

Critical Reflection

Following the KOFF roundtable on

Challenges for Human Rights Defenders: Reflections from Nepal

Dipendra Jha, Chairman, Terai Human Rights Defenders Alliance
Anna Leissing, Program Officer, Centre for Peacebuilding KOFF, swisspeace

Challenges of HRDs

At the KOFF Roundtable on Challenges for Human Rights Defenders: Reflections from Nepal, three inputs were made by Dipendra Jha, Advocate of Supreme Court of Nepal and Chairman of Terai Human Rights Defenders Alliance, Martin Stürzinger from the Swiss Federal Department of Foreign Affairs, Human Security Division and Anna Leissing from the Centre for Peacebuilding KOFF. The roundtable highlighted specific challenges which human rights defenders (HRDs) in Nepal face. It also took a step back and reflected on some common challenges that cut across different contexts.

According to the UN Special Rapporteur on the situation of human rights defenders, HRDs are subject to violations of their human rights in every region of the world. Their situation is often especially precarious in countries where there are legal restrictions on the work they do; when legal and/or institutional protections and guarantees of human rights are not fully assured or do not exist at all. HRDs worldwide risk being the target of killings, torture, beatings, death threats, harassment and defamation, arbitrary arrest and detention, as well as restrictions on their freedom of movement, expression, association and assembly. These acts of aggression are often in violation of both international and national law. However, some countries adopt restrictive domestic legislation that hinders the work of HRDs and is often used to criminalize their activity. Therefore, an

increasing risk for HRDs is to become victims of false accusations and unfair legal trial and conviction.

In Nepal, one can argue that HRDs are at risk of facing five major challenges. First, the state security forces and ruling elites of the specific country tend to ignore the work and identity of HRDs themselves. These persons, including lawyers and journalists, who investigate such unlawful activities are subject to regular threats, inflicted violence and arrests by the police.¹

Second, once human rights defenders create power through their work, they risk co-optation by state agencies that offer them appointments within the state structure. Third, the HRDs who are not co-opted and continue their human rights protection work, risk to be defamed by the state agencies and elements that serve the interests of the state.

Fourth, an increase of power and visibility is often faced with backlash. Rumors are circulated that accuse HRDs of being corrupt, misappropriating

¹ Dipendra Jha was threatened last year by a senior superintendent police officer due to his involvement in a case lodged with the Supreme Court regarding an extra-judicial execution. He was told not to pursue the case, failing which his life would be in danger. This incident was reported on the first page of the Kathmandu Post. Please visit:

<http://www.ekantipur.com/the-kathmandu-post/2011/08/11/top-story/state-of-nepali-state-govt-officials-harassing-us-madhesi-activists/225066.html>

funds or of having made mistakes in their personal lives. After experiencing defamation, the work of HRDs in bringing cases to light and prosecuting them becomes limited due to lack of funding, credibility, reputation and human resources. Many HRDs experience destabilization at this stage of activism. The fifth challenge is a risk of elimination through a physical attack, which is accompanied with other significant issues.

HRDs in Nepal risk facing these five challenges; raising questions on whether this is applicable to other parts of the world as well. The KOFF roundtable heightened fears that these are challenges that are widespread for HRDs the world over. At the same time, reflections on emerging guidelines on HRD protection highlighted that there is some discussion, acceptance and international recognition on risks faced by HRDs and how it is important to establish tools for their protection.

Brief political background of Nepal

Nepal is currently undergoing a transition from the decade-long Maoist insurgency from 1996 to 2006, which was formally ended by way of the Comprehensive Peace Agreement signed on 22 December 2006. Thereafter, the Maoists' political front, in the form of the political party, the Unified Communist Party of Nepal (Maoists), re-joined the democratic electoral process. Nepal's Interim Constitution of 2007 still remains in force, with the first Constituent Assembly ("CA") having been dissolved in May 2012. Baburam Bhattarai, the then Prime Minister, admitted that the four years long effort to write a new constitution had ended with the "collective failure" of the country's politicians.² Parties were unable to reach an agreement on divisive issues such as federalism. The second CA is currently working towards meeting the deadline of January 22, 2015 to promulgate a new Constitution. Despite the presence of the United Nations in Nepal (for

² The Economist, 'Ad hoc Country, An election is called, but political stability remains a distant dream', June 22, 2013, available at <http://www.economist.com/news/asia/21579882-election-called-political-stability-remains-distant-dream-ad-hoc-country?Zid=309&ah=80dcf288b8561b012f603b9fd9577foe>.

instance, in the form of the UN Office of the High Commissioner for Human Rights from 2006 to 2010), with many HRDs and their organizations being able to work with the support of various donors, HRDs face a threat to their continued existence as they have largely failed to impact public opinion on human rights. In particular, civil and political liberties are not given priority in the national conversation, with development issues taking the forefront instead.

There has been little democratic reform in Nepal since the Comprehensive Peace Agreement was signed in 2006. For example, problems of institutional failure remain entrenched, and there is a continued obstacle to restructure the feudal system of ownership. This further leads to an unsatisfactory relationship between development-oriented objectives and human rights objectives.

In this post-conflict context, unlawful activity remains rampant and systemic. At best, the security apparatus remains incompetent in its investigative capacities and is inefficient. At its worst, the security forces corruptly dispense justice for the elitist, the rich and the powerful while abusing the innocent and the marginalized. Against this backdrop, HRDs have faced several challenges in negotiating, monitoring and documenting unlawful activity.

Absence of strong legal mechanisms

In Nepal torture is legally taken as a civil problem not a criminal offense.³ Thus, the Courts do not have criminal jurisdiction to punish perpetrators of torture because torture by the State is not recognized as a crime in Nepal's penal law. The courts are also not adequately empowered to compensate the victim in terms of arbitrary detention. While the Nepal Police has a human rights cell in its headquarters, it does not have functional independence. While the National Human Rights Commission does have some power to investigate such allegations of unlawful activity and competent members, its recommendations remain largely unimplemented. The lack of effective accountability mechanisms

³ Please see Nepal's Torture Compensation Act, 1996 <http://www.lawcommission.gov.np/site/en/content/compensation-relating-torture-act-2053-1996>

to hear complaints within the criminal justice system largely diminishes the ability of HRDs to effect meaningful change and redress. This shows the lack of legal mechanisms to prosecute human rights violators in Nepal. Sometimes, fear of antagonizing the police also prevents the filing of compensation claims for torture.

Extrajudicial execution has also the same problem; police's indirect refusal to provide required information creates problems in impartial investigation. The nexus between armed groups, police force and political groups often leads to cases not being investigated. To-date, there have been no charges brought against police accused of carrying out extrajudicial executions.⁴ In many cases, HRDs are denied access to the information necessary to investigate cases effectively (such as access to post-mortem reports and information about the perpetrator).⁵ This makes it impossible for a full and impartial investigation to be carried out.

In order to commence criminal investigations (including prosecution of the police themselves), First Investigation Reports (FIRs) are to be filed. However, in practice, these are rarely filed when unlawful police action is involved⁶. This problem is exacerbated by the fact that FIRs are to be filed at the police office closest to the incident, resulting in the paradox of the perpetrator filing an FIR against himself, or his colleagues doing so. In cases of arbitrary detention, the police deliberately do not register the arrested person in order to evade the provision requiring the production of the detainee before the court within

⁴Instead, there are reports that those involved have been promoted or sent abroad for peacekeeping operations. In September 2012, for example, Kuber Singh Rana was promoted to Nepal's Inspector General of Police despite the fact that he was being investigated for his alleged involvement in the enforced disappearance and killing of five youths in the Terai's Dhanusha district in 2003.

⁵In two cases, THRD Alliance was denied access to the post-mortem report. The reasons given ranged from it having already been sent to Kathmandu, to the doctor who carried it out being on holiday. In one other case no post-mortem examination was carried out at all despite the family requesting one. In some cases, information on the commanding officer in charge at the time of the 'encounter' has been refused.

⁶For example, Ramakanta Sah (Bara) was arrested on 6 March 2012, but was not recorded in the police register until 9 March, on the day he was given a formal arrest warrant. The public prosecutor refused to file a case against him and he was released.

24 hours of arrest. This is another obstacle that prevents the due course of a full and impartial investigation. Efforts need to be made in Nepal on better accountability mechanisms of the police force. For example, it would be important to have provisions in the new constitution regarding an independent police commission. Such a commission could be a major step to improving protection and minimizing threats to HRDs.

Rumors and threats as tools to defame HRDs

Using rumors and anonymous emails to defame is one tool that is used against HRDs and their activities. This is likely to be used in a critical moment of a just process. Defaming a change agent in Nepal is normal and it often happens when there is impact of activism. Right to freedom from the perspective of citizens' participation in the national political process, among other things, is basically concerned with freedom⁷ of opinion and expression, freedom to assemble peacefully and without arms, and freedom to form unions and associations (Art 12, Interim Constitution of Nepal, 2007). In Nepal, we have a large number of cases. For example, C.K Raut is a Madhesi activist who spoke openly to the Madhesi People (people residing in the southern plains) about their need for an autonomous state; he was arrested without a warrant. After THRD Alliance provided him legal aid, it was accused of supporting a separatist.

Transitional justice discourse

The human rights discourse in Nepal is at a critical juncture with vested interests trying to portray the human rights movement as a donor driven agendas. Mainstream political leaders often undermine the agenda of justice saying it is an agenda of a group of people wearing several hats. Current debates on the Truth and Reconciliation Commission laws particularly prosecution for war era crimes and reparation is entangled in the imbalance of criminal justice and social justice. If both the elements of comprehensive justice can be taken into consideration i.e. equal importance to all the stakeholders and equal participation of

⁷Governance Situation in Nepal, by Dwarika N Dhungel

marginalized community, then none of the political parties would choose to refuse this genuine agenda of prosecution.

The TRC laws definitely have some flaws and ambiguity. Article 29(5) of the Interim Constitution has given the commission the authority to decide on the war era cases. Similarly, there is no clear-cut demarcation between the Special Court that the TRC law intends to create and the regular court. What will be the role of Special Court and how will the judges be appointed? These are some pertinent questions, which should be clarified. There is some scope to expand section 26(2) of the TRC Act. While one can speak of how post-conflict countries often face dilemmas of addressing peace and justice, it is of particular importance that issues such as rape, forced disappearances, torture, extrajudicial executions and war crimes should also be categorized as non-pardonable crimes. What is important is that victims' consent should be compulsory to grant amnesty in any case.

It is surprising that mainstream politicians and media are downplaying the government's pledge to form a separate commission to address the agreements reached with armed groups of Terai. Equally important is that all cases of human rights violations committed post Madhes Movement must be probed. The Movement that took place in January 2007 shook the fragile Nepali State in the aftermath of the overthrow of monarchy and the restoration of democracy.⁸ Effective protection of human rights depends on the free and fair environment for human rights defenders. When human rights defenders are intimidated by state and non-state actors while defending people's human rights, the efforts to protect human rights suffer. Although Nepal claims to be a democratic society giving emphasis to protecting people's human rights, many human rights defenders continue to be intimidated by state and non-state actors.⁹

The previous sections highlighted five key challenges that HRDs face in Nepal while showing particular threats and risks in relation to the justice sector, transitional justice, the absence of strong legal mechanisms and how

⁸ Mathema Bhakta Kalyan, xv- Madhesi Uprising The resurgence of ethnicity

⁹ Please see: <http://asianhrds.forum-asia.org/?events=nepal-whrds-threatened-and-intimidated>

rumours are used to defame HRDs. While it is difficult to compare contexts, reflections from four other cases in the world¹⁰ where HRDs face challenging environments have shown that there are cross-cutting challenges that HRDs face and ways in which local and international actors can support their protection.

Recommendations and good practice in HRD protection

International policies and instruments, such as the Swiss Guidelines on the Protection of Human Rights Defenders, have a great potential of contributing significantly to enhanced HRD protection. During discussions at the roundtable on the situation of HRDs in Nepal, it was acknowledged that the Swiss guidelines are an important effort in giving a sense of confidence among HRDs that some level of protection is in place. However, these instruments are only meaningful if put into practice. Dissemination of, as well as information and discussion on the guidelines are, therefore, crucial. In this regard, it is important not to limit discussions to actors close to the international community, but to reach out to more rural and marginalised communities and people who are less known and familiar with human rights proceedings and language. This includes the need of translating the guidelines and instruments into local languages.

Due to the variety of challenges in HRD-related contexts, protection needs to be adapted to a particular context or situation and should encompass a broad range of activities at different levels. Policies and legislation, including their enforcement, are as important as concrete and practical support for HRDs in difficult circumstances. Different actors such as state institutions in Nepal (e.g. the National Human Rights Commission), international state actors (e.g. embassies), international non-governmental organizations (NGOs), as well as national and local civil society organizations (CSOs) can play

¹⁰ The four contexts discussed at the KOFF Conference „Human Rights Defenders at Risk“ in June 2014 were: Guatemala/Honduras; Russia; Serbia and Sri Lanka. Further information in the KOFF Essential “Implementation of the Swiss Guidelines on the Protection of Human Rights Defenders”: <http://koff.swisspeace.ch/what-we-work-on/human-rights-conflict-transformation/>

differing roles, complementing each other's efforts to enhance effective HRD protection.

In order to protect HRDs in a given context with targeted interventions and measures adapted to their specific situation, a thorough context, conflict and human rights analysis is indispensable. As the reflections on Nepal showed, the main challenges for HRDs relate to the justice sector, to security forces, to issues of dealing with the past and to the public discourse on human rights. This might indicate that HRD protection in Nepal should focus on activities addressing the respect for and guarantee of civil and political rights of Nepali citizens. Access to relevant information is often a main challenge for HRDs. International actors, but also national and local CSOs, can play a key role in creating information sharing and collaboration networks that ensure well investigated information on the prevailing HRD situation in a specific context, relevant actors and their relations, as well as incidents and dynamics that affect the life and work of HRDs. Such networks should include foreign representations in the country, multinational organizations such as the UN or OSCE, NHRIs, international NGOs, national and local CSOs and individual HRDs from different parts of the country in question. Furthermore, such networks are important as reliable sources for the international community, and foreign representations in particular, to act on behalf of HRDs in danger. It is hereby important, that HRDs and CSOs do not see themselves as competitors, but do support less known peers, facilitating contact between them and foreign state actors.

In Nepal, as well as in many other countries, the public opinion of HRDs is not very favourable. In order to counter negative narratives and give legitimacy to the work of HRDs, it is therefore important to make support for human rights visible in the public domain. Furthermore, visibility at the international level can contribute to the protection of HRDs. However, more concretely, staff at foreign representations or UN personnel can, for example: visit HRDs and their organizations in their local contexts; invite HRDs to speak at meetings or conferences; visit HRDs

in prison; attend court hearings against HRDs and issue related public statements in the media. In order not to exacerbate social divisions, all of these measures should be part of a strategic and holistic approach, based on a thorough analysis of a given context. Challenges and risks for HRDs are often related to more structural causes such as discriminative or repressive legislation, corrupt and/or weak state institutions or unequal access to land and resources. The international community can play a key role in this regard, discussing key issues within UN procedures and including HRD issues into bilateral talks with the governments.

Conclusion

Driven by local actors and supported by the international community, processes towards an improved protection of HRDs can take place when HRDs from different contexts are able to exchange experiences, providing the opportunity to learn from each other and create a sense of shared struggle. Safe spaces for joint analysis, discussion and cooperation between all relevant actors are therefore crucial. The roundtable on the situation of HRDs in Nepal has shown that the protection of HRDs is a challenging task and there is still a long way to go. However, the political will of states such as Switzerland, as expressed in the guidelines, as well as the commitment of numerous NGOs/CSOs in Switzerland and abroad offer promising opportunities to take this process further.

swisspeace

swisspeace is a practice-oriented peace research institute. It carries out research on violent conflicts and their peaceful transformation. The Foundation aims to build up Swiss and international organizations' civilian peacebuilding capacities by providing trainings, space for networking and exchange of experiences. It also shapes political and academic discourses on peace policy issues at the national and international level through publications, workshops and conferences. swisspeace therefore promotes knowledge transfer between researchers and practitioners. swisspeace was founded in 1988 as the Swiss Peace Foundation in order to promote independent peace research in Switzerland. Today the Foundation employs more than 40 staff members. Its most important donors are the Swiss Federal Department of Foreign Affairs, the Swiss National Science Foundation and the United Nations.

Center for Peace building (KOFF)

The Center of Peacebuilding (KOFF) of the Swiss Peace Foundation swisspeace was founded in 2001 and is funded by the Swiss Federal Department of Foreign Affairs (FDFA) and 45 Swiss non-governmental organizations. The center's objective is to strengthen Swiss actors' capacities in civilian peacebuilding by providing information, training and consultancy services. KOFF acts as a networking platform fostering policy dialogue and processes of common learning through roundtables and workshops.

Critical reflections

In its *critical reflection* publications, swisspeace and its guest speakers critically reflect on topics addressed at roundtables. They both make a note of the arguments put forward during the roundtables and carry on the discussion in order to encourage further debates.