

TORTURE IN THE TERAI 2020

Torture is a crime; the state continues to commit

TERAI HUMAN RIGHTS DEFENDERS ALLIANCE
(THRD Alliance)

June 2020

Book : Torture in the Terai 2020
Torture is a crime; the state continues to
commit

Published Date : June, 2020

Copyright © : **Terai Human Rights Defenders (THRD)
Alliance**

THRD Alliance permits reproduction of any
part of this report with due acknowledgement.

Table of Contents

| | |
|-------------------------|---|
| Executive Summary | 1 |
|-------------------------|---|

CHAPTER – 1

| | |
|---|----|
| Torture in Nepal | 3 |
| 1.1 History of Torture in Nepal | 3 |
| 1.1.1 Situation of Torture before 1990 | 5 |
| 1.1.2 Situation of Torture from 1990-2006 | 6 |
| 1.1.3 Situation of torture from 2007 to 2016 | 9 |
| 1.1.4 Situation of torture from 2017 to 2020 | 11 |
| 1.2 Methodologies and limitations | 14 |
| 1.2.1 Monitoring and Documentation | 15 |
| 1.2.2 Case Studies | 16 |
| 1.2.3 Court Orders | 16 |
| 1.2.4 Review of Constitutional and Legal Provisions | 17 |

CHAPTER - 2

| | |
|----------------------------|----|
| Torture in the Tarai | 18 |
|----------------------------|----|

CHAPTER - 3

| | |
|--|----|
| Analysis of Implementing Status of Muluki Penal Code, 2017 ... | 22 |
| 3.1 Implementation Status of Torture as a Crime | 22 |
| 3.1.1 First Information Reports (FIR) Refused | 22 |
| 3.1.2 Procedural challenge | 24 |
| 3.1.3 Withdrawal of FIRs still continues | 25 |
| 3.1.4 Medical Examination Problems, especially lack of mental health check-up Continues | 28 |

| | | |
|-------|--|----|
| 3.1.5 | No fine and Imprisonment for the perpetrators | 30 |
| 3.1.6 | Statute of Limitation obstructs justice | 31 |
| 3.1.7 | The denunciation of acts of torture and the impunity of their authors | 33 |
| 3.2 | Trends and Patterns of Torture | 34 |
| 3.3 | Modus Operandi of Torture | 34 |

CHAPTER - 4

| | | |
|-----|--|----|
| | Role of National and International Monitoring Mechanisms | 36 |
| 4.1 | National Instruments and Mechanism | 36 |
| 4.2 | International Instruments and Mechanism | 37 |

CHAPTER - 5

| | | |
|--|-------------------------------------|----|
| | Conclusion and Recommendation | 39 |
|--|-------------------------------------|----|

Executive Summary

Torture, which was historically sanctioned by Nepal, is prohibited under both the international law and domestic laws now. For the first time in the history, the 1990 constitution ensured freedom from torture as a fundamental right. The constitutional prohibition against “physical or mental torture” and “cruel, inhuman or degrading treatment” could not prevent torture. Then in 1991, the country signed and ratified the United Nations Convention Against Torture (CAT) in 1991 and the enactment of Compensation Relating to Torture Act (CRT) in 1996, the state has continued to breach its obligation of preventing torture. After nearly three decades, torture was finally criminalized in 2017 but the goals of the law have actually not been realized yet and the introduction of Penal Code of procedure has failed to address long standing judicial issues.

Moreover, human rights violations and instances of torture are still taking place in Nepal and their perpetrators still enjoy impunity. The legal avenues available for survivors of torture are still weak and systemic issues still plague Nepali judiciary, making justice, compensation and dignity for survivors hard to achieve. Despite the positive measure of criminalization of torture two years ago, this has failed to have a real effect on curbing abuses.

THRD Alliance’s analysis of the victims’ experiences in seeking justice under the new Penal Code paints a bleak picture. Over the nearly past two years, no act of torture has been prosecuted since the Penal Code criminalizing torture came into force. A key reason behind no prosecution lies with the investigation at large. THRD Alliance has documented nine cases of police’s refusal to register First Information Reports (FIRs) filed by the victims. The torture survivors faced a complex challenge due to cumbersome procedures while seeking justice under the Penal Code, when compared with that of the Compensation relating to Torture Act. The efforts made by the mandate holders – National Human Rights Commission and Attorney

General Office – have largely remained ineffective in ensuring justice to the torture survivors.

THRD Alliance's report concludes that an independent investigative body must be set up to effectively implement the provisions of penal code that criminalizes torture. Such a mechanism is necessary to effectively to prosecute for acts of torture and to prevent such acts from occurring again. The roles of existing national mechanisms need to be assessed and changed accordingly for the effective performance. Since Nepal has ushered into federalism, the newly established offices of Chief Attorneys at province level need to be well-equipped so that they could also be developed as the possible mechanisms for the prevention of torture at sub-national levels.

The cases against torture registered at the courts is minimal in comparison to the widespread allegations of torture documented by THRD Alliance. Courts hardly deliver justice in favour of torture victims. Such a gap demonstrates that the legal instruments and mechanism in Nepal that has been constituted for monitoring investigation, ensuring prosecution and providing justice to the victims of torture are not sufficient. The flaws and limitations as in the report poses obstacles and challenges for justice to the victims of torture.

CHAPTER 1

Torture in Nepal

“Those who cannot remember the past are condemned to repeat it.”
- George Santayana

“The only thing we learn from history is that we learn nothing from history.”
- Friedrich Hegel

The above philosophers’ observations on the truth about human history echo the somewhat similar situation of torture across the globe. The use of torture in criminal procedures dates back to the earliest human civilizations and remains to systematic in some way or the other around the world. While a small number of countries have made significant progress in preventing torture, the rest of the world has still been committing serious form of human rights violation under the guise of National Security or maintaining peace and tranquility. A review of Nepal’s progress in ending torture paints a bleak picture when it comes to the state’s actual prevention of torture and commitment to the justice of those responsible for inflicting physical and psychological suffering on someone.

1.1 History of Torture in Nepal

In Nepali criminal jurisprudence, torture is a main tool for the Nepali security forces to create evidence in the process of investigation of crime or to get the confession of the accused. Therefore, in Nepal, there is a very infamous proverb or statement which gives notoriety and ironic symbolic meaning of Nepali criminal jurisprudence: *Pahilekutnus ani bujhanus* (in English, first beat, then ask). This gives a kind legacy to torture in Nepal. It also helps us to understand

that, in Nepal, the use of torture by state agencies has become normalized.

Historically, it is very difficult to locate the timeline about how torture used to be taken in Nepal. However, for describing the incidents, nature and development of torture from political, constitutional and legal perspectives, this section has classified the phases of torture into the four major phases based on political movements and struggles of people of Nepal.

First section covers the history before 1990. Before 1990 there was no constitutional and legal provisions relating to torture and torture was not used to be taken as serious crime. When the Peoples' movement of 1989 became successful and multi-party democracy was restored, then the Constitution of the Kingdom of Nepal 1990 was promulgated. The 1990 Constitution provided the 'right against torture' as fundamental right. However, the 1990 Constitution did not criminalize the torture. Nepal also ratified the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment in 14 May 1991, four years after its entry into force. At present time, however, Nepal has neither signed nor ratified the Optional Protocol to the Convention.

The second phases of political movement are between 1990 to 2006. In this phase, due to Maoist insurgency, the political scenario was changed. In the name of suppression of Maoist movement thousands of people were killed and tortured from the State and Maoist. People of Madhes also became victim of torture by the State in the name of investigation, search and seizure because Madhesi people also had significant support to the Maoist movement. The Torture Compensation Act, 1996 was also enacted in this phase. However, this Act had also not criminalized the torture. It had only the provisions of compensation for torture. The Comprehensive Peace Accord was also signed on 21 November 2006 and it provides in this accord that all the incidents of torture shall be investigated and prosecuted which

occurred either side of Maoist or security forces. It was a milestone development in the history of torture.

The third phase includes during the period of 2007 to 2014. After the agreement of Comprehensive Peace Accord of 2006, the Communist Part (Maoist) of Nepal came into main political stream. The Interim Constitution of Nepal, 2007 was promulgated. The 2007 Constitution provided 'right against torture' as fundamental rights and criminalized the torture. It also provided compensation for victim of torture.

The fourth phase includes the time of 2015-2020. The Constitution of Nepal, 2015 was promulgated and continued the provisions of torture like 2007 Constitution. Another milestone development of this stage is the enactment of the Muluki Penal Code, 2017 which outlined the provisions of torture and criminalized and provides punishment for the perpetrator of torture. It also provides compensation to the victim of torture.

Historically, security forces in Nepal used torture as a tool to control the population. The rulers and authorities in the country continue to use torture as a method to rule over the marginalized and oppressed communities. Torture was and has remained a tool for social control and dominance. In the following sections the above four phases have been described in details.

1.1.1 Situation of Torture before 1990

Nepalese legal system was based on religious scriptures, *Manusmriti*, *Naradsmritis*, *Hindu Dharmashastra*, *rukkas*, *sanad*, *sawal*. Punishment system was based on caste system. The gravity of punishment was based on whether the accused was upper caste or lower caste, women or men. Punishment used to be inflicted on the basis of castes. Punishment was barbarous, torturous, barbaric and inhumane. Degradation from caste (*patiya* system), expelling from the villages, forcing the accused to eat excreta, putting the fire on the hands, drowning in ponds the modes of crime investigation and

punishment which was torturous and inhumane. Historically, looking back to the different dynasties of Kirat, Lichhavi, Malla, Shah and the Ranas, the practice of torture was a political recrimination. The historical literatures find that the physical and mental torture was inflicted on the accused during interrogation and to extract confession or information.

Muluki Ain of 1854 was also based on religious scriptures. Muluki Ain of 1963 was known as Secular Ain, but was also not free from legacy of Hinduism. Several provisions of this Ain was also inconsistent with the modern principles of human rights, rule of law and established and general principles of criminal law. This Ain was silent about the regulation of torture, however, the situation of torture was rampant in the process of crime investigation.

1.1.2 Situation of Torture from 1990-2006

Notably, Nepal set forth its journey of preventing torture after a major political upheaval in 1990. During the Panchayat (party-less) system, many political leaders were the victims of torture. Those politicians coming to power in 1990 pledged their commitment to end torture. Consequently, with the restoration of multi-party democracy regime, the Constitution of the Kingdom of Nepal 1990 outlawed torture for the first time in the history.

The 1990 constitution stipulated freedom from torture as a fundamental right. Its Article 14 (4) prohibited “physical or mental torture” and “cruel, inhuman or degrading treatment.” It also assured that the person tortured would be compensated “in the manner determined by the law”.

Meanwhile in 1990s, Nepal has also ratified the United Nations’ anti-torture conventions such as International Covenant on Civil and Political Rights (ICCPR) and its two optional protocols, the International Covenant on Economic, Social and Cultural Rights and the Convention against Torture (CAT) among others.

As required by the 1990 constitution and CAT, the Compensation Relating to Torture Act (CRT) 1996 was enacted. This was the first ever torture-related law aiming to compensate to the victims of torture, and punish the torturers. Thanks to politicians, lawmakers and civil society leaders and organizations for their deliberations for years.

However, the law fell short of criminalization in line with the CAT. The human rights community, including the UN, criticized the domestic law for a number of flaws. For instance, in accordance with the CAT, the government attorney pleads on behalf of alleged perpetrators and the state provides compensation to them.

With significant development in legal landscape until 1996 from the restoration of multi-party democracy system in 1990, hopes for an end to torture were high but they ended in frustration.

The ten-year-long conflict era (1996 to 2006) left indelible scars in the history for the prevalence of torture. It was not just the decade of internal armed conflict, but it was also the decade of gruesome experience of torture.

In its 2001 report - 'Nepal: Make Torture a Crime' in 2001, Amnesty International reviewed the practice of torture in Nepal. The report stated that torture as a punishment was still widely perceived as acceptable. Police and local authorities continued the historical tradition of torture and humiliation of detainees despite political changes over the last ten years. Amnesty's report (2001, p. 2) mentions:

Sometimes very gruesome forms of torture are reported. They include falanga (beatings on the soles of the feet) with bamboo sticks, iron or PVC pipes; belana (rolling a weighted bamboo stick or other round object along the prisoner's thighs, resulting in muscle damage); telephono (simultaneous boxing on the ears), rape, electric shock and beatings with sisnu (a plant which causes painful swellings on the skin). The latter method of torture is often inflicted on women, more particularly on their private parts.

The UN Special Rapporteur, who visited Nepal in September 2005, concluded in the report submitted to the UN in 2006 that torture and

ill-treatment are systematically practiced in Nepal. The Special Rapporteur's report states:

Torture and ill-treatment are systematically practiced in Nepal by the police, armed police and the RNA primarily to extract confessions and to obtain intelligence in relation to the conflict. That the Government urgently needs to send a clear and unambiguous message condemning torture and ill-treatment was made dramatically clear to the Special Rapporteur when he received repeated and disturbingly frank admissions by senior police and military officials that torture was acceptable in some instances, and was indeed systematically practiced.

Although no legal developments took place in the decade, the occurrence of torture had increased dramatically. Both the security forces and the Maoist rebel forces used torture to intimidate, suppress, control and punish victims. The Comprehensive Peace Accord was signed by the then mainstream political parties and the then Nepal Communist (Maoist) Party in 2006. They agreed to investigate and punish the perpetrator who was involved in the torture during the conflict era. However, the victim is waiting to see the perpetrator to be punished, but such day never come.

Over the decade, CRT remained the only legal recourse for torture victims. Even within the existing laws, when torture-related cases are filed at the courts, those responsible for torture are rarely brought to justice. As a result, thousands of victims of torture from conflict era suffered from injustice.

The UN Office of the High Commissioner for Human Rights (OHCHR), which established a large field presence in Nepal in May 2005, was also involved in carrying out monitoring and reporting of torture. In the report to the UN Human Rights Council on 18 February 2008, OHCHR-Nepal cited three different important issues:

- i. detainees who died in detention due to torture;
- ii. detainees were reportedly hidden prior to OHCHR visits, and
- iii. the pattern of torture and certain practices of torture common

during the conflict occasionally reappeared, mostly in connection with detained individuals accused of belonging to armed groups.

Over the period, CRT remained to be the only anti-torture law in effect until 2016, despite its flaws and the human rights community's wide criticism. The CRT, that remains the only anti-torture law in effect until 2016 fell short due to a myriad of reasons.

First, it aimed to provide compensation to the victims of torture but punish the torturers in a limited way. Second, it failed to meet the international norms and standards as envisaged in the CAT. Third, a defective criminal justice system led to failure of implementing the law. There is lack of victim and witness protection provisions for torture cases. There is a delayed justice delivery, including the implementation of court decisions. Likewise, there is a clear lack of effective monitoring mechanism and absence of proper investigation into the alleged torture. For instance, the government attorney pleads, and the state provides compensation on behalf of alleged perpetrators.

In 2008, Advocacy Forum in 2008 assessed the impact of CRT over its first 12 years (1996-2008) of enactment. The findings show that only 208 cases of torture compensation were filed in 12 years, only 52 victims were given compensations, and of those who got compensation, only seven victims (13.46 percent) received compensation money. None of perpetrators involved in these cases were brought to justice, as per the report Hope and Frustration: Assessing the Impact of Nepal's Torture Compensation Act 1996. Inefficient state machinery, lack of accountability, lack of activism and entrenched impunity have all contributed to dismal implementation of torture-related court decisions under CRT.

1.1.3 Situation of torture from 2007 to 2016

Unlike the conflict era, the period (2007-2017) marks substantial efforts to prevent torture. Despite the efforts, the practice of torture continued widespread and systematic. During its Universal Periodic

Review in 2015, Nepal received criticism from 73 countries for Nepal's poor human rights record, including the continuation of practice of torture. Acknowledging such shortcomings, the state accepted the need for the criminalization and impartial investigation of the acts of torture.

Nevertheless, the first half of this period was no better than earlier period. However, the second half of this period created a milestone development in the history of torture from constitutional and legal perspectives. These two constitutions criminalized the torture and made punishable. Nepal's two constitutions -- Interim Constitution of Nepal, 2007 and Constitution of Nepal (2015) -- guaranteed the right against torture and stated that torture will be "punishable by law," and "any person so treated shall be provided with such compensation as determined by the law". Let's see the constitutional provisions in textual forms for academic discussion.

Article 26 of the Interim Constitution of Nepal, 2007 provided 'Right against Torture' as follows:

- (1) No person who is detained during investigation or for trial or for any other reason shall be subjected to physical or mental torture or to cruel, inhuman or degrading treatment.
- (2) Any act referred to in Clause (1) shall be punishable by law, and any person so treated shall be provided with such compensation as may be determined by law.

In we compare Article 22 of 2007 Constitution with Article 22 of the Constitution of Nepal, then we do not find substantial difference exception the additional word 'victim'. Article 22 of the Constitution of Nepal provides 'Right against Torture' as follows:

- (1) No person who is arrested or detained shall be subjected to physical or mental torture or to cruel, inhuman or degrading treatment.
- (2) Any act mentioned in clause (1) shall be punishable by law, and any person who is the victim of such treatment shall have the right to obtain compensation in accordance with law.

1.1.4 Situation of torture from 2017 to 2020

After nearly three decades of advocacy for criminalizing to torture, Nepal has introduced torture protection under its criminal law through the passage of longstanding bills of Muluki Penal Code, 2017, Muluki Criminal Procedure, 2017 and Criminal Offence (Determination of Punishment and Implementation) Act, 2017 in 2017. Nepali parliament with the enactment of these Codes and Act created history in the history of torture and criminal law. Muluki Penal Code, 2017 provides the legal provisions in line with the 2007 and 2015 Constitutions. It did not only criminalize the torture, it also made individually responsible to the investigating officer if found his involvement in torture. From the legal point of view it was a tremendous change and progressive provisions of criminal law. Section 167 of Muluki Penal Code provides ‘Not to torture’ as:

- (1) The officials authorized in accordance with prevailing law to investigate the offence, to prosecute, to implement the law, to control as per law, to imprison or detain shall not torture another person physically or mentally or commit cruel, inhuman or degrading treatment to such person.

Explanation: For the purpose of this section, any person arrested, controlled or is in custody, detained, imprisoned or is in preventive detention or in the security of himself or because of such person any other person, because of the following purpose, if with intention physical or mental pain or torture or cruel or inhuman or degrading treatment or punishment is inflicted, then it shall be deemed as torture or cruel, inhuman or degrading treatment has been inflicted on such person.

- (a) to get the information on subjects,
 - (b) to get confession for any offense,
 - (c) to punish for any act,
 - (d) to coerce or create threat, or
 - (e) any act in violation of law.
- (2) Any person commits offence pursuant to sub-section (1), shall be punished, on the basis of gravity of such offence, with an imprisonment for a term up to five years or a fine up to fifty thousand or with both.
- (3) The person who commanded to commit the offense as per sub-section (1) or accomplice assisted to commit the offense as per this section shall be punished as the principal offender.

- (4) Any person committed the offense as per sub-section (1) shall not claim that such offense has been committed due to command of the senior and he/she shall not be exempted from the punishment for committing such offense.

The above provision of the Code is more progressive and scope is wide, however, the limitation to register first information report has minimized the scope this section. Section 170 (2) provides as:

The complaint shall not be taken after the lapse of six months of the concerned arrested, controlled or detained or imprisoned or person detained in preventive detention is released as provided in section 167 and in other offenses when it was committed or known.

The Muluki Penal Code which came into force from 17 August 2018 has, for the first time, defined torture as a serious crime with the provision of punishment with five years of imprisonment or a fine of Rs 50,000 or both. It has made the special provision for medical examination of torture victims. Unlike the previous law, the new law has provision for the perpetrators to pay the compensation. It has also ensured protection of the victims and witnesses. The cases of torture cannot be withdrawn once they are registered at the courts. These developments are expected to go a long way in ensuring justice to the victims of torture.

Although the definition of torture offered by the new penal code is far from satisfactory, the criminalisation of torture, however, offers hope for justice as under this law. It means the victims can seek both jail term and punishment besides compensation but the flip side of the new law is that many victims fear reprisal from the police and do not want to file first information report against their perpetrators. This happens also because the victims are supposed to lodge their FIR against in the same police office where they were tortured.

Since torture in Nepal has been referred to a systematic problem, it is impossible to prevent torture without systematic reforms. The Muluki Penal Code is an attempt to bring systematic reform. The

human rights community welcomed the state's positive move to criminalize torture.

A separate bill of anti-torture law is still pending in the Parliament and HRDs have demanded that the bill be passed without any further delay. There is a need for passing a new bill with some retroactive provisions so as to punish those that were responsible for torturing people during Maoist insurgency.

However, despite these positive steps, real systemic issues remain inside Nepal's judicial sector. The statute of limitations for torture cases is a scant six months, given the physical and psychological challenges for victims of torture to report such incidents, this makes it very hard to do so in time. Moreover, all such cases have to first have to submit a First Information Report (FIR) to police. Given that police and other members of the security forces are often the perpetrators of such human rights violations, this is a clear conflict of interest and intimidating for witnesses thus making it even harder.

Given the difficult in securing sentences it is then equally disappointing that punishments for those convicted of torture are low. The maximum sentence available for those sentenced for committing torture is five years in prison and a maximum fine of just NPR 50,000 (\$445). This is far below than the other regional and international sentencing standards. Moreover, this contradicts the maximum compensation stipulated in Nepal's 1996 Torture Compensation Act, which set the maximum level of compensation at double that at Nrs 1 lakh.

Moreover there have been many cases documented of failure to provide compensation after conviction. The lack of restitution for such cases is worrying. This and the need to repeatedly report to their District Administration Office for compensation and to find details of their case.^[1] This time taken will discourage other

¹ NEPAL: Government must allow custodial visitations and monitoring of detention centers <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-144-2016/>

complaints from coming forward and seeking justice.

Another worry is that Nepali Law does not allow for the “retroactively criminalize torture or enforced disappearances”^[2] raising real concerns regarding the ability of many of Nepalis who have faced torture in the past to get access to justice and to ensure Nepal has a proper transitional justice & national reconciliation.

While awareness raising about the new provisions along with the extensive intervention from the human rights community is equally important in exerting pressure on the authorities to take sincere efforts in the implementing of the Muluki Penal Code in relation to torture.

The progress of implementing the new law over the past two years shows that torture is yet to be realized as a criminal offence. The security authorities have reportedly been restricting the lawyers from accessing the detention centers and talking to the detainees even if such acts contradict the constitutional provisions and the changed law.

The implementation of the laws that this report is basically focused to assess is full of challenges.

Amid challenges, human rights community is still advocating for passing a separate anti-torture law complaint with the international standards. The bill for the same has been pending in the parliament since 2014. Likewise, ratification of Optional Protocol on Convention Against Torture (OPCAT) and establishing national monitoring mechanism for the detention centers are equally significant in the context wherein torture is a criminal offence provisioned in the Muluki Penal Code.

1.2 Methodologies and limitations

The nature of this research is qualitative. However, both the primary as well as secondary sources have been used in this research. Those primary and secondary sources are as follows:

CAT is the primary international instrument of this research. The primary sources at the domestic level are the constitutional and legal provisions of Nepal related to the torture. They have been discussed and analysed in this research to link them with the international human rights laws and to find their compatibility with international obligations. Fundamental rights incorporated in the 2015 Constitution is the main constitutional provisions which have been critically analysed in this research. Nevertheless, the legislation enacted to implement the fundamental rights of 2015 Constitution, that is, torture, has been given equal importance in this research because the legislation elaborates the constitutional provisions and provide the means to secure the constitutional rights and remedies.

Nevertheless, monitoring and documentation, case studies, court orders and a documentary review of relevant legal and human rights documents have been analysed and discussed. This study has also used THRD Alliance's resources like monitoring and documenting of torture and other forms of ill-treatment related literature on torture. At the same time, this research has its own limitation and the obstacles faced by the research while doing research on this topic. The limitations and obstacles faced by the researchers have been discussed in the following sections..

1.2.1 Monitoring and Documentation

One of the core methodologies that THRDA has taken into account for this study is its regular monitoring and documentation. For the monitoring, THRDA human rights defenders and lawyers visited police custodies in the places where they were allowed by the law enforcement agencies. Since 2016, human rights lawyers and organisations have been encountering problems in interviewing detaining as police are limiting and sometime denying access to human rights defenders to detention centres. The police are limiting human rights defenders' access to detention centres since reports of detention centres exposed serious problems of torture in detention centres across the country.¹ Police's decision to limit access to detention centres contradicts the constitutional provision. Article 20

¹ NEPAL: Government must allow custodial visitations and monitoring of detention centers <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-144-2016/>

(2) of the Constitution of Nepal provides for lawyers to visit detainees immediately after their arrest. The denial of permission from the law enforcement for easy access to custodial visitations shows that the monitoring and documentation of torture and other ill-treatment has come under scrutiny of late.

Despite challenges, the human rights defenders and lawyers have interviewed the detainees after they were released. Besides, they gathered the information from the detainees through visits to the families, community consultation, media reports and other sources among alternative ways. THRDA used questionnaire during interview with the detainees and their families seek information about how they were treated in the detention centre. THRDA also interviewed family members when the detainees were not available or refused to speak to THRDA due to fear of reprisal from the police.

These detainees were from the different 19 districts of Tarai where THRDA have been working (Kailali, Kanchanpur, Bardiya, Banke, Dang, Kapilvastu, Rupandehi, Nawalparasi, Parsa, Bara, Rauthat, Sarlahi, Mahottari, Dhanusha, Siraha, Saptari, Sunsari, Morang and Jhapa).

1.2.2 Case Studies

THRD Alliance has prepared case studies which show how the victims fought for their rights, what are the obstacles for getting justice and how long the victims should wait to get justice. These studies offer information about the severity of torture employed in the Tarai and methods employed to torture people.

1.2.3 Court Orders

THRDA continues to follow the court orders issued under Compensation relating to Torture Act directing that the perpetrators to pay compensation to the victims. However, victims were found to be reluctant to file torture case against their perpetrators under the Muluki Penal Code due to fear of reprisal.

1.2.4 Review of Constitutional and Legal Provisions

Right against torture is fundamental rights since 1990. However, it was made punishable only in 2007 by the 2007 Constitution. Therefore, the provisions of the Constitution of the Kingdom of Nepal, 1990, Interim Constitution of Nepal, 2007 and Constitution of Nepal have been compared. In the year 2017, the Parliament passed the long pending bills of criminal code known as Muluki Penal Code, 2017, Muluki Criminal Procedure Code, 2017 and Criminal Offence (Determination and Punishment and Implementation) Act, 2017. The penal code that came into force on August 17, 2018 criminalised torture for the first time in Nepal.

CHAPTER

2

Torture in the Tarai

For too long, the Nepali establishment has been denounced for its differential treatment towards people from the Tarai.

- Editorial, Kathmandu Post, 27 June 2019²

Torture in the Tarai is ethnically disproportionate. While this subject lack empirically valid and theoretically informed research, nevertheless, media and human rights communities, including the National Human Rights Commission and the United Nations Office of High Commission for Human Rights have widely reported and documented the issues of torture and other cruel, inhuman or degrading treatment.

Situation of Torture in Tarai

The incidence of torture and other cruel, inhuman or degrading treatment among human rights violations is widely prevalent in the Tarai. Police often treat the Madhesi and Tharu communities living in the region differently. Madhesis and Tharus, who speak their own language and who have their own culture different from hill communities, have suffered systematic discrimination mainly due to their language and culture and affinity with people on the other side of the border. Hill people's attitude towards Madhesis and Tharus has changed since 2007 Madhes movement, however still there are people in the hill communities who suspect their loyalty to the nation. This racial prejudice is at the root of systematic discrimination against Madhesis and Tharus.

² "The police must stop its discriminatory practices." Editorial, Kathmandu Post, 27 Jun. 2019, <https://kathmandupost.com/editorial/2019/06/27/the-police-must-stop-its-discriminatory-practices>. Accessed 8 Jun. 2020.

Police often resort to excessive use of force against Madhesis and Tharus. This is evident from the fact that whenever there is unrest and agitation in Madhes, police force deployed to maintain law and order use excessive force causing death and serious injuries. Between the period of 2007 and 2016 when Madhesis and Tharus protested for their rights, police often used lethal weapons to suppress them causing death and serious injuries. Often the chief of police offices in the Tarai are from hill district who view Madhesis and Tharus as lawbreakers and civilized.

A low-ranking policeman told a Tarai Human Rights Defenders Alliance (THRD Alliance) human rights defender that his pahadi boss used to tell him during Tarai agitation that there should be no mercy against the protesters and the police should not hesitate to use lethal force against the protesters. It is because of this psychology among the police personnel that victimize Madhesis and Tharus. Whenever there is protest in Kathmandu valley, police use water cannons to disperse the protesters but in the Tarai, lethal weapon is used easily to quell the protests. One example shows how people of Madhes suffered at the hands of the security personnel. Between April 2008 and May 2011, 281 alleged extrajudicial executions were reported in the Terai and in 132 cases security forces were the alleged perpetrators.³ There is one video shared by CK Raut led group which shows that during protest police personnel cornered two young boys, who may or may not be the protesters, and rained batons on them and savagely kicked them even when they begged for their lives. Therefore, Madhesis and Tharus are more prone to torture and ill-treatment from the police. A new report—Rise of torture in 2018—published by Advocacy Forum, an organisation that aims to combat the culture of impunity in Nepal, revealed that people from ethnic communities in the Tarai are more prone to torture and misbehaviour from the police. Findings of the report as mentioned in a story carried in this paper reveal that while overall torture rates in detention centres

³ Constituting Extrajudicial Executions in the Terai, page 15.

across the country have risen sharply, Tarai communities, primarily Madhesis and Tharus, are facing the brunt of the punishment. Such differential treatment by the police—an extension of the government who is circumstantially allowed to use force—is condemnable and it needs to stop.

Until 2007, there was no proper monitoring and documentation of human rights violations in Tarai. Even during the decade long insurgency (1996-2006) when the human rights violations, including torture, remained unabated. Terai has a substantive share of the human rights violations committed during the Maoist insurgency. For instance, a study by the UN Office of the High Commissioner for Human Rights (OHCHR) regarding disappearances in Bardiya district clearly indicates that the state security forces specifically targeted Tharus for arrest and torture.

Even after the signing of Comprehensive Peace Accord, the failure of the peace process to address the concerns raised by people from Terai has resulted in numerous protests and strikes. While most demonstrations are peaceful, some have resulted in violent confrontations with the police. OHCHR documented repeated use of excessive force by the police, increasing tensions and the likelihood of violent confrontation.

The incidents of torture in Tarai districts have been found to be higher than the national average due largely to lack of awareness and laws.

Until 2007, there was no proper monitoring of torture also because government and non-government agencies' activities were constrained during Maoist insurgency from 1996 to 2006. Proper documentation of torture and other forms of human rights violation started only after UN OHCHR set up its office in Nepal. The NHRC was in existence even before OHCHR started its office in Nepal post conflict, but the NHRC failed to do the monitoring of torture cases mainly due to language barrier and resource crunch.

In the Terai, cases of torture have gone up between the period of 2007 and 2016 when people of Madhes staged street agitation with the aim of pressuring the major parties – the CPN-UML, the CPN Maoist Centre (now Nepal Communist Party (NCP) and Nepali Congress to address their concerns in the new constitution. THRDA's human rights defenders have always monitored these protests. Human rights defenders do not have access to detention centres

According to a study carried out by the THRD Alliance, in 2017 23.76 percent of 766 detainees interviewed in 19 districts reported torture. The national average of torture incidents among the detainees stood at around 17 percent. Over 13 percent of the interviewed detainees were never produced to the court within 24 hours of their arrest and over 11 percent of them were not provided with medical care, in a 'clear breach of constitutional guarantee of fundamental rights and universal principles of human rights and fair trial, says the report 'Torture in Terai 2016'.

CHAPTER **3**

Analysis of Implementing Status of Muluki Penal Code, 2017

No police personnel have been booked for torture since torture was criminalised in 2017.

Using the evidence generated by THRDA through various methodologies discussed in the first chapter, this chapter primarily looks into the implementation status of the newly enacted Muluki Penal Code, 2017 that criminalised torture and inhuman or degrading treatment for the first time. This law came into force on 17 August 2018. The chapter subsequently analyzes trends of torture, torture methods, implementation status of court orders and compensation.

3.1 Implementation Status of Torture

3.1.1 First Information Reports (FIR) Refused

The human rights community applauded the criminalization of torture after the Penal Code defined torture as a serious crime. With this, the incidents of torture and inhuman or degrading treatment require to be investigated and prosecuted by the state. However, THRDA's monitoring and documentation found that there has not been any progress in the implementation of the new anti-torture law. This is evident from the refusal of the first information reports by the police officers. Some case studies have been mentioned here.

CASE STUDIES

On 30 June 2019, Police Post of Mangalapur, Rupandehi refused to register FIR of the alleged torture victim Sanjeev Shrestha (41 years old), resident of Butwal. On 2 June 2019, Shrestha was arrested for violating traffic rules and he was beaten up in the detention center.

On 29 October 2019, Area Police Office, Lumbini refused to register FIR of Om Prakash Chai (aka Chinak Chai, 46) who was allegedly tortured in police custody. Police refused to register the FIR claiming that no torture was inflicted on Chai. On 27 October 2019, Chai, a resident from Mayadevi Rural Municipality in Rupandehi, was arrested after police found him involved in a dispute with a person. He said he was tortured by the police in police custody. THRDA reported this case to NHRC Butwal office on 17 November 2019.

On 23 June 2019, District Police Office, Rajbiraj refused to register an FIR filed by Jasodhya Devi Yadav (50) and her daughter Saraswati Devi Yadav (30), residents of Dakneshwori Municipality Ward number 9 in Saptari district. They were reportedly beaten up by their neighbor, who is a police constable. The reason for the refusal is that the police decided that the FIR is not qualified for the registration. The police constable beaten her up alleging her of practicing witchcraft.

On 29 August 2019, Sushil Kumar Karn, an activist from Janakpur was beaten up by police after he was called by the police. He had earlier video-graphed when police were beating a street vendor in Janakpur. Earlier, the victim was ready to file the case to the district police office of Dhanusha but the chief of police informed the activist that the office already took a departmental action against the accused police personnel. Thereafter, he refused to file the case. According to DSP Sekhar Khanal, the accused police personnel was transferred to Kathmandu.

In the above case studies, THRDA found that many victims of torture were hesitant to file cases of torture against police officers in the same police office for fear of appraisal by the accused police officer. In those cases, the fellow police officers were also found not cooperating with the victims. Fellow police officers were reluctant

to file FIRs lodged by the victims of torture. Investigation into the incidents of the torture can proceed only when police register victims FIRs. These findings are in line with the THRDA's similar experience in extrajudicial execution cases. In the past, police had refused to register FIRs filed by families of those people who were killed in fake encounters.

In some cases families of EJK victims had approached the court seeking to register their FIRs and the court had also ordered the police to register the victims' FIRs but even after the court orders, the concerned police offices had refused to register the FIRs in one or the other pretext.

3.1.2 Procedural challenge

Section 5 of Muluki Criminal Procedure Code, 2017 has incorporated provision whereby victims of police brutality could be registered through FIRs against their perpetrators. As per the provision, if a concerned police office refuses to register an FIR then the FIR can be filed to the public prosecutor or the superior police office. The public prosecutor and superior police office shall send the FIR to the concerned police office for the necessary action. Even if the public prosecutor or the higher police office refuse to register the victims' FIR, then the victim can file FIRs in the concerned District Administration Office also. In case the District Administration Office refuses to register the FIR, the person can file it at the Ministry of Home Affairs too. Section 5 of the Code provides as:

Complaint against refusal to register first information report or information:

- (1) If the concerned police office refuses to register a first information report or information made or given pursuant to sub-section (1) of Section 4, the person making or giving such report or information may make a complaint, setting out the matter, and accompanied by the first information report or information of the offense, to the concerned District Attorney Office or to the police office higher in level than the police office required to register such first information report or information.

- (2) If a complaint referred to in sub-section (1) is received, such Government Attorney Office or police office shall maintain records thereof and send such information report or information to the concerned police office for necessary action.
- (3) The concerned police office shall register the first information report or information received pursuant to sub-section (2) and take action pursuant to sub-section (3) of Section 4.
- (4) If the office or authority referred to in sub-section (7) of Section 4 refuses to register any information referred to in that sub-section, the informant may make a complaint, setting out the matter, and accompanied by the information of offense, to the chief district officer of the concerned district.
Provided that if the chief district officer himself or herself has been designated as the investigating authority and refuses to register such information, such a complaint may be made to the concerned Regional Administrator or Ministry of Home Affairs.
- (5) If a complaint is received pursuant to sub-section (4), the concerned chief district office, Regional Administrator or Ministry of Home Affairs shall make decision to or not to register the information within three days and give direction to the concerned office to do or cause to be done accordingly.
- (6) Upon receipt of a direction as referred to in sub-section (5), the concerned office or authority shall take action in accordance with the direction.

This long process of FIR registration has created administrative hurdles delaying justice for the victims. Compared to the Muluki Criminal Procedure Code, THRDA's experience shows that seeking remedy under CRT was easier and hassle free for the victims as they were able to file the cases to the courts directly as private case.

3.1.3 Withdrawal of FIRs still continues

Before the Penal Code came into force, THRDA's experience showed that the victims were withdrawing their FIRs after they were threatened by their perpetrators or offered monetary help. THRDA was hopeful that the non-withdrawal provision introduced in the Muluki Criminal Procedure Code would have a positive impact.

Section 116 of the Code does not allow cases of offence under Schedules 1 and 2 to be withdrawn once it is registered in the court.

According to the list of cases which cannot be withdrawn, the cases of torture also cannot be withdrawn once registered in the court.

Prohibition on withdrawal of cases:

- (1) Any case once filed in the court on any offence under Schedule-1 or Schedule- 2 may not be withdrawn.

However, here, the case is that the when the victim goes to the police office to register the FIR, first, they are not ready to accept and register the FIR. Even if they accept, then the polices do not register. If they register, then they force or coerce or threat the victim to withdraw the FIR. In some cases, police often take the FIRs without registering them and put pressure on the victims threatening them that if they did not withdraw their claim then they would frame them in criminal cases. The alleged police offer the victims monetary incentives if they withdraw their claims.

The withdrawal of the FIR continues in one or the other way, THRDA's monitoring and documentation shows. Due to these reasons the cases of torture do not go in the process of prosecution of charge-sheet and trial process.

Some case studies have been mentioned here about the procedural challenges being faced by the victim of torture.

CASE STUDY

On 11 May 2019, Mohammad Nazir Khan, 57, of Narayanpur Rural Municipality- 1 was beaten up by APF Inspector Puran GC and Assistant Sub Inspector of Nepal Police Dirgh Bahadur Sahi for allegedly bringing woods from nearby forest. His left hand was broken after the police officials thrashed him severely. He also had bruises on different parts of his body.

On 16 May 2019, Nazir visited the office of THRD Alliance in Nepalgunj, requesting for support. Next day, the victim, with the help of the organization, filed an FIR at the district police office, Banke, accusing

the police officials of torture. However, the DPO did not register the FIR saying it contained the names of its officials.

On 17 May 2019, Nazir, under pressure by police, and local political leaders, agreed to make a compromise with the police and later decided to withdraw the complaint after the police agreed to provide him medical expenses.

A political representative said on condition of anonymity, the man withdrew the case as the police threatened to indict him in the criminal case that could land him in jail for 20 years.

Likewise, THRDA human rights defenders and lawyers found that police offices received the FIRs without formally registering them. Instead of registering them, they told the applicants that they would seek explanations from the alleged police personnel and take action against them. Despite frequent attempts, they did not register the FIRs.

CASE STUDY

On 23 July 2019, District Police Office (DPO) of Rupandehi refused to register an FIR filed by three juveniles -- Umesh Patharkat (10 years old), Pawan Patharkot (12 years old) and Shiv Kumar Loth (11 years old) -- residents of Chhapiya village, Shiyari Rural Municipality Ward number 4. The accused of the alleged torture and ill-treatment were the police personnel from Area Police Office of Chhapiya. Police tortured the boys accusing them of stealing a mobile phone on 18 July 2019.

Initially, the DPO kept the FIR without formally registering it and told applicants that they would seek explanation from the alleged police personnel and take action. Following the event, THRDA monitor and lawyers made frequent visits to the DPO to inquire about police's action and progress on the FIR. In response, they said that they are still looking into the matter. The police have not registered the boys' FIR yet.

THRDA monitor and lawyer have continued their follow-ups. Meanwhile, the case was registered with the office of National Human Rights Commission, Province 5 Butwal on 21 July 2019.

3.1.4 Medical Examination Problems, especially lack of mental health check-up Continues

THRDA's monitoring and documentation in 2018 and 2019 showed that the past problems with medical examinations has continued even though the Criminal Procedure Code has come up with new provisions related to medical examinations.

Section 22 of the Criminal Procedure Code has made provision for the examination of wounds of victims. It has special provision for the medical examination of torture victims. Sub section 2 and 5 of Section 22 of Criminal Procedure Code have special reference to torture victims. Sub section 2 says that a victim or a third person on behalf of the victim can file an application to the court seeking physical examination of a torture victim and the court can order to do the physical examination of such person from a doctor or a medical professional prescribed by the government. Sub section 5 provides that the court shall order the alleged perpetrator to bear the cost of medical examination of the torture victim and also provide interim relief to the victim if the court finds that the victim is tortured or beaten up in the detention center. Section 22 of the Code provides as:

Examination of injury:

- (1) If any person sustains any injury, bruise, abrasion etc. on his or her body in an incident that happened because of battery and the investigating authority makes a request for the examination of injury, the government doctor or health worker shall examine injury, bruise, abrasion etc. sustained by that person and execute a deed of such examination in the form set forth in Schedule-16.
- (2) If, in addition to that mentioned in sub-section (1), a person who is held in detention in the course of investigation or any other person on his or her behalf makes an application, accompanied by the reasonable ground, stating that evidence may be found, upon the examination of his or her body, that he or she has been battered, subjected to torture or an other offence has been committed against him or her, the court may order to cause such physical examination of such person to be conducted by a government

medical doctor or a doctor or health worker as specified by the Government of Nepal.

- (3) Even in conducting such physical examination pursuant to sub-section (2), injury examination referred to in sub-section (1) shall be conducted.
- (4) The concerned medical doctor, expert or laboratory shall make available the post mortem and other report of examination conducted pursuant to Sections 20, 21 and this Section to the concerned office or investigating authority no later than three days after the date of such examination, excluding the time required for journey.
- (5) If it appears that the person held in detention pursuant to sub-section (2) has been battered or subjected to torture, the court shall order the concerned police office to have medical treatment of the person so battered or tortured and provide interim relief to such a person and to take departmental action, in accordance with law, against the person who has so battered or tortured.
- (6) If the investigating authority does not ask the government doctor or health worker to examine injury pursuant to sub-section (1), the concerned person may make an application to the court, setting out the matter; and if such an application is made, the court may ask the government doctor or health worker for the examination of injury.

In the cases monitored and documented by THRD Alliance, police personnel have continued to use the format of medical examination, known as Injury Examination Report, which fails to ensure a thorough examination of torture victims. On top of that, there is no examination of the detainees' mental condition simply because there is no legal provision for mental examination in this clause. Although Section 167 of the Criminal Code has prohibited both physical and mental torture, a thorough medical report for torture cannot be prepared without an expert's examination of mental condition of torture victims. The irony is that the medical examination clauses included in the Criminal Procedure Code specifically mentions "physical examination" alone. This has failed to stipulate provisions on examining huge impact or damage caused by torture upon one's mental condition.

The lack of mental health examination of detainees had led to the incidents of suicides committed by the detainees in police custody.

Suicide is one among various forms of custodial deaths in Nepal. In lack of mental check-up, police fail to analyze if any detainee should be under suicide watch to prevent such incidents in the detention centers. It is the duty of police authorities to protect the rights of detainees as guaranteed by the constitution. Our monitoring found that the police did not do enough to protect the life of the detainees. The following case study shows the situation of mental torture in detention center.

CASE STUDY

On 10 June 2020, Sambhu Sada Musahar, aged 23, of Sabaila Municipality Ward Number 12, Dhanusha district, died in police custody at around 2 am. He had been in detention since 26 May 2020. On 26 May 2020, he surrendered himself to the Area Police Office (APO), Dhanushadham. The next day (on 25 May 2020), the APO Dhanushadham had transferred him to the APO of Sabaila since the incident had taken place within the latter's jurisdiction. On 25 May 2020, the tractor that he was driving hit two persons. Among the injured, a woman died on the way to hospital.

The detainee was found dead in the wee hours on 10 June 2020, and the facial crime scene is of suicide, according to police. Chandrabhusan Yadav, in-charge of Sabaila APO told our monitor that the detainee hanged himself to death in the bathroom with the help of his dress (t-shirt).

However, the family members of the detainee did not trust the police's claim. Three days before the incident took place, his mother and mother-in-law had met Sambhu in the detention center of APO Sabaila. According to them, the detainee looked scared and worried. He had told them that he might be killed if he was not released instantly.

3.1.5 No fine and Imprisonment for the perpetrators

Over the past two years since the Muluki Penal Code was enforced, no perpetrator has been fined and imprisoned under the newly enacted law. Unlike the CRT, the Code provides that the perpetrators of torture

will be punished with five years' imprisonment or a fine of fifty thousand rupees or both.

Refusal of FIRs and lack of an independent investigation as shown in THRDA's monitoring and documentation, this provision for the fine and imprisonment for the perpetrator has not yet been implemented. Once this provision of the Code is implemented properly, it will help to curb the long-standing impunity. However, two police personnel have been jailed for killing a person in Baitadi.

CASE STUDY

On 13 May 2019, a team of five police personnel led by Sub-Inspector Ashok Bahadur Pal from Nepal Police reached the house of KamalakantPanta, 74, inBhakuda, situated in Ward number 6 of Patan municipality, Baitadi at around 11 pm. The police, following a complaint by his neighbour Devaki, went to Kamalakant's house to arrest his LavadevPanta. Lavadev Pant had consumed alcohol at Devaki's house. A verbal duel and scuffle ensued between Devaki and Lavadev after he refused to pay NPR 160 as demanded by Devaki. Devaki's daughter Shanti got injured during the scuffle. Devaki called the police. The police handcuffed Lavadev and started beating him with a stick when his father, Kamalkant, was sleeping in his room. He came out of his bedroom and requested the police to take his son to the Area Police Office, but not to beat him up. He informed the police that he would discuss the issue at the police office the next day. Police personnel felt that Kamalkant was lecturing them and therefore, they shouted at him. Police personnel started beating the elderly man with their sticks as well. The elderly man fell on the ground. After about 1.30 hours, he succumbed to his injuries, according to the victim's family members.

3.1.6 Statute of Limitation obstructs justice

Compared to the CRT, the statute of limitation to file a case of torture has been increased. Section 170 (2) mentions that a victim of torture can file a complaint within six months of either the date of incident or the date of release of the person from the detention or

prison. However, this provision obstructed justice for the torture victims whose aftereffects were seen after six months. This contradicts with the international principle of human rights. How does the law of limitation affect the victim of torture can be experienced from the following case study?

CASE STUDY

The Supreme Court withheld the judgement in the case of a torture survivor Prashanta Pandey. On 23 January 2013, he had filed a case to the apex court seeking relief and requesting the latter to order that the 35-day statute of limitations is not applied to his case. It took 6 years for the Supreme Court to give the verdict. He could not get justice as the court did not disregard the statute of limitations established under domestic legislation.

On 7 April 2011, three police officers from the Rupandehi District Police Office arbitrarily arrested Mr. Pandey without being informed of the reasons for his arrest nor with any arrest warrant. He was brought to Lumbini Zonal Police Office and subjected to repeated interrogations, torture and severe ill-treatment, in order to extract from him a confession on his alleged involvement in the planning and execution of a bomb-explosion perpetrated on 27 March 2011, in which he always denied having any implication.

He was repeatedly beaten, kept constantly blindfolded and handcuffed, insulted and threatened. He was even forced to urinate on an electric heater, that made him bleeding and fainting, but never received any medical treatment or attention. Exhausted and prostrated Mr. Pandey signed a confession extorted through torture on 13 April 2011. Today, as a consequence of the many torture endured, Mr. Pandey still suffers of a grave form of depression and sexual dysfunctions.

Between 7 and 11 April 2011, he was held incommunicado. While his mother was struggling to determine his fate and whereabouts, Nepalese authorities denied having knowledge of his deprivation of liberty and deliberately concealed his whereabouts. It is only after Mr. Pandey signed this confession that he was allowed to communicate to the outside world. Newspaper articles were published and he was labeled as a terrorist and a murderer.

3.1.7 The denunciation of acts of torture and the impunity of their authors

As soon as he was brought before a judicial authority, he denounced having been subjected to torture. However, these allegations were never investigated and, although he disclosed the identity of the officers responsible, they were never prosecuted and sanctioned.

Mr. Pandey was kept in jail whilst the trial against him took place and he endured inhumane conditions of detention.

On 13 June 2012, the Rupandehi District Court held that there was no evidence of Mr. Pandey's involvement in the placement of the bomb. He was however declared responsible for the preparation of the attack and sentenced to one year's imprisonment, which he had already spent during the trial and was thus released. The confession obtained through torture was considered as valid evidence.

His attempts to obtain justice and redress for the harm suffered were frustrated, as Nepalese authorities refused to register his claims because he did not report the torture within 35 days from having suffered such treatment (which would have been concretely impossible for him).

The Supreme Court's decision contradicts with the conclusion of the Human Rights Committee in response to the submission of Mr. Pandey's complaint, which was facilitated by TRIAL International and THRDA. The Human Rights Committee considers Nepal responsible for the violation of Mr. Pandey's right to liberty and security, as well as his right to a fair trial. In addition, Nepal is held responsible for his detention in inhuman conditions. The UN body calls on Nepal to investigate the facts and prosecute those responsible for these acts. The Human Rights Committee calls for psychological support, public acknowledgement of the suffering endured (e.g. public apology) and reparation measures.

3.2 Trends and Patterns of Torture

Although there are decreasing rates of torture from conflict to post conflict period, rates are still significant. The data suggests the prevalence and reporting of torture initially, then substantial decrease after the end of the armed conflict in 2006. The torture trend after the following years has not changed much.

In the recent years, the overall torture trend in Nepal has significantly decreased, it, however, remains the same or has increased in the Tarai districts. In 2016, THRDA found that 167 (24.74%) detainees out of 674 interviewed in various detention centers of 19 districts were found tortured by Nepal Police. Among those tortured were 9.79% (66) women and 8% (154) juveniles below the age of 18. Likewise in 2017, THRDA found that 118 out of 882 detainees, complained of torture including a case of custodial death in Siraha district.

The reports of the human rights organizations and the UN consistently exposed that torture continues in police detention facilities of Nepal. Significantly, the trends of torture have been changed much because of the enactment and enforcement of Penal Code criminalizing torture. However, the implementation of the law falls short to impartially investigate acts of torture, and provide victims the right to reparation.

3.3 Modus Operandi of Torture

Documented evidences show that the modus operandi of torture are diverse and they can be difficult to track. THRDA's monitoring and documentation consisted of both physical and mental torture. Kicking by boots, beating with plastic pipe, bamboo sticks and wooden sticks, butt of rifles, slapping, punching, making jump upside down and forcing the person to do push-ups, pulling hair, burning with cigarettes, keeping in detention without food and water among others were methods of physical torture. Likewise, the major forms of mental torture included threats to put under strong charge, death threats,

spitting in food, vulgar words and racial slurs and humiliating words relating to the ethnicity of Madhesi and Tharus.

In 2017, some cases have been reported where other co-detainees have been ordered to beat the detainee in the detention centres. The detainees are receiving threats of being indicted with serious crimes and detained for longer periods.

CHAPTER

4

Role of National and International Monitoring Mechanisms

The international human rights treaties signed and ratified by Nepal and domestic legal instruments enacted aim to address torture and CIDT issues. Based on documentary research, case studies and interviews, this section presents an analysis of effectiveness of the national and international instruments and mechanisms to monitor, investigate and prosecute and redress for the acts of torture.

4.1 National Instruments and Mechanism

The Constitution of Nepal 2015, CRT 1966 and Penal Code Act 2017 under domestic provisions are usually followed for the monitoring, investigation and prosecution for the acts of torture and ill-treatment.

NHRC, Office of Attorney General, Nepal Police Human Rights Unit (NPHRU) and judiciary are the mechanisms instituted to address torture-related issues. Experts interviewed for this research pointed out on the independence of these mechanism. Their observation is the same in line with the observation of OHCHR, which states that the he Attorney General and Nepal Police Human Rights Unit lacked independence, as cited in 3c (50) of its compilation (Human Rights Council, 2015). It also further stated that the NHRC was understaffed, and it also needed greater capacity for systematic monitoring and visits to detention sites.

The Office of Attorney General is a constitutional body, according to the Constitution of Nepal 2015. Article 158 (6c) of the Constitution stipulates the power of Attorney General:

If a complaint is made alleging that any person held in custody has not been treated humanely subject to this constitution or such person has not been allowed to meet his or her relative or through his or her legal practitioner or if information of such matter is received, to inquire here into and give necessary directive to the concerned authority to prevent such act.

In its annual report 2015, the Office of Attorney General found problems related to the capacity of prisons, and detention centers along with infrastructural facilities. The report mentioned that none of the person kept in detention centers were found without remand and the detainees received humanely treatment. However, the data produced in this report from different sources does not corroborate with this statement (Terai Human Rights Defenders Alliance, 2016).

Likewise, NPHRU, that was established in Nepal Police on January 16, 2003 to ensure better protection and promotion of Human Rights. The Human Rights Unit is established to uphold the realm of International standard of Human rights in policing and monitoring the human rights practices within the organization (Nepal Police, n.d.). Following the court's order, the NPHRU implements the decision of departmental actions against those police personnel violating human rights, including those of detainees. However, the question again arises here is on its independence, according to human rights organizations.

4.2 International Instruments and Mechanism

The CAT among others signed and ratified by the country is the relevant international human rights instrument. The Committee Against Torture is responsible for reviewing the implementation of CAT. The committee reviews all state parties' reports on a regular basis.

Nepal has not submitted its third, fourth or fifth reports to the Committee Against Torture. These were initially due in 2008. Nepal's

concluding observations to the review due in 2006 were made in 2007, and it still has not submitted follow-up clarifications. The failure in dialogue prompted the Committee to make a confidential inquiry on Nepal in 2010, resulting in a report in 2011.

Nepal has legislated a law criminalising torture but it is relevant to ratify OPCAT.

Universal Periodic Review (UPR)

The UPR is a mechanism is a mechanism with a mandate of promoting human rights and monitoring the human rights situation of UN states parties. It is administered by the Human Rights Council, and reviews 48 countries a year in three 2-week sessions. Each country is considered every four years (Office of High Commissioner of Human Rights, n.d.). The review assesses compliance with international human rights instruments and humanitarian law, and finally concludes with recommendations, which the state under review can accept or provide comment on. Nepal, as a state party, started to participate in the UPR process in 2011.

Recently, Nepal has participated in the second UPR on November 4, 2015. Out of 195 recommendations made by 73 different countries, the government of Nepal had initially accepted 148 recommendations and noted 18 during the UPR in 2015 (National Human Rights Commission , 2015). These include criminalizing and impartially investigating acts of torture, and provide victims the rights to reparation, and also to pass legislation and provide funding to ensure the independence of the NHRC.

Asian Legal Resource Center (ALRC) in its oral statement during the UPR process has described the UPR in relation to Nepal as a “mere ritual” (Asian Legal Resource Center, 2016).

CHAPTER

5

Conclusion and Recommendation

While THRDA welcomes the government's step to introduce torture under its criminal law, it expects effective and transparent implementation of the provisions in line with international principles. Recent legal developments in 2017 are positive, yet there remains a long way to go before torture is eradicated from Nepal. Large judicial reform needs to take place, as does the provision training and education security forces regarding torture and internationally accepted techniques of arrest and questioning. Discrimination must be eradicated and ethnicity cannot be a basis for how a person is treated by security forces. Laws that are ratified need to be properly implemented throughout the country and domestic legal observers should be able to easily observe conditions inside prisons and detention centers across Nepal. Progress has been made, yet there remains a long way to go.

Based on the above analysis and observation, THRDA would also like to make the following recommendations to the Nepal government:

- Set up an independent investigative body to effectively implement the provisions of penal code that criminalizes torture. Such a mechanism is necessary to effectively to prosecute for acts of torture and to prevent such acts from occurring again.
- Make the anti-torture legal provisions fully compliant with the international human rights conventions – more specifically THRDA demands to enact a separate anti-torture law in compliance with international human rights standards.

- THRDA urges the NHRC, National Human Rights Unit of Police as well as the Office of the Attorney General for effective and transparent monitoring of detention centres and also to collaborate with Human Rights NGOs in this regard.
- THRDA urges the Nepal government specifically Nepal police to allow HRDs free access to detainees and respect their right to fair trial and ensure they are kept in clean, sanitary healthy conditions, in line with international prison standards.
- THRDA would also like to urge the government of Nepal to investigate all allegations of torture and implement the decisions of NHRC as well as Courts and to provide justice and reparations, to the victims in a timely manner
- Ratify Optional Protocol on CAT (OPCAT) and form a National Monitoring Mechanism for all detention centres to strengthen legal provisions against torture.