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Criminalization of Torture in a Federal Nepal

Combating torture through the establishment of a functioning criminal justice system in Nepal

In order to overcome the prevailing culture of "impunity" for alleged torture and other forms of severe ill-treatment that has existed in Nepal at the police and prosecution level since the civil war (1996-2006) and which continues to exist, the country has introduced various legislation. However, even today there are still considerable difficulties while enforcing those legal standards in practice. These deficiencies range from the incompatibility of national law provisions with international (UN) human rights standards, through the interpretation of the laws, to their practical implementation by courts and police forces.

Nepal has made concrete commitments against torture by ratifying international instruments and introducing the Constitution of Nepal (2015) such as the Country Penal (Code) Act, 2074 (2017) and the (Revised) National Criminal Procedure (Code) Act (2017). However, the difficulties lie in translating the relevant commitments and guarantees into practice.

The reprocessing of the existing deficiencies has been the objective of the project "Criminalization of Torture and Enforced Disappearance in a Federal Nepal" (April 2019 to December 2020), funded by the German Foreign Office. In addition to the Research Centre Human Rights in Criminal Proceedings (HRCP) of the University of Passau, the International Commission of Jurists (ICJ) as well as the NGOs Advocacy Forum (AF) and Terai Human Rights Defenders Alliance (THRDA) were involved as partners in the project.

The present findings are the result of numerous background discussions with prosecutors, police officers, the civil society, victims of human rights violations and other representatives of the legal profession held on the occasion of different events within the project, such as field missions to Province No. 2, a visit to the National Human Rights Commission and the local office of the United Nations (UN Mission to Nepal) and an ICJ high-level mission in December 2019.

Nepal slowly breaks away from a long history of torture and strives to decrease its numbers of victims of torture.

Torture practices have a long history in Nepal. State organs (Nepal Police, Armed Police Force, Nepali Army and Forest Guards) had used torture on an excessive scale during the long-lasting civil war in Nepal (1996-2006), especially to systematically¹ combat and suppress political uprisings.² The reports about the number of people tortured during the civil war vary. According to the OHCHR Conflict Report it is estimated that over 2,500 people were subjected to a method of torture during this period.³ Pursuant to *Advocacy Forum* the average rate of prisoners subjected to torture during the conflict (2001-2006) was 40.1 %, where the highest peak was found in 2002 at 53.8 %; as a result to a study carried out by *Advocacy Forum* in 2019, 19.8 % out of 1.005 visited detainees complained about torture and ill-treatment (23.5 % in 2018).⁴

By enacting new legislation, such as the Nepal Constitution, Nepal has taken a great step to addressing the prevailing culture of "impunity" for alleged torture.

Sec. 22 (1) Nepal Constitution now explicitly states that no person deprived of liberty ("in detention") shall be subjected to physical or mental torture or treated in a cruel, inhuman or degrading manner (**right against torture**). According to subsec. 2, any such act as defined in subsec. 1 is punishable; a victim of such an act has the **right to compensation by the state** in accordance with national law.

The long-awaited qualification of torture as criminal offence under criminal law shows some shortcomings that need to be addressed in the future.

In August 2018, a new Penal Code and Criminal Procedure Code came into force. As a result, torture became a criminal offence. The actual criminal liability is determined by **Sec. 167 Penal Code**. However, many aspects are still left out. Until now redress is limited with the maximum years of imprisonment currently at five years (Sec. 167 (2) Penal Code), which does not match with the gravity of torture crimes. Furthermore, the victims' ability to report violations of their rights is limited to a period of six months (Sec. 170 Penal Code).

¹ Committee against Torture, Report on Nepal adopted by the Committee against Torture under Article 20 of the Convention, 46th session, June 2011, UN Doc. CAT/C/46/R.2/Add.1, paras. 97, 108.

² See: Human Rights Committee, Basnet/Nepal, Communication No. 2051/2011, 26.11.2014, UN Doc. CCPR/C/112/ D/2051/2011, para. 8.3.

³ Office of the High Commissioner for Human Rights, Nepal Conflict Report, 2012, p. 20.

⁴ *Advocacy Forum*, Torture in Nepal in 2019: The Need for new Policies and Legal Reform, p. 1.

Moreover, there is still no prohibition on the use of evidence for statements made under torture (see Article 15 Convention against Torture), which is particularly important in light of the fact that most convictions in Nepal are based solely on confessions.

In particular, when it comes to granting an effective remedy, the prescribed legal standards and the reality diverge widely.

It is one of the fundamental guarantees of the Constitution of Nepal that an effective domestic remedy for an alleged violation of the prohibition of torture shall exist (Sec. 22 (1) Nepal Constitution).

In practice, however, many victims have been denied legal recourse, particularly in dealing with human rights violations from the civil war.⁵ To investigate the conflict-era human rights violations, **Nepal's two transitional justice bodies**, the Truth and Reconciliation Commission (TRC) and the Commission for the Investigation of Enforced Disappeared Persons (CIEDP), were founded in 2015. However, until today, they have not been able to make much progress and are mired in controversy.⁶

The granting of compensation to victims of torture cannot be misused to refrain from punishing the perpetrators.

All victims of judicially established acts of torture are entitled to compensation under Sec. 22 (2) Nepal Constitution, the nature and extent of which are determined by ordinary law. A reparation is vaguely regulated (Sec. 169 Penal Code and Compensation Relating to Torture Act, 2053 (1996), whereby victims are granted only 35 days from the date of inflicting torture upon him/her or of his/her release from detention to file a complaint to receive compensation (Sec. 5 (1) Compensation Relating to Torture Act).

The many worthy innovations in legislation will not be successful if the implementation of court decisions is not guaranteed.

In addition to the problem of impunity, the lack of implementation of judgements is one of the greatest factors which prevents an effective human rights protection.⁷

⁵ Human Rights Committee, Sharma/Nepal, Communication No. 2265/2013, 6.4.2018, UN Doc. CCPR/C/122/D/2265/2013, Rn. 10.11; Human Rights Committee, Giri/Nepal, Communication No. 1761/2008, 27.4.2011, UN Doc. CCPR/C/101/D/1761/2008, Rn. 7.10; Human Rights Committee, Tharu et al./Nepal, Communication No. 2038/2011, 3.7.2015, UN Doc. CCPR/C/114/D/2038/2011, Rn. 10.10; Human Rights Committee, Maya/Nepal, Communication No. 2245/2013, 23.6.2017, UN Doc. CCPR/C/119/D/2245/2013, Rn. 12.3, 12.7.

⁶ *International Commission of Jurists*, Nepal's Transitional Justice Process: Challenges and Future Strategy – A Discussion Paper, August 2017, p.5.

⁷ *International Commission of Jurists and National Judicial Academy*, Study Report on Execution Status of Supreme Court and Appellate Court Orders, December 2016, p. 26 ff.

Constitution of Nepal (2015)

Section 22 Right against torture: (1) No person in detention shall be subjected to physical or mental torture, or be treated in a cruel, inhuman or degrading manner.

(2) Any such act pursuant to clause (1) shall be punishable by law and a victim of such an act shall have the right to compensation as provided for by law.

Country Penal (Code) Act, 2074 (2017)

Section 167 Prohibition of torture: (1) No authority who is competent under the laws in force to investigate or prosecute any offence, implement law, take any one into control, or hold any one in custody or detention in accordance with law shall subject, or cause to be subjected, any one to physical or mental torture or to cruel, brutal, inhuman or degrading treatment.

Explanation: For the purposes of this Section, intentional inflicting of physical or mental pain or suffering on any person who is arrested, taken into control, held in custody, detention, imprisonment or under preventive detention or security or any other person interested in such person or subjecting such person to cruel, brutal, inhuman or degrading treatment or punishment for the following purpose shall be considered to constitute act of torture or cruel, brutal, inhuman or degrading treatment or punishment against/to such person:

- (a) to get information on any matter,
- (b) to extort confession of any offence,
- (c) to punish for any act,
- (d) to show fear/intimidation or coercion, or
- (e) to do any other act in contravention of law.

(2) A person who commits an offence under sub-section (1) shall be liable to a sentence of imprisonment for a term not exceeding five years or a fine not exceeding fifty thousand rupees or the both sentences according to the gravity of the offence.

(3) A person who orders the commission of an offence under sub-section (1) or an accomplice who aids in the commission of an offence under this Section shall be liable to the same sentence as is imposable on the principal offender.

(4) No person who commits an offence under sub-section (1) shall be allowed to plea that he or she has committed the offence in pursuance of an order by the authority superior to him or her; and, on such ground, he or she shall not be exempted from the sentence imposable on him or her for the commission of such offence.