of their land. This appears to local people as simply a political attempt on behalf of elites to return Nepal to a status quo that has been challenged irrevocably by the conflict. The definition of a violation of rights implicitly privileges particular forms of violence over others. The violence of the conflict that led to killings and disappearance are violations according to those representing the human rights discourse in contemporary Nepal, while the violence of social and economic exclusion and exploitation are not: efforts by the CPN-M to redress unequal property relations through land redistribution are considered violations themselves. Human rights has no theory of violence,[70] but as a state-centred discourse sanctions violence that maintains the existing social order. McEvoy describes this as the rights discourse 'seeing like a state'.[71] This is a symptom of a liberal rights discourse that uses a narrow legalism to ignore the politics that underlie situations that are the result of unequal power relations: 'legalism [...] incessantly translates wide-ranging political questions into more narrowly framed legal questions.'[72] Moreover human rights 'sees' with the same partial eyes as the state, and when the state is exclusionary it is likely that human rights practice will also be. This is the natural result of a human rights that has:

> '... a Western centric and top-down focus; it self presents (at least) as apolitical; it includes a capacity to disconnect from the real political and social world of transition [...] and finally it suggests a predominant focus upon retribution as the primary mechanism to achieve accountability'[73]

The result of this legalism is that 'rights work in conjunction with capitalism and serve as a regulatory discourse, at once normalising certain relations of power and co-opting more radical political demands'.[74] The Tharu of Bardiya see a solution to their problems not in terms of the legal lens applied by rights workers but in terms of something that can put food on their table and ensure their access to land and livelihood in the long term: political demands. Where the state and law have always been servants of elites remote from ordinary people, as in Nepal, transitional justice will require more than the simple application of law to engage with conflict affected communities and to transform the state. This is made explicit when one considers assurances of non-repetition of any violation that are part of the legal right to reparation.[75] In Nepal human rights workers emphasise the reform of the responsible institutions, such as the

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[70] Goodale and Merry 2007.
[71] Scott 1999.
[72] Brown and Halley 2002,19.
[73] McEvoy and McGregor 2008, 24.
[74] Speed 2008, 67.
[75] Joinet 1997.

army and police, while the victims themselves see the problem as more fundamental and articulate different demands:

> 'We want a Tharu State. [...] There were political reasons behind the conflict. [...] Therefore, politics should solve the problems behind the conflict. For all this, giving an autonomous state to the Tharu people is the best way of solving the problems; they would manage their affairs on their own.'[76]

Cultural and social issues

For many families of the disappeared the most extreme impacts of violations are cultural and social, as power relations within families are skewed and the attitude of the community altered by the fact of disappearance. Most notably for the wives of the disappeared problems arise because they do not see themselves as widows, and continue to wear the visible signs of marriage, such as red *sindhur* powder in the hair and bangles. Within the traditional joint family there are power relationships, in which young women are dependent for their status on their husband. If he disappears the wife is perceived as having an ambiguous connection to the family, who brings no income to the household, and who may be seeking to elope with another man and bring shame on the family.

> My in-laws call me very bad things such as prostitute, witch, widow, etc in front of my children when they see me around. (Focus group participant, Katarniya, Bardiya.)

The result of this often extreme stigmatisation is that such women will be treated as a servant, denied food and considered with suspicion. Leaving the family will be impossible in the absence of economic independence, and will often demand leaving children behind. In the community, stigma can arise from a perceived association to the Maoists, which the community punish by excluding the family of the disappeared:

> People don't let us drink or bring water from their hand pump. Other kids and people beat my children when I am not in the house. (Wife of missing man, Bardiya.)

The issues that lead to women being stigmatised in the family can also lead to problems in the community. The ambiguity over a women's marital status and her persistence in wearing the symbols of marriage create the impression that the wives of the Missing are somehow predatory in their search for a new husband. Women report being called whores, and being sexually harassed. These impacts are a direct result of disappearance in the social world in which families of the disappeared live, arising as a result of power relations within families and communities. The rights discourse has little to say about such issues, and in post-conflict Nepal these impacts are invisible outside the impacted communities; agencies working on transitional justice issues have never acknowledged these impacts and remain largely unaware of them.

Social and economic rights and victim needs

> 'I have a 6-year-old daughter who is disabled - she was born four days after the disappearance. The security forces took my husband when I started to feel labour pain. [...] I don't have money to cure her. As I don't have enough to eat, how can I meet the expenses for her treatment?'[77]

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[76] Personal interview with leader of CVC Bardiya, Kathmandu September 2008.
[77] Personal interview with focus group participant, Bardiya, August 2008.

In studies to date[78] and the data of this research,[79] victims of the conflict prioritise livelihoods and the economic well-being of their families. It has been observed that in transitional justice advocacy in Nepal, despite the clear evidence that they are a priority for victims, social and economic rights have taken second place to civil and political rights. In principle, there is 'interdependence and indivisibility'[80] of all rights, but in both the global rights discourse and in praxis (in Nepal and elsewhere), social, economic and cultural rights are far less emphasised. To this author's knowledge, no documents or strategies of advocacy have emerged from the leading Nepali human rights agencies advocating for social and economic rights; potential compensation and economic support for victims is always framed in terms of a legally based 'right to reparation', essentially reframing the issue as a civil/political right. That social and economic rights are secondary has been implicitly acknowledged, in principle in recognition of developing states' challenges in realising such rights, through the concept of 'progressive realisation'[81] of social and economic rights. In transitional justice, the lack of emphasis globally on social and economic rights has been acknowledged at the highest level:

> 'By reaching beyond its criminal law-rooted mechanisms to achieve social justice, transitional justice could contribute to expand our traditional and reductive understanding of "justice" by rendering it its full meaning.'[82]

The language of need is that used by most victims met in this study, and their daily experience confronts them with unmet needs, very often the most basic; the language of rights is an alien one. In the long term, sustainable solutions to the livelihood deficit seen among both Tharu conflict victims and many other sections of Nepal's population will involve both economic development and the confrontation of the structural inequalities in terms of social and economic exclusion. For the Tharu of Bardiya this demands land reform and mechanisms to ensure that they will never again have their land stolen from them. In contemporary Nepal, the claiming of social and economic rights amounts to a challenge to the social, economic and political order of the pre-transition (i.e. pre-2006) state. Whilst in rhetoric this is accepted at the political level, civil society generally and human rights agencies in particular have proved themselves unable or unwilling to articulate the economic and social needs of victims and to challenge entrenched hierarchies that ensure most remain poor. The retributive roots of transitional justice and narrow agenda of its practitioners continue to prevent the emergence of a practice that can deliver a broader justice after conflict that includes addressing the social injustice that led to conflict.

Transitional Justice in an unequal society

Whilst the impact of the violations that most defined Nepal's conflict, such as disappearances, fell largely upon the rural and the disempowered, the response to those violations is being shaped by others. In the years since the end of armed conflict the authorities have failed to create mechanisms of transitional justice[83] and international and national human rights agencies in the capital are attempting to fashion a transitional justice agenda.

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[78] Ibid.

[79] Robins 2009.

[80] e.g. UN 1998.

[81] International Covenant on Economic, Social and Cultural Rights 1966, Article 2.

[82] Arbour 2007, 8.

[83] After this research was made, the Government made a payment of 'relief' of 100,000 rupees (a little over $1,300) to most families of the disappeared.

Human rights agencies, particularly at the senior level, are dominated by members of elites. The indigenous and dalits are excluded from jobs with both national and international rights agencies as they are from many other sectors, as a result of low educational achievement and discrimination. There are no dalits in leadership positions in civil society[84] and few from indigenous communities. Whilst agencies have made efforts at more inclusive staffing policies in recent years, those defining the transitional justice agenda are remote from most victims in terms of class, ethnicity, caste, education, language and geography. Lawoti[85] has studied the approaches to inclusion of Arnstein and Cornwall[86] in the Nepali context, defining modes of inclusion as: manipulation, cooptation, instrumental, consultative and transformative, with only the latter seeking to change the unequal structures that create exclusion. One can try to understand the relationship between rights agencies and victims in Bardiya on these terms.

Efforts at consultation are well represented by the one published effort at consultation that sought to understand victims' views of transition, a largely quantitative survey of victims.[87] This study tells us something of the priorities of those who prepared the survey, dominated as it is by questions about prosecutions and a TRC, and only little about the fact that the priorities of victims are largely social and economic[88]. This is consultation but not on the terms of those being consulted, and thus fails to even satisfy Lawoti's definition of instrumental inclusion; such a survey aims to lend legitimacy to an agenda that has not changed in response to victims' views and is best described as cooptation. One remarkable phenomenon was when human rights NGOs chose to invite victims to meetings in Kathmandu. Such meetings typically operated at a level entirely beyond the typical Bardiya villager: they would be conducted in English or Nepali and would typically be discussing international precedents in transitional justice and the implications for Nepal. The role of the victim was to speak about his or her suffering when requested and be listened to in a respectful silence. Often a victim would break down in tears, demonstrating how highly disturbing the exercise was for them, but they would be otherwise ignored during the meeting. This appears to represent the fetishisation or commodification of victims: their role was symbolic, to acknowledge both their existence and their supposed primacy in the ongoing discussion, but not to permit them to actually impinge on agendas being set by others. This is a mode of inclusion best described as manipulation: victims, particularly from marginalised communities, are included in such meetings as tokens, but no weight is given to their agenda or to the role their indigenousness played in their becoming victims. This permits the rights agencies to ignore the extent to which ethnicity and caste impact on victimhood, and exclude such topics from the transitional agenda. Beyond such contacts the interface between the global rights discourse and a Tharu victim in Bardiya is tenuous, being made through a layered structure of foreign donors, national NGO workers at several levels, and activist victims. Such contact as there is occurs between victims or their representatives, such as those from CVC, and regional or district agency offices who may travel to the villages. The activities of the agencies in turn consist largely of training: exercises in the dissemination of the rights discourse to victims and others, including the emphasis on civil and political rights and a judicial approach. In order to benefit from the patronage of agencies, those who seek to represent victims must learn the global rights language,[89] and only those who present an agenda that coincides with the legalist programme of the agencies will benefit from

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[84] Bhattachan, Sunar and Bhattachan (Gauchan) 2007.
[85] Lawoti 2009.
[86] Arnstein, 1969; Cornwall 2002.
[87] ICTJ (International Centre for Transitional Justice) and Advocacy Forum 2008.
[88] Robins 2009.
[89] Language here is both literal and metaphoric: most Tharu speak Nepali badly if at all.

invitations to Kathmandu programmes and potential support for activities. The domestic rights agencies are funded by international donors who have little direct contact with victims and depend upon the agencies themselves for their understanding of victim attitudes, and so those whose agenda does not coincide with such groups are not funded. The almost complete absence of support to CVC, the oldest and largest district victims' organisation in the country, appears to confirm this.

In interviews with the leader of the Bardiya Family Association, the nature of the interaction between victims' representatives and those representing the human rights discourse was made clear. The Family Association was unable to forge substantial relations with donors:

> The donors won't trust organisations in Bardiya and the big organisations in Kathmandu are backed by the donors but they fail in Bardiya. [...] I and the members represent the victims and we are in favour of bringing programmes if donors show up. But the big organizations work in accordance with the interests of donors. On the other hand, we set our programs on the basis of ground realities but the donors don't give money to us.'[90]

The one embassy donor CVC had found withdrew their funding to that of a national victims' organisation being set up by one of the leading human rights agencies, to the bewilderment of the existing association. Ultimately, CVC was told that if it sought to join the national network it would have to change its remit from representing families of the disappeared to representing all victims of the conflict, otherwise it would receive no funding. As a result, the entire basis of the association was changed due to the use of financial pressure by those with funds in the capital. This demonstrates that whilst rights agencies in Nepal are working to mobilise victims, an apparent prerequisite to empower victims' groups, they are being mobilised on terms set by elites rather than by victims themselves. A constant complaint of the CVC president was that the human rights agencies are led by members of elites from Kathmandu, who have no understanding of the Tharu of Bardiya or their needs, and spend most of their funds in the capital, rather than where victims are. Victim families are aware that large sums are spent on human rights work, much of it paying salaries that are considered enormous by their standards, to both foreigners and Nepalese. Given that their demands are primarily economic it is inevitable that they also compare their own poverty with the apparent wealth of the human rights industry in their country.

The class and caste composition of the human rights agencies is largely elite; there are no Tharu in the Kathmandu office of any large rights agency and even in Tharu majority areas, such as Bardiya, almost all agency staff are non-Tharu and non Tharu speaking. Meetings with victims in rural Bardiya run by one of the most prominent Nepali human rights agencies were attended as part of this research. The agency staffer was not Tharu and as a result many of the victims attending understood rather little. No effort was made to ask victims about their needs, the priorities were to articulate an agenda emphasising prosecution of perpetrators, and to discuss the details of a proposed Truth and Reconciliation Committee, where the agency was opposing Government proposals to enshrine amnesty. The exercise was one of promoting an agenda originating with elites in the capital over that of the victims of the conflict. In Bardiya the rights agencies are perceived as not seeking to address the *structural* issues that caused the conflict, notably that of exclusion:

> 'Since the human rights of the people have been violated on a caste basis, I believe that human rights issues should be raised on a caste basis as well. They have been trying to

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[90] Personal interview with leader of CVC Bardiya, Kathmandu September 2008.

make us backward showing that we are not educated people and we could not speak English. [...] They want us to be merely beneficiaries. This is Brahministic thinking, traditional thinking as practiced by the petty kings in the past. [HR agency leader] represents those people having a similar mind-set [...] we were not [just] backward; we were forced to remain backward.'[91]

Here a direct connection is made between high caste leadership of transitional justice advocacy and traditional high caste exclusion of others. Because those leading the transitional justice effort in civil society are themselves from the very elites who benefitted from social stratification and inequality, these social relations are intrinsic to the relationship between the indigenous victims in Bardiya and the representatives of the global rights discourse.

Additionally, the explicit political alignment of many rights workers impacts on their attitudes and activities. Most human rights workers and agencies are associated formally or otherwise with a party[92] that participated in Governments that fought the Maoist insurgency, and whose members were targeted by the Maoists during the insurgency. This gives additional reason for the Tharu of Bardiya to believe that such people have no commitment to the fundamental changes in Nepali society that the post-conflict dispensation is committed to.

Conclusions: Toward a victim-centred transitional justice

Ignatieff has written that 'Human rights matter because they help people to help themselves. They protect their agency.'[93] This study suggests that in a post-conflict transition in an unequal society the human rights discourse can be used to do just the opposite; that indigenous victims are denied agency by elites using the discourse of human rights. For the indigenous villagers of rural Nepal who became the victims of conflict human rights is a discourse that comes 'from above' and is largely disseminated by members of elites who have traditionally benefited from the historic exclusion of the indigenous (and others). As a result of the narrowness of the transitional justice agenda that emerges, its emancipatory potential is highly constrained: it seeks to address the violations of the conflict, but defines these in a limited way and seeks remedies that emerge from a legalistic analysis. It makes no effort to address the unequal social relations that led to the conflict, and more than this the human rights discourse itself appears to act to maintain and enforce the most fundamental power relations within Nepali society. This appears to confirm what has been written about the limits of rights as an instrument of emancipation in unequal societies:

'… [rights] may become ... a regulatory discourse, a means of obstructing or co-opting more radical political demands [...] The point is that rights converge with powers of social stratification and lines of social demarcation in ways that extend as often as attenuate these powers and lines.'[94]

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[91] Personal interview with leader of CVC Bardiya, Kathmandu September 2008.
[92] Communist Party of Nepal – Unified Marxist Leninist (UML); indeed, one of the most important national agencies INSEC (Informal Sector Service Centre) is run by someone who stood in early 2009 for the position of President of UML.
[93] Ignatieff 2001, 57.
[94] Brown 1995, 98.

The first priority for transitional process in Nepal to challenge such constraints is by seeking to broaden it beyond the legalistic to include those elements, notably the social and economic, which challenge the social injustice that led to conflict.

To describe the interaction of the global human rights discourse with the Tharu victims of Bardiya as a simple binary or dialectical relationship between the *global* and the *local* is to simplify the situation. In practice we see that human rights are constructed through a complex and layered process. The global discourse is instantiated through the actions of international actors and national human rights agencies working in the capital, while contact with the victims themselves is mediated by staff in regional offices and representatives of victims. In this way the human rights discourse filters down to victims who know nothing of rights and articulate their demands in terms of *needs*, which are translated into rights-based language for the consumption of those higher up the chain. In this way, the true desires of victims are sublimated into a rights-centred discourse regardless of how relevant it may be to what is actually being articulated.

This study supports the contention that relationships between those who represent the human rights discourse in the developing world and excluded victims of violations have embedded within them power relations of a colonial character:[95] elites who have access to the discourse import skewed power relations into the practice of human rights. This both dismisses communities of rural victims as a site of production of human rights, in favour of concepts imported from the capital and ultimately from the West, and renders certain forms of violence, notably that inherent in local power relations, invisible to the discourse. This is done by steering funds and granting access to elites (in civil society and in Government) only to those who have internalised the legalism of the rights discourse. Challenging elite control of the transitional discussion in Government and civil society demands replacing tokenistic attitudes to the incorporation of victim perspectives with genuine participation.

Confining transitional justice to a politics of rights under liberal political institutions in which existing power relationships are enshrined, ties any process to the system that produced those power relations. Systems of domination, that include iniquitous property relations and the systematic exclusion of those most impacted both by inequality and conflict (such as the indigenous), must be challenged in any transitional process by recognising the agency of those victimised and challenging power structures that embody the relations that led to conflict.

'Examining rights from the perspective of actual struggles makes it possible for analysis to transcend accepted normative parameters of human rights debates, question conceptual categories and expand the range of claims that are validated as rights:'[96]

Expanding the range of claims made means challenging the legalism of elites, such that social and economic needs of victims, and others, can be considered valid, rights-based demands of transitional justice. Beginning with deeper consultation with affected communities, rights agencies should be working to build capabilities to enable indigenous victims to take part as equals in decision making. If those who purport to represent victims are unable to do this, then it is highly unlikely that the transitional process for which they are advocating will be at all inclusive. Mobilisation of victims must be supported on the basis of their own agendas and not subject to their sanctioning by local and international elites. As a result of the power relations that permeate the practice of human rights in a highly unequal society such as Nepal it is

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[95] Goodale and Merry 2007.
[96] Nyamu-Musembi 2005, 31.

problematic to consider the rights discourse as the sole legitimate driver of transitional justice. Whilst human rights remains a tool of strategy and mobilisation for oppressed groups seeking justice after conflict, victims' organisations offer an alternative route, in which victims themselves have full agency, free of agendas set by elites and less constrained by traditional power relations to use the language of rights or not. Such locally-grown, 'non-human rights' efforts to both address the issues arising from conflict and to fight for political and social change in the system that led to conflict can provide unique input to create transitional justice process that can give space to the agendas of victims.

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