

CRIMINAL JUSTICE RESPONSE TO CORRUPTION IN NEPAL

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I. INTRODUCTION

Nepal is considered a country where status of good governance is not satisfactory. In 2008, Transparency International placed Nepal in 121st place with 2.7 Corruption Perception Index (CPI).¹ Corruption is not only the reason for, but also a result of, the poverty in Nepal.

The criminal justice system has lots of flaws and it is not sufficient enough to deter crime in the country. Many corrupt activities are out of the purview of the judicial system.² The success rate of the corruption cases is quit low and 60 percent of the corrupt activities are out of the scope of the law and among the cases registered in the courts, around 60 percent are result in conviction. Further, the criminal justice system is heavily affected by delay. Although Nepal has attempted to improve law and practice regarding corruption control for long time, results are not satisfactory. So, a search for improvement in law and practices to combat corruption is still going on in Nepal.

II. ANTI-CORRUPTION LAW IN NEPAL: HISTORICAL PERSPECTIVE

The statement of King Prithvi made 250 years ago – “a person who gives or takes a bribe is the enemy of the nation and he deserves the death penalty”– shows the stringent attitude towards corruption in Nepal. The policy still continues as the government has passed a policy of “Zero Tolerance” to corruption. However, the problem persists in Nepalese society. Numerous attempts have been made to tackle this problem through improvement of the legal framework.

The Civil Code 1854 was the first Act which criminalized corrupt activities of public officials in Nepal. After a century, in 1954, a special law regarding corruption came in to force. Afterwards, in 1957, 1961 and 2002 new corruption control Acts were passed; and each Act, one after another, repealed the earlier ones.

Corruption Control Act 2002 (CCA) is now in force. CCA is main substantive law which defines different types of corrupt activities. There are also some legal norms which establish institutions and procedure for investigation, prosecution and adjudication on corruption. Commission for Investigation of Abuse of Authority (CIAA) is the main investigating and prosecuting body established by Constitution of Nepal, 1991; and continued by the present Interim Constitution of Nepal, 2007.

The power and functions of CIAA are stipulated in CIAA Act, 1991. This act has been amended twice with objective of providing more power to the CIAA. Before 1991, there was similar type of constitutional body which had power not only to investigate but also to prosecute and adjudicate.

In 2005, the then King Gyanendra established a Royal Commission on Corruption Control (RCCC) with authority to investigate, prosecute and adjudicate on corruption charges, however it was declared unconstitutional by the Supreme Court in 2006.

Nepal's signature of the United Nations Convention against Corruption (UNCAC) in 2003 is a notable step towards reform and international networking in this area. Ratification of the same could herald a new

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¹ Transparency International, Corruption Perception Index, 2008

² CIAA Souvenir, 2007, p.31.

era in the legal regime on corruption control in Nepal.

III. EXISTING ANTI-CORRUPTION LEGAL REGIME

Under the constitutional framework different laws and institutions have been developed to combat corruption in Nepal. Besides, the Interim Constitution, 2007, CIAA Act, 1991 (CIAA Act), CCA, 2002, Impeachment Act, 2002 (IA), Military Act, 2003 (MA), Judicial Council Act, 1991 (JCA), Money Laundering Control Act, 2007 (MLCA) are the main laws which deal with the investigation, adjudication and enforcement of the corruption cases.

A. Constitutional Framework to Deal with Corruption

Since 1977 an anti-corruption institution has been given constitutional status in Nepal to maintain its independency and impartiality and to enforce anti-corruption law in effective and efficient manner. This is continued in the Interim Constitution 2007. Now, constitutionally, it is obligation of the State to maintain good governance and to end corruption and impunity in the country.³ This obligation can be obtained by effective legal and practical measures.

CIAA is the principal organ which is responsible for investigation and prosecution in corruption cases. It is composed of one Chief Commissioner and other commissioners as may be required. They are appointed by the President on the recommendation of Constitutional Council headed by the Prime Minister. Commissioners are appointed for six years or until they reach 65 years old, whichever is earlier. Their conditions of service are provided by law and it cannot be altered to their disadvantage.

The commission has jurisdiction for investigating and prosecuting the corruption cases against public officials as stated in law. But the CIAA cannot investigate the Constitutional Officials, who can be removed by passing the motion of impeachment, who are in the post of Judge, and the person who are liable to action under the Military Act, 2007 during the time they are in job. However, CIAA shall prosecute them after their removal from the post.

B. Substantive Anti-Corruption Laws

CCA, 2002 is main law related to corruption, which enumerates the activities that amounts to crime of corruption. The main criminal activities stipulated in the Act are:

- Giving or receiving bribe to or by the public official or other person (art. 3);
- Accepting goods or service free of cost or at lower price by the public official (art. 4);
- Unlawfully receiving gift by the public official (art. 5);
- Getting commission in public purchase by the public official (art. 6);
- Cause loss in revenue by the public official (art. 7);
- Getting illegal benefit or causing illegal loss by the public official (art. 8);
- Preparing false document by the public official (art. 9);
- False translation of documents (art. 10);
- Tampering with government documents (art. 11);
- Causing damage to Government or public documents (art. 12);
- Disclosing secrecy or question papers of examination (art. 13);
- Engagement in illegal trade or business by public official (art. 14);
- Claiming false designation (art. 15);
- Submitting false information about oneself for getting or staying in a public post (art. 16);
- Damaging public property (art. 17);
- Pressure to commit crimes (art. 18);
- Providing a false report (art. 19);

³ Art. 33, Interim Constitution of Nepal, 2007.

- Attempt and accomplishment of a crime (art. 20&21);
- The Act provides for additional punishment if the public official is in a senior post. (art. 24)

As stated in Article 15 of the UNCAC, in crime of bribery, undue advantage is exchanged with the action or inaction of the public official. Intentional offering, promising, giving or accepting or soliciting the undue advantage is crime of bribery. There is demand side and also supply side of corruption in this crime. The undue supplier also gets benefit from the crime. But here, necessary thing is intention of committing crime. So, the crimes stated above in Articles 3,4,5 and 6 are the crimes of bribery of the national public officials in Nepal.

C. Procedure and Institutions for Enforcing Anti-corruption Laws

Generally, in corruption cases, CIAA is responsible for investigation and prosecution. The Special Court in Kathmandu adjudicates all the cases. Appeal over the decision of Special Court lies in the Supreme Court of Nepal. Government Attorneys, who work under the Attorney General of Nepal, represent the CIAA during whole adjudication process during trial and appeal as well. As in all other cases, District Courts enforce the decision of corruption cases, except where judgement stipulates otherwise.

1. CIAA Act, 1991

Except provided in other laws, all corruption cases are dealt under CIAA Act. The CIAA is the apex constitutional agency which investigates and prosecutes the corruption cases. This law mainly provides for the powers and functions of the CIAA which are as below:

- CIAA has jurisdiction only over the corruption where public officials are involved. Public official also include the officials of public institution where the government has either full or partial control or ownership;
- CIAA has no jurisdiction over parliamentary activities, policy related or collective decision of Cabinet of Ministers, and judicial activities of judges;
- It has power to investigate on the basis of complaint of a particular person or information from any source;
- It may take statement of the suspect or any person seems necessary;
- It has also power to search and seizure where it is necessary;
- The commission may suspend the suspect from his post of public responsibility, if there is sufficient ground;
- It may arrest and detain suspect for maximum of six months with the competent court's consent, if there is reasonable ground that accused may cause adverse influence in investigation;
- The commission may ask for guarantee with the suspect if there is proof of loss of property;
- Some important features are added in CIAA Act in 2002. CIAA is given access to the bank accounts and other financial transaction. It is empowered to withhold the transaction in accounts, or the property of suspect. Similarly, it may seize the passport of the suspect and also order for area restriction against suspect;
- CIAA may order for punishment to those people who do not comply with its official order during the investigation;
- CIAA, after investigation takes decision on whether to prosecute the suspect or not. If it decides to prosecute registers a case in the Special Court by filing a charge-sheet;
- If a suspect co-operates CIAA during the investigation, it may produce him or her as witness in the court and may lessen or waive the charge against him or her;
- The commission may ask to the government for necessary manpower or hire them in contract.

Table 1
Complaints registered at CIAA and cases registered by it.

	2007/8	2006/7	2005/6	2004/5	2003/4	Total
No. of complaints	2732	3564	4324	4759	3732	19111
Cases registered in court	65	113	114	115	70	477
Percentage	3.5	3.1	2.6	2.4	1.8	2.4

Source: CIAA Souvenir, 2008.

2. Special Court Act, 2002

Objective of SCA is to deliver speedy and effective justice in special types of cases. Government of Nepal, in recommendation of Judicial Council,⁴ appoints members of the Special Court. Currently, Special Court has three members and exercises jurisdiction over the cases related to Corruption, Money Laundering and Treason against the State. Corruption cases are filed in the Special Court by the CIAA. By law, the court shall deliver its verdict within six months from the date of registration.

Table 2
Major Corruption Cases Filed in Special Court by CIAA

Cases	Cases filed in Special Court					
	2007/8	2006/7	2005/6	2004/5	2003/4	Total
Bribery	2	2	3	0	3	10
Illicit enrichment	0	0	9	8	17	34
Forged certificate	56	92	60	80	42	330
Decision related	8	20	43	20	43	134

Source: Special Court Reports

The court exercises its authority as a trial court. Some special power that the court exercises are: taking statements with the accused or with other persons as required; keeping accused in remand or asking for guarantee; withholding the suspect's passport or restricting issuance of passport to the suspect.

After registration of case the special court takes the statement of the accused if he or she is produced in the court by the prosecutor, and after hearing from both sides takes a decision on whether the accused should be kept in custody during adjudication or not. The court may ask for a guarantee if it decides not to keep the suspect in judicial custody.

The court issues summons of 15 days, except for the period of journey, to the accused who is not produced in the court by prosecutor or who could not be contacted during the investigation. If the court cannot contact the accused by any reason, the court publishes a notice in a national newspaper to be present in the court within 30 days.

When all the parties are notified about the case against them or they are present in the court, the court fixes a date for examination of witness and submission of other proofs.

During the date of the final hearing all the parties of the case plead in the court. Then the court takes decision on whether the accused is guilty or not.

There are three members in the court. A single-judge bench can issue an order in procedural matters, but cannot deliver final verdict. A two-judge bench can issue orders in procedural matters as well as deliver final verdicts. For final verdicts a unanimous vote is necessary. A three-judge bench can issue a final verdict with unanimous or majority vote.

⁴ The Judicial Council is headed by the Chief Justice and other members are the senior most judge of the Supreme Court, the Law Minister, a lawyer nominated by the Nepal Bar Association and a legal expert appointed by the Prime Minister.

Table 3
Number of Cases Decided by Special Court in five years

Year	Cases decided	Conviction	Acquittal	Amount recovered (=USD)
2003/4	129	109	20	4,802,184
2004/5	106	97	9	21,351,518
2005/6	109	89	20	7,563,338
2006/7	171	140	31	306,424
2007/8	71	43	28	293,924
Total	586	478	108	34,317,388
Percentage	100	81	19	

Source: Souvenir 2008 of the CIAA.

Appeal against the decision of the Special Court lies in the Supreme Court. The Supreme Court shall decide the case within three months of its registration.

Table 4
Corruption Cases Pending in the Supreme Court

Life of cases in SC (in year)	Number of cases in SC	Percentage
0 to 2	85	13.8
2 to 4	307	49.9
4 to 7	184	29.9
7 to 12	40	6.4
Total	616	100

Source: Supreme Court of Nepal, (as of 7 May 2009)

Decisions on the corruption cases, except otherwise ordered by the courts, are enforced by the relevant district court.

3. Sectoral Laws for Controlling Corruption

There are some other laws which are not administered by CIAA. By constitution and other laws some officials are dealt differently than how CIAA deals. The laws are as outlined below.

(i) *Impeachment Act, 2002*

By constitution, there are some public officials holding the constitutional posts whose removal on corruption charge is possible only through impeachment. During the impeachment process parliament constitutes an investigation committee. The committee may ask CIAA to investigate on the issue and prepare report. On the basis of the committee's report the parliament takes decision on impeachment proposal. Hence, CIAA does not have jurisdiction over their misconduct or corruption while these officials are in job. However, according to IA, CIAA shall prosecute against them in the charge of corruption, on the basis of the investigation committee's report, if they are removed through impeachment.

(ii) *Military Act, 2007*

MA provides that any crime of corruption committed by army staff is investigated and prosecuted by a three-member committee headed by the Deputy Attorney General.⁵ Other members of the committee include an officer working at the Defense Ministry and member of legal department of Nepal Army. Such cases are adjudicated in a three-member Special Military Court which is headed by an Appellate Court Judge who is appointed by the government in recommendation of Judicial Council.⁶ Other members of the court are Secretary of the Defense Ministry and head of the legal department of Nepal Army.

⁵ Article 62(2), Military Act, 2007.

⁶ Article 119, Military Act, 2007.

Appeal against the decision of the Military Special Court lies in the Supreme Court of Nepal.

(iii) *Judicial Council Act, 1991*

Judicial Council, an independent constitutional body headed by the Chief Justice, is responsible for recommendation and appointment of all the judges except Chief Justice, has also power to investigate and prosecute the judges of District Courts and Appellate Courts, in the charge of corruption. Such cases are adjudicated by the Appellate Courts. Appeal against decision of the Appeal Courts lies in the Supreme Court of Nepal.

Council also monitors the observance of the Code of Conduct of Judges which is recently passed by a conference of all the judges of Nepal.

IV. PREPARATION FOR RATIFICATION OF UNCAC

Realizing the fact that corruption is being globalized, and its control is only possible through the collective effort by all the nations, Nepal has already signed the UNCAC in 2003. Parliament has also directed government to ratify it.

Now Nepal is preparing for ratification of the UNCAC. Its ratification could be a major step towards fulfilling its commitment of corruption control. This would open the opportunity to internalize modern and effective legal basis; be a member of strong network against corruption; and participate in the international co-operation. Lacunas in law, which are main causes of impunity in corruption cases, could be corrected.

Numbers of Acts – such as Money Laundering Act, Electronic Transaction Act, Good Governance Act, Special Court Act, Public Procurement Act, and Right to Information Act - have been passed for developing basis for ratification. A task force has submitted a draft of Corruption Control Act to the Prime Minister's office.

V. ARE ANTI-CORRUPTION MEASURES EFFECTIVE?

Legal and institutional measures are developed to curve the corruption. Many positive norms compatible with the modern principles are also inserted in the system. Still, there are some flaws in the system. Three types of main weaknesses can be identified in the judicial administration of corruption.

- 1 Delay in disposal of cases;
- 2 Low conviction rate;
- 3 Weaknesses in the overall system.

A. Delay in Disposal of Cases

In the Special Court, cases are delayed by up to seven years and in the Supreme Court by up to 12 years. There are some reasons behind the delay:

- (i) *No preferential track:* Supreme Court is crowded with the complex cases. There is no priority for hearing corruption cases. Neither there is special rule for fast track procedure on disposing these cases.
- (ii) *Time required by law:* Court cannot dispose a case before certain procedure is fulfilled. Time is required to fulfill the procedure, e.g. time for giving notice to defendants, time for calling witnesses and their examination etc.
- (iii) *Ambiguity in law:* Ambiguity in law or lack of clear precedent is also hampering quick disposal of cases. In 2002, CCA criminalized the illicit enrichment. The CIAA accused against some public official on this charge over the property earned by them even before the Act came into force. The Special Court acquitted them and CIAA appealed in the Supreme Court. But Supreme Court raised some legal questions regarding the principle of retrospective law and referred the case in larger bench. On the other hand the Special Court postponed the hearing of other similar cases waiting for the decision of Supreme Court in these issues.
- (iv) *Reluctant judges:* Sometimes judges seem reluctant on deciding corruption cases in which political persons are involved.

- (v) *Non co-operation by foreign institutions:* Mainly in cases of forged documents, the validity of the document should be verified from Indian universities. Getting reply from the universities is very difficult.
- (vi) *Bench shopping:* In exceptional situations, lawyers may request for postponing the hearing of case, but they are using this rule for bench-shopping (choosing the judge of their favour).
- (vii) *Long presentation:* Lawyers take long time for presenting the case.

B. Low Conviction Rate

Conviction rate in corruption cases in trial and appellate level is about 60% while most of the conviction is in the cases related to forged certificate. Or 125 cases pending in the Special Court, 82 are related to forged certificate. These cases are not of significantly important in comparison to other cases of big embezzlement of public property, because there is not loss of public property in case of forged documents. After 2002, CIAA massively investigated and prosecuted against senior public officials in charge of illicit enrichments. Although, the burden of proof is in defendant in such cases, the Special Court acquitted almost all the accused. Some of the reasons of low conviction rate are:

- (i) *Ambiguity in Law:* In 2002 CCA criminalized the illicit enrichment. The CIAA started to investigate and prosecute public official using this rule, but could not get success in the court because the law did not state about whether this crime is applicable to the property acquired before this rule come into force. Similarly, legal provision about limitation on corruption is ambiguous.
- (ii) *Failure to Address Vulnerability of Victim and Obtain Co-operation:* Sometimes persons do not offer undue advantage to public officials intentionally, instead they are compelled. But in CCA art 4.1, there is no mention about intention. Even the bribe supplier come into the investigation and is charged. This causes failure of cases because such supplier, after arrest, denies the offering of bribe. Instead of that such person should be produced in the court as witness.
- (iii) *Common Flaws in the Administration of Justice:* Experts have identified some problems regarding criminal justice system including in corruption related ones. Some of them can be enumerated as:⁷ Lack of qualified and specialized manpower, lack of quality logistics and resources, lack of security of witness, lack of co-operation and co-ordination among concerned agencies, centralized agencies, lack of integrity of manpower, delay in investigation and scrutiny of cases, inadequate preparation by the prosecutor, delay in trial, hostile witness, lack of victim support, difficulties in obtaining forensic evidence, inadequate court structure, unnecessary adjournment of cases, political pressure, lack of international co-operation, etc.
- (iv) *Political Influence:* As it is a white-collar crime, in most cases big personalities, including politicians, are involved. They manipulate the judicial process.
- (v) *No Victim:* If some person pays bribe for her or his benefit, there will be no apparent victim. There is no person who has really concern for punishing the accused. Enforcing agencies also think leniently in favor of the accused and they indirectly favour the acquittal.

C. Weaknesses in Overall System

Besides specific problems regarding the administration of justice, there are some common problems pertaining to the overall legal system of corruption control, such as:

- (i) *Lack of Laws on par with International Norms:* Though there is intense pressure to ratify the UNCAC, Nepal has not yet ratified it. Most of the weaknesses of corruption related laws could be corrected, if UNCAC is ratified and laws are passed in line with it.
- (ii) *Narrow Coverage of Person:* The Act only deals with the corruption in the government or in public institution where government involves through ownership, grant, guarantee, share etc. Since CIAA has no jurisdiction over the bribery in private institution, a huge sector of corruption is excluded. Also, problems occur when public bribery is mingled with private bribery.

⁷ Dr. Meen Bahadur Poudyal Chhetri, Principles of Conviction Rate, CIAA Souvenir, 2008, p 241.

- (iii) *No Coverage of NGOs and INGOs:* Nepal does not have law in order to control, or punish for, the corruption happening in international organizations or non-government organizations.
- (iv) *Policy Level Corruption:* CCA does not deal with corruption at the policy level. Nepal has also experienced political appointments where taking undue advantage is rampant. The CCA is silent about it.
- (v) *Appointment of CIAA Members:* Constitutional Council is headed by the Prime Minister. Chief Justice of the Supreme Court, Speaker of the Parliament, other three members nominated by the Prime Minister in order that different political parties shall represent it, and leader of the opposition party in the parliament, are other members of the Council. It seems that all the major parties shall have their share in the Council. Consequently, neutrality of the CIAA member has been questionable. On the other hand, for more than two years CIAA does not have Chief Commissioner, and there are only two commissioners working where there were five in previous years. It seems that the Executive does not want that the CIAA work actively.
- (vi) *Problem of Human Resources in the CIAA:* CIAA does not have its own staff. It brings staff from government agencies. Consequently, they are more accountable to their boss. This hinders professional and neutral investigation.
- (vii) *Integrity and Impartiality of the CIAA:* Sometimes CIAA's activities have been criticized as politically motivated actions. It is said that the officials in CIAA themselves involve in the corruption.

VI. POSSIBLE REMEDIES

Proper utilization of judicial administration in combating corruption it requires certain reforms. The possible reforms should address: procedural delay, low conviction rate and weakness in the overall system.

A. Addressing Procedural Delay

Procedural delay may be addressed by the following means:

- In every case a time-frame should be fixed and work accordingly. Judges should be made responsible for not deciding cases within the time line;
- Time should be fixed for lawyers by the bench for pleading;
- Supreme Court should apply continuous hearing in important cases involving serious legal issues and decide them in time;
- Cases should be heard by a panel of specially trained and capable judge so that they don't hesitate to decide serious cases also;
- Especially in the Supreme Court, corruption cases should be treated under fast track rule and given priority over other cases;
- Court should discourage bench shopping.

B. Addressing Low Conviction Rate

The conviction rate may be increased in the following ways.

- Ambiguities in law especially about the illicit enrichment and the limitation should immediately be addressed;
- The cases which are pending in the Supreme Court and have impact in other cases pending in the Special Court should be decided immediately;
- A system of plea bargaining should be applied so that criminals can be punished with the help of other suspects;
- Effective system of protecting witnesses should be developed, so that they don't become hostile;
- All the people who involve in investigation, prosecution and adjudication of corruption cases should be provided quality training;
- CIAA should be well equipped with modern technology of crime investigation;

- The supreme Court should compose a special panel of judges to take decision of corruption cases.

C. Addressing Weaknesses in the System

Other problems which need a long-term strategy to establish permanent and effective mechanisms for curbing corruption may be addressed via the following measures:

- Ratify the UNCAC and make the laws and system compatible with it;
- Draft laws in line with the UNCAC so that all components of crime are addressed and made punishable by the law;
- Immediately fulfill the posts of commissioners in the CIAA;
- Make the CIAA more powerful and free from political influence, and equip it with specialized manpower and technology;
- Divisions of the CIAA should be established at the regional level also;
- Special laws should be passed to disclose the financial documents of the political parties, NGOs and INGOs;
- Persons involved in corruption should be barred from political appointment and political candidature;
- Preventive measure should be made effective through standard surveillance, skilled intelligence, effective process of disclosure of property, regulated banking transaction etc.

VII. CHALLENGES AGAINST REFORM

There are many things to do; but agendas are not free from challenges. Nepal is facing the following challenges in reform of the corruption control system.

- The nation is in transition and the whole political and financial force is centralized in constitution making. Hence, priority is not reform and good governance;
- Parliament is not properly functioning because of political conflict, while reform requires active parliament to make laws;
- UNCAC expects a sophisticated system of laws and network, while Nepal is in financial crisis;
- As criminal-political nexus prevails in Nepal, political leaders are reluctant to institute reform;
- It is too difficult for CIAA staff to maintain neutrality, because the most of the suspects are from the bureaucracy and they have direct or indirect connection to the investigating officer;
- As the nation is heading towards federalism, we need expert manpower to establish a compatible system for that;
- Policy-level corruption is main problem, but politicians are not ready to create a system and comply with its rules.

VIII. CONCLUSIONS

Nepal has a long history of anti-corruption movements. However, visible results are still far away. Numbers of attempts were made to cope with the challenges of corruption through making norms and establishing institutions and developing awareness. However corruption and impunity is rampant in the country. Existing laws and jurisdiction of institutions does not cover all the types of corruption.

Globalization, modern business and development activities have opened new horizons to corrupt people. The international community is also committed to the fight against corruption. One of the examples of it is the UNCAC – a strong international legal instrument which is open for ratification. Nepal should ratify it as soon as possible.

An effective criminal justice system is an important tool for corruption control. Nepal requires many legal and institutional reforms to make its criminal justice mechanism reliable. The reform of the system should be born of political commitment.

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