

Political Stalemate and Transitional Justice in Post- conflict Nepal

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Summary

Having witnessed a decade-long Maoist insurgency (1996-2005) which ended with the Comprehensive Peace Accord (CPA) signed in 2006, Nepal has since been undergoing a prolonged transition. The political stalemate has held back efforts to investigate atrocities committed during the insurgency and offer justice and reparation to victims. Although Nepal's peace process has been celebrated in some quarters, it has largely failed to address issues of justice and reconciliation, with victims being left without succour and voice. Without significant progress on justice and reconciliation work that takes victims' voices into account and addresses their concerns, the ongoing peace process and any further effort towards state-building are likely to be futile.

Introduction

On 8 October 2012, the United Nations Office of the High Commissioner for Human Rights (OHCHR) released a detailed 235-page report on Nepal's conflict along with over 30,000 archived documents containing the database of conflict-related cases and incidents in Nepal between 1996 and 2006. While the Nepal government has questioned the motive and timing behind the release of the report¹, the OHCHR has stated that the report will aid the task of laying a sustainable foundation for peace in Nepal.² The report presents violations across five categories: unlawful killings, enforced disappearance, torture, arbitrary detention and sexual violence; and gives details of 41 specific emblematic cases.³ The contents of the report and the Nepal government's resistance to its release are symptomatic of the key challenges facing transitional justice in the country. As Nepal attempts to *move on* with the writing of the new Constitution, crafting the new state structure, and rehabilitation/reintegration of the former Maoist combatants, the report is a reminder that the country cannot ignore *looking back* on the widespread violation of human rights during the conflict period.

The decade-long insurgency

In February 1996, the Unified Communist Party of Nepal (UCPN) Maoist launched an armed insurgency in the mid-western hills of Nepal and it eventually spread to almost all of the country's 75 districts.⁴ During the 10-year-long armed struggle, the Maoists emerged as a significant player in Nepali politics overshadowing the country's major established political parties. The then government's initial response to the armed insurgency was to deal with it as a law and order problem by deploying the poorly-trained Nepal police. This led to massive abuse and human rights violations, thus fuelling local support for the insurgents and fostering resentment against the state.⁵ As the conflict escalated in form and scale, the government declared a state of emergency and mobilised the army against the insurgents, which led to increased fatalities on both sides as well as among civilians. As

¹ The statement issued by Nepal's Ministry of Foreign Affairs reads: "As the report has been prepared without prior government consent and consultations with stakeholders, the process itself is not compatible with general international practice. Therefore, the legitimacy of the report itself is called into question." See <http://www.thehimalayantimes.com/fullNews.php?headline=OHCHR+report+slammed&NewsID=350413>, accessed on 10 October 2012.

² <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12637&LangID=E>, accessed on 9 October 2012.

³ <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12637&LangID=E>, accessed on 9 October 2012.

⁴ Lawoti, M. and A.K. Pahari, (2010), *The Maoist Insurgency in Nepal: Revolution in the Twenty-first Century*, London, New York: Routledge.

⁵ Thapa, D., ed., (2003), *Understanding the Maoist Movement of Nepal*, Kathmandu: Martin Chautari.

a result, Nepal's image transformed from that of a peaceful Shangrila into a violent state. Over the 10-year period, the local population was caught between Maoist intimidation and forced donations on the one hand and police or army reprisals on the other. Some 13,000 lives, in large part civilian, were claimed by the insurgency and counter-insurgency. The conflict period saw several instances of gross violation of human rights, leaving a large number of victims as evidenced in the OHCHR report. In its report, the OHCHR even suggests that some of these violations might amount to war crimes.⁶

Transitional justice in the peace accord

Transitional justice was a pivotal component of Nepal's peace process. The signing of the Comprehensive Peace Accord (CPA) on 21 November 2006 marked not only an end to the 10-year-old insurgency but also envisioned redressing legacies of past violence in a bid to ensure peace, justice and reconciliation in the future. The transitional period has been marked by an opportunity to rectify not only gross human rights violations but also broader issues of structural violence, exclusion, inequality and poverty that were considered to be the root causes of the conflict. The CPA, which explicitly laid down principles for the country's transition, envisioned transitional peace structures that included Truth and Reconciliation Commission (TRC), Commission on Disappearances (CoD), and High Level Peace Mechanism, Interim Relief and Local Peace Committees (LPCs). These structures were meant to ensure the five elements of transitional justice: i) truth seeking; ii) prosecuting perpetrators; 3) providing reparations or rehabilitation to victims; iv) shaping collective memory to facilitate reconciliation processes; and v) reforming abusive or inequitable institutions.⁷ The CPA also promised to make public the status of 'disappeared' persons within 60 days. This was further reinforced by the Supreme Court's order to the government, in June 2007, to form a high-level commission of inquiry into enforced disappearances. However, there has been no progress on this front. The progress on the five components mentioned above, except the partial success of the ongoing interim reparation related payment, has been murky.

Of the abovementioned four commissions envisioned, only the LPCs have been established. These committees were designed to locally implement national peace agreements by bringing together political parties, non-governmental organisations (NGOs), and relevant local government agencies to prevent potential conflict, resolve them as they arise, and promote peace at the local level. Although the political parties, in theory, have supported the idea of

⁶ <http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/NepalConflictReport.aspx>, accessed: 15 October 2012.

⁷ Russell, Andrea, (2012) "Transitional Justice and the Truth Commission in Nepal", Senior Honors Projects, Paper 272, available at <http://digitalcommons.uri.edu/srhonorsprog/272>, accessed on 18 October 2012.

the LPCs, there has been very little commitment to support their implementation.⁸ Consequently, these peace committees were stymied with problems ranging from low funds, reducing international support and plagued by politicisation in the appointment of coordinators and confusion over mandate, among others.

There are two visible facets of transitional justice: the first that compensates the victims through well-conceived reparations programmes and the second that penalises the perpetrators of war crimes. In Nepal, the former has met with partial success while the latter has been diffused in the name of expediting the political process. Lack of political will, the ongoing political stalemate relating to other pressing issues such as the Constitution, federalism and rehabilitation/reintegration of combatants, and weak activism on the part of civil society and human rights groups have led to a protracted delay in forming the TRC and CoD. The proposed ordinance on these commissions has also been questioned for not meeting international legal requirements. The bill provides for amnesty to perpetrators of hideous human rights violations, such as rape, extra-judicial killings, torture, enforced disappearances and war crimes. The proposed ordinance cites that the Commissioners and the Attorney General would be political appointees, with the Office of the Attorney General retaining discretion in prosecuting criminal cases.⁹ This politicizes the justice system, with political appointees being made responsible for implementing national and international obligations for ensuring justice against human rights violations.

The sole focus of reparation was diluted to relief, which was not taken up as an interim arrangement but more like a substitute for reparation. So far, the Interim Relief Programme has provided benefits to over 30,000 people who were categorized as “conflict victims” and approximately 80,000 internally displaced persons (IDPs).¹⁰ The interim benefits include NPR 100,000 to the nearest beneficiary of those who were killed or who were forcibly ‘disappeared’ by parties to the conflict; NPR 25,000 each to the widows of men who died or the wives of those who were forcibly ‘disappeared’ in addition to the NPR 100,000 above; scholarships for children of persons killed, forcibly ‘disappeared’, or seriously disabled during the conflict; reimbursement of medical expenses or treatment at government hospitals; skills development training for eligible conflict victims; and compensation for persons and institutions whose real or personal property was lost or damaged during the conflict.¹¹ However, lack of evidence on the implementation of these provisions means that it is difficult to know if the victims have actually benefited from these schemes.

⁸ <http://asiafoundation.org/in-asia/2009/05/20/local-peace-committees-in-nepal-a-lost-opportunity/>, accessed on 18 October 2012

⁹ <http://www.hrw.org/news/2012/08/30/nepal-joint-letter-regarding-commission-inquiry-disappeared-persons-truth-and-reconc>, accessed on 21 October 2012

¹⁰ Carranza, Ruben, (2012), *Relief, Reparations and the Root Causes of Conflict in Nepal*, New York: ICTJ, available at <http://ictj.org/publication/relief-reparations-and-root-causes-conflict-nepal>, accessed 12 October 2012

¹¹ Ibid.

The initial impetus for transitional justice was agreed upon because of the political parties' thinking that the focus would be on reconciliation and forgiveness as opposed to 'prosecution' of the guilty. However, reconciliation is a diffuse concept in transitional justice; when linked to amnesty or made conditional for receiving reparations, it can reinforce impunity.¹² Thus, currently, Nepal stands at a crossroads. There have been no prosecutions so far of perpetrators of human rights violations, which would have de-legitimised and partly addressed the systematic use of violence during the conflict era. Further, given the lack of political will to establish transitional justice mechanisms, even if these mechanisms are instituted with pressures from national and international interest groups, Nepal's ability to investigate human rights violations and to bring perpetrators to the book is largely uncertain. Therefore, the question on transitional justice will need to move beyond the establishment of institutional and instruments into the domain of its working. The role of civil society in putting pressure is going to be important in this regard.

The fault lines

There are several fault lines in the political processes relating to transitional justice that demand scrutiny.

Peace process or political progress

In the initial phase of the signing of the CPA, reconciliation and justice did feature prominently. However, as the political processes moved forward, these issues gradually faded from the priority radar. The focus became political expediency and political consensus, albeit at the cost of justice. Offering justice to the victims and punishing the guilty did not get the attention of the political parties driving the political process. There were other issues that threatened to overwhelm the peace process, namely, the erosion of consensus that the CPA represented and agitation by the other marginalised groups like the Madhesis, Janajatis and Dalits.¹³ As these political disagreements were managed through the process of consensus building (considered necessary for "peace"), the question of justice has been eclipsed. Political expediency has been used to evade public accountability and that is most likely to have future ramifications for Nepal's polity and sustainable peace.

Elite capture of victims' voices

Transitional justice processes have been highly centralised, prescriptive and top-down in spirit. Victims of the conflict are largely poor, marginalised and disempowered with no or little access to formal justice mechanisms. But it is the elite members of civil society and the

¹² http://www.nepalmonitor.com/2012/10/relief_reparations_i.html, accessed on 10 October 2012.

¹³ Farasat, Warisha and Priscilla Hayner, (2009), *Negotiating Peace in Nepal*, New York: ICTJ, available at <http://ictj.org/publication/negotiating-peace-nepal-implications-justice>, accessed 15 October 2012.

NGOs that are shaping the response to those violations with very little or no participation of the actual victims. Reports suggest that neither the political parties nor the human rights NGOs have been able to truly represent the voices of the victims.¹⁴ A researcher working on these issues succinctly sums up the phenomenon thus: “In Nepal a liberal discourse, combining ideas of democracy, rights, and development, has become hegemonic as a result of the priorities and resources of international agencies and the willing co-option of national elites who have benefited from an association with it, through access to funds and careers.”¹⁵ Elite capture of the processes appears to have diluted their essence and made the issue of justice subsidiary to political progress and donor funding. The exclusion of victims and their families in managing the transition exposes the emerging divide of access to justice and state resources. In a context where victims’ grievances have not been represented in the political discourses and have partially been an NGO-rhetoric, victims groups, which have surfaced, might be politically mobilized.

State capacity or demand for justice

Nepal’s peace process, despite being home grown, relied heavily on international expertise, donors and international organisations. The authoritative presence of the United Nations Mission in Nepal (UNMIN), OHCHR and many other international agencies are indicative of this. The international presence in Nepal had put adequate pressure on the government to comply with global norms of international justice; however, that often contrasted with the lack of political will and state capacity in the domestic sphere. In hindsight, the lessons from Nepal’s peace process indicate that domestic demand for justice needs to be commensurate with calls for international legal compliance, and international efforts cannot compensate for lack of political will and state capacity.

Demand for justice is shared by a number of factors and actors, including the victims, civil society groups, the conflict parties, regional powers and the international community, all of whom pursue their own politics and interests. The conflicting interests of different parties has surfaced multiple times in Nepal’s transitional process. The National Human Rights Commission (NHRC) of Nepal wanted OHCHR’s role to be limited to assistance to the NHRC in investigation of rights violations or promotion and protection of human rights. But OHCHR is also involved in the promotion and protection of human rights – besides investigating human rights abuses as per an agreement with the Nepal government dating back to April 2005¹⁶ – which led to an open tiff, subsequently leading to OHCHR’s ouster.

¹⁴ Robins, Simon and Ram Kumar Bhandari, (2012), *From Victims to Actors: Mobilising Victims to Drive Transitional Justice Process*, Berghof Foundation, available at <http://www.simonrobins.com/missing/?p=146>, accessed on 10 October 2012.

¹⁵ Robins, S., (2012), “Transitional Justice as an Elite Discourse: Human Rights Practice between the Global and the Local in Post-conflict Nepal”, *Critical Asian Studies*, Vol. 44, No. 1, pp. 3-30.

¹⁶ http://archives.myrepublica.com/portal/index.php?action=news_details&news_id=6790, accessed on 25 October 2012.

Similarly, UNMIN was besmirched by a series of controversies including its alleged bias (it erroneously briefed the United Nations Security Council [UNSC] that all political parties had consented to dismissing the Army chief), its weak monitoring of cantonments (combatants caught with their arms outside roamed scot-free), and its inability to notice murder inside the UN monitored cantonment.¹⁷

Moreover, with unwarranted international involvement on issues of federalism which has irked a section of the Nepali public, the government has capitalised on this nationalist mood to completely trample upon the transitional justice systems by referring to them as an international agenda.

However, international reactions have not been uniform. While Nepal's influential neighbours have remained quiet on the issue of transitional justice, leaving it to domestic actors and instruments, Western donors appear to be highlighting the issue, often creating a sense of discomfort in the country's political circles. This is also a spin-off of events that have shaped Nepal's politics and policy architecture, with India taking the lead in the political process and Western donors in peace-building efforts. However, the calibration of these two efforts was sorely absent. Increasingly frustrated by the slow pace of the peace process, negative public opinion on the "peace enterprise" has started to emerge. While the Western donors, through their work with Nepal's civil society and international NGOs, have created a demand for justice and human rights, the Nepali state has not been able to address those demands due to its limited capacity.

Fissures within

Civil society activism remains largely weak and partisan and has limited its focus to areas that receive funding rather than identifying broad-based needs and deploying resources to address them. Recalling civil society's prominence in the 2006 peoples' movement and its gradual decline thereafter, a 2009 International Centre for Transitional Justice (ICTJ) report quotes a journalist as saying that "the civil society ceded space to the political parties after having 'nurtured the flame' of opposition to the royal rule."¹⁸

Recently, the Maoist-led government withdrew criminal charges filed against two leaders of UCPN (M).¹⁹ Further, it also promoted Nepal Army officer Col. Raju Basnet to the post

¹⁷ Damakant Jayshi, (2011), "UNMIN: Bang to a Whimper", *Himal South Asia*, available at <http://www.himalmag.com/component/content/article/3605-unmin-bang-to-a-whimper.html>, accessed on 10 October 2012.

¹⁸ Farasat, Warisha and Priscilla Hayner, (2009), *Negotiating Peace in Nepal*, New York: ICTJ, available at <http://ictj.org/publication/negotiating-peace-nepal-implications-justice>, accessed 15 October 2012.

¹⁹ <http://www.nepalitimes.com/blogs/thebrief/2012/10/06/criminal-charges-against-ucpnm-leaders-withdrawn/>, accessed on 12 October 2012.

of Brigadier General even though the officer faces serious allegations including torture, force 'disappearance', rape and murder and in spite of calls by national and international rights bodies and victims' families not to reward him.²⁰ Although a handful of rights groups have protested against such practices, their voices have often been ignored by the key political parties. In the immediate aftermath of the peace-process, the Nepali Congress, whose affiliates were the primary enemies of the Maoists during the insurgency, had demanded that the Maoists return appropriated property, allow those displaced from rural areas because of their political ideology to return home, and prosecute the perpetrators. However, as the peace process moved forward, the Nepali Congress only stressed upon the demand to return property of its party affiliates and ignored the other issues relating to conflict victims. At the same time, both the Nepali Congress and Communist Party of Nepal (Unified Marxist Leninist [CPN-UML]) were mindful that they too had their share in the governments that committed some serious human rights violations; this explains why these parties did not use transitional justice as a political weapon to weaken the Maoists.

Nepal has not yet become a party to the Rome Statute of the International Criminal Court (ICC), nor has the UNSC referred the Nepal case to the ICC. Therefore, the ICC does not have jurisdiction over the crimes committed during the conflict in Nepal, which has given the Nepali government a free hand. The government's plan to promote Basnet tramples not only upon Nepal's international legal obligations, but also the recommendation of the NHRC who wrote to the government not to "promote impunity" and demanded that Basnet be suspended from the army as per NHRC's recommendation and put on trial. Further, the diluted ordinances on the TRC and CoD hastily packed up and sent for the President's approval, if passed, will be the last nail in the coffin of transitional justice in Nepal. Justice has been manipulated by the political class in their favour at the cost of justice to the victims of the conflict. Nepal's slow response to promulgating transitional institutions and enforcing policies that contradict international human rights norms and standards would have ramifications in building confidence in justice and security institutions in the long run. Rule of law is critical to preventing Nepal regressing into conflict. Unfortunately, evading the rule of law mechanisms that ensure transitional justice seems to be the only point of convergence among key players.

Further, the domestic constituency for justice is minimal²¹. Other than the victims and civil society organisations oscillating between ambivalence and hyperactivity, the general public have long remained outside the orbit of transitional justice debates, which has undermined

²⁰ <http://www.nepalitimes.com/blogs/thebrief/2012/10/05/government-promotes-accused-na-officer/>, accessed on 12 October 2012.

²¹ International Crisis Group, (2010), *Nepal: Peace and Justice*, available at <http://www.crisisgroup.org/en/regions/asia/south-asia/nepal/184-nepal-peace-and-justice.aspx>, accessed on 8 October 2012.

the advocacy efforts for transitional justice. While the state lacks capacity, the political class lacks the will to pursue this demand for justice by victims which, in turn, leads those responsible to overlook this demand and project it as one created by the international agencies who are perceived as undermining the country's sovereignty.

Conclusion

Nepal's peace process has its share of triumphs, including an interim Constitution, rejection of monarchy in favour of becoming a republic, electing a Constituent Assembly (CA) to write a new consensus-based Constitution, integration of ex-combatants, and charting a framework for fostering post-conflict stabilisation. Despite these significant developments, Nepal's transition to peace remains tenuous, marred by the absence of political will for establishing truth, accountability, and offering justice and reconciliation. Transitions are rare periods that offer opportunities to assess past conflicts and reconstruct the present and future. Tackling impunity, ensuring accountability, and fostering legitimacy is essential to ensure a smooth and stable transition from war to sustainable peace. Political calculations and the politics of consensus have dis-incentivised transitional justice. Policy circles in Nepal must work to reform and build the capacity of justice and security sector institutions, and facilitate the instituting of transitional justice mechanisms to help fill the rule of law vacuum evident in the current state of affairs. The challenge lies in confidence-building exercises where justice, peace and democracy are not seen as conflicting objectives but as mutually reinforcing imperatives.

Implications

1. Given that Nepal is heavily dependent on foreign aid, failure to comply with international legal obligations and norms could have significant impact for aid flow to sectors related to transitional recovery as well as long-term stability in Nepal.
2. Similarly, failure to provide justice will significantly undermine the capacity of the state to uphold the rule of law and undermine the foundations of the new institutions that are being instituted. The state's inability to offer justice and impunity could lead to resentment and may fuel another conflict.
3. The culture of impunity is increasing public distrust and conversely, incentivising perpetrators, leading to a culture of violence and strengthening of criminalisation of politics.
4. Failure to provide justice has led to victim mobilisation, and its politicisation that could be a hot spot for yet another low-intensity conflict that could hinder or retract further political developments.