

Impunity and Political Accountability in Nepal



Aditya Adhikari and Bhaskar Gautam
with Surabhi Pudasaini and Bhadra Sharma



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Technical and financial support for this publication has been provided by The Asia Foundation, with funding from the Department of Foreign Affairs and Trade, Government of Australia. Views and opinions expressed in this publication are of the authors and do not necessarily reflect those of The Asia Foundation or of the Government of Australia.

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Foreword

“Impunity and Political Accountability in Nepal” is the fourth of a series of reports published by The Asia Foundation since 1999 that document impunity in Nepal.

Prior reports provided analyses of the causes and scale of impunity in the context of conflict and political instability during the late 1990s; political corruption and violation of human rights during 2004 - 2006; and the state of impunity prior to and immediately after Jana Anadolan II during 2006 -2010.

This report explores a range of political behaviors that can be understood as examples of impunity. It attempts to position impunity within the wider practice of politics and its intimate connection with the daily interactions of people in Nepal, between 2006 and 2013. The report’s chapters examine the complex relationship between politics and law; the manner in which politicians and bureaucrats transgress or manipulate laws and norms to establish control over state institutions; the operations of the Commission for the Investigation of Abuse of Authority; political protection and cultivation of criminal activity; the increase in politician-criminal ties after 2006; and a transitional justice process that will include prosecution as a means of combating impunity.

The case studies and analyses provided in this report convey a critical and constructive perspective on the status of impunity in post-conflict Nepal.

George Varughese, Ph.D.
Nepal Country Representative
The Asia Foundation

February 2014

Preface

Public disenchantment with Nepal's political parties has been on the rise since the end of the decade-long conflict in 2006. Discussions about impunity have increased correspondingly, mirroring the growing frustration with the political process. A newspaper uncovers an instance of high-level corruption, and there is widespread outrage. The court issues an arrest warrant for a conflict-era murder, and the parties aggressively and effectively shield their cadre from police action. In response, civil society groups instigate furious campaigns calling for the individual to be punished. People are deeply angered as each such case comes to public attention through media reports. The sense on the street is that Nepal's new democratic rulers are behaving much like its older absolutist ones. They have established themselves as a separate class, accountable to no one and above the law.

Impunity becomes a matter of public discussion when particularly egregious legal violations by influential politicians are uncovered. Often ignored, however, is the reality that a range of daily practices embedded within standard political praxis can be classified under the rubric of "impunity." Political and bureaucratic figures may act in ways that violate the law and arouse the ire of the public. Politicians who refuse to participate in legal transgressions may be publicly acclaimed for their probity.

But many politicians find it difficult to translate commendation into concrete support. Such politicians are often regarded by their peers as being naïve or ineffectual.

It is generally accepted among politicians and their supporters that at least some violations of the law are necessary if a party is to create a network of supporters. Legal violations are understood as essential to expanding a party's power, a theory that is not disproven by reality. Though Nepal's political parties are widely reviled by the public and the press, the unpopularity has not prevented them from penetrating deep into society. Indeed, political parties wield substantial influence over both public and private organizations. Much of the parties' influence over society comes from the key role they play as mediator between the population and state institutions.

For the last six decades, state institutions have been the chief domain where powerful forces in Nepal compete to extract resources. Limited market growth in the last decade has meant that the state and bureaucracy remain a crucial source of income for large sections of the population.^a The Nepali state has failed to fulfill the admittedly large public demand placed upon it. However, the resources available to the state, too, are limited. With competition over state resources severe, political parties are the channels through which social battles over access to state resources are waged.

State organs are also often perceived to be inefficient, distant and unapproachable. Individuals who approach them with specific requests find that the rules and procedures they are expected to follow are complex and cumbersome. Individuals and groups thus approach parties to intervene on a wide variety of matters ranging from the minor (a request for a citizenship certificate, for example) to the relatively major (a request to the local government for the release of funds for the construction of

a For more on this see Mangal Shrestha and Krishna Shrestha, *Readings in Nepalese Public Administration* (Kathmandu: Educational Enterprise, 2001), 16–25.

a road). Often, the fulfillment of such requests requires a bending of existing laws and procedures. On some occasions, they may even require an outright violation. For instance, there have been numerous occasions in recent years when parties have interceded with the police on behalf of their supporters to obtain the release of a person who has been taken into custody.

Such cases complicate the prevalent view regarding impunity, which holds that politicians function as a separate class that stands above the population and beyond the law. What such cases make evident is the degree of complicity between parties and other social groups in acts of impunity. Obversely, political leaders do not necessarily think that they are guilty of perpetuating impunity when they engage in actions that violate the law. Rather, they think they are aiding people who have nowhere else to turn. One politician interviewed for this report even described the protection of criminals as his party's "social responsibility."^b

This, however, is not meant as an excuse for political party behavior. Nor is it meant to offer a benign view of impunity. While everyday violations of the law may not appear to be greatly significant when considered in isolation, their cumulative effects are greatly damaging. For one thing, the bending of laws and regulations cannot be justified on the grounds that state organs are unapproachable and their regulations cumbersome. It is evident that the repeated violations of rules and procedures can only lead to the continued erosion of institutional capacity.

Further, it is also important to note that politicians do not mediate between the population and state organs out of any altruistic motive. All assistance is based on calculations of how the action will benefit them personally. The benefits can either be monetary or an expansion of their party's power. It is also difficult for large sections of the population to access political leaders. As a result, the wealthy and influential have a disproportionate influence over politicians. Often, unlawful interventions into state

b Interview, April 2013.

organs serve the interests of the powerful while ensuring that the weak remain marginalized. As the section below on the political-criminal nexus in the town of Biratnagar demonstrates, the parties misuse their powers of intervention with state authorities to create narrow cabals of cronies. This allows the parties, through the cronies as proxies, to establish illegal dominance over other sections of society. In such cases, it is the weaker parts of society that become victims of injustice.

This report will attempt to situate impunity within the wider practice of politics as well as its intimate connection with the very practice of living. It will explore a wide variety of political behavior that can be classified as examples of impunity.

Chapter 1 will discuss the manner in which the nature of politics between 2006 and 2013 (the time-frame with which this report is concerned) contributed to an exacerbation of impunity. In particular, it will explore the complex relationship between politics and the law. It will argue that the rule of law is not something that stands in a pristine realm above politics. Rather, the two always exist in a dialectical relationship with each other.

Chapter 2 explores the manner in which politicians and bureaucrats transgress laws and norms to establish control over state institutions. We do this through a close examination of the operations of a single ministry, the Ministry of Peace and Reconstruction. This chapter argues that corruption and impunity do not result only from politicians and bureaucrats using state resources for private gain. Instead, impunity is inextricably linked with Nepal's style of governance itself.

Chapter 3 examines the operations of the Commission for the Investigation of Abuse of Authority (CIAA), the legally autonomous apex body responsible for holding politicians to account. This chapter will focus primarily on the various methods by which politicians intervene in the CIAA, undermining its autonomy and effectiveness.

Chapter 4 is concerned with political protection and cultivation of criminal activity. Through the detailed examination of an event

that occurred in the town of Biratnagar, Morang district, in 2011, we explore the reasons behind the marked increase in political-criminal ties after 2006. We will also situate the political-criminal nexus within its place in the broader political economy of Morang. This chapter will also look at the efficacy of civil society agitation as a method of holding politicians accountable, as well as the possible role that local elections can play in combating impunity.

Since the end of the civil war in 2006, human rights activists have been arguing in favor of a transitional justice process that will include prosecutions as a means of combating impunity. Chapter 5 will explore the disputes that have inhibited the process and identify transitional justice dilemmas that will need to be resolved.

The conclusion will summarize the political impediments that stand in the way of ending impunity and establishing the rule of law. It will also discuss how specific transformations in Nepal's politics and governing institutions can help combat impunity.

The Politics of Impunity

Politics and the Law in Nepal's Post-Conflict Transition

This report broadly encompasses the period following the regime change of 2006, up to the dissolution of the Constituent Assembly (CA) in 2012. Although this was a time of rapid political and social change, the larger political culture of this period was marked by common characteristics. In some ways, this period resembled the decade of democratic experiment in the 1990s: it followed the overthrow of an absolutist monarchical regime, it witnessed the proliferation of political and civil society groups with competing demands, and it led to severe political competition that led to political instability and damaged governance.

In other ways, however, the politics of the past seven years differs from that of the 1990s. Most obviously, the post-2006 era was officially recognized as a period of transition. Its purpose was three-fold: to accommodate a former rebel group into the democratic process, to disband the rebel army, and to draft a constitution committed to liberal political freedoms while incorporating some of the Maoists' demands for structural change. Later, the parameters of the political transition were expanded to accommodate demands by Madhesi, Janajati, and Dalit groups for federalism and affirmative action.

The 1990 constitution was abrogated in 2006 with the acknowledgement that it would take a number of years for the elected CA to draft a new one. In the meantime, the Interim Constitution of 2007 provided the legal framework for the transition. The Comprehensive Peace Agreement (CPA), signed in 2006 by the Nepali Congress government and the Maoists, provided the political roadmap for the Interim Constitution and the overall transitional period.

Nepal's CPA was in line with most peace agreements signed in the aftermath of armed conflict and arbitrary rule. Among its pledges, the CPA included numerous references to the establishment of the rule of law and an end to impunity. There are two explicit references to impunity. Section 3.4 states that the signatories to the agreement pledge "to maintain good governance by ending corruption and impunity." Section 7.1.3 states: "Impunity shall not be encouraged." The clause further promises to ensure the "rights of the victims of conflict and torture and the families of disappeared persons to obtain relief."

The word "impunity" as used in these two instances has separate but related connotations. Clause 3.4 is a promise to end the abuse of authority in everyday governance. As such, this clause is also an implicit criticism of the rampant abuses of authority that were prevalent during the 1990s. These abuses are widely believed to have contributed to the spread of the Maoist rebellion after 1996. Clause 7.1.3 refers more specifically to human rights violations committed by both the state and the rebels during the armed conflict. This clause contains two pledges: that such violations will not recur, and that the state will provide redress to victims of conflict and their families. (Note, however, that there is some ambivalence in this clause. While it promises "relief" to victims, it does not mention that those guilty of rights violations will be prosecuted. This matter will be explored in greater detail in chapter 5.)

As is well known, the establishment of the rule of law in newly democratizing societies is no simple task. Political leaders

often lack incentives to abide by the rule of law. Further, the relationship between politics and the law is complex. On the one hand, the law is meant to constrain the behavior of politicians. On the other hand, the law is also a political instrument — it is by passing legislation that politicians implement their goals.¹ Countries that are able to ensure that their politicians abide by the law generally possess long histories of political continuity and legal precedent.

It is not simply that such histories are unavailable in countries like Nepal that have only recently broken with a previous regime. In periods of rupture and transition, politics takes precedence over legality. The establishment of a new political system involves the abrogation of at least a large portion of the previous legal regime. Politicians involved in a change of regime find it difficult to justify their actions through legal precedents. Nepal's political leaders did not even attempt to justify the decisions they took in 2006 on legal grounds. Rather, they invoked the mass support they had received during the uprising against monarchical autocracy as the basis of their legitimacy.

An important instance of privileging legitimacy over legality is the reinstatement, in the immediate post-2006 period, of parliament as it was comprised in 1999. This was one of the first decisions taken by the post-uprising government led by Girija Prasad Koirala of the Nepali Congress. The legal scholar Mara Malagodi has argued that the legal grounds for this move were flimsy.² Parliament was dissolved in 2002 by the elected Prime Minister Sher Bahadur Deuba, also a member of the Nepali Congress. Deuba had dissolved parliament in accordance with provisions in the 1990 constitution by which he was bound. There were no provisions in the constitution that allowed a future head of government to reverse this decision, let alone four

1 This analysis of the relationship between law and politics draws on Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Oregon: Hart Publishing, 2000).

2 Mara Malagodi, "Creation of Public Meaning in Nepal's Democratic Transition" (workshop presentation, Martin Chautari, Kathmandu, September 2011).

long years after the parliament's dissolution. Moreover, when parliament was reinstated, the Interim Constitution had not yet been promulgated. The 1990 constitution was thus still in legal force.

It follows that acts passed by the reinstated parliament — which, among other things, stripped the monarch of his privileges and declared Nepal a secular state — were of dubious legal validity. It was therefore unsurprising that many individuals who refused to acknowledge the legitimacy of the 2006 regime change thought these decisions to be illegal. The reinstatement of parliament was challenged by at least three writ petitions filed at the Supreme Court. The Supreme Court, however, disregarded the petitions, arguing that the ordinary standards of legality did not apply in those extraordinary circumstances. The formal abrogation of the 1990 constitution in January 2007 rendered the entire issue obsolete.³

It may appear to the reader that this discussion on the relationship between law and politics is merely an academic exercise without any practical impact. We argue, to the contrary, that the precedence of politics over legality has been a defining feature of Nepal's transition over the previous seven years. And this has had major effects upon state and society. Such a situation is quite natural in transitions that involve a rewriting of fundamental laws. The law is always shaped and interpreted by political processes, but this is much more the case in unsettled regimes than in settled ones. This is not to say that there are no laws during periods of transition and that everything is political. The entire legal system is not dismantled, and laws meant to shape the behavior of political actors do exist. It is a challenge, however, to impose the law upon parties during periods of transition, when the legal foundation is not entirely stable. This will be demonstrated in greater detail below, as well as in subsequent chapters of this report.

3 Mara Malagodi, "Creation of Public Meaning in Nepal's Democratic Transition" (workshop presentation, Martin Chautari, Kathmandu, September 2011).

The peace agreements clearly indicate that politics will take precedence over legality during the transition. The idea of “consensus” is a case in point. This was the defining principle of the political transition, and is mentioned numerous times in both the CPA and the Interim Constitution. Clause 8.3 of the CPA states: “Both parties [the government and the Maoists] are committed to settle all kinds of present or future mutual disagreements through mutual talks, understanding, consensus and dialogues.” The Interim Constitution explains:

For the purpose of this constitution “political consensus” means the political consensus reached between the seven political parties — Nepali Congress, Communist Party of Nepal (UML), Janamorcha Nepal, Nepal Sadbhawana Party (Anandidevi), Nepal Majdoor Kisan Party, Samyukta Bam Morcha-Nepal, and Communist Party of Nepal (Maoist) — on Kartik 22, 2064 (November 8, 2006).

The parties’ emphasis on “consensus” reveals their concern that decisions made during the movement could be legally challenged in the transitional period. They concluded that they could claim legitimacy only by standing together. In the face of a fragile legal framework, a major disagreement between the parties could derail the entire peace process. A member of the (now dissolved) Constituent Assembly’s State Restructuring Committee told the anthropologist Amanda Snellinger that consensus was obligatory during transitional periods when no formal procedures could guide the political process.⁴ He went on to say that consensus was not necessary in the 1990s, as a permanent constitution had been drafted soon after the first people’s movement. In contrast, he said, the period after 2006 was more fragile, as the parties were involved in a long process to establish a new constitutional and legal framework.

The parties believed that “consensus” as a means of ruling derived its legitimacy from popular sovereignty, not from the

4 Amanda Snellinger, “The Production of Possibility through an Impossible Ideal: Consensus as a Political Value in Nepal’s Constituent Assembly” (unpublished paper, September 2013).

law. The seven parties included in the consensus system had jointly participated in the 2006 movement. Consequently, the alliance believed they had represented the people in that “people’s movement.” It followed, they thought, that they continued to jointly represent the will of the people in its aftermath. This argument was then institutionalized in the consensus system established by the Interim Constitution.

The principle of consensus was perhaps a political necessity. The forces involved in the regime change would be able to chart a course through the delicate transition only if they were united. The continued reiteration of a pledge to consistently work together was necessary to preserve the fragile unity between political parties that had only recently been at war. Even in the post-war period, they continued to view each other with substantial suspicion and had radically differing worldviews.

It was evident from the very early days of the peace process, however, that the idea of consensus was also a tool for the parties to maintain their dominance and evade accountability. The insistence that the parties together represented the entirety of the people’s will meant that civil society and other institutions were fundamentally excluded from the political process. Attempts by civil society to establish mechanisms to hold the parties accountable and monitor the implementation of the CPA were repeatedly thwarted. For instance, a National Monitoring Commission for the Ceasefire Code of Conduct (NMCC) was constituted on May 26, 2006. An unwieldy body of 35 members nominated from civil society, the body was tasked with facilitating the peace negotiations and monitoring ceasefire violations in the period before the CPA was signed.

From its very inception, the parties denied the NMCC any role in peace negotiations. Unable to effectively coordinate its members, and barred from high-level political negotiations, the NMCC became a merely symbolic body. In November 2006, the NMCC was dissolved along with the formal announcement of the CPA. No replacement body was established. Members of civil

society continued to demand its reconstitution throughout 2007, but these demands were ignored.⁵

Similarly, as Chapter 5 will explore in greater detail, the parties have tried to use the idea of “consensus” to block the courts from pursuing cases involving conflict-era human rights violations. When lawyers have petitioned the Supreme Court for redress for victims and prosecution for perpetrators, the attorney general has argued on behalf of the government that transitional justice issues do not come under the jurisdiction of the courts, because the CPA states that transitional justice mechanisms will be established through “political consensus.” The Supreme Court rejected this claim. Nonetheless, the attorney general’s argument is an example of how the parties have tried to use the concept of “consensus” to evade accountability.

If collusion among the parties in the name of consensus enabled political impunity, so did competition between them. On the one hand, the parties tried to maintain their collective legitimacy and relevance through appeals to consensus. On the other, they also viewed each other as rivals and were perpetually involved in struggles to expand their own power at the expense of others. They took advantage of the absence of independent bodies that would monitor their actions and hold them accountable. All parties selectively interpreted the peace agreements, emphasizing those clauses that would benefit them while disregarding those they thought would benefit their rivals. (For example, in the early days of the peace process, the Nepali Congress emphasized the provision requiring the Maoists to return land captured during the conflict; the Maoists meanwhile pointed to provisions that emphasize structural change, which included one for land reform). The parties were thus perpetually in disagreement over how the CPA was to be implemented. As a result, the peace process moved in an ad hoc and fragmented manner.

It is clear that the failures of the consensus system were partially a consequence of the parties’ mistrust towards each other. Each

5 Interviews with civil society activists, Kathmandu, May 2013.

desired to expand its own power at the expense of its rivals. After the Maoists won the largest number of seats in the Constituent Assembly in the 2008 elections, the parties negotiated for months over how they would share power. The Interim Constitution had envisaged an all-party government, saying that the composition of the Council of Ministers would be decided through political consensus. Finally, failing to reach an agreement, the parties decided to amend the Interim Constitution so that a prime minister could be chosen through a majority vote in the assembly.

The first post-election government, which was led by the Maoists, collapsed in May 2009. This was the first of four government changes between 2009 and 2013. Each government change followed a similar pattern. The parties would spend months trying to cobble together a governing coalition that commanded a majority in the legislature. Once a government was in place, the leading party in government would be hobbled by the demands of its coalition partners. The parties in opposition would refuse to cooperate, fearing that successful delivery of services to the population would increase the government's popularity.

A key strategy to paralyze government was to disrupt parliamentary proceedings, especially when crucial issues were tabled for voting. For instance, passing the annual budget was a fraught activity that inevitably took months. Alongside a parliamentary blockade, the opposition would accuse the government of incompetence, demand that it step down, and maneuver to force its resignation. In turn, realizing that their tenure in power was likely to be short, the ruling parties would expend much of their energy in finding ways to distribute state resources to their supporters. Needless to say, this process included much bending, if not outright violation, of existing laws and regulations. (Section 2 provides a case study of the abuse of power in the Ministry of Peace and Reconstruction).

The transition, and thus the politics of consensus, was meant to last until the Constituent Assembly drafted a new constitution. Fresh elections to a new legislature would be held as per the new

constitution. The Interim Constitution had initially granted the CA a term of two years: elected in May 2008, it was supposed to produce a new constitution by May 2010. But these two years were marked by acute political instability. It often appeared that the only thing that they could agree on was to extend the CA's term. The parties repeatedly agreed to amend the constitution so as to extend the body's tenure for a few months at a time. Even with these extensions, however, there was scant progress.

For much of the period between May 2010 and the end of 2011, the parties tended to hold the constitution drafting process hostage so as to improve their bargaining position vis-à-vis their more immediate demands.⁶ On some occasions, for instance, the Nepali Congress and the UML refused to engage in constitutional negotiations unless the Maoists agreed on measures that would lead to a disbandment of the latter's army. On other occasions, it was the Maoists who would refuse to cooperate unless the other parties agreed to accommodate large numbers of former Maoist combatants into the Nepal Army.

There was a substantial rise in disillusionment and anger towards the political parties during this period. The smaller parties in the CA and the lower-ranking legislators within the larger parties felt excluded from the constitution drafting process. Indeed, it was true that all major negotiations were conducted by top-ranking leaders of the major parties, leaving the remaining members of the CA with little to do.

Among the wider public, there was a feeling that the parties were privileging partisan quarrels at the expense of their chief task, that of drafting a constitution. For many, the repeated extensions of the CA's tenure indicated that the parties were engineering the rules of the game to suit their own narrow purposes. Large sections of the public and the media thus applauded when the Supreme Court ruled in November 2011 that no further extensions of the CA's term would be allowed after May 2012.

6 See International Crisis Group, "Nepal's Constitution (I): Evolution not Revolution," *Asia Report* 233, August 2012, and "Nepal's Constitution(II): The Expanding Political Matrix," *Asia Report* 234, August 2012.

This seemed to them a much-needed assertion of the rule of law over political brazenness.

Ironically, the effect of the Supreme Court decision was to lead to a further privileging of politics at the expense of the rule of law. The decision did force the parties to finally engage in serious negotiations over the constitution. However, negotiations over constitutional specifics, as over federalism for example, were fraught. Any decisions the parties might have arrived at would have been highly controversial. The parties thus finally chose to postpone such decisions and were unable to come to an agreement. The CA was dissolved without having produced a constitution. The Interim Constitution had made no provisions for such a scenario. The dissolution of the CA thus led to a major constitutional crisis.

The politics of consensus had trumped legality since the very early days of the peace process. However, between 2007 and 2012, the Interim Constitution had at least provided a framework for the parties' actions. Further, during this period, the parties had to seek formal ratification of their decisions — such as those allowing for extensions of the CA — through a vote in the legislature. This provided legal legitimacy to their decisions. After May 2012, the Interim Constitution could no longer provide a framework for their actions. Nor was it possible for elected representatives to vote on the passage of new legislation. All that remained was the politics of consensus. The major parties decided through consensus to hold fresh elections and appoint the chief justice as head of an interim government. The president then ratified these decisions into law. Needless to say, these ad hoc arrangements had no legal basis whatsoever. At the start, Nepal's political transition was meant to lead to the establishment of a liberal polity governed by the rule of law. Instead, in 2013, the transition struck an impasse where politics had become even more unhinged from legality than it had been in 2006.

The recent elections to a new Constituent Assembly have salvaged some of the eroded legitimacy of the political parties as

well as some aspects of the rule of law. The Interim Constitution once again provides a framework for the political process, albeit with modifications. An active legislature has come into existence. The body will be able to legitimately pass laws and maintain a degree of scrutiny over the actions of high-level political leaders. Yet the political process is still largely transitional in character: the chief goal is to draft a permanent constitution. Inevitably, the power struggles and constitutional disagreements of previous years will continue. It is likely that Nepali politics in the years ahead will also be marked by the dynamics of *collusion* in the name of consensus and *competition* for power. As the above discussion has made amply clear, both collusion and competition between the parties make it difficult to end impunity and establish the rule of law. The following sections of this report explore various type of collusive and competitive behavior that lead to impunity. Some of these seem to be specific to the transitional period and can be expected to be ameliorated after a constitution is promulgated; others will likely remain relatively permanent features of Nepali politics. The conclusion will address this in greater detail.

The Consequences of Mistrust Towards the Law

The rule of law does not consist of the implementation of universal and abstract principles. Rather, the structure of law in any society closely reflects its politics. A law-abiding society cannot be established unless its members believe the laws to be just and functioning to their benefit. As Ashraf Ghani and Claire Lockhart state, “Rules are resources that can be used to generate collective power; without active citizens, however, who reflect on and consent to these rules, there can be no legitimacy. The people judge the state’s effectiveness not in the abstract but on the basis of how well it performs its legal functions.”⁷ If the people do not believe that the laws are just, or if they think they are only irregularly applied, they will flout them, and impunity

7 Ashraf Ghani and Claire Lockhart, *Fixing Failed States: A Framework for Rebuilding a Fractured World* (New York: Oxford University Press, 2008), 121.

will prevail. This section explores some of the reasons behind the distrust certain groups in Nepal display towards existing institutions such as the judiciary. It will be argued that this distrust is a major cause of the ongoing difficulties in combating impunity and establishing the rule of law.

It is well known that broad sections of the population in Nepal have historically felt the law to be discriminatory and its application to be inconsistent. To take only the most cited examples, the definition of Nepal as a Hindu state and the fixing of its national language as Nepali in the 1990 constitution privileged the hill upper castes at the expense of Madhesis, Janajatis, and Dalits.⁸ Members of the latter groups were antagonized by a number of Supreme Court decisions in the 1990s. In 1998, for example, a team deployed by the government-formed Citizenship Monitoring and Work Evaluation Committee distributed 34,090 citizenship cards, primarily in the districts of the Tarai. This was considered necessary as large numbers of Madhesis, historically treated with suspicion by the Nepali state for their cultural and kinship ties with Indians across the border, had been deliberately deprived of citizenship papers. A writ was filed against the government's decision to distribute citizenship cards. The Supreme Court declared the entire process null and void on the grounds that it contradicted constitutional and legal provisions.⁹

Similarly, in 1997, the Dhanusha District Development Committee and Rajbiraj municipality announced that Maithili could be used as an official language of local government. Kathmandu municipality announced the same for the Newari language. The Supreme Court annulled these decisions, stating that the 1990 constitution only provided for the use of Nepali as the official language.¹⁰ Although these decisions were justified on

8 See Mara Malagodi, *Constitutional Nationalism and Legal Exclusion: Equality, Identity Politics and Democracy in Nepal* (New Delhi: Oxford University Press, 2013).

9 See Terai Human Rights Defenders' Alliance (THRD Alliance), *In Search of Justice* (Kathmandu: 2012).

10 Ibid.

technical and legal grounds, many perceived them to be blatantly political. Madhesis in particular felt that these decisions reflected the bias of the upper-caste hill elites, who were disproportionately represented in the judiciary's upper echelons.

The Interim Constitution of 2007 replaced many discriminatory provisions in the 1990 constitution. Nepal was declared a secular state. Each community was given the "right to preserve and promote its language, script, culture, civilization, and heritage."¹¹ The use of languages besides Nepali was allowed in local bodies.¹² The drafters of the Interim Constitution envisaged a gradual transformation of Nepal's legal structure in a way that would include the aspirations of groups that had historically been marginalized. Article 107(1) of the constitution allows all Nepali citizens to file petitions at the Supreme Court against any law that is inconsistent with the constitution and imposes "unreasonable restriction on the enjoyment of the fundamental rights conferred by the constitution."

Yet even in the years after the promulgation of the Interim Constitution, the Supreme Court made a number of decisions that antagonized politicians and civil society leaders representing particular communities, Madhesis in particular. An especially polarizing case was that regarding the oath of Vice President Paramanand Jha. On July 23, 2008, Jha, who had recently been elected vice president, took his oath of office in Hindi. Though Hindi is not technically a mother tongue for Madhesis, it is widely used across the Tarai. This caused much consternation and disapproval in the Nepali-speaking public sphere. A writ challenging the oath was filed at the Supreme Court. On July 24, 2009, the court decided that the vice president's oath was unconstitutional and thus void. Jha, however, initially refused to retake the oath in Nepali. There were several months of intense conflict among the parties and the media. Madhesi leaders argued that the Interim Constitution had provided equal rights

11 Clause 17(3) of the Interim Constitution.

12 Clause 5(3) of the Interim Constitution.

for all languages in use in Nepal. Those opposed to the decision argued that Jha was undermining Nepali identity by using India's national language to take his oath. A writ petition filed at the Supreme Court demanding Jha's removal from his position stated that he had acted in "ethnic self-interest" and "with a view to pleasing the neighbouring country." The writ further accused Jha of being "involved in the act of inviting anarchy and erasing the existence of Nepal by inciting ethnic violence in the country."¹³

The leaders of all the major political parties realized that forcing the vice president to retake his oath in Nepali would be taken not just as a personal humiliation for him but as an affront to the entire Madhesi community. They decided therefore to amend the Constitution to allow Jha a face-saving measure. The seventh amendment to the Interim Constitution, effective from January 31, 2010, added a clause enabling the vice president to take his oath in his "mother tongue."

On February 7, 2010, Jha retook the oath in Maithili, which too is a language spoken by people on both sides of the Indo-Nepal border. It is not, however, as closely identified with the Indian state as Hindi is in the popular imagination. Stating that the vice president had retaken his oath according to the new constitutional provisions, the Supreme Court annulled the writ petition demanding his removal.

Resentment towards the state remained, however, among sections of the Madhesi population. An activist interviewed for this report thought the Supreme Court had displayed a high degree of judicial activism in the case of the vice president's oath. He compared that case with a more recent case that received relatively little media attention. On December 15, 2010, Madhesi activist Sunil Ranjan Singh filed a writ petition against a notice published by the Home Ministry.

The notice stated that all government officials and armed forces personnel had to appear in "Nepali costume" on formal

13 Writ petition filed at the Supreme Court by Balkrishna Neupane and others.

occasions such as festivals. A clause in the notice defined “Nepali costume” as “the costume worn by Nepali citizens from former times.” For women, the notice stated, this would include *cholo* and *sari*; for men, *labeda*, *suruwal*, coat, and *topi*. Such attire, of course, has long been officially regarded as Nepal’s “national costume.” But as this attire is traditionally a part of the culture of hill Brahmins and Chhetris, some Madhesi and Janajati groups consider it a symbol of the hegemony enjoyed by the upper-caste state elite.

The petitioner, Sunil Ranjan Singh, argued that this provision was in contravention of the Interim Constitution. He argued that forcing Madhesi and other communities to wear the attire of the dominant community was in violation of three specific articles in the Interim Constitution: Article 3, which defines Nepal as a “multi-ethnic, multi-lingual, multi-religious and multi-cultural” nation; Article 13, which grants the right of equality to all citizens; and Article 17(3), which grants all communities in Nepal the right to preserve and practice their cultures.¹⁴

In its decision, the Supreme Court bench hearing the case rejected the writ petition. Interestingly, the judgment does not address the core issue of whether or not the Home Ministry directive requiring all state officials to wear “Nepali costume” on formal occasions is discriminatory. Rather, the bench decided to annul the petition on two rather technical grounds. First, the bench argued, the directive only required state officials to wear “Nepali costume” and not all members of the general population. “Therefore, such an issue cannot be accepted as an issue of public interest or concern to be included in the extraordinary judicial procedure of court.” Second, the court argued that since the petitioner was not a state official, the Home Ministry directive did not affect him in any way. Further, the verdict stated that the petitioner had not been able to establish that he was a representative of any particular group or community. Therefore,

14 Writ petition filed at the Supreme Court by Sunil Ranjan Singh.

it was argued, “the petitioner does not have the *locus standi* to contend that the issue is of public concern.”¹⁵

Although the decision was taken on specific legal grounds, Madhesi activists interpreted it as yet another assault on their rights by the Supreme Court. In an interview, a Madhesi activist asked, “Why did the court take such an aggressive stance in the case of the vice president, while evading the core issue in the case of Sunil Ranjan Singh’s petition?” According to this activist, it was clear that the decision reflected the bias of the upper castes that have long enjoyed dominance over the judiciary.

The larger point here is not that the Supreme Court has deliberately and systematically discriminated against particular communities. An argument that seeks to make that case would require an analysis of many more court judgments in recent years. Instead, this report only seeks to argue that there is a widespread *perception* of bias regarding Supreme Court judgments among Madhesis and other minority communities. This distrust towards the judiciary translates into a broader skepticism towards the law.

Civil society in Nepal can be broadly divided into two groups vis-à-vis their attitude towards the rule of law. One group believes that the primary problem in Nepali politics is the weak rule of law. Members of this group are particularly critical of political parties. They approved of the Supreme Court decision to prevent further extensions of the Constituent Assembly by the political parties. They are often engaged in campaigns to end impunity and demand the prosecution of party members who have been found responsible for major human rights violations during the conflict.

The second group can broadly be said to include members of communities that have historically been underrepresented. Members of this group believe that while the establishment of the rule of law is necessary, it is at present a secondary concern.

15 Judgment by the Supreme Court on the petition filed by Sunil Ranjan Singh.

They believe that the primary task is the *political* restructuring of the Nepali state to make it more inclusive. As such, members of this group have greater faith in politicians than in the judiciary. For example, a Madhesi activist compares the reactions of the Supreme Court and the political class to the cases of the vice president's oath and the definition of national attire. In both cases, says the activist, the political class was much more receptive to minority sentiment than the Supreme Court.

Due to their lack of faith in the judiciary, some Madhesi activists and opinion-shapers are more willing to forgive the excesses of the political parties. There is a widespread belief that the Constituent Assembly elected in 2008, which included unprecedented numbers of marginalized groups, represented a site of popular sovereignty. This is in stark contrast to other state organs that continue to represent the *ancien régime*. As the writer and political commentator C. K. Lal wrote, "The CA process ... has made a large section of the previously ruled populations aware that they don't have to unquestioningly conform to the values of the dominant community." Lal goes on to explicitly argue in favor of the precedence of politics over legality: "The marginalized have no hesitation in using militant language to stake their claim over polity and society. And the externalized groups have little interest in saving legal processes that show little flexibility for their hopes and aspirations."¹⁶

The distrust that a large segment of the population feels towards the judiciary and existing law leads directly to the exacerbation of impunity. Distrust towards formal rules is one reason why people approach politicians or other leaders to intervene with the state on their behalf. An informal system of "getting things done" thus arises. It is true that informal rules that transgress the law do help certain sections of the population to access state benefits. Overall, however, such transgressions have detrimental effects on state and society. Ghani and Lockhart

16 C. K. Lal, "The Harmonium Players," *Republica*, May 28, 2012.

have powerfully outlined the consequences of public distrust of formal rules. The following paragraph from their book, *Fixing Failed States*, corresponds so closely with the situation in Nepal that it could well have been written specifically about this country:

[D]istrust in the enforcement of formal rules increasingly leads to a universe of parallel rules that constitute the actual norms of society. Criminalization of the economy, informal judicial processes for property and other disputes, patron-client relationships as vehicles of entry into government service, and illegal natural resource concessions and licenses for imports or exports are all symptomatic of this dynamic. Tax avoidance becomes the norm, public land and property are expropriated by officials, the state becomes predatory, rulers perceive themselves to be above the law, and violence becomes the key mechanism for change. The poor lose hope and trust in the system, and their time horizons become very short as they focus on survival. Talent is diverted from the acquisition of skills and capabilities that would normally be the source of collective property.¹⁷

These harmful effects are clearly visible to marginalized groups such as Madhesis. After all, lax implementation of the rule of law benefits the powerful more than the weak. Madhesis are not completely in thrall to their leaders. Across the Tarai, Madhesis regularly express their frustrations with their parties. The latter are perceived to have largely focused on extracting state resources for themselves and a narrow circle of their supporters. The desire for the firm establishment of the rule of law does exist, but as discussed above, the judiciary is itself perceived to be biased. Thus, although there is disenchantment with both the parties and state institutions, there is a preference for the former. The parties are widely considered to be the lesser of the two evils.

17 Ashraf Ghani and Clare Lockhart, *Fixing Failed States: A Framework for Rebuilding a Fractured World* (New York: Oxford University Press, 2008).

Nepal is currently going through a process of reforming state institutions to make them more inclusive. This is a slow and difficult process. It is likely that historically marginalized groups will gradually develop more confidence in institutions such as the judiciary. Over time, this may lead to a greater demand for the implementation of the rule of law as well as decreased tolerance for violations of the law by political leaders.

2

The Ministry of Peace and Reconstruction

Introduction

This chapter will examine the processes through which political parties compete and establish dominance over state resources. It explores the manner in which the competition leads to a subversion of formal rules, and thus to impunity. In order to provide as detailed a picture as possible, this report focuses on a single site: the Ministry of Peace and Reconstruction (hereafter, MoPR).

The MoPR is a relatively young institution, formed specifically to implement aspects of the CPA. Nonetheless, the parties sought to utilize the resources of this ministry in much the same ways they have historically used other state institutions. For the past six decades, Nepal's state institutions have been sites for the fulfillment of popular aspiration. It could be said that the popular movements of 1990 and 2006 represented revolutions of rising aspirations. The state and bureaucracy, however, have been unable to adequately respond to these rising aspirations.¹⁸ Starting in 1950, but accelerating after 1990, powerful forces seeking to extract resources have competed for control over state

18 For more on this see Mangal Shrestha and Krishna Shrestha, *Readings in Nepalese Public Administration* (Kathmandu: Educational Enterprise, 2001), 16–25.

institutions.¹⁹ The MoPR was not free of this social and political reality; it was seen as a resource-rich ministry and fought over by all political actors.

The MoPR was not only influenced by the particular party that happened to control it at a given moment, however. Rather, it was influenced by the wider web of actors and structures, both formal and informal, that were involved in making and implementing decisions regarding the peace process. At the national level, these included top-level political leaders and their “kitchen cabinets,” international donors, and diplomats.

Each of the following two sections will focus on a specific initiative for which the MoPR was responsible. These include the reconstruction of infrastructure destroyed or damaged during the conflict, and the implementation of relief programs for conflict victims. The objective will be to demonstrate how the political parties deliberately flouted existing regulations so as to facilitate the distribution of state resources to their supporters. The concluding section will attempt to extract general lessons from the specific studies.

Post-Conflict Reconstruction

Rebuilding physical infrastructure damaged during the conflict has been a central priority and budgetary category within the MoPR since 2006. Indeed, it was necessary that the MoPR spend a percentage of its budget on reconstruction.

In 2008, the MoPR formed a special Post-Conflict Peace and Reconstruction Project (PCPRP) with 42 employees. It adopted the motto “development for peace.”²⁰ The unit was mandated to coordinate physical planning and construction work between existing departments housed under different ministries. The

19 On the growth and importance of public institutions, particularly their administration, see Tulsi Shrestha and Narayan Shrestha, *Nepalese Administration: A Historical Perspective* (Kathmandu: Ratna Pustak Bhandar, 2005).

20 This motto is printed in internal handouts related to planning and organizational structure. A joint secretary heads this unit with four sections officers, one finance officer, seven engineers, and 14 sub-engineers, among others.

MoPR formed a taskforce headed by Shreekanth Regmi to conduct a nationwide survey of physical structures destroyed during the conflict. In its first year, the Regmi taskforce identified 3,647 buildings for reconstruction.²¹ Soon thereafter, Regmi resigned from his post as convener, saying the Maoists were pressuring him to put buildings damaged in landslides and other natural disasters on the list.

Regmi's resignation marked the beginning of an ongoing dispute over which structures should be listed for reconstruction. Across the political spectrum, all the leaders thought it desirable to build aggressively in their respective districts as a means of "bringing development" to the local level. Unsurprisingly, the parties were competing to increase the number of so-called ruins in the districts they controlled. The reconstruction program became even more controversial when it came to the actual building. In short, every step of the reconstruction effort was plagued by severe problems of both conceptualization and implementation.

The newly formed PCPRP was ill equipped to carry out the technical tasks of reconstruction. With this in mind, the PCPRP was mandated to coordinate with two existing government bodies: the Division of Urban Planning and Building Construction, and the Division of Local Infrastructural Development and Agricultural Roads. However, many in the MoPR felt that proper coordination would put their institution in a subordinate role within the larger peace process. As a result, the PCPRP did not seek assistance even in areas where support was sorely needed.

The lack of systematic collaboration led to competition within the different divisions. Transgressions of mandates and laws were the natural consequence of such competition. In the long run, legal violations and the mismanagement of all resources were

21 Information published in official handouts produced by the MoPR. Of the 3,647 buildings, there were 1,260 VDC offices, 899 police stations, 587 government offices at district headquarters, 399 local government offices, and 90 schools.

core to the PCPRP's activities. Such mismanagement was far more prevalent than mere financial corruption, and it directly impacted the quality of the physical infrastructure, which even internal assessments have acknowledged to be substandard.²²

The ongoing, years-long building spree fulfilled the extractive goals of the political parties and ensured the longevity of the PCPRP. At the end of the 2012/13 fiscal year, the PCPRP had completed only 30 percent of the structures demanded of it.²³ Given its past record, it needs at least another 8–10 years if it is to complete this list of demands.

Similarly, duplication of work across departments allowed multiple actors to extend patronage networks. The reconstruction in Dhankuta is a case in point. It is estimated that the Maoists destroyed 75 distinct pieces of infrastructure in Dhankuta. But local forces demanded the reconstruction of 273 separate structures in the post-conflict period. In the past six years, the PCPRP built 30 VDC buildings in Dhakuta despite the fact that not more than 7 VDC buildings were destroyed during the conflict.²⁴

In the period between Jetha 2066 and Magh 2067 (May 2009–January 2011), when Rakam Chemjong headed the MoPR, reconstruction in Dhankuta accelerated. Chemjong released NPR 130 million for his district. Dhankuta built 82 new structures in this time. The other political forces did not oppose Chemjong. Dhanmaya Bishwokarma, the Maoist district-in-charge in Dhankuta, explained that they saw no reason to hinder the development of the region.²⁵ The general sense was that bringing resources to the districts was important regardless of whether the process was legal. As actual procedures were always

22 This was acknowledged in a summary report prepared and shared by Prem Kumar Sanjel, under-secretary and deputy spokesperson of the MoPR.

23 Figures taken from a handout prepared by Deependra Nath Sharma as part of the official briefing given to the head of government. May 21, 2013.

24 Dinesh Sunar, "Puna: nirmandma 29 arbako khel," *Kantipur*, (February 23, 2013): 6.

25 Ibid.

followed on paper, the PCPRP did not challenge extra-legal practices.²⁶ According to a senior officer, the job of bureaucrats was to endorse the demands even when they knew bylaws and regulations were being breached.²⁷

Fundamental characteristics of the Nepali state's style of governance are illustrated through the functioning of the PCPRP. The case of the PCPRP highlights the systemic corruption this style of governance facilitates. (Yet, journalistic figures on "corruption" are often exaggerated.²⁸) Governance is a web of political, legal, and managerial considerations. With regard to reconstruction, the MoPR provided a legal context to all the political agreements around the peace process. But the methods that politicians and bureaucrats used to handle projects through the MoPR involved transgression of the rules and procedures. This is a kind of systemic corruption, and it took place with the consent, tacit or otherwise, of both the representative and bureaucratic forces.²⁹

Welfare Program for Conflict Victims

To date, there is no comprehensive welfare program for conflict victims. Most of what is now termed "welfare" was introduced piecemeal since 2006 under the heading of "relief package."

26 For details on procedures see collection of bylaws published in a single volume of *Peace* vol. 4, no. 4 by the MoPR.

27 Interview, May 20, 2013.

28 Two investigative reports by Dinesh Sunar and a piece of commentary by Baram Baniya are recent examples of exaggeration. Such reporting focuses mainly on "corruption" and primarily on Maoist transgressions. The amount of money involved is also often inflated in such reports. Dinesh Sunar, for example, reported that NPR 29 billion was being misused in reconstruction projects alone. But 29 billion Rupees was just the estimated budget. Since 2008, the total budget disbursed to the PCPRP amounts to just NPR 867 million. See: Dinesh Sunar, "Ladakuko naamma lutailut," *Himal Khabarpatrika* (September 1–16, 2012): 12–14; Dinesh Sunar, "Puna: nirmandma 29 arbako khel," *Kantipur* (February 23, 2013): 6; and Baram Baniya, "Dwandwaka naamma dohan," *Kantipur* (February 23, 2013): 6.

29 Before making a decision to provide government subsidies to the PLA, the SPA and the Maoists had to amend by laws related to financial regulations. This was done on Kartik 23, 2063, by a cabinet-level meeting headed by then-Prime Minister Girija Prasad Koirala.

Initially, the Ministry of Home Affairs was responsible for conceptualizing and handing out these packages. The job was later transferred to the MoPR immediately after its formation.

Whether called “welfare” or “relief,” MoPR programs targeted at victims share two common characteristics. First, all assistance is earmarked for distinct social groups, including internally displaced persons, widows, families of the disappeared, and martyrs’ families. These categories emerged out of specific projects, each concerned with a bounded social group. In practice, there were a number of overlaps, as social categories cannot be cleanly demarcated. For instance, the defense and home ministries both had given financial support to the widows of armed forces personnel who died as a result of the conflict. The aid was part of the government’s effort to keep morale up within the ranks. But starting in 2006, the MoPR also earmarked funds for conflict widows in general. There was a clear overlap between the three ministries, leading to administrative challenges in identifying beneficiaries. This overlap was likely the result not so much of poor oversight as of efforts by political parties to maximize the funds flowing through the ministries that they controlled.

The second key characteristic of the programs is that they were, and largely continue to be, cash based. Employment guarantees as a form of welfare were never considered. The political and bureaucratic powers all benefited from having a cash based program. First, the highly centralized MoPR was able to extend its relevance by consistently adding people to the victim list.³⁰ Next, political parties across the spectrum were able to register their supporters as victims. There were a particularly large number of fraudulent claimants in the IDP list and in compensation given for loss of private property.³¹

The consequence of its poor planning is now, seven years into the peace process, starting to become clear within the MoPR. A

30 For example, the numbers for those widowed and orphaned due to conflict are largely estimated figures.

31 Interviews, May 17 and 22, 2013.

recent report has highlighted two major problems in the ongoing cash grant scheme: the lack of an end date for data collection, and the absence of standardized data. The process of collecting basic data on conflict victims is still ongoing, with the list of people owed money expanding. At the same time, due to a lack of coordination, the MoPR's own internal reports differ on the numbers.³² For instance, there is no consensus within the MoPR on the number of people physically disabled by the conflict.

The failure to standardize the data as soon as discrepancies were noted has had long-term consequences. Because there were no standards, the figures for conflict victims increased with every new minister. Subsequently, the demand for funds has only increased over time. To date, the government has disbursed NPR 5,246,854,000 under the “relief and financial support” category. No government since 2006 has tried to systematize welfare payments. This is so because endlessly expanding the list of conflict victims has enabled parties to distribute state funds to their supporters.

Concluding Observations

In Chapter 1, we stated that the dual dynamics of collusion and competition between the political parties had aided impunity. The examination of the MoPR's operations in Chapter 2 offers further confirmation of this trend — for example, how the parties collectively ensured that the rules governing the MoPR's operations were kept vague and open-ended. Tighter regulations would have constrained their desire to use the MoPR's resources for patronage purposes. Weak regulations enabled the parties to vastly inflate the numbers of buildings that had allegedly been damaged or destroyed during the conflict. Similarly, incoherent or non-existent regulations enabled the parties to include large numbers of their supporters in the list of conflict victims and thus give them cash handouts.

32 Information based on summaries of various internal monitoring reports published by the MoPR.

If the parties colluded to facilitate the use of state resources for patronage purposes, competition between them exacerbated this tendency and led to administrative dysfunction. We saw how the UML's Rakam Chemjong, when he was peace minister, released a large sum of money meant for post-conflict reconstruction to his home district of Dhankuta.

It is often believed that bureaucrats resent political intervention in state institutions as this prevents them from properly following laws and regulations. The example of the MoPR complicates this view. As we saw in the section on post-conflict reconstruction, bureaucrats are often guided by similar incentives as politicians. The bureaucrats in the PCPRP, desiring to maintain their dominance and protect their turf, were reluctant to cooperate with more experienced bodies such as the Division of Urban Planning and Building Construction, even though they were required to do so. The ad hoc working style that they preferred led to the flouting of regulations and the mismanagement of resources.

The above discussion of the MoPR also challenges a prevailing tendency that views impunity solely as the blatant embezzlement of public funds. No doubt, such embezzlement does occur. Nonetheless, it is clear that in addition to such corruption, there is a systemic type of impunity that is deeply embedded in the day-to-day structures and mechanisms of governance itself. This type of impunity, which involves the manipulation of regulations to extract state funds for partisan use, is perhaps even more damaging to state institutions, and leads to greater waste of resources than relatively isolated cases of blatant corruption. It also leads to the systematic privileging of certain groups over others, as those who enjoy proximity to political power manage to capture resources at the expense of the less powerful.

There is no simple remedy to this kind of systemic impunity. It is no easy task to reform institutions that are large, complex and deeply steeped in historical practice. Furthermore, such impunity is an accepted part of political practice. As we saw, there

was no opposition among locals in Dhankuta when Chemjong disbursed large sums of money to the district in the guise of post-conflict reconstruction. Rather, local politicians from rival parties approved of Chemjong's decision, viewing it as an effort to bring development to their home district. While a handful of technocrats might be able to "fix" electoral policy, for instance, there is no comparable group of specialists who can reform ministries or other state organizations. Such reform will require the development of strong and autonomous state institutions. And this will require a transformation in the practice of politics itself.

The Commission for the Investigation of Abuse of Authority (CIAA)

Introduction

This chapter explores the functioning of the Commission for the Investigation of the Abuse of Authority (CIAA), a body tasked with looking into cases of political impunity. As a constitutional body, the CIAA is mandated with maintaining oversight over other state organs and public organizations. Constitutional bodies legally enjoy substantial autonomy from the executive. In practice, politicians are able to influence the functioning of these bodies in numerous ways. In addition to scrutinizing the successes and failures of the CIAA in recent years, this chapter will demonstrate the extent and aims of political intervention within the watchdog body.

The CIAA is the apex constitutional body for corruption control. The Interim Constitution of 2007, the Corruption Prevention Act (2002), and the CIAA Act (2002) have endowed the body with substantial powers. The CIAA has a mandate to inquire into allegations of corruption or other misconduct by any individual holding public office. The body is also authorized to file cases based on its findings at the Special Court. The CIAA thus enjoys more powers than other anti-graft institutions such as the Office of the Auditor General, the Public Accounts

Committee, the National Vigilance Centre, and the Inland Revenue Department.³³

The genesis of the CIAA dates back to the aftermath of the democratic transition of 1990. Subsequent to the regime change, the need was felt for a powerful agency that could monitor and prosecute abuses of authority by public officials. A predecessor to the CIAA Act was adopted in 1991, but was subsequently repealed. Later, parliament endorsed four separate bills that would enable the body to carry out its activities. These included the Corruption Prevention Act and the CIAA Act, which were both passed in 2002. In order to prevent officials from using their position to hamper investigations, these acts require all officials facing active corruption charges to be relieved of their jobs.

The acts call for stringent punishments for those convicted of corruption. The Interim Constitution 2007 barred politicians convicted of corruption from participating in elections for life. Similarly, Article 65 (C) of the Interim Constitution 2007 states that a person who has been convicted of corruption or found guilty on criminal charges of moral turpitude is ineligible to become a member of the legislature. The major political parties, however, have successfully opposed the measure — they argued that only those convicted by the courts should be barred.

All Nepali citizens are empowered to file corruption complaints at the CIAA. Complaints can be submitted through paper documents or via the Internet. An online mechanism to provide complainants with information regarding the status of the investigation also exists. On occasion, the CIAA decides to pursue investigations of its own accord, based on stories in the media.

The Special Court was established in 2002 with the explicit purpose of dealing with cases related to corruption, money laundering, and crimes against the state. A fast-track court, it is able to avoid the interminable delays that sometimes occur in the

33 CIAA, *Commission for Investigation of Abuse of Authority (CIAA), Nepal: An introduction* (2007).

regular courts. The CIAA has the authority to register an appeal with the Supreme Court if it is dissatisfied with the judgment of the Special Court. There have been numerous instances where the Supreme Court has overturned judgments issued by the Special Court.

The CIAA enjoys a strong legal mandate, even in comparison to the authority granted to anti-graft bodies in established democracies. In India, for example, debate is still ongoing about whether the head of government and ministers should be brought under the jurisdiction of the anti-corruption Lokpal Bill. The CIAA, in contrast, has not only long enjoyed such powers, but also has a history of investigating high-level politicians and officials. The CIAA interrogated the Nepali Congress leader Girija Prasad Koirala regarding his involvement in the Lauda Scam, related to the leasing of an airplane by Royal Nepal Airlines, while he was prime minister in the late 1990s. Moreover, hundreds of corruption-related cases filed by the CIAA and involving politicians and high-level bureaucrats are still being heard at the courts.³⁴

In recent years, a number of cases filed by the CIAA have resulted in convictions. For instance, Jaya Prakash Gupta was convicted in February 2012 while he was minister of information and communications. Two former ministers, Chiranjivi Wagle and Khum Bahadur Khadka, were also similarly convicted.³⁵ Many other bureaucrats, police chiefs, and politicians have also recently served or are currently serving jail terms.

Political Control Through Appointments

Although the CIAA enjoys substantial autonomy, there are a number of ways in which political leaders can intervene in its operations. During the period of royal emergency rule in 2005,

34 "Around 300 corruption cases pending at Supreme Court," *KarobarDaily.com*, May 26, 2013.

35 Ananta Raj Luitel, "Something to cheer on the anti-corruption front," *Himalayan Times*, December 30, 2012.

King Gyanendra sought to prosecute his political opponents through the CIAA. When commissioners proved reluctant to further his political desires, he formed a parallel body, the Royal Commission for the Control of Corruption (RCCC). The RCCC harassed CIAA commissioners and made it immensely difficult for them to do their work.³⁶

The period of the king's direct rule between 2005 and 2006 was, of course, anomalous. In more stable periods, political parties have sought to influence the CIAA through control over appointments. According to provisions in both the 1990 constitution and the Interim Constitution of 2007, the head of state (the king before 2006, the president afterwards) has the power to appoint CIAA commissioners at the request of the Constitutional Council (CC).³⁷ The CC is a body headed by the prime minister. It also includes the chief justice of the Supreme Court, the speaker of parliament, opposition leaders, and three ministers nominated by the prime minister. Commissioners recommended by the CC are meant to face a special hearing before their appointment. Appointments last for a period of six years, unless the commissioner is impeached by parliament before his or her term ends.³⁸

Most heads of government since the 1990s have attempted to appoint commissioners who are loyal to them and thus unlikely to pursue cases implicating the ruling party.³⁹ Successive governments after 2006 were unable to appoint commissioners to the CIAA primarily because each party insisted on appointing their own loyalists. All prime ministers after 2008 — Pushpa Kamal Dahal, Madhav Nepal, Jhalaanath Khanal, and Baburam Bhattarai — proposed nominees for commissioners. In the

36 See Suryanath Upadhyay, *Akhtiyarma Chha Barsha* (Kathmandu, 2065 v.s.)

37 Clause 119 (2) of the Interim Constitution 2007.

38 Clause 120 (2) of the Interim Constitution 2007.

39 During some periods, the ruling party has also sought to use the CIAA to pursue and harass political rivals. Former King Gyanendra, for example, tried to do this during the period of direct royal rule in 2005. Such behavior has, however, been the exception rather than the rule. Most politicians in power from the 1990s onwards have been more focused on trying to prevent the CIAA from pursuing cases against themselves and their supporters.

first three cases, the opposition parties rejected the suggestions outright or refused to cooperate.⁴⁰ (The prime minister could not autonomously recommend names, as opposition parties are also represented in the Constitutional Council.) It appears that in each case, the opposition parties calculated that the existing government would soon fall. They would then be better placed to nominate commissioners. When he was prime minister, for instance, the UML's Jhalanath Khanal called a meeting of the CC with the purpose of appointing commissioners. But the committee's Nepali Congress member, Ram Chandra Poudel, claimed he was ill and refused to attend, even though he was seen at a public function earlier that day.⁴¹

It was only in 2013, after the dissolution of the Constituent Assembly and the appointment of Chief Justice Khila Raj Regmi as head of government, that the parties finally agreed to nominate Lokman Singh Karki as chief commissioner. Karki's appointment caused much controversy. Large sections of civil society and media thought him unsuitable, as he had been Chief Secretary during the royal regime in 2005–2006.

It was widely believed that Karki had engaged in large-scale corruption during his time in the bureaucracy. The CIAA had previously charged him with smuggling gold. Further, the Constitutional Council nominated Karki even though he did not fulfill constitutional requirements. He had not served as a civil servant for 20 years, the minimum tenure constitutionally required to be chief commissioner. There have been allegations that Karki was appointed after promising senior party leaders he would shelve cases in which they were implicated. Though Karki has already taken up the position, a writ petition filed against his appointment is awaiting a hearing by the Supreme Court.⁴²

40 "PM blames Maoists for delay in appointments in constitutional bodies," *Nepalnews.com*, February 21, 2010.

41 Interview with Gokarna Bista, Minister for Energy in the Jhala Nath Khanal government.

42 Mumaram Khanal, "Afraid of catching big fish," *Nepali Times*, August 30, 2013.

Other Methods of Political Intervention

Even though CIAA commissioners are appointed through a political decision, they enjoy substantial autonomy once they are in office. There have been instances where commissioners have acted with integrity and pursued cases filed against their patrons. When Girija Prasad Koirala was prime minister in 2000, he appointed Surya Nath Upadhyaya chief commissioner. This did not prevent him from pursuing corruption charges against Koirala.

One of the functions of the chief commissioner is to shield other CIAA officials from political pressure. Such protection was wholly lacking during the period after 2006, when there was no chief commissioner. Political intervention in the body's workings was especially pronounced between 2010 and 2013, a period when the CIAA was headed by secretaries. As civil servants, secretaries are required to fulfill the demands of elected ministers. As government has the capability to transfer, promote, and demote civil servants, secretaries have a strong incentive not to antagonize ministers.

Bhagawati Kumar Kafle was secretary at the CIAA until October 10, 2012. During his tenure, the constitutional body took a number of bold actions, including against prominent politicians. For example, the CIAA prosecuted and got the courts to convict members of the Constituent Assembly for illegally selling their diplomatic passports.⁴³ It also filed a case against high-level police officials, including a sitting inspector general of police. Kafle failed, however, to initiate proceedings against politicians for accumulating property disproportionate to their stated income. Similarly, the CIAA failed to pursue a case relating to misuse of government funds disbursed for the upkeep of former Maoist combatants living in cantonments. Secretary Kafle refused to take up the case. He argued that the CIAA could not immediately look into the matter, as the Maoist party was

43 "CIAA files lawsuit against lawmakers, immigration staff," *Kathmandu Post*, May 12, 2011.

undertaking an internal investigation. This, of course, was a flimsy excuse, as a party's internal report has no legal validity. (See Case Study 3 in Annex).

It is widely believed that Kafle failed to pursue these cases because many of the individuals implicated in them held positions of power. Prime Minister Baburam Bhattarai, Deputy Prime Minister Bijaya Kumar Gacchadar, and Minister of Physical Works and Planning Hridayesh Tripathy were all members of the CC. Kafle had applied for the vacant position of CIAA chief commissioner and did not want to antagonize members of the CC.

After Kafle's retirement, the Bhattarai government appointed Ganesh Raj Joshi, Secretary at the Ministry of Tourism and Civil Aviation, as CIAA's secretary. During his tenure at the MoTCA, Joshi had granted controversial contracts for the construction of the Pokhara International Airport and the purchase of aircraft.⁴⁴ Many believe that the government appointed Joshi so he would obstruct cases accusing the government of violating public procurement regulations. Such allegations seem to be corroborated by another of the government's decisions. At the time, Finance Secretary Krishna Hari Banskota had stated that there were irregularities in the aircraft purchase contract and had refused to release funds for this purpose. The government transferred him to the Prime Minister's Office and appointed Shanta Raj Subedi in his place.⁴⁵ Subedi was known to be close to the Maoist party and thus more amenable to fulfilling decisions made by the government.

Another case that bears mention in this context is that of the long-pending 3G Spectrum scam. The Parliamentary Accounts Committee (PAC) had investigated irregularities in 3G license distribution by the Nepal Telecommunications Authority (NTA).

44 "Pokhara airport MoU signed before calling construction bid," *Republica*, March 22, 2012.

45 "Shanta Raj Subedi takes oath of office," *Rastriya Samachar Samiti*, September 10, 2012.

A report prepared by Prakash Chandra Lohani, coordinator of the PAC, stated that the NTA was required to distribute frequencies only through the holding of auctions. However, no auctions had been held, and this had cost the state an estimated loss of between NPR 7 and 10 billion in revenue. Most individuals who have held the position of minister of information and communication since 2006 were accused of misusing their authority. The PAC had instructed the CIAA to investigate this case and prosecute those involved in irregularities. Kafle had initiated investigations. But his successor, Joshi, halted these investigations. Instead, he informed the NTA and the Ministry of Information and Communications that there had been no irregularities in the distribution of frequencies. (See Case Study 4 in Annex).

Those charged with abuse of authority do not just seek to prevent investigations into cases that implicate them. Many of them also try to influence cases that are being investigated. It is a weakness of the CIAA that it does not possess its own body of investigators. Rather, civil servants from other government agencies are deputed to investigate particular corruption cases. Further, the investigation process is often lengthy. Because of these circumstances, political leaders in power are able to influence investigations through the transfer of officials. In addition, influential individuals implicated in cases sometimes offer bribes to officials involved in investigation and prosecution. Kafle has publicly stated that he was offered a bribe of NPR 10 million and requested not to take those implicated in a case related to deforestation in Dadeldhura district to court.⁴⁶

In a number of cases where the CIAA has filed charges at the Special Court, there have been efforts to influence judges. Bhoopdhwoj Adhikari, who was the chairman at the Special Court until October 16, 2008, is thought to have succumbed to external pressure when he acquitted former ministers Jaya Prakash Gupta and Govinda Raj Joshi, former IGP Moti

46 Kafle's speech delivered during the launch of the CIAA's annual progress report in 2012.

Lal Bohara, and former joint secretary Sabitri Rajbhandari. Adhikari stated that, in his judgment, these individuals could not be prosecuted because the statute of limitations requires cases against public officials to be filed within a year of their retirement. The statute of limitation clause, although present in previous legislation, did not exist in the Corruption Prevention Act of 2002. The Supreme Court later sent all these cases back to the Special Court for rehearing. A new Special Court bench headed by Gauri Bahadur Karki reversed most of the judgments in these cases.⁴⁷ (See Case Study 2)

The Aftermath of the Constituent Assembly's Dissolution

On one level, disagreements between political parties have led to state paralysis and inertia. On another level, it is clear that politicians have colluded across party lines to distribute state resources and act in ways that promote impunity. However, collusion has not been a universal feature of Nepali politics over the past seven years. There have been cases where elected lawmakers have sought to hold party leaders accountable. As the case studies in the annex make clear, parliamentary committees such as the Public Affair Committee (PAC) and the State Affairs Committee (SAC) have investigated charges of corruption and directed the CIAA to pursue them. These parliamentary committees have provided the CIAA with much-needed political backing.

In one high-profile case, the PAC investigated charges of large-scale embezzlement of government funds earmarked to purchase armored personnel carriers (APCs) and other equipment for the UN Mission in Darfur (UNAMID). The PAC directed the CIAA to pursue further investigations and file charges against senior politicians, bureaucrats, and police officials. Ultimately, the CIAA filed charges against a number of senior police officials, which led to their conviction. The CIAA was widely criticized for

47 Keshav P. Koirala and Ananta Raj Luitel, "Special court revokes its decision, convicts Joshi of grafts," *Himalayan Times*, July 7, 2012.

its inability and/or reluctance to file charges against politicians and senior bureaucrats. Nonetheless, the CIAA demonstrated great initiative and tenacity in this case. The lawmakers in the PAC, themselves relatively senior politicians, indirectly helped mitigate political pressure on the CIAA.

The dissolution of the Constituent Assembly in May 2012 led to decreased transparency in the CIAA. Since that time, senior political leaders have not had to face any parliamentary scrutiny. For example, the appointment of Lokman Singh Karki as chief commissioner would have been far more difficult had the legislature existed. Given the degree of public controversy over the appointment, Karki would have faced a tough parliamentary hearing at the least.

Though Lokman Singh Karki's appointment had little public support, he does appear to have had a galvanizing impact on the institution. After a preliminary period in which he took stock of the CIAA's activities, Karki began a widespread campaign against corruption. In August 2013, the CIAA raided several government offices, arrested 76 officials, and filed cases against them at the Special Court.⁴⁸

Such measures indicate that the CIAA is capable of significant action if there is a strong and relatively autonomous chief commissioner in charge. However, it has to be recognized that civil servants are relatively easy prey. The true test for the CIAA is to prosecute politicians who have been charged with abusing their authority. Karki has not filed charges against any politician so far, and has thus been unable to dispel accusations that he is beholden to the politicians who appointed him. The prosecution and conviction of politicians in office are rare occurrences. In cases where politicians are prosecuted, this usually happens only after the accused have left office. Even J.

48 Thira Bhusal, "Too early to judge CIAA's recent actions," *Republica*, August 29, 2013. The CIAA arrested officials from the Department of Foreign Employment, the immigration office at Tribhuvan International Airport (TIA), the Nepal Electricity Authority, the BP Koirala Institute of Health Sciences, and Nobel Medical College.

P. Gupta, who was convicted while he was a minister in 2012, was facing charges dating to a previous tenure in office in the 1990s. Nonetheless, the Supreme Court set an important precedent with this case, opening the door to prosecuting senior politicians.

(Four detailed studies of cases pursued by the CIAA are included in the Annex.)

Politics and Criminality in Biratnagar

Introduction

Nepal's politics have historically included the practice of political leaders offering patronage and protection to individuals involved in organized crime. This tendency has increased since the peace process began in 2006. This section will examine the incentives for politicians to patronize criminal groups, the nature of criminal group activity, and the reasons behind police and administration ineffectiveness in controlling organized crime. When members of this research team began interviews with politicians and civil society members in Biratnagar, it quickly became evident that one incident in 2011 was considered emblematic of the links between politics and criminality. This was the physical assault on the journalist Khilanath Dhakal by men employed by Parshuram Basnet, a gang leader with official ties to the UML.

Given the degree of prominence accorded to this incident by Biratnagar residents, the research team focused on it as a way of unpacking the criminal-political nexus. The consequences of the attack on the journalist Khilanath Dhakal were dramatic. A massive civil society movement against criminality and impunity took place, forcing the police to take action against criminal groups. This section will therefore also explore the efficacy of civil society agitations in combating impunity.

Outline of Events

Around 1:00 in the afternoon on June 1, 2011, the police brought Abhishek Giri to the Morang District Court for a hearing. Giri was widely known as a gang leader with affiliations to the Nepali Congress. He had been charged with the murder of a man named Karan Yadav, who had been killed three years previously during a violent dispute over the submission of a tender at the office of the Morang District Development Committee (DDC).

A large group of UML-affiliated Youth Force (YF) cadres were waiting for Abhishek Giri. As he entered the premises of the district court, this group attacked Giri and the police personnel escorting him with *lathis*, stones, bottles, and glass. The police subsequently fired in the air to scare away the attackers.

In two stories published during the days following the attack, Khilanath Dhakal, the Biratnagar correspondent for the *Nagarik* daily, wrote that Parshuram Basnet and Abhishek Giri had previously partnered in capturing tenders and running extortion rackets. At some point, the two had fallen out. Dhakal speculated that Basnet was worried his former partner Giri would somehow implicate him in court. It was perhaps to prevent Giri from giving testimony that Basnet had ordered the attack.⁴⁹

On the night of June 6, Rohit Koirala, a UML youth association member, summoned Khilanath Dhakal to a late-night meeting. At the meeting, Dhakal was severely beaten by Manoj Rai, an aide of Parshuram Basnet, and a number of other men. A police inspector, Durga Regmi, found Dhakal collapsed on the road and took him to hospital. A team led by Regmi then arrested Rohit Koirala at his house. Manoj Rai succeeded in evading arrest that night, but was detained a week later.

In the immediate aftermath of the attack, it was widely assumed that Parshuram Basnet was ultimately responsible for the attack on Dhakal. After all, he had threatened the journalist only the previous day, and members of the organization he led were directly implicated in the beating. The Morang branch of

49 Interview with Khila Nath Dhakal, April 2013.

the Federation of Nepali Journalists (FNJ) held protests the day following the attack. They demanded that Basnet and Rai be detained along with Koirala. Bikram Niraula, head of the Morang branch of the FNJ, registered a case at the district police office charging the three with abduction and attempted murder.⁵⁰

At the trial of Manoj Rai and Rohit Koirala at the Morang district court, Khilanath Dhakal alleged that the two Youth Force members had abducted and tried to murder him at Parshuram Basnet's instigation. Manoj Rai and Rohit Koirala disputed Dhakal's version of events. They conceded that they had met Dhakal on the night of June 6 and that Manoj Rai had beaten him up. But they stated that they had not abducted Dhakal, nor tried to murder him. Rather, they had met for a drinking session and Rai had beaten Dhakal up after a drunken argument. There had thus been no premeditated attack, but only a spontaneous brawl between friends.⁵¹

The district court ordered the continued detention of Manoj Rai and Rohit Koirala. The appeals court upheld this decision, but the Supreme Court later released Koirala on bail. The district court had also issued a warrant for Parshuram Basnet's arrest. The police, however, remained unable to find him. Around 11 months later, in April 2012, Parshuram Basnet presented himself at the district court. He was released on bail the same day. In April 2013, the Morang District Court issued a final verdict. Manoj Rai and Rohit Koirala were found guilty of attempted murder and sentenced to five years and six months respectively. They were acquitted of the charge of abduction. The court found no evidence that Parshuram Basnet had participated in the attack.

The Circumstances of Parshuram Basnet's Rise

As in other areas of Nepal, Biratnagar has a long history of collusion between political parties and mafia elements. During

50 Interview with journalists, Biratnagar, April 2013.

51 Statements made by Manoj Raj and Rohit Koirala at the Morang District Court, accessed from the court in April 2013.

the Panchayat years, the regime cultivated groups of militant youth to ensure dominance over the banned political parties. After the restoration of democracy in 1990, the parliamentary parties adopted similar methods. The Nepali Congress and the UML mobilized gangs of young men to help them win elections. Similarly, the Nepali Congress used the police force to maintain dominance over political rivals in rural areas in a way that violated the law. Various political leaders also protected accused criminals from the police and the courts as a method of demonstrating their power.⁵²

The links between parties and criminal elements in those early years of democracy, however, do not appear to have been as deep as they are now. Many individuals active in politics in Biratnagar over the past few decades observe that the connection between criminal gangs and politicians was seasonal in the past. The parties deployed young men for specific tasks, such as capturing election booths. In recent years, however, leaders of gangs have been more deeply involved in the parties' routine work. Many of them are even members of local party committees. In addition, observers state that during the 1990s, leaders of gangs were heavily dependent on political leaders for money and protection.

In recent years, mafia elements appear to have gained more autonomy and succeeded in making party leaders dependent upon them. This shift has occurred because gangs have been increasingly involved in illegal profiteering. Gang leaders make money by capturing government tenders, involvement in property transactions, extortion, and smuggling rackets. A significant proportion of funds accrued in this way are transferred to political patrons.⁵³

In Biratnagar, such tendencies seem to have been exacerbated after the peace process began in 2006. The post-conflict period saw the rise of two political forces that hitherto did not have much of a presence in the city. First, after entering mainstream politics,

52 Cf. International Crisis Group, "Nepal's Political Rites of Passage," (2010)

53 Interviews with politicians and journalists, Biratnagar, April 2013.

the Maoists began a frenzied expansion drive into urban areas, where they had a limited presence. Their affiliate organization, the Young Communist League (YCL) played a crucial role in the party's expansion. Taking advantage of the state's weak capacity to enforce the rule of law, the YCL established itself as a parallel law enforcement mechanism in urban areas where the Maoists had not managed to establish control during the conflict.

The YCL was also involved in profit-making deals. For instance, they reportedly brokered real estate deals and took a share of the profits, used intimidation to obtain development contracts, and took a percentage cut for their "mediation services."⁵⁴ Second, following the Madhes movements of 2007 and 2008 and the Constituent Assembly elections of 2008, the Madhesi parties rose as a formidable political force across the Tarai.

The rise of these political forces disrupted the power balance in Biratnagar, which had long been a Nepali Congress stronghold. This caused much anxiety among the older parliamentary parties, particularly the Nepali Congress and the UML. In addition, the rise of the Maoists and the Madhesi parties made many important social groups in Biratnagar (which had traditional links with the older parliamentary parties, particularly the Nepali Congress) feel insecure.⁵⁵ Businessmen were perturbed by Maoist demands for funds and the disruption to industry caused by the Maoist trade union. During and following the Madhesi movement, there were also fears of communal violence between the Madhesi and Pahadi communities. There were, in fact, some cases of overt violence. During 2007 and 2008, various underground armed groups emerged, claiming that they were waging a liberation struggle on behalf of Madhesis. They threatened and extorted money from Pahadi families and government officials. Some Pahadi families felt so insecure that they left their homes to resettle in areas further north.⁵⁶

54 Carter Center, Nepal, "First Interim Report" (August 26, 2009).

55 Interviews with businessmen, Biratnagar, April 2013.

56 Interviews with journalists, Biratnagar, April 2013.

Nepali Congress and UML politicians started discussing plans to retaliate against the new political upstarts and reclaim political space during this period. They decided to establish their own militant “youth” organizations. Congress’ attempt to form such a force did not go very far. The UML, on the other hand, formed the Youth Force (YF) in June 2008, soon after the Constituent Assembly election. At this time, UML leaders believed that their poor showing in the elections and the Maoists’ electoral success were largely due to intimidation and coercion on the part of the YCL. From its very inception, therefore, the YF was envisaged as a militant and semi-criminal body that would help the party establish dominance through the use of force.

It was in this context that Parshuram Basnet was appointed head of the Morang district Youth Force. He had previously succeeded in establishing himself as a gang leader with significant power over the authorities and various sections of society. One of his chief sources of income was government contracts. Basnet’s goons would occupy government offices when tender bids were active. Only those contractors with a prior arrangement with Basnet were allowed to submit tenders. The rest were intimidated into staying away. The individual who received the contract, of course, had to later pay a large cut to Basnet. Basnet also collected protection money from various businesses including gravel, sand, and hoarding board sectors. Individuals who wished to sell their property were also forced to hand over a large proportion of their profits to Basnet. There were also some cases where people were forced to sell their property to Basnet at a rate far below the market price.⁵⁷

His criminal activity notwithstanding, Parshuram Basnet seems to have long harbored political aspirations. He often described himself as a “social worker.” Observers in Biratnagar attribute Basnet’s political rise to two reasons. First, it seems his gang was successfully able to challenge the YCL’s control

57 Interviews with journalists and civil society activists, Biratnagar, April 2013.

in Biratnagar. Second, during the Madhes movement and its aftermath, Basnet positioned himself as the protector of the Pahadi castes. In a number of cases, he successfully prevented armed groups from extorting funds from local businessmen. Later, Basnet became a member of the Chhetri Samaj and thus became an open champion of the hill castes.

Basnet's growing links to influential UML leaders allowed him to pursue his criminal activity with impunity. For a time, there were other powerful gang leaders in Biratnagar, Abhishek Giri the most prominent among them. The police were compelled to take Giri into judicial custody after he was found to be directly implicated in a murder in November 2008. Basnet then gained unparalleled power over extortion and other criminal networks in Biratnagar.

A Climate of Impunity

As Parshuram Basnet's power grew and affiliations with UML politicians deepened, the police became increasingly reluctant to pursue criminal charges against him. The fact that Basnet was so emboldened as to order an attack on Abhishek Giri at the Morang district court, in full view of the police and other government officials, indicates the degree to which he felt immune from prosecution. In the days that followed the attack at the court premises, it did seem that the authorities were reluctant to press charges against him. The press too was silent — no journalist besides Khilanath Dhakal mentioned Basnet's name in the reports they filed. Similarly, the reaction from the Morang district administration, including the CDO, was initially muted.

A number of political figures, civil society activists, and journalists in Biratnagar believe that there was large-scale collusion between the Morang police and Basnet. It was thought that Basnet could not have established such dominance over contracting processes and the smuggling racket unless he had the cooperation of individuals in the police force. Some claimed that

at least one police insider had aided Basnet in the attack at the Morang district court.⁵⁸

Such behavior on the part of the police, of course, is common in areas across the country. Rather than blame the police for failing to fulfill their responsibilities, however, it is analytically more fruitful to identify the political and social conditions that shape their behavior. Since 2006, police officers have complained that the political circumstances of the post-conflict transition have prevented them from enforcing the rule of law. In the early years of the peace process, many police posts across the country that had been displaced during the conflict had not yet been reestablished. Even where they had been reestablished, the police found it difficult to regain their authority and legitimacy among the population.

There was often a deliberate policy to adopt a relatively lax attitude towards violations of the law. The Nepali Congress politician Krishna Prasad Sitaula was home minister between 2006 and 2008. He was then commonly accused of turning a blind eye to Maoist excesses. From his perspective, however — and that of Girija Prasad Koirala, who was prime minister at the time — one of the government's major goals was to enable the Maoists to transition from a rebel force into a political party that abided by democratic norms. They believed that using the police to strictly enforce the law upon the Maoists could backfire.⁵⁹

Gradually, however, circumstances changed, and there was no danger that the Maoists would return to war. The political situation transformed into one of no-holds-barred competition between parties. As during the 1990s, this included efforts by politicians to use state organs such as the police for partisan ends. Police officers were constantly pressured to release or withhold action against individuals who were connected to the parties. In Biratnagar, it is widely believed that Parshuram Basnet was able to act with rampant impunity between 2008 and 2010 because

58 Interviews.

59 Interview with Nepali Congress politician, Kathmandu, June 2009.

the UML was in charge of the home ministry during this period.⁶⁰ Police personnel who did try to enforce the law were threatened with demotions or transfers to remote places.

It wasn't just that the police were beholden to parties in control of the Ministry of Home Affairs. Many of them felt that they had no choice but to give in to the demands of all parties that had a hold on the population. Given the political instability and the repeated change of governments, it was never certain who would hold office in the near future. If a politician who was out of power was antagonized, he could very well retaliate against police officers who caused him displeasure after coming to power. A home minister could very well provide his tacit or explicit approval for the arrest of an individual, but a politician from another party would then demand that individual's release.

Threatened by repercussions of this sort, a major objective of the police is to avoid upsetting the powerful in their communities. Unwilling to press charges against the politically connected, the police often choose not to enforce the rule of law, but rather to act as managers and mediators of conflicts. It is well known that when a person approaches the police with a grievance against another, the police are often reluctant to press charges or take the dispute to court. Rather, police personnel seek to mediate an agreement between the two parties that culminates in a written agreement (*milapatra*).⁶¹ The police's role in such cases is to prevent the dispute from escalating. In most cases, the agreement benefits the more powerful of the two parties. Justice becomes a secondary issue and impunity prevails.

The Aftermath of the Khilanath Dhakal Affair

The attack on Khilanath Dhakal was a relatively minor crime, and YAN members in Biratnagar had probably not expected

60 Interviews with politicians, Biratnagar, April 2013.

61 Interviews with journalists and human rights activists, Biratnagar and Kathmandu, April and May 2013.

that there would be much of a backlash. They failed to consider, however, that Dhakal was a journalist, and thus a member of a highly voluble and organized community. The day after the attack, the head of the Morang chapter of the FNJ registered a case at the Morang district police office. The FNJ interpreted the incident as an assault on the freedom of the press, and organized protests in urban areas across the country.

These activities transformed what would otherwise have remained a purely local issue into a national one. The government in Kathmandu was forced to respond. A number of ministers released statements that said they were committed to punishing those involved in the attack on Dhakal. As mentioned earlier, the police did not succeed in finding Basnet. Court proceedings began when he voluntarily submitted himself at the Morang district court almost a year later. He was ultimately acquitted on all charges.

Nonetheless, the widespread movement against the attack on Dhakal had a major impact on Basnet's position in Biratnagar. It also helped to significantly curtail criminal activity associated with party-affiliated youth organizations. The YAN and the UML lost influence over the administration and police. The UML youth organization lost their power over lucrative rackets in Biratnagar. At the time of research, no other criminal group had managed to take over the space vacated by Basnet and his supporters.

The police in Morang district also regained a degree of autonomy and began a special campaign against mafia-type criminal activity ("*vishesh gunda-gardi abhiyan*"). Smuggling and extortion rackets were brought under control. Many observers in Biratnagar credited these developments to the personal initiative of Deputy Inspector General (DIG) Surendra Bahadur Shah and, especially, of Superintendent of Police (SP) Pradhyumna Karki, who had been transferred to Biratnagar shortly after the Khilanath Dhakal incident. Some observers interviewed in Biratnagar dissented from the conventional wisdom that these

individuals had succeeded in controlling crime in Morang. One member of civil society, for instance, said that the police had aggressively gone after lower and medium-level gang members. They had not, however, managed to take any action against their leaders. Despite these qualifications, however, it is clear that the movement against the attack on Khilanath Dhakal helped establish conditions that allowed the police to take a more autonomous and aggressive stance.

Observations on Civil Society and the Rule of Law

The journalists who spearheaded the movement to bring Parshuram Basnet to justice explicitly conceptualized it as standing for the establishment of the rule of law. Some journalists close to the UML had criticized the movement for what they thought was an attempt to isolate and vilify a single political party. In response, Ameet Dhakal, then editor of *Republica*, published an article on June 21, 2011. The movement, he said, was “not for Khila or against Parshuram Basnet. Nor is it against the state or the UML.” Rather, he wrote:

A wretched broker-class is taking over the political parties, especially in the districts, and is functioning with utter impunity. This class runs smuggling rackets, captures contracts through intimidation, intervenes in local disputes and extorts money ... That is the larger problem. It is the cancer that we need to fight. Political parties are not going to purge themselves on their own. And a fractured and discredited civil society with its allegiance to various political parties cannot exert the necessary pressure on the political parties ... But if the rule of law becomes our rallying point we can contribute, despite our imperfections (let’s not downplay the imperfections of the Nepali media fraternity), to a qualitative improvement of our democracy. Let’s not aim for anything less than that.⁶²

The impact the movement had on the politics of Biratnagar seemed to indicate that it had been at least partially successful in

62 Ameet Dhakal, “A letter to fellow journalists,” *Republica*, 2011.

the goals laid out by Ameet Dhakal. As such, it can be held up as an example of the positive role civil society activism can play in consolidating the rule of law.

A closer look at the nature of the movement, however, reveals that such a view is much too optimistic. For one, such movements arise out of specific circumstances and only last a short period of time. Many people interviewed in Biratnagar for this report stated that the energy and initiative that the police demonstrated in the aftermath of the Khilanath Dhakal incident were dissipating. There were signs that the police force was once again colluding with criminal elements affiliated to the parties.

More importantly, the movement by journalists has to be considered not as a unique event, but rather as one instance of a phenomenon that arose after 1990 and became increasingly common after 2006. This is a tendency for organized bodies in Nepali society to take advantage of the permissive political environment to agitate around issues and seek to extract concessions from the government. Madhesi and Janajati groups, for example, have repeatedly agitated on the streets in recent years demanding that certain provisions for ethnic and regional rights be inscribed into the constitution. The use of such mobilization techniques is not limited to pressing demands against the central government. They are also used to influence local authorities on all manner of issues across the country. In Biratnagar, for instance, there have been numerous cases where a party to a dispute in court has organized protests to influence the court in their favor. Groups of individuals from particular areas have agitated in front of DDC and municipality offices demanding that their locality be granted a particular development project.⁶³

The spread of mass agitation techniques as a means of exerting pressure upon authorities is indicative of a deepening democracy. Such techniques would not have been possible without guarantees of freedom of speech and association that have been included in subsequent constitutions since 1990. Their widespread use also

63 Interviews with DDC and municipality officers, Biratnagar, April 2013.

indicates that large sections of the population now have a keener sense of what they are owed by the state. They are reluctant to simply submit to the whims of authority. In addition, there have been many localized movements that have gathered less attention.

More often than not, the police and courts have been unwilling to prosecute cases of sexual violence. Often, men responsible for sexual assault come from relatively powerful backgrounds; the women who are assaulted often come from marginalized backgrounds. When this is the case, there is often pressure by the man and his family for the administration to drop the case. In recent years, however, in Biratnagar as in other parts of the country, women's groups — both independent and affiliated to political parties — have gathered large numbers of people outside courts, or police and district administration offices, to demand prosecution and punishment for the perpetrator.⁶⁴ This has made it difficult for the authorities to ignore victims' claims to the same degree as before.

An increased ability to exert collective pressure on authorities does not, however, necessarily correlate with an increased application of the rule of law. The effectiveness of movements does not entirely rest on the justice of their claims, but rather on the power and pressure they are able to generate. The journalists' movement in Biratnagar relied on its ability to generate mass public opinion against Khilanath Dhakal's attackers and the politicians who protected them. The movement was also effective because it included high-profile journalists based in Kathmandu who had the ability to directly intervene with high-level politicians.

When groups do not have the power to command public or political attention, they seek to extract concessions from the government through a brute demonstration of force. The most common method used to demonstrate a group's power is of course the *banda*, or general strike. During such strikes, a party forcibly shuts down entire urban areas by threatening violence against anyone who drives their vehicles or opens their shops.

64 Interviews with journalists and civil society activists, Biratnagar, April 2013.

Such shutdowns make the government look weak, and it is compelled to negotiate a settlement with the agitating groups.

In some cases, protesting groups do not even seek to argue that they have right on their side. Instead, they rely entirely on their ability to hold the government and the citizenry hostage. This is often the case with organizations representing economic cartels that seek to prevent the government from imposing regulations upon them. In recent months, taxi drivers have threatened strikes against government attempts to prevent tampering with meters; goldsmiths have gone on strike against efforts by government inspectors to prevent them from selling underweight measures or adulterated gold; sellers of drinking water have gone on strike after they were found operating unlicensed businesses and illegally pumping dirty water. In all these cases, the government has succumbed to the whims of these groups. These cases provide the clearest examples of how mobilization is used not to uphold, but rather to undermine, the rule of law.

Many individuals in positions of authority in Biratnagar have come to adopt a cynical attitude towards such agitations. A single phrase was offered in repeated conversations to characterize contemporary local politics: “*bhid tantra*” or mob rule. A number of lawyers complained that judges found it difficult to follow due process and issue verdicts after sober reflection because of noisy protests outside the court premises. One of Biratnagar’s most prominent lawyers criticized judges for being too influenced by “populist” pressure and undertaking “judicial adventurism” in the name of “judicial activism.” Similarly, a senior municipality officer complained that local governments often had to give in to demands of the most vocal and organized section of society. As a result, he said, local governments determined priorities in an ad hoc manner, without regard for longer-term and large-scale goals that would benefit the wider society. All municipalities had periodic plans, he said, but they were hardly implemented.

Another observer provided an example that clearly demonstrates how public pressure undermines the rule of law.

One party to a dispute over property, he said, showed up at the land registration office with a large group of people to press his claim. The official present thought that the other party had a stronger claim. But he was intimidated by the sight of such a large number of people. The official informed the second party that they too should bring 40 to 50 people along to balance the pressure being applied by the other side.

Such events complicate the common view that political parties protect criminals and engage in rampant impunity while the citizenry has no option but to suffer silently. It is true that politicians often act in an opportunistic and self-serving manner. But it has to be recognized that they are deeply entrenched in the political economy of towns like Biratnagar. In most cases, they are responding to demands from sections of society. As mentioned above, Parshuram Basnet gained substantial power because he was able to assuage the insecurities of certain communities in the aftermath of the Maoist rebellion and during the Madhes movements. Youth organizations like the YF or the YCL gain public support when they lend their organizational weight to local struggles.

In a telling example, a member of the UML's Morang district committee offers the story of how the YF held protests against the decision by the brick manufacturers' association to increase the price of bricks. Eventually, the manufacturers apparently released a press statement promising to increase the price of bricks by a sum less than they had initially planned. The UML leader who recounted this story claimed that the manufacturers had paid off the YF to call off their protests.

The widening of democratic space after 2006 has thus led to a somewhat paradoxical situation. On the one hand, it has enabled hitherto marginalized groups to campaign for access to justice. On the other hand, powerful and entrenched pressure groups have also succeeded in taking advantage of the freedoms of association and expression to exert pressure upon the state. The political parties attempt to mediate the relationship between

state and society. On occasion, they help the marginalized access state resources. On other occasions, it is in their interest to ally with the more powerful sections of society against the state. Nepal's governing institutions have become more receptive to public pressure. But the pressure is so relentless that it has also undermined the ability of state institutions to act in an autonomous manner. In short, collective action has not helped establish the rule of law.

One major factor behind the state's weaknesses vis-à-vis organized pressure groups is the absence of formal channels of political competition at the local level. Local governments have been absent in Nepal since they were dissolved by the Sher Bahadur Deuba government in 2002. The parties have been unable to reach agreement on holding elections after 2006. Throughout the transition period, bureaucrats have been in charge of local bodies. The central government decided in 2006 that a committee of party representatives (formally called All Party Mechanisms or APMs) would advise the bureaucrats in charge. However, this system only caused confusion and the fragmentation of authority. There was widespread collusion among parties in the districts to divide up resources among themselves. As a consequence, the Ministry of Local Development decided to dissolve the APMs.

The absence of local elections has meant that the population has had no way to express political preferences at the district level in more than a decade. The emergence of a culture where demands are expressed through protests and strikes is partially a result of this. Civil servants at the local level, lacking political power and networks of their own, lack the capacity to manage such pressure.

The revival of formal political competition through local elections can help mitigate some of the problems described in this chapter. Elections will establish political authority at the local level, which will be more capable of negotiating competing claims. The connivance of the police and administration with

influential social groups will not disappear overnight. But through elections, the police and administration will gain greater political backing. They will become less susceptible to pressure from interest groups that mobilize in the streets.

5

Transitional Justice

Introduction

Over the past two decades, there has been growing international consensus on the need for formal institutions such as truth commissions and special courts in countries emerging from conflict. These institutions are perceived to be necessary if societies are to both “respond to suffering from past abuses” and “prevent similar suffering from happening in the future.”⁶⁵ The field of transitional justice encompasses a variety of processes that are meant to guide countries towards these ends. These include an accounting of past atrocities through truth commissions, reparations, and the establishment of memorials to provide dignity to victims. Such measures are meant to heal the wounds of war and reconcile victims with perpetrators.

The preventative goals of transitional justice are also pursued through a variety of measures. In some countries, perpetrators of violence have been prevented from reasserting power. Truth commissions have also provided detailed recommendations for the reform of state institutions aimed at preventing repetitions of large-scale human rights violations.

65 Ellen Lutz, “Transitional Justice: Lessons Learned and the Road Ahead,” in *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, edited by Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge University Press, 2006), 325.

Increasingly, trials and prosecutions of perpetrators of violence are thought to be necessary if victims are to receive justice. Human rights activists, in Nepal as in other parts of the world, argue that all states have a moral and political obligation to prosecute conflict-era atrocities. Trials are also considered necessary to prevent a resurgence of violence, to establish the rule of law, and to thus end impunity. It is thought that prosecution holds individuals accountable and “deters future perpetrators from committing violence.”⁶⁶ In contrast, the failure to prosecute, it is thought, can only lead to an erosion of the rule of law and a further entrenchment of a culture of impunity. Those in favor of trials, therefore, remain staunchly opposed to all political efforts to provide amnesties to those violating international human rights and humanitarian law.

This approach, however, has its detractors. It is sometimes argued that prosecutions undermine the fragile stability that is necessary in the aftermath of conflicts. For instance, a rebel group may be reluctant to lay down arms unless they believe that they will be offered amnesties. Similarly, a state army may be reluctant to cooperate with peace settlements if its officers believe they will be held accountable for past atrocities. Those who emphasize the need for stability in political transitions have traditionally argued in favor of non-judicial mechanisms to address the legacy of armed conflict. A number of truth commissions in the 1980s and 1990s placed greater emphasis on revealing the history of wartime atrocities and reconciling victims with perpetrators than on prosecution. In South Africa, for instance, the truth commission explicitly offered amnesties in exchange for testimony by perpetrators of violence.⁶⁷ This fault line is often characterized as a truth vs. justice conflict.

66 Tricia D. Olsen, Leigh A. Payne, and Andrew G. Reiter, “The Justice Balance: When Transitional Justice Improves Human Rights and Democracy,” *Human Rights Quarterly* 32, no. 4 (November 2010): 983.

67 Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (New York: Routledge, 2001), 26.

By the early 2000s, however, the majority of human rights activists and the international community started believing that truth and justice are not necessarily irreconcilable goals. This opinion is reflected in the title of a recent book on transitional justice: *Transitional Justice in the Twenty-First Century: Beyond Truth and Justice*.⁶⁸ Recent experiences with transitional justice in countries like Sierra Leone and East Timor have included the establishment of both truth commissions and special courts. The revealing of truth and the prosecution of perpetrators have proceeded together.

In the international discourse, the argument that prosecutions can derail transitions has lost favor. Amnesties for major violations of human rights and humanitarian law are now held to be against international law as well as domestic obligations. Amnesty in exchange for truth, as practiced by the South African Truth and Reconciliation Commission, is no longer considered acceptable.⁶⁹

From very early in the peace process, Nepali human rights activists have been guided by this international opinion. In coordination with international organizations, domestic human rights groups have demanded a dual-pronged approach to transitional justice, considering both truth and prosecution. According to these groups, the first need of the transitional period is for the criminal justice system to prosecute those responsible for human rights violations during the conflict. These prosecutions are aimed at ending impunity and establishing the rule of law. Second, activists call for the formation of a truth commission to establish facts regarding conflict-era violations. This is considered a means of societal healing.⁷⁰ However, the

68 Naomi Roht-Arriaza, and Javier Mariezcurrena (editors), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (Cambridge: Cambridge University Press, 2006).

69 International Centre for Transitional Justice (ICTJ), "Navigating Amnesty and Reconciliation in Nepal's Truth and Reconciliation Commission Bill" (November 2011), 2–3.

70 Cf. Govinda Bandi, "Truth and Reconciliation Ordinance and Its Implications" (presentation at a seminar organized by the Nepal Institute for Policy Studies, May 22, 2013).

emphasis on prosecution is by no means universal. Activists involved in the transitional justice movement, in Nepal as well as other countries, raise important questions regarding the importance of trials within the larger transitional justice process. This aspect will be explored in the section below on the dilemmas of transitional justice.

The politicians who negotiated the peace agreements, meanwhile, neither understood the nuances of transitional justice nor were particularly keen on its implementation. Only a few of the provisions relating to transitional justice included in the CPA had the explicit approval of the political parties. For example, there was general agreement to investigate the disappearances that occurred during the war.⁷¹ The Maoists in particular were keen on this measure, as a large proportion of those disappeared had been affiliated with their party. Similarly, there was also general agreement that the provision of relief and rehabilitation was necessary.⁷²

In contrast, provision 5.2.5 of the CPA, in which the parties agree to the formation of a TRC, seems to have been included largely because of pressure from the human rights and international communities. At this stage, the parties appear to have had little idea about the long-term implications of the TRC. Its goal is simply described as to “investigate the truth” regarding severe rights violations and to “create an environment for reconciliation in society.”

There is no mention at all in the CPA regarding the second aspect of transitional justice: the establishment of prosecutorial mechanisms. Rather, Clause 5.2.7 appears to provide for blanket amnesty. It guarantees the withdrawal of all “accusations, claims, complaints and cases under consideration alleged against various individuals due to political reasons.” The definition of what constitutes crimes committed for “political reasons” remains vague and has been a source of dispute. The parties continue

71 Clause 5.2.3 of the CPA.

72 Clause 5.2.4 of the CPA.

to claim that this refers to all violations committed during the conflict. Human rights activists, meanwhile, insist that severe violations of international human rights and humanitarian law cannot be included in this category. Nonetheless, it is clear that during negotiations over the CPA, the parties intended to offer both sides blanket amnesty for crimes committed during the civil war.

Since 2007, the political parties have made a number of attempts to pass bills relating to the Disappearances Commission and the TRC. None of them have come to fruition, however. At most stages, human rights groups have heavily criticized the proposed TRC bill, and the government has been forced to withdraw it.

The Ministry of Peace and Reconstruction published a first draft of the TRC bill in July 2007. Following numerous rounds of consultation with lawyers, human rights activists and political parties, the draft was returned to the ministry, where it was reworked with the assistance of the Ministry of Law, Justice, Constituent Assembly and Parliamentary Affairs. In February 2010, two separate bills to establish truth and disappearances commissions were registered in parliament. But they failed to pass.

After the dissolution of the Constituent Assembly, the parties once again negotiated a bill relating to transitional justice. This was part of a political agreement that paved the way for the resignation of the Baburam Bhattarai government. The parties agreed to merge the two bills — on disappearances and truth and reconciliation — into one. On March 13, 2013, the bill was sent to the president, who promulgated it as an ordinance the following day. This time too, however, there was widespread criticism from groups representing conflict victims, local human rights activists and NGOs, donor agencies, and the diplomatic community. Two writs were filed in the Supreme Court demanding that a number of clauses of the bill be rewritten. On April 1, 2013, the Supreme Court stayed the implementation of the TRC ordinance. The

Court argued that some of its provisions contradicted the Interim Constitution. In January 2014, the Court ruled that the amnesty provisions in the ordinance were unacceptable and ordered the government to revise the bill in consultation with conflict victims, human rights activists and legal experts.

The TRC and disappearances bill will thus have to be renegotiated by the recently elected legislature. This chapter examines the political disputes over transitional justice in Nepal, and identifies specific dilemmas that should be addressed before the process moves forward.

Criticisms of the Ordinance

From 2007 onwards, criticism of the various draft bills has primarily focused on provisions that offer blanket amnesties for serious violations of international law. In addition, human rights activists also argue that the various bills give the government and political parties too much power over the body. If the TRC is to be effective and address the needs of conflict victims, it is argued, the body needs to be granted complete autonomy. The version of the TRC bill that was passed by the president in March includes provisions that seek to address these criticisms.

The ordinance that is currently in place differs from the first draft discussed in the CA in three significant ways. First, the preamble now states explicitly that a goal of the TRC is to “end the state of impunity by bringing perpetrators of serious crimes under the ambit of the law.” Second, a clause stating that TRC commissioners would be appointed through “political consensus” has been removed. Instead, Article 3.3 of the ordinance provides for the formation of a “Recommendation Committee” that will appoint TRC commissioners. Third, Article 23 of the ordinance, which allows the commission to grant amnesties, now includes a clause that amnesties cannot be afforded to perpetrators of “serious human rights violations, including rape ...”

As mentioned above, human rights activists do not consider these measures adequate. Before we discuss the specific

contested clauses of the current TRC and disappearances bill, it is important to note that the bill's many critics do not speak as a homogeneous block. Further, different groups not only stress different aspects of the bill — truth, justice, reconciliation — but define each of these terms somewhat differently. These groups do, however, form alliances — long and short-term — for advocacy, public attention, and legal activism. Nonetheless, there is general agreement among various rights groups regarding the specific clauses in the current bill that are flawed. Their common positions are discussed below.

Overall, victim groups and rights activists make two broad criticisms of the TRC bill. First, these groups express frustration with the procedure by which the TRC bill was passed. Second, they are dissatisfied with the form of the bill. The latest bill, it is argued, was rushed through as part of a larger political package. There was no consultation at all with rights or victims groups. Many activists argue that political party leaders took advantage of the dissolution of the Constituent Assembly to prevent broad discussion of the draft. Had that body still existed, they would have been forced to present the draft before the CA, which would have led to wider discussion. Instead, a small number of politicians negotiated the bill and got it passed as an ordinance by the president.

Regarding form, there is some unhappiness that two separate bills — for the TRC and disappearances — have been merged into one. All rights and victims groups have long demanded separate bills. More recently, however, there have been disagreements between groups over how much emphasis to give to this issue. Some activists continue to demand that the process be reset and the two separate bills brought back. A coalition of victims groups, on the other hand, fears that resetting the process will only cause additional delays. They believe it best to agree broadly to the structure of the bill and to insist on revisions only to specific unacceptable articles.⁷³

73 Interview with representative of a victims' group, August 2013.

All rights organizations and victims groups agree that rewriting articles 13, 23, 25 and 29 is essential and non-negotiable.

Article 13, which falls under Section 3 of the bill, establishes the functions, duties and powers of the commission. Clauses (b) and (d) of Article 13 are deemed to be particularly objectionable: 3(b) states that a function of the TRC is to “reconcile perpetrators and victims;” 3(d) states that the TRC can “recommend actions against those perpetrators who do not qualify for amnesty.” Critics state that clause 3(b) seems to provide the TRC with the mandate to coerce victims into reconciling with perpetrators. The TRC should have no such right, it is argued. Only victims should have the right to decide whether or not to reconcile with perpetrators. Regarding clause 3(d), activists state that the word “action” used in the clause is problematic, as it is ambiguous and does not necessarily mean prosecution.

Article 23 specifically deals with amnesty. Clause (a) of the article empowers the commission to recommend that the government grant amnesty to specific perpetrators. A number of rights groups oppose this clause outright. They argue that international law does not allow truth commissions to grant amnesty. (This is a relatively recent development. As mentioned above, the South African truth commission had the mandate to offer amnesties in exchange for testimony by perpetrators.) Others worry about the ambiguous wording of Article 23. While clause (a) states that the commission must provide “sufficient grounds and reasons to the government,” it does not specify what these grounds should be. It only states that the amnesty recommendation must be “deemed reasonable.”

Clause (b) of Article 23 meanwhile states that amnesties will not be recommended for “serious human rights violations including rape that lack sufficient reasons and grounds for granting amnesty.” Critics point to the phrasing of this clause, expressing concern that only rape is specifically mentioned. They worry that this clause can be interpreted to mean that only perpetrators of rape cannot be granted amnesty. They ask that

this reference to rape be removed, as section 2 already provides a list of cases that constitute serious violations.

Further, clause (d) of Article 23 states that the commission “may ... consult the victim as per need.” Critics argue that the word “may” grants the commission too much discretionary power and should be changed to “shall” or “must.” Article 25, “Recommendations for Action,” is also opposed for the discretionary powers it offers the commission through the use of the word “may.” Clause (a) of the article states that the commission “may recommend action” against those not granted amnesty, and that it “may recommend to take action as per the existing laws.” Critics argue that the ordinance not only makes amnesty for perpetrators a first priority, it does not even state that those not eligible for amnesty will be prosecuted.

Article 29, “Provisions Related to Filing Cases,” outlines the procedures that need to be followed before a case appears in court. According to the current provisions, four steps need to be followed. First, the commission must consider amnesty, opting for prosecution only if amnesty cannot be granted. Second, the commission must write to the Ministry of Peace and Reconstruction recommending prosecution. Third, the cabinet must discuss and agree to the recommendation. Once they agree to it, they must publish an order in the Nepal Gazette. Fourth, the attorney general can file a case only at this stage.

Critics state that there are far too many steps that need to be followed before a case goes to the attorney general. Further, most of these are contingent on political whims. It is argued that the Office of the Attorney General should be empowered to take up cases directly on the TRC’s recommendations.

The Supreme Court judgment of January 2, 2014 vindicated the standpoint of victim groups and activists to a substantial extent. The Court ruled that the truth and reconciliation had to be considered separately from enforced disappearances, and that a separate “Inquiry Commission” needed to be established to investigate enforced disappearances. Further, the Court ordered

revisions to Articles 23, 25 and 29. The judgment argued that Article 23 made the “involvement and consent of victims in the amnesty proceedings not mandatory but only a secondary requirement” and that was against the “victim’s fundamental right to justice.” Articles 25 and 29, meanwhile, made criminal prosecution subject “to the discretion of the executive and uncertain” and therefore obstructed “the process of justice.” In addition, the Court ordered that there should not be any statutory limitations for filing cases involving serious rights violations.⁷⁴

The Politics of Transitional Justice

In some ways, the manner in which the parties have handled transitional justice can be taken as yet another instance in which they have, despite their differences, colluded to evade accountability. Although it is the two Maoist parties and the state security forces that are primarily implicated in conflict-era human rights violations, all of the major parties are unanimous in their opposition to prosecutions. Some of them feel that their members too will be dragged to the courts if trials are held. The Nepali Congress, for example, is opposed to prosecution, as many of the severe violations committed by state security forces occurred when its leader, Sher Bahadur Deuba, was prime minister.⁷⁵ Further, all major parties are also under pressure from the Nepal Army to protect its officers and personnel.

There are, however, some major differences between the way the parties have sought to shape the transitional justice debate and the ways they have tried to control bodies like the CIAA. For one, transitional justice is a much more sensitive issue than, say, corruption. In recent years, transitional justice has been at the centre of the public discourse on impunity.

It is not only domestic civil society activists who have been galvanized into pushing for trials for conflict-era violations. Efforts

74 Supreme Court, “Order 069-WS-0057” [Verdict on the Truth and Reconciliation Ordinance]” (January 2, 2014). For a summary and analysis of the judgment see Advocacy Forum, “Nepal: Transitional Justice at Crossroads” (January 2014).

75 Interview with human rights activist, August 2013.

by domestic human rights activists are complemented by those of the transnational human rights community, including western governments and organizations such as the UN Office of the High Commissioner for Human Rights, the International Commission of Jurists, and the International Centre of Transitional Justice. The international actors point to the fact that Nepal is party to major treaties on human rights and international humanitarian law that require it to investigate and prosecute cases of human rights violations. The pressure generated on the parties is thus much greater than in cases involving corruption. The fact that the parties were forced to amend the TRC legislation to enable prosecution is evidence of their susceptibility to pressure on issues related to transitional justice.

Despite the shared interest in evading accountability, not all parties are equally affected by transitional justice. Only the Maoists were a direct party to the armed conflict, and the party's leaders have been most active in drafting transitional justice legislation. It is true that the Nepal Police and Nepal Army were responsible for the majority of wartime human rights violations. But these bodies are not as beholden to the public as political parties. After all, they do not contest elections and are not responsible for drafting legislation. The pressure they apply upon the parties to prevent prosecution occurs behind the scenes. In public perception, therefore, the Maoists are held most responsible for blocking prosecutions of conflict-era violations.

In recent years, there have been numerous efforts by human rights and civil society groups to push for the immediate prosecution of specific individuals accused of severe violations of international humanitarian law. The majority of these cases have implicated members of the two Maoist parties. Most recently, activists pushed for the arrest of Maoist cadre accused of the murder of 19-year old Krishna Prasad Adhikari in 2004. Previously, they had pushed for the arrest of Maoist cadre responsible for the murder of the journalist Dekendra Thapa in Dailekh. There have also been a number of cases in which

activists have pushed for the arrest of senior Maoist leaders, such as former CA members Agni Sapkota and Bal Krishna Dhungel.

Such cases have pushed the Maoist leadership into a frightened and defensive position. Their recent actions and statements indicate that they remain implacably opposed to trials for wartime rights violations. It is perhaps understandable that the Maoists should want to protect their cadre. However, it seems that the Maoist leadership's legal understanding of transitional justice issues is poor, and that this has prevented them from a proper engagement with it. Some of their fear and defensiveness appears to be a consequence of their lack of understanding.

For instance, members of the two Maoist parties fear that they will be presented before the International Criminal Court at The Hague, even though Nepal is not a signatory to the Rome Statute. They also fear that allowing a single prosecution through the criminal justice system will open the door for widespread prosecutions. This, Maoist leaders believe, will lead to the arrest and conviction of many Maoist cadres, and will thus fatally undermine their party organizations. They are also worried that activists will deploy legal arguments regarding chain of command responsibility to push for the arrest and prosecution of some of the most influential leaders of the two Maoist parties. Further, as they feel specifically targeted, Maoist leaders argue that transitional justice is being used as a political tool by elites to push back against political gains that have been achieved through the Maoist rebellion and the 2006 People's Movement.⁷⁶

The transitional justice debate in Nepal is currently highly emotional and acrimonious. This has led to the many misunderstandings and the adoption of extreme positions. The parties – the Maoists in particular – have adopted a highly reactive stance. It sometimes appears that their sole goal vis-à-vis transitional justice is to block and deflect all attempts towards prosecution. For example, Maoist Chairman Pushpa Kamal Dahal has repeatedly stated that wartime crimes cannot be prosecuted

76 Interviews with Maoist leaders, July–August 2013.

through the criminal justice system but only dealt with through the TRC. Given that the existing legislation is heavily biased in favor of amnesties, it appears to many observers that the Maoists intend to use the body solely to evade accountability. This in turn further inflames passions among activists. Their continued insistence on prosecution makes it seem to party leaders that they are in fact bent on arresting as many politicians and political activists as possible.

As mentioned above, the Supreme Court has ordered a thorough revision of the TRC bill. It is now almost certain that the bill will be renegotiated. Now that elections have been held, the situation is more propitious for wider public consultation. The parties will not be able to negotiate transitional justice legislation behind closed doors and pass it as an ordinance. The newly elected legislature will have to discuss the proposed legislation before passing it. This will be a process that will be open to the scrutiny of the public.

It will be to the benefit of all sides to enable widespread and public debate. Formal consultations can help cool temperatures and prevent the debate over transitional justice from becoming a partisan battle. There are currently contradictory expectations of the TRC. Contrary to public perception, the TRC is not a judicial mechanism that focuses on prosecution. As mentioned earlier in this chapter, the TRC is meant to offer a public reckoning of the conflict, help society heal, and recommend state reforms to prevent further violence. Widespread consultation can help bring these issues to the fore as well as identify the process through which these goals can be met.

Such public consultation should help the Maoists and other parties realize what will and will not be acceptable to rights activists and the international community. For instance, it should become clear to them that some prosecutions are inevitable under the current international consensus on transitional justice. At the same time, public consultations should also help reduce the Maoist leadership's fears that many in their party

will be prosecuted and convicted. In most countries that have established TRCs, a small number of cases — between 30 and 40, according to estimates — have gained the most attention. Not every case is prosecuted. Activists in Nepal privately state that most cases are not prosecutable due to a lack of evidence.⁷⁷ The point is that even if prosecutions go forward, they will not irreparably damage the Maoists. There have been cases in the past where Maoist activists have been convicted that did not lead to any major fallout within the party. A Maoist cadre, for instance, is still serving a prison sentence for the murder of businessman Ram Hari Shrestha at Chitwan's Shaktikhor cantonment in 2008.

In fact, selected prosecutions can only enhance the Maoists' credibility. If they and other parties wish to change the public's perception, they have to adopt a more proactive stance on prosecutions. For instance, the parties can themselves push the TRC to investigate certain high-profile cases such as the Madi bus bombing of 2005, for which the Maoists were responsible, and the Doramba massacre of 2003, in which the then-Royal Nepal Army killed 17 unarmed Maoists and two civilians. Such steps could help reduce conflict between the parties and the human rights community.

Widespread debate should also move the parties away from the view that the chief purpose of transitional justice is to provide justice to all conflict victims through the prosecution of perpetrators. While this is a laudable goal, it is impossible to accomplish it in the face of the large number of victims, the political context, and the absence of evidence in many cases. To argue in favor of such a goal is to raise expectations to a level that cannot be met. A more cautious approach would involve viewing the transitional justice process as a means of strengthening the judicial system. A few selected prosecutions can be used to demonstrate that the state is committed to holding perpetrators of serious rights violations accountable. A secondary objective

77 Interview with human rights activists, July–August 2013.

should be to reform institutions and adopt laws — such as those regarding disappearances and torture — that will prevent and contain abuses of human rights and provide victims with methods of redress.

Additional Dilemmas

As mentioned in the introduction, many transitional justice experts believe that the old dilemma of truth vs. justice has been resolved. They maintain that the goal of setting post-conflict societies on the path to healing and recovery is not irreconcilable with prosecutions that ensure justice to victims and help end impunity. They emphasize parallel processes to ensure these two ends. In their view, it is the function of the truth commission to provide an accounting of the structural causes behind the conflict and promote healing. A special court or the regular justice system is meant to hold trials to promote accountability and help end impunity.

In reality, tensions between these two goals have been evident even in countries that have adopted both processes. In Nepal too there is a division within the transitional justice movement over which goal to prioritize. There are a number of significant dilemmas that have not yet been adequately confronted by rights activists. They will have to be dealt with in the days ahead, possibly during the next round of debate over the TRC.

The primary fault line within the transitional justice movement in Nepal is between a coalition of victims' groups called the National Network of Families of Disappeared and Missing, Nepal (NEFAD), and human rights organizations, both domestic and foreign. The latter have dominated the transitional justice agenda, and the leaders of the former have been severely critical of them. NEFAD President Ram Kumar Bhandari and the researcher Simon Robins have spoken most vocally on behalf of victims' organizations. While they do maintain that prosecutions are necessary, they believe that human rights

organizations have pushed excessively for prosecutions at the expense of all other transitional justice goals. They write:

Whilst transitional justice has remained central to the rhetoric of donors, the UN and other international actors active in Nepal, this has been defined exclusively on their terms, echoed by human rights agencies dominated by caste and economic elites, driven by global norms and dominated by a narrow legalism that neglects the priorities of victims. Discussion of transitional justice refers far more to priorities internal to the global human rights discourse than to the local and contingent needs of victims, largely because one is articulated by the powerful and one by the powerless: human rights practice in an exclusionary society remains exclusionary. The result is that the interventions of both national and international agencies make little reference to victims' needs: analyses are perpetrator and violation centred, rather than victim centred.⁷⁸

In their survey of victims' needs, Bhandari and Robins report that justice, in terms of punishment of perpetrators, is not the most important priority for a very large number of victims' families. The survey found that goals such as finding out the whereabouts of disappeared kin and accessing compensation in the form of money, education, medical treatment and jobs were more important for the families of those killed or disappeared during the conflict. In addition, the report states, families have specific needs that have not been addressed at all. For instance, the kin of victims often suffer from trauma and mental illness. The widows of those disappeared or killed face extreme stigmatization within their communities. Robins and Bhandari argue that these matters have remained unaddressed because the excessive focus by human rights organizations on trials and judicial processes has forced political parties into the defensive. This has led successive governments to reject transitional justice in its entirety.

78 Simon Robins and Ram Kumar Bhandari, *From Victims to Actors: Mobilizing Victims to Drive Transitional Justice Process* (Berghof Foundation, June 2012).

Such disputes are not peculiar to Nepal, but have arisen in many countries that have adopted transitional justice mechanisms. Broadly, the dispute can be seen as a question of what set of rights to prioritize. Is it more important to ensure civil and political rights (also known as first generation rights)? If so, then emphasis should be on holding perpetrators accountable for specific violations. Or is it more important to ensure social and economic rights (second generation rights)? In that case, the focus should be on reparations and livelihood support. This approach would also require a fine-grained analysis of socio-economic disparities within society that may have led to the targeting of marginalized ethnic or caste groups. Such an analysis would help better identify the specific kinds of livelihood support required by different sections of the population. The analysis would also lead to policy measures to ensure that these groups do not become victims of discrimination in the future.

It is, of course, true that the two sets of rights are not mutually exclusive. Indeed, they can be pursued simultaneously. In response to criticism by Bhandari and Robins, Advocacy Forum and the International Commission of Jurists conducted their own survey of victims' needs.⁷⁹ This study found that victims do emphasize justice as a priority, but are also concerned with livelihood support. In many recent transitional justice processes, however, there have been divisions between those who prioritize one set of rights over the other. And in most cases, first generation rights receive more attention, whereas second generation rights are relatively ignored.

Scholars studying transitional justice processes in a number of countries have been critical of the tendency to focus on the individual guilt of perpetrators and to ignore the structural or systemic nature of human rights violations. Remarking on the South African case, for example, Mahmood Mamdani states: "From the outset, there was a strong tendency in the TRC not

79 Interview with human rights activist, August 2013.

only to *dehistoricize* and *decontextualize* the story of apartheid but also individualize the wrongs done by apartheid.”⁸⁰

Though [the TRC] acknowledged apartheid as a “crime against humanity” which targeted entire communities for ethnic and racial policing and cleansing, the Commission majority was reluctant to go beyond formal acknowledgement. The Commission’s analysis reduced apartheid from a relationship between the state and entire communities to one between the state and individuals. Where entire communities were victims of gross violations of rights, the Commission acknowledged only individual victims. If the “crime against humanity” involved a targeting of entire communities for racial and ethnic cleansing and policing, individualizing the victim obliterated the particular — many would argue central — characteristic of apartheid.⁸¹

Similar arguments have been made in the cases of East Timor and Peru. In East Timor, the Special Crimes Investigation Unit (SCIU) set up by the UN was criticized “for failing to focus on the systematic nature of the violations that had occurred ... and the role played by the Indonesian military apparatus, instead treating them as individual criminal cases.”⁸² In Peru, as Lisa Laplante and Kimberly Theidon argue, a focus on prosecutions of Shining Path members served to obscure the inequalities within Peruvian society that were a major cause behind the civil war in the country.⁸³

It is widely acknowledged that structural inequalities between ethnic and caste groups served to exacerbate the conflict in Nepal.

80 Mahmood Mamdani, “Amnesty or Impunity? A Preliminary Critique of the Report of the Truth and Reconciliation Commission of South Africa (TRC),” *Diacritics* 32, no. 3/4 (Autumn–Winter, 2002): 57.

81 *Ibid.*

82 Caitlin Reiger, “Hybrid Attempts at Accountability for Serious Crimes in Timor Leste,” in *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, edited by Naomi Roht-Arriaza and Javier Mariezcurrena (Cambridge: Cambridge University Press, 2006), 148.

83 Lisa J. Laplante and Kimberly Theidon, “Commissioning Truth, Constructing Silences: The Peruvian Truth Commission and the Other Truth of “Terrorists,”” in *Mirrors of Justice: Law and Power in the Post-Cold War Era*, edited by Kamari Maxine Clarke and Mark Goodale (New York: Cambridge University Press, 2010).

There is also evidence that members of particular groups were targeted. A study by the UN Office of the High Commissioner for Human Rights (OHCHR) regarding disappearances in Bardiya district clearly indicates that the state security forces specifically targeted Tharus for arrest and torture.⁸⁴ The transitional justice process in Nepal should ensure that the focus on trials and prosecutions does not detract from an analysis of social factors behind the conflict and related recommendations.

Another dilemma concerns the relationship between the TRC and the criminal justice system. There is much confusion about this in the public sphere. Many people believe that there is no distinction between the two; they think that the purpose of the TRC is to hold trials. Public debate needs to take place to clarify the respective roles of the TRC and the criminal justice system when it comes to transitional justice.

Leaders of the parties and human rights organizations may agree that these are separate processes, but they are divided on the relationship between the two. Rights activists argue that cases that have sufficient evidence should be pursued immediately. They state that a second round of prosecutions can take place after the findings of the TRC are made public. In this view, a function of the TRC would be to act as an investigative arm that reveals evidence that can be used in court.

On the other hand, the political parties maintain that no conflict-era crime should be prosecuted before the TRC is established. In this view, only cases that the TRC recommends for prosecution can be pursued. This position is, of course, intended to severely restrict the numbers of cases that can be presented in court.

The Supreme Court, meanwhile, has issued a number of judgments that have maintained the independent right of the courts to pursue conflict-era cases. An important ruling in this regard was issued on June 1, 2007. From early in the conflict, the courts have been petitioned on cases concerning disappearances.

84 UNOHCHR, *Conflict Related Disappearances in Bardiya District*, December 2008.

But the number of such cases grew rapidly following the signing of the CPA. As there is no law relating to disappearances in Nepal, the majority of these cases were filed as *habeas corpus* petitions, which demand the right to a trial. Taking this pattern into consideration, the Supreme Court bundled together all the *habeas corpus* petitions before it and issued a ruling common to all of them. This case was named the Rajendra Prasad Dhakal case. Dhakal was disappeared by state security forces in 1998, and his relatives filed the first conflict-related *habeas corpus* petition in January 1999.

Lawyers appearing on behalf of the victims cited the state's obligation to protect its citizens' "right to life and personal freedom" as guaranteed by the constitution and international laws to which Nepal is party. The attorney general's office responded that the matter was beyond the court's jurisdiction, arguing that:

Solutions of such questions should, in the changed context, be sought through political consensus ... As a consensus has already been made to establish a Truth and Reconciliation Commission for the purpose of eradicating the problems evolved during the time of conflict, this aspect should also be considered.

The Supreme Court sided with the petitioners. The ruling cited clauses in the CPA — clause 5.2.5 regarding the TRC, and clause 5.2.3, where signatories to the agreement agree to make public the names and whereabouts of the disappeared — as proof that the state had already accepted liability for enforced disappearances. It further pointed to articles in the Interim Constitution that guaranteed reparations for families of the disappeared and the formation of a TRC. The court then argued that "... the legal investigation, prosecution, and remedy to be carried out ... [is a] fundamental right [and thus] cannot be a matter of second priority and also cannot be a matter outside the jurisdiction of the court."

The Supreme Court ordered the government to enact legislation criminalizing disappearances, prosecute officials found guilty of disappearances, and provide compensation to victims and their families.

Despite attempts by the parties to block prosecutions, Supreme Court judgments such as the one in the case mentioned above firmly establish that the TRC should remain independent from the criminal justice system. What remains unclear is the nature of the relationship between the two institutions. In many countries that have adopted parallel processes for truth-telling and prosecution, there have been tensions between the TRC and the prosecutorial mechanism.

Such tensions arise because the two bodies have somewhat different goals. In a number of countries, there has been some resistance to the idea of using the TRC as an investigative mechanism for cases that will later be pursued in court. In Sierra Leone, for example, there was a proposal that the TRC should share information with the Special Court that had been established specifically to deal with conflict-era cases. However, the TRC commissioners were concerned that perpetrators would be dissuaded from offering testimony at the TRC if they felt that it would be used against them in court.⁸⁵ Because of this, among other reasons, the TRC and Special Court in Sierra Leone were unable to come to any agreement on coordination. Instead, there were a number of occasions where the two bodies engaged in hostile press fights with each other.⁸⁶

It is beyond the scope of this report to offer recommendations as to the relationship that should exist between the TRC and the criminal justice system in Nepal. The above discussion is merely meant to demonstrate the likelihood of the emergence of tensions between the TRC and the criminal justice system after the former is established. This issue, too, should be publicly discussed, and an attempt made to define the relationship between the two institutions before the TRC is constituted.

85 William A. Schabas, "The Sierra Leone Truth and Reconciliation Commission," in *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, p. 34.

86 Sigall Horivitz, "Transitional Criminal Justice in Sierra Leone," in *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, p. 56.

Concluding Observations

The public debate on transitional justice in Nepal has played out in a narrow and partisan manner. It often appears that the sole goal of the political parties when it comes to transitional justice is to block prosecutions altogether. The parties need to recognize that trials cannot be avoided and that they will not be as damaging to their organizations. Until then, the transitional justice agenda cannot move forward.

A wider public debate is required to bring greater clarity to the transitional justice process. So far, there has been a great deal of emphasis on prosecuting those responsible for conflict-era rights violations. However, other important goals have been relatively ignored. It has to be recognized that the purpose of transitional justice is not simply to provide justice to all victims of the conflict. Given the large number of cases, the lack of evidence, and other political complexities, this is an impossible goal.

The larger goal of the process should be forward rather than backward looking. It has to lead to a reform of state institutions in ways that will prevent the recurrence of violence. This includes making the judiciary more accessible to those seeking redress for rights violations. Some prosecutions can set precedents and help strengthen the judiciary and make it more sensitive to citizens' fundamental rights. It can also help establish greater trust in the institution among the population. For this to happen, it will be essential to ensure that prosecutions are not perceived as biased and "political". However, prosecutions by themselves seem unlikely to help end impunity. Non-judicial processes such as the TRC are equally important. The TRC can offer further recommendations for the reform of institutions such as the police and the army. It can also push for the adoption of laws that will inhibit the emergence of large-scale violence and egregious human rights violations in the future. It is the task of the political parties and the human rights community to find the right balance of judicial and non-judicial mechanisms.

Conclusion

This report has analyzed a range of political practices that constitute examples of impunity. These actions vary in terms of their social acceptability and the severity of their effects. The bending of regulations to divert state resources to supporters is a minor case of illegality compared to massive embezzlement. A politician may have few qualms about siphoning off state resources, but may be reluctant to openly provide protection to organized crime. There are, however, significant commonalities between such practices. The differences between them are a matter of degree rather than of nature.

For the most part, politicians commit legal violations for a single purpose, namely to accumulate power and expand their constituencies. This is not to say that all acts of impunity are simply accepted as part of the normal political game. There is widespread outrage against political impunity in the public sphere. The media regularly reports instances of embezzlement. Civil society groups often protest against the political protection of criminals. Yet, it is clear that such campaigning does not necessarily impact political party behavior.

The crux of the problem lies in the fact that political power is not derived from broad public perceptions of individual or party probity. Politicians need only marshal support from a

much narrower constituency to gain and remain in power. To get elected, one needs support from an electoral constituency. Nepal's politicians build their constituencies through the dispensing or promise of patronage. Successful politicians are able to provide their constituencies with public goods such as roads or electricity. They may also have to provide jobs to private individuals or facilitate their access to state institutions.

Beyond the support of voters, politicians require support from lower-ranking party members. Maintaining such support may require protecting party cadre from the law. While this may diminish a politician's standing in the broader public sphere, it increases his or her credibility among the party faithful. Political leaders rarely lose party support because of egregious corruption or other legal violations. When the Nepali Congress leader Khum Bahadur Khadka was recently released from prison after serving a sentence for corruption, a large group of supporters greeted him outside the jail premises with rapturous applause.

In the few cases where party cadres have accused their leaders of illegal behavior, the accusations have not been aimed at opposing impunity. For example, Maoist leaders had been siphoning off state resources meant for the upkeep of combatants for several years before a group of former fighters publicly accused them of corruption. The former combatants were not seeking to strengthen the rule of law by speaking up. Rather, they were driven by the sense of betrayal they felt over what they perceived to be an unfavorable deal on integration and rehabilitation negotiated by their leadership.

In addition to voters and party cadre, politicians require the support of higher-ranking leaders within their parties. This is particularly necessary during elections, when a narrow group of top-ranking leaders hand-pick candidates. A politician's chance of being nominated by the party leadership is in no way hampered by his or her involvement in illegal activity. Rather, politicians with criminal backgrounds often have an advantage, as party leaders seek candidates who are able to mobilize resources for

the election campaign. Politicians linked to criminal networks often have large sums of cash that can be deployed for campaigns.

The reinforcing link between illegal or criminal activity and political success points to the difficulties in ending impunity. This is not to say, however, that fighting impunity is an impossible task. Political behavior is not shaped merely by the strategic decisions politicians make to increase their power. Their actions occur within a larger institutional framework. The remainder of the conclusion will explore how changes in the institutional framework within which politics is practiced in Nepal can influence political party behavior.

Some types of impunity are inherent in the kind of multi-party democracy that exists in Nepal and other countries in South Asia. The subversion of laws and regulations to provide supporters with state resources will likely remain a permanent feature of politics. In Nepal, moreover, certain types of impunity have become particularly entrenched in the ongoing, post-conflict, transitional period. There are grounds to expect that new mechanisms for accountability will emerge as the country makes the transition to a more stable political framework.

There is reason to hope that the precedence of politics over legality, a reality that has been characteristic of the transition period, will decline. It is often said that the transition will give way to a stable political system only after a constitution is promulgated. This is broadly true. Nonetheless, the judiciary has increasingly been asserting itself in the latter years of the transition. Despite its weaknesses, the CIAA has successfully prosecuted a number of cases in the courts. Similarly, the Department of Money Laundering Investigation has successfully pursued cases against Parshuram Basnet and other individuals involved in organized crime.

The judiciary will become more capable of combating impunity when other related institutions are strengthened. For much of the transitional period, constitutional bodies such as the CIAA and the National Human Rights Commission (NHRC)

have been rendered weak by the lack of commissioners. However, a chief commissioner was recently appointed at the CIAA. A commissioner is likely to be appointed at the NHRC now that elections have been held. Although appointments to these bodies are inevitably political, commissioners do help constitutional bodies gain autonomy.

Similarly, there is substantial pressure from human rights activists and the international community against the parties' efforts to neutralize transitional justice mechanisms. There is thus a strong likelihood that the parties will not be able to use the TRC process simply as a means of protecting their cadre. Although it is clear that the transitional justice process will not be able to ensure justice for many victims of the conflict, at least a few prosecutions appear inevitable. If handled well, the transitional justice process can help strengthen the judiciary, making it capable of tackling cases involving egregious human rights violations.

Certain types of criminal behavior nurtured by the parties also appear to be on the decline. In the early years of the peace process, the Maoists mobilized muscle power through affiliate organizations such as the Young Communist League (YCL). In response, the UML formed its own militant youth organization to retaliate against the Maoists. These groups were effective in using violence and the threat of violence to establish dominance over sections of society. As politics has settled in recent years, there has been a decrease in the use of violence to expand power.

Criminal-political linkages, however, are not likely to end anytime soon. There is little incentive for the parties to, say, give up control of lucrative smuggling rackets. Nonetheless, the revival of an institutional framework for competitive politics at the local level can help mitigate some of the post-conflict increase in criminality. Holding local elections will compel parties to become more accountable to their constituents. Local elections will also help establish firm political authority in districts across the country. Clear authority at the local level through elections can help the police and administration gain the political backing

they so desperately require to become more effective.

As mentioned in Chapter 1, the mistrust felt by a large section of the population towards state institutions remains a significant cause of rampant political impunity in Nepal. The inability of the state to provide necessary services, as well as its perceived bias, leads people to seek alternative avenues of recourse. These alternatives inevitably require mediation by the political parties. Consequently, there exists a parallel system of informal judicial processes and patron-client relationships as a means of accessing state resources.

Over the longer run, combating impunity will require the development of greater trust in state organs. This can be partially accomplished through technical measures, such as increasing the capacity of the courts to swiftly process cases. In addition, however, increasing trust in institutions will require expanding representation to make the Nepali state more inclusive. This can only be accomplished through political means. Although this will be a long and difficult process, it is at least heartening that it is already underway.

Annex

Case Studies for Chapter 3

This annex provides further detail on the CIAA cases mentioned in Chapter 3.

1. The Sudan Scam

The “Sudan scam” as it came to be popularly known was the most prominent corruption case pursued by the CIAA in the aftermath of the regime change of 2006. Despite delays and frictions within the anti-graft body, the case did lead to prosecutions. Ultimately, many senior-ranking police officials were convicted. The case can thus be considered a success. Nonetheless, as the narrative below makes clear, the CIAA faced numerous obstacles on its path to prosecuting ranking police officers. Consequently, the entire process was riddled with omissions, preventing the case from being an unqualified success.

Soon after the popular movement of 2006, the Nepal Police purchased logistical equipment for Nepal Police personnel deployed with the United Nations Mission in Darfur (UNAMID). The equipment included armored personnel carriers (APCs), night vision equipment, mobile houses, a water treatment plant, and water tankers. On August 15, 2009, the *Kantipur Daily* reported that much of the equipment that had been supplied to the mission was of obsolete make and in very poor condition. The

newspaper published photographs of this equipment, claiming that a large sum of money — NPR 445 million — allocated for the purchase had been embezzled.⁸⁷

Following the news story, a complaint was filed with the CIAA. The complaint stated that the funds were misused through “collusion among bureaucrats, top police officials and politicians.”⁸⁸ The parliamentary State Affairs Committee (SAC) formed a sub-committee headed by the UML leader Pradeep Gyawali to probe the Sudan Scam. The committee conducted a field inspection and prepared a report, which concluded that NPR 340 million of the total NPR 450 million allocated for the supply of logistics to Darfur had been embezzled.⁸⁹

The report stated that Michael Rider, director of the London-based Assured Risks Pvt. Ltd., had supplied the APCs and other equipment to the Nepali police through his local agent Shambhu Bharati, director of Bhagwati Traders. Assured Risks had purchased the APCs, which had been used during the Second World War, from the Czech Republic. Both Rider and Bharati were accused of participation in the faulty deal.⁹⁰ Police officials questioned by the SAC also revealed that Rubel Choudhary, son-in-law of Nepali Congress politician Sujata Koirala, had acted as a broker between Michael Rider and Bharati. Bharati later stated that he had been introduced to Choudhary by Sujata Koirala’s personal assistant. An email conversation acquired after the CIAA filed a case against Bharati at court provided further evidence of Bharati’s involvement in the deal.

The parliamentary report pointed out that both the political and bureaucratic classes were involved in the scam, but failed to provide names. Nonetheless, the report indicated the involvement of the Home Ministry. Ramnath Dhakal, chairman

87 Sarojraj Adhikari and Kedar Ojha, “Sudan ma Swaha,” *Kantipur Daily*, August 15, 2009.

88 Report by the State Affairs Committee, April 23, 2010

89 *Sudan Ghotala Sthalgat Pratibedan* (Report of the Sub-committee of the Parliamentary State Affairs Committee), 2010

90 “SAC directs govt. action over Sudan scam,” *Republica*, April 23, 2010

of the SAC, was quoted in a report published by the organization Global Integrity as saying that substandard equipment had been supplied to the UN mission in Darfur as the “then political and administrative leadership [had] embezzled large amounts of money.” Nepali Congress leader Krishna Prasad Sitaula and UML leaders Bam Dev Gautam and Bhim Rawal headed the Home Ministry during the period when the scam occurred. The home secretaries during this time were Umesh Mainali and Govinda Kusum. The SAC interrogated former Home Minister Krishna Prasad Sitaula and former Home Secretary Umesh Mainali.⁹¹

The SAC asked the CIAA to further investigate the scam and pursue charges against those involved. The SAC made it clear that it expected charges to be filed against politicians and senior bureaucrats. The CIAA took almost 19 months to complete its investigation. In June 2011, the body filed corruption cases at the Special Court against 34 senior police officials, including former police chiefs Om Bikram Rana, Hem Bahadur Gurung, and Ramesh Chanda Thakuri. The two suppliers were also charged with embezzlement. In its charge sheet, the CIAA said that Rider and Bharati had abetted Nepali police officials and politicians in the planning, purchase and supply of obsolete APCs and other equipment. The CIAA established that NPR 290 million had been embezzled.⁹²

The CIAA failed, however, to file any cases against politicians and senior bureaucrats. It did not even question any politicians and bureaucrats in the course of its investigation. Although the media had repeatedly established Rubel Choudhary’s involvement in the Sudan scam as well as a number of other corruption cases, the CIAA made no effort to book him. Choudhary left the country in June 2011. The CIAA and the government made no effort to prevent him from doing so. When asked why the CIAA failed to pursue charges against politicians and bureaucrats, Secretary

91 “SAC sub-committee summons Sitaula, Mainali on Sudan scam,” *Nepalnews.com*, April 2010.

92 CIAA charge sheet on Sudan scam. June 5, 2011

Kafle said investigators could not find any written evidence that implicated them. In addition, Kafle said, “We had told the media that a complementary case could be filed at the court if the accused police officials, who did not point to the involvement of politicians or bureaucrats during conversations with us, did so before the court.” According to Kafle, police officials failed to level charges against politicians at court.⁹³

In fact, in his statement at court, Inspector General of Police (IGP) Thakuri had said that the police alone were not to blame for the Sudan scam. He had obliquely charged “individuals in positions above him” with bearing more responsibility. But he did not reveal the identities of those individuals. The court had taken note of Thakuri’s statement in its verdict, and had expressed dismay that the CIAA had failed to investigate senior politicians and bureaucrats. The verdict mentioned that the anti-graft body had only interrogated a single accountant at the Home Ministry. “It appears that the commission overlooked key actors involved in the scam,” says the full text of the verdict. In the court’s view, the CIAA should have investigated not just senior officials, but also individuals like Rubel Choudhary. The verdict states, “In an email written to Shambhu Bharati, Michael Rider, the proprietor of Assured Risks Pvt. Ltd., had scolded Rubel Choudhary, but the CIAA did not take this into account during its investigation.”⁹⁴ The CIAA, which had promised to file a supplementary case against politicians, did not live up to its word. It did not even re-investigate the matter.

It would, however, be unfair to accuse the CIAA of completely shirking its responsibility. The body did manage to investigate and prosecute many senior-ranking police officials. And it did so with tenacity and determination. The obstacles the CIAA had to overcome were quite severe. CIAA officials rarely speak openly about the difficulties they faced. But many of them obliquely

93 Conversation with former acting CIAA chief Bhagwati Kumar Kafle, March 2013.

94 Full verdict of Special Court on the Sudan Scam.

refer to attempts by police officials to cajole and intimidate investigators. For a number of weeks before the completion of the investigation, CIAA Secretary Kafle instructed all his officials to disconnect their telephones or not receive any phone calls to avoid attempts to influence the investigation. Kafle himself switched off his mobile phone and disconnected his landline for a period of two weeks.⁹⁵

At one stage of the investigation, it did seem that police officials had succeeded in influencing the case. CIAA officials state that IGP Thakuri attempted to influence the lead investigator, Joint Government Attorney Rajendra Subedi. Subedi was known to regularly meet with Thakuri.⁹⁶ In the initial probe report, Subedi did not implicate Thakuri and other senior police officers in the case. He had reportedly prepared his report without interrogating top police officials. Later, when this came to light, Attorney General Yubaraj Sangraula replaced Subedi as chief investigator with Joint Attorney General Dilli Raman Acharya.⁹⁷ Subedi's investigation report was discarded and replaced by a new one prepared by Acharya. The new charge sheet implicated 34 senior police officials, including former IGPs Thakuri, Om Bikram Rana, and Hem Bahadur Gurung.

CIAA officials also speak of difficulties in uncovering evidence due to non-cooperation by the police. The anti-graft body tried repeatedly to procure the minutes of meetings held at police headquarters. But they were unable to access the minutes until the government removed Thakuri from the position of IGP. According to Dilli Raman Acharya: "We got a chance to go through the minutes of the meeting that decided to release the budget for the purchase of APCs only a week before filing the case. We were prevented from gaining access to this minute for over 18 months."⁹⁸ The CIAA updated the charge sheet at the very last moment to reflect information they received through this minute.

95 Interviews with CIAA officials, March 2013.

96 Interview with the former Attorney General Yubaraj Sangraula, March 2013.

97 Ibid.

98 Interview, March 2013.

The above details demonstrate the level of obstruction and pressure CIAA investigators faced in investigating the high-profile Sudan Scam. While the investigation cannot be called a complete success, it does show the CIAA in a good light. Overall, the case is significant because it demonstrates how much can be achieved if there is just a little bit of political and bureaucratic commitment to investigating and prosecuting legal violations.

2. The Conviction of a Sitting Minister

Jaya Prakash Gupta was minister of information and communications when he was sentenced on corruption charges on February 21, 2012. There were a number of previous instances when politicians who had occupied high government positions were convicted. Nepali Congress politician Chiranjivi Wagle was the first high-ranking politician to be imprisoned on corruption charges. But he was not a sitting minister when he was sentenced. Gupta was thus the first individual in Nepal's democratic history to be convicted while occupying the position of minister.

Both Wagle and Gupta had become subject to a CIAA investigation on the basis of a report prepared by the Lamsal Commission in 2003. This commission, led by former Justice Bhairab Prasad Lamsal, had instructed the government to investigate the property details of 601 politicians and businessmen. Given its limited resources, the CIAA chose to investigate a number of select individuals from this group.

After finding a mismatch between his income and property, the CIAA filed a corruption case against Gupta at the Special Court on March 20, 2003. Specifically, he was charged with being unable to demonstrate a legitimate source of income for NPR 20.8 million worth of property in his possession. The Special Court acquitted Gupta, citing lack of sufficient evidence, on June 7, 2007. Around the same time, some other politicians were acquitted on the basis of the statute of limitations — the court stated that corruption cases should be filed within a year of an individual's leaving office. But it was clear that the court was on

shaky legal ground, as the 2002 Corruption Prevention⁹⁹ Act had removed the statute of limitations.

Dissatisfied with the Special Court's ruling, the CIAA appealed to the Supreme Court. Officials at the CIAA believed that investigator Chetnath Ghimire had uncovered sufficient evidence to press charges. According to the charge sheet, Gupta possessed a mere NPR 22,000 before he became advisor to then Prime Minister Girija Prasad Koirala in 1992.¹⁰⁰ While Gupta went on to hold senior political positions, from member of parliament to minister, he did not have any other large source of income. The Supreme Court, too, was convinced by the evidence, and found that Gupta could not adequately account for NPR 8.4 million worth of movable and immovable property in his possession. He was sent to jail on February 21, 2012, and released on March 19, 2013.¹⁰¹

3. Corruption at the Cantonments

Senior leaders of the UCPN (Maoist) party have been charged with embezzling large sums from funds disbursed by the government for the upkeep of former Maoist combatants. Although corruption charges were filed at the CIAA on September 21, 2012, the anti-graft body has so far failed to pursue investigations.

After the end of the armed conflict in 2006, the parties decided to temporarily house the former Maoist combatants at cantonments. Once a political deal was agreed upon, the combatants were to be either reintegrated into society or integration into the Nepal Army. Till 2010, when it left Nepal, the cantonments were monitored and supervised by the United Nations Mission in Nepal (UNMIN). It was initially agreed that the state would provide each former combatant a monthly allowance of NPR 3,000. Subsequently, the Madhav Nepal government increased the allowance to NPR 5,000. Two years

99 Interview with Kedar Khadka, anti-corruption activist, February, 2013.

100 Charge sheet prepared by Supreme Court on the Gupta case.

101 "JP Gupta leaves jail after 13 months," *Republica*, March 19, 2013

later, the Baburam Bhattarai government further increased the allowance to NPR 8,000.¹⁰²

In its initial count, UNMIN registered a total of 30,852 former Maoist combatants. The government disbursed funds based on this number for over four years. Later, 4,008 combatants were disqualified by the UN, bringing the number of former combatants in cantonments down to 26,844. A recount took place immediately before the combatants were offered rehabilitation and integration options. At this time, only 24,412 former combatants were counted. Yet, the Maoist leadership had continued to draw allowances for the nonexistent combatants. It is estimated that a total of NPR 1.34 billion was disbursed for the upkeep of absentee combatants.¹⁰³

The Maoist party also deducted NPR 1,000 per month from the allowance of each existing combatant. The total amount deducted in this way is estimated to be NPR 1.14 billion. Maoist commanders state that 60 percent of this money was transferred to party headquarters.¹⁰⁴ It is also alleged that Maoist leaders collected commissions from ration suppliers to the cantonments. A Maoist commander stated that the party charged suppliers a 20 percent commission.¹⁰⁵ According to one estimate, the party accumulated at least NPR 600 million through commissions.¹⁰⁶ One former commander of the Maoist army estimates that the party leadership illegally accumulated a total of over NPR 7 billion from the cantonments.¹⁰⁷

Initially, Maoist combatants uncomplainingly submitted a portion of their allowances to the party headquarters. Over time, however, there was friction within the party as combatants started questioning the leadership's use of funds meant for the

102 "Govt hikes allowances for PLA," *Nepalnews.com*, October 2011.

103 Narayan Manandhar, "Cantonment Corruption," *Kathmandu Post*, October 22, 2012

104 *Ibid.*

105 Interview, April 2013.

106 Manandhar, Narayan, *op.cit.*

107 Interview with Saral Sahayatri, a former Maoist commander, *Nepal Magazine*, July 2012

rank and file. Former combatants had been raising this matter with their immediate superiors inside the cantonments. But it was during the party's plenary meeting in Kathmandu in July 2012 that former combatants were most vocal. They accused Maoist Chairman Pushpa Kamal Dahal and Vice Chairman Baburam Bhattarai of being directly responsible for misusing funds. A group of former combatants attending the meeting disrupted the plenary session, stalling it for a number of hours.¹⁰⁸

In order to quell the agitation by former combatants, the Maoist party formed two investigation commissions. One, headed by Amik Sherchan, was given the responsibility of investigating the property holdings of party leaders and commanders. The other, headed by Post Bahadur Bogati, was tasked with producing a report on cantonment irregularities. Maoist Chairman Dahal also assured the rank-and-file that he would hire a chartered accountant to keep a record of the party's finances.¹⁰⁹ The Sherchan-led commission soon produced a report that absolved Dahal and other party leaders of accumulating property through illegal means. The Bogati-led commission has yet to submit its report despite immense pressure from former combatants.

Even before the Maoist party formed these commissions, former Maoist combatants and the UML-affiliated Youth Association Nepal (YAN) had both formally lodged complaints at the CIAA demanding a probe into embezzlement of cantonment funds.¹¹⁰ However, Bhagwati Kafle, then CIAA secretary, refused to pursue investigations. Speaking at a program organized to release the 22nd annual report of the anti-graft body, he said, "We have read news reports and heard about corruption at the cantonments, but we do not think it is necessary to currently investigate the matter as a responsible party that is heading

108 Rewati Sapkota, "Chair thrown at chairman; leaders knocked down from the dais," *Himalayan Times*, July 20, 2012.

109 Narayan Manandhar, "Cantonment corruption," *Kathmandu Post*, October 22, 2012.

110 "UML youth want corruption at Maoist cantonments probed," *Republica*, September 21, 2012.

government [the UCPN(M)] is already looking into it. We will decide whether the CIAA should pursue investigations only after the Maoist party releases its report.” Kafle further stated that there was no need for haste, as he didn’t believe that a “responsible party” like the UCPN(M) would destroy evidence.¹¹¹

It is clear in this case that the CIAA has no legal basis for acting in such a manner. Surya Nath Upadhyaya, a former CIAA chief commissioner, has been very critical of Kafle’s stance. In an interview, Upadhyaya stated that the Maoist probe had no legal basis and seemed more concerned with the management of inner-party dynamics than with the truth. He also said that the CIAA has the legal right to carry out investigations even if another state organization already has an investigation pending into the same matter. In fact, Upadhyaya went so far as to term Kafle’s statement itself an instance of abuse of authority.¹¹²

Many CIAA officials as well as press reports have speculated that Kafle was reluctant to pursue investigations because the case implicated extremely powerful politicians from the ruling party. There are also suspicions that Kafle wished to appease the Maoist party so that it would promote him after his retirement. The Bhattarai-led government had announced that it would fill vacant positions in constitutional bodies through open competition. Kafle had applied for the position of chief commissioner at the CIAA.¹¹³ Eventually, however, the Bhattarai-led government’s tenure came to an end without it being able to make any constitutional appointments. The government that succeeded it appointed Lokman Singh Karki to the vacant position. But the Bhattarai government did present Kafle with the Best Civil Servant Award for 2013.

Karki, the new CIAA chief commissioner, and the new secretary, Ganesh Raj Joshi, are also widely believed to be beholden

111 Sana Guha Magar, “Aayogbatai Akhtiyar Durupayog,” *Himal Khabarpatrika*, Asoj 16–30, 2069 (October 2–16, 2012).

112 Suryanath Upadhyay, “CIAA is not an institution to await investigation report from others,” *Himal Khabarpatrika*, Asoj 16–30 2069 (October 2–16, 2012).

113 Conversation with Kafle, March 2013.

to the Maoist party. There has been no progress in investigating corruption at cantonments so far. It seems likely, however, that this case will not go away. Investigations and prosecutions over the cantonment corruption are likely in the years to come.

4. The Telecom Scam

On January 13, 2011, the parliamentary Public Affairs Committee (PAC) formed a subcommittee headed by lawmaker Prakash Chandra Lohani to investigate the distribution of 3G licenses to private companies. The committee prepared a report that indicated that there had been widespread irregularities in the manner in which the Ministry of Information and Communication had distributed 3G frequencies to GSM mobile operators. The report stated that companies such as Ncell had been allotted frequencies without paying the minimum fee. Further, the ministry had not held auctions for frequency distribution as required. The report stated that both the Ministry of Information and the Nepal Telecom Authority (NTA) seemed to be involved in the irregularities. Their actions had led to a severe loss of revenue. “If 3G frequency licenses were distributed as per Indian practice,” the report stated, “Nepal would have acquired around NPR 25 billion.” It was acknowledged that Nepal had lower Internet penetration and per capita income than India, but even using a much lower estimate, the Nepali state lost between NPR 7 and 10 billion.¹¹⁴

The report concluded that all information and communication ministers after 2006 had been involved in these irregularities. According to Lohani, it was clear that ministers and officials had personally amassed large sums of money in exchange for illegally distributing frequencies. In 2012, the committee forwarded its report to the CIAA, asking the anti-graft body to pursue further investigations and file charges.¹¹⁵ Then CIAA Secretary

114 The report of the Parliamentary Sub-committee formed to probe irregularities in 3G distribution service. January 13, 2011

115 Conversation with Prakash Chandra Lohani, Co-coordinator of the parliamentary probe committee, March 2013.

Bhagwati Kafle assigned Joint Secretary Ishwori Paudyal as chief investigator of the case. In the following months, CIAA officials repeatedly told the media that they were seriously pursuing investigations. They claimed to have sought clarifications from dozens of NTA employees.

After Kafle retired and Joshi was appointed CIAA secretary, Paudyal was transferred to the Department of Water Supply and Sewerage. Joint Attorney General Sameer Silwal was appointed chief investigator in the case. It appeared, however, that Joshi and Silwal were more concerned with preventing proper investigation. Even before the CIAA procured the clarifications it had sought from NTA officials, the new investigating officer claimed that 3G licenses had been distributed in accordance with the law. He also recommended that a ban on frequency allocation that had been in place for a year be lifted.¹¹⁶

Many NTA and CIAA officials remain unhappy with this decision. A number of CIAA officials claim that they found out about the lifting of the ban through the media. The members of the PAC committee who prepared the report have also expressed their dissatisfaction regarding the CIAA's investigation procedure. There was nothing they could do, however. By this time, the Constituent Assembly had been dissolved and the PAC rendered defunct. Members of the PAC suspect that this hasty decision was taken at the behest of prominent politicians and bureaucrats involved in the scam. They also believe that these individuals deliberately took advantage of the legislature's dissolution. According to Rabindra Adhikari, a former member of the PAC, the CIAA would not have dared to make such a decision if the legislature had been in place. In that situation, he said, lawmakers would have strongly criticized the CIAA and demanded that the investigation be continued.¹¹⁷

116 The report of the parliamentary committee.

117 Interview with Rabindra Adhikari, former member of the Parliamentary Public Account Committee, March 2013

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 **The Asia Foundation**

G.P.O. Box 935
Bhat Bhateni
Kathmandu, Nepal

www.asiafoundation.org