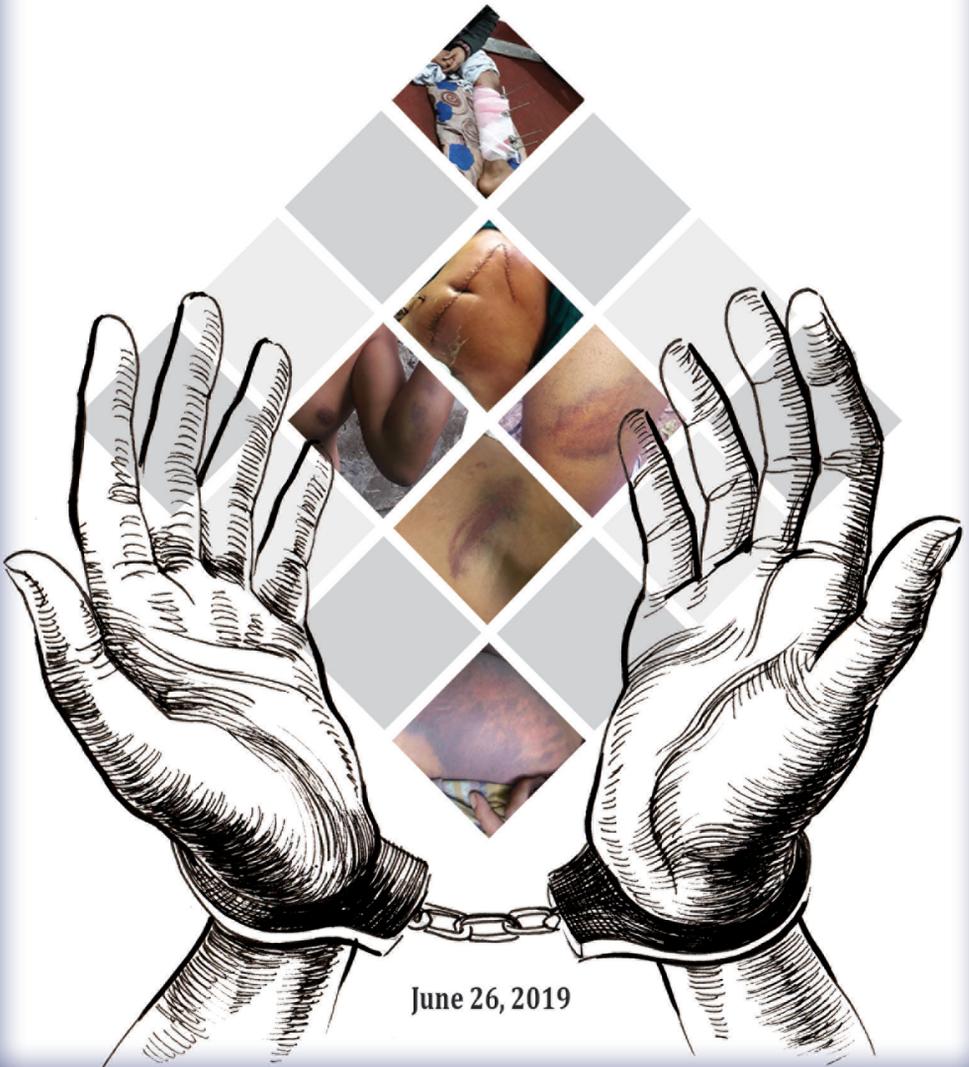




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RISE OF TORTURE IN 2018

Challenges Old & New Facing Nepal



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FOREWORD

Every 26th of June, Advocacy Forum (AF) publishes a report outlining the situation on torture and Human Rights in Nepal to mark the International Day in Support of Victims of Torture. This report follows past years publications through sharing the findings from AF's monitoring efforts over 2018 followed by a general analysis. AF lawyers and staff work tirelessly all year round to record brutal and inhuman instances of torture and other ill-treatment of survivors of torture in detention centres.

AF wishes to acknowledge and express sincere thanks to Matthew Chau for compiling all of the relevant information, conducting data analysis, and drafting the overall report with invaluable guidance and supervision from Mandira Sharma and Ingrid Massage. Sincere gratitude is further extended to all AF staff who worked hard collecting data during regular visits to police detention centres, providing free legal aid, medical support for detainees in need, and for helping provide key documents and translation. AF's dedicated team in 2018 includes: Bikash Basnet, Pushpa Raj Poudel, Basanta Gautam, Shova KC, Sammar Basnet, Roshani Giri, Bal Krishna Ghimire, and to all further AF staff at central and provincial offices.

This past year was a difficult one. It pains to see that reports of torture rate have increased after consistently declining over

the past six years. The threat of Nepal taking a step back and reversing all of the hard work done by AF and other human rights organisations to bring the torture rate down from over 50% at its peak in 2002, all the way down to 16.2% in 2014, emphasises the significance placed on this year's data and the essential importance of AF's work to continue this downward trajectory.

In the face of continued resistance when accessing detainees and an increasingly hostile political and legal climate, AF and survivors of torture have both showed bravery and resolve in the pursuit of justice. AF is forever indebted to the survivors and their families who are the ones who live with the physical and psychological pain that torture has inflicted on them. We thank them for sharing their stories and believing in us.

AF would also like to extend gratitude to the police authority who have helped AF gain access to detention centres and who have been allies in the fight against torture and impunity. AF strives for a healthy relationship with police and other stakeholders in the criminal justice system, without the collective efforts of all actors involved there would be no progress.

We are confident in all of the work AF does and hopeful that this year's report, alongside all of the other work AF has done this past year, will ultimately bring greater awareness, support, and justice for survivors of torture.

Om Prakash Sen Thakuri

Director

Advocacy Forum – Nepal

EXECUTIVE SUMMARY

The past year proved that torture in Nepal is not an issue on the verge of disappearing. With the reported torture rate rising 5% over the past three years, torture remains a systemic issue facing Nepal. Advocacy Forum (AF) conducted 1,165 interviews with detainees over 2018, of which, an alarming 22.2% reported experiencing a form of torture or other cruel, inhuman or degrading treatment (CIDT). Out of the total number of survivors interviewed, 306 were juveniles who reported an even higher 23.5% rate of torture. These findings are concerning. They represent a reversal or at the very least a stalling of the downward trajectory generally seen in the yearly torture rate since 2011. The findings further expose Nepal's failure to uphold its national and international human rights obligations to protect against and prosecute instances of torture.

KEY FINDINGS IN 2018

It is encouraging to see improvements when observing some of the procedural safeguards such as police providing a reason for arrest, detainees being brought before a judicial authority within 24 hours, and families having access to detainees. However, the following findings remain a point of concern:

- 22.2% of those interviewed reported torture overall
- 23.5% of juveniles interviewed reported torture
- Torture is disproportionately inflicted at a higher rate against socioeconomically poorer so-called “lower-caste” groups versus so-called richer “high-caste” groups and individuals with greater social status
- Lack of compliance with procedural safeguards highlighted consistent inadequacies and failures, in particular with the administration of required detainee health examinations
- Detainees of Terai ethnic origin experienced torture at 30.4%, 8.2% higher than the overall torture rate, partially attributable to a growing Terai rights movement and resulting government suppression
- Juveniles remained especially vulnerable while being processed through the police and judicial system; the rate of torture reported by juveniles remains higher than the adult rate, though the difference is markedly smaller than previous years (1.7% as compared to 4.5% in 2015)
- Detention centres and Child Correction Homes remained a distinct point of failure. Correction homes were reported to be housing juveniles nearing double their capacity. A total of 200 juveniles were found being housed in the Bhaktapur Child Correction Home with an official capacity of only 110 juveniles, contributing to the illegal detainment of juveniles with adults in conventional detention centres as a persisting issue

AF's year-long monitoring efforts provided valuable data for analysis and was effective in complimenting a further evaluation of recent political and legal developments which may have contributed to the higher torture rate. Post-conflict Nepal has sustained relative peace since the end of the Maoist insurgency, yet if recent political developments are not kept in check, this sustained peace might become threatened. A main concern is the increasingly controversial positions of the Government in some key aspects of human rights work as reflected in a number of contentiously proposed draft bills. It was also seen that, police have also been emboldened to restrict lawyers' access to detainees.

The new penal and criminal procedure code which came into force in August of 2018 introduced the much-needed criminalization of torture. While this development is applauded there still remains concerning issues, specifically in regard to an unacceptably low maximum sentence of five years imprisonment and a fine of a mere Rs. fifty-thousand (\$445 USD), despite the 1996 Torture Compensation Act (TCA) setting the maximum compensation at Rs. one-hundred-thousand. There is also a lack of legal framework to provide compensation for survivors who are moreover restricted by an incredibly short six-months Statute of Limitation to report instances of torture that can inflict profoundly debilitating physical and psychological harm onto survivors, limiting their ability to come forward and report. An issue surrounding the submission of first informant reports (FIR) was also identified that fundamentally undermines the filing and investigation of torture cases against police due to conflict of interests that can arise with police offices having the ability to oversee FIR submissions against their own police unit. AF can

already report a case that has been hindered due to complicit police having control over the FIR, resulting in evidence tampering.

Further, a correlation is drawn between AF's diminished presence in detention centres and as a result a lack of training, monitoring, and accountability among police officers to uphold human rights. The rise in torture and the multiple factors at play are explored but what is certain is that police, judicial, and legislative systems in conjunction with the current legal and political context have failed to properly safeguard the rights and welfare of those under detention.

RECOMMENDATIONS

Many of our previous reports have included recommendations that are vital in the prevention of torture and ill-treatment in detention. Unfortunately, many of them are still not fulfilled. AF would like to reiterate and reinforce the importance of those recommendations, which include:

- The tabled 2014 anti-torture bill is revisited and revived with the crucial provision improvements outlined in this report so that Nepal has a standalone anti-torture Act that comprehensively covers all concerns relating to the prevention, documentation, prosecution, and compensation aspects connected with torture,
- Nepal ratify the Optional Protocol of the Convention Against Torture as recommended during the Universal Periodic Review so that an official national body can facilitate independent monitoring and reporting of torture,
- The new Penal Code establishes a statutory limitation of a mere six-months on complaints regarding torture. Due to the

sometimes severe short and long-term effects of torture, AF urges that the statutory limitation be completely removed so that survivors of torture can come forward when they are physically and mentally ready,

- Provide immediate review on provisions regarding First Informant Reports (FIRs) when filing criminal torture cases. The 2017 Criminal Procedure Code allows for torture FIRs to be processed and if not rejected subsequently investigated by a district police office which may be a party to the FIR. This results in the possibility of an internal conflict of interest where torture cases are filed at the same police office employing the officers accused,
 - Improved provisions would consist of a higher or another district police or at a minimum a different independent authority overseeing the filing of the FIR and subsequent investigation instead of the police office in question,
- Support for existing survivors of torture is treated as importantly as prevention. A Basket Fund should be established and implemented to ensure that survivors are rightfully compensated for their hardship,
 - The Supreme Court of Nepal has ordered to establish a basket fund but the decision is yet to be implemented,
- Section 3(2) of the TCA is enforced so that detainees receive two health checkups, upon detention and upon release. The execution of this provision is essential for improving medico-legal reports and documenting instances of torture while detainees are under detention,

- Medico-legal support for adults and juvenile is modernised and used more frequently through increased training initiatives and funding to improve the administration and quality of medico-legal documents,
 - A uniform state system guided by appropriate laws should be established in order to achieve proper medico-legal documentation and implementation,
- Equip police with resources, technologies and updated operational manuals for best practices on respecting the human rights of detainees and preventing torture to ensure proper compliance with the new Penal and Criminal Procedure Codes,
- Child Correction Homes receive the attention and help required under national and international human rights law. While maintaining that placing a juvenile under detention should always be of last resort, there are still immediate infrastructure improvements needed to properly care for juveniles who find themselves detained with adult detainees,
 - Each province must have its own Child Correction home to prevent overcapacity and guarantee that the child has access to their family or guardian,
 - Build separate Child Correction Homes for boys and girls to ensure the safety of all juveniles,

-
- Immediately implement Section 22(c) under the Act Relating to Children requiring every district police office to have a separate ‘observation’ room for juveniles. This is imperative to ensuring juveniles are no longer kept with adult detainees where they are more vulnerable to further harm,
 - Additional legal text is needed to clarify what constitutes a sufficient ‘observation’ room.

METHODOLOGY

Advocacy Forum's (AF) central method for quantifying observance of detainee's constitutional rights is based on interviews with detainees that AF meets when providing legal assistance.

In 2018, AF lawyers visited detention centres in six districts in Nepal where they interviewed 1,165 detainees from six districts of Nepal.¹ Out of 1,165 detainees visited, 306 claimed to be below the age of eighteen-years.

The data analysed in this report is based on first-hand information gathered from AF lawyers during their regular visits to district, area, and ward police offices. Data regarding torture or ill-treatment of juveniles from Child Correction Homes, often from juveniles who have already passed through adult detention centres.

Lawyers fill out a standardised questionnaire for each detainee which was created in consultation with domestic and international experts and is based on best practice. A fundamentally identical questionnaire is used each year in order to identify larger trends and patterns. Detainees to be interviewed are chosen randomly from a detainee register maintained by the detaining authority.

¹ The number of districts covered, and collection timeframes, have been recurrently smaller in recent years due to a decrease in overall funding. Full-year data was collected from the Kathmandu and Banke districts, five-months of data from Kanchanpur and Rupandehi, and four-months of collected data from Kaski and Morang.

However, juveniles and women are prioritised by AF if identifiable from the list.

By exercising the rights of detainees to have legal counsel, as guaranteed under the Constitution of Nepal, AF is able to access these detainees. Following best practices, AF then briefs detainees on the work AF does and the legal and constitutional rights they hold. Detainees are then asked if they consent to their information being used to fill out a questionnaire and if they are interested in possible further legal-aid provided by AF.

When conducting interviews with juveniles, full confidentiality is maintained, and consent is always formally agreed upon by a juvenile's family, and if their family cannot be contacted, their information is kept confidential and they are informed of this. When deemed necessary, confidentiality includes anonymising juveniles or vulnerable adults with pseudonyms and the redaction of identifiable material during the information gathering process. Full consent has been sought and obtained for all juvenile and adult cases included in this report.

When determining whether torture or cruel, inhumane or degrading treatment (CIDT) had occurred, AF lawyers are guided by the definition provided in article 1(1) of the UN Convention Against Torture (CAT) which defines torture as:

“Any act by which severe pain or suffering, whether suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when

such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.”²

This methodology is not strictly limited to torture within the walls of traditional detention centre interrogation rooms. Torture can occur at first point of contact with police, during arrest, during transit to detention centres, as well as in strategically private locations within police centres in often informal settings away from potential witnesses.

The data analysis draws a distinction for juveniles. When the “overall rate” is stated this includes data from all age groups and when “juvenile” is stated it includes all detainees which were found to those who have not obtained the age of eighteen. This distinction is in accordance with the UN Convention on the Rights of the Child.³ However, it should be noted that under the old Children’s Act of 1994⁴, juvenile legal distinction had previously been limited to only those who had not reached the age of sixteen, until this was repealed by the 2018 Children’s Act and new Penal Code that came into force in August 2018 which treats juveniles as those who have not attained eighteen years of age.⁵ For over a decade, AF has been advocating for this change and both human rights organisations and the legislative power in Nepal should be commended for finally enacting this change in accordance with

² UN Convention Against Torture, Art 1(1)

³ Convention on the Rights of the Child 1989, Art 1

⁴ Children’s Act, (2048 BS) 1994, Act Relating to Children 2018, Sect. 2(j)

⁵ Penal Code (2074 BS) 2017, Sect. 45

international law. At certain points, the term “adults” is used for those that are 18 and over.

LIMITATIONS

When meeting detainees, a confidential interview room is not provided nor available for AF lawyers to talk to detainees in private. AF had previously paid for and built separate interview rooms to be built in some police offices, but those rooms have now either been dismantled or reallocated to a different use. Often, interviews and legal consultation meetings are conducted through the bars of the detention cell within earshot of other detainees and police officers, the latter is a direct contravention of article 20(2) of Nepal’s Constitution (2015) which states that any person has a right to legal counsel and that any consultation shall be confidential.⁶

This vulnerable environment in which AF collects data no doubt has an influence on the truthfulness of answers provided for the questionnaires with detainees possibly fearful of reprisal and further abuse by police officers if they are witnessed reporting torture. When detainees were unwilling to even respond to specific questions due to officers being present, these instances were recorded as blanks. This methodological reality may indicate that the overall torture rate is, in fact, higher than reported in the questionnaires.

Further, AF does not have access to the Centre of Investigation Bureau (CIB) detention centres, where most high-profile detainees are handled, as most lawyers or human rights defenders are not welcome. However, AF has documented a number of cases,

⁶ Constitution of Nepal (2072 BS) 2015, Sect. 20(23)

including of Bishal Chaudhary and Pradeep Rawal, who were falsely accused in the Nirmala Panta case, proving that CIB officers often abuse their power and commit torture and CIDT when making arrests as well as inside CIB detention centre walls.

As aforementioned, only Kathmandu and Banke district were visited regularly throughout 2018. As such, any data analysis involving district factors have been omitted from the report as the differing sample sizes would distort any credible analysis. The more limited coverage of additional districts is the result of resource constraints, which also impacts the ability to collect detainee data and maintain a strong presence in detention centres to have an accurate picture on the prevalence of torture.

In general, however, lawyer's access to detainees has been an ongoing issue for AF which has continued into 2018. However, AF is confident that the data collected from this year's reporting is of sufficient merit and importance to be published and analysed alongside the statistical analyses of torture dating back to 2015 and previous years going back to 2001 in AF's pursuit of safeguarding and upholding human rights in Nepal.

FUTURE STRATEGIES

Looking forward, AF would like to see lawyer visitation and expanded monitoring efforts in all provinces in Nepal to deter the prevalence of torture⁷ and to gain a comprehensive nation-wide understanding of the use of torture. Continued monitoring efforts

⁷ As part of a EU evaluation in 2012, an independent evaluator determined there is a strong correlation between AF's interventions and a reduction in reported torture: <http://www.advocacyforum.org/downloads/pdf/publications/torture/independent-evaluator-report-on-pot.pdf>

is imperative to understand the long-term trends of torture in Nepal so that measures can be put in place to prevent its prevalence.

Lately, AF has started to document authorities instigating co-detainees to inflict torture, which remains an underrepresented issue. Understanding torture holistically as a practice involving non-compliance with procedural safeguards is the best approach to begin comprehending and ending Nepal's use of torture and culture of impunity. As AF believes that the prevention of torture requires a holistic approach and that all stakeholders in the criminal justice system have a role to play. AF looks to work even more with all stakeholders: judges, police, public prosecutors, lawyers to that end.

Ending Nepal's culture of impunity also begins with the next generation. AF will be looking to start education initiatives to instruct children on their rights as juveniles, citizens of Nepal, and as humans on this earth. Ensuring the next generation recognises and values their inalienable rights is one AF's most important undertakings.

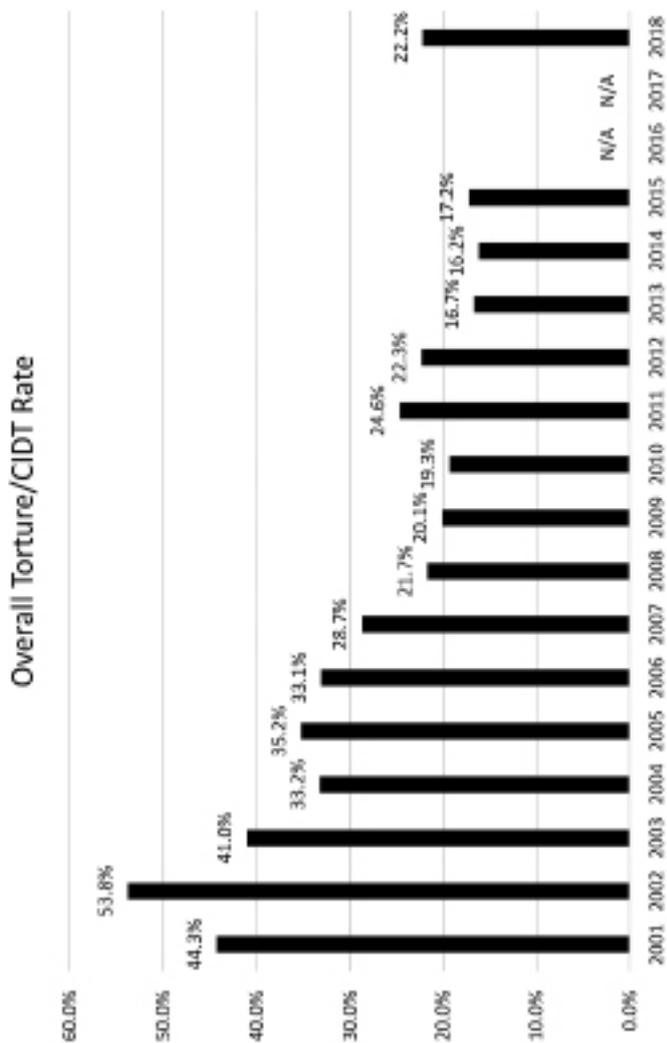
CHAPTER 1

THE TORTURE RATE IN 2018 & THE TREND

The rate of torture found in 2018 is worrisome. With 22.2% of detainees reporting a form of torture or other ill-treatment in police custody, this is a 5% increase from 17.2% in 2015, the last year a torture rate was produced. This is significant as it bucks the general downward trend identifiable post-conflict, particularly from 2011 onwards. Since data collection began in 2001, there has been a significant decrease in torture, from peaking in 2002 at 53.8% during the height of the Maoist insurgency before declining to 16.2% in 2014.

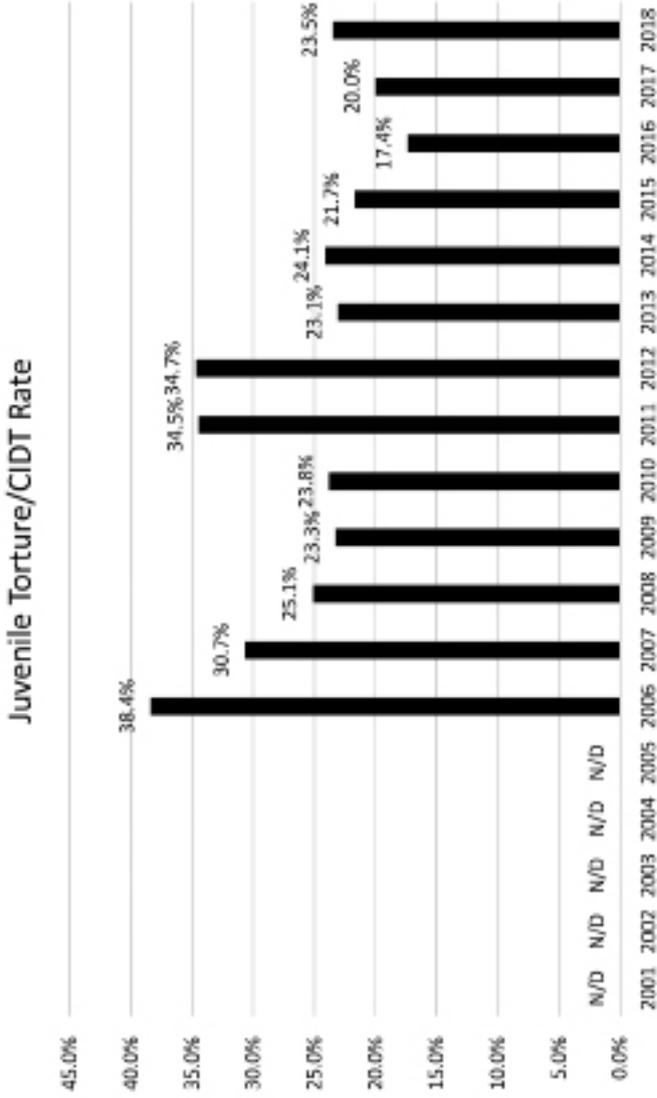
It is noteworthy to highlight that 2015 saw a 1% increase from 2014 which is then followed by two years of omitted data in 2016 and 2017.⁸ This rise in the rate could possibly be part of a gradual increase beginning in 2015 that is missing data representation. These missing two years could explain the 5% hike between 2015 and 2018 and perhaps reduce the shock of this “jump”. However, there is juvenile data available for 2016, 2017 which mostly corroborates this hypothesis, showing a gradual increase from 17.4% and 20% respectively to 23.5% in 2018.

⁸ Overall data and resulting torture rate were omitted these years due to insufficient access to detainees in detention centres.



Overall Annual Torture Rate since Data Collection Began in 2001 – Figure 1

N/A = Not Applicable



Annual Torture Rate since Juvenile Records Began in 2006 – Figure 2

N/D = No Data

As aforementioned the overall torture rate was omitted for 2016 and 2017. AF lawyers' ability to properly provide legal aid and collect data has always been to a degree restricted by police hostility but there was a discernible deterioration identified in 2016 resulting in the decisions to omit data. Juvenile data is partially available for these years as AF often interviews juveniles in a safe and confidential environment at Child Correction Homes after they have already filtered through the adult detention centres, resulting in a higher confidence level of juvenile data over adult data.

To be clear, this police hostility continued into 2018, however, the decision to include this year's data is supported by confidence in the methodology and in conjunction, driven by a strong belief that presenting this data is of great importance to properly represent the situation of torture and human rights in Nepal. To omit this year's data would be to ignore and fail those that have voiced their pain and would ultimately be a disservice to past, current, and future victims, in the larger fight to advocate against and stop torture as a police practice.

Issues around detainees being able to speak freely due to a police presence during the interview process persists. This hostility has led AF lawyers to adapt and improve their collection abilities. The long-term experience of AF lawyers, many having been collecting data yearly for over five years, some for ten years, has led to a unique and comprehensive understanding of police practices, detention centres cultures and procedures, and how torture is committed.

How increased police hostility is associated with the rise in the torture rate is examined in the section below examining AF's relationship with police and in the political context section in

Chapter 3 which outlines how an emboldened Communist Party of Nepal (CPN) majority government has taken a decidedly anti-human rights stance to suppress dissent and opposition.

AF believes that its work in detention centres help State authorities in general and in particular police to implement its constitutional obligations. Thus, AF seeks a strong and mutually-beneficial relationship with police. However, AF looks to ensure that this does not come at a sacrifice to identifying and prosecuting human rights abusers. This at times tricky relationship can cause tension and result in AF being pushed back at times, as has been the case in recent years.

AF regularly organises consultation meetings bringing all actors in the justice system together to provide a forum to discuss practical issues and difficulties facing stakeholders and to find ways to mitigate them collectively.

With the increased vigilance of civil society organisations like AF, laws on torture have been improving, specifically with the recent criminalisation of torture under the new Penal Code (page 46), police may have become more fearful of repercussions, with the possible threat of more serious legal action taken against them it is conceivable to see how officers have become more hostile towards AF lawyers if they think they are “monitoring” them.

It is a well-founded fear. Recently, AF has made use of these new laws and have actively pursued criminal cases against officers; detention centres have responded by increasingly closing their doors and being uncooperative with AF lawyers in some police station. This poses a key issue for AF’s monitoring efforts and as aforementioned, AF has had to adapt.

As AF is the primary organisation in the country, proactively reaching out to detainees and monitoring the treatment of detainees in detention centres, without AF's presence there is not only a diminished educational component but a reduction of pressure on officers to uphold the law. Whether this monitoring void can be filled by one-off initiatives by the National Human Rights Commission (NHRC) or an envisioned National Preventive Mechanism, as outlined by the Optional Protocol of CAT, remains in the short-term, unrealistic due to Nepal's apathy to ratify the Protocol. AF believes a holistic intervention is the best approach to changing Nepal's culture of impunity, as all too often laws are unknown or ignored.

CHAPTER 2

OVERALL FINDINGS

While the 22.2% torture is the highest rate seen since 2012 it is still considerably lower than the recorded rate during the Maoist insurgency between 2001 and 2006 which averaged at 40.1% for the six years AF existed and follows a general downward trend post-conflict – Figure 1 shows this trend and annual rates. Methods of torture recorded will first be examined followed by further data analysis.

METHODS OF TORTURE

There has been an observable decrease in the severity of torture methods over the past couple of years. This is based on experienced observations of lawyers who have noted a decrease in the more extreme methods of torture with more common forms remaining constant.⁹

Common methods of physical torture that have been seen were repeated face slapping, kicking, punching, hair-pulling, and beatings from plastic/bamboo sticks (*lathis*) on detainee's backs and other parts of the body. Some more severe forms of torture reported were waterboarding, pinning detainees down and beating

⁹ Distinguishing between “ill-treatment” and “torture” on the questionnaire will be introduced in the coming years to quantify the severity of torture

the soles of their feet and/or buttocks with *lathis*, and in certain cases forcing detainees to stand upside down against a wall as will be described in the case Tika (pseudonym) below.

Psychological torture remained a commonly reported form of ill-treatment by police. Frequent methods of psychological torture included general death threats, threats of further torture, threats to detain family members, threats to be disappeared, being threatened at gunpoint, and in two case studies being threatened that they would have to urinate on an electric heater - both detainees ended up giving forced confessions under this threat. Psychological manipulation was also reported with detainees being told that if they cooperated, they would go free, some detainees were even promised a job with the police afterwards. Instances of forced labour were also seen among juveniles.

Many methods of torture are specifically used to minimise and conceal evidence of torture as seen with the common beatings on the buttocks and soles of the feet. Allegedly, detainees are also often told to jump up and down after being beaten in order to minimise blood clotting on the soles of their feet. This is a crucial insight as it proves that police officers are well aware that their actions are illegal and yet they continue to torture, adopt new methods, and take steps in order to evade detection from organisations like AF.

GENDER

While males by far made up the majority of detainees at 92.2% they surprisingly experienced torture at a lower rate than females. 91 females were interviewed, making up 7.8% of the total interviewed but reported tortured at a rate of 23.1%. This is

somewhat surprising as female rates have consistently been lower than males with the 2015 and 2014 data both placing the female rate at ~4%. However, while females are prioritized by AF those interviewed represent a smaller sample size which may skew the torture rate found. Similarly, in regard to previous years' data, boys in 2018 made up 93.1% of juveniles interviewed and were subjected to torture at a rate of 23.9% while 19% of girls reported torture despite only making up 6.9% of juvenile interviewees.

CASTE

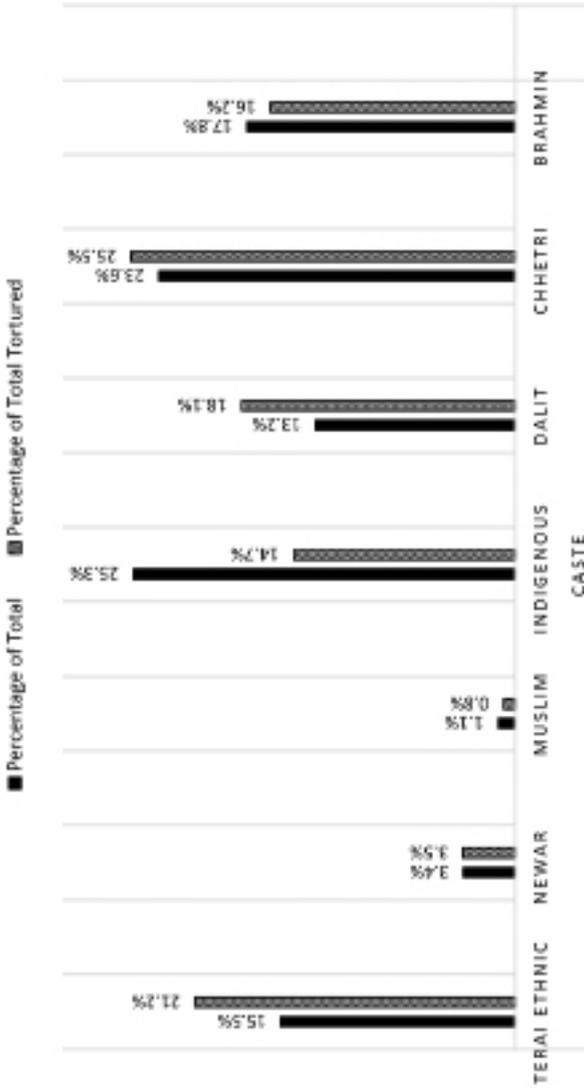
As expected and consistent with previous years, caste and the resulting social group status is still a significant indicator on how one is treated in Nepali society and by police despite discrimination based on caste and race being illegal under Nepali law since 1962 and criminalised under the 2017 Penal Code¹⁰ so-called “higher-caste” groups such as Brahmins are overrepresented in Nepal’s government and bureaucracy while the so-called “lower-caste” groups such as Dalit, Muslim, and Indigenous Peoples are underrepresented in positions of power based on their percentage within the general population.¹¹ The caste system in Nepal can be highly complex and caste groups often have additional social rankings within caste. For the sake of intelligibility, caste groups have been condensed into seven main groupings seen in Figure 3.

From the reported data, the so-called “high-caste” Brahmin were subjected to torture at a rate of 1.9% lower than the overall rate. Interestingly, the rate for Indigenous peoples, which includes

¹⁰ Penal Code (2074 BS) 2017, Art. 166(1)

¹¹ Neupane, Govind. Nepalko Jatiya Prasana (Question of Caste/Ethnicity in Nepal) *Kathmandu: Centre for Development Studies*, 2000.

Torture/CIDT by Caste



Caste Percentage Total vs. Caste Percentage of Total Tortured – Figure 3

Janjatti, Magar, Gurung, Sherpa, Tamang, etc., was 12.9% within group, a notable 9.3% lower than the overall torture rate. This finding deviates from 2016 and 2015 which placed Indigenous Peoples at below and near the average rate. Additionally, Chhetris interviewed showed a torture rate 3.3% higher than the overall torture rate, surprising as Chhetris are considered higher-caste and have experienced torture at a lower rate in previous years.

Further, the so-called “low-caste” Dalit caste group experienced torture at the highest rate at 30.5% within group, a full 8.3% higher than the overall rate. One particular case of a twelve-year-old Dalit boy, Kumar (pseudonym), highlights the egregious treatment of detainees, juveniles, and lower-caste groups in detention. Kumar was arrested on a crime he did not commit; his brother had stolen money and had given him only Rs. 1,000 without telling him how he had acquired it. When police arrested him and brought him to the district police office, they repeatedly beat him with *lathis* and kicked him with heavy police boots. At one point he was ordered to sit on the floor where a police officer proceeded to grab his legs and hold them in the air while another repeatedly beat the soles of his feet as they screamed at him to confess to the crime. As he continued to insist his innocence he began to cry, for which they punished him by beating him more. After his ordeal, Kumar was admitted to a hospital for five days for treatment after police had initially refused to give him medical care, telling him that he was faking his injuries. He was then returned to the adult detention centre, where he had been detained throughout. Kumar was finally transferred to a child correction home around one month after his initial arrest as his family could not pay the \$270 USD bail demanded, despite asking for bail money for juveniles being

illegal. Kumar's case is a distressing one but not an exceptional one. His plight is one of many similar realities experienced by castes of lower socioeconomic status and of juveniles.

MADHESI RIGHTS MOVEMENT IN THE TERAI

Members of the Madhesi community, which as a grouping is representative of people from the Terai region, experienced a significant increase in torture. In the Terai, there is an additional complex caste system with its own hierarchy of high-caste and low-caste. In 2018, 30.4% of those interviewed with a Terai ethnic background were tortured, this is 8.2% higher than the overall rate. Those tortured represented 21.2% of all detainees interviewed who reported being tortured despite only making up 15.5% of those interviewed in total. This is unprecedented with the 2014 rate being only 4% higher than the annual rate and the 2015 rate being 2.7% lower than the annual average.

Certain areas in the Terai region have always been characterised by higher rates of crime due to cross-border illegal activities such as the smuggling of goods, drugs, etc. The open border with India, also allows for criminals on both sides to commit crimes and then easily escape over the border, making the area a hotbed for crime. The police has a generally larger presence in comparison to the hill regions. Furthermore, in recent years, the movements in Terai for inclusion and equality has also resulted in mass arrests and detentions, increasing detention populations and torture.

An explanation for the dramatic increase among Terai ethnic detainees can be potentially linked to the Terai geographic region as a rising topic of political contention. Over recent years, there has been a noticeable rise of a Madhes rights and a more

fractional Terai independence movement, the latter previously led by C.K. Raut, a political activist and politician. C.K. Raut has been arrested over a dozen times due to his views on the Terai with the government taking clear exception to them. The police's response to this threat has been harsh in its attempts to quell the movement. Numerous protesters have been killed by police bullets while protesting and clashing with security forces over the past five years. In 2018, a staunch supporter of C.K. Raut, Ram Manohar Yadav, died while in police custody after being arrested during a peaceful protest. Yadav's family say he was in good health when arrested and alleges death as a result of torture by the police.¹² Yadav's mysterious death, C.K. Raut's history of questionable arrests, and illegal arrest and ill-treatment of other protesters' by police is confirmation that the police are aligned with the government's staunch anti-secession stance resulting in the rise of discriminatory ill-treatment of Terai ethnic detainees in police detention.

More recently, C.K. Raut signed an 11-point agreement with the government in March 2019 which obligates him to end all pro-secessionist stances in return for the dropping of all his charges. While this has been seen as a positive development by some as it appears to bring Raut into mainstream politics and achieve peace between the growing divide between the state and pro-secessionists, others such as Vijay Kant Karna of Tribhuvan University see this agreement as separate from the pro-secessionist movement. Karna sees the agreement as a manifestation of the personal pressure being put on Raut by the government via his

¹² <https://myrepublica.nagariknetwork.com/news/relatives-of-ck-raut-s-supporter-who-died-in-police-custody-suspect-murder/>

arrests, threat of a long-term jail sentence, and threats to his family's well-being.¹³ Therefore, it remains to be seen how this agreement impact's the larger Madhes rights movement and the government's response to them.

Nonetheless, a correlation can be made between AF's 2018 data on people of Terai ethnic origin and the larger Terai rights and secessionist movement. Specifically, AF lawyers visited detention centres in Rupandehi and neighbouring districts in the Terai region, the former the same district where in late 2018 a second-tier leader of C.K. Raut's group along with 23 other group members were arrested by police for arbitrary reasons.¹⁴

CASE STUDY: THE NIRMALA PANTA INVESTIGATION AND FRAMED INNOCENCE

The high-profile case of thirteen-year-old Nimala Panta's brutal rape and murder was a clear example of police ineptitude and corruption which drew widespread public outrage and protests. Bishal Chaudhary, Pradeep Rawal, and Dilip Singh Bista, along with three others, including a seventeen-year-old-girl, were all wrongly accused as Nirmala's killers. Bishal, Pradeep, and Dilip were all reported to be subjected to extreme torture and CIDT during police detention and continue to struggle as a result. When all three were absolved of any involvement, public perception turned to public outrage at what appeared to be police trying to hide the real killers by framing the murders on two young men and a cognitively challenged man – all coming from economically poor

¹³ <https://www.aljazeera.com/news/2019/03/nepal-ck-raut-joins-mainstream-politics-averting-conflict-190320055647567.html>

¹⁴ <https://kathmandupost.ekantipur.com/news/2018-10-14/central-joint-coordinator-of-ck-rauts-group-arrested.html>

backgrounds. AF was able to meet with and record statements from all three and their families from their ordeal during detainment.

Dilip was first arrested twenty-five days after Nirmala's body was found in a sugarcane field not far from her village in Kanchanpur district on 26 July 2018. The District Police then quickly organized a well-publicised press conference where they stated that they had detained Dilip and that he had confessed to raping and killing Nirmala. According to Dilip and his brother, Dilip had confessed after he had been severely tortured by the police who had laid him down, wrapped his head in a cloth, then proceeded to pour water over his face. While he was being waterboarded like this, he screamed for his mother and father. There was also a report that said that police force-fed Dilip an intoxicating substance.¹⁵ Dilip says that the police told him that if he confessed, the pain would stop.

Local citizens began protesting immediately after police had started to parade Dilip around as the killer, refusing to believe that they had the right person and that the police were protecting the real killer who was assumingly someone of money and power. Further outrage among the public was stoked when police took the DNA of over three-hundred local people, creating a fear that others would be framed next with their DNA in police hands. The recurring protests were met with force by police, resulting in over a dozen injuries and the death of fourteen-year-old Sani Khuna who was shot in the chest by police. It would emerge that Sunny was not even involved in the protests but was on his way home

¹⁵ <https://kathmandupost.ekantipur.com/news/2018-12-18/mother-files-case-against-police-for-destroying-proof.html>

with his brother when police accused them of pelting stones at officers, resulting in them opening fire.¹⁶

Dilip was finally released on 12 September 2018 after a DNA test proved his innocence. However, according to his brother, Dilip's mental health has severely deteriorated since returning home. He can no longer leave the house, is scared of strangers, has become increasingly violent, often cannot sleep and when he does, he has nightmares. Dilip's long-term mental health struggles as a result of his torture is not at all limited to those with cognitive disabilities. Dilip's lingering mental health issues are characteristic of many survivors' struggles after they've returned back to their families.

Dilip's family has begun treating him with medicine but they are economically poor and have trouble paying for his treatment and giving him the care that he needs. Monthly expenses for his medicine is reportedly around Rs. 6,000 alone. With Nepal's GDP per capita being just over Rs. 90,000 a year in 2017¹⁷, Dilip's burden on his family as a result of his torture is representative of what many victim families go through, having to take care of their loved ones after they have been subjected to torture and continue to suffer from mental harm long after the physical scars have faded.

Bishal was eighteen at the time of his arrest; Pradeep was seventeen; both are friends. Both were also known previously by the police for an unrelated unproven crime, the same was true for Dilip. For the first two days of Pradeep's detainment at a CIB office, the police treated him reasonably well. They had promised

¹⁶ <https://myrepublica.nagariknetwork.com/news/sunny-khuna-killed-while-out-to-collect-his-wages/>

¹⁷ <https://data.worldbank.org/country/nepal>

him a job with the police or a lucrative job overseas – so long as he told them the ‘truth’: that he had raped and killed Nirmala.

After continuing to insist his innocence, the police turned to torture to try and extract the ‘truth’ and confession. Pradeep says that for three consecutive days the police beat the soles of his feet three times a day for about ten minutes each, repeatedly slapping him throughout. The police would also mentally torture Pradeep. Police would say that they were going to shoot him and say that he had tried to run away or simply tell the public that he was the killer so that an angry mob would kill him instead. At one point he was told that he was going to be forced to urinate on an electric heater.

When Bishal, Pradeep’s friend, was arrested on suspicion of the Nirmala Panta case he was brought to the Kanchanpur district police station where he says police blindfolded him, put a gun to his temple, and said he would die if he didn’t confess. Police officers then brought him to the sugarcane field where Nirmala’s body was found and began asking Bishal where he had killed her. Bishal says police would switch between threatening to kill him in the field and make it seem like he was escaping, to the next minute showing compassion and promising him job offers if he complied. The police told him that if he admitted to the crime, they would destroy any DNA evidence and make his jail term as short as possible.

When Bishal was brought to the CIB office in Kathmandu he was blindfolded and handcuffed to a chair where he was further physically tortured and told that if he did not confess, they would force him to urinate on an electric heater or be shot. They complained that the police mixed some black material in their tea

due to which they felt dizzy. Pradeep complained that a polygraph test was taken against his will. Both Bishal and Pradeep were told that the other had already confessed and had given their names as accomplices.

Under the immense physical and psychological torture inflicted on both Bishal and Pradeep, they both ended up confessing to the rape and murder of Nirmala Panta despite both being innocent. Bishal was forced to confess in front of his own father. Nonetheless, just as Dilip was proven innocent by a DNA test, so were Pradeep and Bishal. Both, Pradeep and Bishal still have lasting physical harm and reoccurring mental illnesses as a result of their torture – their families fear they will never be the same.

The reality that all three of these innocent men and boy were subjected to extended periods of extreme physical and psychological torture speaks to the inept and archaic investigative tactics of police units and the continuing acceptance of torture as a means to extract confessions. Yet, their experience may also speak to the belief held by many in Nepal that all three were intended to be framed and take the blame for Nirmala's murder. All three come from poor economic backgrounds, were recently known by the police, and were more vulnerable by way of youth or cognitive disability. As of June 2019, seven officers and the then Kanchanpur District Police Chief SP Dilipraj Bista were suspended or dismissed by the police force and are now facing charges in relation to evidence tampering and torture.

While the primary officers involved in Pradeep's, Bishal's, and Dilip's suffering have faced some charges, been suspended or transferred, AF feels that all those responsible for attempting to subvert the investigation have not been punished accordingly

– all while Nirmala Panta’s rape and murder goes unresolved, the investigation severely impeded by the previous wrongful investigations into Pradeep, Bishal, and Dilip. Moreover, whether the punishment imposed on the eight officers does anything to improve Nepal’s justice system is unconvincing. While Nirmala’s case has been nationwide news, with reassurances of justice coming from as high as Prime Minister KP Sharma Oli, the investigation into her death appears hopeless. The investigative committee looking into Nirmala’s death has been characterised by a committee leadership change as well as a committee member stepping-down after receiving anonymous death threats by those looking to undermine the probe. The failed Nirmala Panta investigation is a strong emblematic case to represent police torture, and negligence in 2018.

CHAPTER 3

CURRENT LEGAL & POLITICAL CONTEXT

Before further analysing the findings related to police compliance with procedural safeguards in Chapter 4, it is beneficial to examine the encompassing political and legal context in order to better understand the general findings and the 5% rise in the reported torture rate.

Having already covered the potential impact of AF's reduced presence at detention centres, another focus will be on the newly elected ruling Communist Party of Nepal (CPN) which formed after the merger of the CPN Unified Marxist-Leninist and CPN Maoist Centre parties on February 15, 2018. This incumbent government is the strongest since democratic elections began in Nepal in 1990 with the CPN winning a two-thirds majority.

Although this result provides the stability in the country, there are growing concerns about the Government's move to limit civil society space, and efforts to bring legislation that could have significant negative impacts on human rights protections. Some of the proposed bills warrant discussion to analyse the current political context, impacting human rights discourse and realisation in Nepal.

NEPAL MEDIA COUNCIL BILL, BILL ON MASS COMMUNICATIONS, & INFORMATION TECHNOLOGY BILL

Although there might be the need to have a legal framework to regulate media, all of the above-mentioned bills, as identified by the Terai Human Rights Defenders Alliance (THRD Alliance), were introduced by the current CPN government to clampdown on freedom of expression by media outlets as well as on personal social media accounts alike.¹⁸ The Media Council bill carries a fine of Rs. one million if a news outlet and/or any of its employees publishes content that tarnishes the “image of any individuals”.¹⁹

Also concerning is the Bill on Mass Communications which punishes anyone who publishes contents “undermining national sovereignty and national integrity” with a maximum sentence of 15 years’ imprisonment and Rs. 10 million monetary punishment. The bill fails to define what exactly would constitute subverting national sovereignty and integrity and its ambiguity leaves this provision open to be abused by state powers looking to suppress and attack any figures in the media who dissent or oppose Government actions and policy. Both bills look to undermine the freedoms of the press in order to censor critical media coverage.

An additional bill, the Information Technology Bill, includes a provision which attempts to regulate and censor freedom of speech online under the guise of regulating social media platforms. In the same vein, a previous Federal Service Bill targeted civil

¹⁸ Nepal Government Attempts to Shrink Civil Space and Weaken Human Rights. THRD Alliance. May 20, 2019

¹⁹ Extensive protests against this bill led by the Federation of Nepali Journalists (FNJ) are ongoing at the time of writing.

servants voicing their freedom of expression online by targeting any opinions shared on social media sites that were determined anti-Government.

These bills will likely facilitate the violation of the basic human right of freedom of expression and thought as enshrined in Nepal's constitution, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

INCREASED I/NGO MONITORING

The Government has further looked to control the presence and conduct of human rights organisations by proposing a draft bill to give a government body the authority to register International/National Non-Governmental Organisations (I/NGO)s in Nepal. The Government is looking to merge two-existing governmental bodies to create one authority which will register and endorse I/NGO projects.²⁰ This bill follows the failed National Integrity Policy (NIP), which collapsed after sustained national and international pressure from human rights bodies, and had also brazenly attempted to exert control of I/NGOs.²¹

Centralising this power comes at a time when the Government is looking to set stricter regulations on I/NGOs, human rights organisations and defenders. All are fearful that this authoritative body may restrict new human rights organisations from working in Nepal and actively stifle new projects proposed by existing human rights organisations.

²⁰ <https://thehimalayantimes.com/nepal/authority-to-register-monitor-i-ngos-activities-proposed/>

²¹ <http://www.thrda.org/nepal-contracting-civil-society-pretext-national-integrity/>

CASE STUDY: GYANENDRA BAHADUR SHAHI

AF would like to highlight the recent case of Gyanendra Bahadur Shahi, a social rights and anti-corruption campaigner. At an organised public rally against state corruption in Surkhet district on 29 May 2019, Gyanendra was arrested under a public offence charge and a questionable charge of breaking cyber crime laws – cyber crime laws can be very similar to the abovementioned bill proposals due to their anti-freedom of speech provisions or lack of provisions. The cyber crime charge stems from a Facebook post he had made being critical of a journalist, while also stating that some journalists were complicit with corrupt practices of the Government but he denies writing bad words against journalists. Regardless, Gyanendra was not attempting to incite violence or harm any police officers. He was simply exercising his freedom of speech to criticize what he saw as media malpractice.

Evidence of his public arrest is verified from talking with Gyanendra in person, examining footage of the public arrest, and interviewing eye-witnesses. All sources show how police forces at the rally violently grabbed him and repeatedly beat him. Gyanendra was then taken to a the district police office where he says he was subjected to further repeated beatings and ill-treatment. He was briefly taken to a local hospital for treatment of his injuries before being transported in the back seat of a local bus under the custody of police officers to Kathmandu to face charges. During this eighteen-hour bus ride, Gyanendra was handcuffed with both his hands behind his back the entire time and was refused food or the use of a toilet – he was given water only once. Many of his supporters followed him and made a trip to Kathmandu to ensure his safety.



Gyanendra's back – Credit: Gyanendra Bahadur Shahi



Gyanendra's back II – Credit: Gyanendra Bahadur Shahi



Wound on smallest toe from being stamped on by a police boot – Credit: Gyanendra Bahadur Shahi



Gyanendra in hospital – Credit: Gyanendra Bahadur Shahi

Gyanendra was then brought to a trauma centre where significant injuries to his back and feet were identified, his face

was also visibly swollen, allegedly from repeated slapping. The deep bruising and wounds on his back are thought to be from the use of *lathis* (sticks) while an injury to his small toe is thought to be from being kicked and stamped on by heavy steel-toed police boots. He was then presented before the district court before returning to the trauma centre for further treatment.

Gyanendra was released more than a week after his arrest thanks to pressure from human rights defenders. Human rights lawyers filed a writ of habeas corpus petition to the Supreme Court of Nepal demanding he be released from his unlawful detention. Gyanendra's plight has made him a prominent symbol of increased torture and human rights abuses in Nepal, his story was shared extensively online through peer to peer sharing, Youtube, and smaller media outlets.²²

What is known is that the suspect charges of cyber crime and public offence under which he was arrested and illegally detained were brought against Gyanendra for exercising his freedom of expression through a Facebook post. These laws are in the same vein as the above mentioned proposed bills are feared to be signs of a Government which is increasingly looking to clamp-down on dissent and opposition.

DECLAWING THE NATIONAL HUMAN RIGHTS COMMISSION (NHRC)

Under current law, the NHRC has the power to order directly to the Attorney General (AG) to require the AG's Office to prosecute

²² <https://thehimalayantimes.com/kathmandu/man-on-hunger-strike-seeking-justice-for-shahi/>

someone upon the evidence provided by an NHRC investigation. This process is the result of a writ petition filed at the Supreme Court by human rights lawyer Om Prakash Aryal. The subsequent Supreme Court decision of 2019 is a significant step for human rights in Nepal as the NHRC is the only public institution and constitutional body investigating cases of human rights violations.

A proposed amendment to the NHRC Act looks to reverse this entire process. The proposed bill would give the AG discretionary power over NHCR recommendations to prosecute and investigate, leaving the final say to the AG. Under this reversal of power, AF lawyers and human rights defenders are deeply concerned that this would take Nepal back to the time when virtually no human rights prosecutions were ever initiated by the AG. Furthermore, the new proposal also has a provision to interfere in the commission's financial autonomy and remove the power to establish regional and provincial offices.

It is clear that this amendment looks to constrain the autonomy, capacity, jurisdiction, and overall independence of the commission. Therefore, AF alongside all human rights organisations in Nepal, are taking a strong stance against this proposed NHRC Act amendment bill which could jeopardize all future human rights cases and contribute to perpetuating Nepal's culture of impunity.

NATIONAL SECURITY COUNCIL BILL

Stoking fears of an escalation towards another conflict, the Government attempted in March 2019 to pass a bill which would, in times of emergency, grant the Prime Minister the power to mobilize the Nepalese Army without having to consult the National Security Council as is the current constitutional requirement. The

Prime Minister would effectively, at their own discretion, bypass the Security Council and Army Commanders to mobilize the Army representing a serious attempt to nullify the divisions of power in the Constitution in regard to military command.²³

This move by the Government can be read as a response to the heightened violence being carried out by Netra Bikram Chand “Biplab” led maoist party, banned by the government on March 2019, who has taken a staunch anti-Government stance and has stoked fears of another armed-insurgency. While fears of an escalation back to the levels of violence seen during the insurgency remain limited, it appears that the Government is preparing for any eventuality by attempting to entrench its control over the Nepal Army.

This bill and other of the above mentioned bills have led human rights defenders to highlight the anti-human rights shift of the present government.

BILL ON PASSPORTS

The Council of Ministers passed a bill on passport which was heavily criticized by the opposition parties and the civil society. The opposition parties blame the government that despite many applications to amend some provisions and the government’s assurance to amend those provisions, the bill was hastily submitted to the President for endorsement; however, the President returned the bill suggesting to think once again in the contentious provisions. The main controversial provisions of the bill are: Section 12 (1) (g) that provides, “The passport can be seized or

²³ <https://thehimalayantimes.com/kathmandu/nc-expresses-reservations-about-security-council-bill/>

not issued if any unit of the government authorities issues a written notice.” And Section 21(b) provides, “If travels or attempts to travel without a passport or travel permission letter as per this act, he or she is punishable of one to three years imprisonment and/or an Rs. 200,000 – 500,000 fine.

In strong support of this bill’s criticism is the case of Lenin Bista who was barred from travelling to Bangkok in August 2018 to present at a human rights seminar on youth in conflict zones. The immigration official stopped him saying he did not have the necessary travel permission letter for his travel. However, there are no laws requiring a citizen to obtain travel permission letter before travelling apart from the standard travel documents (passport, visa, etc.). So, he has filed a case against the government authority and the case is under consideration at the Supreme Court of Nepal

Bista is a former Maoist child combatant who was recruited at the age of twelve. He has been raising voices for child combatants recruited during the Maoist insurgency. As a result he was falsely charged and detained for one year under trial until the court released him on the ground of innocence on 24 January 2014.

Bista says to AF that he fears further fabricated charges and reprisal from the ruling CPN Government due to his campaigning for the rights of former child soldiers. It appears that the Government is introducing this new passport bill in order to have the requisite legal framework in place to ‘lawfully’ stop someone like Bista from travelling abroad in the future.

GUTHI BILL

Another affront on citizen’s rights and freedoms by the CPN Government is seen with the recently tabled Guthi Bill in June

of 2019. Guthis are an integral part of Nepali civil society and in particular, Newari society. They are socio-economic institutions that facilitate, fund, and provide overall support for religious and cultural activities for particular groups in Nepali Society. Acting as public or private trusts that supporters can pool money and assets into, cultural groups are able to financially support religious sites and continue traditional practices such as the famous Newari Indra Jatra. There are hundreds of different Guthis in Nepal serving hundreds of different initiatives.

This new bill by the Government looks to nationalise all Guthis, bringing them under the control of the Government with the ability to commercialise and potentially outright sell the assets owned by them for profit. Despite the Government controversially attempting to selectively ban and restrict protests and rallies in June of 2018, two days of massive protests against the Guthi Bill burgeoned in the Kathmandu valley calling for the withdrawal of the bill that protestors say would wipe-out past and present cultural heritage and diminish overall cultural diversity in Nepal.²⁴

In the current political context, this can be seen as another attempt by the Government to corral more power at the expense of civil society. By bringing Guthis under governmental control, the social capital and capacity of civil society will be fundamentally undermined. This bill would be in contravention of Article 26(2) of Nepal's Constitution which guarantees religious denominations the right to protect and administer their religious sites and Guthis.²⁵ Increasingly, the CPN leadership is revealing its drive to take away

²⁴ <https://kathmandupost.ekantipur.com/news/2019-06-12/with-guthi-bill-government-wants-to-exploit-ancient-customs-for-money-locals-say.html>

²⁵ Constitution of Nepal (2072 BS) 2015, Art 26(2)

individual and community rights in its chase for more power and control over Nepali people. In thanks to the widespread protests, the Guthi Bill was withdrawn on June 18, 2019, highlighting the power and importance of civil society in Nepal.

LEGAL LANDSCAPE: ANALYSIS OF THE NEW PENAL & CRIMINAL PROCEDURE CODE

On 17 August 2018, a new Penal Code which for the first time criminalised the infliction of torture came into force. Previously, torture was only prohibited but not specifically criminalised under Article 22 of Constitution of Nepal 2015 and the Torture Compensation Act (TCA).²⁶ This new Penal Code should be applauded as an important step in recognising the severity of torture in Nepal and the need to have legal safeguards to prevent and respond to its use; however, the new Penal Code still falls short in some key areas in providing victim-centric protections.

The criminalisation of torture in the new Penal Code is a tremendous step for Nepal to prevent torture. Yet, AF maintains that the maximum sentence and fine following a torture conviction under the new Penal Code is grossly insufficient in relation to the potential severity of the crime. The current maximum sentence is five years imprisonment and a fine of a mere Rs. fifty-thousand (\$445 USD) which is unacceptably low especially when considering that the TCA places the maximum compensation at Rs. 100,000.²⁷ Due to often profound long-term physical and mental harm torture inflicts on survivors, AF calls for a re-evaluation of

²⁶ Constitution of Nepal (2072 BS) 2015, Art 22, Compensation Relating to Torture Act, 2053 (1996)

²⁷ Penal Code (2074 BS) 2017, Art. 167(2)

the current maximum jail-term and compensation to be in line with the severity of torture.

This leads to the issue of compensation. The Penal Code under Section 169 holds that a reasonable amount of compensation shall be paid to the survivors but fails to provide any mechanisms to determine what is a reasonable amount and how this compensation will be distributed to survivors.²⁸ It should be noted that AF and other human rights organisations have lobbied for the amendment of the TCA to establish a Basket Fund to provide support and compensation for future and existing survivors but has yet to be implemented fully. Ideally, this fund would eventually not be limited to torture survivors, compensation could be provided to any victims of rape, extra-judicial killings, etc.

Nevertheless, this lack of coordination and overlap with the new Penal Code is of great concern as this could result in survivors only receiving the aforementioned pitiful amount of Rs. fifty-thousand. As well, survivors can still be kept waiting and fighting for a number of years to claim any amount of compensation. AF is currently aware of over a dozen torture survivors who have been waiting on compensation for nearly or over a decade.

It should be noted that it is often the case that survivors receive out of court payments from alleged perpetrators. In a bid to stop a survivor from filing a continuing a legal case against an officer or a police unit, police will bribe a survivor to keep quiet. AF has heard of amounts ranging from Rs. 100,000 to Rs. one million in exchange for silence. This practice is much more widespread than compensation being received officially through the judicial system due to a combination of the economic reality of survivors

²⁸ Penal Code (2074 BS) 2017, Art. 169

and their families, and a well-founded lack of faith in the legal system to provide survivors justice with adequate compensation inside a reasonable time or even at all. For survivors, out of court payment by way of a bribe is the best they can hope. This results in the perpetuation of police impunity as police can just bribe their way out of potential legal punishment.

Out of court payment is often the only viable option for survivors and their families. The case of Som Bahadur Basnet highlights how impossible it can be to refuse a bribe from the police even when you are seeking full legal justice. As Som was returning home one night, he was violently beaten by police with *lathis* and kicked repeatedly after they had heard him speaking English. He returned home feeling excruciating internal pain. After being taken to the hospital it was revealed that he was suffering from severe injuries. Som's bile duct, bladder and pancreas were damaged with blood clotted in his stomach. The doctor reportedly said that if he had been admitted only a few hours later, he could have died. In the end, Som received fifty-two stitches over his stomach from his surgery. Images relating to his surgery are below. With Som being the breadwinner in his family, his family has struggled financially without him being able to work. Faced with this reality, his family agreed for an out of court payment by police in exchange for not pursuing legal charges despite his family telling AF that they had hoped to find legal recourse.



*Som Bahadur Basnet post-operation needing fifty-two stitches –
Credit: Krishna K Basnet*

Section 170 of the new Penal Code establishes a statutory limitation of six-months on complaints regarding torture.²⁹ This provision is inconsistent with the reality of post-torture survivors and the physical and mental struggles that can follow. Many survivors may be more concerned with their immediate health issues they go through as a result of torture and are preoccupied

²⁹ Penal Code (2074 BS) 2017, Art. 170.

with rehabilitation not, prosecution. Other survivors may not be mentally ready only six-months after being subjected to torture. The long-term psychological struggle of being a survivor of torture coupled with the possible fear of further harm by the perpetrators has been well-documented by AF, seen with the Nirmala Panta case involving Pradeep, Bishal, and Dilip on page 28, as a consistent source of pain and hardship that can last longer than any physical wound. Therefore, AF urges that the statutory limitation be completely removed so that survivors can come forward when they are physically and mentally ready.

There is further an issue of command responsibility. Sub-Sections 3 and 4 of Section 167 in the new Penal Code ensures that any person who orders the commission of torture is just as liable as those that carry out the order, while also exempting the “I was just following orders” plea as a credible line of defence.³⁰ However, the text fails to understand the commonly indirect nature of torture. Pressure from senior officers on lower-ranking officers to obtain a confession can imply the use of torture as a means to extract “evidence” in order to progress a case without a senior officer ever ordering explicitly for torture to be executed. Certain archaic methods of police investigation are systemic in Nepal and the current laws fail to address holistically the often indirect or non-existent “order and execution” process of inflicting torture on detainees.

Lastly, the new Criminal Procedure Code, enacted at the same time as the new Penal Code, offers guidance on how first information reports (FIRs) should be submitted, yet it does not make appropriate consideration on FIRs reporting instances of

³⁰ Penal Code (2074 BS) 2017, Art. 170(3,4)

torture inflicted by police. As is the current process under Section 4,³¹ an FIR shall be submitted to the nearest police station which will then forward the FIR to the District Police office. Sub-section 6³² does outline conditions stating that the appropriate investigative body shall be assigned to an FIR if there is a separate investigative body relevant to the reported crime, however, torture as a crime does not currently have this distinction under Sub-section 6 resulting in torture FIRs being investigated by district police.

This becomes problematic as it appears that an FIR may be processed at a district police office employing the same officers who committed the torture, their peers, or supervising officers. Officers may look to protect themselves, their fellow officers, and their police unit from criminal proceedings if they are able to oversee an FIR filing, giving them the power to either refuse to register an FIR or conduct the subsequent investigation. For e.g., Bishal's FIR was fused to register by Kanchanpurhdistrict police

³¹ Criminal Procedure Code (2074 BS) 2017, Sect. 4(1): First information report or information on commission of offence to be given: (1) A person who knows that any offence set forth in Schedule-1 has been committed or is being committed or is likely to be committed shall, as soon as possible, make a first information report in writing or give information verbally or through electronic means, on such offence, along with whatever proof or evidence which is in his or her possession or which he or she has seen or known, to the nearby police office in the form set forth in Schedule-5.

³² Criminal Procedure Code (2074 BS) 2017, Sect. 4(6): Any first information report or information received pursuant to sub-section (1) shall be forwarded to the separate investigating authority if any specified by law in relation to such report or information, and, failing the specification of such separate investigating authority, to the concerned District Police Office.

on 21 June so he has filed an application at District Attorney's Office for a necessary orders to register the FIR.

As there is no dedicated investigative body for torture crimes, provisions need to be established to rid this potential conflict of interest by ensuring that an independent and impartial body is brought in from a different or higher authority to process an FIR claiming torture.

A survivor's case which has been hindered already by this legal shortcoming is the case of Pyam Gurung in Pokhara. After a minor dispute with a local fishmonger, police arrested Pyam and brought him to a police station where they beat him for half an hour. As his arrest was quite public, a large crowd followed him to the station. Unknown to the police at the time, his brother was able to film through a window a portion of Pyam's treatment in detention. The video shows in detail how Pyam was handcuffed and how police frequently slapped him, violently pulled his hair, pushed him to the ground, punched him, kicked him, and constantly berated him verbally – resulting in his hand being broken. When he was walked out of the station by police he was visibly shaken up with his pants around his ankles. After release, Pyam filed a FIR to the police station to seek justice. As part of his FIR he included a copy of the video showing his torture for evidence; however, when evidence was produced to a judge, the video had been tampered with and wouldn't play – the police submitted it in CD format despite originally receiving it on a USB memory stick – resulting in its initial omission in his case. Thankfully, the video was resubmitted properly by AF lawyers as they continue to provide legal aid for Pyam. However, Pyam's case clearly shows how police, with a

conflict of interest, can take advantage of their control over FIR reports if it implicates themselves or their police unit.



Pyam's broken hand after returning from the hospital – Credit: Advocacy Forum

To reiterate, AF stresses the need for a separate anti-torture Act in Nepal that properly criminalizes torture in accordance with the CAT. The current legal framework for prosecuting perpetrators and aiding survivors of torture requires human rights defenders to grab provisions from legal provisions scattered across different laws with lacking or differing provisions. This hindrance has resulted in a noticeably harder, lengthier, and more restrictive process when submitting cases for prosecution – a streamlined, and robust legal framework is needed. AF proposes that the “Torture or Cruel, Inhuman, or Degrading Treatment (Control) Act (2071) tabled in parliament in 2014 be reintroduced onto the agenda so that it can

be updated with the above mentioned suggested improvements and act as a newly distinct and comprehensive anti-torture Act.³³

³³ For further discussion on the tabled 2014 anti-torture bill refer to page 47 of AF's 2018 annual torture report: <http://www.advocacyforum.org/downloads/pdf/publications/torture/june-26-2018.pdf>

CHAPTER 4

POLICE COMPLIANCE WITH PROCEDURAL SAFEGUARDS

This section will evaluate how well national and international laws are upheld in regard to ensuring proper care and treatment of detainees going through the lawful procedures and requirements in the police and judicial system. Police compliance with these procedures and requirements is essential for ensuring the protection of human rights and the facilitation of fair trials in the pursuit of legal justice. However, it is found that police are often unaware or actively disregard the necessary safeguards for juvenile protection. Cases such as Kumar, a twelve-year-old Dalit boy detailed on page 25, identify how police officers strategically handcuffed consistently during detainment but unhandcuffed him when he was presented before court, proving that the officers were aware that it is illegal to handcuff juveniles. This is another example of how police are aware that certain practices are illegal yet intentionally look for ways to continue the practice while evading detection.

REASON FOR ARREST GIVEN

Altogether, 90% of detainees were informed of the reason for their arrest after detention with only 1.5% given a reason at the time of arrest and a further 8.5% not receiving any reason at the time of

interview. Similarly, 89.2% of juveniles received a reason for their arrest after detention, 2.5% at the time of arrest, and an additional 8.8% never provided a reason at all at the time of interview.

Detainees should be informed of the charges for their arrest via an arrest warrant upon the moment of detention in custody under Article 20 of the Constitution of Nepal 2015. These findings are disappointing as the rate of detainees given no reason for their arrest more than halved since 2015, the rate of detainees provided a reason at the time of detention has decreased dramatically since 2013, from 15% to 1.5% in 2018.

These findings represent an issue for detainee rights as they are a failure by the police and Government to comply with the UN Human Rights Council Universal Periodic Review recommendation to ensure no person is subject to arbitrary arrest or detention³⁴ and with the legal provisions from the CAT which state that:

“[The] State party should take immediate effective measures to ensure that all detainees are afforded, in practice, all legal safeguards from the very outset of their detention; these include [...] to be informed of their rights at the time of detention, including about the charges laid against them.”³⁵

HEALTH CHECKUPS

Under section 3(2) of the TCA 1996, detainees are entitled to a health checkup upon detention and release. This process is essential to ensure there is a proper record of torture if it occurs.

³⁴ UNHCR Concluding Observations on the Second Periodic Review Report of Nepal (April 15, 2014)

³⁵ CAT Article 20 Recommendations 109© and 110(d)

However, in practice, virtually zero detainees received two health evaluations in 2018. 97.8% received a checkup but this is divided between 64.5% seeing a doctor before detention and 33.3% after detention. A slightly higher 98.7% of juveniles received checkups with 55.9% receiving an examination before detention and 42.8% after.³⁶

Two health examinations are able to document the physical state of a detainee upon arrival and release which would provide strong evidence of torture if it occurs during detention. Only one examination opens up the possibility for police to situate torture inflicted harm before police contact and deflect the blame. Admittedly, this process does not cover torture during arrest as strongly and the quality of health checkups has been a sustained concern in 2018.

Detainees have often commented on the superficiality of the checkup, describing the doctors as perfunctory and some reported only being asked whether the detainee had consumed alcohol. Checkups are carried out hastily at hospitals overnight as detainees are usually transported en masse and chained together by their hands throughout the transport and hospital checkup process. Additionally, it has been reported to AF lawyers that police have forced detainees to pay for their health checkup, usually at a cost of fifty rupees and if a detainee doesn't have money another detainee is forced to pay for him/her. This is understood to be as the detainees are also treated as outpatient department (OPD). This situation is representative of how holistic in nature certain issues are.

³⁶ This is the first year that the methodology has temporally distinguished when the health checkup occurred

A lack of effort to properly examine detainees can be to a degree attributed to pressure from police to ensure that checkups are as brief and incomprehensive as possible. Examination doctors are directly employed by government-funded hospitals and often submit to police pressure to not take active steps during checkups out of fear of reprisal if they appear critical towards police.³⁷ Further, doctors are often ill-trained for medico-legal documentation. There were also instances where some examinations were happening at dentistry clinics.

The health checkup process is carried out with police supervision throughout which imposes a fear on detainees that if they report torture, they could be re-victimized and subjected to further torture as punishment. This was seen in the case of Tika (pseudonym) a fourteen-year-old boy who for only being complicit in the theft of a mobile phone was forced to stand upside down against a wall while police beat his body and the soles of his feet with *lathis*. When he was finally taken to the hospital the doctor did ask him whether he had any injuries, and while Tika had severe pain and injuries all over his body he lied to the doctor saying he was fine as he was scared of the police officer who was standing over him during the entire checkup.

While Tika's case shows an example of indirect pressure from police on detainees to keep quiet, other detainees have mentioned that police have even threatened them directly to not complain about the pain and wounds that they have received as a result of their torture. Yet, even when detainees are brave enough to say to

³⁷ Jeevan Raj Sharma, Tobias Kelly, Monetary Compensation for Survivors of Torture: Some Lessons from Nepal, *Journal of Human Rights Practice*, Volume 10, Issue 2, July 2018, Pages 307–326.

the doctor that they were subjected to torture many were met with indifference and dismissiveness. However, it should be stressed that there were also reports of doctors directly confronting police about the use of torture and recording it in their reports. Effective action like this is what AF advocates for and is an example that needs to be replicated to further discourage police from using torture.

To gain insight on the importance of medico-legal documentation, it was presented at the April 2018 workshop that out of 150 torture cases AF had submitted to the courts, 94 were thrown out or lost because of insufficient medical evidence as a result of weak medico-legal reports. Dr Harihar Wasti, a doctor and professor at the Forensic Medical Department at the Nepal Institute of Medicine stated at the workshop that medico-legal reports are frequently substandard or absent due to institutional failures. He commented that due to an absence of political will there has not been enough steps taken to increase the amount of trained forensic experts in hospitals and an overall lack of medico-legal training for doctors. This institutional inability has resulted in the current reality of poor evidence collection for torture cases and common age falsification if juveniles resulting in their detention with adults as will be outlined on pages 65–69.

Dr Wasti further mentioned that doctors are still reluctant to conduct medico-legal reports out of fear that they will become entangled in court cases. He stressed that doctors need not be fearful of overlapping their work in health with the legal sphere as he highlighted all of the positive work he has done in aid of court proceedings and how working alongside organisations

like AF have improved and continue to improve medico-legal documentation.³⁸

JUDICIAL AUTHORITY WITHIN 24 HOURS

Under Article 14 of the Criminal Procedure (Code) Act 2017, once a person is arrested, they must be produced as soon as possible before the adjudicating authority within 24 hours.³⁹ This is an area of positive development as there has been a 17.7% improvement over the past 4 years with 86.4% of detainees being brought before a judge within 24 hours in 2018 as compared to 68.7% in 2014. While this improvement should be celebrated there is still work to be done to bring it to 100%. It should be noted that the 24-hour timeframe begins when the detainee arrives at the detention centre and does not include the travel time from the point of arrest.⁴⁰ This is despite some detainees having to travel very long distances after arrest. Regardless, these findings represent a failure by the police to comply with not only the Penal Code but with the recommendation of the CAT to ensure detainees are brought before court within the necessary 24 hours.

Further, it is noteworthy that the juvenile rate for presentation before the relevant judicial authority is 80.1%, a full 8.5% lower than the adult rate at 88.6%. This issue may stem from juveniles being often placed within adult detention centres while they

³⁸ Few years back, AF in consultation with national and international experts on medico-legal documentation, had prepared a medico-legal documentation form and submitted to the authorities. But very few recommendations were incorporated in the medico-legal documentation form of government.

³⁹ Criminal Procedure Code (2074 BS) 2017, Sect. 14(1)

⁴⁰ Criminal Procedure Code (2074 BS) 2017, Sect. 14(6)

wait to be produced before a juvenile bench. Section 55(4,5) of Nepal's 2018 Children's Act, holds that juveniles should be tried by a Juvenile Court, that there should be a Juvenile bench in every district court, and that in addition to a judge there should be a social worker, child specialist or psychologist on hand. However, in practice, there have been reports that juveniles have been brought before conventional benches (juveniles can only be presented before a conventional court if an adult is a party to a case). Therefore, it appears that this juvenile court has not been well implemented, resulting in the 8.5% lower juvenile rate produced before court within 24-hour. The juvenile situation in regard to juveniles being detained among adults will be elaborated upon further on page 72-75.

DID JUDICIAL AUTHORITY ASK WHETHER TORTURE HAD OCCURRED?

There is no current legal procedure to ensure that judicial officers ask detainees in court whether they have been subjected to torture or any other form of CIDT but AF has been working for numerous years to educate judges on how crucial making this step can be in order to record, prosecute, and prevent torture committed by police.

Regardless of any legal obligation, there has been a significant improvement from 2015 (last year of recorded data). In 2018, 35% of judges asked about CIDT. While this is still not an ideal number for the detainees going through the judicial process, it is still a 12% improvement from 2015, and 18.4% higher than 2014 – a rate which should be welcomed and likely linked to the effectiveness of AF's training programs.

Another positive development is the 2018 data showing that juveniles reported being asked by a judge whether they had experienced torture at a rate 9.2% higher than adults. While this is evidence that judges appear to be more sympathetic and watchful over the well-being of juveniles there are still cases such as Bikram's (pseudonym) reported. Bikram was fourteen-years-old when he was arrested for rape and beaten with a *lathi* by an assistant sub-inspector on his back, legs, and for an extended period of time, on the soles of his feet. When he was produced before a judge, Bikram was very vocal and detailed about the torture that he had received but while the judge listened to his pleas they were promptly ignored, and the judge proceeded as if Bikram had said nothing.

Bikram's case especially highlights the lack of effective implementation of this procedural safeguard. While Bikram had pleaded with the judge that he had been tortured, his pleas meant nothing in the face of a judiciary which seemingly did not value his voice or well-being. While encouraging judges to ask whether CIDT had occurred is a good step, this procedure must be followed by an effective response that pursues further evidence when torture or CIDT is identified – this is only possible if the judiciary respects and listens to the voice of detainees.

Alongside this, at times judicial indifference, police are often present during court proceedings, which can further intimidate detainees. AF has been working to lobby with judges to restrict police presence during proceedings, to look for non-verbal signs of torture such as wounds, to properly evaluate medical reports, and to take proper steps when torture is evident or suspected.

LEGAL & FAMILY ACCESS TO DETAINEES

Access to family members and legal representation are often denied to detainees once they have been arrested. The Constitution of Nepal 2015 guarantees that every person has the right to be consulted and defended by a legal practitioner from the outset of arrest but access to family members, especially for juveniles, remains an issue. Access to detainees is imperative for recording instances of torture as it has been observed that the first 24 hours after arrest are when police are most likely to commit acts of torture – typically with the intention to extract information or produce a forced confession. As there are no specific legal safeguards that ensure that every detainee is guaranteed contact and access to family – aside from juveniles who are ensured familial access under the Act Relating to Children – AF has long advocated through educational training of legal authorities, for the rights of detainees, to have contact and support from their families while they are going through the remand process.⁴¹

10.7% of overall detainees did not have contact with family members with the rate rising to 12.1% for juveniles. However, this is a marked improvement from 2015 which found that overall 18.5% of detainees and 22.2% of juveniles had zero contact with their families. Despite the lack of stringent legal pressure on legal authorities, this noteworthy change is a testament to the potential and effectiveness of AF's presence and advocacy within police and judicial systems. Cases where the family cannot be found, contacted, or if the detainee does not wish to contact their family must also be considered. The 2018 questionnaire does

⁴¹ Further discussion and issues surrounding family access for juveniles will be covered on page 73.

not distinguish for this multitude of factors; therefore, as of June 2019, the questionnaire will be updated to account for all of these options to better understand why certain detainees do not have contact with family members.

FOOD PROVIDED

2.4% of detainees and 3.9% of juveniles reported never receiving food at the time of interview. This is unacceptable and a fundamental denial of human rights. The Constitution of Nepal 2015 under Article 36(2) guarantees that every citizen has the right to never be in danger of not having food.⁴² Further, the right to food is protected internationally by the International Covenant on Economic, Social and Cultural Rights, to which Nepal acceded in 1991. Article 11(1) ensures that every person has the right to adequate food and is further protected by Article 8(2) that prohibits any state authority from restricting this right.⁴³

For the first time this year, the AF questionnaire checked when food had been given to detainees – before or after remand. Overall, food was primarily given before remand but a noteworthy 24.7% of detainees only received food until after remand. This may be partially explained by detainees being forced to pay for food by police before remand. If a detainee doesn't have the funds to buy food, they would find themselves waiting until after remand at which time they would be under judicial authority, where food is provided without a fee.

⁴² Constitution of Nepal (2072 BS) 2015, Art 36(2)

⁴³ International Covenant on Economic, Social and Cultural Rights, art 11(1), 8(2)

CHAPTER 5

JUVENILE SITUATION

The situation of juveniles going through the police and judicial system in Nepal remains one of the most worrisome aspects of human rights in Nepal. With juveniles consistently being subjected to torture at a higher rate than adults since AF began collecting juvenile data, the reality of a child in police detention is of profound and deep concern for AF. Children are far more vulnerable, physically and mentally, than adults, which makes them not only more susceptible to torture, as easier targets, but also more vulnerable to the long-term harm that torture can inflict. Many of the juvenile findings from the 2018 data outlined above will be revisited below and will then be followed by a more comprehensive analysis of the current situation of juveniles in Nepal in regard to procedural safeguards and juvenile legal framework.

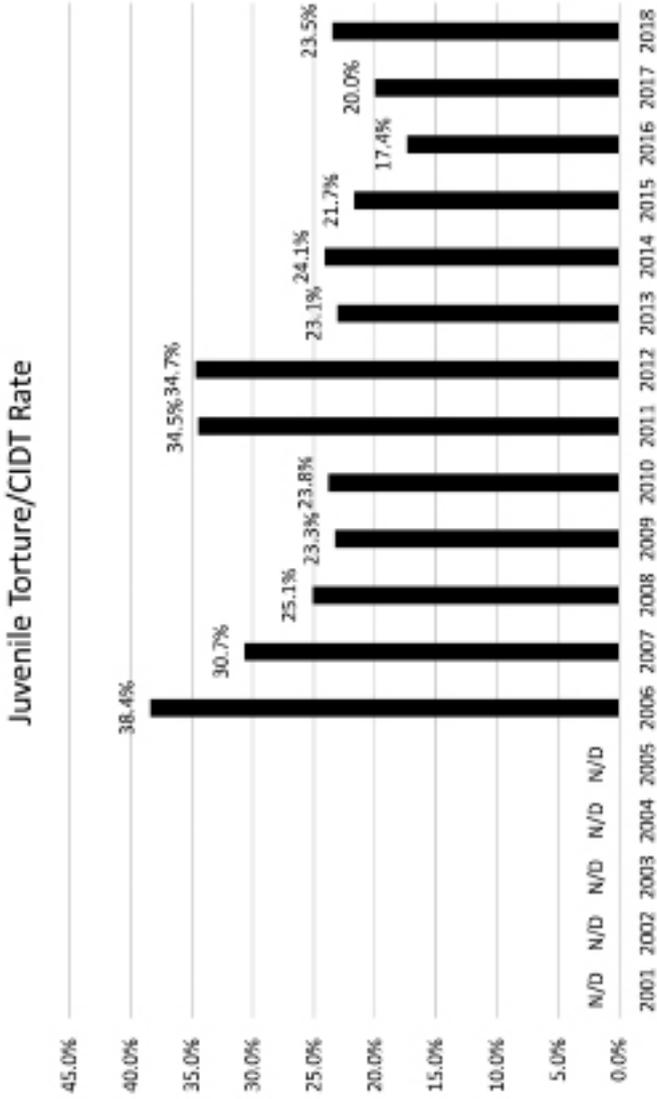
FINDINGS

AF interviewed 306 juveniles in 2018, the far majority from Kathmandu and Banke. Regrettably, the rate of juveniles who experienced torture and other ill-treatment at the hands of police was again higher than the adult rate and increased from last year's

rate by 3.5%.⁴⁴ At 23.5% the juvenile rate for 2018 is at its highest since 2014 and rose 3.5% from 2017 and 6.1% from 2016. 2018 represents a worrying deterioration in comparison to the general downward trend of juvenile torture since juvenile data began in 2006, with the highest rate recorded that same year at 38.4%. Even more worrisome is the reality that the juvenile torture rate has been consistently higher than the overall/adult rate every year since 2006. However, in 2018 the margin between the adult and juvenile rate was 1.7%, a smaller difference than previous years which usually shows a difference between ~5-10%. The majority of juveniles recorded were fourteen and older but nearly 9% were thirteen and under, the youngest being two seven-year-olds.

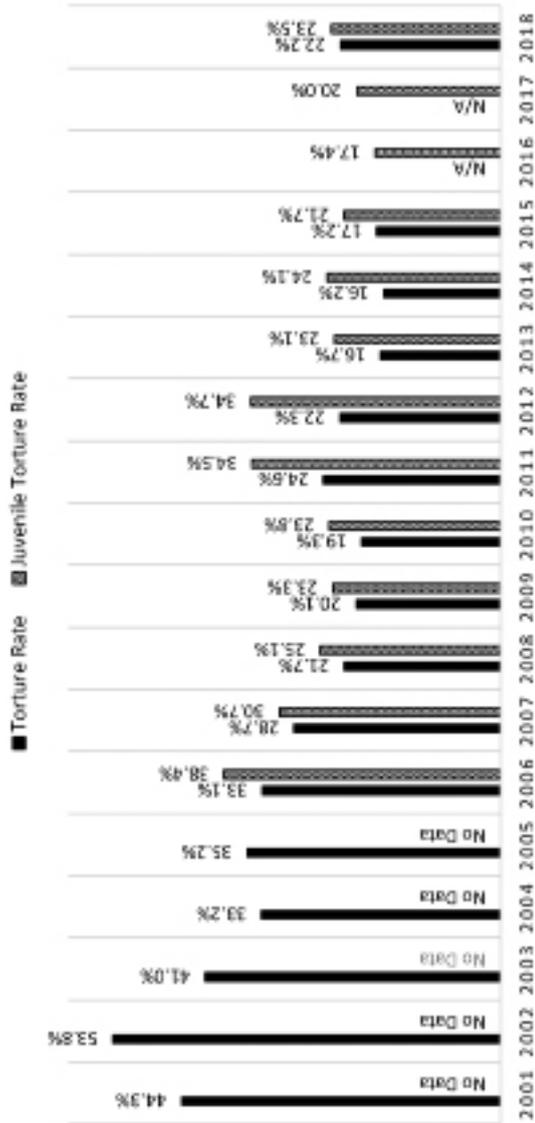
Police treatment of juveniles in regard to compliance with procedural safeguards in 2018 offers both hope and concern. While it is a positive development that juveniles were 9.2% more likely to be asked by a judge whether they had experienced torture or ill-treatment during detention in 2018, juveniles were mistreated at a higher rate than adults in a number of other procedural categories.

⁴⁴ While the overall torture rate was omitted in 2016 and 2017, torture data on juveniles was prioritised these years and conducted primarily at Child Correction Homes allowing for proper data collection and analysis.

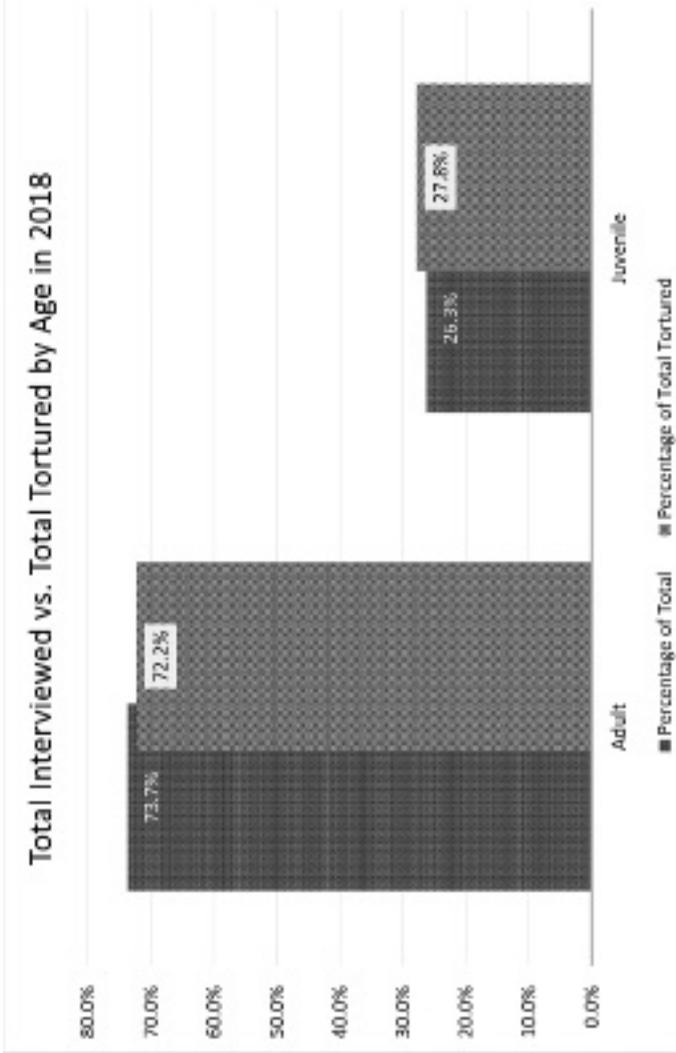


Annual Torture Rate since Juvenile Records Began in 2006 – Figure 4

Overall Torture/CIDT Rate & Juvenile Torture/CIDT Rate



Overall Torture Rate vs. Juvenile Torture Rate – Figure 5



Adult & Juvenile: Percentage of Total vs. Percentage of Total Tortured – Figure 6

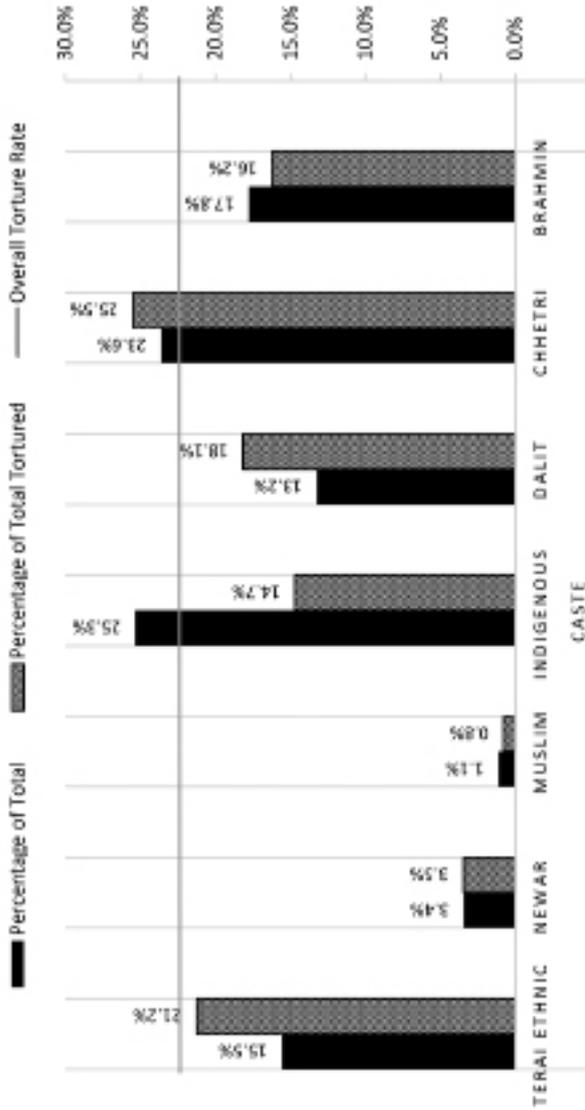
CASTE

Similar to the overall findings, Terai ethnic juveniles were subjected to torture at a significantly higher rate than any other group. At 34.1% within the group being tortured, this is 10.6% higher than the overall juvenile rate while Madhesi detainees only made up 13.4% of detainees interviewed, they represented 19.4% of all those tortured. As aforementioned, this is further consistent with the unprecedented general findings which found a spike in torture against people in the Terai that is inconsistent with data from 3-4 years ago and is possibly part of a larger trend of police suppression against Madhesi.⁴⁵

Further following the general findings from 2018 and previous years, the juvenile data on Brahmins re-highlights the privilege and power that the so-called “high-caste” Brahmins have within Nepali society resulting in their more favourable treatment by police. Of the juvenile Brahmins interviewed 12.2% reported experiencing torture which represents only 6.9% of all juveniles tortured despite making up 13.4% of the total. While the plight of Brahmins and all other juvenile survivors are met with equal sadness and outrage it is important to recognise disproportionate infliction of torture based on caste and origin.

⁴⁵ For a more comprehensive analysis of the Madhesi rights movement refer to page 26.

TORTURE/CIDT BY CASTE



Juvenile Caste Percentage of Total Tortured – Figure 7

CHILD CORRECTION HOMES

It is of serious concern that 19.9% of juveniles not being brought before the relevant court within 24 hours. As aforementioned, the ineffective implementation of Juvenile Courts/bench has resulted in juveniles not being produced before a Juvenile Court/bench within 24 hours and in some instances produced before an unsuitable adjudicating authority. This failure is part of the larger issue of detaining juveniles properly in accordance with the law.

The UN Convention on the Rights of the Child, which Nepal has ratified, under article 37(b) asserts that any detainment of a juvenile shall follow the appropriate guiding laws and that detention or imprisonment of a juvenile should be of last resort.⁴⁶ The appropriate guiding laws applicable in Section 154 in the Criminal Procedure Code 2017 which states that “if a minor below the age of eighteen years is convicted of an offence, the minor shall be held in a separate children’s reform [correction] home or similar other home as provided by the Government of Nepal.”⁴⁷ If taken under custody, juveniles are further protected by the Act Relating to Children which states that if a juvenile is placed in an observation room it shall be in a separate room, detached from adult cells and that any investigative authority shall not exercise force when taking a juvenile under observation.⁴⁸

However, due to a lack of resources and infrastructure, the correction homes are drastically overcapacity and underserved resulting in juveniles remaining at adult detention places, despite these places themselves being overcrowded and it being a direct

⁴⁶ UN Convention on the Rights of the Child 1990, Art. 37(b)

⁴⁷ Criminal Procedure Code (2074 BS) 2017, Sect. 154

⁴⁸ Act Relating to Children 2018, Sect. 21(4),22(2)

contravention of the Children's Act and Criminal Procedure Code for juveniles to be detained alongside adults. For all of Nepal, there are only five Child Correction Homes operating in: Bhaktapur, Banke, Kaski (Pokhara), Morang, and Rupandehi. These five homes are unable to house the number of juveniles which are currently under detention. Additionally, girls are only kept in Bhaktapur, where there is only a capacity of 110 juveniles. At the time of writing, it was housing nearly 200 juveniles, resulting in dozens having to sleep on the floor, according to staffs at the correction home.

Further, this geographical reality of having only five correction homes for a country with often limited transport infrastructure means many juveniles have to be transferred very far away from their homes and families. A lack of familial support due to geographic distance is coupled with the fact that the court they are being tried in is sometimes over a day's journey away leading to cases being proceeded and ruled in their absence, depriving them of a fair trial.

Due to correction homes only housing juveniles awaiting trial or already convicted, all juveniles pass through conventional detention places. Some juveniles are put in adult detention facilities by police artificially increasing their age to the age of majority despite insistence by juveniles that they are in fact a juvenile and often clear biological signs of youth. This is primarily done by requiring juveniles to prove their age with official documents before they are transferred to juvenile facilities. As many juveniles under arrest are from a poorer socio-economic background, they simply do not have access or don't have any documents to verify their age, resulting in them often being

detained side by side with adult detainees. Being detained with adults puts juveniles at a much higher risk of ill-treatment at the hands of police and adult detainees who are much more developed physically and physiologically. Conversely, there have been zero reports of torture inflicted upon juveniles by police once they reside in Child Correction Homes.

AF has long advocated for juvenile rights and the separation of adults and juveniles in detention through its advocacy work. However, the failure to do so is not squarely on the police officers working day to day in detention places. Police and staff at correction homes carry out what procedures they can with the resources they have. It is also important to acknowledge that police are working within a much larger system mired by policy failure and lack of political will which limits what needs to be achieved as required by national and international law.

HEALTH EXAMINATION AND AGE VERIFICATION

As aforementioned, while juveniles reported receiving a health check-up at a rate 1.3% higher than adults, they were more likely to receive a check-up after detention. It is worth emphasising again that the health examination procedure should ideally be carried out twice, upon detention and upon release, in order to properly record a detainee's health status and any possible physical ill-treatment during detention. This shortcoming is part of a larger issue of proper medico-legal procedure within the police and judicial system.

AF has been conducting workshops on medico-legal documentation, inviting judges, prosecutors, lawyers, police and the medical professionals. During a workshop conducted by AF

in April 2018, many of these medico-legal issues were discussed, specifically in regard to the juvenile justice procedure.⁴⁹ AF lawyers raised the point that many of the juveniles who are arrested by the police come from very low socio-economic status and often commit crimes without even knowing that they are crimes. These juveniles sometimes don't even know their date of birth, have no birth certificate, and are unaware of their legal rights. In the face of this reality, an official medical age examination is needed to verify the age of these juveniles so that they are guaranteed their juvenile rights and not treated and detained as adults as further explained on page 74.

However, police are sometimes reluctant to take juveniles to the hospital for age verification tests as hospitals usually charge for the test or don't have the capacity at all to conduct such examinations. This leads police to either attempt to contact human rights organisations to arrange and pay for the age test or to simply falsify the age based on personal estimate or convenience. For the last several years, AF has been helping police with age verification. However, as of late, AF has been less able to provide this support due to limited resources and capacity. AF was able to facilitate twenty-two age verification tests between November 2018 and March 2019 but could not help more due to the budget limitations resulting in many cases resulting in police simply recording the age of a detainee as an adult.

⁴⁹ The workshop was organised by AF and supported by DKA Austria. Titled "Importance of Medico-Legal Documentation in Juvenile Justice", the workshop took place on April 17, 2018 in New Baneshwor, Kathmandu. There was a total of 39 participants which included: doctors, police officers, prosecutors, defence lawyers, and representatives from local NGOs.

FAMILY ACCESS FOR JUVENILES

Juveniles are at their most vulnerable when separated from their family and access to family should be prioritised alongside legal representation. Access and continued contact with family members for juveniles who have been deprived of liberty is enshrined as a right under Article 37(c) of the Convention on the Rights of the Child which also requires that juveniles be separated from their parents for as short as possible.⁵⁰ Further, for the first time under the Act Relating to Children, provisions exist to help ensure that juveniles have access to family members or guardians if placed under custody.⁵¹ However, in 2018, 12.1% of juveniles had zero contact with their family, 1.9% lower than the adult rate at 89.8%. 12.1% is an even more substantial rate considering juveniles were most often interviewed after they had been convicted or awaiting trial while most adult detainees were interviewed while in pre-trial detention (before remand).

However, simply explaining as to why 12.1% of juveniles did not have contact with their family is difficult. While there were cases of outright denial, as seen with the horrific experience of Rapti, a sixteen-year-old boy who was purposefully kept from his family for ten days after being intentionally shot in the leg by a police officer (page 78), there are additional barriers outside of police control which impede familial access. Certain cases arise where the parents or guardian of a juvenile can't be located or contacted quickly. It is unfortunate but many juveniles who find themselves under detention no longer live or have direct contact with their parents or other family members. This poses a unique

⁵⁰ UN Convention on the Rights of the Child 1990, Art. 37(c)

⁵¹ Act Relating to Children 2018, Sect. 22(4)

difficulty for police, who have an obligation to exert all efforts to contact the rightful family or guardian of a juvenile who has entered detention – sometimes they’re never found. Other times, the parents or guardian can’t physically be there quickly or at all to be with a juvenile. Due to a lack of infrastructure and Nepal’s geography, there have been cases where the location of juveniles and their parents were a multi-day journey away. One juvenile’s home village was a two days’ walk from the nearest road. As aforementioned, the questionnaire has been updated to include for all of these possible eventualities.

AF has long advocated that whenever possible juveniles should be with their rightful family or guardian. In the case of Karanjit (pseudonym), AF intervention resulted in his successful release back to his parents. Karanjit had been originally arrested by police on suspicion of stealing a phone charger. He was arrested without an arrest warrant, was given no health check-up, and was illegally detained for five days until an AF lawyer arrived and informed the police inspector on the rights of juveniles leading to Karanjit’s release. Karanjit’s case is another example of the integral role AF plays in not only providing legal guidance for juveniles but indirectly enforcing the often ignored or not understood laws by informing and pressuring the police. With the Act Relating to Children only being recently passed in September 2018 and the somewhat vague language used under Section 22(4) in regard to police being able to stipulate the necessary “time and conditions”,⁵² a strong and increased presence of organisations like AF would

⁵² Act Relating to Children 2018, Sect. 22(4): “If any member of the family of a child kept in an observation cell desires to stay with her/him for her/his assistance, the investigations authority may grant permission for her/him to stay after stipulating the time and conditions, as necessary.”

ensure that the legal provision is being upheld to the highest degree.

JUVENILE LEGAL LANDSCAPE

As has been noted, Nepal ratified the Convention on the Rights of the Child (CRC) in 1990 which sets out Nepal's main international obligation in relation to juvenile rights. Domestically, Nepal introduced the country's first juvenile specific law, the Children's Act, in 1992, followed by the Juvenile Justice Procedural Rules in 2006 providing further procedural details on the handling of juvenile cases. Most recently, the Penal Code 2017 and The Act Relating to Children 2018 were passed.

However, this new Penal Code falls short of meeting Nepal's international obligations. Section 45(1) of the new Penal Code places the minimum age of criminal liability at ten years old. Yet, international standards recognise twelve as the minimum age for criminal liability. Further, as aforementioned, the new Penal Code or any law in Nepal fails to ensure that juveniles have contact with their family during detention, that detention of a juvenile is solely used as last resort, and to ensure that juveniles are never detained alongside adults.

In light of these legal shortfalls, AF calls for a distinct and comprehensive anti-torture bill with specific provisions safeguarding the rights of juveniles under police detention and in the judicial system.

CASE STUDY: RAPTI

Rapti (pseudonym) was interviewed by AF and provided the following version of events. Rapti is sixteen-year-old boy who

was working as a bus helper when he was approached by a man, Dipendra (pseudonym), who began to take him under his wing and promised him a job with the police and a driver's license in return for Rapti paying for Dipendra's food and drinks when they went out.

One day they went out together with another boy, Deepak, in the local area. It is then, Rapti states, when they were all behind a bus park, Dipendra snuck up behind Deepak, struck him with a heavy wooden stick and when Deepak fell to the ground, Dipendra proceeded to slit his throat in front of Rapti. Deepak would die there behind the bus park. Rapti then started to run away but Dipendra told him he would kill him too if he ran. Dipendra then ordered Rapti to touch Deepak's bloodied body and then made Rapti hold the knife while Dipendra took pictures of him. It would later emerge that it appeared that Deepak had been similarly groomed by Dipendra and had recently given Dipendra Rs. 150,000 with the promise of a job with the police.⁵³

According to Rapti, the next evening while at his aunt's, nine to ten police officers came to arrest Rapti and threw him in a van. They then brought him to a jungle where they instructed him to run. Fearing that they would shoot him, he refused. They then walked him further into the jungle where they further threatened to shoot him and beat him with lathis unless he confessed to Deepak's murder. Rapti began to beg for his life and said if they were going to shoot him in the leg not in the chest. The head officer obliged him and went to shoot his leg. His gun jammed but then the driver was ordered to come over and shot Rapti on the shin of his left

⁵³ <https://kathmandupost.ekantipur.com/printedition/news/2019-01-13/man-found-dead-20190113082108.html>

lower left leg. Rapti was then transported to the Teaching Hospital where he was kept for ten days but his family was denied access to him. When he was discharged, he was almost immediately brought back to the police office for further interrogation where he was subjected to continued threats of being shot in his other leg if he didn't confess to the murder.



*Rapti's leg after he was shot and returned from the hospital –
Credit: Advocacy Forum*

Not surprisingly, the police presented a different sequence of events. They reported that after they had arrested Dipendra they went searching for Rapti where they found him fleeing the area, they shot him as he ran away, injuring his leg. This version of

events is what was published in the main newspapers which also stated that Deepak was strangled by both Dipendra and Rapti. Rapti has also told AF that Dipendra has been telling him and his family that if Rapti takes the fall for the murder of Deepak his family will be paid Rs. 5000,000, otherwise there would be consequences for them.

At the time of writing, Rapti is in a Child Correction Home while his trial on murder charges is proceeding where he faces murder charges. AF lawyers have been providing legal aid and are representing Rapti. Rapti represents an extreme case of how juvenile vulnerability can possibly be taken advantage of and abused by adults as well as the police, further highlighting the strong need for proper juvenile legal protections.

CONCLUSION AND RECOMMENDATIONS

CONCLUSION

The findings by Advocacy Forum lawyers in 2018 are representative of a system which has year after year failed to fully safeguard detainees from indefensible harm. In particular, economically and socially marginalised groups were highlighted through case studies and data analysis. Police compliance with certain procedural safeguard provisions showed welcomed improvement in regard to providing reason for arrest, detainees being brought before a judicial authority within 24 hours, and families having access to detainees, while other procedures continued to struggle or take a step back. 2018, in general, echoed many issues seen in earlier years but also introduced new challenges and contexts, in particular, with the new legal measures that the Government has been attempting to put in place.

AF would like to stress that while monitoring efforts explicitly focus on instances of police abuse and procedural failure, this is to not solely find fault with those closest to the issues. AF aims to help address and unpack the complex and layered problems that result in detainees being tortured or not given the proper procedural care. Despite the facts that confessions obtained through torture being rarely valid or helpful as evidence, police continue to use

it.⁵⁴ We must value improving resources in the justice system as well as foster a system of internal accountability in the protection of the rights of detainees – the two are intimately interconnected.

As was seen with police forcing detainees to pay for their health check-ups, police should need not worry about who ought to be paying for medical examinations. There should be a system in place that ensures that the Government reimburses any expenses incurred during health checks of detainees. NHRC, AF, other human rights organisations, and governments must approach interventions with an understanding that there are always multiple factors contributing to singular issues.

Moving forward, AF is further updating the detainee questionnaire to incorporate improved questions with increased answer options to better represent and understand the reality of the justice system. Yes and no answers only reveal so much. AF is continually training and improving its human resources capacity to better understand problems holistically.

In order to reverse the 5% increase in reported torture identified in 2018, a continuation of AF's monitoring and training interventions followed by appropriate state protectionary and investigative efforts is needed. Holistic interventions can work to counteract and actively resist rising political and legal uncertainty in Nepal. By advocating for a functioning system of internal accountability, disseminating human rights values into not only laws but into stakeholder understanding of police and judicial systems, we can help safeguard the well-being of detainees and be

⁵⁴ Hans Draminsky Petersen. Torture: An Expert's Confrontation with an Everyday Evil, by Manfred Nowak. Review. *Journal on Rehabilitation of Torture Victims and Prevention of Torture*, Volume. 29, Issue 1, 2018, Page 134.

better positioned to fight and resolve political and legal instability contributing to the ill-treatment of detainees.

RECOMMENDATIONS

Many of our previous reports have included recommendations that are vital in the prevention of torture and ill-treatment in detention. Unfortunately, many of them are still not fulfilled. AF would like to reiterate and reinforce the importance of those recommendations, which include:

- The tabled 2014 anti-torture bill is revisited and revived with the crucial provision improvements outlined in this report so that Nepal has a standalone anti-torture Act that comprehensively covers all concerns relating to the prevention, documentation, prosecution, and compensation aspects connected with torture,
- Nepal ratify the Optional Protocol of the Convention Against Torture as recommended during the Universal Periodic Review so that an official national body can facilitate independent monitoring and reporting of torture,
- The new Penal Code establishes a statutory limitation of a mere six-months on complaints regarding torture. Due to the sometimes severe short and long-term effects of torture, AF urges that the statutory limitation be completely removed so that survivors of torture can come forward when they are physically and mentally ready,
- Provide immediate review on provisions regarding First Informant Reports (FIRs) when filing criminal torture cases. The 2017 Criminal Procedure Code allows for torture FIRs to

be processed and if not rejected subsequently investigated by a district police office which may be a party to the FIR. This results in the possibility of an internal conflict of interest where torture cases are filed at the same police office employing the officers accused,

- Improved provisions would consist of a higher or another district police or at a minimum a different independent authority overseeing the filing of the FIR and subsequent investigation instead of the police office in question,
- Support for existing survivors of torture is treated as importantly as prevention. A Basket Fund should be established and implemented to ensure that survivors are rightfully compensated for their hardship,
 - The Supreme Court of Nepal has ordered to establish a basket fund but the decision is yet to be implemented,
- Section 3(2) of the TCA is enforced so that detainees receive two health checkups, upon detention and upon release. The execution of this provision is essential for improving medico-legal reports and documenting instances of torture while detainees are under detention,
- Medico-legal support for adults and juvenile is modernised and used more frequently through increased training initiatives and funding to improve the administration and quality of medico-legal documents,
 - A uniform state system guided by appropriate laws should be established in order to achieve proper medico-legal documentation and implementation,

- Equip police with resources, technologies and updated operational manuals for best practices on respecting the human rights of detainees and preventing torture to ensure proper compliance with the new Penal and Criminal Procedure Codes,
- Child Correction Homes receive the attention and help required under national and international human rights law. While maintaining that placing a juvenile under detention should always be of last resort, there are still immediate infrastructure improvements needed to properly care for juveniles who find themselves detained with adult detainees,
 - Each province must have its own Child Correction home to prevent overcapacity and guarantee that the child has access to their family or guardian,
 - Build separate Child Correction Homes for boys and girls to ensure the safety of all juveniles,
- Immediately implement Section 22(c) under the Act Relating to Children requiring every district police office to have a separate ‘observation’ room for juveniles. This is imperative to ensuring juveniles are no longer kept with adult detainees where they are more vulnerable to further harm,
 - Additional legal text is needed to clarify what constitutes a sufficient ‘observation’ room.

ANNEXES

Annex 1: Torture/CIDT Infliction

Overall	Count	Percent	Juvenile	Count	Percent
Yes	259	22.2%	Yes	72	23.5%
No/Blank	906	77.8%	No/Blank	234	76.5%
Total	1165	100.0%	Total	306	0.0%

Annex 2: Torture/CIDT Infliction - Gender

Overall		Yes	No/ Blank	Total	Percentage of Total
Female	Count	21	70	91	7.8%
	% Reporting Torture	23.1%	76.9%	100.0%	
Male	Count	238	836	1074	92.2%
	% Reporting Torture	22.2%	77.8%	100.0%	
Total	Count	259	906	1165	100.0%
	% Reporting Torture	22.2%	77.8%	100.0%	

Annex 3: Juvenile Torture/CIDT Infliction - Gender

Juvenile		Yes	No/ Blank	Total	Percentage of Total
Female	Count	4	17	21	
	% Reporting Torture	19.0%	81.0%	100.0%	6.9%
Male	Count	68	217	285	
	% Reporting Torture	23.9%	76.1%	100.0%	93.1%
Total	Count	72	234	306	
	% Reporting Torture	23.5%	76.5%	100.0%	100.0%

Annex 4: Torture/CIDT Infliction - Caste Group

Overall	Yes	No/Blank	Total	Percentage of Total Tortured	Percentage of Total
Count	55	126	181		
Terai Ethnic	30.4%	69.6%	100.0%	21.2%	15.5%
Count	9	31	40		
Newar	22.5%	77.5%	100.0%	3.5%	3.4%
Count	2	11	13		
Muslim	15.4%	84.6%	100.0%	0.8%	1.1%

Overall	Yes	No/Blank	Total	Percentage of Total Tortured	Percentage of Total
Count	38	257	295		
Indigenous					
% Reporting Torture within group	12.9%	87.1%	100.0%	14.7%	25.3%
Dalit					
Count	47	107	154		
% Reporting Torture within group	30.5%	69.5%	100.0%	18.1%	13.2%
Chhetri					
Count	66	209	275		
% Reporting Torture within group	24.0%	76.0%	100.0%	25.5%	23.6%

Overall	Yes	No/Blank	Total	Percentage of Total Tortured	Percentage of Total
Count	42	165	207		
Brahmin	20.3%	79.7%	100.0%	16.2%	17.8%
% Reporting Torture within group					
Count	259	906	1165		
Total	22.2%	77.8%	100.0%	100.0%	100.0%
% Reporting Torture within group					

Annex 5: Juvenile Torture/CIDT by Caste Group

Juvenile	Count	Yes	No/Blank	Total	Percentage of Total Tortured	Percentage of Total
Terai Ethnic	Count	14	27	41		
	% Reporting Torture	34.1%	65.9%	100.0%	19.4%	13.4%
Newar	Count	2	7	9		
	% Reporting Torture	22.2%	77.8%	100.0%	2.8%	2.9%
Muslim	Count	2	6	8		
	% Reporting Torture	25.0%	75.0%	1	2.8%	2.6%
Indigenous	Count	20	69	89		
	% Reporting Torture	22.5%	77.5%	100.0%	27.8%	29.1%

Juvenile	Yes	No/Blank	Total	Percentage of Total Tortured	Percentage of Total
Count	13	41	54		
% Reporting Torture	24.1%	75.9%	1	18.1%	17.6%
Juvenile	Yes	No/Blank	Total	Percentage of Total Tortured	Percentage of Total
Count	16	48	64		
% Reporting Torture	25.0%	75.0%	100.0%	22.2%	20.9%
Brahmin	Yes	No/Blank	Total	Percentage of Total Tortured	Percentage of Total
Count	5	36	41		
% Reporting Torture	12.2%	87.8%	100.0%	6.9%	13.4%
Total	72	234	306	100.0%	100.0%
% Reporting Torture	23.5%	76.5%	100.0%	100.0%	100.0%

Annex 6: Reason for Arrest Given

Overall	Count	Percent
Yes	18	1.6%
After Detention	1049	90.0%
No/Blank	98	8.4%
Total	1165	100.0%

Juvenile	Count	Percent
Yes	6	2.0%
After Detention	273	89.2%
No/Blank	27	8.8%
Total	306	100.0%

Annex 7: Provided a Health Checkup

Overall	Count	Percent
Yes/Before Detention	751	64.5%
After Detention	388	33.3%
No/Blank	26	2.2%
Total	1165	100.0%

Juvenile	Count	Percent
Yes/Before Detention	171	55.9%
After Detention	131	42.8%
No/Blank	4	1.3%
Total	306	100.0%

**Annex 8: Brought Before Relevant Judicial Authority
within 24 Hours**

Overall	Count	Percent
Yes	1006	86.4%
No/Blank	159	13.6%
Total	1165	100.0%

Juvenile	Count	Percent
Yes	245	80.1%
No/Blank	61	19.9%
Total	306	100.0%

Annex 9: Food Provided

Overall	Count	Percent	Juvenile	Count	Percent
Yes/Before Remand	849	72.9%	Yes/Before Remand	241	78.8%
After Remand	288	24.7%	After Remand	53	17.3%
No/Blank	28	2.4%	No/Blank	12	3.9%
Total	1165	100.0%	Total	306	100.0%

Annex 10: Family Access Given

Overall	Count	Percent	Juvenile	Count	Percent
Yes	1040	89.3%	Yes	269	87.9%
No/Blank	125	10.7%	No/Blank	37	12.1%
Total	1165	100.0%	Total	306	100.0%

Annex 11: Did Judicial Authority Ask Whether Torture Had Occurred?

Overall	Count	Percent	Juvenile	Count	Percent
Yes	407	35.0%	Yes	128	41.8%
No/Blank	758	65.0%	No/Blank	178	58.2%
Total	1165	100.0%	Total	306	100.0%

June 26, 2019

Advocacy Forum (AF) is a leading non-profit, non-governmental organization working to promote the rule of law and uphold International Human Rights standards in Nepal. Since its establishment in 2001, AF has been at the forefront of Human Rights advocacy by actively confronting the deeply entrenched culture of impunity in Nepal. AF's contributions in Nepal have been recognised by Human Rights Watch as *“One of Asia’s most respected and effective Human Rights Organisations”*. AF is a recipient of a number of awards including the *Women in Leadership Award* conferred by the Swiss Agency for Development and Cooperation.

AF's mission is to combat Nepal's culture of impunity by promoting the rule of law while building mutually beneficial relationships with stakeholders. AF seeks to achieve this mission through a number of activities, including capacity development for survivors of torture, legal aid, and high-level policy advocacy aimed at establishing effective institutions with the necessary legal and policy frameworks for the fair and effective delivery of justice.

AF's objectives are to provide legal aid to the survivors of Human Rights violations, target assistance for women and children, ensure juvenile protections, undertake systematic monitoring and documentation of Human Rights violations, promote comprehensive transitional justice mechanisms, advocate for legislative reform, combat impunity, and ultimately prevent and eliminate the use of torture in Nepal.

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