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Torture Redress Mechanisms in Nepal and Bangladesh

A Comparative Perspective

JEEVAN RAJ SHARMA, MORTEN KOCH ANDERSEN

Human rights organisations have been active in documenting widespread torture in Nepal and Bangladesh, taking very different paths towards accountability—Nepal stressing civil compensation and Bangladesh, criminal liability. Accountability in both countries, however, is limited, with the poor and marginalised, who are particularly vulnerable to torture and ill-treatment, fearful of reporting incidents and seeking justice. This paper explores the appropriation and unfolding of rights vocabularies in two distinct political, institutional and legal contexts, and suggests that human rights organisations should place protection of victims and legal assistance alongside advocacy for accountability.

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Jeevan Raj Sharma (jeevan.sharma@ed.ac.uk) teaches South Asia and International Development at the School of Social and Political Science, University of Edinburgh, UK. Morten Koch Andersen (MKA@dignityinstitute.dk) is a postdoctoral researcher at DIGNITY–Danish Institute Against Torture and is currently researching the relationship between torture and corruption in South Asia.

Reports from human rights organisations suggest that torture by police and armed forces is systematically practised in Nepal and Bangladesh (Ramakrishnan 2013).¹ Over the last two decades, there has been a surge in the number, activities and influence of human rights and other civil society organisations in the two countries. These organisations draw on the language, networks, institutions and norms of human rights law and often rely on international funding, in hostile political contexts. Both Nepal and Bangladesh have ratified the United Nations (UN) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and have put constitutional and legal provisions in place to address torture.

While Nepal’s Compensation Relating to Torture Act (CRTA) 1996 has come under intense criticism from human rights activists for failing to criminalise torture (Advocacy Forum 2008),² hundreds of cases have been brought to domestic courts under this act, a scale that is rare on the international human rights scene. Following decade-long lobbying by human rights activists and an order from the Supreme Court of Nepal on 22 May 2009, a new bill (known as the Torture or Cruel, Inhuman or Degrading Treatment [Control] Bill) that sets out criminal liability is pending in the Nepalese parliament.

Bangladesh has already implemented the Torture and Custodial Death (Prevention) Act, 2013 that makes torture by law enforcement or government officials a criminal offence. However, very few cases have been brought to the domestic courts under this law in Bangladesh (the exact number is unknown, but according to local human rights organisations and independent lawyers, it is less than 10) and so far, no one has been convicted.

In this paper, we compare Nepal and Bangladesh, draw lessons for redress for torture victims, and examine the prospects of accountability. We ask how survivors of torture have been able to bring cases to the courts in Nepal while similar cases fail to proceed to the courts in Bangladesh despite a punitive law. In other words, we inspect the processes and practices of redress and accountability in the two countries.

In this endeavour, we draw on two influential notions in human rights critique and analysis, namely, Sally Engle Merry’s “vernacularisation” (2006), and Felstiner, Abel and Sarat’s “naming–blaming–claiming” (1980–1981). Both concepts have had a great impact on human rights thinking and practice.

We side with Merry (2006) when she focuses on the “social processes of human rights implementation and resistance.” Instead of asking whether human rights are a good idea, she advocates for a perspective that explores what difference they make. In other words, this article is not about how human rights ideas are adopted in culturally distinct communities or how ideas move from one sociocultural setting to another. It is about the appropriation and unfolding—the vernacularisation—of rights vocabularies in two distinct political, institutional and legal contexts (Merry 2006). It focuses on the key role of human rights organisations that “translate the discourses and practices from the arena of international law and legal institutions to specific situations of suffering and violation” (Merry 2006: 39). The article is about situating global discourses in local practices—the relationship between legal provisions and the infrastructure of documentation—as an exploration of human rights work from the perspective of practice under the specific political, institutional and legal contextual conditions in Nepal and Bangladesh.

We employ Felstiner, Abel and Sarat’s notion of naming–blaming–claiming (and/or shaming)³ to shed light on the links between political and legal conditions and the opportunities and limitations for redress and accountability in Nepal and Bangladesh. This approach allows us to consider the emergence and transformation of human rights violations and “the way in which experiences become grievances, grievances become disputes, and disputes take various shapes, follow particular dispute processing paths, and lead to new forms of understanding.” “It means studying the conditions under which injuries are perceived or go unnoticed and how people respond to the experience of injustice and conflict” (Felstiner et al 1980–1981: 632). In other words, it allows us to explore how individuals and organisations deal with experiences of torture and ill-treatment in particular contexts.

In human rights work, the detection and documentation of violations is vital to transform injurious experiences into acknowledged (legal) claims. Following the above notion, once an injurious experience is perceived and responsibility attributed, the decision on whether or not to make a claim and ask for remedy is made. The choice of seeking redress and accountability is conditioned by the legal provisions and infrastructure of documentation and assistance. This decision is made against a background of economic, political and social inequality that disadvantages the poor and marginal populations in coming forward and claiming their rights, via courts or media.

Drawing on fieldwork in Nepal and Bangladesh, we show that human rights documentation for redress and accountability is not a straightforward process of situating global discourses in local practices, such as naming–blaming–claiming of rights. While there have been increased activities, networks and documentation by human rights organisations in the two countries, our findings suggest that the poor and marginalised, those particularly vulnerable to torture and ill-treatment, may not report incidents of violence and abuse because of fear of repercussions and lack of resources necessary to come forward and seek justice.

We argue that human rights organisations and activists have to consider protection to warrant the participation of survivors and their families. To do this, human rights organisations will need to find ways to identify cases of torture and ill-treatment that may never reach their attention—for example, when violent abuses take place on the street or in the homes of victims, not in detention or during arrest. They will also need to find ways to ensure that redress and accountability begins with the safety and security of the victim claimants and their families. This spatial and institutional bias not only challenges access to justice but also questions the probability of accountability.

Legal Prohibition of Torture in Nepal

In 1990, multiparty democracy was restored in Nepal and fundamental rights were guaranteed in the new constitution of 1991. Article 14(4) of the 1991 constitution outlawed torture and gave torture victims the right to compensation. Nepal’s most recent constitution of 2015 prohibits torture, treats it as a criminal offence, and recognises the right to compensation.

In 1991, Nepal ratified the UNCAT. In its attempt to meet its constitutional commitments, as well as its obligations under CAT, the Nepali government passed the CRTA 1996, the same year as the Maoist insurgency (1996–2005) broke out. The CRTA provides formal redress for victims of torture in the course of inquiry, investigation or hearing, or for any other reason. It also contains provisions for departmental action against government employees who inflict torture on others.

The definition of torture in the CRTA limits compensation to victims detained in a government facility. The victim’s relative or a lawyer can file a case in court within 35 days of the date of torture or release from detention. The law requires the police to facilitate a medical examination of detainees before detention and upon their release. It grants a victim of custodial torture the right to compensation, for a maximum of NPR1,00,000 (approximately \$1,000).

The CRTA allows officials accused of torture to be defended in proceedings by the public prosecutor at public expense. To file a case under the CRTA, the victim needs to provide: (i) the reason for detention and period in detention; (ii) details of torture inflicted while in detention; (iii) details of losses caused by such torture; and (iv) amount of compensation claimed and any other details that help in proving the case. While determining the compensation amount, the court considers the following:

- (i) Physical or mental pain or hardship caused to the victim, and its gravity.
- (ii) Decline in income-earning capacity of the victim as a result of physical or mental harm.
- (iii) Age of the victim and his or her family liabilities in case he or she has suffered physical or mental damage, which cannot be treated.
- (iv) Estimated expense of treatment following the incident of torture.
- (v) Number of family members dependent on the victim’s income in case of death of the victim of torture, and the minimum amount necessary for their livelihood.

(vi) Other proper and appropriate matters from among those contained in the claim filed by the victim.

Only a minority of all cases of torture and ill-treatment make it to court under the CRTA. Not only is there a 35-day limit for filing a case, but human rights lawyers interviewed said that torture survivors often do not want to carry on the legal battle due to the lengthy court procedures and the ubiquitous intimidation that goes with them. Even if the victim is willing to file a case, obtaining the paperwork (such as arrest papers or detention release notes) and evidence (such as medical reports, photographs or witness report) can be resource-intensive and daunting. Getting medical evidence, considered by human rights lawyers a key element of evidence in the court's decision-making, is particularly challenging. If a survivor is in custody and a medical report is not available, lawyers can make use of the legal provision in the CRTA that allows them to write to the court for permission to take the survivor for medical documentation. Often, the medical evidence produced by the police from government hospitals is of relatively poor quality. Human rights lawyers interviewed said that the most common reason for losing a torture case filed in court is lack of medical evidence.

Systematic data is not available on cases under the CRTA. However, we can begin to put together a general picture from the information that does exist. In 2013–14, there were 91 active cases in Nepali courts under the CRTA (Supreme Court of Nepal 2014). In 2006, a Nepali non-governmental organisation (NGO), Centre for Victims of Torture (CVICT), published a compilation of court verdicts that granted compensation to victims (CVICT 2006). The CVICT report states that of a total of 109 cases filed by them, 21 were decided in favour of the survivor, eight of which ended in a “compromise” (that is, they were settled out of court, although there is no provision in the CRTA for this). A report published by the Advocacy Forum (2008) states that it was able to document 5,342 cases of torture between 1996 and 2008. Of these, 208 victims or their descendants have filed cases under the CRTA, and only 52 cases have been decided in favour of the victims. More recently, a publication from the Advocacy Forum (2014) reported that they filed a total of 146 cases under the CRTA since 2003, with the following outcomes: 31 cases (21%) were granted compensation, 48 cases (32.9%) were dismissed, 61 cases (41.8%) were awaiting decision, and six cases (4.1%) were withdrawn.

Even when compensation is ordered, survivors and human rights organisations report that it can take months to be processed. Many survivors spend far more money, time and hardship during the process than is compensated. According to the 2006 CVICT report, the compensation claimed by victims or their legal representatives ranged from NPR10,000 to NPR1,00,000. However, the actual compensation awarded has ranged only from NPR1,000 to NPR50,000, with just one instance where the court awarded NPR1,00,000 (CVICT 2006). Similarly, the report published by the Advocacy Forum (2008) covering the period 1996–2008 states that of the 52 victims who had been awarded compensation, only seven were able to receive compensation in 2008.

The CRTA also gives courts the power to order departmental action against individual perpetrators of torture. Importantly, according to the 2006 CVICT report, departmental action was recommended against the perpetrator in just over half the successful cases. In two cases, the perpetrator was let off with a warning. Similarly, the Advocacy Forum report (2008) states that none of the perpetrators named in the CRTA cases had actually been brought to justice. Human rights workers interviewed said that this has not changed in recent years and no one has been prosecuted for torture.

The new bill on torture (Torture and Cruel, Inhuman or Degrading Treatment [Control] Bill, 2014) sets out criminal liability. In its current form, the bill has a provision for a five-year jail term and up to NPR50,000 fine for a person inflicting torture and those encouraging it, and a three-year jail term and up to NPR30,000 fine for attempting or assisting torture. It seeks to increase the compensation available to victims up to NPR5,00,000. The bill also has a 90-day limit on filing a case, which is an increase from the 35-day limit in the current legislation. However, like the CRTA, the bill in its current form defines torture as taking place in detention. There is no mechanism in the bill for reporting or filing a complaint against an act of torture inflicted on a person not under detention. Human rights organisations have criticised this bill in its current form for failing to meet international standards (ICJ 2016).

Legal Prohibition of Torture in Bangladesh

In Bangladesh, the use of draconian laws such as the Special Powers Act of 1974 (SPA) by consecutive governments and paramilitary forces such as the Rapid Action Battalion (RAB) has increased since the early 2000s.

The SPA grants wide-ranging discretionary powers to law enforcement agencies (ICG 2016). The act allows for preventive detention initially for one month and thereafter a court may prolong it by six months at a time. The use of the SPA is closely connected to the use of Sections 54 and 197 of the Code of Criminal Procedure. Section 54 gives the police authority to arbitrarily arrest anyone, anywhere, at any time, without a court order or a warrant (see BLAST 2005). Section 197 prohibits prosecution against public officials without the government's prior sanction if the offence is committed in an official capacity. Section 197 ensures that public authorities are protected from accusations and criminal proceedings in the discharge of their official duties.⁴ The law has been debated in the run-up to every election but consecutive governments have kept the act as a tool to motivate, control and direct law enforcement agencies.

The RAB has been used as the main tool to enforce government authority. The force is recruited from all sections of the military and police. It is directly under the Ministry of Home Affairs and is therefore under the direct political supervision and control of the party in government. The force was established in 2004 by the Bangladesh Nationalist Party (BNP) to combat organised crime. It was set up in the aftermath of two major security drives known as Clean Heart and Spiderweb in Khulna division on the western border with India, where military

units were deployed to undertake policing. It attracted popular support, eradicating criminal networks and groups that ordinary police were unable to fight, reclaiming state authority in the targeted areas. However, over time, the battalion earned a reputation as a death squad, known to execute people—including opponents of the regime—in so-called “crossfires” and “encounters.” Recently, incidents of crossfire have decreased, and enforced disappearance has become a new reality. Little is known about why people disappear, but the disappeared include high-level opposition politicians and political opponents.

Additional laws have given the government and law enforcement agencies extensive discretion in the exercise of authority. The vague definition of “terrorist activities” under the Anti-Terrorism Act (ATA) 2009 is prone to abuse and is incompatible with the principle of legality, which requires that criminal liability and punishment be limited to clear and precise provisions. In addition, the Information and Communication Technology (ICT) Act (Amendment) 2013 introduced severe punishment for any person publishing any material in electronic form that deliberately causes a deterioration of law and order, damage to the image of the state or person, or hurt to religious belief. A broadcasting policy was also introduced in 2014, which aims to regulate the media and freedom of speech. Some national media outlets have been closed down under this policy. Likewise, the Foreign Donations (Voluntary Activities) Regulations Act 2016 could be used to curb dissent and the activities of NGOs defending human rights. Together, these legislations shrink the public space for criticism of the state and its practices.

Torture and Custodial Death

Before 2013, “torture” was not defined in Bangladesh’s domestic laws. Article 35 of the Constitution of the People’s Republic of Bangladesh states: “No person shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.” If this is the case, then acts of cruel, degrading and inhuman treatment by law enforcement agencies can be taken to court as contravening constitutional guarantees. The Penal Code 1860 provides punishment for crimes such as “hurt” and “grievous hurt” to obtain information regarding the commission of a crime or the whereabouts of stolen goods, as well as physical assault, criminal intimidation and wrongful confinement, all of which may also be construed as part of the act of “torture.” However, because there were no laws actually dealing with torture as defined in the Convention against Torture, it was easy for the government to declare that torture did not exist in Bangladesh (Khan 2016).

In 2013, the Torture and Custodial Death (Prevention) Act, 2013 was approved by the Bangladesh parliament.⁵ Its definition of “torture” is any physical or psychological torture that hurts. In addition, the following acts are considered torture:

- (i) Extorting any information or confession from the person or any other person.
- (ii) Punishing any suspected person or any offender.
- (iii) Intimidating any person or any other person through him.

(iv) Any work done on a discriminatory basis, act done on someone’s provocation, with someone’s consent or by the power of any government or government officer.⁶

“Custodial death” is defined as “death of any person in custody of any government official. Besides this, ‘custody’ will also mean illegal detention order or death during an arrest by a law-enforcing agent. Custodial deaths will also include death during interrogation, regardless of whether the person is a witness of the case or not.”⁷

The law stipulates that torture by a law enforcement officer is punishable with imprisonment for at least five years and a BDT25,000 fine, and that custodial death due to torture is punishable with life imprisonment and a BDT1,00,000 fine.

The 2013 act applies to all law enforcement agencies. It defines “law enforcement agencies” as “uniformed and disciplined forces like the Police, RAB, Border Guards of Bangladesh, Customs, Immigration, Criminal Investigation Department (CID), Special Branch, Intelligence Agencies, Ansar VDP, Coast Guard and any other state agencies engaged in enforcement and implementation of law in the country.”⁸ It renders inadmissible various excuses for the use of torture such as superiors’ orders, political interference or need for confessions.

The act provides for monetary compensation to victims—specifically, BDT25,000 for the offence of torture and BDT2,00,000 for death as a result of torture—to be paid by the convicted person.⁹

This act states that any victim or aggrieved person can turn to the court if he or she suspects that the police cannot carry out proper investigations. In that situation, the court can ask for a judicial inquiry into the allegations.¹⁰ This is an important clause because previously, victims of police abuse, for instance, had to file a complaint at the police station stating they had been victimised. The officer-in-charge is responsible for forming an investigative team of police officers of the same station to investigate the complaint against a colleague. This conflation of authority and interests has been counter-productive for filing of cases and fair investigations. However, the act does not address Section 197 of the Criminal Code.

According to the three main human rights organisations—Odhikar, Bangladesh Legal Aid and Services Trust (BLAST) and Ain o Salish Kendra (ASK)—involved in documentation and legal redress, none of the cases they have filed has gone through the entire legal process. Two cases that BLAST filed in 2014 are pending in the courts and no one knows when they will be heard. The backlog of cases in the courts has further delayed and complicated human rights cases. Justice is not delivered even in cases of complete innocence, such as the Limon case in which a young boy was shot in the leg by the RAB, later leading to amputation. Limon was freed of the criminal charges against him after 42 months of legal battle and public debate, but the cases against the known and named perpetrators are pending.¹¹

Despite its good intentions, there are fears that the 2013 law will be utilised by the government and politicians to control law enforcement agencies and ensure obedience and compliance instead of achieving justice and redress for victims. The cases filed and tried at the courts continue to be limited and

restricted to severe cases of torture, including death of the victim. Several interconnected reasons could be behind this:

(i) The law is new and there is little awareness of it and the rights it grants to victims.

(ii) People, especially the poor, do not trust the police or the courts as an instrument to achieve justice and redress.

(iii) Victims and victims' families are threatened with violent repercussions and/or implication in criminal cases if they complain.

(iv) Courts and judges are threatened with violent repercussions and/or political interference if they accept complaints as cases.

(v) Violence, abuse and oppression are accepted as a fact by many poor people. Violations by authorities do not constitute a reason to complain. On the contrary, complainants risk damage to their own health and livelihood, as well as their family's. Staying out of public purview is a safeguard, despite the physical and economic suffering and humiliation.

Human Rights Documentation in Nepal

Torture by police and armed forces has been an endemic phenomenon in Nepal. While torture has been practised by the ruling government for long periods in the 50 years of Nepal's modern history, human rights organisations report that torture by the police and armed forces was particularly widespread during the Maoist insurgency of 1996–2006, reflecting widespread impunity in the country (UN-OHCHR 2012). Throughout the insurgency and more specifically after the mobilisation of the army following declaration of the state of emergency in 2001, there were widespread human rights violations in different parts of the country. The United Nations Office of the High Commissioner for Human Rights (OHCHR) reported that there were over 2,500 cases of alleged ill-treatment over the decade-long insurgency (UN-OHCHR 2012). The CVICT claims that as many as 30,000 people were tortured during this period. The Terai Human Rights Defenders (THRD) Alliance, another human rights NGO, writes that cases of torture have been widespread in Nepal's southern Terai region since the Madhesh uprising²² of 2007 (THRD Alliance 2014). Following the insurgency, human rights organisations report that the police have continued to inflict torture and ill-treatment, particularly as a method of securing a "confession."

In Nepal, the history of human rights work is closely linked to the restoration of multiparty democracy in 1990, and the protracted political transition following the Maoist insurgency. Against the background of the expansion of the public sphere and the use of the language of rights, international funding for human rights organisations began to come into Nepal through bilateral donors, UN agencies, international organisations and private foundations. This led to the development of an infrastructure of documentation, with its organisational structures and professional incentives.

Since 1993, the Informal Sector Service Centre (INSEC) has been publishing the *Human Rights Year Book* based on its annual monitoring of human rights. The CVICT was the first organisation, established in 1990, to work explicitly on torture.

Much of its earlier work focused on state violence during the pro-democracy protests of 1990 and later expanded to include torture amongst Bhutanese refugees as well as Maoist insurgency in Nepal. The Advocacy Forum was established in 2001, largely as a response to Nepal's conflict-related torture, illegal detention, enforced disappearance, and extrajudicial killings. Established in 2002, the Forum for Protection of People's Rights, Nepal (PPR-Nepal) has been engaged in documentation of torture and ill-treatment and other human rights violations following the escalation of Maoist insurgency and the state's response to it in early 2000. The THRD Alliance was established informally in 2008, and registered in 2011, as a direct response to the political movement in Nepal's lowland Terai region, bordering India. The THRD Alliance is engaged in public advocacy as well as filing cases in Nepali courts.

A mapping of human rights organisations in 2014 showed that there are 17 organisations involved in the documentation of human rights, including torture and ill-treatment. Four of them focus explicitly on the documentation of torture and ill-treatment. This is in addition to regular media reports and a number of international organisations, such as the Human Rights Watch, Amnesty International and Asian Human Rights Commission, among others, which occasionally bring out reports on human rights violations, torture and ill-treatment specifically. This number does not include organisations that broadly consider human rights their mandate but do not document cases, although they may refer cases of human rights violation to organisations that do document torture and ill-treatment. Only two human rights NGOs (Advocacy Forum and THRD Alliance) involved in torture documentation had staff at branch offices outside of Kathmandu. INSEC has district representatives in all of the 75 districts of Nepal, who are paid a small stipend and an incentive or reward for each case of human rights violations they identify and report.

The social networks of these organisations and their staff or representatives in NGOs, media, government offices, police, lawyers, and health facilities, are integral to the monitoring, identification and documentation of torture and ill-treatment. Human rights organisations have the greatest organisational presence in urban areas and the Kathmandu Valley.

Human Rights Documentation in Bangladesh

In Bangladesh, torture, custodial death, extrajudicial killings known as "crossfires" and enforced disappearances are widespread (ASK 2015; HRW 2016a; ICG 2016; Odhikar 2014). For decades, the party in government has ruled with a firm hand, utilising the law, law-making and law enforcement agencies to suppress opponents (Islam 2013). All governments have blatantly used the parliament to benefit themselves and their allies. The two parties have continuously utilised, amended and ignored the legal system for their own ends, which has created a society based on the rule through law, not rule of law. Members of parliament use state resources such as contracts, jobs and promotions, to build support bases and secure vote banks. This practice ensures party control of the state and establishes a structure for the exchange of favours, distribution of

benefits, allocation of rewards, and nomination of positions (Andersen 2016).

Today, violence, torture and ill-treatment are the product of three processes. The first is harassment, extortion and interrogation by police officers.¹³ The second is ongoing political tension between supporters of the Awami League government and its opponents, mainly in the BNP and Jamaat-e-Islami. The third is the rise of political terrorism in the country by people aligned to fundamentalist and extremist readings of Islam. Increasing securitisation of society, in an attempt to pre-empt further attacks, challenges the basic rights and liberties stipulated in the constitution and in international law.

This follows a trend of increasing extrajudicial killings and enforced disappearances that commenced with the re-election of the Awami League government for a second consecutive term for the first time in Bangladesh's political history (HRW 2016b). This came after the cancellation of the caretaker system, the change of election laws that prevented Jamaat-e-Islami from participating, and the boycott of the major opposition party, the BNP, which resulted in an election where 154 out of 300 seats were won uncontested.

Hundreds of organisations work on human rights issues. Many are registered and some are not. The majority are either not active or work as a façade for political actors on either side of the political spectrum. Most of the human rights organisations were established around the time democracy was reinstated in 1991, after 16 years of successive military regimes.

Three organisations have a reputation for actively documenting and publishing on human rights issues, torture and ill-treatment in particular. (As in Nepal, this is in addition to regular media reports and a number of international organisations such as Human Rights Watch, Amnesty International and the Asian Human Rights Commission, among others, that occasionally bring out reports on human rights violations more generally and torture and ill-treatment specifically. This does not include other organisations that broadly consider human rights their mandate but do not document cases although they may refer cases of human rights violation to organisations that do.) At the time of research, these three organisations were ASK, Odhikar and BLAST. ASK was founded in 1986. It provides legal aid, undertakes documentation of human rights violations, and advocates for the rights of victims and the poor. ASK operates in just under a third of Bangladesh's 64 districts. BLAST, founded in 1993, is a legal services organisation, specialising in women's and constitutional issues, operating in under a third of the country's districts.¹⁴ Odhikar, founded in 1994, specialises in the documentation of torture and extrajudicial killings and has a network of supporters in two-thirds of Bangladesh's districts. Since 10 August 2013, Odhikar has come under increasing political and economic pressure from the Bangladesh government.¹⁵

Both ASK and Odhikar monitor human rights violations in the country. According to ASK, 195 people were killed by law enforcement agencies between January and December 2016.¹⁶ According to Odhikar, between January and June 2016, 74 persons were allegedly killed and six were tortured to death

by law enforcement agencies. Forty-eight persons had disappeared after being picked up, allegedly by men claiming to be members of law enforcement agencies. Of them, six were found dead and 22 were later produced before the court or had surfaced alive. The whereabouts of 20 persons are still unknown, and 34 have died in custody (Odhikar 2016).

With the exception of BLAST, the organisations do not have branch offices, and rely on referrals by third parties and volunteer members of local human rights networks. Human rights workers are usually either lawyers or journalists. Clinicians for medico-legal reports are recruited on consultancy or voluntary basis. However, it is often difficult to persuade doctors to take up such work.

The modalities of work, including national and local coverage and documentation, are constrained by the fact that less than 30 people work professionally with the documentation of human rights violations, torture and ill-treatment, including the inactive Human Rights Commission. This, in a country of more than 150 million citizens, with 12 million in Dhaka alone. Resources, be they financial, logistical or human, do not match the depth and extent of the problem.

As in Nepal, the social networks of organisations and their staff, whether they are NGOs, media, government officers, police, lawyers or health workers, are key to the identification and documentation of torture and ill-treatment. Human rights organisations have the greatest presence in urban areas and especially in the capital, Dhaka.

Common Challenges

Almost all human rights organisations that work on torture in Nepal and Bangladesh draw on the language, institutions and norms of international human rights law, and have focused on legal accountability.

They are run by legal professionals with limited medical or psychosocial expertise, and their work is mostly shaped by an orientation towards advocacy of institutional and legal reform, or "naming and shaming." Issuing urgent appeals, taking cases to the UN Human Rights Committee, litigation and public advocacy are strategies employed by human rights organisations that often prioritise legal accountability above protection of survivors. This strategy has important consequences, as survivors of torture may want to prioritise silence over reporting. Thus, while "naming and shaming" remains a preferred strategy of human rights organisations, it may discourage survivors from coming forward to report their experiences for fear of repercussions.

All human rights organisations in Nepal and Bangladesh publish reports. Though these reports may be targeted at the urban intellectual class at the national level and the global community of informed human rights actors, changes in specific country contexts are pursued through law and institutional reform efforts. However, when the prospects of change on the ground are not positive or conducive to public campaigning and advocacy, international dissemination becomes a viable tool. This is based on the hope that external attention and action will bring about change in the actions

of law enforcement agencies, limiting violations and ensuring accountability.

Given the lack of resources within politically hostile national environments, human rights organisations rely on international funding and transnational networks, often on a project basis, to carry on their documentation and fact-finding activities. When projects end, organisations often follow up only those cases that are not too costly to pursue in logistical, financial and human resource terms, or cases with prospects for political agenda-setting, nationally and internationally.

This positions human rights organisations in the precarious space between the people and the government. Critics point out that the dependence on international funding makes organisations more accountable to donors than to survivors. This is substantiated by the fact that reports are mainly written and published in English. More recently, human rights organisations working in Nepal have been criticised by victim groups and other commentators for elitist and donor-serving human rights work in Nepal.

Making themselves accountable to the local population, especially the poor and marginalised, is a serious challenge for the human rights community, even beyond Nepal and Bangladesh. Human rights organisations do not just need to improve detection and documentation but to ensure adequate and relevant assistance, including protection of those whose rights have been violated.

Conclusions

Nepal and Bangladesh illustrate the limitations and potentials of focusing human rights work on criminalisation and financial redress for acts of torture.

Despite the limitations of Nepal's CRTA, scores of survivors have been granted compensation since the act came into force. This in itself can be seen as a considerable success, though survivors face hurdles in receiving compensation, and many of those awarded compensation by the court do not receive it. In contrast, in Bangladesh, hardly a handful of cases have made it to the courts under the Torture and Custodial Death (Prevention) Act, 2013.

Nepal has a relatively well-developed infrastructure of documentation, partly as a legacy of the expansion of the civic sphere post 1990. This network of organisations and activists is crucial for the relative success of the CRTA. Indeed, the existence of the CRTA has also shaped much documentation work done by human rights organisations. It also means, however, that documentation is simultaneously enabled and limited by the existing infrastructure, legal provisions and priorities of human rights organisations.

Nepal's CRTA results in unequal access to the courts and fails to prioritise wider political accountability. Nepal's case shows that political and legal action against perpetrators of torture could make compensation for individual survivors more difficult. More broadly, the criminalisation of torture can have an important role in prevention, as well as in ending impunity. However, the criminalisation of torture could in fact shrink the space available for individual compensation.

Human rights organisations have to open up avenues for justice, redress and compensation.

The Torture and Custodial Death (Prevention) Act, in Bangladesh criminalises torture and requires that a police officer be suspended whilst an investigation is carried out. In the absence of working victim protection mechanisms though, the result is not higher levels of criminal accountability but higher levels of intimidation, as police officers pressurise survivors to withdraw cases. The Bangladesh case shows that though the Torture and Custodial Death (Prevention) Act is a very progressive legislation, the scope for practical applicability is very limited.

There are two reasons why the act has had a limited effect so far. The first relates to the legal framework that plays a decisive role in the potential success of the act. Draconian laws that grant complete immunity for the actions of law enforcement agents have been in place for decades. The SPA and special acts in connection with large-scale security drives have undermined the possibilities of applying the Torture and Custodial Death (Prevention) Act in general and also weakened access to justice and the rule of law. Accountability is not a practical reality and naming is hardly a realistic option, especially for the poor, marginalised and resourceless.

The second reason relates to the political system and the practice of politics and politicking. The historically antagonistic relationship and competition between the Awami League and BNP over control of state institutions and state resources through elections inherently obstructs the implementation of

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progressive laws that grant opportunities for justice to all citizens. For instance, the SPA has been debated in the run-up to most elections, but has not been cancelled by either party when in power. Furthermore, as in many other countries today, human rights as well as the wider civil and political rights such as freedom of expression and assembly, are under pressure. When law enforcers have greater discretion and wider legal boundaries for investigation and control, critical voices within media and civil society are threatened, and access to justice and legal redress, including the naming of injuries, is hampered. These are the challenges today. Political conditions within both countries do not indicate positive pro-poor changes in current practices of justice and redress, or progressive changes in the legal framework. Given the practices of documentation today, it is very likely that the suffering of the poor and marginalised may not be perceived and named. Not only are the poor extremely vulnerable to

violence due to their precarious situation, but they lack the resources and support that are necessary to report cases and seek justice.

Therefore, to identify violent exposure and name injurious experiences, to make claims of accountability, human rights work has to go beyond documentation for legal accountability and political advocacy. It needs to consider the protection of victims as a priority.

Human rights organisations should continue to test the legal frameworks for justice, redress and compensation under national and international law and legal obligations. However, they should engage further with organisations of the poor and marginalised that could help identify cases of torture and ill-treatment that may never come to their attention. Such an engagement would also offer the possibility of relevant assistance and protection of victims while cases are documented, injuries named and advocacy advanced.

NOTES

- 1 Also see <https://www.hrw.org/news/2014/06/26/hrw-torture-expanding-scourge-asia>.
- 2 Also see <http://www.omct.org/reports-and-publications/nepal/2015/11/d23450/>; <http://alrc.asia/nepal-torture-and-ill-treatment-in-nepal-anti-torture-law-impunity-and-the-upr/>; <https://www.hrw.org/news/2013/01/04/nepal-warning-rights-abusers>.
- 3 The preferred strategy of many international human rights organisations is to embarrass regimes into changing laws, policies and practices.
- 4 Section 197 of the Code of Criminal Procedure states: "(1) When any person who is a Judge within the meaning of Section 19 of the Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act, in the discharge of his official duty, no Court shall take cognisance of such offence except with the previous sanction of the Government; (2) The Government may determine the person by whom, the manner in which, the offence or offences for which, the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held."
- 5 It was tabled in parliament as a private member's bill by Member of Parliament Saber Hosain Chowdhury in 2009 and passed by the parliament as the Torture and Custodial Death (Prevention) Act in 2013.
- 6 Torture and Custodial Death (Prevention) Act, 2013, Section 2(vii). Unofficial translation in BLAST 2015.
- 7 Torture and Custodial Death (Prevention) Act, 2013, Section 2 (vii).
- 8 Torture and Custodial Death (Prevention) Act, 2013, Section 3 (iv).
- 9 Torture and Custodial Death (Prevention) Act, 2013, Section 15.
- 10 Torture and Custodial Death (Prevention) Act, 2013, Section 5.
- 11 Limon Hossain became a well-known public figure when media and human rights organisations picked up his case. Limon was mistakenly shot by the Rapid Action Battalion (RAB) on suspicion of being a criminal. Though RAB quickly realised he was not a criminal but a school student (he was 16 at the time of the incident) they nonetheless implicated him in two cases of possession of arms, obstructing on-duty

- law enforcers, attempted murder and injuring RAB personnel.
- 12 The Madhesh uprising was an ethno-regional movement in Nepal's Terai region bordering India that challenged the Nepali state. Not only has this ongoing movement put federalism on the political agenda in Nepal, it has also resulted in significant loss of life, injuries, damage of property and disruption of communal harmony. The uprising has historical roots in the particular process of state formation and nationalism in Nepal.
 - 13 See *BLAST and Others v Bangladesh and Others*, <http://www.blast.org.bd/issues/justice/214-38060f1998>.
 - 14 See <http://www.blast.org.bd/who>.
 - 15 Written statement submitted by Odhikar to the Coalition for Human Rights, 27th session, agenda item 4: "Human Rights Situations That Require the Council's Attention," 25 August 2014.
 - 16 See <http://www.askbd.org/ask/2017/01/08/death-law-enforcing-agencies-january-december-2016/>.

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