

IMPUNITY IN NEPAL

AN EXPLORATORY STUDY

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BACKGROUND

The “mother” dictionary of the Nepali language, *Nepali Brihyat Sabdhakosh*, has no listing of *dandabinta*—what human rights groups say is the Nepali equivalent of impunity. The term *dandabinta*, itself, is of recent origin, brought into usage by human rights groups. Other close references to impunity in the Nepali lexicon are *ucchrinkal* (meaning, one who does not abide by rules and discipline and is ‘carefree’, among others) and *uddhanda* (one who seeks to control over others by force and one that does not fear punishment). However, even collectively both definitions do not come sufficiently close to containing a meaning that embodies the spirit and scope of the English equivalent, i.e. “freedom or safety from punishment or ill consequences.” Simply put, impunity means not being punished for something, even though it should have been.ⁱ The absence of a clear and straightforward definition, juxtaposed with sayings such as *saat kbun maaf* (forgiveness for seven murders), tell—perhaps—that impunity is not new to Nepal. Only this “common” fact of life is either totally ignored or taken for granted.

Little documentation or research on impunity exists in Nepal. Human rights groups have made attempts to combat impunity since the early 1990s, after Nepal changed from a party-less, absolute monarchy to a multi-party polity. However, there has been little systematic documentation of anti-impunity activities. One early effort was a survey of the views of elected members of parliament done by INHURED International, a human rights organization, on whether or not the violators of human rights during the uprising for the restoration of democracy should be punished. Accordingly, 174 of the 205 new MPs had said that the violators should be brought to the book.ⁱⁱ Most of the work on impunity has since been limited to advocacy.ⁱⁱⁱ Another reference to impunity—*dandabinta*—is found in the Informal Sector Service Center’s “Kathmandu Declaration on Human Rights 1996”. The declaration says impunity in Nepal has been part of tradition. Not only are criminals not punished, they are even rewarded. Human rights violators have not been brought to justice, which has encouraged them, increasing the possibility of further violations. Those that violated human rights during the *Janaandolan* (uprising for the restoration of democracy and human rights, 1990) have not been punished but have been taken to respectable positions (Luitel: 2055/1998)^{iv}.

The *janaandolan* (February 18, 1990–April 8, 1990) was a combined effort of the banned political parties, mainly the Nepali Congress and the United Left Front (a communist coalition), for the restoration of democracy and human rights in Nepal. Investigation of the crimes and excesses committed by officials of the previous regime did become an issue for which a commission was also formed. The report and recommendations of the commission were not only not executed by the interim government and the first elected government, but were also dismissed as a half-finished job. “The commission could not question palace officials. The Army officers could not be questioned... the commission did not succeed in its effort to interrogate even some of the civil servants who had, to everyone’s knowledge, played a critical role in perpetrating crimes against the people participating in the movement” (Panday: 1999). The inability of Nepal’s post-1990 rulers to bring violators of human rights during the transition to justice contradicted the whole purpose of the new political order—the rule of law—that was being put in place. The rule of law in post-democracy Nepal remains questionable, especially in cases where alleged perpetrators have been associated with positions of power and influence.

Going only by what is reported, it can be concluded that alleged criminals continue to find ways to escape justice, even in cases where their crimes violate the victims’ human rights or have broader societal implications—as, say, the illegal diversion of public funds would have on society. The media that is clearly divided along political ideologies often distorts even crimes that do get attention.

Inadequate follow-up of the violations by the media often causes the issues to be forgotten over time.

The examples of violations that take place on a day-to-day basis are many. On July 24, 1999 a story in the vernacular *Kantipur* daily reported that some “high caste” people had beaten up supposedly “low caste” persons for de-sanctifying a water source. The victims filed a case in court seeking punishment for those that had made “untouchability”, abolished since 1964, an issue. It will be a rare occurrence if the media report on how the “story” ends. Likewise, on May 29 a teashop owner manhandled another so-called “low caste” person, a customer of the shop, for not cleaning his teacup. Police called to help settle the quarrel is reported to have tortured the victim and ordered him to pay a fine of Rs. 40,000. The monetary “compensation” was later annulled after protests by organizations working for the welfare of disadvantaged groups. The police also said departmental action had been initiated against the said officer.^v But given the nature of departmental actions taken against errant police officers in the past that in this case may not be severe enough to discourage others from committing similar crimes in the future. This conclusion has a basis because a majority of “departmental actions” that have been taken have been transfers.

Police, in general, are seldom punished for repeated violations of the rights of individuals. Violations that have become almost commonplace are inability of the police to produce the accused in court within 24 hours of arrest and torture in custody, as required under the fundamental right regarding criminal justice in the Constitution. The longer the period of the accused in custody, the greater is the potential for torture. Sangroula (1999) also found that in a majority of the cases seeking extension of detention the courts gave no reasons for its agreement. Torture in custody reported by the survey ranged from beating with sticks and pipes to application of electrical shock. In one case, the study says, police even resorted to putting a leach into the mouth of the accused to extract a confession.^{vi} More recently, on August 17, newspapers reported death of a person arrested on charges of robbery due to alleged torture in police custody. Charges against the police included beating the dead and using kerosene to set the person’s feet on fire during interrogation. Seven police officers were immediately suspended and an inquiry was also launched.^{vii} The level of impunity prevalent among law enforcement officials is no secret.^{viii} Other than crimes that violate the rights of individuals, police officials have also been implicated in for providing assistance to smugglers, especially of foreign currency.^{ix}

Crimes against women also go unpunished to a large degree. The media has reported about crimes against women—some of which are too inhuman even to describe—which range from public shaming for practicing “witchcraft” to the sufferings caused by day-to-day domestic violence. Punishing the perpetrators of the violence is constrained because Nepal does not have specific laws that define or treat crimes against women and girls as a special form of violence.^x Similarly, there have been reports about sexual abuse of children, where perpetrators have either been let to go due either to undue influences from different power centers or the lack of adequate laws to bring them to book, or both.^{xi}

Despite alarming estimates of girl trafficking in Nepal, a study looking into impact of corruption in criminal justice, focussing specifically in cases relating to sexual crimes committed against women, reports an unusually low number of cases that have actually reached the courts. The study by Center for Legal Research and Resources (CeLRR) is based on analysis of detailed case histories of suits registered in the district courts of Sindhupalchowk, Nuwakot and Kathmandu Valley, and interviews with victims and key informants. The study says that not only has justice delivery been delayed but also the entire process is riddled with holes—hinting possibility of corruption at almost every level of the justice administration. The impediments in the justice delivery process listed in the study include delays in recording First Information Reports, delays in investigations and arrest of alleged perpetrators, taking cases to court without basic minimum or contradictory evidences, not presenting

all witnesses in court and verbal harassment of the victims. In an alarming 96 percent of the cases, additional evidence was not sought by the government attorney before going to court even though the study found that over 50 percent of the case files did not have the minimum basic evidences or had contradictory evidences. The study also details stories of harassment in court by defense lawyers and minimal “objections” during cross-examination of victims by the prosecutors despite the very sensitive, and harassing nature of the questions asked. In cases such as rape and trafficking, the victims are the main witnesses and exclusion of their testimonies in court, for whatever reason, is detrimental to the acceptance of the evidence by the court. The outcome of denial of justice and violations of human rights not only affects the victims in the short-term but also leads to a dilution in their trust in the entire justice administration system. ^{xiii}

Recent developments aimed at amending the law regarding women trafficking suggest that the law will also have a provision dealing specifically with child abuse. But the flip side is that both government and non-government organizations have prepared different drafts for the amendments. The process of discussion and finalization of the new bill could thus take months and effectively allow child abusers a longer grace period before the law becomes operative and they are brought to justice. Widespread impunity in Nepal has resulted from protection received by the criminal elements from political parties and governments under their influence (Luitel: 2055). But in the absence of documentation making specific linkages between crimes that go unpunished and resultant human rights violations of the victims, it is difficult to establish a “cause-and-effect” relationship.

Impunity begins to take root when individuals lack fear of punishment. This lack of fear at the person level is a manifestation of the unwillingness or inability of the State to punish and/or the people’s erosion of faith in the judicial system. The social distortions that result as outcome of non-punishment manifest from something as simple as disregard and violation of traffic rules in the presence of police officers to blatant, large-scale diversions of public funds earmarked for development of the poor and the disadvantaged. When impunity becomes pervasive, it activates a self-propelling, re-energizing cycle with every additional infringement that the low risk of punishment inspires.

This exploratory study on impunity and resultant human rights violations in Nepal bases on the aforesaid assumptions. The “violation of rights” for this study is defined to mean every instance where the right of a citizen to be redressed for inhuman crimes committed against him or her, to his or her community and to his or her society has not been upheld. Similarly, “punishment” has to be understood to mean the administration of justice with due process, in accordance with legal norms acceptable to a democratic polity. This presumes a free and fair trial for every sanction. It is about respecting the worth of every person as a human being.

RATIONALE OF THE STUDY

Impunity or lack of fear of punishment not only weakens the concept of the rule of law but also violates the human rights of others, the victims and society at large. The human rights violations are taking place on a day-to-day basis. Nepal also has also major scars from the past that still hurt. The routine violations include basic issues like not producing accused criminals in court within the legally specified time and even torture in custody to extract confession. Among the scars of the “Movement for the Restoration of Democracy and Human Rights” are the human rights violations by the then rulers in the name of maintaining law and order and internal peace. A government commission report documents many of the violations. However, none of the alleged violators of human rights have been tried for their actions or punished. Nor has a general amnesty been announced. While this remains an example of State’s failure to guarantee justice for those whose rights have been violated, it

is often also cited as a compromise that was reached to guarantee the enjoyment of rights by all in the future. The political debate on whether it is right or wrong to absolve violators of the rights of citizens during transition is argued well by both sides—those for and against.^{xiii} However, because no conclusion has yet been reached—let alone anyone being punished—the rights of victims to see justice done continue to be violated. This background provides reason for this study, which seeks to document the level of impunity in Nepal and identify areas and actions that may be undertaken to remedy the situation.

DEFINITIONS

The International Covenant on Civil and Political Rights provides a basis for defining impunity in the context of human rights. It is about upholding the rights of victims to be redressed for violations that have caused them to suffer. Article 2 in Part II (Paragraph 3) reads:

Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.^{xiv}

METHODOLOGY

The study primarily bases on published material on cases/instances of impunity in Nepal. The publications include newspapers, journals, books and official reports. A number of pertinent court cases, which stand as prime examples of prevalence of impunity in Nepal, have also been considered for the finalization of the study. A literature search was also done on the Internet. Besides, unstructured exploratory interviews were also conducted with different human rights activists, lawyers, NGO activists and government officials.

OVERVIEW OF IMPUNITY IN NEPAL

Impunity in Nepal has to be understood in the context of the society, its source of law and the justice administration system. The first attempt to “unify and codify” Nepali society was made by King Jayasthiti Malla in the late 14th century. Four laws, on “houses”, “area”, “caste” and the “legal rules for human justice” (*Manab Naya Sastra*) were codified during his rule. Little, however, is known of the court administration system. The beginning of Nepal’s modern legal history dates back to 1853, when the first comprehensive legal code, known as the *Muliki Ain*, was decreed.¹ Early Nepali laws originated from kings—in the case of the legal code, from the Prime Minister—the source of power. The decrees that were law were upheld as long as they were backed by the power needed for enforcement. Decrees could also be reversed at whim, as long as there was power to back up enforcement. The arrest of Kaji Damodar Pandey under orders of a self-exiled Shah king marching to reclaim the throne, and Pandey’s execution later without a trial of any sort, is one gory example of Nepal’s judicial history. Those were different times where justice was always an extension of power—where orders issued by the powerful were executed without questioning.^{xv}

Impunity is in-built in arrangements where the source of law is muscle or power. Shaha (1982) describes some of the main features of the administration under the Shah dynasty between 1769 and 1846, which provide a guideline for understanding the evolution of the Nepali social context. Accordingly, hereditary monarchy, rule by preemptory command and the authority of the monarch as the final court of appeal for justice in both civil and criminal cases, were some features. Others included the monarch’s sole power in conducting *pajani*, dispatching *daudabas* and requiring regular *salam* or *darshan*. Many of these were adapted and continued by the Ranas that ruled Nepal till February 1951.^{xvi}

However, remnants of the power relationships in justice administration are still very obvious to ignore. Democratic Nepal has an independent judiciary but judges are mostly appointed from among career bureaucrats in the judicial service with very small number of distinguished lawyers inducted to the Bench. The appointments are based on recommendations by a Judicial Council comprising of the Chief Justice and two other senior judges of the Supreme Court, the law minister and a distinguished jurist nominated by the King, which gives it an independent face. In case of the Chief Justice, the appointment is made on the recommendation of the Constitutional Council comprising the Prime Minister, the (outgoing) Chief Justice, the Speaker of the House, Chairman of the National Assembly and the Leader of the Opposition. However, because the appointments are made from the legal bureaucracy and not from among practitioners, the allegiances to different power centers within and outside the judicial system cannot be ruled out. Moreover, the judges, appointed from the bureaucracy, generally lack the experience that a practitioner of law could bring to the Bench. In many instances, especially in cases related to the public interest including human rights, the rulings of the judges have been found to be wanting in terms of the degree of assertiveness.

It is not a particularly encouraging commentary on Nepal’s judiciary that since the adoption of modern judicial system in the early 1950s, there has been only one Chief Justice from among the practicing lawyers. This sole representative of practicing lawyers still commands the highest honor and respect for his performances as the chief of judiciary even decades after his retirement. All the rest of the 11 personalities who have occupied the high office have been law officers of the government, who in due course of time got promotions to finally be installed as the head of judiciary.

¹ Sangroula, Y, 1999: Analysis and Reform of the Criminal Justice System in Nepal, p. 18-19

There is a growing demand that more competent lawyers be inducted into the judiciary to provide to the bench newer perspectives and experience.

Sharma (1996) makes a forceful case in favor of inducting more independent lawyers into the Bench to ensure greater independence of the judiciary.^{xvii} His argument centers on the fact that despite being a traditional society, Chief Justice Hari Prasad Pradhan's tenure as the Chief Justice of the Supreme Court in the 1950s and 1960s saw one of the finest eras of judicial independence in Nepal. "His training as an independent lawyer enabled him to give a firm leadership as a Chief Justice. This gives a lesson that a modern institution can be functional even in a traditionally handicapped society, provided that the leadership has a strong commitment and dedication to the institution. The weakness of the institution in the early phase of development was overcome by the strength of the leadership." He further argues that judges generally appear as one wing of the bureaucracy of the State and lawyers keep a posture in the opposite. The degree of impunity can only be expected to rise under such a circumstance because the context within which the legal system functions—one molded from a history of authoritarian rule and traditional, hierarchical and semi-feudal social structure—also influences the administration of justice.

Added to the problem is the state's attitude towards constitutional bodies like the judiciary and the Commission for the Investigation of Abuse of Authority (CIAA), which is entrusted with the power to investigate misuse of authority by public officials and prosecute them in court. "The tendency to treat the judicial organ as an unproductive section of the society" to quote a Supreme Court judge, is prevalent in the executive branch, resulting in decline in the yearly budgetary allocation for the courts and constitutional organs. Despite constitutional provisions that establish the courts and the CIAA as powerful bodies with the authority to deal with the misuse of power and executive and legislative excesses, the institutions remain largely underutilized. The reason is financial and institutional.

The government, which controls the State treasury, has shown little inclination to support such organs, which could upon empowerment prosecute the government officials and ministers. Some of the district courts barely have resources beyond the salaries and allowances of staff. Addressing a yearly conference of Supreme Court judges and Chief Judges of the Appellate Courts in 1997, Bhairab Lamsal, then an appellate judge, shocked the audience by disclosing that in one instance he had to donate money from his pocket to enable a district court in the plains to buy a copy of the *Muluki Ain*. This comprehensive legal code, a collection of civil, criminal and procedural laws of the land, is one of the most widely used sets of legislation in the country. Clearly, empowering the organs that could help reduce impunity is not a major agenda on the list of priorities of the government.

Widespread impunity in Nepal is a manifestation of a combination of social and cultural factors—such as the illiteracy of over 13 of 22 million people, a feudal past and non-existence of basic human rights until a decade ago. Add to this a situation where a majority of the victims still equate injustice with fate and show allegiance to God for good fortune by making lavish offerings at holy shrines. There are practical implementation problems as well. The judiciary is overloaded with litigation, which take years to be resolved. Each year about 100,000 cases (both civil and criminal) are filed in the district courts or "courts of first instance." Likewise, 30,000 cases are filed in the Appellate Courts and about 27,000 in the Supreme Court. Of these, 47 percent of the district court cases, 53 percent of that in the appeals courts and 25 percent of the cases at the apex court are resolved.^{xviii} The time taken for the resolution of criminal cases is also long. Sangroula (1999) found that only 17 percent of the 222 cases examined in the five districts of the county had been settled within three months. This is the larger context that explains why many crimes, which would seldom have gone unpunished in law-abiding societies, are committed without fear or remorse.

Violations of law are commonplace at almost every level of society. Early this year there were reports about a woman in Pokhara who slapped a government official in response to his alleged demand for a bribe for issuing her a citizenship certificate. The woman was jailed and eventually released but little is known if there was a departmental response—if only an inquiry—into the alleged demand for the money. What is more ironic is that the incident took place at the District Administration Office, a quasi-judicial executive arm entrusted with maintaining law and order in the districts. Demands for bribes by public officials are no secret in Nepal, yet there has been no serious, sustained effort to weed out the malaise.^{xix}

SOCIAL CONTEXT

The reasons for inaction are many—from political affiliations and connections to power centers to kinship bonds. Where the political and legal machinery has attempted, howsoever rarely, to bring offenders to book, Nepal's *afno manchhe* institution and *chakari*, stand in the way of justice. *Afno manchhe* is the expression used to designate one's inner circle of associates—it means 'one's own people' and refers to those who can be approached when need arises" (Bista: 1990).^{xx} In the context of Hinduism, Bista explains *chakari* "to mean to wait upon, to serve, to appease, or to seek favor from a god." In a modern social context, it can be interpreted to mean "a necessary and appropriate method of getting employment..." (Caplan in Bista: 1990) and about transmitting information and offering gifts for seeking favors, making it thus the built-in "guarantor of incompetence, inefficiency and misplaced effort." Bista also describes how *chakari* works in today's social context:

"As the gifts increase, the size of social debt increases and the patron effectively loses control of the relationship. This readily leads to a point where the patron is forced into actions that he would not normally perform, and that are not in the best interests of his higher obligations to the organization of which he is a part. The more strategically placed the patron is in society, the greater the ramifications. Decisions are made and appointments are determined because of pressing obligations formed through *chakari*, not as a result of an objective determination of what is best at the point. The entire social apparatus then suffers as critical positions are filled and governmental decisions made as a result of *chakari*."

Violation in the name of politics is a different ball game altogether. Panday (1990) traces the beginning of institutionalized political corruption—where corruption by public officials was legitimized for "Reasons of State"—to the national referendum, 1980. That was when "the palace gave full authority for the use of public resources and other 'commons' in order to ensure a verdict in favor of the *Panchayat* system." Attempts to legitimize similar corruption for 'reasons of the party' are not uncommon today. Not only have all political parties attempted to pressurize and distort constitutional provisions, between May 1991 and 1997 alone, governments have withdrawn legal proceedings against about 1450 persons being tried for different crimes, even murder.^{xxi} Prior to these withdrawals, the Interim Government (1990-91) had withdrawn legal proceedings against about 1150 people, most of who had been prosecuted and jailed by the previous dispensation.

POLITICS OF IMPUNITY

Succeeding governments have misused the same provision of withdrawing criminal prosecutions to serve party interests. "Criminalisation of politics" that has become a major human rights issue in Nepal can take two forms: "criminal activities sponsored by political activists to gain control of power" and "political protection to hide the crime or escape legal punishment."^{xxii} Among cases withdrawn by different governments is one against an elected Member of Parliament of the then

ruling party who was being tried for murder. Records also show that murder charges against a minister of a coalition government were withdrawn within 15 days of the accused person being appointed as Home Minister. The proposal to withdraw such pending cases is made by the Ministry of Law and Justice at the recommendation of the Home Ministry upon which the cabinet takes the final decision. The decision to recommend withdrawal of charges is made by the Home Minister.^{xxiii} Again, a sad commentary about the judiciary on the issue of indiscriminate withdrawal of criminal cases is that the courts, which have the authority to deny withdrawals asked by the prosecution, have mostly kept quiet while the cases were withdrawn.

The cases that have been withdrawn involve people accused of murder, forgery of official stamps and bank checks; girl trafficking, armed robbery, corruption, possession of illegal weapons, violation of foreign exchange regulations, felling trees and even drug trafficking. Murder, if proven, is punishable with life imprisonment and forfeiture of property, forgery of official stamps with 10 years imprisonment.^{xxiv} The recklessness with which the legal proceedings have been terminated is exemplified by one case where two different governments granted amnesty to the same person charged for the same crime, within one year.

The accused, a person from Sunsari district, was charged for “industry to destroy human life,” which includes everything from prostitution to trafficking of girls. The punishment, if proven guilty, and depending on the exact nature of the crime—selling human beings (girls), attempting to sell girls, enticing or forcing women into prostitution and just being an accomplice—is imprisonment for 5 to 20 years^{xxv}. Even if impunity for politicians was imaginable, that they came under compulsion of this one person to be pardoned twice for such a despicable accusation, is difficult to comprehend—let alone accept. A closer look at other cases may reveal more outrageous circumstances for which the accused may have been pardoned. Nepal’s post-1990 governments have also ended sentences being served by powerful persons who had been convicted by previous governments.^{xxvi}

A case relating to violation of foreign exchange regulations made headlines in September 1993 when the government’s Revenue Investigation Department arrested an individual with investments in over 20 public and private companies. The district court heard the case and set the bail for the accused at US \$ 2.57 million. The son of the arrested businessman was absconding when the father was taken to court.^{xxvii} This was one of over 951 cases withdrawn by a government that ruled for nine months.

The political environment has been corrupted to an extent where it is difficult to find instances of the abuse of law where some parties or individuals that identify with certain parties have not been involved. The outcome of the aforesaid anomalies is “pervasive abuse of authority by public officials, misuse of public resources by party leaders, workers and sympathizers, and corruption by all and sundry to such an extent that the concept of the rule of law is now virtually only on paper (Panday:1999).”

The infamous “Red Passport” ^{xxviii} scandal, in which parliament members have been accused of misusing diplomatic privileges, is a case where society has failed to punish both the responsible officials and others allegedly involved in the violations. A government committee was formed to “look into possible reasons for misuse of official passports” and to recommend ways to prevent the same in the future. Thus, even though an inquiry was done, it came with built-in impunity. The investigation was not specifically required to find out who had misused passports nor was it mandated to recommend legal action. The reason for dousing the criminality associated with the scandal, according to media reports, was the possible involvement of powerful people from all major political parties. Some political parties are said to have had internal probes on the issue before handing out party tickets for the May 1999 elections. However, the reports of these investigations

have not been, and are not expected to be, made public. Another inquiry, being done by a former Supreme Court Judge, on the scandal is underway.

The alleged misdeeds in the scandal include selling passports after getting visas stamped on them (which were then allegedly used by the buyers, some of who were arrested with records hinting of dealing with drugs, after “P.C.” or “photo change”). Another form of misuse stated in the investigation committee’s report is that of using the influence, which comes with diplomatic privileges, to obtain visas for alleged relatives for travel abroad. A classic case, mentioned in investigation report, is the visa application made by a Member of Parliament and his stated family, a wife and two sons. The difference in ages of the alleged sons was six months. Another Member of Parliament was prevented by Indian authorities at the New Delhi airport from boarding a London-bound flight while he was trying travel along with a group of other Nepalese with fake passports.

Nepal’s Passport Act 2024 (1967) categorically pronounces misusing of passports as a punishable offense. Accordingly, one who allows his or her passport to be used by someone else can be jailed for one year or fined Rs. 500 or both. The same is applicable for a person found using someone else’s passport. The law also expressly states that any police officer can arrest a person suspected of violating the provisions of this law without a warrant. The government report acknowledges that legal action has not been initiated against anyone so far.^{xxix}

There also exists another rule that requires all those holding diplomatic passports, except members of the royal family, to return the document to the government after using it for the specified purpose/visit. The investigation reports that only a handful of the lawmakers and others that had been issued such passports had abided by this rule and returned their passports. Until early August—the time of writing this report—the government had not taken any steps to stop possible misuse that could still be taking place. One obvious step to take would have been making arrangements to cancel all passports issued so far and to provide new, genuine ones to those that need to be, with proper record keeping.

JUSTICE DENIED

The inability of the State to punish the alleged, documented violators of human rights during Nepal’s transition from an absolute monarchy to multi-party democracy remains a major blotch in the country’s history of justice administration. After the restoration of democracy in April 1990, the government formed a three-member commission to investigate the loss of life and property during the Movement for the Restoration of Democracy. The three-judge commission—comprising Justice Janardan Mallik, then chief judge of the Eastern Regional Court, Justice Uday Raj Upadhyay, then of the Central Regional Court and Justice Indra Raj Pandey, then of the Central Regional Court—submitted its report in December the same year. It said that 45 people had been killed and 23,000 injured during the 50-day movement. The report of the Mallik Commission, named after the lead investigator, also names people who were involved in “countering” and “containing” the supporters of the Movement. None of the post-1990 governments have tried to bring the violators of human rights to justice.

In 1991, the government sought the advise of the then Attorney General on whether criminal prosecution could be initiated against civil and police officials, and politicians named in the report as responsible for the destruction of life and property during the 50-day Movement. The Attorney General is the chief legal counsel of the government and under the Constitution, the final authority to decide on whether or not to proceed with a case in which the government is a party. The Attorney General responded saying that the Mallik Commission had failed to come up with substantive

evidences to support charges that held officials and politicians of the day responsible. Another reason given for the failure to prosecute was the argument that under the prevailing laws any criminal prosecution had to be initiated by the district attorneys and the police in the respective districts where the alleged violation of human rights occurred.^{xxx} There is a decision of the Council of Ministers (2047/3/18) which pardons the police. A rough translation of the decision reads: “because of the faulty system even if there have been police excesses, in order to keep the morale of the police high and because the police are responsible for all internal security, and taking into account that the police will have a major role to ensure that the forthcoming elections are peaceful, no action will be taken based on the Commission’s report.”

In January 1999 a group of law students at the Tribhuvan University filed a petition with the Supreme Court seeking an order to get the concerned agencies to act on the Mallik report. They wanted the court issue a writ of certiorari, mandamus or any other order directing the government and other organs like the Attorney General to take action against the violators of human rights listed in the Commission’s report. The petitioners included 121 law students and lawyers from 38 of Nepal’s 75 districts, some of them kin and kith of those killed or injured in the 1990 movement, also demanded that parliament should pass new laws, if necessary, to facilitate prosecution of those named in the report. The petition also argued that violators of human rights could be prosecuted any time and said several international documents favored such prosecution. “The report could be taken at least as the first information report by the police and the prosecution,” said the petitioners, “if not as proof of conduct of those named in the report.”

The petition, however, was summarily dismissed by the registrar of the Supreme Court who declined even to register the petition, reasoning that the petitioners had failed to elaborate as to which of their fundamental rights had been infringed by the non-execution of the Mallik Commission report. The petitioners filed another petition against the decision of the registrar, which too was dismissed by the Supreme Court.

One reason for not executing the recommendations of the Mallik report may have to do with the present system of governance. Essentially it resulted from a compromise between different political forces—the royal palace, the Nepali Congress and the United Left Front. Panday (1999) says this kind of compromise has its price. He adds “the new leaders were permitted to criticize the old regime to their heart’s content, but they did not feel empowered enough to do much to sever the corrosive linkages with the past.”^{xxxi} Contrary to popular expectations the democratic government, elected in the May 1991 elections, did not even make the Mallik Commission report public—willingly. Eventually one copy of the 900-plus-page report was placed in the library of the Parliament Secretariat and it was a human rights group that hired a photocopier, copied the report and finally published it as a book. ^{xxxii}

Nepal’s new polity thus began taking shape ignoring totally the “fundamental character of the new order to be established, an order based on the rule of law and on respect for the dignity and worth of each human person.”^{xxxiii} One of the earliest attempts to cleanse and absolve an alleged perpetrator of crimes committed during the Movement was made by the Nepali Congress Party when it publicly welcomed a person who was minister during the *Panchayat* regime into its ranks after the political changes.

Also political parties, which while in government did nothing about the Mallik Commission report, continue to refer to it—mainly during elections. The manifesto of the present main opposition, the Communist Party of Nepal (Unified Marxist-Leninists), even makes a categorical

promise to implement the Commission's report."² However, as part of an election alliance, the same party openly supported a candidate whose name has been cited as someone responsible for some of the killings of 1990. The candidate was a person that the Mallik Commission recommended both departmental action and also "other necessary actions" in accordance with existing laws. The candidate lost.

The Mallik report says that the responsibility for "criminal negligence" has to be borne by the then council of ministers. The cabinet, by not stopping the excesses, was agreeing to what was going on, it adds. What has happened in the nine years since Nepal became a democracy vis-à-vis "retrospective justice" is a classic example of what impunity can lead to: Among people named by the report as those responsible, one got an opportunity to become Prime Minister once again after 1990. Another member of a "countering committee" that was formed to defuse the demands for democracy and human rights has held several ministerial appointments.

² The Commitment of CPN (UML), Gist of the Election Manifesto of the Communist Party of Nepal (Unified Marxist-Leninist) for 2056 B.S. (1999), under the section "Human Rights as the Basis of a Democratic Society."

LACK OF LAWS

Impunity because of inadequate laws is one issue that came into debate early this year after police rounded up alleged sexual abusers of children. The news reports that came after the arrests brought into discussion the inadequacy of laws to prosecute violators. Subsequently a government committee, under the coordination of the Social Welfare Council, an umbrella body that coordinates work of non-governmental organizations, was formed to investigate the issues. This committee reported that the existing law has provisions for punishing those that do “unethical acts” against children. However, the same law falls short of defining what those unethical acts are and as a result, the law has not been able to account for all forms of sexual abuse of children.^{xxxiv} The report says there are no provisions in the said law (Children’s Act 2048) for punishing sexual abusers of children and it recommends inclusion of sexual abuse under the crimes against children section and make provisions for necessary punishment.

In general, the laws for prosecuting human rights violators in Nepal are lacking or inadequate. Even where there are laws, either they are almost unenforceable because of impractical “burden of proof” requirements or for unclear definitions.

POSITIVE BEGINNINGS

Impunity remains pervasive but there are also some signs that things are changing. This concerns issues relating to torture of alleged criminals in custody. Torture has been one instance where law enforcement officials have always gone unpunished. Article 5 of the Declaration on Human Rights says, “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” In Nepal torture has been reported in police custody and during investigations carried out by National Parks and forest officials. There are also serious discrepancies in treatment of alleged offenders and sentencing within and between different tribunals (District Forest Officers, Wardens of National Parks and formal courts) in relation to wildlife offences.^{xxxv} The positive, though largely unrealized development in this regard, are the enactment of the Law Relating to Compensation for the Victims of Torture, 1996, and the Human Rights Commission Act, 1996.

Law Relating to Compensation for the Victims of Torture (1996)

Nepal became a party to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Punishment in 1991. Besides, the Constitution also prohibits torture and states that persons subjected to torture shall be compensated in a manner determined by law (Article 14.4 of the Constitution). Although criticized for failing to incorporate all the basic elements of the UN Convention, like recognizing torture as a criminal offence, the law, nevertheless, provides a framework from which a new anti-torture jurisprudence could develop. The law’s provisions include: allowing medical check-up of the person in custody by a government doctor, filing of the petition in the district court by the victim’s lawyer or relative and for seeking departmental action against the persons charged of torturing victims, besides a compensation of up to Rs 100,000. However, the law also has serious procedural flaws like requiring the victim to file a petition with the court within 15 days of torture. Still, about a dozen cases have been filed following the enactment of the law at various district courts but the outcome has not been very encouraging. In one rare decision, however, a district court has even awarded compensation, howsoever meager to the plaintiff. However, the burden of proof required for receiving compensation is impractical as a result of which victims have not been duly compensated.^{xxxvi}

Human Rights Commission Act 1996

Another notable development toward the protection of human rights and containing impunity is the Human Rights Commission Act, 1996, the first private member's bill passed by the parliament. The law is an innovation, followed also by a number of other countries, in the direction of forming a new and effective institution to deal with violations of human rights. The law primarily aims at ensuring greater accountability of the government in cases of human rights violation. The five-member commission is appointed by the King at the recommendation of a body comprising the Prime Minister, the Chief Justice and the Leader of the Opposition in the House of Representatives. The Commission can receive complaints from any citizen who feels his or her human rights have been infringed, a third party acting on behalf of the aggrieved party or initiate investigation on a matter on its own. The Commission can also advise and recommend formulation of laws and other measures for the protection of human rights.

A frustrating aspect of the Human Rights Commission has been that even after more than two years since the law came into existence, governments have only expressed their commitment to constituting the commission. In July this year the Supreme Court had to intervene on the matter. Acting on a writ petition filed by a few public-spirited lawyers, the judges directed the government to constitute the Commission as per the Act as soon as possible. In a pronouncement made after the court's order, the Prime Minister on 15 August, told the parliament that the government was waiting for the detailed ruling of the Supreme Court. The government had not formed a Commission till September end but did form a task force to recommend certain procedural issues. Clearly, the Commission has potentials to cause major embarrassments for the rulers and the government seems to be in no hurry about its formation.

CONCLUSIONS AND RECOMMENDATIONS

Major findings

Impunity is widespread in Nepal and worse still, it is almost taken for granted. The lack of fear of punishment, inadequate laws and ineffective law enforcement compound the problem. The problem is both cultural and structural. Cultural because of its apparent acceptance, but we don't know if this apparent cultural acceptance of impunity has resulted from the fact that people have had little opportunity to experience justice being done in order to demand for more. The problem is also structural because of the obstacles related to enforcement of laws and bringing criminals to justice. Human rights of the victims are violated because of impunity guaranteed by political protection and/or corruption.

The level of impunity is highest at the highest levels. At lower rungs of society there is little information on the fate of perpetrators for lack of adequate communication systems or mechanisms. The press can be developed to play this role through training of reporters in in-depth reporting techniques. Generally, it is the poor and the disadvantaged groups that are denied the right to be redressed for violations or crimes committed against them. This is because they are largely illiterate and unaware of their rights. Where they are aware, accepted social practices stand in way of them being redressed for wrongs committed against them.

The lack of research and documentation on impunity vis-à-vis the violation of human rights of the victims has limited the impact of advocacy and awareness-building activities. The involvement of human rights groups in anti-impunity activism remains scattered and undocumented.

The role of the media has been positive in forcing investigations into crimes committed by public officials. Even though a large section of the Nepali media is polarized along political lines, because of the “pluralism” practiced there, it has been able to force investigations and/or corrective actions.

Suggested remedial strategies

Research and documentation of instances and level of impunity and the resultant human rights violations stands out as immediate priority. Nepal has a notably strong human rights movement, which may be employed for focusing research on impunity. However, given that there are allegations that human rights activists are also polarized along political lines, it may be effective to form a task-oriented network of representatives from different sections of civil society for the purpose of documenting and publishing an annual report on impunity. Training journalists in investigation techniques can help the information generation process.

Credible documentation of the level and types of impunity needs to be popularized in order to build public opinion needed to trigger a social response against non-punishment. More so given the background of Nepali society. Public opinion can play a major role in bringing to book criminals that escape punishment and those that protect them from justice. Human rights organizations should be supported for undertaking activities for raising public awareness. Equally important is building awareness on the supremacy of law and the need for nurturing a law-abiding culture. The abidance should not result out of fear but as a responsibility of every citizen.

Strategically, for any awareness building effort to succeed, there would be a need to undertake research to document instances and level of impunity, and the violations of the human rights of the victims. This research has to be directed to examining legislation for adequacy, enforceability and also the punishment. This knowledge can provide the content for awareness building/ advocacy and lobbying that will be needed to build the desired social response against non-punishment.

The contributions made by civil society organizations so far are scattered but have had an impact. Increased support to their activities, for focussed programs and institutional development, can contribute toward the creation of local groups that can monitor impunity on a continuous basis. Good quality research and dissemination of the findings can contribute toward generating the political support needed for establishing the rule of law. The civil society organizations can play a major role in reducing impunity through informed debate, purposeful advocacy and publications.

All of the aforesaid activities can contribute towards, and even exert the necessary pressure, needed for building the “political will” for battling non-punishment. Since political reforms take time to materialize, sustained advocacy, discussions and information-exchanges between the NGOs and the public, may be the short-term approach to tackle impunity. This approach can lead to the formation of public opinion necessary to influence the political decision-making process.

Suggested research areas

Research on impunity and the violation of human rights has the potential to develop as a popular area of study for students of human rights and public policy. Facts are needed to begin building public opinion for punishing the violators of human rights and for establishing the rule of law. Accurate facts are also needed to establish correlation between prevalence of impunity with the rising instances of human rights violation and misuse of power by those occupying high offices. An annual

analysis on this aspect of Nepali society could serve as major education and public opinion building tool for the population at large.

As noted earlier in this study, those who abused their power to suppress the 1990 people's movement occupied high public officers within years of successful conclusion of the movement. The research could focus on the impact this has had on the way people evaluate the rule of law in democratic Nepal. A study of this nature could take the issue to a final conclusion—either punishment for the perpetrators of the offences resulting in human rights violations or granting a general amnesty. Either way, all could begin with a clean slate.

Specific studies could also be carried out on impunity associated with domestic violence, child molestation and the criminal justice system—torture, lack of adherence to the rights regarding criminal justice, and the awfully slow judicial process. Another area of study could be corruption, where the level of impunity is said to be the highest. Monitoring and reporting corruption and impunity regularly can help make this issue of greater public concern.

No matter what the specific area of research is, the focus should be to look for the cause and effect relationship between violation of human rights and increasing instances of the society's failure to punish violators. It is only through establishing such a relationship can public opinion building against impunity can be effective.

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Upayabaru Apanauna Sakincha Tyasbare Sthalghat Adhyangari Peshgarna Samak Kalyan Parishad ko Samyojkatvama Gathit Samitiko Pratibedhan.

Himal Khabarpartika, May 30-June 13, 1999

Kanoon, Numbers 2, 4, 6, 8, 9, 11

Kantipur, several issues

Mulyankan, Year 17, No 68:

Gorkhapatra, several issues

Prahari, Number 2-3, August 1999

ⁱ Based on references in the Nepali Brihyat Sabdakosh, Royal Nepal Academy, Reprint 1998; Chambers 20th Century Dictionary, Allied Publishers, Reprint 1987; Collins Cobuild English Language Dictionary, HarperCollins Publishers India, Reprint 1992

ⁱⁱ Based on an informal interview with Dr. Gopal Shiwakoti, INHURED International. The survey was reportedly done by this organization but documentation about the same could not be found. The group, which has since split into two. This could be reason for the loss of documentation.

ⁱⁱⁱ Kapil Shrestha of the Human Rights Organization of Nepal and Sushil Pyakurel, Chairman of the Informal Sector Service Center said that there is little systematic documentation of their work, even though they have organized different educational and advocacy programs on impunity. In fact, INSEC and seven other human rights organizations had in early 1998 even announced a “Human Rights Campaign Against Impunity-1998.” The organizations had divided activities each would undertake throughout the year. Among others, this campaign was based on the belief that the perpetrators should be punished. The human rights groups were to have even monitored the violations, and from among public officials found violating the rights of the people; they had planned to initiate legal actions against 20 percent of the perpetrators, as an attempt to discourage similar violations in the future. There are no records, however, of whether or not the commitments were met. This information is contained in INSEC’s newsletter, *INSEC Abhiyan*, Year 3, No. 10. Vol. 28.

^{iv} The Nepali Vikram Sambat (year) is 57 years ahead of the Gregorian year.

^v *Kantipur*, July 24, 1999, *Mulyankan*, June-July 1999

^{vi} Sangroula, (1999) reports that 37 percent of the 222 cases examined were detained for more than 24 hours despite specific legal safeguards against such detention. Article 14(4) of the Nepali Constitution categorically states that “(n) o person who is detained during investigation or for trial or for any reason shall be subjected to physical or mental torture, nor shall be given any cruel, inhuman or degrading treatment.” Likewise Article 14 (6) states: “Every person who is arrested and detained in custody shall be produced before a judicial authority within a period of 24 hours after such arrest, excluding the time necessary for the journey from the place of arrest to such authority, and no such person shall be detained in custody beyond the said period except on the order of such authority.”

^{vii} *Gorkhaparta*, August 18, 1999 and other newspapers of August 17 and 18, 1999.

^{viii} The issue was raised in an Amnesty International report on the “deteriorating human rights situation” in Nepal, November, 20 1998

^{ix} A police inspector was suspended for alleged involvement of the accused for assisting a person to hide currency in his body and walk him past the security checks at Tribhuvan International Airport. Further one police official was even reported to have returned about US \$ 200,000 from the confiscated amount to the person attempting to smuggle the currency. This was reported by Kantipur (2055/1/11) based on the initial report of a commission formed by the police to investigate the case.

^x See Saathi and The Asia Foundation, 1997: ‘A Situational Analysis of Violence Against Women and Girls in Nepal.’

^{xi} Pradhan, G, 1999: *Jibith Pidabaru: Sandarva Banyonndurachar*, and different media reports following arrest of alleged pedophiles in Kathmandu in early 1999.

^{xii} CeLRR, Preliminary report of the study on Impact of Corruption in Criminal Justice on Women and interview with Yuba Raj Sangraula., the study coordinator.

^{xiii} Mendez Juan E. discusses the arguments in “In Defense of Transitional Justice.”

^{xiv} From the International Covenant on Civil and Political Rights, UN General Assembly Resolution 2200-A (XXI) of December 16, 1966; entered into force, March 23, 1976.

^{xv} See Acharya Baburam, 2055 (1998): *Aba Yasto Khailyi Nahos* (translation: Let This Not Happen Again) for understanding the evolution of Nepali society.

^{xvi} *Pajani* was annual routine renewal and termination of tenures of those employed in the civil and military service. *Dandabas* were royal commissions that were sent on inspection tours. *Salam* or *darshan* was the practice of requiring regular attendance at the royal court or camp of everyone who was somebody in the area. In this collection of essays Shaha also discusses Nepal’s patrimonial system and the patrimonial elite that provide further insights for understanding many unique features of Nepali society.

^{xvii} Sharma Ganesh Raj: “Independence of the Judiciary” in Essays On Constitutional Law, Nepal Law Society, (Nov-Dec 1996, Jan 1997)

^{xviii} The Gorkhapatra daily in a report on August 3, 1999 attributed these numbers to the Chief Justice of Nepal’s Supreme Court.

^{xix} Not only the media reiterate this but the acceptance is there even in government documents. One example is the Finance Minister’s budget speech for the fiscal year 1999-2000. A rough translation of the same would read: “corrupt behavior and financial indiscipline has been spreading as a economic and social distortion at every level and sector. This has made taking the services provided to the poor and helpless very difficult.” Another extreme example is the “ability” of officials to explain bribes by comparing them with tips left behind for waiters in hotels. A similar argument is made by the then special secretary of the Finance Ministry in a 1997-1998 report of the Joint Parliamentary Committee Investigation on Revenue Leakage, published by *Nepali Awaj*, (special issue against corruption).

^{xx} See Bista: 1990, Fatalism and Development for a detailed account of the *Afno manchhe* institution and *chakari* as an integral feature of the Nepali social organization.

^{xxi} Kanoon, Volume 2, provides detail information of persons against whom cases were withdrawn by the State.

^{xxii} See INSEC’s Human Rights Yearbook 1997, which discusses the alleged crimes committed by political party workers during the elections.

^{xxxiii} Pokhrel, S. P. 1998: “The Law for Withdrawing Litigation and its Use,” in *Kanoon* Number 9. The author, a government advocate, analyses the wording of the Law Ministry’s decisions to recommend the withdrawal to the Council of Ministers, which includes phrases such as “false papers and proof” with the intention to “frame.” That such recommendations were accepted shows that the concerned government arms have also been charged of wrongdoing but were not given the opportunity to defend their decisions. The bill for withdrawing litigation was adopted and made into law in 1992. In *Kanoon* No. 11, Madhav Poudel discusses the issues surrounding the withdrawal of cases in another article entitled “Rule of Law: Principles and Experiences (*Kanoonko Sabashan: Abadharama ra Anubhuti*). The author argues that the decision of the government to withdraw some cases based on political affiliation and not others is against the Constitutional provision that guarantees equality of all in the eyes of law. Once the government decides to withdraw litigation, the government attorney makes the request in Court. According to Poudel, records show that the Court has agreed to some decisions and not others, which is also against the principal of equality in the eyes of law. The author further argues, that if, as the government justifies withdrawal of litigation saying that charges have been framed then departmental actions should be taken against persons filing such litigation.

^{xxxiv} Sangroula, 1999 details punishment for different categories of offences, under existing laws. Nepal has abolished the death penalty.

^{xxxv} The legal provisions have been quoted from *Prabari*, Year 41, Number 2-3 a bimonthly publication of the Nepal Police Headquarters. Also see Sangroula, 1999.

^{xxxvi} See INSEC’s Human Rights Yearbook 1997.

^{xxxvii} See Spotlight, September 10, 1993 for details.

^{xxxviii} The color of the cover of the diplomatic passports issued by the government of Nepal is red. That explains the name the media coined for the scandal.

^{xxxix} *Kutmitik Rabadani Durupayog Sambandhama Chanbin Garna Gathit Samitidvara Prastuth Pratibedan* (Report of the Investigation Committee on the Misuse of Diplomatic Passports), submitted to the government on 2055/10/25/2. A special secretary of the Ministry of Home Affairs headed this committee. It is an irony that the same ministry that reports that no action has been taken against persons that had allegedly misused their privileges so far is entrusted with overseeing the Nepal Police.

^{xxx} Letter written by the Attorney General Moti Kaji Staphit to the Chief Secretary dated 2048/3/23. The letter was published as part of a publication brought out by a human rights group.

^{xxxi} What makes this observation more relevant is that Panday himself was a member of the Interim Government, as Finance Minister.

^{xxxii} Based on an informal interview with Dr. Gopal Siwakoti of INHURED International. According to him, attempts were first made to bring out some pages and copy them. When this proved to be too taxing, the group hired a portable copier and copied the entire document in the library. The copied text was retyped and published.

^{xxxiii} See Mendez Juan E., “In Defense of Transitional Justice.”

^{xxxiv} The Ministry of Women and Social Welfare formed the committee “to study the reports on sexual abuse of children in some children’s homes in order to prevent those incidents from being repeated.” The committee’s mandate was to undertake necessary on-site visits and submit a report with recommendations. The report was made public in early August 1999. Among others, it recommends amendments in laws and rules in order to effectively implement the existing law.

^{xxxv} See Pringle C., Murgatroyd C., and Shakya Mangal Man, May 1999: CITES Compliance in Nepal

^{xxxvi} Based on discussion with Sushil Pyakurel, INSEC.