Questions and Answers on Enforced Disappearances

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1. Where to go for registering FIR?

As there is no separate law governing the crime of enforced disappearance, the Penal Code is the applicable law. Being a Schedule-1 crime, the Criminal Procedure Code requires that a First Information Report (FIR), written, oral, or through electronic means, need to be filed at the nearest police station. In the FIR, the complainant should provide evidence (to the extent possible) that the alleged incident happened. These provisions of the new Penal Code are yet to be tested in practice as no one has attempted to file a complaint demanding an investigation of enforced disappearances committed in the past under the Penal Code.

2. What process do we follow if FIR is not registered?

The Penal Code provides that if the police officer refuses to register the FIR, a complaint can be lodged at the District Government Attorney Office (DGAO) or the police office higher in level than the police office (nearby police office) required to register such FIR or information. If the police office still refuses to register the complaint even after the decision of the Office of the District Government Attorney or higher police office, then the complainant can resort to the extraordinary jurisdiction of the Court through the writ of certiorari and/or mandamus.

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1 The list of offences under various chapters of the Penal Code is included in Schedule-1 of the Criminal Procedure Code. The Crimes enlisted under Schedule-1 require the Government of Nepal to be the plaintiff in the cases stipulated.

2 National Criminal Procedure Code 2017, section 4 (1) states “...A person who knows that any offence set forth in Schedule-1 has been committed or is being committed or is likely to be committed shall, as soon as possible, make a first information report in writing or give information verbally or through electronic means, on such offence, along with whatever proof or evidence which is in his or her possession or which he or she has seen or known, to the nearby police office in the form set forth in Schedule-5.”

3 National Criminal Procedure Code 2017, section 5 (1) states “...If the concerned police office refuses to register a first information report made or information given pursuant to subsection (1) of Section 4, the person making or giving such first information report or information may make a complaint setting out such matter, accompanied by the first information report or information, to the concerned district government attorney office or the police office higher in level than the police office required to register such first information report or information.”
3. Can we register FIR for the disappearance committed by the Maoists?

Section 206 (1) of the Penal Code prohibits enforced disappearance and entails different elements of crimes, such as detention or any other form of control of a person causing deprivation of liberty, failure to produce such person before the law enforcement authority within twenty-four hours, and concealment of information about the condition of such person. It includes both State and non-state actors (such as any person, organization or group, whether organized or not) capable of committing the crimes of enforced disappearances. Thus, if the Maoist has abducted the person without giving information about his/her whereabouts, FIR can be filed under the same section of the Penal Code.

Although the definition of enforced disappearances under the international human rights treaties is narrower as under international law only the disappearances committed by the State apparatus is considered as enforced disappearance. However, under international law duty to investigate is not limited to violations of human rights committed by state agents. States are held responsible for their failure to investigate and to provide effective remedies even if the crimes are committed by non-state actors. In some situations, a State’s refusal to intervene could be characterised as acquiescence.

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4 National Criminal Code 2017, section 206 (1) (b) states that “enforced disappearance” means ‘the abduction, custody, control or any other form of deprivation of liberty of a person by any person, organization or group, whether organized or not, followed by concealment of information to the concerned person as to the reason for such deprivation and where, how and in what condition such person has been so held.”


Maoists, nonetheless, as non-state actors were involved in abducting and disappearing people during the armed conflict, an FIR for the disappearance committed by the group can be registered, followed by State’s obligation to investigate and held the perpetrator accountable.

3. के हामी माओवादीले बेपता पारेरो घटनामा समेट जहारी दराँ गर्न सक्छ्नुहोस्?

मालको अपराध सहिताको दफा २०६९(०)ले जवर्जस्टी बेपता गर्न विषेष गर्दै हिरासत वा अन्य कृपा स्वरूपमा व्यक्तिको नियन्त्रणावर हुने स्वतन्त्रताको हनन, ल्यायता नियन्त्रणमा लिङएका व्यक्तिलाई चौथरीर घटनामा काृत्तमा सामग्री माज्री को अधिकारमा अधिकारीको सम्भव प्रस्तुत गर्न असफल, र यस्तो व्यक्तिको अस्थायिक जानकारी लुकाउने जस्तो कुराहरू अपराधको विभिन्न तत्त्वहरूमा पर्दछन् भनेको छ । यसमा जवर्जस्टी बेपता पाने अपराध गर्न सक्छ र गैर-राज्यपक्ष (जसैले कृपा व्यक्ति, संगठन वा समूह, चाहे त्यो संगठित होस् वा न होस्) हुने पर्दछन्। तस्र्य, माओवादीले कमेलाई उसको दर्पण अपहरण गरेको छ र यस्तो अपहरित व्यक्तिको अवस्था/उसलाई राखेको ठूलो बारेमा परिवर्तनालाई जानकारी दिन इन्कार गरेको छ भने त्यस्तो घटनामा अपराध सहिताको माध्यम उल्लेख यीही दफालन्तगत जहारी दरा गर्न सक्छ।

अत्तरापियत्या कानूनमा अत्तरापियाँ मानवाधिकार कानूनमा जवर्जस्टी बेपताको परिभाषा केरी साँपुरो छ किनिक कृषि अन्तरालगत राज्यका निकायहरूका गरिएको बेपतालाई मात्र जवर्जस्टी बेपता भनी परिभाषित गरिएको छ । जे भएकर्ता, अत्तरापियत्या कानूनअन्तर्गत छानविन्न गर्न दायित्व राज्यका निकायहरूबाट भए गरिएका मानव अधिकारको उल्लंघनमा स्थित छैन। गैर-राज्य पक्षसम्बन्ध व्यक्तिहरूबाट भए गरिएका मानवाधिकार ज्यादतीर्थहरू पान सामान्यको अनुसार र उपचार प्रदान गर्न असफल हुँदा पनि राज्यका निकायहरूलाई नियन्त्रण बनाइन्। कृपा परिस्थितिमा गैर-राज्य पक्षबाट भएका मानवअधिकार ज्यादतीर्थविश्वविद्यालय राज्यले हस्तक्षेप गर्न अस्बीकारी गरिएमा यस्तो अस्वीकारलाई त्यस्ता ज्यादतीर्थहरू राज्यको स्वीकृतता कृपा मा लिङ्च्छ ।

स्पष्ट इन्द्र कमामा गैर-राज्य पक्षको रूपमा रहेको माओवादी समूह मानिसहरूलाई अपहरण गर्न र बेपता पाने कार्यमा सांगन थियो। यस समूहमा गरिएको बेपताको लागि जहारी दरा गर्न सकिन्छ र यस्तो जहारी छानविन्न गर्न र अपराधोलाई जावादेदै बनाउने राज्यको दायित्व हुन्छ ।

4. What do we do when the disappearance is registered as death because of the Government’s discriminatory relief programme?

The Government has enacted different legal and policy measures discriminating against families of those killed and disappearances. This has resulted in many families of disappeared registering their case killing for the purpose of legal and administrative work although they do not think their loved ones are dead and continue to wait for the truth about their loved one.

Evidence Act 1974, section 32 provides that a disappeared person will be presumed to be dead after 12 years of the disappearance unless the person claiming the disappeared person is alive furnishes the proof. This provision of the law seemed to come to help victims families and facilitate their other rights such as the transfer of property, pensions and others. However, the presumption that the forcibly disappeared person is dead is contrary to the continuous nature of
the crime of enforced disappearances and the obligations arising thereof. Under international law, enforced disappearance is a continuous crime and extends over the entire period until the fate and whereabouts of the disappeared are established or made public by the State. There should not be any hurdle in access relief, recognition, transfer of property, pensions and bank transactions simply because a person is disappeared, not dead.

While adopting legislation concerning the legal situation of disappeared persons whose fate has not been clarified, the Committee on Enforced Disappearances has recommended the State party to the issuance of declarations of absence by reason of enforced disappearance, without the need to declare that the disappeared person is presumed dead.8

8 Committee on Enforced Disappearances (CED) ,Concluding observations:Peru, UN Doc. CED/C/PER/CO/1 of 8 May 2019, para 31 http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsjww1pXxaYAoAoSynAhhvKGyg7KdpXME8i5RvP52YWgNmLNG13241PsCeGudWrFSofPj0CYVVoq bKN49c3qykc%2FFKKVhvc8lnRqz9z1s4 (Accessed 30 December 2020) ;  CED ,Concluding observations:Chile, UN Doc. CED/C/CHL/CO/1 of 8 May 2019, para 29 http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhsr%2BtNoU2a8f4aG6g1KfZycMdKcNiVixKXbOq6YRc%2BN02zXOEv%2B1 Ha3WmqxRsOjQQJybJs08B7UPkk1hqf%2FyBrouJ5jxs8EEf29sI2ZemH ( Accessed 30 December 2020).
5. The crime was committed long ago: what about statutory limitation?

Human rights bodies have developed jurisprudence that statutes of limitations and any other measures that prevent investigation and prosecution of those responsible for serious human rights violations such as enforced disappearances are inadmissible.9 Ensuring an effective remedy through criminal proceedings enforced disappearances should not be subject to statutes of limitation.10 Enforced disappearances are continuous crimes and the statutory limitation in reporting cases does not apply as long as the person is disappeared. International law does not allow statutory limitations for gross violations including enforced disappearances, which is also upheld by Nepal’s Supreme Court of Nepal.

For example, in Madhav Kumar Basnet v. Office of the Prime Minister11 the SC observed that the statutes of limitations on crimes amounting to gross violations of international human rights law and serious violations of international humanitarian law were against the basic norms of criminal jurisprudence and that the act of disappearance is a gross human rights violation and the alleged perpetrator involved in such crime needs to be prosecuted under criminal law. While issuing a writ of mandamus, the SC has instructed the Nepal Government to make necessary arrangements for the investigation of enforced disappearances, in line with the Constitution, laws, and the jurisprudence produced by the Supreme Court in the case of Rajendra Prasad Dhakal and other legal precedents set by the Court.12

In Rajendra Prasad Dhakal’s case, the SC has further observed that the incident of disappearance should be taken as a violation of fundamental rights of persons such as the right to life, freedom, and justice.13 Whether in wartime or peace, the State cannot escape its responsibility to identify and publicise the condition of the disappeared persons and initiate legal action against the responsible person.

5. अपराध देरै पहिले भएको थियो : हदम्याद लागि त कि लागैन?

वल्पूर्वक वेपता पार्नेंजस्ता गम्भीर मानवाधिकार उल्लेखनीय घटनाहरूमा हदम्यादको व्यवस्था वा यस्ता घटनाहरूको छानबिन एवं अभियोजन रोक्ने अन्य कुनै पनि संयन्त्रहरू अस्तित्वकार्य हुन्छन् भनी मानवाधिकार संयन्त्रहरूले विक्षिप्तलाई विकास गरेका छन्। फोर्जिकाँस बिधिमार्फत प्रमाणवकारी

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11 Madhav Kumar Basnet et al. v. Office of the Prime Minister and Others, Nepal Kanoon Patrika (NKP) 2070, Issue No 9, Decision No. 9051, pp. 1101-1155.

12 Madhav Kumar Basnet et al. v. Office of the Prime Minister and Others, Nepal Kanoon Patrika (NKP) 2070, Issue No 9, Decision No. 9051, para. 55.

6. Penal code does not have retroactive effects: how can we use the penal code for the past cases of enforced disappearances?

The human rights bodies have developed jurisprudence clarifying that States can and should enact legislation having a retroactive effect when such conduct are already crimes according to the laws recognised by the community of nations when they were committed.\(^{14}\) As enforced disappearance has long been established as a crime under international law, the international treaties oblige States Parties like Nepal to make laws fully in compliance with international standards. Adhering to its international obligation, Nepal should have previously criminalised the act of enforced disappearance. However, criminalising the act at present does not exempt it from not investigating the act of enforced disappearance that took place before the criminalisation.

The UN Working Group on Enforced or Involuntary Disappearances has issued a General Comment stating that “where a statute or rule of procedure seems to negatively affect the continuous violation doctrine, the competent body ought to construe such a provision as narrowly as possible so that a remedy is provided or persons prosecuted for the perpetration of

the disappearance.”

Given that the offence of enforced disappearance is a continuous crime, it can be safely argued that the crimes of enforced disappearances in Nepal can be investigated and prosecuted under the Penal Code, which came into force in August 2018.

As discussed earlier, enforced disappearance is a Schedule-1 crime requiring the Government of Nepal to be the plaintiff in the case, therefore, the role of public prosecutors is of utmost importance to bring and try the case before the Court of law despite both the constitutional and legal prohibition of retroactivity in criminal law. International standards also exist concerning the roles of prosecutors in the protection of human rights and ensuring due process and smooth functioning of the criminal justice system. The United Nations Guidelines on Roles of Prosecutor provides that “prosecutors shall perform an active role in criminal proceedings, including the institution of prosecution and, where authorised by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.”

6. फौजदारी सहिताको भूमिपर्यायी असर छैन : हामी कसरी निगमतमा भएका जवर्जस्ती बेपत्ताको घटनाहरूको लागि फौजदारी सहिताको उपयोग गर्न सक्छौं?

घटना हुन्छ र भएका जवर्जस्ती बेपत्ताको घटनाहरूको लागि फौजदारी सहिताको उपयोग गर्न सक्छौं। जवर्जस्ती बेपत्ताको घटनाहरूको लागि फौजदारी सहिताको उपयोग गर्न सक्छौं र भएका जवर्जस्ती बेपत्ताको घटनाहरूको लागि फौजदारी सहिताको उपयोग गर्न सक्छौं।


16 United Nations Guidelines on the Role of Prosecutors 1990, UN Doc. A/CONF.144/28/Rev.1,7 September 1990, Guideline 12 provides that, “Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.”

7. What obligation does the state have under international law to investigate?

States cannot excuse themselves from conducting a thorough, prompt and effective investigation on the ground that no one filed a complaint about the crimes. In cases of violations like enforced disappearances, States are under obligation to initiate investigation ex-officio, meaning on their own as soon as the State authorities are aware of the act of enforced disappearances. This obligation is independent of the filing of a complaint.18

This has been recognised by the Penal Code. Section 4(4) and 4(5) empower the police to prepare their own report if they find out about the incident from any other source apart from the complaint. Therefore, police have the obligation to initiate an investigation if they have information about the crime of enforced disappearances. They cannot relieve themselves from this obligation using the excuse that no one has filed the FIRs.

Moreover, the Human Rights Committee (UN HRC) states that in gross violations such as a death in custody, enforced disappearances, murder, rape and torture, the investigation has to be started ex-officio and without delay.19

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Duty to investigate under international law also includes conducting independent and impartial investigations.\textsuperscript{20} An impartial and independent investigation includes several components such as the assurance that there is no influence of any alleged perpetrators in the investigation;\textsuperscript{21} investigators have no records of being involved in violations etc.\textsuperscript{22} The impartiality and independence of an investigation cannot be achieved only thorough having a legal provision ensuring it (\textit{de jure}) but translating that into practice (\textit{de facto}),\textsuperscript{23} which may in some cases require taking temporary measures such as suspension of a public official pending the investigation involving gross violations including enforced disappearance.\textsuperscript{24}

\textbf{7. अन्तरराष्ट्रीय कानूनविज्ञान राज्यको अनुसंधानको दायित्व के हो ?}

कसैले पनि अपराधको उजुरी गरेको छैन भने आधारमा राज्यहरूले बस्तृत, तत्काल र भ्रामणकारी 
झाँझनिन नगर्ने बहाना लिन सक्दैन्न। बलपूर्वक वेपता पार्नेजस्ता उल्लेखनहरूमा राज्यहरूले स्वतः
दायित्व बहन गर्न सिद्धान्तुनु र त्यस्ता घटना धाँहा पाउनेबाटिकै आफैले झाँझनिन शूरू गरेछ दायित्व 
हुन्छ। उजुरी दर्ता गरिएको वा नगरिएको पयाः दायित्वको सरोकार हुदैन।

अपराध सहितको दफा ४ को उपदफा (४) र (५) ले घटनाहरू उजुरीविहारको अन्य स्रोतबाट प्राप्त 
जानकारीलाई पनि समावेश गरिएको अफूल प्रतिवेदन तयार गर्न सक्ने अधिकार प्रहरीलाई दिएको छ।
त्यसकारण बलपूर्वक वेपतासम्बन्धी अपराधविहार जानकारी भएका अनुसन्धान शूरू गर्नुपर्ने प्रहरीको 
बायाता हुन्छ। कसैले पनि जादैर्दा दर्ता गरेको छैन भने बहानामा उनीहरु यो दायित्वबाट पन्छन 
मिल्दैन।

यसविहारक हिरासतमा मून्यु बलपूर्वक वेपता, हत्या, बलात्कार र यत्नाजस्ता जगधन्य उल्लेखनहरूमा 
झाँझनिन दिलासुर्की नगरी शूरू गर्नुपर्ने मानवाधिकार सम्मिलितको भनाइ छ।

अन्तरराष्ट्रीय कानूनविज्ञान अनुसन्धान गरेको दायित्वमा स्वतन्त्र र निष्क्रिय अनुसन्धान पनि समावेश छ।
निष्क्रिय र स्वतन्त्र अनुसन्धानमा कुनै पनि आरोपित अपराधिको अनुसन्धानमा कुनै प्रभाव छैन भने 
करारहो भ्यापृष्ठत लगायत अनुसन्धानकर्तारहरूके उल्लेखनहरूमा स्वतन्त्र भएको रेकर्ड छैन भने जस्ता 
लगायत अबयथहरू हुन्छ। अनुसन्धानको निष्क्रियता र स्वतन्त्रता कानूनी प्रवचन राखेका मात्र सुनिश्चित गरेछ 
सक्दैन तर त्यसलाई आधारमा पनि लागू गर्न आवश्यक हुन्छ। केही अवस्थामा बलपूर्वक वेपता

\textsuperscript{20} OHCHR, Compilation of General Comments And General Recommendations Adopted By Human Rights Treaty Bodies. General Comment No. 20. Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment) UN Doc. HRI/GEN/1/Rev.9 (Vol.I), para. 14.


\textsuperscript{22} Güleç v. Turkey, ECtHR, Application No. 54/1997/838/1044, Judgment of 27 July 1998, paras 81-82.

\textsuperscript{23} Judgment of 6 April 2006, IACtHR, Baldeón García v. Peru, Series C No. 147, para. 95.

\textsuperscript{24} Abdülsamet Yaman v. Turkey, ECtHR, Application No. 32446/96, Judgment of 2 November 2004, para. 85.
8. What punishment exists for the perpetrator?

If the public prosecutor decides to prosecute, a charge sheet is filed in the District Court. In cases involving enforced disappearances, the punishment could be up to fifteen years of imprisonment and fines up to 500,000 (five hundred thousand rupees) depending on the gravity of the crimes.

The Penal Code has the provision of a plea bargain and has several circumstances contributing to the mitigation of sentences. For example, if the accused pleads guilty of the offence in whole, before the investigating authority or prosecuting authority, remission of a maximum of twenty-five percent of the sentence can be offered to the accused.

Furthermore, if the accused pleads guilty of the offence in which he or she was also involved and assists in revealing detailed facts as to the offence and the other offenders or gang involved in the offence or the principal giving direction to commits the offence or in helping to arrest the persons involved in the offence, the prosecutor can demand a fifty percent remission in punishment. Similarly, if the accused in the case of any organised offence or offence committed in a group, helps to locate the other persons involved in that offence or the place where criminal conspiracy of such offence was made, in seizing or forfeiting any vehicle, machine, equipment or other object or arms used for the commission of such offence, the prosecutor can also demand up to a fifty percent remission in punishment.

Although some grounds for mitigation of sentences are provided under international law, punishment for those involved in enforced disappearances needs to be proportional to the seriousness of that offence.

25 National Criminal Procedure Code 2017, section 32
26 National Criminal Procedure Code 2017, section 33 (3)(a)
27 National Criminal Procedure Code 2017, section 33 (3)(b)
9. Can victims claim reparation under the current legal provision?

Reparation under the Penal Code is narrow and limited to the victims’ right to compensation. For the crime of enforced disappearance, the victim has the right to receive compensation from the offender after the victim is released. In the case, where the disappeared has died, the nearest kin of the deceased victim is entitled to get compensation. Furthermore, section 32 (2) of the Penal Code provides that victims of crimes have the right to justice including compensation and social rehabilitation without spelling out what social rehabilitation entails. However, the Penal Code does not have any specific provision of reparation for those victims suffering crimes of enforced disappearances except the right to receive compensation from the offender.

It is important to note that the Crime Victim Protection Act, 2018 enacted to implement fundamental rights envisions victims’ right to fair treatment as well as compensation and social rehabilitation. This could be considered as an opportunity to expand understanding of reparation for victims suffering gross violations of human rights.

In Liladhar v. Government of Nepal, the Supreme Court has highlighted the States’ obligation to provide reparation. Although the case was related to forceful eviction and confiscation of land by the armed groups, the Supreme Court underlined the obligation of the State to provide compensation. The Court has emphasised that the State has a primary obligation to protect citizen’s right to life and property. The Court deemed that the incident deprived and continues to deprive the claimants of their rights to obtain benefit from their property. Hence, SC issued an order to return the property of the owner captured unlawfully and provide compensation for the

28 National Penal Code 2017, section 32
29 National Penal Code 2017, section 32
30 The Crime Victim Protection Act 2018, section 4
31 The Crime Victim Protection Act 2018, section 19 (1) (2)
32 Liladhar Bhandari v. Office of the Prime Minister and Council of Ministers et al., NKP 2065,Issue No 9 Decision No. 8012, para. 16.
loss by assessing the damage caused by the seizure of said property. Therefore, there is space building on the SC jurisprudence and to expand the understanding of reparation under the Penal Code through legal interpretation, which can be done once the cases reach the Courts.

9. के पीडितहरूले वर्तमान कानूनी प्राध्याद अन्तर्गत परिपूरण दाखी गर्न सक्छन्?

दण्ड सहितमा परिपूरणको साधन धुर्घ व्यवस्था छ, यो केही पीडितहरूको क्षतिपूर्ति को अधिकारमा सीमित छ। जवर्जस्ती वेपताको अपराधमा पीडित छटैपछि अपराधीवार शारीरिक क्षतिपूर्ति प्राप्त गरौं अधिक छ। वेपता भएको अवस्थामा मृत्यु भएको छ, भने मृतकको निकटमा आफ्नो क्षतिपूर्ति पाउने हुन्छ। यस्तै भएको, दण्ड सहितमा धारा ३२ (२) ले अपराध पीडितहरूलाई कस्तो सामाजिक क्षतिपूर्ति दिने भने उल्लेख नगरी सामाजिक क्षतिपूर्ति र सामाजिक पुन:स्थापना सहित न्यायको अधिकार हुन्छ, भने न्याय गर्ने छ। तर मौजूदाने सहितले अपारधीवार शारीरिक क्षतिपूर्ति पाउने अधिकारहरूको जवर्जस्ती वेपतापारिएका पीडितहरूलाई अतिरिक्त क्षतिपूर्ति दिने कुनै विषय व्यवस्था गरेको छ।

पीडितहरूको उल्लेख उपचारको अधिकार, साथै क्षतिपूर्ति र सामाजिक पुन:स्थापना जस्ता मौनिक अधिकारहरूको संरचनाको लागि अपराध पीडित सरकार ऐन, २०३७ लागू गरिएको कुरा टिपोट गरन महत्वपूर्ण हुन्छ। यसलाई मानवाधिकारको गम्मी उल्लेखनका पीडितहरूलाई लागि क्षतिपूर्तिसम्बन्धी वञ्जाइलाई विस्तार गरेपन अवसारको रूपमा लिन सकिन्छ।

लिलाढ विरूङ नेपाल सरकारले भूमामा सवोच्च अदालतले पनि परिपूरण प्राप्त गरेन राज्यको दायित्वलाई उल्लेख गरेको छ। यो मुद्रा साघर्ष महाकोस्त समहले व्यक्तिको उसको घरबाट हटाउने र जनिम काठका गर्न कार्यसंग सम्बन्धित भए पनि सवोच्च अदालतले क्षतिपूर्ति प्राप्त गरेन राज्यको दायित्व हो भने ठहर गरेको छ। सवोच्च अदालतले नागरिकको जीवन र सम्पत्तिको हक सरकार गरेन राज्यको प्रमुख दायित्व भएको जोड दिएको छ। अदालतले उन्होले घटनावार उन्मुखीकरण हुनु अधिकारमा उपभोग गर्न र लाम पार्न गरेल अधिकारवार विद्वेष गरिएको ठहर गरेको छ। तस्मात, तिनीहरूले गैरकानूनी नर्तकले काठका गरेको सम्पत्ति फिराया गरेन र उनको सम्पत्ति जकल गर्ने भएको काठको मूलमा गर्ने क्षतिपूर्ति प्राप्त गरेन आदेश जारी गरेको छ। त्यसैले, सवोच्च अदालतले विधिशस्त्रलाई स्थापित गरेन अपारध पीडिताको अंतर्गत परिपूरणको वुफाइलाई विस्तार गरेपन अवसर छ। त्यसका लागि मुद्राहरू अदालतसम्बन्ध पुनःजरी छ।

10. Can the existence of CIEDP prevent an investigation by the police?

No, the investigation of CIEDP can not prevent the criminal investigation. There are growing concerns that these mechanisms are being used to deny remedies to victims as victims are being prevented from accessing the regular justice system. Further, police authorities are refusing to

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33 Liladhar Bhandari v. Office of the Prime Minister and Council of Ministers et al., NKP 2065, Issue No 9 Decision No. 8012, para. 18.

initiate criminal investigations on these cases on the pretext that they will be dealt with by the CIEDP and the TRC. In this respect, it is important to note that the duty to investigate gross violations of human rights violations requires criminal investigation and prosecution. These Commissions do not substitute the criminal justice process but exist to be complementary. In several cases, the HRC has stated that States’ obligation to provide effective remedy entails criminal investigation, prosecution and punishment of perpetrators. Administrative bodies like TRC or CIEDP cannot fulfil these obligations. The Committee viewed that the transitional justice bodies established by the Act on the Commission on Investigation of Disappeared Persons, Truth and Reconciliation of 2014 were not judicial organs capable of affording a judicial remedy, and the remedies identified by the State party had been ineffective.

Furthermore, Nepal’s Supreme Court has also rejected the argument that the regular criminal justice system should not investigate cases involving abduction and disappearances that took place during the Conflict. In Keshav Rai’s case, the Supreme Court has stated that the argument that conflict era cases need to be dealt with exclusively by TJ mechanisms, not by the regular justice system is not just against the jurisprudence, but also humanitarian law and principles of transitional justice.

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Furthermore, in the context of Nepal, the WGEID has indicated that the practice of enforced disappearances was widespread.\(^{39}\) Thus, it can be argued that enforced disappearances in Nepal may amount to crimes against humanity. Neither the Truth and Reconciliation Commission (TRC) nor the CIEDP have mandates to investigate crimes against humanity, meaning this crime falls completely outside the jurisdiction of criminal justice and Transitional Justice (TJ) processes.

10. बेपता पारिएका व्यक्ति को छानबिन आयोगको गठनले पह्द्दी अनुसन्धान रक्षा सबूत?

हैन, बेपता पारिएका व्यक्ति को छानबिन आयोगको गठनले फौजदारी अनुसन्धान रक्षा सबूत। पीड़ितहरूलाई नियमित न्याय प्रणालीको उपयोग गर्नुहुन्छ र को सङ्क्रमणकारी न्याय प्रणालीको यी संयमहरू पीड़ितहरूलाई उपचार गर्ने गरिएको हुनाले सम्मिल चासो बढाएको छ। यसबाहेक, सङ्क्रमणकारी मुद्दाहरू संयमहरूले हनेन भर्दै पह्द्दी अधिकारीहरूले यी मुद्दाहरू माफी दिने अनुसन्धान शुरू गर्न अवश्यक गर्नुहुन्छ। यस सन्धेशमा, जजहरे मानवबिधिकार उल्लेखनको घटनाको अनुसन्धानको दायित्व अन्तर्गत अपराध अनुसन्धान र अभियोजन अन्तर्गतरहरूले छ। यी आयोगहरू नियमित फौजदारी न्याय प्रणालीको विकास नयाँ गर्नुहुन्छ। मानवबिधिकार सामाजिकताले जग्गा मुद्दावाही माफी दिने अनुसन्धान, अभियोजन र अपराधीहरूले सजाउन राज्यहरूले प्रभावित उच्चार प्रदान गर्न गरेका दायित्व रहेका छ। सत्यनिरर्पण तथा बेपता पारिएका व्यक्ति को छानबिन आयोग जस्तो धाराबाटको निकायहरूले यी दायित्व रूपरेखा गर्न सक्छनुहुने। सामाजिकताले बेपता पारिएका व्यक्ति को छानबिन, सत्य र मानवबिधिकार सम्बन्धि एउटा, 1996 ले स्थापित गरेका सङ्क्रमणकारी सन्यमहरू न्यायिक उच्चार प्रदान गर्न सक्ने न्यायिक निकायहरू होइनुहुने र राज्यपाल र प्रधान मन्त्रीले पहिचान गरेको उच्चार प्रभावित रहेको बताएको छ।

यसका साथै, नेपालको स्वतन्त्र अदालतले नियमित फौजदारी न्याय प्रणालीमा फंट इन्कारलामा भएको अपहरण र बेपता जस्तो मुद्दाहरूको छानबिन नगरुहैन भनेर तर्कलाई पनि अवश्यक गरेको छ। त्यसै केन्द्रशील राईको मुद्दामा, स्वतन्त्र अदालतले इन्कारलामा मुद्दाहरू नियमित फौजदारी न्याय प्रणालीबाट तयार सङ्क्रमणकारी न्यायका संयमहरूले मात्र सम्बन्धित गर्नुपर्ने भनेर तर्क विधिशासकीय मात्र नभए मानवीय कानून र सङ्क्रमणकारी न्यायको सिद्धांत विपरीती पनि भनेर उल्लेख गरेको छ।

यसबाहेक, जवर्जस्टी र अस्वतन्त्र स्वतन्त्र जमध्यसिकार (WGEID) ले नेपालको सन्धेशमा जवर्जस्टी बेपता पारिएको यस्तो रूपमा गरिएको थियो भनी उल्लेख गरेको छ। यसी नेपालको भएका जवर्जस्टी बेपता को घटनाबाट मानवबिधिकार अपराध हुन भनी तर्क गर्न सकिएको छ। सत्यनिरर्पण तथा बेपता पारिएका व्यक्ति को छानबिन आयोग दुवैलाई मानवबिधिकारको अपराध र अभियोजनको छानबिन गर्ने अधिकार छैन। यसबाहेक यो अपराध फौजदारी न्याय र सङ्क्रमणकारी न्याय प्रणालीको क्षेत्रबिधाकारक्षेत्र बाहिर छ।

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