

THE CRIMINAL JUSTICE RESPONSE TO CORRUPTION (IN THE CONTEXT OF NEPAL)

*Rajan Prasad Bhattarai**

I. HISTORICAL BACKGROUND

After the unification of Nepal, the great King Prithvinarayan Shah declared that the bribe takers and bribe givers were the greatest enemies of the nation and deserved the death penalty. This proves that corruption prevailed in the 18th century and corruption was considered to be a serious crime. Many rulers after that took various measures to control corruption. After the political change in 1951, The Prevention of Corruption Act, 1960 was implemented to maintain good governance. Similarly, the State Cases Act, 1960 and the Evidence Act, 1974 were implemented, adopting the principles of criminal justice. These two Acts are considered milestones in the field of criminal justice. These legal provisions were further strengthened by establishing the Commission for the Prevention of Abuse of Authority as a Constitutional body in 1975. Investigation, accusation and adjudication of corruption cases were the responsibilities of the Commission for the Prevention of Abuse of Authority. After the people's movement in 1990, the constitution of the Kingdom of Nepal, 1990 provided for the establishment of a Commission for the Investigation of Abuse of Authority (CIAA). However, the CIAA was vested only with the power of investigation and accusation.

II. THE EXISTING CORRUPTION CONTROL SYSTEM IN NEPAL

The Interim Constitution of Nepal, 2007 was promulgated after the second people's movement in 2006. The Constitution provides for the Commission for the Investigation of Abuse of Authority. The president of Nepal, with the recommendation of the Constitutional Council, appoints the Chief Commissioner and other Commissioners. The term of the office of the Chief Commissioner and other Commissioners is six years from the date of appointment. They can do their work freely and fairly since they shall only be removed by an impeachment resolution passed by the parliament.¹

A. Functions, Duties and Powers of the CIAA²

The following are the functions, duties and powers of the CIAA as mentioned in the Interim Constitution of Nepal, 2007.

- To conduct inquiries and investigations of improper conduct or corruption by a person holding any public office (subject to the exception of certain public officials);
- To write to the concerned authority for warning or departmental action or other actions, if it finds that any person holding public office has misused his or her authority by improper conduct;
- To prosecute the person holding public office and other involved in the crime, if it finds that the person holding public office has committed an act defined by the law as corruption;
- To submit an annual report to the president and president will submit the report to the parliament;
- To investigate and inquire into cases of any official of a constitutional body removed from their office following an Impeachment Resolution on the ground of misbehaviour; any Judge removed by the Judicial Council on similar charges, or any person proceeded against under the Army Act after they are removed from office.

The above mentioned Constitutional provisions show that CIAA can only investigate and file the cases

* Deputy Attorney, Commission for the Investigation of Abuse of Authority, Kathmandu, Nepal.

¹ Article 119 of the Interim Constitution of Nepal, 2007.

² Article 120 of the Interim Constitution of Nepal, 2007.

against corrupt officials in 'public institutions'. The CIAA Act defines 'public institutions' as follows:³

- A company, bank or committee wholly or partly owned or controlled by the Government of Nepal;
- Universities, campuses, schools, research centres and any other academic or educational institutions run by the Government of Nepal;
- Local bodies;
- Institutions run with loans, grants or guarantees of the Government of Nepal;
- Institutions with full or partial ownership of the institutions run by the government;
- Any other institution designated as a public institution in the Nepal Gazette.

Similarly, "Improper Conduct" denotes any of the following acts committed deliberately or through negligence by the person holding a public post as defined in the Commission for the Investigation of Abuse of Authority (CIAA) Act, 1991:⁴

- 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 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 office, officer or employee or getting any unauthorized work done from such office, officer or employee 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 one's own benefit under improper influence or enticement to the employee under one's influence or control; or
- Abuse of immunity, facility or concessions associated with the post.

Likewise, "Corruption" implies the guilt punishable under the prevalent law pertaining to the prevention of corruption.

The Corruption Prevention Act, 2002 has defined corruption as:⁵

- 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 subscriptions;
- Taking commissions;
- Public servants leaking revenue;
- Working with the *mala fide* intention to incur illegal benefit or loss;
- Public servants preparing wrong documents;
- Wrong translation;
- Tampering with Government documents;
- Destroying Government or public agencies' documents;
- Breach of confidentiality of the question paper or changing the results of an examination;
- Public servants indulging in illegal commerce and business;
- Claiming positions not versed upon;
- Giving false descriptions;
- Damage to public property;
- Exerting illegal pressure;
- Giving wrong reports;
- Illegal acquisition of property;
- Committing attempts;
- Accomplice.

False certificate related cases are the most common among the above mentioned crimes filed by CIAA in the Special Court. For appointment and promotion, the public servants need higher level academic

³ Section 2 of the CIAA Act, 2002.

⁴ Section 3 of the CIAA Act, 2002.

⁵ Chapter 2 of the Prevention of Corruption Act, 2002.

certificates. Some of them submit fake certificates from Indian schools and universities.

Fake certificates for appointment and promotion create two types of problem in public administration. On the one hand, work can't be done effectively by fake certificate holders who are not qualified for the post. On the other hand, the capable candidates do not get the chance for employment and promotion. This will affect the overall development of the country.

The CIAA files the cases in the Special Court if it finds the certificates fake. According to the Preventing of Corruption Act, 2002, the fake certificates holders are sentenced to six months to one year's imprisonment and also fined depending on the degree of the offence committed. CIAA has won about 95% of cases against fake certificates holders. They are removed from their jobs after the decision according to the law.

The following are the statistics related to fake certificates cases filed in the Special Court by the CIAA in the last three years.⁶

Fiscal Year	Total registered cases	Cases related to fake certificates	Percentage
2007-2008	70	54	77.14
2006-2007	115	93	80.86
2005-2006	114	69	60.52

B. Investigation Methods of the CIAA

The CIAA uses diverse methods of investigation for improper conduct or corruption committed by a person holding any public post. It receives written complaints from various sources and starts the investigation.

1. Sources of Complaint for the CIAA

- News published in news papers;
- Official publications and reports;
- Telephone, e-mail, fax, online complaints and other information through media;
- News and information published in electronic media;
- Information collected from other sources.

The complaints collected through the above mentioned sources are handed to the two Commissioners with the opinion of the Chief of the Investigation Department. Then these complaints are investigated in two stages, preliminary and detailed investigation.

During the preliminary inquiry, complaints are analysed on the basis of their merit and available evidence. At this stage the division concerned collects records and evidence. If it appears to be a *prima facie* case, the CIAA appoints an investigation officer for detailed investigation. The investigation officer makes all necessary inquiries, records, statements of the accused, analyses the findings and submits a report to the meeting of the CIAA. Such report is reviewed by the meeting and decisions are made either to frame the case or admonition or departmental action recovery of the loss or any other action on the basis of gravity of the crime committed. In cases where the investigation leads to insufficient evidence, the case is disposed of by the CIAA. The CIAA usually makes decisions through consensus.

In the beginning, corruption-related cases used to be filed in the general courts. The government of Nepal established a Special Court in 2002 for effective and fair trial of corruption related cases. The government of Nepal, on the recommendation of the Judicial Council, appoints one chairman and two member judges from the Appellate Court. The Special Court initiates proceedings and finalizes the corruption cases. However, appeals can be filed in the Supreme Court.

⁶ 18th Annual Report of the CIAA, 2007-2008.

Here are the comparative statistics of the disposed complaints by CIAA for the last three years:⁷

Fiscal Year	Registered Complaints	Complaints decided	Complaints remaining	Decided percentage
2007-2008	2732	2135	547	78.14%
2006-2007	3564	2976	588	83.50%
2005-2006	4324	3353	971	77.54%

The comparative statistics of the cases registered in the Special Court and cases decided for the last three years.⁸

Fiscal Year	Cases registered	Cases decided	Cases won	Cases lost	Won percentage
2007-2008	70	127	95	32	74.80%
2006-2007	115	171	140	31	81.87%
2005-2006	114	109	89	20	82.00%

In addition to above mentioned works, CIAA can also perform as an Ombudsman mentioned in the Interim Constitution of Nepal, 2007 and CIAA Act, 1991. The CIAA can also give suggestions to the Government of Nepal for good governance.

III. EXISTING CRIMINAL JUSTICE SYSTEM IN NEPAL

With the promulgation of the Interim Constitution of Nepal, 2007, the concept of an independent and competent system of justice, the concept of the rule of law, and human rights and universal principles of the justice system have been introduced.

In order to uphold and implement the concept of an efficient and impartial criminal justice system, a new State Cases Act, 1992 further elaborated the procedures of investigation and prosecution. According to the Interim Constitution of Nepal, 2007 and the State Cases Act, 1992, the institutions involved in the criminal justice system are as follows:

A. Police

Under the Home Ministry, a police organization has been established, which is regulated by the Police Act, 1956. The Police Headquarters is the top organ of the police organization. Under the Police Headquarters 75 District, one Police Office has been set up in every district. This is the grassroots law enforcement unit entrusted with the responsibility to investigate crime within its territorial jurisdiction. District Police Officers are directly involved in the investigation of the crimes under the territorial jurisdiction.

B. Public Prosecutors

The Attorney General of Nepal is constitutionally responsible for prosecuting in criminal cases. The Attorney General has the power to delegate the responsibility for prosecution of criminal cases to his or her subordinates. There are 75 district level offices and 16 Appellate offices under the office of the Attorney General of Nepal.

C. Courts

The District Court is the court of first instance. It has the power to entertain all the criminal cases except otherwise provided by any law. There are 75 District Courts in Nepal. All cases in the District Courts are tried by a single Judge Bench. The Supreme Court of Nepal is the apex court. Constitutionally it is a Court of Record. The Constitution of Nepal has conferred on the Supreme Court vast and extraordinary

⁷ 18th Annual Report of the CIAA, 2007-2008.

⁸ 18th Annual Report of the CIAA, 2007-2008.

jurisdiction in order to reinforce the fundamental rights of citizens. The Supreme Court has the power to declare any legislation void for being inconsistent with any provision of the Constitution. Immediately below the Supreme Court there are 16 Appellate courts. District Courts within the territorial limitation are subject to review by the Appellate Courts on appeal.

In this way, the institutions involved in criminal justice system are the police, public prosecutors and courts. The police have the responsibility of investigation, public prosecutors have the power of prosecution and the courts give verdicts in criminal cases. However, for corruption related cases investigation and accusation are the remit of the CIAA and adjudication is the remit of the Special Court as per the Special Court Act, 2002.

IV. PROBLEMS IN CORRUPTION CONTROL

In Nepal, corruption has been considered a serious crime for a long period of time and various measures have been taken to control it. The Commission for the Investigation of Abuse of Authority has been established as the supreme institution to control corruption and it has been working continuously throughout the nation. However, the country is not able to control corruption. The number of complaints and court cases against corruption shows that corruption is deeply rooted in Nepal. The following are the major hindrances to controlling it:

- (i) Corruption in the private sector is beyond the jurisdiction of the CIAA;
- (ii) Lack of skilled personnel;
- (iii) Lack of modern equipment;
- (iv) No regional offices of its own;
- (v) Low pay scale;
- (vi) Lack of public awareness;
- (vii) United Nations Conventions against Corruption not ratified.

V. CONCLUSION

Nepal has given special priority to controlling corruption. The CIAA has been adopting punitive, preventive and promotional activities to control corruption. Because of the political instability in the country the United Nations Convention against Corruption (UNCAC), which was signed by former Chief Commissioner on 10 December 2003, has not been ratified by the parliament yet. In the present context, Nepal has been declared a Federal Democratic Republic Country. A general election for the Constitutional Assembly has been conducted. The nation is in the process of writing a new constitution. In this context, on the one hand, voices have been raised from the CIAA and various organizations to ratify the UNCAC. On the other hand, the Government of Nepal has implemented the following Acts to work according to the provisions of the UNCAC for corruption control.

The Acts are as follows:

- (i) Prevention of Money Laundering Act, 2008
- (ii) Right to Information Act, 2007
- (iii) Public Procurement Act, 2007
- (iv) Good Governance Act, 2008
- (v) Electronic Transaction Act, 2006.

In addition to these, voices have been raised to include corruption in the private sector within the jurisdiction of CIAA.

In conclusion, it is hoped that if the United Nations Convention against Corruption is ratified by the parliament, international co-operation will be gained to control corruption. Similarly, if corruption in the private sector falls within the jurisdiction of CIAA in the new Constitution of Nepal, we will be able to control corruption.