ARTICLE

Constitutional Restraint on Amnesty Policies in Indonesia and Nepal: The Interaction Between Norm Recipients and Norm Providers

Shinya KOSAKA

Abstract

Although the practice of transitional justice has increased around the world, the existence of the rules governing transitional justice has not been clear. Even if the practice entailed abusive policies for victims, such as a wide range of amnesty, such policies have been overlooked in this "lawless" situation.

This paper analyzes the case studies of unconstitutionalizing the truth and reconciliation commission (TRC) laws in Indonesia and Nepal, and it discusses how transitional constitutionalism is working toward restraining the "lawless" policies of transitional justice in both countries. While previous research in the field of transitional justice tended to focus only on the existence of applicable rules on amnesty in international or domestic contexts, this paper considers that the rules on amnesty have broad uncertainty and do not have strong binding forces. Instead, in some cases, the results of the constitutional restraint on amnesty policies have been constructively found through the interaction between rule providers and recipients in transitional contexts. This paper discusses how the interaction between domestic courts (as norm providers) and victims (as norm recipients) caused the results of restraining national amnesty policies in Nepal and Indonesia.

The discussion of this paper shows that the finding process of the constitutional norm is affected by the responses of the victims against abuse in transitional justice policies and traits of domestic courts in dealing with international and domestic laws in transitional contexts.

1. Issue of Uncertainty of the Restraining Process of Transitional Justice and Amnesty

Since the inception of the field in the early 1990s, transitional justice has become a set of policies, debates, and practices for addressing past human rights issues. However, contrary to the accumulated policies adopted in many transitional situations, the practice of transitional justice highly depends on the political decisions of the new government in each country. This fluctuation in political positions, as contributed to ambiguity, not only in the implementation process, but also in the restraining process of national policies regarding transitional justice.[1] In several countries, there have been some practices on restraining amnesty in cases of severe past human rights abuses, such as crimes against humanity, war crimes, and genocide. However, some recent cases still indicated the lack of unified state practice, such as the broad amnesty adopted in the peace agreements in some countries.[2] For instance, the peace agreement between the government of Mozambique and Resistência Nacional Moçambicana

(RENAMO) in August 2014 provided general amnesty provisions.[3] The government of Afghanistan also made the same kind of peace agreement with Hizb-e Islami of Afghanistan in September 2016.[4] These sorts of unstable attitudes of states create a "lawless zone" for the adoption of transitional justice policies of amnesty, even if new regimes have been just utilizing such policies to escape justice.

This paper considers how transitional constitutionalism is working to restrain the "lawless" policies of transitional justice by analyzing the case studies of unconstitutionalizing the TRC Laws in Indonesia and Nepal.[5] In both countries, domestic courts referred to developing international norms to try to find legal principles to bind national transitional justice policies with a wide range of amnesty claims.

Through a qualitative analysis focusing on the social context and roles of actors, this paper discusses how the development of international norms was not enough to restrict abusive transitional justice policies by new regimes. By referring to testimonies gathered in both Nepal and Indonesia, this paper argues that constitutionalism was led by the interaction between the victims, as norm recipients who were excluded from the national transitional justice processes, and the norm providers, which are the national legal institutions under the transitional government. The discussion of this paper shows that the constitutional norm on amnesty cannot only be found through the adaptation of developing international norms. This paper discusses how such constitutional norms work in the context of state transition and how they can be found through the interaction between norm recipients and norm providers.

2. Interaction of the Norm Providers and Recipients Regarding Constitutional Restraints on Transitional Justice

2.1. Transitional Constitutionalism

As long as any transitional justice system can be considered a national public policy, it can be considered to be restrained by checks-and-balances. One of the domestic restraining mechanisms is a function of "constitutionalism" led by judicial institutions. The word "constitutionalism" can be defined as an idea for restraining state powers based on the fundamental norm adopted in the state. In the states that have a well-established culture of the rule of law, the fundamental norm restraining state power can be found in the constitutional law; the restraining process is governed by the domestic courts that apply the law.

However, in many situations of social transition such an effective function of the restraining process cannot be expected to play a role similar to that played in developed democratic countries. The most salient example shows that this difference is a lack of stable restraining mechanisms for correcting injustices by government organizations. For instance, during the social transition toward democratization or peace, both the prosecution of perpetrators of past human rights abuses and the reparations for victims have been compromised. Although the "justice cascade" can be globally observed, it does not necessarily mean that the unification of the justice systems' enforcement mechanisms can effectively govern from outside of the state.[6] As the recent backlash and criticisms for over-emphasizing the mechanisms of the International Criminal Court (ICC) indicate, fragmented but similar transitional justice mechanisms have been working to fill the void of justice in many transitional countries that are in the process of transformation of governmental and legal systems.

It is difficult to find the restraining mechanisms of abusive transitional justice policies in each state. The fragmented transitional justice mechanisms inevitably reflect the political context, and that fragmentation works in society by separating the values of fairness or transparency from the core idea of justice. For example, the lack of national reparation mechanisms for victims has been observed in many former Yugoslavian countries, the region

that has domestically prosecuted the world's highest number of perpetrators of severe human rights abuses.[7] On the other hand, a lack of prosecution against perpetrators and the adoption of broad amnesty policies can also be observed in Morocco and Myanmar. In these cases that illustrate imperfect justice, the domestic restraining process of the national transitional justice policies is rarely seen, even if victims wish to have fair and just prosecution against past human rights abuses. In the field of transitional justice, many scholars have tended to depict this as a peace versus justice diametrical dilemma, which questions whether amnesty or prosecution should be prioritized for maintaining social order during a transition.

Therefore, Teitel (2000) developed a discussion about "transitional constitutionality," which has features different from those observed in ordinary justice systems. She argued that transitional justice works in the context of "political transformation," and it entails the many conflicting concepts of justice that occurred in the transformation process, i.e., from the former illiberal norms to liberal norms (Teitel, 2000, p. 6). She also emphasized the inapplicability of the ordinary principle of the rule of law. She stressed the importance of the idea of the transitional rule of law, which sustains the idea of "transitional constitutionality" that entails the transformation of the sources of law itself and even the role of judiciaries and their organizations (Teitel, 2000. pp. 6–7). Regarding the source of the law, transitional societies need to find applicable new laws that are suitable for the value codes adopted under the new regime. On the other hand, judicial organs also have the burden of making a decision about whether they will keep legal continuity from the former regime or find a new legal principle to adopt in the transitional society. In evaluating the mitigating factors of this legal uncertainty in a transitional society, Teitel stressed the role of international law, the role of the socially-constructed concept of law, and the role of laws limiting politics (Teitel, 2000). Regarding the role of international law in maintaining the legality of transitional justice, Mendez (2012) also argued that "the state understands that international law obliges the state to avoid impunity for major international crimes," even if the constitutional law does not impose an obligation for the states to do so (Mendez, 2012, p. 1273).

2.2. Remaining Uncertainty in the International Norms on Transitional Justice and Amnesty

In the field of international law, implementing amnesty has been generally regarded as a domestic practice governed by the authorities of each state. One notable example is the additional protocol of the 1977 Geneva Convention. Article 6 (5) of the Convention stipulated that "the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained" (Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1977). As a notable case of the *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* (*AZAPO* case) of the Constitutional Court of South Africa in 1996, some countries' domestic courts referred to this provision to explain the validity of their practice of amnesty.[8]

However, the rise of the human rights movement has increased the trend of limiting the state practice of amnesty. Several human rights/humanitarian treaties stipulated the obligations of the member states to punish severe human rights abuses, such as genocide, war crimes, and torture. For instance, Article 1 of the Genocide Convention stipulated that "the contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish" (Convention on the Prevention and Punishment of the Crime of Genocide, 1948). "This kind of obligation setting for the member states can be observed in several other multilateral treaties, including the four 1949 Geneva Conventions and the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, Punishment. Since the 1990s, the International

Committee of the Red Cross (ICRC) also started maintaining their restrictive interpretation of Article 6 (5) of the Geneva Convention 1977 (Close, 2019). In 2005, the study issued by the ICRC stated that "the provision could not be construed to enable war criminals, or those guilty of crimes against humanity, to evade punishment;" this referred to the fact that the USSR promoted such an interpretation when Article 6 (5) was adopted (Henckaerts and Doswald-Beck, 2005 p. 611).[9]

In fact, tendencies for emphasizing the developing international legal obligations for transitional justice can be observed in some academic debates (Mendez, 2012). However, there is still uncertainty in international law that governs current amnesty policies. This uncertainty is because of the lack of explicit legal sources that specifically govern the practice of amnesty. So far, there have been no international treaties explicitly prohibiting or discouraging implementing amnesty itself (Freeman, 2009). The above-mentioned provisions of the treaties only implicitly restrict the implementation of amnesty as a logical consequence of the obligation of member states to punish certain violations of the law.[10] In addition, due to the limitation of treaty obligations for prosecuting such crimes, these treaties have been generally considered not to have binding power over crimes against humanity or war crimes committed during internal conflicts (Close, 2019). Furthermore, the increasing frequency with which states are granting amnesty has cast doubt on international laws and customary rules about amnesty.[11]

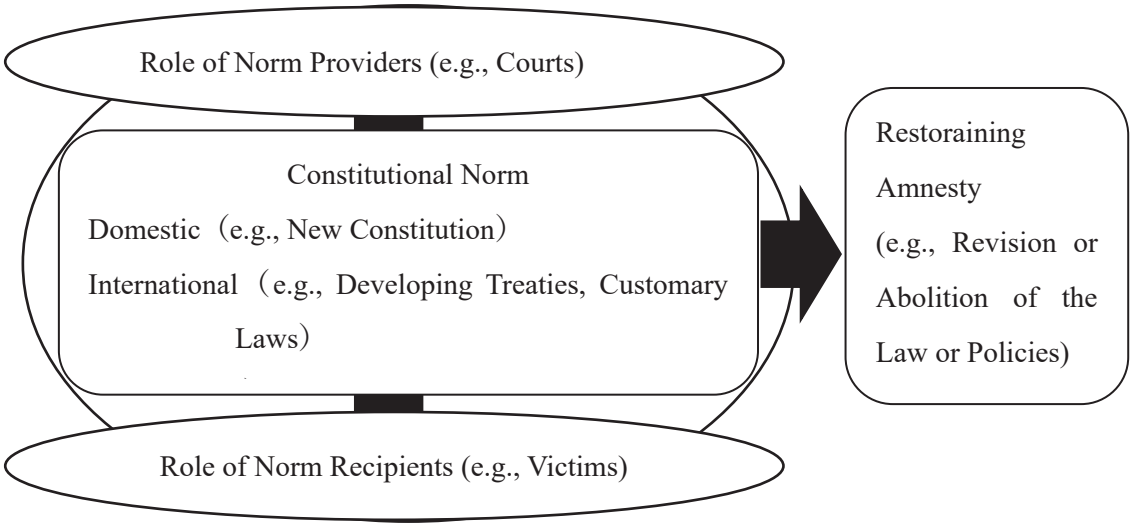
2.3. Interaction between Norm Providers and Norm Recipients for Restraining Amnesty

This discussion indicates the need for an analytical framework for understanding the function of transitional constitutionality, which is not only based on the norm itself but on the variables that affect the norm. The existence of norms and their application is not enough to lead to the result of constitutional restraint in specific cases; there are multiple uncertainties in international and national norms. The norm expected to be applicable in the context of transition does not actually have a normative character, because of its ambiguous developmental features in both international and internal society. In other words, confirming the existence of applicable norms is not sufficient to discuss restraining transitional amnesty policies.

Theoretically speaking, as figure 1 shows, the result of restraining can be considered a result of interaction between the norm provider and recipient in the context of transition. As a function of social construction, Teitel argued that legality in transitional societies cannot be fixed due to the transition of the norm itself (Teitel, 2000). The norm recipients, such as victims or civil society organizations that support victims, try to find ways to correct the injustice that occurred or continues from the past. Their campaign for bringing the case to norm providers constructs a substantial part of the legality of the norm accepted in the transitional social context, and it exhibits the normative gap in the adopted policies. On the other hand, norm providers (i.e., domestic courts) try to find the rule of law in the uncertain and developing international/national norms, and they try to examine applicability in the transitional context. The norm providers inevitably need to evaluate the traits and attitudes of international/domestic laws developed before and after the transition; legal institutions and transitional justice processes must determine the legality of transitional constitutionalism. In the process of finding and adopting uncertain international/domestic laws that function as rules of transitional justice, the legal institutions that function as norm providers constructively find applicable rules in each transitional society. In order to understand the constitutional restraining process of transitional justice, how both norm providers/recipients work in each transitional context needs to be analyzed.

In the following chapters, this paper discusses how constitutional norms can be found through the interaction between norm recipients and norm providers in Nepal and Indonesia, both of which have successfully constrained

state practices of amnesty. Specifically, this study sheds light on the highest courts in each country and their roles as norm providers. On the other hand, this study focuses on the role of victims and their supporters as norm recipients.



Made by Author

Figure 1. Interaction between norm provider and norm recipient in the context of transition

3. Case of Nepal

3.1. The Context of Transitional Justice in Nepal

The internal conflict between the Maoist group and the government of Nepal lasted from 1996 to 2006. Since the declaration of a state of emergency in 2001, the government of Nepal publicly recognized the Maoist group as "terrorists," and gradually escalated their response to consider the group an anti-governmental force. During 11 years of conflict, more than 13,000 people were killed, and various types of human rights abuses such as enforced disappearance or torture, were observed.[12]

The context of transitional justice began after the Maoist group and the government of Nepal made a comprehensive peace agreement in 2006. After the prolonged decision-making process of crafting the national transitional justice policy, in February 2015, Nepal established two mechanisms: the Truth and Reconciliation Commission (TRC) and the Commission of Investigation on Enforced Disappeared Persons (CIEDP). Both were based on the Enforced Disappearances Enquiry, Truth and Reconciliation Commission Act (Nepal TRC Law). The adoption of the TRC was based on the experience of South Africa and had a broad amnesty mechanism.[13]

However, in both *Basnet and others v. Government of Nepal* in 2014 (*Basnet* case) and *Adhikari and others v. Government of Nepal* in 2015 *(Adhikari* case), the victims and their supporters brought the case to the Supreme Court, and the Court recognized the unconstitutionality of the national TRC Law. In the *Basnet case*, the focus of the Court's discussion was the unconstitutionality of Section 23, which stipulated that "the Commission may, if deemed reasonable for amnesty to the perpetrator, make a recommendation to the Government of Nepal explaining sufficient grounds and reasons thereof" (Section 23 of the Nepal TRC Law). Although Nepal's TRC Law was amended in 2014, the new law was also unconstitutionalized in the *Adhikari* case. Section 26 of the 2014 Nepal TRC Law remained a broad power of the Commission for granting amnesty, and there were several mandatory provisions imposing reconciliation between victims and perpetrators. After the decision of the Court, some government officials

expressed their intention to reform the transitional justice policies, and the terms of the TRC and CIEDP were expanded.[14]

3.2. Interaction between Norm Providers and Recipients for Constitutional Restraint on the National Amnesty Policy in Nepal

In the transitional context, the restraint of the amnesty policy in Nepal was led by the interaction between victims and the Supreme Court, which retained the power of the perpetrators in the new regime. Since negotiations began between the Maoist group and the government, the policymaking process of transitional justice in Nepal has consistently excluded victims.[15] The decision to establish two organizations and policies stressing reconciliation was made through a top-down process exclusively between the Maoist group and the government of Nepal (Farasat and Hayner, 2009). The remaining possible perpetrators in the government prioritized political debate over the functions of the TRC, which included addressing the past human rights abuses of government officials. As some scholars cast doubt on the degree of acceptance of the value of reconciliation among the people, reconciliation was mainly promoted to enact political reconciliation between the two former conflicting parties, i.e., the government of Nepal and the Maoist group.[16] There was an observable gap between the adopted transitional justice policy and the human rights principles of protecting the human rights of victims endorsed by the Constitutional Law. This led to a backlash from victims (as norm recipients), who asked for the constitutionality of the national TRC Law in several cases in the Supreme Court.[17] The Supreme Court also found the unconstitutionality of the TRC Law by referring to some gaps between the adopted policies and those expected by victims. In the *Adhikari* case, for instance, section 22 of the TRC Law required the mandatory reconciliation between perpetrators and victims; the Supreme Court stated that the provision violated victims' rights because the reconciliation process "requires the independent and informed consent of both parties" and it "cannot be imposed on the victim" (*Adhikari* case, 2015, p. 61).

The decisions that led to restraining the national TRC Law were also caused by the attitude of the Supreme Court toward adopting laws. Even before the transition, the traits and attitudes of the Supreme Court of Nepal have indicated the active inclusion of international human rights standards.[18] Regarding the international human rights law and its principles, Wagle (2012) referred to the representative case and the amendment process of the domestic laws that pushed for marital rape; he pointed out that the "Supreme Court has started relying heavily on international human rights instruments to which Nepal is a party to interpret domestic legal provisions" (Wagle, 2012, pp. 91-92). In both cases of *Basnet* in 2014 and *Adhikari* in 2015, the Court's referencing and reasoning based on the implicit restraint of amnesty in several international laws indicated that this path of laws tended to adopt international norms in domestic cases.[19] In the case of *Adhikari*, for instance, the Supreme Court also referred to the main objective of transitional justice as follows:

> ... to prevent serious crimes under humanitarian laws and human rights law during the conflict; to guarantee the non-reoccurrence; to generate a feeling of self-dignity and security in victims; to keep a true record of the incidents; to create an environment for national reconciliation and to restore the rule of law; and finally, to contribute to the peacebuilding process. (*Adhikari case*, 2015, p. 50)

In order to decide the unconstitutionality of the national TRC Law, the Court applied the "principle and practice of transitional justice" with international human rights/humanitarian law (*Adhikari* case, 2015, pp. 52 – 59). Eventually, based on the gap observed between the domestic constitutional principles and the international standards, the

Supreme Court recognized the unconstitutionality of the national TRC Law.

4. The Case of Indonesia

4.1. The Context of Transitional Justice in Indonesia

Since it became an independent state after World War II, the people of Indonesia have been facing various types of violence, including both internal conflict and democide.[20] Regarding violence derived from internal conflict, there have been ongoing conflicts between the government of Indonesia and separatist entities (such as Aceh and Papua New Guinea) that tried to declare independence from Indonesia. Although they have been trying to implement some transitional justice mechanisms, the results of restraint of amnesty policy can be observed with regard to the human rights abuses that the Suharto Regime (1965-1998) committed against citizens.[21]

The democide in Indonesia began in the name of the anti-communist party campaign in 1965, after which Suharto gained power as a result of the internal insurgency triggered by the military coup. On September 30, 1965, six military officials were kidnapped and killed. Suharto and his aides publicly claimed that the incident was carried out by members of the Communist Party of Indonesia (PKI) and their supporters (McGregor and Setiawan, 2019). Suharto and his aides commanded the national army and their supporters, like Pancasila Youth and Muslim militias, to kill communist groups. As a result, approximately 500,000 people were killed.[22] As many scholars and civil society organizations have reported, violence entails a variety of human rights violations, such as enforced detentions, torture, and sexual abuse.[23]

Although the mass killing that occurred in 1965 was legitimized with the stressed value of promoting democracy in the "New Order Era," the discussion about the national transitional justice policy gradually started in 1998; this was when the Suharto Regime ended and the "Reformasi" era began.[24] In the public sector, the first development of transitional justice was the establishment of the National Commission of Human Rights (Komnas HAM) in 1993. Around 1998, Komnas HAM began their investigation of past violence, including mass killing in 1965.[25] At that time, Lembaga Studi & Advokasi Masyarakat (ELSAM) and Komisi untuk Orang Hilang dan Korban Tindak Kekerasan (KontraS) became active national human rights organizations in the non-governmental sector.[26] On October 26, 2000, the Law No. 26 for Establishing the National Human Rights Court was implemented and ultimately led to the creation of the TRC.[27] As can also be observed in Nepal, the adoption of a transitional justice policy centered on the TRC was largely influenced by the experience of South Africa (Zyl, 2005). Finally, in 2004, the National Law No. 27 established the TRC in 2004.

However, the Constitutional Court of Indonesia struck down the TRC Law on December 7, 2006, before the TRC started their work (*Decision Number 006/PUU-IV/2006*, 2006).[28] The decision mainly evaluated the legality of the amnesty provision of Article 27 of the TRC Law and determined that it violated the principle of the Constitution of Indonesia. As possible options for settling past human rights abuses in Indonesia, the Court said that remedies could be implemented "by achieving reconciliation in the form of legal policies (laws), which are in line with the 1945 Constitution and universally applicable human rights instruments, or achieving reconciliation through political policies on general rehabilitation and amnesty" (*Decision Number 006/PUU-IV/2006*, 2006, pp. 28-29). Since then, the discussion has continued, and no state-level transitional justice mechanisms have been adopted in Indonesia so far.[29]

4.2. Interaction between Norm Providers and Recipients for Finding the Constitutional Restraint on the National Amnesty Policy in Indonesia

The interaction between norm recipients, including victims and their supporters and norm providers, including the Constitutional Court, affects the process of finding constitutional norms in Nepal.

The lack of consultation itself, as in the case of Nepal, has not been explicitly observed in Indonesia. However, the human rights activities of victims have been facing substantial exclusion from the decision-making process within transitional justice systems; this is largely due to the power of the military in the political sphere of Indonesia. Since the inception of the domestic transitional justice process in Indonesia in 1998, the new regime displayed a cooperative attitude towards addressing past human rights abuses. During the Reformasi era, various members of human rights organizations took part in the discussion to address past human rights abuses and to establish a national TRC Law. Bhatara-Ibnu Raza, Lecturer of Law of Universitas Bhayangkara Jakarta Raya, stated that "some prominent civil society organizations, such as ELSAM, initiated the discussion about the law, and they got assistance from ICTJ [and he also stated that] .... they are involved in everything. Since the beginning, in every case, 1965, the Tanjung Priok case, what else?"[30] Victims and civil society organizations prioritized their independence in some grassroots activities. Collaboration with the government itself was maintained during the Reformasi era (Wahyuingroem, 2020). Although there were conflicting opinions among civil society organizations, the idea of having a TRC as a transitional justice mechanism was generally well-received.[31]

However, there was conflict over the idea of "reconciliation" in the drafted TRC Law. The conflict caused the substantial exclusion of victims from the decision-making process of transitional justice policies; the exclusion was attributable to the power of perpetrators, who were still active in the political sphere in Indonesia. Although many victims and civil society organizations took part in the drafting process of the national TRC Law, the TRC Law did not reflect the needs of victims and it had several provisions that were opposed to victims' ideas on reconciliation. The most problematic provisions of the 2004 TRC Law were Articles 1 (9) and 27. Article 1 (9) of the 2004 TRC Law granted a wide range of amnesties, because it determined that "human rights abuses" were already dealt with in the law that included genocide or crimes against humanity; both were defined as "human rights abuses" in the ad hoc Human Rights Court Act in 2000. The 2004 TRC Law also stipulated that victims can receive rehabilitation or reparations "when a request for amnesty is granted."[32] This compromised product did not meet the expectations of victims; in Indonesia, former perpetrators are in the center of the government, powerful military positions, and in Islamic groups. Mugiyanto, a survivor of disappearance in 1998 and an Adviser at Ikatan Keluarga Orang Hilang Indonesia (IKOHI), stated:

> ... For the truth commission, there were more than 100 consultations ... But the problem is that the bill reflected not only our thoughts, but also those of the military and Islamic groups who were against communism. So, Civil Society Organizations (CSOs) were there, victims were there, and perpetrators were there .... and the militaries wanted amnesties.[33]

Due to their substantial exclusion from the transitional justice process, victims and civil society organizations brought the case to the Court to ask the constitutionality of the national TRC Law. Regarding Article 27 of the National TRC Law, which conditioned compensation for victims on the exchange of granting amnesty for perpetrators, the Court confirmed the impossibility of centering amnesty of perpetrators *and* achieving the legal objective to promote reconciliation. The Constitutional Court stated:

> If the purpose is to achieve reconciliation, by applying an approach which does not focus on the individual, the starting point shall be the gross human rights violations and the existence of victims who serve as the measure of reconciliation by the provision of compensation and rehabilitation (*Decision Number 006/PUU-IV/2006*, 2006, p. 61).

The attitudes toward applying international/national laws of the Constitutional Court of Indonesia also led to the decision to strike down the 2006 case. Although there have been some exceptions, since the early 2000s, the Constitutional Court of Indonesia has been actively utilizing international human rights laws as the basis of its decision-making.[34] As can be observed in the case of Nepal, the Constitutional Court of Indonesia also referred to international laws and tried to confirm the authority of the Commission to grant amnesty. Although the Court stated that the General Comment and Report of the Secretary-General of the United Nations have not been accepted as binding law, it seems that such conceptions mirror the content of the 1945 Constitution, which stipulates principles for human rights protection *(Decision Number 006/PUU-IV/2006*, 2006, p. 24).

Another notable feature of the decision of the Court was that the Court showed the practice of "ultra petita," which means "not beyond the request." Although the Court only affirmed the unconstitutionality of Article 27, the Court stated:

> Article 27 and articles related to Article 27 of the KKR[35] Law are articles that strongly affect the enforceability or unenforceability of all provisions in the KKR Law, so that declaring that Article 27 of the KKR Law does not have binding force will give rise to legal implications, which will render all articles relating to amnesty as not having a binding force (*Decision Number 006/PUU-IV/2006*, 2006, p. 24).

With regard to the reason for the decision, Jimly Asshiddiqie, the former Chairperson of the Constitutional Court at the time of the decision on the constitutionality of the national TRC Law, said that "the rule was the substance of the law .... that was the heart of the law."[36] Actually, this kind of "ultra-petita" decision has been observed in other Constitutional Court cases.[37] Pan Mohamad Faiz, a researcher of the Constitutional Court, said that "this was not the first time for revoking entirely...Even in the first decision of 2003, the Court revoked entirely...This is my count, at least ten decisions have been revoked by the Constitutional Court"[38] In this sense, the decision to restrict the national TRC Law was affected both by the attitude of the Constitutional Court to actively refer to international human rights norms and the Court's developed tendencies for dealing with constitutional cases.

5. Conclusion

This paper discussed how constitutionalism in Indonesia and Nepal works to restrict national transitional justice policies by specifically referring to the unconsitutionalizing process of the national TRC Laws that contained amnesty provisions. As the discussion shows, the restraining of the national TRC Laws was guided by the interaction between the norm recipients (the victims) and the norm providers (the national courts).

In both countries, to a greater or lesser degree, victims and their supporters were excluded from the decision-making process over the national transitional justice policy on the TRC. In Nepal, victims did not have much consultation with the new regime. In the case of Indonesia, while victims took part in discussions about the national TRC Laws, they were substantially excluded from participating in political decisions about amnesties. In both countries, the remaining perpetrators in the new regime created transitional contexts that rejected victims' thoughts

about transitional justice policies. As notable cases showed, their bringing cases to the courts illustrated that there was a gap between adopted policies and the victims' expectations. In both countries, that gap led to court decisions that specifically pointed out the impossibilities of achieving the objectives of the law.

Another reason behind the decisions to restrain amnesty practices in both cases were the traits and attitudes of the norm provider in dealing with international/national law in their jurisdictions. In both Nepal and Indonesia, the courts dealt with cases of national TRC Laws that shared attitudes in line with international laws. In addition, as the case of Indonesia clearly showed, courts' tendencies in dealing with cases developed with experience over time and also affected the decisions. In this sense, although the international/national norm of restricting amnesty is uncertain, the interaction between norm recipients and norm providers can constructively work to find reasonable rules that can govern the amnesty practice implemented by states.

However, it should be noted that the restraining of amnesty policies has not necessarily led to states actively revising their transitional justice policies for meeting victims' expectations. In Nepal, while more than five years have passed since the court decisions were made, the government still has not taken effective measures to build new justice mechanisms. Since the Indonesian Constitutional Court provided two options, either legal or political means, to achieve the goal of reconciliation about 15 years ago, the new regime has not implemented any state-level transitional justice programs. Further research on the impact of each decision and on the follow-up activities of the government will be needed.

Acknowledgment

This work was supported by JSPS KAKENHI Grant Number JP20K13445.

Notes

[1] This paper defines the "restraining process" as a policy process restricting and limiting the implementations of amnesty by entirely abolishing or partly revising its conditions.

[2] On the lack of the unified state practice for restraining amnesty against severe human rights abuses, see, Close (2019).

[3] Article 3 (f) of the peace agreement stipulated that "no element of any party can be prosecuted on the basis of acts or facts derived from the hostilities or connected situation" after the end of conflict. Article 3 (g) also stipulated that "the parties agree that it is necessary to approve an amnesty law, in this session of the Assembly of the Republic." Actually, in 2019, the parliament of the government of Mozambique approved a broad amnesty law and it has been criticized by international human rights organizations. On the text of the peace agreement in 2014, see, The University of Edingburgh Peace Agreement Database. (n.d.). On the response from international human rights organizations, see, Human Rights Watch (2019).

[4] Article 11 of the peace agreement stipulated that "the Government of the Islamic Republic of Afghanistan will guarantee judicial immunity of the leader and members of Hezb-e Islami in regards to past political and military acts upon announcement and in accordance with this agreement." On the text of the peace agreement, see. Rahim (2018). pp. 21-25.

[5] This paper defines "constitutionalism" as the restoration process of national policies by fundamental norms adopted in each society. However, in transitional societies, such restraining process often does not work the same as that of ordinary situations that already established effective rule of law. As Teitel argued, this paper considers the constitutionalism at work in transitional justice is different from that in ordinary situations; as per the function of "transitional constitutionalism." For details, see, Teitel (2000).

[6] As Sikkink (2011) argued, the number of countries that adopted accountability measures for past human rights abuses can be globally observed today. However, such discussion itself does not mean universality or unification of the adopted justice mechanisms.

[7] Although they have been criticized because of the delayed prosecution process, the domestic courts of Bosnia successfully prosecuted more than 560 individuals as war criminals as of 2017 (OSEC, 2017). That high number of criminals domestically processed is unparalleled and not observed in other countries that had a similar scale of conflict.

[8] For instance, see, Southern African Legal Information Institute (SAFLII). (1996). Para. 30.

[9] However, Close argued that this position of ICRC did not reflect states' attitude at the time of adoption of the article. On the other hand, she pointed out that several states expressed their negative attitude for governing amnesty issues under the international law. See. Close (2019), pp. 131 – 134.

[10] As a "soft law" in the international society, for instance, Article 24 of the "Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity" stipulated prohibition of amnesty against severe human rights abuses (UN Doc. E/CN.4/2005/102/Add.1). However, no codification process of this principle has been observed so far.

[11] Close (2019) also pointed out the lack of consensus for making procedures that effectively oblige states to prosecute genocide, torture, crimes against humanity, and war crimes. See, Close (2019), p. 143.

[12] About the number of casualties of the conflict in Nepal, an official of the Ministry of Peace and Reconstruction said that 17,800 people died during the conflict. See, Nepal 24 hours, "Official says 17800 killed in decade-long civil conflict" (June 16, 2012), Retrieved April 20, 2020 from https://www.nepal24hours.com/official-says-17800-killed-in-decade-long-civil-conflict/. Other sources showed different numbers ranging from approximately 13,000 to 15,000. See, Informal Sector Service Center (ICSC) (n.d.). or Amnesty International (2019).

[13] During the peace agreement discussions in 2004, the South African model of the TRC was introduced by several international consultants like Hannes Sibert. See, Farasat, W. and Hayner, P. (2009), pp. 16, 26.

[14] Himalayan Times, "Govt to amend transitional justice act: AG" (April 12, 2018), Retrieved April 9, 2020 from https://thehimalayantimes.com/nepal/government-to-amend-transitional-justice-act-attorney-general-agni-kharel/; On the ongoing debate over national transitional justice policies in Nepal, see, Human Rights Watch (2020).

[15] Interview with Nirajan Thapaliya, Human Rights Activist in Nepal, in Kathmandu on May 3, 2018.

[16] On the lack of acceptance of reconciliation among victims, see, Sajjad, T. (2006), p. 36.

[17] The continued inactivity of the TRC also broadened the gap between national transitional justice policies and victims' wishes. Interview with Achyut Acharya, former staff member of the National Human Rights Commission of Nepal, in Kathmandu on

May 4, 2018.

[18] On the path of law of the Supreme Court of Nepal, see, Wagle, R. (2012), pp. 83-106.

[19] As of July 2020, the official English translated version of the Supreme Court cases has not been released. On the unofficial English translated version of the *Basnet* case, see, The Office of the High Commissioner for Human Rights (OHCHR), (n.d.). On the unofficial English translated version of the *Adhikari* case, see, International Committee of the Red Cross (ICRC). (n.d.).

[20] In the field of transitional justice dealing with the case of Indonesia, the state also has been facing international responsibility for the violence against the people living in Timor Leste. However, this paper explicitly focuses on human rights abuses that have been domestically observed in Indonesia, in order to effectively analyze the finding process of the constitutional norms in comparison with the case of Nepal.

[21] For instance, although this paper does not focus on it, Aceh became the first entity related to violence that successfully established the TRC as a transitional justice mechanism in 2016.

[22] As Cribb mentioned, the exact number of deaths has not been confirmed and the number is different from source to source. There have been sources that showed the number of deaths anywhere from 150,000 to 1 million. See, Cribb (1990).

[23] For instance, see Amnesty International (1977); Pohlman (2017).

[24] Actually, the violent anti-communist campaign was publicly "ignored" by the United States due to their Cold war strategy. See, Human Rights Watch (2017). Moreover, some reports pointed out the fact that the United States partly supported Indonesia's campaign. See, Bevins (2017).

[25] On the early history of the human rights investigation of Komnas HAM, see, International Center for Transitional Justice (ICTJ) and the Komisi untuk Orang Hilang dan Korban Tindak Kekerasan (KontraS) [The Commission for Disappeared and Victims of Violence], (2010), pp.12-13.

[26] However, these civil society organizations did not necessarily share the same idea for pursuing transitional justice. While ELSAM emphasized the importance of truth-seeking, KontraS stressed prosecution against perpetrators. Interview with Wahyudi Djafar, Deputy Director of Research of ELSAM and Rachatul Aswidah, Senior Researcher of ELSAM, in Jakarta on February 26, 2020.

[27] Article 47 (1), (2) of the Law No. 26.

[28] On the English translated version of the decision, see, Constitutional Court of Indonesia (2006).

[29] However, this does not mean the stagnation of the entire transitional justice process in Indonesia. As local level activities, "Kamisan" (protest meetings) of victims and their family, empowerment, and support for victims have continued. Interview with Sandra Moniaga, Vice Chairperson of the Komnas HAM in Jakarta on February 24, 2020.

[30] Interview with Bhatara-Ibnu Raza, Lecturer of Law of Universitas Bhayangkara Jakarta Raya, in Jakarta on February 19, 2020.

[31] Interview with Mugiyanto, Survivor of Disappearance in 1998, Advisor of IKOHI, in Jakarta on February 21, 2020.

[32] As ICTJ complained about the article after the draft was opened, both domestic and international transitional justice organizations opposed the provision. On the example of the response from international transitional organizations, see, ICTJ (2005).

[33] Interview with Mugiyanto in Jakarta on February 21, 2020.

[34] For instance, Butt discussed that the Constitutional Court of Indonesia had not explicitly shown their views about dealing with the international laws as legal precedent for domestic cases, but the Constitutional Court of Indonesia has been referring to international human rights treaties or principles as highly persuasive guides. (Butt, 2014, p. 13)

[35] "KKR Law" is an abbreviation of the national TRC Law in Indonesian language.

[36] Interview with Jimly Assidique, the former Chairperson of the Constitutional Court of Indonesia, in Jakarta on February 25.

[37] The judicial reviews that entailed the practice of "ultra-petita" of the Constitutional Court have been conducted since its inception in 2003. The representative examples observed before the case of the TRC Law include the Case Number 001-021-022/PUU-I/2003 (law on electronics), Case Number 007/PUU-III/2005 (law on social security), Case Number 003/PUU-IV/2006 (law on corruption), and Case Number 005/PUU-IV/2006 (law on judicial review). For details, see, Sasmito (2016).

[38] Interview with Pan Mohamad Faiz, Researcher of the Constitutional Court of Indonesia, in Jakarta on February 27, 2020.

References

Amnesty International. (1977). *Indonesia: An Amnesty International report*, Retrieved April 5, 2020, from https://www.amnesty.org/

download/Documents/204000/asa210221977en.pdf

Batt, S. (2014). The position of international law within the Indonesian legal system, *Emory International Law Review*, 28 (1). 1-28.

Bevins, V. (2017). What the United States did in Indonesia: A trove of recently released documents confirm that Washington's role in the country's 1965 massacre was part of a bigger Cold War strategy. *The Atlantic*, Retrieved April 21, 2020, from https://www.theatlantic.com/international/archive/2017/10/the-indonesia-documents-and-the-us-agenda/543534/

Constitutional Court of Indonesia. (2006)., *Decision Number 006/PUU-IV/2006*, Retrieved July 5, 2020, from https://mkri.id/public/content/persidangan/putusan/putusan_sidang_eng_Verdict%20No.%20006-PUU-IV-2006.pdf

Close, J. (2019). Amnesty, serious crimes, and international law: Global perspectives in theory and practice, Routledge.

Cribb, R. (ed.). (1990). The Indonesian killings of 1965-1966: Studies from Java and Bali, Monash University. Retrieved July 31, 2020 from https://www.academia.edu/1969905/The_Indonesian_killings_of_1965-1966_studies_from_Java_and_Bali

Farasat, W., and Hayner, P. (2009). *Negotiating Peace in Nepal: Implications for Justice*, International Center for Transitional Justice.

Freeman, M. (2009). *Necessary evils: Amnesties and the Search for Justice*, Cambridge University Press.

Henckaerts, J. and Doswald-Beck, L. (Eds.). (2005), *Customary international humanitarian law volume 1: Rules*, Cambridge University Press. Retrieved July 31, 2020, from https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf

Human Rights Watch (2017). *Indonesia: US documents released on 1965-66 massacres justice*, Retrieved April 20, 2020, from https://www.hrw.org/news/2017/10/18/indonesia-us-documents-released-1965-66-massacres.

Human Rights Watch (2019). *Broad amnesty in Mozambique likely to fuel future abuses*: *Fourth law exempting opposing forces from punishment* Retrieved July 31, 2020 from https://www.hrw.org/news/2019/07/30/broad-amnesty-mozambique-likely-fuel-future-abuses

Human Rights Watch (2020). *Nepal: Recent steps undermine transitional justice, victim concerns ignored yet again*, Retrieved April 25, 2020, from https://www.hrw.org/news/2020/01/25/nepal-recent-steps-undermine-transitional-justice.

Informal Sector Service Center (ICSC) (n.d.). *Conflict victim's profile (Nepali)*, Retrieved April 20, 2020, from http://www.insec.org.np/victim/.

International Center for Transitional Justice (ICTJ) and Komisi untuk Orang Hilang dan Korban Tindak Kekerasan (KontraS). (2010). *Derailed: Transitional justice in Indonesia since the fall of Soeharto*. Retrieved July 5, 2020, from https://www.ictj.org/sites/default/files/ICTJ-Kontras-Indonesia-Derailed-Report-2011-English_0.pdf

International Committee of the Red Cross (ICRC). (n.d.). *Review of the investigation of disappeared persons and Truth and Reconciliation Commission Act, Supreme Court (Adhikari case), February 26, 2015*, Retrieved, April 5, 2020, from https://bit.ly/30cAKwW.

Organization for Security and Co-operation for Europe (OSCE). (2017). *War crimes case processing in BiH*. Retrieved July 31, 2020, from https://www.osce.org/mission-to-bosnia-and-herzegovina/451408.

Pohlman, A. (2017). Sexual violence as torture: Crimes against humanity during the 1965-66 killings in Indonesia, *Journal of Genocide Research*, 19 (4), 574-593.

Rahim, M.M. (2018), Peace prevails: A review of the process to peace and reconciliation between the Afghan government and Hezb-e Islami, Berghof Foundation, Retrieved July 31, 2020, from https://www.berghof-foundation.org/fileadmin/redaktion/Publications/Papers/Transitions_Series/transitions13_afghanistan_english.pdf.

Sasmito, H.A. (2016), Ultra Petita decision of Constitutional Court on judicial review (the perspective of progressive law). *Journal of Indonesian Legal Studies*, 1(1), 47-68.

Southern African Legal Information Institute (SAFLII). (1996). *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others* (CCT17/96). Retrieved May 5, 2020, from http://www.saflii.org/za/cases/ZACC/1996/16.html

Teitel, R. (2000). *Transitional Justice*, Oxford University Press.

McGregor, K. and Setiawan, K. (2019), Shifting from international to "Indonesian" justice measures: Two decades of addressing past human rights violations, *Journal of Contemporary Asia*, 49 (5), 837-861.

Mendez, J. (2012), Constitutionalism and Transitional Justice, in R., Michel and S., Andras, *The Oxford handbook of comparative constitutional law*, Oxford University Press.

Sajjad, T. (2006). Heavy hand, helping hands, holding hands: The politics of exclusion in victims' networks in Nepal, *International*

Journal of Transitional Justice, 10 (1). 25-45.

Sikkink, K. (2011), *Justice cascade: How human rights prosecutions are changing world politics*. W.W. Norton & Co Inc.

United Nations (UN). (2005), *Updated set of principles for the protection and promotion of human rights through action to combat impunity* (UN Doc. E/CN.4/2005/102/Add.1.[2005]). Retrieved July 28, 2020, from https://undocs.org/E/CN.4/2005/102/Add.1

The Office of the United Nations High Commissioner for Human Rights (OHCHR). (n.d.). *UN treaty body database (Basnet Case)*, Retrieved April 5, 2020, from http://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/NPL/INT_CCPR_CSS_NPL_16473_E.pdf.

Wagle, R. (2012), Judicial activism and the Ues of International Law as Gap-filler in Domestic Law: The Case of Forced Disappearances Committed During the Armed Conflict in Nepal, in Kristjansdottir, E. et.al. (Eds.). *International law in domestic courts: Rule of law reform in post-conflict states* (pp. 83-106), Intersentia.

Wahyuningroem, S. (2020). *Transitional Justice from state to civil society: Democratization in Indonesia*, Routledge.

Zyl. P. V. (2005), Dealing with the past: Reflections on South Africa, East Timor, and Indonesia." in M. Zurbuchen (2005). (ed.). *Beginning to remember. The past in the Indonesian present* (pp. 324-342), Singapore University Press.