

THE CRIMINAL JUSTICE RESPONSE TO CORRUPTION

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I. THE NEPALESE CRIMINAL JUSTICE SYSTEM

The Nepalese criminal justice system is more or less influenced by the common law system, and operates as follows:

- A. Investigation and prosecution;
- B. Court hearing and adjudication.

A. Investigation of Crime

The Nepal Police are responsible for investigation of all criminal cases. The police function under the general supervision and control of the Ministry of Home Affairs of the Government of Nepal.

The crime investigation begins with the filing of the First Information Report (FIR) to a police post by the victims or his or her near relatives. The police investigate crime subject to the District Government Attorney's instruction. On completion of investigation, the police prepare a case file and submit it to the District Government Attorney who decides to institute or not to institute a suit.

B. Prosecution

All criminal offences to which Government is a plaintiff are defended by Government Attorneys. Government Attorneys are under the Attorney General of Nepal, who is the principal legal adviser to government of Nepal.

The Attorney General and his Subordinates are responsible for representing the Government for the protection of the rights and interest of the state. Similarly, the Attorney General is the final authority to decide whether or not to prosecute a person in a criminal offence, and for providing legal opinions to the central government agencies.

Sixteen Appellate Government Advocate Offices and 75 District Government Advocate Offices function under the Attorney General and are responsible for defending and prosecuting criminal cases.

C. Court

Under the Interim Constitution of Nepal, 2007, there are three categories of court:

(i) Supreme Court

This is the supreme court of the land. This court has both ordinary and extra-ordinary jurisdiction. Powers include hearing appeals against judgments delivered by the Courts of Appeal. The extra-ordinary power of the court includes the power of issuing the writ petitions. It also has power of judicial administration over the whole country.

(ii) Appellate Court

The Court of Appeal is the second tier in the hierarchy of the courts in Nepal. Sixteen Courts of Appeal, in various locations, are established under the Supreme Court.

The Courts of Appeal are empowered to hear appeals from the district courts under their jurisdiction, issue writ petitions and try certain cases under their respective jurisdictions.

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(iii) District Courts

The District Court is located in a district, administrative unit. The District Courts are the court of first instance. The courts are responsible for trying all the civil and criminal cases.

II. CORRUPTION CONTROL LAWS IN NEPAL

A. Understanding Corruption

Corruption is a complex and multi-faceted phenomenon with multiple causes and effects, as it takes on various forms and functions in different contexts. The phenomenon of corruption ranges from a single act of activity contradicted by law to a way of life of an individual or group. It is the misuse of public goods by public officials, for private gain. This private gain is achieved by ignoring prohibitions against certain acts. This is the abuse or misuse of public offices and professional rights and duties for personal gain.

Corruption not only undermines ethical values and justice, it damages democratic institutions, the national economy and the rule of law. Corruption facilitates other forms of serious crimes, in particular transnational organized crime, human trafficking and fiscal crime such as money laundering. Corruption is also the cause of poverty and underdevelopment and diverts funds intended for development. It makes it difficult for the government to provide basic services, eliminate inequality, provide justice, and to utilize the available resources, including foreign investment and aid.

B. Corruption in Nepal

For at least 15 years, and more in recent years, the problem of corruption has been at the centre of the political agenda in Nepal. It is recognized as one of the chief causes of Nepal's under development. It is very widespread, has different manifestations. This is really a great challenge to modern Nepal. Businesspersons, politicians, government officials, academics, and even consumers, are responsible for this.

C. Corruption Control Laws in Nepal

Nepal has long made efforts to control corruption. Legislation on the control of corruption started in 1957. Recent legislation was enacted in 2002.

The main laws relating to corruption control are as follows:

1. Prevention of Corruption Control Act, 2059 (2002)

This Act has defined corruption as the following activities and penalizes:

- Taking or giving a bribe or agreeing to take a bribe;
- Procuring goods or services free of cost or at lower cost;
- Accepting contributions, charity, gifts and subscription;
- Taking commissions;
- Public servants preparing wrong documents;
- Making wrong translations;
- Tampering with government documents;
- Destroying government or public agencies' documents;
- Breach of confidentiality of the question paper or changing the result of the examination;
- Public servants indulging in illegal trade and business;
- Claiming positions which one does not hold;
- Giving false descriptions;
- Damage to public property;
- Exerting illegal pressure;
- Giving wrong reports;
- Illegal acquisition of property;
- Accomplice/inciting corruption offences.

2. Commission for Investigation of Abuse of Authority Act, 2048 (1991)

Commission for Investigation of Abuse of Authority Act, 1991 defines the abuse of authority as improper conduct. Improper conduct denotes any of the following acts committed deliberately or through negligence by the person holding a public post:

- Refusal to undertake any work under one's authority or undertaking any work outside one's authority;
- Not following mandatory procedure while making any decision or giving any instruction;
- Use of authority vested in oneself for purposes contrary to the relevant law, decision or instruction;
- Use of discretionary power with a *mala fide* intention or selfish desire;
- Unauthorized obstruction of the work of other offices, officers, or employees or getting any unauthorized work done from such offices, officers or employees under pressure;
- Shifting one's responsibility by sending the work to be done by oneself to another officer;
- Not fulfilling the responsibility demanded by the nature of one's position;
- Getting work done to own benefit under improper influence or enticement to the employee under one's influence or control; or
- Abuse of immunity, facility or concession associated with the post.

3. Anti- Money Laundering Act, 2008

The Act aims to prevent conversion of proceeds of crime into legal money. It establishes a department to administer the Act.

4. Good Governance Act, 2008

This Act aims to have good governance in the country.

5. Public Procurement Act 2007

This Act aims to maintain competition and transparency in procurements by public bodies including government bodies, Government controlled and funded bodies.

III. CORRUPTION CONTROLLING BODIES

A. Commission for the Investigation of Abuse of Authority (CIAA)

The Commission for the Investigation of Abuse of Authority, publicly known as CIAA, is a constitutional body, which serves as the investigating and prosecuting authority in corruption cases and the watchdog authority against the abuse of authority. The Interim Constitution of Nepal, 2007 provides for it in explicit terms in part 11, Article 120. Various actions, including prosecuting the concerned public official in a court of law, may be taken by the CIAA.

Pursuant to the constitution, functions, duties and powers of the commission are as follows:

- Inquiry and investigation of improper acts or corruption by a person holding public office;
- Recommending departmental action or any other necessary action against the person who has abused authority by committing an improper act;
- Filing cases against persons alleged to have committed corruption.

The CIAA, the main investigating and prosecuting body in corruption cases, filed 70 cases to the Special Court in the last fiscal year and in 28 cases the commission recommended departmental action to the concerned body. The commission called for attention in 19 cases too.

B. National Vigilance Center

National Vigilance Center (NVC), established by the Nepal Government, is a body of the government intending to control corruption and bring about good governance in the country. It is established as per chapter 4 of the Corruption Control Act, 2002. It functions under the direct control and supervision of the Prime Minister.

The main objective of the Center is to play a preventive and vigilant role to ensure good governance by controlling work delays, administrative and financial irregularities, mis-collection of public revenue and other misdeeds that exist in the various steps of the government and public sector organizations.

C. Special Court

This court hears the corruption cases filed by CIAA. This is the court of first instance in respect of corruption. Judges are deputed from the ordinary Appellate Court. It can have more than two benches.

As of 2007, the Special Court tried 142 cases related to corruption. There are four categories of corruption, according to court data: 35 cases relate to illegal property; 30 relate to decision making (at policy level); 73 are of fake certificates; and four concern bribery.

IV. ANTI-CORRUPTION NATIONAL POLICY

To prevent corruption, the following measures need to be incorporated into the draft anti-corruption national policy and strategy:

- Co-ordinating preventive anti-corruption policies and best practices;
- Collaborating with each other in the prevention of corruption;
- Disseminating knowledge on prevention of corruption;
- Ensuring anti-corruption bodies are independent and free from undue influence;
- Ensuring transparency, accountability, integrity and rule of law in the public sector, conduct of public officials, public procurement and management of public finance, including objective and transparent systems for recruitment, promotion, retirement of civil servants; legislative and administrative measures to establish criteria for candidature and election to public office; transparency in funding of candidates for elected public office and funding of political parties; standards of conduct for public officials; transparency, completion and objective criteria in decision making in public procurement and public finances;
- Strengthening integrity and independence of the judiciary and prosecution services and preventing opportunities for corruption within these institutions;
- Preventing corruption in the private sector, including provision of proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures;
- Public reporting and participation of society by facilitating access of the general public to information on the organization, functioning and decision making of public administration and promoting the active participation of civil society, NGOs and community-based organizations in the fight against corruption.

V. ROLE OF NON-GOVERNMENT ORGANIZATIONS IN THE PREVENTION OF CORRUPTION

NGOs have a significant role in preventing corruption by raising public awareness against corruption. There are number of NGOs in Nepal working in such a role.

VI. ARRANGEMENTS FOR IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION IN NEPAL

Nepal signed the Convention on 10 December 2003 in Merida, Mexico. Preparation of the administrative and legislative measures required upon becoming party to the convention are in progress.

By a Cabinet decision, the Ministry of Law, Justice and Parliamentary Affairs (the Ministry) has been given responsibility to work as a focal point and co-ordinating agency of the Convention at a national level. The Ministry is also assigned the work of the central depository of all types of treaties and conventions.

The Government of Nepal constituted a Working Committee under the chairpersonship of the Joint Secretary of the Ministry of Law, Justice and Parliamentary Affairs with the representatives of the Office of the Prime Minister and Council of Ministers, Ministry of Home Affairs, Ministry of Finance, Ministry of Foreign Affairs, the Commission of the Investigation of Abuse of Authority as members and the Under Secretary of the Ministry of Law, Justice and Parliamentary Affairs as the member-secretary. The Committee has identified an extensive list of legislative, administrative, institutional and policy reform measures required for the implementation the Convention at the national level.

Considering the Report of the above mentioned Working Committee, the Government has also constituted a high level Taskforce under the chairpersonship of the Secretary to the Ministry of Law, Justice and Parliamentary Affairs with the Joint Secretary level representatives of the Ministry of Home Affairs, Ministry of Finance, the Commission for the Investigation of Abuse of Authority, and the National Vigilance

Centre as members and the Joint Secretary to the Ministry of Law, Justice and Parliamentary Affairs as the member-secretary. The reinstated House of Representatives by its resolution dated 2063. 06.25 (11 October 2006) has also directed the Government to ratify the Convention.

VII. MEASURES TO BE TAKEN

Nepal is under a moral obligation to create a conducive environment to become a party to the Convention and to refrain from such acts which would defeat the object and purpose of the Convention. To fulfill these obligations, the following tasks are necessary.

A. Policy and Strategy Reforms

An anti-corruption policy and strategy in line with the Convention needs to be developed reflecting the principles of the rule of law, transparency and accountability. It should consist of awareness-raising of the importance of the participation of civil society, non-governmental organizations and community-based organizations, promotion of education against corruption through the development of school and university curricula, and collaboration with regional and international organizations.

B. Legislative Reforms

1. New Legislation

The Anti-money Laundering Act, Public Procurement Act, Good Governance Act, and Right to Information Act have recently been passed. The legislature must enact laws on Mutual Legal Assistance; Extradition; Protection of Witnesses, Victims or Experts; Recovery of Assets acquired through corruption/transfer of proceeds of crime; Transfer of Prisoners; Conflict of Interest; Whistle Blower Protection; Transparency; Corruption in the Private Sector; Corruption in Foreign Public Officials and Public Officials of Public International Organizations. The government must formulate policies on anti-monopoly practices; integrity in public life; public interest disclosure; other economic offences; transfer of criminal proceedings; trading in influence; execution of decisions of foreign courts; disclosure of the income and expenditure of political parties; regulation of nongovernmental organizations; and trade fraud. Some of these measures are in the process of formulation and drafting.

2. Review and Amendment of Existing Legislation

The existing Prevention of Corruption Act; Bank and Financial Institutions Act; Political Parties Act; Financial Procedures Act; Judicial Council Act; Military Act; Companies Act; Nepal Rastra Bank Act; Insurance Act; Civil Service Act; laws relating to the service and condition of the employees of public corporations/agencies; Partnership Act; Evidence Act; Private Firm Registration Act; Association Registration Act; Commission for Investigation of Abuse of Authority Act; and the Prison Act, need to be reviewed and amended.

VIII. INSTITUTIONAL REFORMS AND STRENGTHENING

The following institutions need be reformed and strengthened in light with the Convention:

1. The Commission for Investigation of Abuse of Authority;
2. National Vigilance Centre;
3. Special Court;
4. Related branch dealing with the cases of corruption within the Judicial Council;
5. Related branch dealing with the cases of corruption within the Nepalese Army.

IX. NEW INSTITUTIONS

The Anti-Money Laundering Act stipulates an Anti-Money Laundering Department. The Department will be formed soon. Similarly, Nepal Rastra Bank is entrusted to work as a financial intelligence unit under the Act.

X. CONCLUSION

Nepal's drive to prevent corruption has a long history. Despite efforts going back a long time, corruption has been not reduced but has increased furthermore. A strong legal regime against corruption, strong enforcement of general laws, development of a law-abiding culture, an end to impunity for corruption, and improvement of the socio-economic condition of government officials and also of the general public are pre-requisites for corruption control.

Legal provisions alone may not be sufficient to control corruption. Public awareness and collaboration and co-operation with the international community are also important.

With the enactment of the Prevention of Corruption Act 2003, investigation of corruption cases was speeded up. However, the speed did not remain constant. With the formation of the new government, a new opportunity has arisen to start afresh in controlling corruption.