ASIAN HUMAN RIGHTS COMMISSION

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NEPAL: The State of Human Rights in 2012

The slow erosion of democratic institutions

Nepal's Constituent Assembly / Legislative Parliament dissolved at midnight on May 28, 2012, plunging the country's constitutional creation, and thereby human rights framework, into extended limbo. The Assembly was dissolved after it failed to usher in a new constitution for Nepal, and though its mandate had been extended four times from two to four years. With the legislative authority of Nepal dissolved, pieces of legislation essential to the protection of human rights have been put on hold, and so has fundamental debate on the structuring and strengthening of democratic institutions in the country. Thus, democratic institutions have faced slow erosion through the year, bringing the development of a human rights protection framework to a standstill.

In November 2011, a special five member bench, headed by the Chief Justice, had authorized the Constituent Assembly's tenure to be extended one last time for a period of six months. In spite of this, and amidst continuing disagreement about the federalist structure of the state, the government registered a bill seeking to amend the Interim Constitution, to extend the Constituent Assembly's deadline by another three months. On May 24, the Supreme Court issued an interim order against the move to extend the Constituent Assembly's mandate, and on 28 May the Prime Minister announced the dissolution of the Assembly, and the holding of fresh elections on November 22. But, elections have proven impossible to organize within such a short period of time, and at the time of writing, among calls for resignation of the government, and never-ending attempts to forge a consensus among political parties, the political developments of Nepal seems to have hit yet another impasse. A partial budget had to be released through ordinances and the Prime Minister announced fresh elections for May but no long-term solutions to the impasse seem to have been found.

The increased proliferation of *bandhs* (shut-downs) in the lead up to May 28, suggests the national political parties may be losing their leverage over protest groups they had earlier helped organize. Nepal's far-western region was subjected to crippling *bandhs* for some 30 days in May, which, concomitant to disrupting daily life, hampered access to essential services including food and medicine, affecting the most vulnerable and the sick. Concerns raised about possible eruption of violence following the dissolution of the Constituent Assembly – which, thankfully, did not materialize – have lead the public to favour the current extended state of limbo over tense and destabilizing political developments.

Promises of a federal state, which had become a symbol of a larger agenda of inclusion to compensate centuries of hill Brahmin and Chhetri monopoly of state structure, have proven to be the very stumbling block that led to the dissolution of the Constituent Assembly once it became apparent that the political parties were not eager to deliver on their promises.

The failure of an overhaul of the state structure, to ensure equal participation of all citizens, should not only to be analyzed in terms of power stakes, but also in terms of institutional deficiencies to develop an inclusive, democratic, transparent, and rational decision-making process, which can effectively take into account and protect the different interests and rights of all the components of Nepali society.

What the last few months of the Constituent Assembly have shown is that the interest groups who managed to show enough force, or who were more privileged, were able to sign agreements, with the government yielding to their demands. This reflects the piecemeal approach that has characterized Nepali politics since the end of the conflict: the demands of the most organised and vocal are heeded, the isolated and vulnerable communities ignored.

The Nepali people's trust in their political institutions and in major political parties has considerably eroded, as these have visibly placed their own political interests and objectives ahead of the aspirations of the people they have claimed to represent.

The role played by the judiciary in dissolving the Constituent Assembly has also brought it under fire from political actors, for allegedly exceeding jurisdiction. This has led to a reduction in the role played by the judiciary since May 28. The risk of backlash against the judiciary, which may strengthen calls to reduce its independence and strength, remains a concern.

Judiciary Undermined, Accountability Forestalled

In AHRC's 2011 annual report, the trend of increasing government intervention in the due course of justice, to ensure that human rights violations cases do not get prosecuted, was denounced. Attempts to withdraw numerous human rights cases filed against government supporters, to grant pardon or amnesty, and to undermine the future transitional justice mechanisms' ability to promote justice and accountability had intensified in 2011. This continued unabated in 2012. That the government has felt it could freely trample on its commitments to justice and accountability has been apparent. Following the closing of the OHCHR field office in Nepal on 8 December 2011, the absence of international monitoring contributed to this feeling.

A special taskforce[1] formed by government to ascertain the loss of life and property found that, during the conflict era, at least 17,265 people were killed. Likewise, more than 50,000 people were internally displaced. The number of conflict era rape and torture victims is yet to be established. In 2003 and 2004, Nepal topped the list of countries with the highest number of disappearances being reported to the Working Group on Enforced or Involuntary Disappearances (WGEID), with the whereabouts of more

1 http://www.nepalmonitor.com/2011/07/recording_nepal_conf.html

than 1400 persons remaining unknown to date, according to the International Committee of the Red Cross[2].

In October, the OHCHR released a comprehensive report mapping the violations of international human rights and humanitarian law which had taken place in Nepal between February 1996 and November 21, 2006. It is accompanied by an online Transitional Justice Reference Archive, a database of 30000 documents and cases relevant to human rights violations that occurred during the armed conflict. This bulk of evidence, compiled and made public for the first time, was meant to facilitate the work of the transitional justice institutions, but due to unending delays in the establishment of such mechanisms, it served as a warning against inaction to impunity.

Extracts of the findings of the OHCHR's Nepal conflict report[3]

"In each of the categories of violations documented in this report (unlawful killings, disappearances, torture, arbitrary arrests and sexual violence), OHCHR has found that there exists a credible allegation amounting to a reasonable basis for suspicion of a violation of international law. These cases therefore merit prompt, impartial, independent and effective investigation, followed by the consideration of a full judicial process. The establishment of transitional justice mechanisms in full compliance with international standards are an important part of this process, but should complement criminal processes and not be an alternative to them."
More specifically, available data in the Transitional Justice Reference Archive show that:

- "The TJRA catalogues over 2,000 incidents that raise a reasonable basis for suspecting that one or more killings occurred in circumstances amounting to a serious violation of international law"

- "Taken collectively, allegations of unlawful killings and discernible patterns relating to such killings by both the Security Forces and the Maoists raise the question of whether certain patterns of unlawful killings were a part of policies (express or condoned) during the conflict. Of particular note are the numerous reports of deliberate killings of civilians by both sides, in particular those who were perceived as having supported or provided information to the enemy. In these circumstances, the leaders of the parties to the conflict at the time could attract criminal responsibility for these acts."

- Enforced disappearances were among the most serious human rights violations committed during the armed conflict in Nepal. Conflict-related disappearances were reported as early as 1997 and escalated significantly following the declaration of a state of emergency and mobilization of the Royal Nepalese Army in November 2001.

2 http://www.icrc.org/eng/resources/documents/news-release/2012/nepal-news-2012-08-30.htm
3 http://www.ohchr.org/EN/Countries/AsiaRegion/Pages/NepalConflictReport.aspx

- "Torture, mutilation, and other sorts of cruel and inhumane and degrading treatment appear to have been perpetrated extensively during the conflict, according to available data, by both the security forces and the Maoists. Altogether, the TJRA recorded well over 2,500 cases of such alleged ill-treatment over the decade-long insurgency."

- "Arbitrary arrest was a significant feature of the conflict in Nepal. Thousands of people from both sides of the conflict were detained in a manner that amounted to arbitrary detention under international law. While suffering the injustice of arbitrary arrest, persons held beyond the reach of the law were easy targets for additional forms of ill-treatment, including torture."

- Over a hundred cases of sexual violence were also documented, a number considered as "underreported" and "the data available indicates that children, i.e. girls under 18 years old, were particularly vulnerable during the conflict period."

Such an extensive compilation of data offers, for the first time, an opportunity to understand the root causes of the conflict, and the institutional failures, which opened the door to such abuses and prevented attempts to hold perpetrators accountable.

A comprehensive peace agreement was signed in 2006, in which the former belligerents committed to investigate and prosecute human rights violations, to not foster impunity (Article 7.1.3), to publish the names of the persons killed or disappeared within 60 days (5.2.3), and to form a high-level Truth and Reconciliation Commission (TRC) that would investigate conflict-era crimes against humanity and gross human rights violations (5.2.5).

The 2007 interim constitution stipulated the state's duty to establish a high-level TRC and to provide relief to victims of disappearances, and in June 2007 the Supreme Court ordered the government to establish a commission of inquiry into allegations of enforced disappearances.

However, not only are the transitional justice mechanisms yet to be established, 2012 has seen considerable suggestions from higher ranking political circles that, should these mechanisms be created, they will be used to foster "reconciliation" – a euphemism for amnesty, over "justice". Since 2007, different versions of two bills have been drafted without the political parties reaching an agreement over their content.

Worryingly, in early March, media reported that the three major political parties of Nepal were considering amending the proposed draft bill on Truth and Reconciliation (TRC), and to either introduce blanket amnesty for human rights violations committed during the conflict or to make certain offences punishable at the exclusion of certain serious human rights violations that include torture. By the end of the month, political party leaders agreed to remove Section 25 (2) of the draft TRC Bill, which incorporated a list of crimes for which amnesty was not permitted, and instead proposed that the Commissions would grant amnesty when both victims and perpetrators would agree to reconcile. In the

absence of reliable victim and witness protection mechanisms, this clearly would have put the victims at great risk.

On the eve of the dissolution of the Constituent Assembly on 28 May, the draft bills were withdrawn. Although Nepal has since been without an elected legislative authority, the government announced that it was prepared to recommend to the President a promulgation of the transitional justice bill through ordinance. And, an Ordinance for the establishment of a Commission on Disappeared Persons, Truth and Reconciliation, was adopted by the Council of Ministers on 27 August 2012, and submitted to the President for promulgation on 28 August 2012.

The new draft merges the two bills and proposes a single Commission, whose members would be appointed by political consensus, and thus endangering the independence of the commission. In addition, the ordinance would provide for the victims and the perpetrators to "reconcile", providing the perpetrator with amnesty, if the perpetrator files an application for reconciliation, accepts the crime and shows regret. The perpetrator would also have to pay compensation to the victim. In the absence of a victim and witness protection mechanism, this emphasis on reconciliation may put the victims at high risk of being pressurized and threatened. The adoption of the Commission through ordinance, without parliamentary oversight or consultation with victims groups, prevents any possibility to contest or amend the content of the bills.

The International Commission of Jurists which has published an analysis of the ordinance, terms it "a political bargain between the political parties [...] designed to avoid accountability for those responsible for gross human rights violations and crimes under international law committed over the course of Nepal's decade-long conflict".

It criticizes the following points[4]:

- The scope of the mandate of the commission would be restricted to those human rights violations committed in a "systematic manner", hence to crimes against humanity

- The mandate of the commission is restricted to facilitating and promoting reconciliation, to investigating serious human rights violations and to recommending amnesty and reparations

- The commission can promote reconciliation between the victim and the perpetrator even if none of them has requested it

4 http://www.humansecuritygateway.com/documents/ICJ_Nepal_ICJUrgesaccountabilityforviolationsdetailedinOHCHRreport.pdf

- The commission has the power to grant amnesty, including in cases of torture and enforced disappearance

- The commissioners will be appointed on the basis of consensus among the political parties, and the financing of the commission will depend on the government, making its independence virtually impossible

- The commission cannot recommend for prosecutions

- Prosecutions will become "a virtual improbability", because of the Attorney General's powers to initiate prosecutions dependent upon instructions from the Ministry of Peace and Reconstruction, the lack of provisions for the preservation of evidences, and because several of the crimes against humanity, which the commission has the mandate to deal with such as torture or enforced disappearances, are not even criminalized in the Nepali domestic system.

That transitional justice mechanisms would be corrupted to ensure they act as umbrellas sheltering perpetrators from prosecution is worrying in itself. But it is even more distressing as since the end of the conflict victims and their families wishing to file complaints concerning violations committed during the conflict by the security forces, or the Maoists at police stations, have routinely been sent home. This has been done under the pretext that such cases fall outside the scope of the regular criminal justice system, and will be dealt with by the TRC instead. This argument has been a permanent feature in the rhetoric of those with personal, institutional, or political connections with persons accused of such crimes. However, the Supreme Court repeatedly found that transitional justice mechanisms do not supersede the regular criminal justice system. It has repeatedly directed the police to register such cases and conduct investigations within an assigned timeframe.

Using established transitional justice mechanisms, established through an executive decision, to supersede the regular criminal justice system and protect influential individuals from accountability, will have long-lasting consequences on the institutional set up of Nepal. It has the potential to definitely destabilize judicial power and undermine its authority. The fundamental concept of justice and its centrality to the development of the Nepalese state and justice institutions are at stake in the decision to enable or disable the prosecution of human rights violations. Denying victims their fundamental right to a legal remedy would be symptomatic of a state which flouts fundamental principles of justice and equality for all before the law.

While the political stalemate and legal and constitutional vacuum prevailing in Nepal may lead to a delay in the establishment of transitional justice mechanisms, nothing prevents the State from proceeding with criminal investigations and prosecutions in cases that have been pending for a long time. Court orders have already been made, calling for the government to investigate and prosecute specific cases, but they have been routinely ignored. It is imperative that delays to the establishment of such mechanisms are not used to justify the undermining of the rule of law and the process of justice delivery.

Furthering the trend of government's voluntary neglect of court decisions, several individuals against whom serious human rights violations allegations have been pending, cases in which the Supreme Court had ordered investigation, have been promoted to higher ranks of the security forces. In October, the promotion of Colonel Raju Basnet to the rank of Brigadier General of the Nepal Army, in spite of the seriousness of the allegations of human rights violations brought against him is one such example. Raju Basnet, then Lieutenant Colonel, was in charge of the Bhairabnath Battalion, stationed in Maharajganj in Kathmandu, whose leading role in the arbitrary arrest, secret detention and torture of hundreds of suspected Maoist combatants and forced disappearance of at least 49 of them in 2003, has been abundantly documented, including by the Office of the High Commissioner for Human Rights and the National Human Rights Commission of Nepal. The Supreme Court of Nepal had ordered the government to investigate the case independently and initiate prosecutions against those responsible in 2007. His promotion had been stayed by the Supreme Court.

Basnet's promotion follows that of Kuber Singh Rana to the post of Inspector General of Police, the highest ranking position in the Nepal Police. This was in spite of a 2009 Supreme Court order to investigate allegations that he played a leading role in the enforced disappearance of five students in Danusha District in 2003.

On September 3rd, the government withdrew 33 cases which were under consideration by the judiciary, including cases of murder further showing despise for the country's rule of law[5].

Independence of NHRC further compromised

In addition to these constant challenges to the authority of the judicial system, the authority of another institutional human rights watchdog, the National Human Rights Commission was also undermined by the adoption of a new National Human Rights Commission Act in January, which curtailed its powers and its independence.

The new act has removed the reference to the independence and autonomy of the commission in the preamble, has made the approval of the finance ministry necessary before entering an agreement with a national or international body or before establishing a new office, and has prevented the commission from appointing its own employees, which it was empowered to do under the previous act. It has also made it necessary for the government to approve the commission's infrastructure and has made human rights programmes conducted in Nepal by an international organization, contingent upon the NHRC's approval.

5 http://advocacyforum.org/news/2012/10/rights-organizations-condemn-recent-withdrawals-of-cases.php

It has instituted a six month limitation in lodging a complaint of human rights violations, in clear contradiction to internationally accepted human rights standards, as entrenched in the updated set of principles to combat impunity. It may make the simple gesture of reporting a case of human rights violations impossible for victims who remain exposed to retaliations by the perpetrators, do not have access to such information in time, or are still suffering from the trauma of the violation and cannot file a case immediately. The power of the commission to grant compensation is now also subject to certain conditions that did not exist before. We have to keep in mind that this new act emerged after the departure of the OHCHR field office from Nepal, when the NHRC was called upon to ensure the bulk of the monitoring of the human rights situation in Nepal, and to play a role complementary to the role of the judiciary to ensure that the government of Nepal abided by its human rights obligations.

In the joint context of departure of the OHCHR and increasing executive intervention within the due course of justice, that the government has tightened its grip on the NHRC is extremely worrying for the future of independent human rights monitoring in Nepal[6].

Police Reform

Policing is one of the pillars of a functioning democratic institutional set-up. An accountable and transparent police force should form the mainstay of an effective rule of law system, preventing the corruption of institutions into tools of oppression and abuses of power.

So far, in-depth reforms are necessary in Nepal to ensure that the police would be able to play the role of protector of democratic institutions and of the rights of all the citizens equally against abuses of power.

The police remain largely unaccountable, be it to redress human rights violations committed by its members or to independently investigate cases of human rights violations against the most vulnerable segments of society. No sanctions are taken against police officers who refuse to file First Information Reports concerning abuses of rights, especially when the perpetrator possesses a lot of leverage, or who fail to implement court orders.

Until in depth police reforms take effect, bringing the police under the rule of law framework, the criminal justice system will remain a giant with feet of clay, unable to guarantee the protection of the rights of all Nepali citizens.

Torture, in particular, remains widespread and continues to form the core of an investigation process oriented mainly toward confessions.

6 See http://www.advocacyforum.org/downloads/pdf/nhrc-act-review.pdf and http://asiafoundation.org/in-asia/2012/03/14/new-act-a-blow-to-human-rights-in-nepal/

In November, the Committee against Torture rendered public a report on Nepal, adopted under article 20 of the Convention against Torture (CAT), which allows for a special inquiry by the committee on countries for which it has received information that torture was systematically practiced. The Committee not only found "well-founded indications that torture is being systematically practised, and has been for some time, often as a method for criminal investigation and for the purpose of obtaining confessions, in a considerable part of the territory of Nepal" but also that "actions and omissions of Nepal therefore amount to more than a casual failure to act. It demonstrates that the authorities not only fail to refute well-founded allegations but appear to acquiesce in the policy that shields and further encourages these actions, in contravention to the requirements of the Convention." [7]

Indeed, police torture remains rampant in Nepal, and debate over critical reforms necessary to bring the police under a framework of accountability has been sacrificed to political brinkmanship, postponing necessary action.

The following cases, brought to the attention of AHRC by its partners, brings to light clear patterns of abuse perpetuated by the police, which ensure the continuing denial of rights of those from the least advantaged background or with the least influential connections.

Bhutanese refugee tortured, threatened with fake charges

In April 2012, a 29 year old Bhutanese refugee, who was applying for resettlement to the USA, got arrested under suspicion of having provided fake identification documents and was tortured by police personnel from the Central Investigation Bureau, Maharajganj, Kathmandu. In this case, documented by Center for Victims of Torture (CVICT) Nepal, the victim belongs to one of the thousands Nepali-speaking families which were, after having lived for several generations in Bhutan, expelled from the country to refugee camps in Nepal twenty years ago. The refugee had applied for resettlement to the USA and was kept, for 15 days, in the transit office of the International Organization for Migrant (IOM) in Baluwatar, Kathmandu, for investigation of his identification documents.

On April 27, 2012, at around 2.30 pm, he was arrested from the IOM office by 4 to 5 police officers in civilian clothes. Neither was he given any reason for his arrest, nor was any arrest warrant produced by the police. He was then brought to the Central Investigation Bureau (CIB), Maharajganj, Kathmandu, and was kept there for two days, without being provided with a detention letter or an arrest warrant. He was brought before a judicial authority on April 29, 2012, exceeding the 24-hour permissible delay set up by the constitution within which every person arrested needs to be produced before a judicial authority, which amounts to illegal detention.

7 http://www2.ohchr.org/english/bodies/cat/docs/Art20/NepalAnnexXIII.pdf

He was kept in the CIB for two days, reportedly without being provided with food or water. His family was not informed of his arrest. The first day he was tortured under interrogation by two policemen wearing civilian clothes. He was slapped across the face a dozen times, the soles of his feet were beaten and the policemen beat him all over his body. Due to the pain, he almost lost consciousness. The policemen then interrogated him on the involvement of other persons related to the same charges and, as he could not provide information, the policemen put a packet of drugs in his pocket and threatened to charge him with drug smuggling.

At no point during his detention was the victim informed of his legal rights. His lawyer visited him twice: once on May 3rd in the office of the District Attorney, Kathmandu, and the second time on May 8th at the MPR Hanumandhoka. In both cases, the police refused to allow the lawyer to meet with his client without the police presence. This denial is in spite of the Interim Constitution of Nepal guaranteeing the right of every person who was arrested to consult a legal practitioner and that the consultation should remain confidential.

The police was also present during the victim's medical check-up, when he was sent to Bir hospital on May 7th. According to the Torture Compensation Act, 1996, persons being taken into custody should be provided with medical check-up as soon as possible. This was not the case here. Further, due to the presence of the police, the victim did not dare mention the torture to the doctor and the doctor did not ask about it either. The presence of the police during the medical examination prevented the victim from getting proper treatment and he was just provided with anti-allergy medicines. The victim's health condition deteriorated due to lack of proper treatment and the poor conditions in Hanumandhoka detention center. His body was covered with scars from worms and insects and he suffered from sleeplessness.

Torture by the Central Investigation Bureau

Another case, showing a strikingly similar pattern of torture and threats of fake charges and also involving the Central Investigation Bureau was reported in June, and documented by Protection of People's Rights (PPR), Nepal.

A 43 year old man, working as a paralegal in Kathmandu, was arrested on June 25, 2012, at 4 pm, from his home by 4 to 5 police personnel in civilian clothes. The police officers did not introduce themselves as police personnel, did not present the victim with an arrest warrant, and did not explain the charges brought against him. As the policemen did not identify themselves, the victim and his family feared that he was being abducted by a non-state group.

The way the police conducted the arrest went against national laws, by which the police are mandated to identify themselves and inform the arrestee of the ground for his arrest at the time of arrest. Similar

requirements are intrinsic to international human rights standards, including the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, which reads: "Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him."

The police hushed him into a police van. As soon as he entered the van, the police reportedly beat him randomly. He was then brought to a room in the Central Investigation Bureau (CIB), Maharajganj, Kathmandu, where he was subjected to torture again by about six police officers in civilian clothing.

They interrogated him in relation to a case of document forgery. They put a gun in his mouth and on his temple and slapped him on the face an uncountable number of times. The slaps were so violent that he fell unconscious several times. The soles of his feet were beaten with a plastic pipe, and he fell unconscious again. The torture lasted for one and a half hours, according to the victim.

The victim was transferred to another police station and kept there for the night without any food. The next morning a police officer threatened him that he would be killed if he did not confess. At 2.30 pm the same day he was again transferred to the Metropolitan Police Circle, Hanuman Dhoka. He was provided an arrest warrant dated from the day before.

His family, who had not been given any information by the police at the time of his arrest, got in touch with a lawyer from PPR Nepal and filed a petition at the National Human Rights Commission. They came to know that the victim had been brought to the court for remand on June 26th and the lawyer could petition the court for an order for forensic checkup of the victim. The court ordered for a medical examination of the victim in the forensic department of Teaching Hospital. That examination was, however, not conducted. On June 27th, the police took the victim to Bir Hospital and asked him to pay NRs 500 to cover the expenses of the medical examination. As the victim did not have money on him, he was brought back to the police station without having been examined.

Safeguarding the health of persons placed in detention is the responsibility of the State and the medical examination should therefore be provided free of costs. Under the Torture Compensation Act, 1996, if a detainee or his legal representative requests for a medical examination then such an examination should be provided free of charge.

In the meanwhile, one of the inspectors continuously threatened the victim to withdraw his application for medical examination or he would be charged with drug-related offences. Suspects charged under the Narcotic Drugs (Control) Act 1976 can be detained, without trial, for a period up to 3 months, with the permission of the court.

Delays in conducting the medical check-up can damage the collection of forensic evidence and hamper the victim's claim that he has been tortured, if the examination is conducted after his wounds have healed. The police refusal to allow the victim to have a medical check-up, in clear violation of the court order, can be deemed contempt of court.

Minor tortured and illegally detained with adults

Another case documented by PPR Nepal is that of Ramesh (name changed), a fifteen year old domestic worker employed in the house of an army officer in Kathmandu, who was accused of having stolen gold from his employers for whom he worked. He was arrested by the police on 16 August 2012. He was charged with committing a Public Offence. The Public Offence Act mandates Chief District Officers, non-independent government officials, to judge offences falling under its scope. They can order a two year jail sentence in proceedings which do not meet international standards of fair trial. In addition, in this case, the accused is a juvenile and should as such be brought before a juvenile branch, as per section 55 of the Children's Act, 1992.

The child was brought before the CDO and sent to the custody of Hanumandhoka Metropolitan Police Range. One week later, the police arrested two of his relatives who were also detained in the same police station. They witnessed and reported that Ramesh was kept in the same cell as adults, in violation of the provisions of the Children' Act.

The Supreme Court of Nepal has repeatedly interpreted the provisions of the Children's Act in the sense that it is illegal to keep children deprived of liberty together with adults in prison. Further, Article 37 c of the Convention on the Rights of the Child also mandates the state party to keep children detainees separated from adults.

The eye-witnesses further shared that Ramesh was being tortured, submitted to random beating and falanga (beating of the soles of his feet). A lawyer from PPR Nepal visited Hanumandhoka Metropolitan Police Range on several occasions and each time, under various excuses, the police refused to allow him to meet with the detainee. The first time the police said that the victim was not present as he had been taken to his village to look for the gold. Two days later, the police told him that lawyers were not allowed to see detainees during office hours. Such a regulation does not exist and actually contravenes the provisions of Nepali law, such as the 2007 Interim Constitution, which, in its article 24-2 guarantees the right to consult and to be defended by a legal practitioner. The next day the lawyer asked the highest ranking police officer in that police station for permission to meet with the detainee. Again, he was prohibited to meet with the detainee "during office hours". The lawyer therefore waited until 6 pm, one hour after the end of office hours, but was still not allowed to meet with Ramesh and was told that the detainee had been taken to the District Attorney's Office. As of September 18, more than a month after the child was arrested, the lawyer had still not been granted access to the detainee.

Torture victim threatened

Babu (name changed) was caught by local people, who had reportedly seen him snatching the gold chain of a woman in a teashop in Pokhara, Kaski District, on September 9, 2012. The locals who had caught him beat him and handed him over to the police.

At around 8.15 pm on the same day, he was taken to the Litigation Section of District Police Office, Kaski, where several policemen tortured him by beating him with plastic pipes on his thighs, his back, and on the soles of his feet for about 5 minutes. Although he confessed to having snatched the gold chain, the police continued torturing him by forcing him to lie on a table, and rolled a 3 meter diameter iron rod on his thighs with one policeman putting pressure on it and two policemen rolling from two ends. Then, the police questioned him about his involvement in other theft cases and beat him for about 2 hours. The same day he was taken for medical checkup, but the doctor did not ask him whether he had been tortured.

On the next day, four unidentified policemen took him to an under construction building behind the building of the DPO. They handcuffed him and forced his knees between his wrists, inserted a stick through his bent knees and hung him in the air. After that the police beat him with plastic pipes on his soles, punched him with fists and kicked him with police boots for about 2 hours.

On the same day, he was taken to the court for remand. The judge asked the victim whether he had been tortured by the police. He verbally complained of torture before the judge but as his hands were handcuffed he could not show and explain where and how he was tortured and the judge was reluctant to verify his complaints. As he was not aware that he could file an application for his physical and mental checkup, he did not request one and the judge did not order one.

On September 13, 2012 a lawyer from a human rights organization working with Khimlal visited him, and the organization wrote a letter to the National Human Rights Commission (NHRC) on that day to ask for their intervention in the case. On September 16, 2012, staff from the NHRC visited the detainee and documented his case. Following the intervention of human rights defenders, however, the victim began receiving threats from policemen at the DPO. On September 19, the victim's lawyer was refused access to the detainee as the officer in charge of the police station was absent. The lawyer was also told that, as the police had come to know that the victim had complained about the torture to human rights defenders, he would be "made to pay for this". The victim remained in the same detention center for more than ten days, at risk of reprisal.

Another torture victim receives death threat

In Danusha district, a couple faced death threats after filing a case under the Torture Compensation Act against a police officer. The police visited Muni's (name changed) house twice, on March 7 and March 8, 2012, to search for her brother-in-law, who was involved in a land dispute with a certain Ramprit. At 2 pm, on March 8, Ramprit and three police officers in uniform with weapons came back to the house to look for her brother-in-law. When she asked them the reason behind the frequent visits to her house, an argument ensued between her and the police. As a result, the policemen arrested her without a warrant.

She was taken to the Area Police Office, Chorakoila. After arriving at the police station, the ASI punched her once on the left side of her forehead and slapped her many times on her left cheek following which she fell to the floor, only semi-conscious.

Her husband and neighbours, who had followed them to the police station, arrived at that point and rescued her. She was taken to Janakpur Zonal hospital for treatment. She was so terrified that she could not speak for forty hours after the incident.

On 22 March, 2012, she filed a case against the ASI under the Torture Compensation Act in the District Court, Dhanusha. Ramprit, the person who had the initial dispute with her brother-in-law and a local leader reportedly tried to give Muni NPR 60, 000 (approximately US $ 750) to settle the case outside court, although the case was not filed against Ramprit.

On June 16, at 12.30 pm, Muni's husband received a call from an unknown person asking him to meet the caller near Kalanki temple, in Kathmandu. Muni's husband is a marble paver and the caller said that he wanted to hire his services for house construction. Muni's husband reached there at 1.30 pm. Three persons were waiting for him in a taxi and pretended that they would bring him to the house to be marbled. He was brought to a village, near a river, below Thankot in Kathmandu district. Two more persons were following them on a motorbike.

He was taken out of the car and the five persons asked him why he had filed a torture compensation case against their friend. They beat him randomly, kicked and punched him. They ordered him to withdraw the case within a week, or else they threatened that they would kill all his family members, including his children. They also asked him about who helped them to file their case. They beat him until he fell unconscious, upon which they sprinkled water on his face to bring him around. The beatings and threats lasted for half an hour. The five persons involved in the abduction and the beatings were all wearing civilian clothing and appeared to be thugs.On July 2, Muni received four anonymous calls and the caller insulted her and threatened to kill all her family members if she did not withdraw the case.

The above cases reflect trends, and expose continuity of old patterns of exploitation of loopholes in the Nepali legal system to ensure that victims keep silent while the few safeguards which exist to protect the rights of the detainees are blatantly trampled on.

A report by Advocacy Forum based on the interview of 1,900 detainees in 58 detention centers from January to June 2012 maps such abuses of legal safeguards[8]:

- Only 10.6% of detainees were informed of the reason for their arrest at the moment of the arrest, 74.2% were only informed once they were brought in detention and 15.3% of them were not informed at all
- 8.9% of them did not receive a detention letter
- 45.4% were not brought before a judge within 24 hours, as required in the constitution
- 94.8% of the detainees had a medical checkup before being brought into detention
- In 84% of the cases, when the detainee was brought before a judicial authority for remand, the judge did not ask whether he or she had been tortured.

The status of legal safeguards shows that the judiciary is playing far too little a role in helping curb torture and holding the police accountable for abuses of law. The fact that in 84% of the cases the judge does not ask the detainees whether they have been interrogated under duress, or a story such as Babu's – who complained about having been tortured to the judge and the judge did not order any measure to ensure the protection of the victim from further abuses –speaks of the inadequate role played by the judiciary in holding police liable for rights abuses.

A lack of authority that can act as a check against police's abuses of power fuels the feeling of impunity in police officers, and further entrenches the idea that they are above the reach of law. It accounts for the fact that the police openly refuses to abide by the law, insisting to be present during medical examinations and preventing detainees from accessing their lawyers.

Such practices have led the Committee against Torture to note that[9]:

- "Actions and omissions of Nepal therefore amount to more than a casual failure to act. It demonstrates that the authorities not only fail to refute well-founded allegations but appear to acquiesce in the policy that shields and further encourages these actions, in contravention to the requirements of the Convention."

8 http://www.advocacyforum.org/downloads/pdf/publications/torture/torture-briefing-january-to-june-2012.pdf
9 http://www2.ohchr.org/english/bodies/cat/docs/Art20/NepalAnnexXIII.pdf

- "Nepal failed to ensure the effective prosecution of those responsible in cases in which copious evidence of guilt was gathered [...] and particularly in cases in which national courts established the responsibility of those involved. It failed to put an end to practices such as falsification of police and prison registers, police holding individuals incommunicado for multiple days or for periods longer than 24 hours before presentation to a judge, police refusals to register FIRs. It failed to put an end to the implementation of provisions of the Arms and Ammunition Act that violate basic due process guarantees. It failed to ensure that detainees receive medical examinations conducted by independent physicians, that judges exclude confessions obtained through torture from legal proceedings, and that promotions of as well as refusals to suspend officials accused of torture or extrajudicial killings are banned. The State party also failed to implement court orders and recommendations of the National Human Rights Commission. All these practices and acts of negligence contribute to the continuing habitual, widespread and deliberate practice of torture in Nepal."

In particular, the ongoing impunity that benefits perpetrators of torture remains the main element of perpetuation of torture. The CAT has gone on to state that:

- "While noting the State party's claims that it does not approve of torture acts and that it is committed to end impunity, in the Committee's determination, the State party has not provided the Committee with clear and practical evidence corroborating this. [...] Allegations of torture continue to be made with great frequency despite the end of the armed conflict in 2006, and the State party has failed to adequately investigate all but a handful of these allegations. In rare cases where investigations into allegations of torture have been successfully carried out, those found responsible have not been subjected to criminal penalties, and particularly not to terms of imprisonment commensurate with the gravity of the offence."

Nepal is yet to pass a law to criminalize torture.

In May 2012 a proposed "Torture or Cruel, inhuman or degrading treatment (offence and punishment Act, 2012" was tabled in the Parliament Secretariat. Nevertheless, the dissolution of the Constituent Assembly on May 28th brought those efforts to a halt.

Although the draft of the bill criminalizing torture contains substantial improvements in comparison to the current legislative apparatus, it still falls short of international standards and does not provide for an effective and comprehensive framework to bring torture to an end in the country. A serious approach, to the eradication of torture legislation, should couple the criminalization of torture with the development of an independent and strong complaint and investigation system, currently missing in Nepal.

Such an investigation system should include:

- Opening independent venues for the victims to file their complaints, ensuring that the complaints are promptly and professionally investigated by an autonomous and credible agency leading when

enough evidence is gathered to the prosecution in civilian courts of the alleged perpetrators, in legal proceedings respecting the rules and procedures of fair trial.

- If proven guilty, the perpetrators should be handed an appropriate sentence, commensurate with the gravity of the crime committed.
- The sentence ordered by the court should be executed immediately.
- Through all the length of the investigation and legal proceedings, and after the sentence is handed the victims and witnesses should be protected from reprisals and intimidation.
- The victims should also have a prompt access to a procedure through which they can obtain redress and rehabilitation.

The following are extracts from a review of the proposed torture bill conducted by the AHRC and the Rehabilitation and Research Center for Torture Victims, Denmark.

REVIEW OF THE TORTURE BILL

A Loose Definition of Torture

The definition of torture used in the proposed bill is largely inspired from the definition contained in the Convention against Torture, but introduces some nuances which have the effect of restricting the scope of the definition and may leave acts which do amount to torture according to international standards outside the scope of the law. We therefore recommend changing the definition to follow the definition established by the CAT.

In particular, although the CAT considers that "*a person*", without restriction, can be subjected to torture, the definition contained in the current bill restricts it to only "*a person who is detained*". The bill does not acknowledge that torture happens in many different situations and can take place even when the victim has not been formally detained. This would prevent victims who have been tortured in the streets, at their house, during demonstrations or while held incommunicado in detention from claiming that they have been tortured.

The proposed bill suggests that the act must be committed by a "*public official*" and currently defines the term as "*an official who is responsible to take somebody under control, arrest, investigate, prosecute an offence or execute a case or implement punishment and the term also denotes other person acting in such capacity at the instigation of or with the consent or acquiescence of such official*". This definition is too restrictive and omits persons exercising State power or authority who may not directly have the responsibilities depicted above, such as officials from a local government body or a health officer.

Further, the bill does not strictly follow the letter and spirit of the CAT in distinguishing four levels of involvement of public officials which render them implicit in the act of torture: infliction, involvement, consent, acquiescence. The proposed bill does not properly cover the cases of consent or acquiescence. The bill also contains several sections which create loopholes which could be exploited to absolve perpetrators of criminal liability. Section 12, specifying which acts do not fall under the definition of torture, leaves room for an interpretation authorizing excessive or disproportional use of force during arrests or demonstration for instance.

> "*Notwithstanding anything contained elsewhere in this Act, the pain or suffering resulting naturally to a person during his/her arrest, while taking him/her under control or keeping in detention, custody or preventive detention or during investigation or for trial, implementing punishment or keeping in prison by a public official under current law shall not be, for the purpose of this Act, deemed torture*".

This goes far beyond the scope of the CAT which merely specifies that torture "*does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions*".

Although the act contains provisions that no order from a higher authority and that no exceptional circumstances may be invoked as a justification of torture, it should be strengthened by explicitly prohibiting immunities, the provision of general or individual amnesty and the granting of pardon.

At the moment, section 37 provides that "*a person who has been convicted and punished by the court for the offence under this Act shall not be pardoned or excused without the consent of the victim*". We are concerned by that provision which may expose victims of torture to pressure and intimidation to "*pardon*" their torturers, especially in the absence of a strong victim protection mechanism as will be discussed below. We recommend taking away the part "*without the consent of the victim*" to ensure that perpetrators of a non-derogable human rights violations cannot legally escape punishment in Nepal.

Further, section 35 providing "*protection for acting in good faith*" should also be scrapped. It reads at the moment – "*Notwithstanding anything contained elsewhere in this Act, no public official shall be charged or otherwise punished for fulfilling his/her official duty in good faith under current laws.*" No Nepal law condones the commission of a crime and a human rights violation while "*fulfilling his or her official duty in good faith*". Neither is torture an act that could be committed while fulfilling official duty, since it is expressly barred by the Interim Constitution of the country. That provision is incompatible with Nepal's international obligations and should be scrapped altogether.

Section 13 which places a statutory limitation of 35 day to file a case of torture runs therefore contrary to human rights standards and should be removed. The 35-day limitation to file a case of torture was already present in the Torture Compensation Act, 1996, and has regularly been

denounced as an insurmountable impediment to the victims' access to justice by national and international human rights groups. For instance, while reviewing Nepal's report in 2005, the Committee against Torture recommended that Nepal "*should amend its current and planned legislation so that there is no statute of limitation for registering complaints against acts of torture*"[10]. Additionally, it is simply unrealistic to expect that victims of torture would be ready to file a case within 35 days, given the psychological and physical impact of torture on victims. Further, victims of torture often belong to the poorest and most marginalized communities of Nepal, with limited resources making it difficult to access the institutions within such a period of time. A 35-day statutory limitation would defeat the primary purpose of that law and should be removed.

On Inconsistent Punishment

The draft act provides, in its section 22, for different "degrees" of punishment depending on the different levels of involvement in the act of torture or cruel, inhuman or degrading treatment. It also lists aggravating circumstances under which the punishment for torture can be supplemented (for instance if the victim is a minor). We welcome such breakdown as an attempt to clarify the different degrees of liability. However, it is done in a confusing and inconsistent fashion, which may pave the way to contradictory interpretation by the court.

Further, the proposed list of penalties falls short of being proportional to the gravity of the crime of torture, with the maximum punishment being a 5 years jail term or a 50,000 NPr fine or both. It is clear that the possibility that a perpetrator of torture would be able to get away with a simple fine is inappropriate and that the act should provide for a mandatory prison sentence for all those convicted of torture. The Committee against Torture[11] has repeatedly expressed concern that a maximum prison sentence of 5 year would be inadequate to the gravity of the offence and to play the role of a deterrent. According to the CAT jurisprudence[12], a significant prison sentence – for instance a minimum sentence of 6 year imprisonment and a maximum sentence of 20 years – is considered an appropriate punishment for acts of torture. We recommend the section be amended in line with Nepal's obligations under the UNCAT and take into account the gravity of the crime of torture.

On Procedural Inadequacy

We are of the opinion that the current bill is inadequate in that it does not set the outline of a procedural framework that will be able to adequately address the question of torture. At the moment, in Nepal, there is no independent and credible mechanism where victims of torture can file a complaint without fear of reprisal. There is no such mechanism that can conduct impartial, professional, and prompt investigations into allegations of torture, leading – when sufficient

10 Committee against Torture, Concluding Observations on Nepal (2005) available online at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.NPL.CO.2.En?Opendocument
11 See Urra Guridi v Spain, CAT Communication No. 212/2002, 17 May 2005, §6.7.
12 Chris Ingelse, The UN Committee against Torture: An Assessment, Kluwer Law International, 2001, p. 342

evidence is gathered – to prosecutions which, following the international standards of fair trial, would sentence perpetrators of torture to a penalty proportionate to the gravity of the offence. During the whole length of the process, the victims and witnesses must be protected from reprisals and repercussions. The inadequacy of the complaint or investigation system is such that often investigations of torture are investigated by police officers from the same police station as the accused, leading to obvious conflict of interest and exposing victims to reprisals.

Further, the Act does not provide for an international obligation of the State to investigate and prosecute allegations of acts of torture even in cases where no formal complaint was filed by the victim. The Act should be amended to acknowledge that obligation and provide for the Attorney General office, including district government attorneys, to act *ex officio* on allegations of torture.

Neither does the Act provide for the establishment of an independent complaint mechanism on the conduct of security forces. During the Universal Periodic Review of Nepal in January, Australia, for instance, recommended for the adoption of such an independent complaint mechanism on the conduct of security forces[13]. Nevertheless, the government did not accept that recommendation and merely indicated that the existing complaint mechanism is already independent. It also responded to recommendations to ensure prompt and impartial investigations and prosecutions of allegations of torture by stating that it considered they were already implemented or on the way to being implemented. This is a complete denial of the reality of the obstacle course that torture victims have to go through to seek legal redress.

To strengthen the right to a remedy of the victims and their access to justice, Nepal should also consider opening avenues other than the court, for victims to file a complaint without fear of intimidation, such as the National Human Rights Commission.

On Compromised Investigations

The bill does not outline an independent and professional mechanism to conduct investigation into allegations of torture. Without such a mechanism being established, the criminalization of torture would be yet another opportunity squandered. In light of the cases documented in Nepal by the AHRC and its partners in recent years, it is apparent that the absence of an investigation body mandated to investigate complaints of torture is a serious loophole that contributes to the lack of any impartial and efficient investigations into such complaints. Under current legislation, the head of police retains control of the investigation process, even when it concerns his or her staff. As long as no independent body is created to probe cases which, if investigated by the police, would result in an open conflict of interest, the effective prosecution of cases of torture will remain impossible.
The body in charge of conducting investigations into allegations of torture should be governed by the following principles:

13 Report of the Working Group on Universal Periodic Review – Nepal, 2011, A/HRC/17/5 available online at: http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/17/5&Lang=E

- practical independence with no institutional or hierarchical relations with the body or public official alleged to have committed torture,
- promptness,
- adequacy with the investigation being conducted professionally with the assistance of all modern investigation techniques to collect evidence,
- transparency allowing public scrutiny,
- accountability,
- And involvement and protection of the victims in all stages of the investigation.

These six elements are necessary to strengthen the public's trust in their countries' rule of law institutions and to develop a framework efficiently designed to expose and prosecute torture in Nepal, protecting the rights of all.

Although the draft bill roughly outlines provisions that contain some of these principles, it falls short of producing the effective mechanism able to uphold them all.

Section 15 of the Act provides for the court to "order the concerned District Police Office to investigate the offence provided the complaint is filed pursuant to Section 13 or report submitted by the government physician pursuant to Sub-Section (3) of Section (14) provides prima facie evidence that a person has been subjected to torture". It specifies "provided that, in a condition where complaint has been filed against the in-charge of the concerned District Police Office, the court shall order an official higher than his/her rank to carry out the related investigation".

That an officer from the District Police Office would be entrusted with the task to investigate allegations of torture from its jurisdiction is utterly inadequate and falls short of fulfilling the independence criteria. A case of torture does not only concern one or several individuals but a government agency as a whole, often the police. This falls short of the principles depicted by the Istanbul Protocol which state that "*Investigations should be carried out by competent, qualified and impartial experts, who are independent of the suspected perpetrators and the agency that they serve*."[14]

The concerned agency and its members should be excluded altogether from the investigation team to guarantee its independence and impartiality. What's more, AHRC's partners in Nepal have collected a significant amount of anecdotal evidence in which the District Police Office was involved in covering up allegations of torture committed in a lower ranking police office and in obstructing the victims' access to justice.

Entrusting the District Police Office, or for that matter any other police authority, with the task of investigating their own colleagues or subordinates creates a direct conflict of interest which

14 PROFESSIONAL TRAINING SERIES No. 8/Rev.1, UNITED NATIONS, New York and Geneva, 2004, Istanbul Protocol, Manual on the Effective Investigation andDocumentation of Torture and Other Cruel,Inhuman or Degrading Treatment or Punishment http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf

sacrifices the rights of the victims. Failure to create an independent body would defeat the whole purpose of the law by making an independent investigation virtually impossible.

On Victim and Witness Protection

We welcome the introduction of section 28 which provides for orders to be issued to provide witnesses who fear for their safety with security protection.

Nevertheless so far the proposed section is too vague and does not strictly define a framework of protection to guarantee the victims and the witnesses' safety. It does not specify a time-frame within which the court should give an order for protection, which should be made as short as possible, nor does it outline a process by which the court will decide whether protection is necessary. Nor does it provide the victim or witness with a right to appeal the decision of the court not to provide him or her with protection. The section should also give the possibility to the court to act ex officio to order the protection of victims or witnesses at high risk of attack. It should further specify criteria upon which the court will decide to terminate the protection programme.

More importantly, the proposed section is extremely vague regarding the nature of the "concerned authorities" who would be ordered to "manage security" for witnesses and victims. It is a pre-requisite that the authority in charge of providing security and protection to witnesses and victims of human rights abuses should be independent. In cases of torture, where the complaint is, most of the time, directed against security forces, the police cannot and should not be entrusted with the task of guaranteeing the protection of witnesses and victims. Being in charge of ensuring the protection of witnesses and victims, in order to allow them to pursue a case against their own agency, creates an obvious conflict of interest in which the safety of those placed in the protection programme is at risk. The bill should clearly define which body is responsible for the protection programme and guarantee its independence.

Witness and victim protection does not stop at the provision of physical security. The bill fails to define what protection mechanisms are available and to provide for other measures crucial for a functioning system of protection of victims and witnesses. The law should also allow for the anonymity of witnesses and victims, allowing testimony by video conferencing, the provision of safe houses, etc.

Most crucially, the officials against which allegations of torture are being brought up – unless manifestly ill-founded – should be suspended from their duties, pending the outcome of the investigation and subsequent legal proceedings. This suspension is imperative to remove the alleged perpetrators from any position of control or power over complainants, witnesses, and investigators and to prevent them from interfering with the due process of investigations.

In addition, the law should also include a provision covering the cases in which the victim, complainant or witnesses are still in custody and may be directly exposed to reprisals or further torture. The law should ensure that they are transferred to another detention facility immediately.

We also recommend Nepal to consider developing a separate piece of legislation dealing exclusively with the issue of witness and victim protection and including all the points listed above. Developing a comprehensive, strong, independent and credible victim protection mechanism is a pre-requisite to make the law work. The success of the bill will depend upon the ability of victims and witnesses to come forward and collaborate with the investigation and legal process without fear of retaliation. So far, in Nepal, extreme delays in rendering justice, fear of reprisals, and no effective protection of witnesses and victims have led to a general failure of justice and a lack of fair trials. Building a strong protection mechanism will be a tremendously important step toward rebuilding the trust of the public in their institutions and toward strengthening the right to a legal remedy of the victims, leading to greater protection of human rights in Nepal.

On Making Medical Examination Mandatory

Section 14 mandates the court to issue an order for medical examination within three days after a complaint of torture is filed, provided the complainant is still in detention. An order for medical examination should not depend on whether the person is still in detention. Those who were tortured, but did not have any charge brought against them afterwards, which is the vast majority of torture cases in Nepal, should also be provided medical examination.

The court should also have the power to order a medical examination in the absence of a formal complaint from the alleged victim if it has enough reason to suspect that the person had been tortured.

The proposed bill suggests that the examination should be conducted by a government physician. Nevertheless, international norms and standards, as entrenched in the Istanbul Protocol, have recommended that the medical examination should be conducted by an independent authority, to avoid the risk of collusion between the police and doctors, or of pressure upon doctors, who have often left evidence undocumented in many cases.

Further, we welcome the introduction in section 25 of a mandatory medical check-up when the person has been kept in or released from detention, prison or preventive detention. Nevertheless, the section seems to provide for an "*official concerned*" which could mean the person in charge of the jail or the detention facility to administer the check-up if "*such physicians are not available*". The clause should be clarified to prohibit police officers or non-medical personnel in general from conducting the examination and guarantee the independence of the medical examination.

In addition, the medical check-up should be made mandatory, and not be provided "*as far as possible*", both upon taking the person into custody and upon release, in line with the CAT

recommendation "*to ensure that all detainees have access to a proper medical examination at the time of arrest and upon release*".[15]

On Reparations

The bill contains a section dedicated to compensation, which sets the maximum amount of compensation the victims are liable to at 500,000 NPR. Setting a maximum amount of compensation may prevent the provided compensation from fulfilling its primary purpose of covering all economically assessable damages resulting from torture.

Further, we urge that the level of proof required for establishing civil liability and criminal liability should be clearly distinguished. The availability of a civil procedure aimed at obtaining reparation should not be dependent on the outcome of a criminal procedure.

The procedure related to the payment of compensation as established in section 24 also requires in-depth revision. In criminal jurisprudence, the execution should be carried out immediately, unless the sentence is suspended by a court of appeal. In other words, once the conviction has been pronounced it must be the state's responsibility to execute the sentence, and it should not be made the victim's responsibility to take further steps to obtain the effective payment of compensation.

Miscellany

Section 34, which provides for a fine up to 10,000 Npr for filing a fake complaint of torture is incompatible with Nepal's international obligations under the CAT and should be scrapped.

We welcome the inclusion of section 40 and 41, which make provisions respectively for formulating and implementing a code of conduct for law implementing public officials, and for the incorporation of "*subject relating to torture or cruel, inhuman, or degrading treatment in school and university curriculum*" and the development of *"training for public officials in order to prevent torture or cruel, inhuman or degrading treatment."* These steps are essential for an effective prevention of torture or cruel, inhuman or degrading treatment.

We regret that the draft bill does not contain provisions to set up a mechanism of regular visits by independent bodies to places of detention in order to monitor the respect of human rights on their premises. Although the National Human Rights Commission is mandated to carry out visits, it has failed to do so to an acceptable level. The extensive work of NGOs in Nepal have demonstrated that in places of detention in which visits were regularly conducted, the incidence of torture tended to decline, thus illustrating the necessity to have such a mechanism implemented nation-wide. We strongly recommend Nepal to consider developing such an independent monitoring mechanism.

15 Committee against Torture, Concluding Observations on Nepal (2005) available online at: http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CAT.C.NPL.CO.2.En?Opendocument

The cases included in this report illustrate that the fight against torture not only entails a reform of the policing system, but a much deeper overhaul of the criminal justice system. For instance, the exploitation of the legal construct which gives power to Chief District Officers (CDO) to judge cases falling under the Some Public (Offences and Penalties) Act, 1970, and the Arms and Ammunition Act, 1962, with the latter granting the CDO the power to sentence people to up to seven years' imprisonment after hearings. With the CDO, being a government official, without a legal background, these provisions go against the principles of separation of powers, and have been abundantly exploited by the police, colluding with the CDO to sentence torture victims to long prison sentences without a proper trial. In September 2011, the Supreme Court issued a directive order to the government to form a research committee to amend the existing laws providing the CDO with quasi-judicial powers and to submit a report within six months. This report is still to be published, and cases in which the CDO collude with the police continue to be reported and put victims' rights at risk.

The Case of Forced Evictions in Kathmandu

One of the rather emblematic illustrations of the consequences of weak democratic governance and check and balances in 2012 has been the eviction in broad daylight of slum dwellers staying by the banks of the Bagmati River, in violation of all international norms of due process. Over 248 houses, including a school, were destroyed in the eviction process of the squatter settlements in Thapathali, Kathmandu on May 8, 2012. Estimations put the number of persons affected by the eviction to 994, including 401 children below 15.

The evictions followed an April 2011 Supreme Court decision in which it directed the government to stop the encroachment of slum dwellers on public land. In November 2011, the slum dwellers were told to leave their settlement within two weeks, but were not offered any alternative housing option. After three ultimatums to the slum dwellers to evict the place, without providing them with alternative housing arrangements, a meeting on December 4, 2011, decided to resort to force to conduct the eviction.

Five slum dwellers' organisations filed a writ petition to the Patan Appellate Court to suspend this decision, and, in December, the court issued a stay order to suspend the eviction process until January 17, 2012. The court further ordered the Office of the Prime Minister and Council of Ministers to conduct an identification process of the "genuine" slum dwellers and to develop appropriate housing alternatives for them if they are to be evicted. On January 27, the Supreme Court upheld the government decision to evict the slum dwellers, but further ordered appropriate alternatives for them.

However, the government's plan to develop the banks of the Bagmati River did not include any provision to provide alternative housing options to the community, and the community was not consulted in the process leading to the decision to evict them. In public, the different government agencies had been rejecting the responsibility for finding accommodation for the slum dwellers on each other. The

government had offered to provide the "genuine" landless with a three-month renting allowance, but did not make any plan for relocation.

No proper research was done by the government to evaluate the situation in the slums, including to determine the number of children and elderly who would be affected by the relocation or to evaluate the poverty level of the community.
On May 8th, more than 2000 police personnel from the Nepal police and the Armed Police Forces, and three bulldozers, were deployed in the area to conduct the eviction. Sources report that many families were not informed in advance that the eviction would take place on that day and that they were awoken at 5 am by the police asking them to gather their belongings and leave. The destruction of the houses lasted until 1 pm.

Police used rubber bullets and tear gas to control the community. Several civilians including the elderly, pregnant women, and children were beaten, ill-treated, or suffered injuries from the tear gas and rubber bullets. NGOs estimate that 25 to 30 people were injured in the beatings, including four who suffered serious head injuries. The police prevented those injured from getting treatment until 4 pm, when they were allowed to receive treatment at the Bir hospital. According to the police, 31 people were taken into custody, which, according to NGOs, included several children.

The government announced that it was ready to provide 15,000 NPR as a housing allowance to those identified as genuinely landless, and that it was getting ready to relocate them to Ichangunarayan area. Nevertheless, the first round of evictions was conducted before steps to provide such allowance, or to organize for the relocation, were taken. As a result, many found themselves without shelter and deprived of food and water. The community has lost valuable property as they were not given enough time to gather their belongings including cooking utensils, tools, clothes, citizenship papers etc. Some saw their income sources, a small shop, a vegetable cart and other essential items destroyed in the eviction. A school run by an NGO in which 150 children were enrolled was among the first buildings to be destroyed.

Following the evictions, the government announced that it would review the first process and draw conclusions to be applied on the further rounds of evictions. This is considering that the lives of the thousand people who were evicted were not worth much more than those of guinea pigs, subject to laboratory experiments. The lack of professionalism of government agencies is not only to blame in that case. Also at fault is the absence of state structures able to provide a defined framework of decision-making and governance ensuring that human rights principles of due process are abided by. That the evictions were carried out in broad daylight in the center of Kathmandu should act as a wake-up call, triggering awareness of the consequences of the decay of democratically accountable institutions on everyday life.

Burden of Caste, Alive & Unaddressed

One of the issues sacrificed to short-term political gains is the issue of caste. The failure to adopt a new constitution has meant that addressing the issues of the Dalit community has been put on the backburner once more. A law criminalizing caste-based discrimination for the first time in Nepal's history had been adopted last year: the Caste based discrimination and Untouchability Crime Elimination and Punishment Act, 2011. Nevertheless, the government's commitment to its effective implementation and to the provision of redress to the victims of caste-based discrimination remains under question. It has been mentioned, earlier in the report, how the inability of the state to deal with demand for greater representation and inclusion led to the dissolution of the Constituent Assembly. By failing to take steps to allow for a greater access to the state structure to most excluded communities of Nepal, an opportunity to ensure such communities have a greater say in the protection of their rights has been squandered.

This failure became obvious in the political bargains that led to the first draft of an inclusion bill, wherein concerns for equal representation and socio-economic and cultural disadvantages were sacrificed to political consideration. The bill is yet to be adopted.

Being denied of participation to state structures has been accompanied by a continued denial of access to justice, leaving members of the dalit community, in particular, exposed to abuse of their rights, fueled by discrimination and intolerance. Investigations into cases of caste-based violence are typically slow, biased, and liable to interference by the perpetrators of caste-based crimes. Indeed, victims of caste-based violence are often exposed to threats and intimidation from the perpetrators.

A report released by the Office for the High Commissioner for Human Rights in Nepal on 'Access to Justice for Dalits in Nepal'[16] identified major challenges which hampered the access to justice for the dalit community and restricted the prosecution of cases of caste-based violence, allowing discrimination against the dalit community to go unabated. This includes considering caste-based discrimination and untouchability as a social issue rather than as a crime. As such, these instances of discrimination fall beyond the police's scope of duties, and cases often disappear in legal loopholes. The report also denounced the routine refusal of the police to file FIRs, which encourages the victims to find a mediated compromise and the routine failure of the police to ensure the protection of victims and witnesses.

Victims of caste-based discrimination have often found themselves in an unequal relationship in relation to their perpetrators, as they belong to a more economically and socially vulnerable community with less power to influence the course of the investigation. By contrast, instances in which the perpetrators collude with the police are numerous, as illustrated, in a case that follows, by the police's refusal to file an FIR, its refusal to investigate the case, and by the pressure the police place on the victim's family to fingerprint a report without being shown or read its content. The law itself provides a 35 day deadline to register

16 *http://nepal.ohchr.org/en/resources/Documents/English/reports/HCR/2011_12_07_Opening_the_Door_to_Equality_E.pdf*

instances of caste-based discrimination which makes it extremely difficult for victims suffering from trauma to file an FIR.

Documented by the Jagaran Media Center, is a case that involves the killing of a young dalit man, following his marriage with a Brahmin girl. Shiva Shankar Das, 21, had a love affair with a 20-year-old woman belonging to a so-called 'upper-caste' community. Both Mr. Das and the woman resided in Siraha District. The relationship was known to the whole village. The girl's family sternly opposed the relationship, which challenged the strict social barriers of caste.

On January 29, the girl's brothers threatened Shiva, demanding that he bring the relationship to an end or to "prepare everything for his funeral". According to Shiva's family, on January 30, Shiva was beaten up by seven of the girl's relatives and sustained numerous scars and bruises from the attack.

Later that day, Shiva went to meet with the girl to get his phone, which had been taken by the girl's relatives. He was healthy at the time. He came back home around 8.30 pm crawling on his hands and knees, and told his family that he had been poisoned by her family. He vomited twice while narrating the event. He was taken to the Nursing Home at Lahan for treatment. The Nursing Home referred him to BP Koirala Institute of Health Science, Dharan, where doctors announced his death the next day.

The local police officers' initial reaction to the case has been highly problematic and suggests that they have been attempting to cover up the case, protecting the perpetrators. Collusion between the police and the perpetrators typically happens in cases of caste-motivated violence and prevents the victims from benefiting from the protection of the law.

A death certificate specifying the victim's cause of death was provided to the police, rather than to the victim's family. The AHRC has been informed that the police did not give the death certificate to the victim's family at any time. In addition, the doctors prepared a post-mortem report, but the victim's family did not see its content. Requests by human rights organizations to see the postmortem report have yielded no result.

Immediately after Shiva's death, his parents contacted the police about the case, but the police failed to return their call until almost 8 hours later. Inspector Pradhumn Adhikari from the area police office, Kalyanpur VDC, Saptari District refused to file the family's complaint, and without conducting a thorough investigation into the case, alleged that the victim had committed suicide instead. As per the State Cases Act, the police have an obligation to register and investigate every First Information Report brought before them.

The police then allegedly prepared a report, but did not allow the family to see its content. Instead, the police forced Das' father to mark his fingerprints on the police report without being able to see its content and without it being read to him. They threatened to thrown him into jail if he did not comply with their demands. After the initial rejection of the case, the victim's family sent their First Information Report to the Chief District Officer and the District Police Office, Saptari.

Dalit civil society led a campaign protesting the police's rejection of the case, and eventually the case was registered on February 26, 2012 in the Kalyanpur area police office in the name of the seven Chaudhari family members. Despite this step being taken, however, no investigation has been launched.

Five members of the Women, Children and Social Welfare Committee, a subcommittee to study and find solutions to the caste based discrimination and untouchability experienced by dalit communities within the Legislative Parliament, conducted a fact-finding mission in the VDC, under the leadership of the subcommittee chairman Binod Pahadi. The team met with the victim's family, the Chief District Officer (CDO), the District Police Chief, District Attorney, and the SSP of Armed Police Forced, and the team leader shared that the preliminary report has concluded that the victim had, in fact, been murdered. In spite of these efforts, the police investigation has been slow and the victim's father has been struggling to get justice.

A successful a civil society campaign to ensure that a victim's family is able to access redress is can be found in the case of 50 year old Sete Damai, resident of Dailekh district. Sete Damai was stabbed to death on August 30, 2011, by a group of non-dalit members when his son married a non-dalit girl. A group of masked men visited Sete's home and stabbed him with a curved knife and thrashed other family members. Sete succumbed to his injuries the following morning because he could not be taken to the hospital on time, as there was fear of further attacks on the way.

Following the intense campaigning of dalit civil society which ensured that the incident was known nationally and internationally, the police caught 9 alleged perpetrators. In June 2012, Dailekh District Court finally gave its verdict after 10 months, sentencing three individuals directly involved in the murder to 20 years in prison, while the others that participated in the beatings received between five to ten year jail terms.

The government promised to declare Sete Damai a martyr of caste-based discrimination and to provide compensation to the victim's family. However, at the time of writing this report, the relief has still not been provided to the family. The government has also not provided the rewards of NPR 100,000 (USD $ 1,282), which, according to a government policy to promote inter-caste marriage, should have been delivered within 30 days of marriage registration.

This incident shows the extent to which non-dalits will go in order to protect their so-called social prestige. It also shows that the coordinated effort of the dalit civil society is necessary to balance the relationship between the victims and the perpetrators and ensure that victims have access to legal redress.

These two cases are, of course, not isolated ones. They show that the dalit community is disproportionately affected by the absence of a functioning rule of law framework, and a police force that is unaccountable, as member of this community lack connection or financial resources to mobilize the country's police system in cases where their rights are violated.

Presently, without the support of civil society and campaigns which aim to mount pressure on the authorities, encouraging the state to take steps to ensure justice, dalit victims of human rights violations would have little chance of having their cases investigated, let alone prosecuted successfully. Moreover, they would remain exposed to threats and retaliations from the perpetrators.

Conclusion: Rule of law reforms, the heart of rights movement

In January 2011, Nepal was reviewed under the Universal Periodic Review for the first time, and received a large number of recommendations, notably those concerning ongoing reports of torture and violence by law enforcement agencies, persistence of gender-based violence, continuous caste-based discrimination, insecurity of human rights defenders in a context of overreaching impunity for past and present human rights abuses, and with regard to failing police and justice systems in the country. The government accepted a majority of these recommendations and therefore committed to take necessary measures to turn them into concrete advancements in the human rights situation. Nevertheless, as shown in this report, few concrete achievements have been made to implement commitments in reality.

This failure to improve Nepal's human rights record not only underlines government negligence toward the protection of human rights of the people it is supposed to serve, but, even more importantly, points at larger institutional failures.

Improved human rights protection requires institutional changes to foster the development of a strong and independent State capable of reaching out to all the citizens, throughout the country. The fight against impunity relates to the substance of the functioning of State institutions and implies in-depth reforms to put concerns for human rights of the people at the heart of their functioning. The justice and policing systems still lack the strength, accountability, and independence demanded from institutions supposed to safeguard human rights in a vibrant democracy.

This report has tried to show the far reaching consequences of institutions, which are unable to deliver justice to all equally, on the lives of ordinary people. When one's right to an effective remedy does not depend on the law but on one's ability to mobilize resources, be it in terms of personal or political connections or financial resources, the protection of human rights will be subjugated to arbitrariness and corruption.

In Nepal, the slow erosion of the basic structures of justice is of serious concern and it is the responsibility of the human rights movement to focus on the twin tasks of strengthening the authority and the independence of the judiciary, and developing the accountability and effectiveness of the policing system. The dissolution of the Constituent Assembly should not put the debate about the kind of institutions on hold. On the contrary, the people of Nepal should seize this opportunity to reclaim the terms of the debate and make sure the institutions that will be developed will crystalize the collective sense of fairness of Nepali people.