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NHRIs & the Prevention of Torture and other forms of ill-treatment

Nepal

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Torture: Role of National Human Rights Commission of Nepal

Article 14 of the Constitution prohibits any activity purporting physical and mental torture as follows:

‘No person who is detained during investigation or for trial or for any other reason shall be subjected to physical or mental torture, nor shall be given any cruel, inhuman or degrading punishment’

There is also a safeguard in the constitution as against preventive detention. Article 15 states in relation to preventive detention as follows;

(1) No person shall be held under preventive detention unless there is a sufficient ground of existence of an immediate threat to the sovereignty, integrity or law and order situation of the Kingdom of Nepal.

(2) Any person held under preventive detention shall, if his detention was contrary to law or in bad faith, have the right to be compensated in a manner as prescribed by law.

Similarly, there is also a legal safeguard for the prevention of torture under the Compensation Relating to Torture Act 1996, Under the Act the term ‘torture’ is defined as follows:

In this act, unless the subject or context otherwise requires:

(a) The term 'torture' shall be understood as physical or mental torture inflicted on a person who is in detention for investigation or awaiting trial or for any other reason, and this term includes cruel, inhuman or degrading treatment that person is subjected to.

With regards to compensation, Section 4 of the Act provides:

If it is held that any employee of His Majesty's Government has inflicted torture on any person the victim shall be provided compensation in accordance with this Act.

Under the Act, a victim of torture is required to file a complaint to the District Court within 35 days of having been subject to torture or having been released from detention. If the victim is unable to file a complaint in person, an adult member of the victim's family or the victim's legal representative may file a complaint on behalf of the victim. In the event of suspicion of acts of torture, a victim's family or legal representative may petition the District Court, upon receipt of which the Court may order the detainee's physical or mental examination within three days.

Section 7 of the Act provides for action to be taken against the person involved in the act of torture:

If it is held that torture has been committed in accordance with this Act, the district Court shall order the concerned authority to take a departmental action according to existing law against the government employee who committed the act of torture.

Under Section 6 of the Act, a District Court may impose on the Government of Nepal a maximum fine of one-hundred thousand rupees. In determining the level of compensation to be awarded, the following considerations apply:

- (a) The physical or mental pain or suffering caused to the victim and its gravity.
- (b) Depreciation in income earning capability of the victim as a result of physical or mental damage.
- (c) In case the physical or mental damage caused cannot be treated, the victims age, his responsibility to the family.
- (d) The estimated expenses required for treatment if the damage can be treated.
- (e) In case of death due to torture, the number of family members dependent upon the victim's income and the minimum expenses needed for their livelihood.
- (f) Among the matters claimed by the victim, those deemed reasonable and appropriate.

With respect to acts not considered torture, Section 11 of the Act states:

Notwithstanding any provisions elsewhere in this Act, for the purpose of this Act, any suffering inherently caused by detention pursuant to the existing law shall not be regarded as an act of torture.

The bringing of an action under the Act is not a bar to commencing a separate action under existing law. However, the Act lacks the followings

- The narrow definition of torture, including failing to define it as a criminal offence; It covers only the torture inflicted in the custody not out side of the custody
- The absence of any provision for the rehabilitation of victims of torture;
- The absence of any witness protection provisions;
- Inadequate accountability provisions and ineffective punishment provisions; and
- The absence of any capacity to conduct impartial and independent investigation of cases of torture.
- The law has safeguarded the government authorities with a provision where by public prosecutors are required to defend them.

The National Human Rights Commission Compensation rules also set some guidelines for providing compensation to the torture victims. It has also followed a broad definition of torture.

Role of National Human Rights Commission

The Commission has been receiving two types of complaints relating to torture. There are a number of torture cases allegedly by the state agencies and a number of complaints are against non state actors.

- The nature of complaints against state actors are torture in the custody mostly in the army barracks.
- Similarly there are cases of torture inflicted during search operations. There are examples where army has tortured in the area after a major attack by the Maoists. Maoists flee but local people suffer.
- There are also examples where security authorities torture at the place where they arrest.
- All kinds of physical and mental torture are found
- Maoists family members are tortured
- There are also incidents of rape to Maoists and their family members by the security forces.

There are also cases against not state actors. The Commission has mandate to accept torture cases allegedly by the non state actors if complainant argues that the government failed to take an appropriate action against the perpetrator.

Non state actors

Armed conflict related

- Torture by the Maoists for not following their ideologies
- Torture because of denial to provide donation
- Torture alleging some one of being an informer to the government agency
- Torture because one denies to join their military cadre
- Headmaster other teachers of schools are tortured in front of their students
- There are examples of brutal torture with intention to bodily harm permanently
- Forcefully asked to eat culturally restricted foods
- Torture for denial to provide refuge and food
- Daughter is raped in front of her parents

Torture in a general situation

- There are also cases of torture in general situation for example torture, inhuman and degrading treatment by the general mass blaming some one of being a witchcraft

Intervention by the Commission

Legal and policy

- The Commission has completed the review of existing torture related legislative provisions. It has found several disparities with the international norms. The Commission is going to recommend to the government as it is now in the process of consultation with other stake holders.
- The Commission is involved in providing technical support to the government in treaty reporting to the treaty bodies. The Commission provided training on report writing to NGOs and also to the government. As a result the government started to be involved in treaty reporting
- The Commission in 2004 drafted a document named a minimum step to be followed by the security forces for the protection of and respect for human rights in general that includes provisions relating to torture and recommended to the government
- Similarly it also sent a similar document a minimum step to be followed by the Maoists for the respect of human rights
- If the Commission thinks that government failed to have effective institutional and legal mechanism to provide justice to the victim of torture by non state actors it recommends to the government to provide compensation. The commission has asked the government to provide compensation to the victims of torture by Maoists and mass torture such as in the name of witchcraft.
- Army was handling itself even rape cases. However the Army Act did not allow so. Because of intervention of the Commission, now onwards they are sending it to regular courts

Other Activities

- The Commission has power under its Act to recommend for the compensation to the victims of torture. It has recommend to the government on several instances to provide compensation to the victims of torture
- It has also recommended for punishment to the perpetrators
- Regular visits of the detention centers with a medical team if necessary
- Monitoring of different parts of the country
- Receiving complaints
- Interaction with security forces and even with the Maoists in the field level

- Training on humanitarian laws
- Condemning Maoists against their torture related activities through press releases
- Celebration of United Nations Day Against Torture in cooperation with civil society for the purpose of sensitizing the concerns

Challenges

- Still it is not very clear to us whether we should continue to take up the issue of physical assault by non-state actors as it falls under a separate Act and the regular court has jurisdiction over it.
- There are many numbers of victims because of Maoists and security forces. They have life long physical problems. They need counseling and physical treatment our study conducted in the Maoist affected area shows that
- Despite efforts of the Commission, there are examples where the perpetrators are not punished and government feels relieved after providing compensation to the victims
- There is a complete impunity to all the Maoists alleged perpetrators
- There are many cases which are not reported because of fear from the government and Maoists.