

INVESTIGATION, PROSECUTION AND ADJUDICATION AGAINST ILLICIT PROPERTY OF PUBLIC OFFICIALS IN NEPAL

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I. INTRODUCTION

Good governance is a key to sustainable development and social well-being of a nation. However, corruption is considered as a strong constraint of good governance towards the way of prosperity. Corruption is spread throughout the world in different forms. The corruption perception index shows that more than two-thirds of countries in the world score below 50 out of 100. At least 6 billion¹ people around the world are witnessing rampant corruption. Therefore, corruption is a global problem, and the entire world is trying to combat corruption through various institutional and policy measures.

II. CURRENT SITUATION OF CORRUPTION IN NEPAL

Naturally, Nepal is one of the most beautiful countries in the world. It has a wide range of geographical and cultural diversity which is unique and incredible itself. But economically Nepal is known as one of the least developed countries. Corruption, no doubt, is one of the causes of Nepal's underdevelopment².

Even though corruption is a criminal offence in Nepal, all forms of corruption, like bribery, embezzlement, fraud, extortion, illicit enrichment etc., are present. Nepotism and favouritism have been rooted in Nepali society and the public sphere. Almost all spheres, i.e. the executive, legislative, judiciary, political parties, non-governmental organizations, and the private sector, are perceived to be suffering from corruption. Transparency International's Global Corruption Barometer (GCB) Survey Report 2013 is evidence of the above-mentioned statements. In a 2011 survey, the total percentage of respondents saying "corruption increased a lot in Nepal" was 62.8 percent. This figure rose to 72 percent³ in 2013. The GCB survey also revealed political parties (90%) as highly corrupt institutions in Nepal, followed by public officials (85%), police (80%), and parliament (79%), the judiciary (77%), business (54%), Non-Government Organizations (46%), the military (43%) and the media (33%). Based on daily bribery experiences of the people, other corrupt institutions in Nepal include customs, land revenue, judiciary, and tax revenue⁴.

Revenue leakage, misappropriation of public funds, damage or loss to public property, bribery, fake and falsified documents, breaching of laws and procedure and illicit enrichment, etc. are the common current prevalent corruption tendencies in Nepal⁵. The bitter truth is that no sectors/areas escape the grip of corruption in the country. The table presented below also supports that corruption is a fact.

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¹ <https://www.economist.com/graphic-detail/2018/02/22/corruption-is-still-rife-around-the-world>

² Corruption in Nepal: An Anthropological Inquiry Madhusudan Sharma Subedi, Central Department of Sociology/ Anthropology, Tribhuvan University Kirtipur, Nepal.

³ Global Corruption Barometer survey report 2013, www.transparency.org

⁴ Institutional Strategy of the Commission for the Investigation of Abuse of Authority (2014-2019).

⁵ Based upon yearly reports of CIAA.

Table-1
Corruption Perception Index and Nepal's status

S. No.	Year	Score	Rank
1	2017	31	122
2	2016	29	131
3	2015	27	130
4	2014	29	126
5	2013	31	116

Source: Transparency International Corruption Perception Index reports, www.transparency.org

III. ANTI-CORRUPTION AGENCY AND LAWS TACKLING ILLICIT ENRICHMENT IN NEPAL

Illicit enrichment is defined in the United Nations Convention against Corruption (UNCAC) as “a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income⁶”.

A. Commission for the Investigation of Abuse of Authority

The Commission for the Investigation of Abuse of Authority (CIAA, henceforth) is an apex constitutional body mandated with controlling corruption involving public responsibility. All arrangements for its independence and competency are also managed by the Constitution. There is one chief commissioner and four other commissioners. All commissioners are appointed by the President for six years on the recommendation of the Constitutional Council. They may be removed from their responsibility if a motion of impeachment is passed by a two-thirds majority of the members of the House of Representatives. It is a unique anti-corruption agency and the first agency established in the SAARC region which is acting as ombudsman, investigator and prosecutor.

B. Laws Relating to Illicit Enrichment

1. The Prevention of Corruption Act, 2002

Section 20 of this Act criminalized illicit enrichment as an offence of corruption, resting the burden of proof on the suspect. According to this provision, In case the statement of property submitted in accordance with prevailing laws by a public servant deemed to have held a public office in accordance with prevailing laws seems to be incompatible or unnatural or in case he maintains an incompatible or unsuitable lifestyle or it is proved that he has given someone a donation, gift, grant, present or has lent money beyond his capacity, he shall prove the sources from which he has acquired such property, and if he fails to do so, such property shall be deemed to have been acquired in an illegal manner.

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

The CIAA is empowered by this act to search, seize, and suspend the suspects from their posts. The CIAA has the right to arrest and hold the suspect in custody for a maximum of six months with the competent court's consent. It may obtain details of financial transactions and even stop the fixed real estate of the suspect. In addition, it may seize the accused's passport.

3. Illegal Property Investigation Procedure, 2018

The illegal property investigation procedure is a new document issued by the CIAA incorporated and updated with different practices, norms and verdict of court to make the investigation scientific, evidence-based and reliable. This is a detailed guideline to investigate upon the complaints received by the CIAA against illegal property earning by any public position holders. The procedure covers the norms related to

⁶ United Nations Convention against Corruption, United Nations Office on Drugs and Crime.

calculation of income and expenditures of suspects during the investigation process.

IV. INVESTIGATION, PROSECUTION AND ADJUDICATION OF ILLICIT ENRICHMENT CRIMES

A. Investigation

The CIAA is mandated to investigate corruption matters committed by persons holding public office based on received complaints. There are other anti-corruption agencies authorized to investigate in their respective area, as permitted by relevant laws; however, the crime of acquiring property illegally by public officials can be investigated only by the CIAA.

The CIAA has been receiving a large number of complaints relating to various irregularities and earning of illicit property through complaints lodged by any person, or it obtains information via its own source. The investigation procedure is basically divided into two stages:

1. Preliminary Inquiry

During the preliminary inquiry, the complaints are analysed with regard to their merit and the first-hand available evidence. At this stage, the "Special Investigation Division" works with an aim to collect most of the possible evidence. For this purpose, the CIAA may write to any concerning agencies to send any relevant information and details of a concerned suspect which may be useful in investigation. One major document, the annual property details form, is collected from concerned agencies. After receiving necessary documents are collected, a brief report is prepared.

2. Detailed Investigation

When the Commission deems it necessary to conduct an investigation upon findings, a preliminary inquiry investigation officer is designated. The investigation officer collects further evidence, makes all necessary inquiries and analyses the findings. Upon the completion of the specified procedures, a report is submitted to the Commission. Such report shall be reviewed by the Commission and a decision to this effect shall be taken.

B. Prosecution

The CIAA is the only authorized institution to prosecute in the Special Court against illicit earnings of holders of public posts. Based upon the recommendation of the investigator, the Commission decides whether to prosecute. If a charge can be proved on the grounds of the collected evidence, the Commission prosecutes in the special court; otherwise the case is disposed of. On behalf of the CIAA, the Special Government Attorney Office pleads at the Special Court as well as the Supreme Court.

C. Adjudication

The Special court is mandated to adjudicate all the corruption cases filed by the CIAA at the trial level. This court has the same status of the appellate court. So the Supreme Courts have appellate jurisdiction over the decisions of this court. The table presented below is a summary of complaints received and resolved by the CIAA.

Table-2
Complaints Received and Resolved by the CIAA

S.No.	Particulars	Fiscal Year				
		2013/14	2014/15	2015/16	2016/17	2017/18
1	Total number of complaints received	22,602	31,213	24,691	19,580	19,488
2	Total number of resolved complaints	12,892	21,648	16,694	11,861	12,400
3	No. of complaint of illicit enrichment	2,060	2,591	1,083	606	425
4	Total cases filed in court	168	303	144	154	192
5	Cases of illicit enrichment filed	2	2	7	11	4
6	Success rate on total prosecution	80%	80%	81%	60%	NA

Source: CIAA Annual Reports 2013-2017

V. BEST PRACTICES OF ANTI-CORRUPTION MEASURES IN NEPAL

The following are some of the mechanisms and practices in use in Nepal that are worth mentioning.

- Independent constitutional agency (CIAA) for investigation and prosecution;
- Distinct special court for adjudication of corruption cases/crime;
- Burden of proof is on the defendant in illicit enrichment cases;
- Additional punishment for high-ranking officials who commit corruption offences;
- Imprisonment is mandatory for almost all corruption offences.

During the investigation and prosecution of corruption cases, the following rights of the suspect are valued with due respect.

- No arrest or custodial detention without informing the arrestee of the grounds of arrest and provision of a detention slip;
- No custodial detention for more than 24 hours without the order of adjudicating authority;
- Right to consult a legal practitioner;
- Right to be presumed innocent until proved guilty of the offence;
- Right to privacy;
- Right against torture;
- Right to fair trial by independent, impartial and competent court;
- Right of the person during taking of a statement:
 - Right to remain silent,
 - Right not to incriminate themselves,
 - Provide interpreter if necessary.

VI. MAJOR CHALLENGES REGARDING CORRUPTION CONTROL IN NEPAL

Corruption control is not an easy job; hence it is challenging itself. Major challenges regarding the control of corruption in Nepal are as presented below:

A. Political Commitment and Full Support

Lack of political support is a challenge. Even though the political parties publicly express commitment for controlling corruption, the behaviour has not been exactly the same in practice. Here are some other examples: about 83.2 percent of the participants in a survey thought that corruption in Nepal was caused by the lack of political commitment⁷. The CIAA can investigate and prosecute the political people holding public

⁷ Tek nath Dhakal and Ratna raj niroula, "Prevalence of corruption and its challenge for improving governance in Nepal."

positions, so it is difficult to get real support from them. The post of chief commissioner has been repeatedly vacant in the history of the CIAA. It shows lack of political commitment to corruption control.

B. Legal/Political Transition and Instability

After a decade long conflict, the adoption of a constitution by a Constituent Assembly, restructuring the state to federal system, and the election of all levels of the federal government were completed. The number of complaints received by the commission against the local level of government is increasing. On the other hand, there is still contradiction among the constitution and some legal provisions. There is a need to amend the existing laws as well as to build new laws. In this situation, ending the legal and political transition and getting stability and a comfortable environment remains challenging.

C. Limited Jurisdiction of the CIAA

The CIAA is a major anti-corruption institution of the nation, but a new constitution of Nepal narrowly restricted the jurisdiction of the CIAA. The constitutional bodies and judges, Nepalese army, policy decisions of the cabinet and the corruption in the private sector are outside of the CIAA's authority. It is another challenge to control corruption within the nation with limited jurisdiction.

D. Limited Mandate by Other Laws

The new constitution of Nepal has not given the right to investigate improper conduct. In the present situation, after the removal of the improper conduct from the Commission's jurisdiction, the challenge has been added to the Commission, because the majority of the corrupt practice starts with improper conduct. It is not easy to separate improper conduct and corruption. This limited mandate is an obstacle in the strategic campaign of zero tolerance against corruption.

E. Mindset of Other Stakeholders

The general mindset of other state agencies seems to be that the CIAA is the only responsible agency for controlling corruption. But corruption control is a common responsibility of the whole nation. Sometimes the CIAA is not getting whole-hearted cooperation and support from other institutions as expected due to that mindset which is unfavourable to control corruption.

F. Nature of Nepal's Economy

The economy of Nepal has not been completely formalized. Even informally various economic activities are going on. On the other side Nepal's law has not made a compulsory provision to each individual and public official for maintaining a strict record of all income and expenditures. This situation also added the challenge to investigation especially investigation of illicit property.

G. Protect and Maintain the Rights of Suspects

If there is any prosecution until the court adjourns, no person is guilty. But when someone is prosecuted, the Nepalese society views that he/she is guilty so the suspect will lose social reputation. Even if the court says not guilty, someone cannot restore his or her reputation. Under this condition there is a challenge for the CIAA to balance between protecting and maintaining the rights of suspects and investigation and prosecution.

H. Open Border and Relation to India

There is about 1750 km of open border between Nepal and India. There are linguistic and cultural similarities as well as family relations of people between the two neighbouring countries. People of the two countries can easily cross international borders without visas or any registration. In this situation it is easy to hide illegally acquired assets in India. This is a big challenge to uncover the property when investigating illicit enrichment cases.

I. Gaining Public Confidence

The CIAA is blamed sometimes for not focusing on the big corruption cases based on the expectations of the people. On the other hand, large numbers of complaints received daily in the CIAA are the proof of public trust in the CIAA. Maintaining this belief by bringing all corruption cases to the scope of investigation and being successful is also another challenge.

J. Implementation of International Commitments and Developing Interconnection

Since Nepal is signatory to UNCAC, its implementation is a national obligation, but it does not have significant action yet. It is also challenging to bring into light the functional and operational management of UNCAC. On the other side, corruption is emerging in new forms, colours and the dimensions in the contemporary world. To overcome this social crime, nations should develop networks, collaboration and cooperation among countries, international organizations and diplomatic agencies. It has also been challenging to develop such interconnection and delivery of mutual legal assistance on time.

VII. PROBLEMS REGARDING CORRUPTION CONTROL IN NEPAL

A. Lack of Enough Laws, Legal Provisions and Implementation

The assessment of the National Integrity System Assessment Nepal, 2014 reveals there is significant variance between law and practice. The legal framework is sound, but it is not implemented consistently⁸. There are various weaknesses and lapses in prevailing anti-corruption laws. Prevailing law has not covered all the possible corruption offences. There is no clear definition of unsuitable lifestyle regarding illicit enrichment, neither of the legal provisions calculate net worth of a suspect by analysing total assets and liabilities. There is a maximum of two years' imprisonment if found guilty of illicit enrichment.

B. Lack of Coordination and Collaboration Mechanisms

Mechanisms to exchange information related to corruption among the law enforcement agencies and joint research system is crucial but there are not such practices yet.

C. Complexity in Investigation

New trends, techniques and methods of corrupt practices are emerging day by day which is a challenge and problem itself in investigation. To adopt new techniques, technologies and speed up investigation of crimes is not easy due to legal and resource limitations.

D. Lack of Capable Human Resources and Capacity Development

The CIAA does not have its own human resources. All personnel are deputed by the government from various disciplines as per the need of the CIAA. The job nature of the CIAA demands various specialized manpower. Availability of this manpower and capacity development of them is important, but due to the lack of resources, capacity development as per the necessity is not even possible. Frequent transfers and poor retention of capable human resources is also an issue.

E. Difficulties in Gathering Evidence and Establishing the Case

Corrupt activity is done in secret and by abusing law. A corrupt official tries to hide it as far as possible by using the loopholes of law and tries to protect oneself. In this situation to collect evidence of corruption is not easy itself. In the ground of investigation, prosecution is not so difficult, but it is not easy to establish the offences in court.

F. Time Consuming and Different Verdicts Regarding Similar Issues

Investigating issues related to corruption takes time. Court procedure also consumes a long time to take a decision. Sometimes the court reaches different verdicts in similar cases. That creates confusion as to which verdict to follow while investigating the corruption cases.

VIII. A CASE STUDY ON CORRUPTION: MINISTER FOUND GUILTY ON CORRUPTION CHARGES

A. Introduction

There was a young and popular Nepali political leader who had been holding different public positions during different time periods. His family background was a simple farming family. He was in a high-level public post from June 1991 to September 2002 in different capacities. At the first time, he was an advisor to the then Prime Minister. Later, he was elected as a member of parliament and also appointed as a cabinet minister of the government.

⁸ National Integrity System Assessment Nepal 2014, Transparency International Nepal

B. Complaint and Investigation

The Commission for the Investigation of Abuse of Authority (CIAA) had received a complaint on September 2002 against him alleging that he was living at an unreasonably high standard of living by earning illegal assets, i.e. corruption. The CIAA started an investigation designating an investigation officer on October 24, 2002. During the investigation interesting facts relating to him were revealed.

Before being appointed to a public post, his bank balance was quite nominal: just Nepalese Rupees (NPR) 22000.00. But when he was in public position his bank balance increased unexpectedly to 9.191 million Nepalese rupees. In addition to this, he acquired fixed assets (land and a house) of 8.485 million. Apart from these; he purchased vehicles worth NPR 2.463 million. While he was taking important public posts, his and his wife's bank balances increased. He bought land and cars, built modern houses. Finally it was found that he collected a total of NPR 24 million 332 thousand (24,332,664.78 NPR). Out of this amount, the CIAA found that only 3.5 million Nepalese Rupees (NPR 3,524,618) was obtained from legal sources. He had collected vast property within about 11 years, which was quite impossible to earn by legal means by holding such public post in Nepal.

C. Some Facts Revealed by the Investigation

- Before holding public posts, his bank balance was only NPR 22 thousand, but from June 1991 to July 1994, within a three-year period, he deposited cash in the amount of NPR 4.04 hundred thousand in his and his wife's bank account.
- He purchased real estate worth more than 8.55 million rupees while he was a cabinet minister of the government, and he purchased land worth NPR 53 million when he was a member of the parliament.
- During the period of 7 years 10 months while he was in a public position, he deposited 8.755 million in his and his wife's bank account.

The CIAA filed a case against him and his wife before the Special Court claiming that he had earned NPR 20.8 million illegally, i.e. by corruption.

D. Judgement of the Special Court

After filing the case by the CIAA, the Special Court give its verdict on June 2007. The court decided that he had total property of NPR 11.263 million, and he was found to have legal property of NPR 10.557 million. The Special Court found only NPR 706,139 illegal. So the claim of the CIAA was not approved by Court. In connection with the decision taken by the special court, the CIAA had appealed before the Supreme Court disagreeing with the verdict of the Special Court.

E. Supreme Court's Verdict

The Supreme Court pronounced its decision in March 2012. The Court held that under the Corruption Prevention Act, the culprit earned unlawful property worth NPR 8.409 million which is unrealistic and illegal, and the fact that the source could not be satisfied. The income claimed by the defendant did not appear to be reliable. The Court decided against him to be imprisoned for a term of one and half years and also imposed a penalty of NPR 8.409 million.

The decision of the Supreme Court seems to have raised serious questions on the decision of the special court and ordered to take necessary action against the concerned Judges of the Special Court.

While being the final decision from the Supreme Court, the culprit was the incumbent Minister of government of Nepal. Even after he was found guilty of corruption by the Supreme Court of Nepal, his political party had decided to continue him in his position as the president of his party. After the final decision of the Supreme Court he claimed that he was being sentenced for his political activities and not for the crimes he committed.

F. Conclusions

After the final verdict of the court, the culprit was sentenced to jail, his property earned by illegal sources was confiscated and he had to pay a penalty. Thus, due to his involvement in corruption, an emerging political leader not only got punished but was also penalized such that he was ineligible for any public posts in the

future as per the existing law of Nepal⁹.

IX. THE WAY FORWARD

A. New Laws and Improvement in Existing Laws

New laws are necessary concerning whistle-blower and witness protection. Legal provisions are also required for corruption control in the private and non-governmental sector. Not only to control corruption, laws and policy regarding integrity development should also be made and enforced.

The property declaration system is mandatory under present law, but its effectiveness should be reviewed. The present cabinet ministers declared their property, but it became spicy news in Nepali media entitled "Poor ministers, rich wives¹⁰".

B. Implementation of UNCAC

Nepal should take necessary arrangements to implement UNCAC and other international obligations.

C. Coordination and Collaboration

Effective coordination and cooperation among law enforcement and investigating agencies are necessary. That is also essential for close collaboration and networking among civil society, media and individual citizens. Information sharing systems among law enforcement agencies and financial information units is another requirement to overcome present rampant corruption.

D. Human Resources Development

Manpower with high morale is an important factor for controlling corruption. Capable and smart human resources with high integrity are required for investigation. The Commission should have a concrete plan and resources to develop the capacity of human resources.

E. Effective Investigation

Success in corruption cases depends on investigation. Investigation should be technology based and evidence based. Use of new technology and equipment in investigation makes better results. The Commission should give more emphasis on the use of technology for effective investigation.

F. Emphasis on Promotional and Remedial Activities

The Commission should focus on promotional activities as well. Creating an atmosphere that stops corrupt activities is more important than investigating, prosecuting and taking action. It is crucial even though it is not easy task. Awareness and civic education programmes should be conducted frequently.

X. CONCLUSION

Corruption is a social as well as a criminal offence. As mentioned in the preamble of UNCAC, corruption is no longer a local matter, but a transnational phenomenon that affects all societies and economics. Anti-corruption laws, institutions and policies have been set up to combat corruption, but it is increasing day by day.

Corruption in Nepal is rampant. Lack of political commitment and low priority, long transition period, lack of strong coordination mechanisms with stakeholders and lack of adequate awareness are some causes of increasing corruption in Nepal.

There is no single prescription to control corruption. Combating corruption is not possible in isolation and requires a holistic approach. Focus on preventive as well as promotional measures along with punitive measures should be adopted simultaneously to combat corruption. The criminal justice system regarding

⁹ **References:**

The Charge sheet filed by CIAA to the Special Court

The Final judgments by Supreme Court, www.supremecourt.gov.np/

http://www.nepalmonitor.com/2012/03/corruption_in_nepal_.html

¹⁰ myrepublica.nagariknetwork.com/news/poor-ministers-rich-wives

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PARTICIPANTS' PAPERS

corruption has to be strong and effective.

References:

The Constitution of Nepal,

The Prevention of Corruption Act, 2002 A.D

Commission for Investigation of Abuse of Authority Act, 1991

Institutional Strategy of the Commission for the Investigation of Abuse of Authority (2014-2019)

Developing Jurisprudence on Illicit Enrichment: Kumar Chudal <http://nkcs.org.np/nja/elibrary/pages/view.php>

Corruption in Nepal: An Anthropological Inquiry Madhusudan Sharma Subedi Central Department of Sociology/ Anthropology, Tribhuvan University Kirtipur. Nepal

Teknath Dhakal and Ratna Raj Niroula, Prevalence of corruption and its challenge for improving governance in Nepal.

United Nations Convention against Corruption, United Nations Office on Drugs and Crime, Vienna

NJA Law Journal, National Judicial Academy, Nepal, Different volumes

<https://www.unodc.org/unodc/en/treaties/CAC/>

<http://www.lawcommission.gov.np/>

<https://myrepublica.nagariknetwork.com/news/poor-ministers-rich-wives/>

<https://www.transparency.org/>

<https://www.economist.com/graphic-detail/2018/02/22/corruption-is-still-rife-around-the-world>

National Integrity System Assessment Nepal 2014, Transparency International Nepal