



ANTI-CORRUPTION AGENCIES (ACAS) FOR COMBATING THE CORRUPTION IN NEPAL: A REFERENCE FOR INDIAN ACAS *

Abstract:

All the work within the mandates of the Anti-Corruption Agencies (ACA) has to do with accountability, effectiveness, efficiency, adherence to the rule of law, established procedures and regulations all of which are elements of anti-corruption. In Nepal, a constitutional ACA, CIAA, has been working inquiries, investigations, promotion and prosecution of anti-corruption and is a part of Nepal's law enforcement – making it distinctive ACA in South Asia. One of the major limitations of ACAs like CIAA is that they have not proven capable of addressing the drivers of systemic corruption. This requires difficult reforms in procurement practices, public financial management, internal and external audits, and conflict of interest laws, among other initiatives.

Strengthening ACAs can be an important tool to prevent corruption. The absence of an adequately independent and empowered body to investigate and prosecute allegations of corruption, is one of the concern in India. The Central Vigilance Commission's (CVC) has proved ineffective as it has few resources at its disposal while the Central Bureau of Investigation (CBI), which is relatively empowered, lacks independence. Nepalese experiment and exercise on ACAs will be complimentary to India where the laws are in the process of drafting. Hence, also the India, considering the international practices and standards, should focus on developing strong ACA mechanism to combat the corruption.

1. Meaning of Corruption:

Corruption is a complex and multifaceted phenomenon with multiple causes and effects, as it takes on various forms and functions in different contexts. The definition of corruption consequently ranges from the broad terms of "misuse of public power" and "moral decay" to strict legal definitions of corruption as an act of bribery involving a public servant and a transfer of tangible resources.¹ Defining the corruption has always been a difficult task. The straight forward definition of corruption is behavior. Even so, different individuals and organizations have portrayed in their own way. Robert Klitgaard has given an equation defining corruption. The equation is: "Monopoly + Discretion – Accountability = Corruption."²

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¹JENS CHR. ANDVIG ET AL., RESEARCH ON CORRUPTION A POLICY ORIENTED SURVEY, 3 (2000)

² ASIAN DEVELOPMENT BANK (ADB), COMBATING CORRUPTION IN AISA AND PACIFIC ECONOMY 909 (1999)

The World Bank defines corruption as the misuse or the abuse of public office for private gain.³ Transparency International (TI) defines it as the “misuse of entrusted power for private gain. It hurts everyone who depends on the integrity of people in a position of authority⁴It can come in various forms and a wide array of illicit behavior, such as bribery, extortion, fraud, nepotism, graft, speed money, pilferage, theft, embezzlement, falsification of records, kickbacks, influence peddling, and campaign contribution⁵

UN Conventions Against Corruption⁶ (do not define ‘corruption’, but establish various forms of Corrupt offences in order to tackle the problem of ‘corruption’):

1. Bribery
2. Extortion
3. Facilitation Payment
4. Collusion
5. Fraud
6. Obstruction of Justice
7. Embezzlement, misappropriation or other diversions of property by a public official
8. Trading Influence
9. Abuse of function
10. Illicit enrichment
11. Money laundering

2. Types of Corruption⁷:

Corruption can be active or passive taking into consideration who is the person that has the power of decision making or to whom is requested. Corruption also can be private among particular individuals and public corruption that takes place in the public sphere of politics and

³ V. V. BHARGAVA, CURING THE CANCER OF CORRUPTION, (2006), available at <http://siteresources.worldbank.org/EXTABOUTUS/Resources/Ch18.pdf>

⁴<http://www.transparency.org/whatwedo?gclid=CI34t8yS4LICFaTJtAodRS0A2g> (accessed on June 15, 2015)

⁵ http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/ac_strategy_final.pdf (accessed on June 15, 2015)

⁶ The Convention was adopted by the General Assembly of the United Nations on 31 October 2003. The Convention contains seventy-one articles. It is divided into eight chapters: Chapter I on “General Provisions”; Chapter II on “Preventive Measures”; Chapter III on “Criminalization and law enforcement”; Chapter IV on “International cooperation”; Chapter V on “Asset recovery”; Chapter VI on “Technical assistance and information exchange”; Chapter VII on “Mechanisms for implementation”; and Chapter VIII on “Final provisions”.

⁷ Karin Hilmer Pedersen and Lars Johannsen, CORRUPTION: COMMONALITY, CAUSES AND CONSCIENCES. COMPARING 15 EX-COMMUNIST COUNTRIES. Paper prepared for the 13th NISPAcee Annual Conference May 19-21 in Moscow, Russia. (2008)

government administration. The face of corruption itself is impenetrable and opaque. It is hard to analyze and categories corruption. There are no examples where a unanimous analysis of the types of corruption has been done.⁸ However, a basic categorization considers political corruption, economic corruption and public administration corruption.

- a. Political corruption: Political corruption results in gaining political power. There is political corruption when the behaviors deviate from the principles that guide politics and policies, adapting decisions with abuse of power, which means that the private interests displace the public and common interests. Power is used to service the private interest.
- b. Economic corruption: Economic corruption can be defined as the sacrifice of the principal's interest for the agent's interest. Economic corruption results in making profits. Economic corruption has implications of determining the loss of income, how and how much for the principal, the agent, the state, the consumer, the economy, etc.
- c. Public administration corruption: In the administrative corruption the behaviors of public agents neglect the principles of efficiency, truthfulness and rightfulness. Public administration corruption results in transfer of public benefits to private benefits taking advantage of the entrusted power, as for example, in the form of nepotism that results in the transfer of benefits from society to family members. Taking into consideration the magnitude of corruption, the type of corruption can be grand corruption and petty corruption. According to the depth, corruption can be individual and systemic. Other typology of corruption also considers commercial scale illegal logging, and legal logging but contributions paid to gain access to concessions of resources. Some examples of forms of corruption are bribery, collusion, embezzlement of public funds and theft, fraud, extortion, abuse of discretion, favoritism, clientele, nepotism, the sale of government property by public officials, patronage, etc.

3. Concept of Anti-Corruption Agencies:

The problem of how best to control corruption has challenged policymakers from the dawn of civilization. Strategies and institutional responses have varied, but in recent decades the approach of choice has increasingly become: establish an anti-corruption agency. Since late nineties specialized anti-corruption agencies have been increasingly considered to be an effective solution to preventing and fighting corruption.

The World Bank (1999) proposes a somewhat more restrictive definition, describing the ideal ACA as a body that: reviews and verifies official asset-declarations; carries out investigations of possible corruption; and pursues civil, administrative, and criminal sanctions in the appropriate forums. This definition – really a recommended model – identifies several of the core features of ACAs that distinguish them from other institutions, but leaves out some of them (e.g. information and outreach, analysis and technical assistance) and at the same time is too specific (e.g. including litigation and direct responsibility for asset declarations) to accommodate the range of agency forms now in use⁹. Over the past two decades, their number is growing exponentially. There were less than 20¹⁰. ACAs have increased dramatically particularly after the enforcement of UN Convention against Corruption (UNCAC). By 2015,

⁸ BABU RAM DHAKAL, EMPIRE OF CORRUPTION 17 (2005)

⁹PATRICK MEAGHER, ANTI-CORRUPTION AGENCIES: A REVIEW OF EXPERIENCE 3 (2002)

¹⁰SEVENFOLD SAMUEL. DE JAEGERE, PRINCIPLES FOR ANTICORRUPTION AGENCIES: A GAME CHANGER, 1 JINDAL JOURNAL OF PUBLIC POLICY, 18 (2012)

the numbers of countries that have ratified UNCAC have risen to 176¹¹. As per Article 6 and Article 36 of UNCAC, it is mandatory for the member countries to establish corruption prevention and anti-corruption law enforcement body or bodies. The popularity of ACAs can be found in Africa, East Asia and South Asia. States like Hong Kong, Singapore and Australia have established ACAs that are renowned for other countries to emulate.

4. Types of ACA:

There are no generally accepted models for creating an anti-corruption agency, Professor John R. Heilbrunn has identified certain characteristics that he has categorized into four primary Models¹² These models are segregated by the scope of their mandate and by the branch of government to which they are responsible:

1. Hong Kong's ICAC: The Universal Model

Since 1974, the Hong Kong Independent Commission Against Corruption has enjoyed resounding success in fighting corruption.¹³ The ICAC controls corruption through three functional departments: investigation, prevention, and community relations. Largest among the departments is the Operations Department that investigates alleged violations of laws and regulations. Almost three-fourths of the ICAC's budget is allocated to the Operations Department and many talented officials gravitate to that department. The Corruption Prevention Department funds studies of corruption, conducts seminars for business leaders, and helps public and private organizations identify strategies to reduce corruption. The Prevention Department has funded several thousand studies for public sector agencies and businesses in Hong Kong¹⁴

2. The Investigative Model: CPBI:

It is characterized by its limited scope and consists of a small, centralized investigative commission (with powers of arrest). It is typified by Singapore's Corrupt Practices Investigation Bureau (CPIB), which has only three functions:

- I. investigate complaints alleging corruption;
- II. investigate malpractice and misconduct by public officers involving corruption; and
- III. prevent corruption by analyzing government practices and procedures, and recommending changes when appropriate. Both the Universal Model and the Investigative Model are organizationally accountable to the executive.

The CPIB derives its power from legislation that grants it remarkable discretion. First, the 1960 Prevention of Corruption Ordinance gave it a mandate to investigate allegations of corruption and prepare cases for prosecution. This original ordinance has been amended seven times and renamed the Prevention of Corruption Act (Chapter 241 of the Statutes of Singapore). The 1989 Confiscation of Benefits Act expanded government powers to seize assets of civil servants accused and convicted of taking bribes. This legislation prohibits illegal payments as well as the solicitation and

¹¹<https://www.unodc.org/unodc/en/treaties/CAC/signatories.html> (accessed on July 4, 2015)

¹²JOHN R. HEILBRUNN, ANTI-CORRUPTION COMMISSIONS: PANACEA OR REAL MEDICINE TO FIGHT CORRUPTION 32 (2004).

¹³ ROBERT KLITGAARD, CONTROLLING CORRUPTION 98-100 (1988)

¹⁴ DE SPEVILLE, HONG KONG: POLICY INITIATIVES AGAINST CORRUPTION 49 (1998)

acceptance of bribes. Later, the Confiscation of Benefits Act was strengthened and renamed the Corruption, Drug Trafficking and Other Serious Crimes Act of 1999.¹⁵

3. The New South Wales ICAC: the Parliamentary Model

It reports directly to the parliament or legislative body and is independent of the executive or judicial branches of government. Since its creation, the NSW-ICAC has adopted three principles as the basis of corruption prevention: First, prevention is better than the cure. Second, prevention is better than punishment. And third, prevention is better than management¹⁶ Accountability in the NSW ICAC is imposed by a requirement that it submit annual reports and internal and external audits must be prepared on ICAC operations. This provision recognized that effective oversight is crucial if the commission is to be accountable for its actions. The NSWICAC operates under the supervision of two committees: a Parliamentary Joint Committee and an Operations Review Committee. Responsibilities of the 11 member Parliamentary Joint Committee include supervision and review of ICAC activities¹⁷

4. The United States Office of Government Ethics: the Multi-Agency Model

In partnership with Federal police agencies and the Justice Department, the OGE fosters high ethical standards for employees and strengthens the public's confidence that official business is conducted with impartiality and integrity. The OGE's organizational goal is to create an ethical environment by coordinating multi-agency cooperation while acknowledging the autonomy enjoyed by each individual agency¹⁸. The OGE enforces a set of laws that define conflicts of interest and specify penalties for violations. It defines the length of time between when an official may leave office and accept employment with firms that conduct business with the government, the terms under which a government official may advise a private company, and regulates other activities that involve elected or appointed officials and private sector companies. Unlike anti-corruption commissions in many countries, the OGE has no investigative function, but serves to inform public officials about actions that might represent potential conflicts of interest. As a consequence, its role is entirely preventive and its operations are to improve bureaucratic understanding of laws and regulations. Its reports are submitted to the President and Congress for review and when it determines evidence of malfeasance, it submits such evidence to the Department of Justice for investigation and prosecution. Investigation and enforcement are the domain of the Department of Justice with its multiple agencies that perform police and prosecutorial functions. Hence, the OGE serves to disseminate information to elected and appointed officials without any mandate to enforce provisions of laws and regulations.¹⁹

¹⁵ www.gov.sg/pmo/cpib/aboutus.htm (accessed on June 4, 2015)

¹⁶ Peter Gifford, former Director of Corruption Prevention Department, NSW ICAC, presentation prepared for the workshop on anti-corruption agencies at the Boyanna Residence, Sofia, Bulgaria, (29 October 2002)

¹⁷ INFORMATION ON THE PARLIAMENTARY JOINT COMMITTEE (available at www.icac.nsw.gov.au)

¹⁸ F. Gary Davis, Former Chief Counsel, the Office of Government Ethics, presentation prepared for the workshop on anti-corruption agencies at the Boyanna Residence, Sofia, Bulgaria, (29 October 2002)

¹⁹ JOHN R. HEILBRUNN, ANTI-CORRUPTION COMMISSIONS PANACEA OR REAL MEDICINE TO FIGHT CORRUPTION? 10 (2004)

5. Anti-Corruption Agencies in Nepal:

There has not been much study on Nepalese Economic History in comparison to its political history. On top of that, there has been no research on corruption.²⁰ So, it is very difficult to trace the history of ACAs in Nepal. The prevailing ACAs have been formed in recent decades, including CIAA. There are over a dozen agencies directly or indirectly related to combating corruption and there are over two dozen relevant laws.²¹ Some anti-corruption agencies are involved in investigating and prosecuting corruption crimes (e.g. CIAA, Attorney General), while others are involved in adjudication process (e.g. Special Court and Supreme Court). The National Vigilance Centre is engaged in corruption prevention activities. It has emerged as a government watchdog, and is highly under resourced. Others tackle sector specific corruption cases, like the Department of Revenue Investigation to control revenue leakages, the Judicial Council to combat corruption within the judiciary and recently, the Independent Review Committee in public procurement. The government has yet to establish a separate anti-money-laundering institution as required by law, so this task falls to the Revenue Investigation Department. The Department for Crime Investigation and Nepal Investigation Department also support corruption investigation activities

6. CIAA: Leading Anti-Corruption Agency of Nepal:

Empowered by the Interim Constitution of Nepal, CIAA is a distinctive anti-corruption agency in South Asia.²² Nepal's constitutional anti-graft agency, the then Commission for the Prevention of Abuse of Authority (CPAA) and its present day avatar Commission for the Investigation of Abuse of Authority (CIAA), has come a long way with marked vicissitudes. The Government of Nepal has designated number corruption control agencies. Of these, CIAA has the constitutional authority for investigation and prosecution. Therefore, successes and failures in tackling corruption are measured through the effectiveness of CIAA. In many countries, the new laws, which are in practice in Nepal, are in the process of formulation. India has recently decided to draft anti-corruption act and to establish Ombudsman body like Lok Pal. However, Nepal has already established the institution like Commission for Investigation of Abuse of Authority (CIAA) and anti-corruption act which empowers the investigative authority to file the cases against anybody. Our experiment and exercise will be complimentary to India where the laws are in the process of drafting. In terms of controlling corruption, CIAA Act and Anti-Corruption Act are very progressive and forward. Our act will be one of the examples.²³ CIAA brings cases to the Special Court, whose verdict can be appealed in the Supreme Court. The Special Court was not considered by those interviewed to be very effective.

Constitution of Nepal (2015) has entrusted to continue CIAA's constitutional mandate. The CIAA Act, 2002 and Corruption Prevention Act, 2002 and Special Court Act, 2002 have widened the power and authority of the CIAA. The amendments have incorporated the

²⁰ *Supra* note. 8, at 28

²¹ Sarah Dix, *Corruption and Anti-Corruption in Nepal* 17 (2011)

²² Prabhat Chhetri, *Dealing with Corruption*, *The Himalayan Times*, 28 October 2014, at 8.

²³ <http://www.spotlightnepal.com/News/Article/-Nepal-Has-Proud-Legal-History> (accessed on Feb 18, 2015)

recommendations of various studies and reports including recommendations of Parliamentary Committee, CIAA and Office of the Auditor General (OAG) annual reports. The empowerment of anti-graft body through the amendment of Corruption Prevention Act in 2002 has helped CIAA to move comparatively at a faster pace in investigating and filing corruption cases at the Special Court. To facilitate CIAA's internal procedure, it has developed Enquiry & Investigation Guidelines, 2002 & Investigation & Prosecution Guidelines, 2002. For the first time, CIAA developed its Five Year Strategy, 2003-07 & second three Year Strategy in 2008-10 to strengthen institutional and procedural tasks.

Presently, CIAA has issued third six year Strategic Plan, 2014-2019. At this stage, CIAA is at the crossroad. In the future constitution there is a need to clarify and strengthen the mandate of the CIAA. However, control of corruption is much beyond just CIAA and its activities. Therefore, the political will to control corruption must be reelected by making provisions in the new constitution by covering legislatures, political parties and overall system of governance. The new constitution is expected to reelect to resolve the rampant corruption in the country.

7. Major Legal Provisions on CIAA

Major legal provisions on CIAA are provided in the constitution and other Nepalese laws. Basically following laws can be analyzed to evaluate the status of CIAA:

7.1 Constitution of Nepal (2015 A.D)

According to the Nepalese Constitution, CIAA shall consist the Chief Commissioner and such number of other Commissioners as may be required²⁴. The President shall, on the recommendation of the Constitutional Council, appoint the Chief Commissioner and other Commissioners²⁵. The term of office of the Chief Commissioner and other Commissioners shall be six years from the date of appointment²⁶

Also, the Constitution of Nepal, 2015 has prescribed following functions, duties and power of CIAA²⁷:

1. The Commission for the Investigation of Abuse of Authority may, in accordance with law, conduct, or cause to be conducted, investigations of any abuse of authority committed through corruption by any person holding public office. If the Commission for the Investigation of Abuse of Authority finds, upon inquiry and investigation conduct that a person holding any public office has misused authority by committing any act which is defined by law as an improper conduct, it may admonish such person or write to the concerned authority for taking departmental action or any other necessary action against such person as provided in law. However, It shall not apply to any official in relation to whom this Constitution itself separately provides for such action and to any official in relation to whom any other law provides for separate special provision
2. In the case of the persons who can be removed from office by passing a motion of impeachment, the Judges who can be removed by the Judicial Council and the persons who are liable to action under the Army Act, it may conduct, or cause to be conducted, investigations in accordance with the Federal law after they have been removed from office.

²⁴ Constitution of Nepal (2015), art. 238(1)

²⁵ *Id.* art.238(2)

²⁶ *Id.* art. 238(3)

²⁷ *Id.* art. 239

3. If a person holding any public office has committed an act which is defined by law as corruption, it may file, or cause to be filed, a case against such person and any other person involved in that offense in the competent court in accordance with law.
4. If any act or action done or taken by a person holding any public office appears to be of such nature as to be falling under the jurisdiction of another official or body, the Commission for the Investigation of Abuse of Authority may write to the concerned official or body for necessary action.
5. The Commission for the Investigation of Abuse of Authority may delegate any of its functions, duties and powers relating to the inquiry and investigation or filing of cases, to the Chief Commissioner, a Commissioner or any employee of the Government of Nepal to be exercised and complied with subject to the specified conditions.

7.2. *Commission for the Investigation of Abuse of Authority Act, 1991:*

According to the CIAA Act, the Commission may conduct inquiries and investigations, or initiate other action on the basis of the complaint filed by any person, or of information obtained by the Commission from any source²⁸. Except provided by law, in case the Commission does not initiate action within a period of 5 years, no action shall be initiated in respect of corruption under this Act after the expiry of that period. there shall be no limitation to file a case if corruption is committed by misappropriation of government or public property or the property an institution owned by Government of Nepal²⁹. In case there exist reasonable grounds to believe on the basis of any complaint or report, or from information received by the Commission from any other source, that a person holding a public post has committed an offence involving corruption, the Commission may conduct a preliminary probe thereof secretly³⁰. In case, any person holding a public post being is detained by the commission, such person shall be deemed to have been ipso facto suspended from his/her post for a period of such detention, and in if, the case has been filed against him/her in he/she shall be deemed to have been so suspended until the case is disposed off. The person so suspended shall be deemed unfit for any post in the government offices or public institution or any other post which may cause financial burden to the loan or grant received by the Government of Nepal³¹

8. Analysis on internationally recognized Standards of ACA:

In the light of international conventions, generally following are recognized as major internally recognized standards of ACA:

1. Necessary independence and autonomy of specialized anti-corruption institutions:

An anti-corruption institution should have a clear legal basis governing the following areas: mandate, institutional placement, appointment and removal of its director, internal structure, functions, jurisdiction, powers and responsibilities, budget, personnel-related matters (selection and recruitment of personnel, special provisions relating to immunities of the personnel if appropriate, etc.), relationships with other institutions (in particular with law enforcement and financial control bodies), accountability and reporting, etc. The legal basis should, whenever possible, be stipulated by law rather than by-laws or governmental or presidential decrees. Furthermore, internal operating, administrative, and reporting procedures and codes of conduct

²⁸Commission for the Investigation of Abuse of Authority Act, 1991 (2048 AD), § 13(1)

²⁹*Id.* § 13(1)

³⁰*Id.* § 14

³¹*Id.* § 17

should be adopted in legal form by regulations and by-laws. It should have independent Selection and recruitment of personnel procedure and fiscal independence also.³²

2. Adequate resources and training

To perform their functions effectively anti-corruption agencies should be provided with adequate material resources and specialized staff. Financial resources, stability of human resources, academic background, previous work experience of staff members, reliability of staff members, efficiency of recruitment procedures, career prospects and professional training.

³³

3. Adequate criminal liability:

To enable anti-corruption agencies to dispose of effective means for their work and facilitate international cooperation in investigating and prosecuting corruption, different activities that are related to corruption should be criminalized in each country and treated as a serious crime. The sanctions should be adequate and effective.³⁴

4. Coordination of anti-corruption policies and cooperation at national level:

Anti-corruption bodies do not fight corruption alone. The international conventions encourage all public institutions to prevent corruption in their ranks and in the country in general. Therefore, coordination of anticorruption efforts at national level is important. Practice in the ACA WG countries shows that anti-corruption agencies act as coordinating bodies of national anti-corruption efforts or take part in inter-institutional working group³⁵

9. Conclusion

Nepalese experiments and experiences have well acknowledge the fact that ACAs and anticorruption plans and laws can be an important tool to combat corruption.

The absence of an adequately independent and empowered body to investigate and prosecute allegations of corruption, is one of the major concern in India. The second pattern involves the implementation of anticorruption laws by several anti-corruption agencies. In India, the Prevention of Corruption Act (POCA) is implemented by the Central Bureau of Investigation (CBI), the Central Vigilance Commission (CVC), and the anti-corruption bureaus and vigilance commissions at the state level.³⁶ The Central Vigilance Commission's (CVC) has proved ineffective as it has few resources at its disposal³⁷; while the Central Bureau of Investigation (CBI), which is relatively empowered, lacks independence. Nepalese experiment and exercise on ACAs will be complimentary to India where the laws are in the process of drafting. Hence, also the India, considering the international practices and standards, should focus on developing strong ACA mechanism to combat the corruption.

³² United Nations Convention against Corruption, Art. 6 and 36, Council of Europe Criminal Law Convention, Art .20, Council of Europe Resolution (97) 24, Art. 3

³³ United Nations Convention against Corruption, Art . 6 and 36, Council of Europe Criminal Law Convention, Art, 20

³⁴ (United Nations Convention, Art . 15-19, Council of Europe Criminal Law Convention, Art . 2-4, 8, and 12-15, Council of Europe Resolution (97) 24, Art . 2)

³⁵United Nations Convention against Corruption, Art . 5 and 38, Council of Europe Criminal Law Convention, Art .21

³⁶ Quah, 2003a, p. 66Quah, J.S.T. (2003a). Curbing Corruption in Asia: A Comparative Study of Six Countries. Singapore: Eastern Universities Press.

³⁷ <http://indianexpress.com/article/opinion/columns/aap-aam-aadmi-party-jan-lokpal-jokepal-bill-arvind-kejriwal-prashant-bhushan/>



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