

ASIA REPORT 2015



NEPAL

Crushing its dissenting voices
Protests and violence spiral
amidst institutional failure



INTRODUCTION

This year, 2015, did not start off well for Nepal. On April 25, a devastating earthquake hit the nation killing more than 9000 people, injuring thousands and destroying millions of dollars worth of property. Help poured in from all over the world to assist the poor Himalayan nation. Youths and volunteers were reaching out to victims and assisting them with whatever they had.

People in the villages however, were left to fend for themselves. It took 12 days for Congress and the political parties to come up with an official response. The lack of coordination between the government and the international community that flooded into Nepal to help was visible.

At the onset of this devastation, Nepalese resilience was again proved. Neighbors helped neighbors, villages helped villages. However, something big was missing: the government. The government of Nepal was clearly unprepared for a disaster on this scale. It knew it was coming, but negligence led to being unprepared.

With the winter fast approaching, victims of this natural disaster were on their own. With only a tent and dry food distributed by donors, they waited for government assistance. The government was busy however, planning what to do. Nothing ever reached the people other than glib words and fake promises.

Those who had links and networking with the government received help and compensation. The real victims, who did not enjoy such links, still await the government to fulfill its futile promises.

In the political realm, the government used this opportunity to complete writing the constitution. The three top Brahmins from the top three political parties saw it as an opportunity to fulfill their hidden desires of a Brahminical constitution. They mistakenly thought the average Nepali was too distracted by the earthquake; they did not realize the populace would hit the streets for their say in the new constitution.

In spite of the ongoing protests all over the country, the three Brahmins promulgated their constitution on 20 September 2015.

They neglected killings by the Nepal Police and the Armed Police Forces. Protesters were shot on sight and killed by angry policemen with direct orders from Kathmandu. Protesters were killed en masse with bodies dumped in many places. In a violent response, 10 police officers were mob-lynched, their bodies chopped up and burnt in the Kailali district. The protesters also burnt down many police posts and government offices.

Although it is the duty of the state to protect government offices, the level of force used to protect property such as police posts is disproportionate. It is a point of friction that the government uses water canons to control protests in Kathmandu, whereas in the Tarai they fire live bullets at the head and chest of protestors. This discrepancy has caused much anger.

Now, protests and desire for revenge spiraled into Nepal's Southern Plains. Killings and revenge became the norm. Without mercy, protesters were shot to death, while injured police officers were dragged from ambulances and killed. 2015 saw the height of insanity in Nepal.

For the last four months, Madhes has been burning. A value for life has turned into a bullet. All over Madhes, there were demands for amending the constitution, and starting the process of demarcation and delineation.

To make the situation worse, India, a friendly neighbor in the past, ceded to the Madhesis demand of blocking the border. This meant stopping essential supplies including petrol, gas bullets, medicines and other necessary supplies from reaching Nepal. India never officially owned the blockade. But it was there under the clout of security for the Indian vehicles entering Nepal. It was a clear infringement of the sovereignty of Nepal. India stayed mute, citing security reasons.

The blockade affected the people of Nepal whether they were from Kathmandu or Madhes. Madhesis faced the brunt of the blockade and protests, with schools, offices, and markets completely shut down. Life had come to a standstill.

With all this upheaval in Nepal in 2015, something became clear. There are no readily available, reliable institutions to deal with a humanitarian crisis or human rights violations, by protesters or police. The government clearly looked inept as it tried to maintain peace and order in society, and protect the human rights of people.

The Sushil Koirala to the KP Oli led government have shown indifference towards what has been happening in the country. They lacked common sense and empathy for the peoples' distress. Protests, blockades and revenge remain, with the government unable to address it.

Political dialogue must begin for the people to gain inclusive ownership of the new constitution. Lip service and verbal commitments from the government have not served to narrow the growing distrust in society. The following could pave the way towards wider ownership and reduce further violence in Nepal's Terai: a written commitment, leading to the early amendment of the constitution, reflecting past agreements on electoral constituency, delineation based on population, on equal citizenship rights, on proportional inclusion, and the revision of provincial boundaries.

More lives will be sacrificed if the government keeps marching ahead with the view "Let the protesters shower with bullets".

All this has happened because Nepal was not prepared and lacked viable institutions. Natural disasters and human rights violations committed before and after the constitution's promulgation have destroyed Nepal. Let this not be the end. This critical time can be an opportunity for the government to reach out to the people. Now is a special time for Nepal as a people, to rebuild the nation and radically redesign and fundamentally transform already available institutions. Topmost priority must be given to the justice institutions—the police, prosecution, judiciary and penal system.

POLICE

The police in Nepal are under the general supervision and control of the Ministry of Home Affairs. The cabinet appoints the inspector general of police and other senior police officers. The Police are subdivided into the Nepal Public Police Force, Armed Police Force, Guard Police Force, Riot Police Force and Traffic Police Force. Crime investigating is carried out by the Crime Investigation Department (CID), which is headed by an Assistant Inspector General of Police, under the Nepal Public Police Force, Nepal Police Headquarters. The CID has police officers

organized across five regions, 14 zones, and 75 districts in Nepal. The regional police officers are each headed by a Deputy Inspector General of Police, and the Zonal Police Offices are under the command of Senior Superintendents of Police. The district level police officers are under the command of Superintendents of Police or Deputy Superintendents of Police. The District Police Offices are local investigating bodies with a mandate to investigate cases in their territory.

They are the most widespread investigating units; however, not all the districts have separate CIDs. They may also lack experts and important resources for effective and immediate investigation. Regional Police Offices on the other hand are supervising and coordinating bodies that are not directly involved with investigations. They serve as the middlemen between district units and the Central Crime Investigation Department at Nepal Police Headquarters in serious cases. In many cases however, criminal activities are found to be fueled by the police themselves, who are involved either directly or covertly in assisting the criminals in various ways possible. How can people be assured of peace and security when those bearing the responsibility to maintain law and order in society involve themselves in crime? Besides, many a time they seem incapable of investigating crimes and finding the perpetrators in time.

Nepal police have a Human Rights Unit, established in 2003 to ensure better protection and promotion of human rights. From its inception, the Human Rights Unit has been claiming to firmly uphold international standards of human rights in policing and monitoring the human rights practices within the organization. However, it is not working as per its mandate.

The police have a mechanism to take in citizens' complaints, as well as Women and Children cells to ensure comfort for women to register complaints. However, cases of human rights violations are sometimes not registered by the police, especially in conflict areas. Furthermore, cases of domestic and sexual violence are not taken seriously and are "recommended" for mediation even in severe cases. In fact, police in Nepal generally lodge complaints in a selective way. Police file complaints in criminal cases, but they are reluctant to take complaints associated with human rights violations.

Cases of human rights violations are not a high priority for Nepal's government, which seems to think that it is the realm of NGOs and INGOs. Most of the complaints/ First Information Reports (FIR) of human rights violations including torture cannot be registered due to a lack of proper law and mechanisms. When the FIR of human rights violation cannot be registered at that situation, the question of investigation does not even arise. Furthermore, there are no independent mechanisms established to investigate human rights violations.

In many cases, the Nepal Police deny receiving the FIR. At the same time, there is no security for victims who register a complaint against the perpetrators. The criminal justice system in Nepal inadequately protects the constitutional rights of citizens; in many cases the security forces knowingly violate these rights in the interest of convicting suspects. Rights violations come in many forms: torture in custody remains a routine practice; thousands are detained illegally; defense lawyers are barred access to detainees after arrest; the indigent and uneducated stand trial without legal counsel; and families of victims of disappearances, murders, and rape are unable to seek justice against known perpetrators who are blanketed by a culture of impunity.

Due to rampant corruption, criminals who have money live freely in society, while the poor and innocent are in prisons. There is a rising feeling of insecurity among Nepali people.

Although the theoretical goal of Nepal's police may be to protect and assist citizens to obtain justice, many believe the police do not act accordingly. Rather, the overall goal of Nepal's law

enforcement is to provide security to powerful persons such as politicians, elites and business persons. Ordinary people generally hesitate to go to the police for any service, let alone access to justice. Budget allocation for the police department is very limited and basic infrastructure is lacking at police stations; modern tools of scientific investigation are a far cry away.

Police officers tend to conduct arrests without arrest warrants at the time of arrest, or only some time after arrest. Arbitrary detention is another major issue facing the Nepali police. Victims of arrest and detention are usually denied or delayed access to legal counsel, and their families are not informed of their arrest or the grounds for arrest. Additionally, cursory medical checks are rarely carried out without police scrutiny.

The country's police far from functions as an independent institution; rather, it is heavily politicised and controlled by political parties. In our society, it is a stark reality that a murderer turns into a revolutionary, and a culprit metamorphoses into a leader of a political party. Many political leaders are backed by criminal gangs, and the leaders reciprocate by giving them protection. Political pressure is put to release convicts from jail even if his/her crime is serious, obvious and destructive. Crime has thus been politicized, and politics has been criminalized, contributing to the culture of impunity.

Without the orders and whims of their political masters, the Nepal police do not engage in their responsibility to protect the Nepali citizens. From the very start of recruitment to promotion, there is significant political interference. This makes it practically impossible for the police to be independent and carry out duties against their political masters.

When one senior police officer tried to expose the game of receiving bribes for promotion in an open forum, politicians were so scared that their connection to bribery and control would be revealed that they transferred him for breaching the police protocol and making statements in public.

Although the policing institution is supposed to work on the basis of a chain of command, command responsibility is weak, especially when it comes to mob control and taking criminal liability. In cases of human rights violations, the commander always defends the violators and they want to dismiss the case. Practically, the commander does not want to take any kind of responsibility on such incidents. In principle there are disciplinary rules and processes, but these are overlooked in human rights violation cases. Ultimately, the government is ready to defend the perpetrator of abuse rather than provide justice for the victim.

Corruption

Corruption is said to exist at all levels of the policing system, whether for the accused to escape from charges or the police to secure better promotions. Corruption is rampant for various reasons: tolerance of the practice itself, the attitude that nothing can be done without bribing, the lack of strict rules and regulations for rewards and punishment, and no ombudsman overlooking these issues.

Police recruitment involves large sums of money and influence rather than capability. After recruitment, corruption is allowed because the money goes to higher level. The lack of transparency is used for political interest. At the same time, the bureaucrats want to become more powerful by making use of corrupt policing. This kind of corruption is creating huge differences between Nepal's wealthy and the general masses.

The effect of corruption in Nepali politics is becoming visible in the mind-set of an average Nepali: "He can be a leader because he has money and muscle (goons)," has become a common perception among people. People are angry and tired, and media houses often publish news about the connection between political leaders and goons, but no one takes to the streets to protest corruption; an anomaly for a country where people have Nepal Bandhs, countrywide strikes, for every distress. People instead take to social media and everyday conversations to express their anger and frustration. Even the private sector does not speak out against corruption. Why? Perhaps because they are also involved in tax evasion and they have built connections with government bureaucrats to evade sentences. Corruption exists at all levels of government and police, and the courts remain vulnerable to political pressure, bribery, and intimidation. There were problems with self-censorship by members of the press. Although the law provides criminal penalties for corruption by officials, there continue to be reports that officials engage in corrupt practices with impunity. Police corruption, especially among low-level and underpaid police officers, and impunity for police abuses remains a problem.

Torture

Torture is rampant in police custody, although it has decreased after the peace agreement in 2006, compared to the time of civil conflict (1996-2006). The Nepal government has no policy regarding the prevention of torture. According to detainees, police torture them to obtain confessions. Human rights organisations have succeeded in reducing the percentage of torture since 2001 through regular monitoring, legal intervention and sensitizing the victims, public, police, prosecutors, lawyers, judges and medical professionals. The Human Rights Unit of Nepal Police also provides human rights training to new cadres, as do other NGOs and INGOs. However, when torture occurs, the police deny the allegation and pressurize victims not to speak of the incident. In some instances, police officers justify torture by saying that without some slaps and beatings, criminals do not open their mouth.

During the previous Universal Periodic Review (UPR) 2011, the government of Nepal clearly denied the recommendation for the ratification of OPCAT. During the UPR 2015, the government received similar recommendations. Merely providing lip service, the authorities justify the practice of torture to international bodies by citing the lack of infrastructure and modern tools of scientific investigations. To ensure that such incidents do not reoccur, the government should criminalize torture, and introduce an anti-torture law, at the earliest.

There are many cases of torture committed by the police in 2015. There was even one case of police torture of a fellow officer belonging to a Dalit caste.

PROSECUTION

Nepal has established a prosecution system based on the criminal justice system. The Attorney General (AG) is the Chief of all prosecutors. The Office of the Attorney General has been established as a constitutional body with a separate mandate under "The State Cases Act". However, the Attorney General is a political appointee and he/she is the Legal Counselor of the government; this makes the AG's role dubious in many instances. For example, it has played a controversial role in the past by recommending the government to withdraw serious human rights violation cases.

Nepal's prosecution system has been functioning under the general criminal justice system. The public prosecutor's (PP) office guides the police investigation on legal issues and once the investigation is complete, the public prosecutor files the case before the court. First of all, the police investigate the cases, arrest the accused and make an investigation report on the basis of forceful verbal statement of the accused. If the accused bribes the police, they make a soft report so that the accused would be getting free from the court. When the police forward the case to the prosecutor, again the prosecutor can bargain with the accused. If the accused bribes the prosecutor, then the charges would be soft. The prosecutor has the authority to decide whether to file the case or not, after the police has completed the investigation. At this stage, the public prosecutor's office can play a foul game by not filing serious human rights violation cases. This occurred in the Nanda Prasad Adhikari case, where the prosecution refused to file a case even after the police had completed its investigation and submitted the file to the prosecution.

When the government changes, the AG is changed as well. In these circumstances, there are significant chances of wrongly prosecuting members of the opposition party. Nepal's prosecution system is far from highly professional or competent. It has totally failed in addressing human rights violations; not a single perpetrator of torture has been prosecuted for instance. Even though the National Human Rights Commission (NHRC) has recommended the government to take action against perpetrators of human rights violations in many instances, not a single case has been prosecuted.

As the prosecution system is ineffective, the Nepal Police hardly follows the system. The conditions of arrest and detention, the right to legal counselling, the right to fair trial; all of these are only found on paper. They have never been implemented, resulting in lengthy and unjust legal procedures and the perpetrators going free.

Investigation and prosecution are coordinated acts in the criminal justice system, both of which require investigation skill as well as legal expertise. The State Case Act 1992 and other prevailing laws have entrusted police as an investigating institution and Office of the Attorney General as a prosecuting authority. Therefore, a collective and coordinated effort of both the police and Government Attorney is required for successful prosecution. However, the police considers it as interference in their domain if the Government Attorney gives any direction to the investigating official. Similarly, Government Attorneys always blame the investigation for the failure of cases. This gulf between the police and prosecution only serves to hamper justice.

Nepal is now seeing the illogical separation of the role and mandate of the police and prosecution: the police considers its job accomplished once it hands over the case file to the Government Attorney, and wants nothing to do with the further proceeding of the case; the Government Attorney meanwhile, has a very limited and minimal role in the investigation process. Furthermore, the AG is appointed as a political post so there are high chances of becoming biased, and the AG is not focused on improving the prosecution system. The appointment of the AG should therefore be independent and merit based.

Delays and corruption are the main criticisms made of Nepal's prosecution system. The low number of judges and staffs in courts create delays in the prosecution. There are limited resources provided to the prosecutors, which means that there are few capable prosecutors. The prosecution system is generally seen as ineffective, highlighted by the case Okhaldhunga district, where a person believed to have been murdered returned after 6-7 months, hale and healthy, while the accused were facing jail term in his murder case.

When the police forward a case to the prosecutor, the prosecutor bargains for a bribe. If the accused are able to pay, then the prosecution would be soft and they would have chances to get free. For those who are poor and innocent, there are chances of getting longer sentences. Due to the political pressure and also receiving threats, the prosecution have frequently freed the perpetrators in general attendance (Tarik) or for few seed money (Dharauti). This practice occurred particularly during the Maoist movement from 2000-2010. The Dekendra Thapa case from Dailekh district for instance, in which despite the accused independently accepting his crime, the PP office refused to register the case by the order of then Prime Minister Baburam Bhattarai.

As a result of such practices, the Commission for Investigation of Abuse of authority (CIAA) has now filed a corruption case against Resham Acharya, District Attorney of Kathmandu Public Prosecutor's Office. In another case Keshav Ghimire, a non-gazetted officer from the same office is also facing a corruption charge.

There is very little discussion about this even within civil society and human rights activists. Although there were some discussion programs conducted by NGOs and INGOs on the reform of the criminal justice system, this is not enough. The government must make such reform a priority, and take concrete steps to see it through. Until now, only some government officials and judges have mentioned briefly that there is need of reform in the prosecution system; there is no policy or discussion regarding this matter.

Most importantly, the government should change the prosecution system to have an Office of the Prosecutor General rather than Attorney General. It must be free of police influence and should not be changed with the change of governments. Rather, the government should establish a separate body for its own legal counselling that can come and go with changes in governments. Another crucial aspect is providing enough human and material resources to strengthen the prosecution system. The hearing system should be independent and it should be free from political influence, which has badly affected the delivery of justice to victims.

JUDICIARY

There are three tiers of courts within the Nepalese Justice System. The Supreme Court is the apex Court, with the power to declare ultravires the law, which is inconsistent with the constitution. It is regarded as a court of record. It supervises and controls all the subordinate courts. There are sixteen Appellate Courts in various regions to hear appeal and writs. There are seventy-five District Courts in each district established as a trial court or court of first instance. District Courts have also been empowered to hear habeas corpus petitions.

The judicial power of the state is applied by the courts through the established national and international principles of justice and the law. The chief justice of Supreme Court is appointed by the President on the recommendation of the Constitutional Council. Other judges of the Supreme Court, and the Judges of Appeal Courts and District Courts are appointed by the Chief Justice on the recommendation of the Judicial Council. The courts have no role in the investigation and prosecution process apart from some exceptional situations.

The separation of power principle is fully recognized in Nepal, and the parliament, executive and judiciary work separately and check and balance each other in principle. In practice however, the government allocates less than one percent of its total budget to the judiciary. The government always intervenes in the appointment of judges; sometimes judges are appointed on the basis of

division of political parties. The appointment of judges for the Supreme Court and appeal court sees nepotism, favouritism and political influence. In fact, the judiciary in Nepal is not totally independent in terms of separation of power.

The judiciary has been working with a limited number of judges and huge case loads for many years, resulting in many pending cases and delays in justice. Other than the number of courts, judges, and staff availability, the working system is lengthy and inefficient. The judiciary is dependent on manual processes, such as traditional paper filing; there is no modern audio/video or microfilming system in the judiciary. There are no modern facilities or infrastructure in the judicial institutions, which have worsened after the recent earthquake.

Citizens are treated as second-class citizens in courts, making people hesitant to go there. At nearly every step of the court process, people are asked for bribes; they are treated as customers, instead of court officials thinking of themselves as service providers. There is no effective mechanism for hearing complaints regarding corruption.

Despite the many allegations of corruption, not a single judge has been punished. Former Vice President Permananda Jha for instance, was alleged to have received a huge amount of money from the accused in the case of drug trafficking while he was a Supreme Court Judge. Apart from asking him to resign, the Judicial Council took no other action against him. Moreover, he was later appointed as the first Vice President of Nepal. Also in the case of Special Court judges who were accused of releasing Chiranjivi Wagle on corruption charges, the Judicial Council took no action. One of those judges, Cholendra Shamsher Jabara, has now been promoted as a judge at the Supreme Court.

As a result, ordinary people have no confidence in courts; they do not believe that the court will provide justice to them on time, and without costing them large sums in bribes.

There are very few running programs that intend to reform and improve the judiciary. While the United Nations Development Program (UNDP) and other INGOs in coordination with the government have provided significant funds to reform the judiciary, Nepal's government has not implemented any specific policy goals regarding judicial reform. Sporadic projects such as that entitled "Rule of Law" by the UNDP in collaboration with the government, together with the Nepal Bar Association's running of free legal aid in a few districts, is not enough to address the deeply rooted problems facing the country's judicial institutions.

PRISONS

State-supported penal institutions, including the central prison in Kathmandu and jails in most district capitals, have long been criticised by human rights activists. According to various human rights reports, prison conditions were unsanitary and degrading. Prisoners were segregated into three categories. Class C prisons, the lowest and most numerous type of prison, were populated with common criminals who were often subjected to beatings and abuse at the hands of police jailers. The higher prison categories were reserved for persons with political connections or higher social status. Conditions in these facilities generally were better than in Class C prisons. Women were incarcerated separately from men, although in equally poor conditions. Mentally ill persons were often placed in jails because most communities lacked other, more appropriate, long-term care facilities.

Torture is a common practice in detention centers and prisons. Though there are legal guarantees for the security of detainees, there is no competent policy against torture. Some years ago, the Centre for Victims of Custodial Torture (CVICT) published a report that 75 percent of prisoners are tortured inside prisons. The prison administration at present is led by the Naike (Leader), who tortures the prisoners.

Over-crowding, and lack of basic facilities are key problems faced in prisons. Washing facilities are largely limited. In several prisons, there is little ventilation and light, with many prisoners being confined in a small, dark and poorly ventilated room. Naturally, this results in little opportunity for movement or exercise. It is common to see juveniles being kept in the same facilities as adults. Persons with disabilities have no special or separate facilities.

Medical care is a huge issue because prisoners are rarely granted the right to see a medical doctor before their detention, and human rights defenders or family members are usually required to provide medical assistance after prisoners' release. Recently, prisoners at the Central Jail have been demanding good and higher quantity of food and basic services. They have filed a complaint against the prison authorities.

Corruption is rampant in prisons as well, particularly in the purchase of basic food and minimum facilities. Due to this corruption, prisoners get low quality of food and facilities inside prisons.

The Prison Act governs the whole prison system. There are some clauses to take disciplinary action against such conduct, and the Commission for Investigation of Abuse of Authority (CIAA) can also investigate cases of corruption, but implementation is almost zero.

CONCLUSION

The Asian Human Rights Commission (AHRC) is worried at the condition of human rights in Nepal, which is heading downhill. With the humanitarian crisis hitting the country on April 25 this year, the country has seen violent confrontations between Nepal's Police, Armed Police Force and the Madhesis and Tharus protesters, as there is disagreement on the Constitution promulgated on 20 September 2015. Police have not followed even minimum standards of crowd control, directly shooting with intent to kill, whereas protesters have turned to vandalism and mob lynching of security officers.

All this is happening in Nepal due to the existing defects in the criminal justice institutions in Nepal. Since the status quo facilitates corruption and all forms of non-accountability in government, people in power do not want to radically redesign and fundamentally transform the country's justice institutions. Without such change however, there is no hope of improving people's human rights and standard of living.

Police reform is particularly important, which must be approached from different perspectives, such as resources, training, changes in the legal operating framework, accountability, and the criminalization of torture. The working style of the Nepal police should be changed and modernized. It is high time for the police to carry out universally accepted investigative methods, rather than practicing torture in the guise of an investigation. The recruitment system should be more focused on hiring competent police officers through open competition and capacity, not through influence.

Nepal must turn this critical time into an opportunity to rebuild its institutions, and reform the criminal justice system in order to provide justice to justice-seekers.